JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 20-201
For business meeting on November 13, 2020

Title
Jury Instructions: Civil Jury Instructions (Release 38)

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

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

Agenda Item Type
Action Required

Effective Date
November 13, 2020

Date of Report
October 7, 2020

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication new and revised civil jury instructions prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official 2021 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective November 13, 2020, approve for publication the following civil jury instructions prepared by the committee:

1. Revisions to 16 instructions: CACI Nos. 418, 430, 435, 440, 1305, 1814, 2204, 2210, 2511, 3020, 3801, 3903C, 3903D, 4308, 4320, and 4560; and
2. The addition of 2 new instructions: CACI Nos. 441 and 3906.

A table of contents and the proposed new and revised civil jury instructions are attached at pages 7–76.

Relevant Previous Council Action

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

This is release 38 of *CACI*. The council approved release 37 at its May 2020 meeting.

Analysis/Rationale

A total of 18 instructions are presented in this release. The Judicial Council's Rules Committee has also approved changes to 23 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

New instructions

CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. Assembly Bill 392 (Stats. 2019, ch. 170), effective January 1, 2020, amended Penal Code section 835a, which is the basis for this new negligence instruction. The statutory amendments principally relate to the use of deadly force by a peace officer. Former CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, had served as the negligence instruction for both deadly and nondeadly force cases.

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

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

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

This committee proposes a new instruction addressing a peace officer's use of deadly force, and revising No. 440 (discussed below) to address nondeadly force by law enforcement officers.

Five commenters suggested revisions to the new instruction. The committee refined the instruction based on these comments, including removal of the so-called *Graham* factors that have been used to determine "reasonable" force under the Fourth Amendment.

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

Revised instructions

CACI Nos. 430, *Causation: Substantial Factor*, and 435, *Causation for Asbestos-Related Cancer Claims*. CACI No. 435 is based on *Rutherford v. Owens-Illinois, Inc.* (*Rutherford*), which addressed exposure to asbestos from "defendant's defective asbestos-containing products."[3] In November 2018, the council approved additions to the Directions for Use that noted an unsettled issue concerning whether the same causation standard applies if the defendant was alleged to have created exposure to asbestos but is not a manufacturer or supplier of asbestos-containing products.[4] In a recent case,[5] the court directly addressed that unsettled issue, holding that the jury was properly instructed with a modified version of CACI No. 435 that required plaintiff to prove exposure to asbestos from defendant's property or operation.[6] The court concluded "that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though

[3] (1997) 16 Cal.4th 953, 982–983.

[4] The Directions for Use of CACI No. 435 presented the unresolved issue as follows:

> Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant]; see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236–1239 [142 Cal.Rptr.3d 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].)

[5] *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679.

[6] *Id.* at pp. 686–687.

[the defendant was] not a manufacturer or supplier of asbestos."[7] The committee proposed changes to the Directions for Use of both instructions in light of this new authority, and the addition of *property* or *operations* as choices in CACI No. 435.

On posting for public comment, numerous comments were received from the asbestos defense bar (some on behalf of clients) expressing the view that CACI No. 435 does not accurately present the holding of *Rutherford*, and that the asbestos causation instruction should only be used for manufacturers and suppliers. With respect to the former contention, the committee reviewed the cases cited and concluded that the instruction is consistent with *Rutherford*. Because remittitur in *Lopez* issued on December 31, 2019, *Lopez* is authority for the propositions cited in the Directions for Use of both instructions. *Lopez* is also authority for the new bracketed terms ("[,/or] activities/ [,/or] property/ [,/or] operations") in CACI No. 435.

The same commenters urged the committee to retain a citation to another Court of Appeal decision, *Petitpas v. Ford Motor Co.*, in the Directions for Use.[8] Because that decision has not been overruled or superseded by statute, the committee agreed with the commenters, and has decided to retain it in the Directions for Use and has added it to the Sources and Authority of both instructions.

CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. As stated above, CACI No. 440 had addressed negligent use of force, whether deadly or nondeadly, by law enforcement officers. To give effect to Penal Code section 835a, the committee has revised CACI No. 440 for use in nondeadly force cases only.

CACI No. 1305, *Battery by Peace Officer—Essential Factual Elements*. The committee proposes additional changes arising from Penal Code section 835a. Two commenters encouraged the committee to draft a new instruction for battery claims for use only in deadly force cases. The committee will consider those suggestions in the next release cycle.

CACI No. 2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw).* A bar association in the previous public comment cycle (CACI 20-01) suggested changing "supervisor" in the instruction to encompass persons other than a supervisor. The committee reviewed the case law and concluded that the suggestion had support in the case law. In response to this change, the committee received four comments against the revisions and one comment agreeing with the proposal. The commenters against recommended either no change to the instruction or some modification of supervisor or other person—for example, "a significant participant in the employment decision." On the basis of these comments, the committee has revised the Directions for Use to reflect that the scope of the cat's paw rule is not yet settled when the decision maker relies on the acts of a nonsupervisory coworker or other person

[7] *Id.* at p. 687.

[8] (2017) 13 Cal.App.5th 261.

involved in the employment decision. The committee did not further revise the proposal because courts will determine, before the issue goes to a jury, whether the "other person" had a role in the employment decision sufficient to raise a triable dispute.

CACI No. 4308, *Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4)).* A trial judge pointed out that the unlawful detainer instruction for nuisance did not define the term "nuisance," and proposed including a definition of the term. The committee agreed and recommends adding to the instruction an optional definition. Based on two comments in favor of the proposed language, the committee has further revised the definition to provide that "indecent or offensive to the senses" is assessed from the perspective "of an ordinary person with normal sensibilities."

CACI No. 4560, *Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b)).* An attorney who practices construction law observed that under Business and Professions Code section 7031, consumers do not have to prove that they had a contract with an unlicensed contractor. The committee agreed with the suggestion and proposes clarifying revisions that eliminate a contract as an element of the claim, and that broaden the concept of "contractor services" based on case law.

Policy implications

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

Comments

The proposed additions and revisions to *CACI* circulated for comment from July 21 through September 2, 2020. The committee received 21 different comments (two of which were submitted jointly). Some commenters submitted comments on multiple instructions, and some commented on only a single instruction. Ten comments (not counting two bar associations who agreed without substantive comment) were received on asbestos causation, all but one of which was from the asbestos defense bar. Other than the comments concerning asbestos causation, discussed above, the instructions concerning use of force by law enforcement and peace officers (CACI Nos. 440, 441, and 1305) generated several comments, and the negligence instructions were refined, as discussed above.

The committee evaluated all comments and revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions and the committee's responses is attached at pages 76–156.

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.

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 2021 edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. Jury instructions, at pages 7–75
2. Chart of comments, at pages 76–156

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CIVIL JURY INSTRUCTIONS
Release 38: November 2020

418. Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**

If [*name of plaintiff/defendant***] proves ~~If you decide~~**

1. **That [***name of ~~plaintiff/~~defendant/plaintiff***] violated this law and**

2. **That the violation was a substantial factor in bringing about the harm,**

then you must find that [*name of ~~plaintiff/~~defendant/plaintiff***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of ~~plaintiff/~~defendant/plaintiff***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of ~~plaintiff/~~defendant/plaintiff***] was negligent in light of the other instructions.**

New September 2003; Revised December 2005, June 2011, November 2020

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence—Violation Excused*.

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669.
- "Although compliance with the law does not prove the absence of negligence, violation of the law

does raise a presumption that the violator was negligent. This is called negligence per se." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529]; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)

- " 'The negligence per se doctrine is codified in Evidence Code section 669, subdivision (a), under which negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.' 'The burden is on the proponent of a negligence per se instruction to demonstrate that these elements are met.' " (*Taulbee v. EJ Distribution Corp.* (2019) 35 Cal.App.5th 590, 596 [247 Cal.Rptr.3d 538], internal citations omitted.)

- "The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc., supra,* 190 Cal.App.4th at p. 1526, internal citation omitted; see also Cal. Law Revision Com. com. to Evid. Code, § 669.)

- "[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence." (*Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 534 [238 Cal.Rptr.3d 528].)

- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)

- "Where a statute establishes a party's duty, ' "proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." ' This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)

- "[I]n negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 371 [199 Cal.Rptr.3d 522].)

- " 'The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The

jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.' " (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167], internal citations omitted.)

- "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)

- "[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*Cal. Serv. Station Etc. Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)

- "In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

- "While courts have applied negligence per se to building code violations, it has only been applied in limited situations." (*Jones v. Awad* (2019) 39 Cal.App.5th 1200, 1212 [252 Cal.Rptr.3d 596].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1002–1028

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation ("Negligence Per Se")*, ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations—Presumptions*, ¶ 8:3604 (The Rutter Group)

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

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof*, § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018, May 2020, November 2020

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes*, should also be given.

~~In a case in which the plaintiff's claim is that the plaintiff contracted cancer from exposure to the defendant's asbestos-containing product,~~ A case in which the plaintiff's claim is based on disease resulting from asbestos exposure requires a different instruction. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] [citing previous discussion of issues related to asbestos

cases in Directions for Use of this instruction and CACI No. 435] ~~requires a different instruction regarding exposure to a particular product~~.) Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction. (But see ~~Cf.~~ *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].)

~~Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered the plaintiff has suffered a compensable injury].)~~

~~Although the court in *Rutherford* did not use the word "trivial," it did state that "a force [that] plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) While it may be argued that "trivial" and "infinitesimal" are synonyms, a very minor force that does cause harm *is* a substantial factor. This rule honors the principle of comparative fault. (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford,* the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford, supra,* 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.~~

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term

'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath, supra,* 21 Cal.4th at p. 79*,* internal citations omitted.)

- "[G]iving CACI No. 430, which states that a factor is not substantial when it is 'remote or trivial,' could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally 'remote,' precludes an otherwise sufficient asbestos claim. ' "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.' It was not error for the court to give CACI No. 435 alone instead of CACI No. 430." (*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citation omitted.)

- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' … Subsection (2) states that if 'two forces are actively operating … and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)

- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- "Giving CACI No. 430 in its entirety also would have meant instructing the jury on the principle of 'but-for' causation. Although generally subsumed within the substantial factor test, 'the but-for test is inappropriate in cases when two forces are actively operating and each is sufficient to bring about the harm.' … 'If a plaintiff [or decedent] has developed a disease after having been exposed to multiple defendants' asbestos products, medical science [is] unable to determine which defendant's product included the specific fibers that caused the plaintiff's [or decedent's] disease.' A 'but-for' instruction is therefore inappropriate in the asbestos context, at least when there are multiple sources of exposure.

(*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citations omitted.)

- "That the Use Notes caution against giving the more general CACI No. 430 in a mesothelioma case, when the more specific instruction CACI No. 435 is more applicable, does not support a conclusion that it was error to give both instructions. CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* [*v. Owens-Illinois, Inc.*] noted, more specific instructions *also* must be given in a mesothelioma case. Because the more specific CACI No. 435 also was given, we do not find that the trial court erred by giving both instructions." (*Petitpas, supra,* 13 Cal.App.5th p. 299, original italics.)

- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was *not* a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- "The first element of legal cause is cause in fact ... . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)

- "If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)

- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 309, 349 P.3d 1013], original italics, footnote omitted.)

- "The second aspect of proximate cause 'focuses on public policy considerations. Because the purported [factual] causes of an event may be traced back to the dawn of humanity, the law has imposed additional "limitations on liability other than simple causality." [Citation.] "These additional limitations are related not only to the degree of connection between the conduct and the injury, but also with public policy." [Citation.] Thus, "proximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the

consequences of his conduct.' " [Citation.]' " (*State Dept. of State Hospitals, supra,* 61 Cal.4th at p. 353, internal citation omitted.)

- "On the issue … of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [236 Cal.Rptr.3d 128].)

- " 'Whether a defendant's conduct actually caused an injury is a question of fact … that is ordinarily for the jury … .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' … ' "A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- "Ordinarily, proximate cause is a question of fact which cannot be decided as a matter of law from the allegations of a complaint. … Nevertheless, where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Modisette v. Apple Inc.* (2018) 30 Cal.App.5th 136, 152 [241 Cal.Rptr.3d 209].)

- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)

- "As a general matter, juries may decide issues of causation without hearing expert testimony. But '[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.' " (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236

Cal.Rptr.3d 802], internal citation omitted.)

- "The Supreme Court … set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra,* 21 Cal.4th at p. 80, footnote omitted.)

- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major, supra,* 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1334–1341

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s [product/ [,/or] activities/ [,/or] property/ [,/or] operations] was a substantial factor causing [his/her/***nonbinary pronoun*/**[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her/***nonbinary pronoun***] risk of developing cancer.**

New September 2003; Revised December 2007, May 2018, November 2018, May 2020, November 2020

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that the plaintiff contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product or asbestos-related activities. ~~This instruction is based on~~ (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 688 [254 Cal.Rptr.3d 377] [addressing causation standard for exposure to asbestos from a defendant's property or operation when the defendant is not a manufacturer or supplier of asbestos-containing products]; ~~).~~, ~~which addresses only exposure to asbestos from "defendant's defective asbestos-containing products." Whether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled. However, at least one court has given CACI No. 435 with regard to a defendant other than an asbestos manufacturer or supplier, but there was no analysis of the issue on appeal. (See~~ but see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 290 [220 Cal.Rptr.3d 185] [court gave CACI No. 435 with regard to premises liability defendant].~~); see also *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236–1239 [142 Cal.Rptr.3d 678] [*Rutherford* causation standards cited in case against contractor alleged to have created exposure to asbestos at job site].) See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.~~ If the plaintiff's claim is based on anything other than disease resulting from asbestos exposure, then this instruction is not to be given.

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related

cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford, supra,* 16 Cal.4th at pp. 982–983, original italics, internal citation and footnotes omitted.)

- "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though [defendant] is not a manufacturer or supplier of asbestos. [¶] CACI No. 435 was developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant. These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos." (*Lopez, supra,* 41 Cal.App.5th at p. 687, internal citation omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable

medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "[G]iving CACI No. 430, which states that a factor is not substantial when it is 'remote or trivial,' could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally 'remote,' precludes an otherwise sufficient asbestos claim. ' "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases.' It was not error for the court to give CACI No. 435 alone instead of CACI No. 430." (*Lopez, supra,* 41 Cal.App.5th at p. 688, internal citation omitted.)

- "That the Use Notes caution against giving the more general CACI No. 430 in a mesothelioma case, when the more specific instruction CACI No. 435 is more applicable, does not support a conclusion that it was error to give both instructions. CACI No. 430 is a correct statement of the law relating to substantial factor causation, even though, as *Rutherford* noted, more specific instructions *also* must be given in a mesothelioma case. Because the more specific CACI No. 435 also was given, we do not find that the trial court erred by giving both instructions." (*Petitpas, supra,* 13 Cal.App.5th at p. 299, original italics.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[T]here is no requirement that plaintiffs show that [defendant] was the exclusive, or even the primary, supplier of asbestos-containing gaskets to PG&E." (*Turley v. Familian Corp.* (2017) 18 Cal.App.5th 969, 981 [227 Cal.Rptr.3d 321].)

- "[T]o establish exposure in an asbestos case a plaintiff has no obligation to prove a specific exposure

to a specific product on a specific date or time. Rather, it is sufficient to establish 'that defendant's product was definitely at his work site and that it was sufficiently prevalent to warrant an inference that plaintiff was exposed to it' during his work there." (*Turley, supra,* 18 Cal.App.5th at p. 985.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos 'constituted a substantial factor in the causation of [the decedent's] cancer.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a 'plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.' " (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

- "Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure." (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to

"medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

440. ~~Unreasonable~~ Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

A law enforcement officer may use reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] a person when the officer has reasonable cause to believe that that person has committed or is committing a crime. However, the officer may use only that degree of force necessary to ~~accomplish the~~ [arrest/~~detention~~detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person~~]~~. [Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force.]

[*Name of plaintiff*] claims that [*name of defendant*] was negligent in ~~used~~using unreasonable force ~~in~~ to [arrest~~ing~~/detain~~ing~~// [,/or] prevent escape of/ overcome resistance by] [him/her/*nonbinary pronoun*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] used force ~~in~~ to [arrest~~ing~~/detain~~ing~~/ [,/or] prevent escape of/ [,/or] overcome resistance by] [*name of plaintiff*];**

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

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

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

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

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

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

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

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

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by using

objectively reasonable force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance by] the person.]

New June 2016; Revised May 2020, November 2020

Directions for Use

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

For cases involving the use of deadly force by a peace officer, Penal Code section 835a use CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. (Pen. Code, § 835a.) This instruction and CACI No. 441 may require modifications to the instruction if the jury must decide whether the force used by the defendant was deadly or nondeadly force, or if the jury must decide whether the defendant was a peace officer.

Factors (a), (b), and (c) are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are to be applied under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) They are not exclusive (see *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468 673 F.3d 864, 872.); additional factors may be added if appropriate to the facts of the case. If negligence, civil rights, and battery claims are all involved, the instructions can be combined so as to give the *Graham* factors only once. A sentence may be added to advise the jury that the factors apply to all three multiple claims.

Give optional fFactor (d) is bracketed because no reported California state court decision has held that an officer's tactical decisions before using nondeadly force can be actionable negligence. if the officer's conduct leading up to the need to use force is at issue. It has been held that Lliability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (*Hayes, supra,* 57 Cal.4th at p. 639 ["[T]he state and federal standards are not the same, which we now confirm."]; cf. *Vos v. City of Newport Beach* (9th Cir. 2018) 892 F.3d 1024, 1037 ["To determine police liability [under state law negligence], a court applies tort law's 'reasonable care' standard, which is distinct from the Fourth Amendment's 'reasonableness' standard. The Fourth Amendment is narrower and 'plac[es] less emphasis on preshooting conduct.' ".)

Sources and Authority

- Legislative Findings re Use of Force by Law Enforcement. Penal Code section 835a(a).
- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt*. … [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez, supra,* 46 Cal.4th at p. 514, internal citation omitted.)
- "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of ' "the nature and quality of the intrusion on the individual's Fourth Amendment interests" ' against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citations omitted.)

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

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

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

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

- "The California Supreme Court did not address whether decisions before non-deadly force can be actionable negligence, but addressed this issue only in the context of 'deadly force.' " (*Mulligan v. Nichols* (9th Cir. 2016) 835 F.3d 983, 991, fn. 7.)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

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

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

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

441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

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A peace officer may use deadly force only when necessary in defense of human life. [*Name of plaintiff***] claims that [***name of defendant***] was negligent in using deadly force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance to] [him/her/***nonbinary pronoun/name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a peace officer;**

2. **That [***name of defendant***] used deadly force on [***name of plaintiff/decedent***];**

3. **That [***name of defendant***]'s use of deadly force was not necessary to defend human life;**

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

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

[*Name of defendant***]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that deadly force was necessary [either]:**

[to defend against an imminent threat of death or serious bodily injury to [*name of defendant***] [and/or] [another person]][; or/.]]**

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

i. **The felony threatened or resulted in death or serious bodily injury to another;**

ii. **[***Name of defendant***] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**

iii. **[***Name of defendant***] made reasonable efforts to identify [himself/herself/***nonbinary pronoun***] as a peace officer and to warn that deadly force may be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist a peace officer unless the peace officer is using unreasonable force.]

["Deadly force" is force that creates a substantial risk of causing death or serious bodily injury. It is not limited to the discharge of a firearm.]

A threat of death or serious bodily injury is "imminent" if, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to or perceived by the peace officer at the time, including the conduct of [*name of defendant***] and [***name of plaintiff/decedent***] leading up to the use of deadly force. In determining whether [***name of defendant***]'s use of deadly force was necessary in defense of human life, you must consider [***name of defendant***]'s tactical conduct and decisions before using deadly force on [***name of plaintiff/decedent***] and whether [***name of defendant***] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to an objectively reasonable officer.**

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance].]

New November 2020

Directions for Use

Use this instruction for a negligence claim arising from a peace officer's use of deadly force. Penal Code section 835a preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes a peace officer to use deadly force only when "necessary in defense of human life." If the plaintiff claims that the defendant used both deadly and nondeadly force, or if the jury must decide whether the force used was deadly or nondeadly, this instruction may be used along with the corresponding essential elements for negligence involving nondeadly force. See CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*.

Element 1 may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact regarding element 1, include the specific factual findings necessary for the jury to determine whether the defendant was a peace officer.

Select either or both bracketed options concerning the justifications for using deadly force under Penal Code section § 835a(c) depending on the facts of the case. If only one justification is supported by the facts, omit the either/or language. Include the bracketed sentence following the justifications if the plaintiff claims that the only threat the plaintiff posed was self-harm. A peace officer may not use deadly force against a person based on a danger that person poses to themselves if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the

peace officer or to another person. (Pen. Code, § 835a(c)(2).)

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) The definition may be omitted from the instruction if a firearm was used. Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings Regarding Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force Is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt v. City of Los Angeles, supra,* 2 Cal.3d 575. … [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

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

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

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

1305. Battery by Peace Officer—Essential Factual Elements

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

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

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

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

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

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

[A/An] [*insert type of peace officer***] may use reasonable force to [arrest/ ~~or~~ detain/ [,/or] prevent the escape of/ [,/or] overcome the resistance of] a person when the officer has reasonable cause to believe that that person has committed a crime. Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force. [A peace officer may use deadly force only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that it was necessary in defense of human life.]**

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

(a) The seriousness of the crime at issue;

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

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

[[A/An] [*insert type of peace officer***] who makes or attempts to make an arrest does not have to retreat or stop ~~is not required to retreat or cease from the officer's efforts~~ because the person being arrested resists or threatens to resist. Tactical repositioning or other deescalation tactics are not**

retreat. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance.]

New September 2003; Revised December 2012, May 2020, November 2020

Directions for Use

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

Include the first bracketed sentence ~~For~~ in cases involving the use of deadly force by a peace officer~~,~~. Penal Code section 835a ~~may~~ will require further modifications to the instruction. For example, if the defendant claims that the use of deadly force was justified because it was necessary in defense of human life, modify the instruction to include the second paragraph in CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. Select one or both options from the second paragraph depending on the justification(s) claimed.

For additional authorities on excessive force, see the Sources and Authority for CACI No. 440, ~~*Unreasonable Force by Law Enforcement in Arrest or Other Seizure–Essential Factual Elements*~~*Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*, and CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*.

Sources and Authority

- Use of Objectively Reasonable Force to Arrest. Penal Code section 835a.
- Duty to Submit to Arrest. Penal Code section 834a.
- "Plaintiff must prove unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)
- " ' "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)
- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe

that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)

- "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

To recover damages for money spent to investigate or verify whether [*name of plaintiff*]'s computer system, computer network, computer program, or data ~~[~~was or was not~~/were or were not]~~ altered, damaged, or deleted by ~~[*name of defendant*]'s access~~[*specify wrongful conduct under section 502(c) that led to accessing the plaintiff's computer system, computer network, or computer program*], [*name of plaintiff*] must prove the amount of money reasonably and necessarily spent to conduct such an investigation.

New May 2020; Revised November 2020

Directions for Use

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

For other damages instructions, see the Damages series, CACI No~~s~~. 3900 et seq.

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

Sources and Authority

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

Secondary Sources

5 Witkin, California Criminal Law (4th ed. 2012) Crimes Against Property, § 229 et seq.

31 California Forms of Pleading and Practice, Ch. 349, *Literary Property and Copyright*, § 349.91 (Matthew Bender)

2204. Negligent Interference With Prospective Economic Relations

[*Name of plaintiff***] claims that [***name of defendant***] negligently interfered with a relationship between [him/her/***nonbinary pronoun***/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in a future economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew or should have known of this relationship;**

3. **That [***name of defendant***] knew or should have known that this relationship would be disrupted if [he/she/***nonbinary pronoun***/it] failed to act with reasonable care;**

4. **That [***name of defendant***] failed to act with reasonable care;**

5. **That [***name of defendant***] engaged in wrongful conduct through [***insert grounds for wrongfulness, e.g., breach of contract with another, misrepresentation, fraud, violation of statute***];**

6. **That the relationship was disrupted;**

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

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

New September 2003; Revised November 2020

Directions for Use

Regarding the fifth element, the judge must specifically state for the jury the conduct that the judge has determined as a matter of law would satisfy the "wrongful conduct" standard. This conduct must fall outside the privilege of fair competition. (~~*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877];~~ *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740]; *Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757].) The jury must then decide whether the defendant engaged in the conduct as defined by the judge. If the conduct is tortious, judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which fall outside the boundaries of fair competition." (*Settimo Associates*, *supra*, ~~*v. Environ Systems, Inc.*~~

~~(1993)~~ 14 Cal.App.4th ~~842,~~ at p. 845 ~~[17 Cal.Rptr.2d 757]~~, internal citation omitted.)

- "The elements of negligent interference with prospective economic advantage are (1) the existence of an economic relationship between the plaintiff and a third party containing the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) the defendant's knowledge (actual or construed) that the relationship would be disrupted if the defendant failed to act with reasonable care; (4) the defendant's failure to act with reasonable care; (5) actual disruption of the relationship; (6) and economic harm proximately caused by the defendant's negligence." (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1005 [230 Cal.Rptr.3d 98].)

- "The tort of negligent interference with prospective economic advantage is established where a plaintiff demonstrates that (1) an economic relationship existed between the plaintiff and a third party which contained a reasonably probable future economic benefit or advantage to plaintiff; (2) the defendant knew of the existence of the relationship and was aware or should have been aware that if it did not act with due care its actions would interfere with this relationship and cause plaintiff to lose in whole or in part the probable future economic benefit or advantage of the relationship; (3) the defendant was negligent; and (4) such negligence caused damage to plaintiff in that the relationship was actually interfered with or disrupted and plaintiff lost in whole or in part the economic benefits or advantage reasonably expected from the relationship." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 786 [69 Cal.Rptr.2d 466].)

- "'The tort of *negligent* interference with economic relationship arises only when the defendant owes the plaintiff a duty of care.' " (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 348 [60 Cal.Rptr.2d 539], original italics, internal citation omitted.)

- "Where a special relationship exists between the parties, a plaintiff may recover for loss of expected economic advantage through the negligent performance of a contract although the parties were not in contractual privity." (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804 [157 Cal.Rptr. 407, 598 P.2d 60].)

- The trial court should instruct the jury on the "independently wrongful" element of the tort of negligent interference with prospective economic advantage. (*National Medical Transportation Network v. Deloitte & Touche* (1998) 62 Cal.App.4th 412, 440 [72 Cal.Rptr.2d 720].)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc.* *v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877]~~, *supra,* 45 Cal.App.4th at p. 603~~, internal citation omitted, disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].)

- "While the trial court and [defendant] are correct that a defendant incurs liability for interfering with another's prospective economic advantage only if the defendant's conduct was independently wrongful, we have been directed to no California authority, and have found none, for the trial court's conclusion that the wrongful conduct must be intentional or willful. The defendant's conduct must 'fall outside the boundaries of fair competition' … , but negligent misconduct or the violation of a

statutory obligation suffice. The approved CACI No. 2204 does not indicate otherwise and, in fact, indicates that either a misrepresentation or 'violation of statute' is sufficient." (*Venhaus v. Shultz* (2007) 155 Cal.App.4th 1072, 1079–1080 [66 Cal.Rptr.3d 432], internal citations omitted.)

- "The fact that the defendant's conduct was independently wrongful is an element of the interference cause of action itself. In addition, the wrongful interfering act can be independently tortious only as to a third party; it need not be independently wrongful as to the plaintiff. Accordingly, … to state a cause of action for intentional or negligent interference with prospective economic advantage, it is not necessary to also plead a separate, stand-alone tort cause of action." (*Redfearn, supra,* 20 Cal.App.5th at p. 1006, internal citations omitted.)

- ~~Notably, one of~~ "[A]mong the ~~[t]he~~ criteria for establishing [the existence of] a duty of care is the 'blameworthiness' of the defendant's conduct. For negligent interference, a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Lange v. TIG Ins.~~urance~~ Co.* (~~1999~~1998) 68 Cal.App.4th 1179, 1187 [81 Cal.Rptr.2d 39], internal citations omitted.) ~~The *Lange* court stated that in a negligent interference case "a defendant's conduct is blameworthy only if it was independently wrongful apart from the interference itself." (*Ibid.*) Thus, the "independently wrongful" element may, in effect, be decided by the judge in the course of determining whether a duty of care was owed.~~

- ~~There is currently no cause of action for negligent interference with contractual relations (see *Fifield Manor v. Finston* (1960) 54 Cal.2d 632, 636–637 [7 Cal.Rptr. 377, 354 P.2d 1073]): "Although the continuing validity of the so-called '*Fifield* rule' is questionable in light of the California Supreme Court's recognition in *J'Aire* of a cause of action for negligent interference with prospective economic advantage, the Supreme Court has yet to disapprove *Fifield*." (*LiMandri, supra,* 52 Cal.App.4th at p. 349.)~~

- "Under the privilege of free competition, a competitor is free to divert business to himself as long as he uses fair and reasonable means. Thus, the plaintiff must present facts indicating the defendant's interference is somehow wrongful—i.e., based on facts that take the defendant's actions out of the realm of legitimate business transactions." (*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 Cal.App.3d 1139, 1153–1154 [265 Cal.Rptr. 330], internal citations omitted.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- ~~There are other privileges that a defendant could assert in appropriate cases, such as the~~ "There are

three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive." ~~manager's privilege."~~ (~~See~~ *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391~~–1392~~ [77 Cal.Rptr.2d 383].)

Secondary Sources

~~95~~ Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§~~ 751–754~~867–869

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.135 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.70 (Matthew Bender)

2210. Affirmative Defense—Privilege to Protect Own ~~Financial~~ Economic Interest

[*Name of defendant*] claims that there was no intentional interference with contractual relations because [he/she/*nonbinary pronoun*/it] acted only to protect [his/her/*nonbinary pronoun*/its] legitimate ~~financial~~ economic interests. To succeed, [*name of defendant*] must prove all of the following:

1. **That [*name of defendant*] had a [legitimate] ~~financial~~ economic interest in the contractual relations because [*specify ~~financial interest~~ existing economic interest*];**
2. **That [*name of defendant*] acted only to protect [his/her/*nonbinary pronoun*/its] own ~~financial~~ economic interest;**
3. **That [*name of defendant*] acted reasonably and in good faith to protect it; and**
4. **That [*name of defendant*] used appropriate means to protect it.**

New June 2016; Revised November 2020

Directions for Use

Give this instruction as an affirmative defense to a claim for intentional interference with contractual relations. (See CACI No. 2201.) The defense presents a justification based on the defendant's right to protect its own ~~financial~~ economic interest.

In element 1, the jury should be told the specific ~~financial~~ economic interest that the defendant was acting to protect. Include "legitimate" if the jury will be asked to determine whether that ~~financial~~ economic interest was legitimate, as opposed perhaps to pretextual or fraudulent.

Sources and Authority

- "In harmony with the general guidelines of the test for justification is the narrow protection afforded to a party where (1) he has a legally protected interest, (2) in good faith threatens to protect it, and (3) the threat is to protect it by appropriate means. Prosser adds: 'Where the defendant acts to further his own advantage, other distinctions have been made. If he has a present, existing economic interest to protect, such as the ownership or condition of property, or a prior contract of his own, or a financial interest in the affairs of the person persuaded, he is privileged to prevent performance of the contract of another which threatens it; and for obvious reasons of policy he is likewise privileged to assert an honest claim, or bring or threaten a suit in good faith.' " (*Richardson v. La Rancherita* (1979) 98 Cal.App.3d 73, 81 [159 Cal.Rptr. 285], internal citation omitted.)
- "Justification for the interference is an affirmative defense and not an element of plaintiff's cause

of action." (*Richardson, supra,* 98 Cal.App.3d at p. 80.)

- "Something other than sincerity and an honest conviction by a party in his position is required before justification for his conduct on the grounds of 'good faith' can be established. There must be an objective basis for the belief which requires more than reliance on counsel." (*Richardson, supra,* 98 Cal.App.3d at pp. 82−83.)

- "A thoroughly bad motive, that is, a *purpose solely to harm the plaintiff,* of course, is sufficient to exclude any apparent privilege which the interests of the parties might otherwise create, just as such a motive will defeat the immunity of any other conditional privilege. If the defendant does not act in a bona fide attempt to protect his own interest or the interest of others involved in the situation, he forfeits the immunity of the privilege. . . . *Conduct is actionable, when it is indulged solely to harm another, since the legitimate interest of the defendant is practically eliminated from consideration*. The defendant's interest, although of such a character as to justify an invasion of another's similar interest, is not to be taken into account when the defendant acts, not for the purpose of protecting that interest, but *solely* to damage the plaintiff." (*Bridges v. Cal-Pacific Leasing Co.* (1971) 16 Cal.App.3d 118, 132 [93 Cal.Rptr. 796], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~760~~876

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.119 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.137 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, § 122.42 et seq. (Matthew Bender)

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

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

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

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

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

New December 2012; Revised June 2013, May 2020, November 2020

Directions for Use

Give this instruction if the "cat's paw" rule is a factor in the case. Under the cat's paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision maker, however, acted on information provided by another person ~~supervisor~~ who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the "cat's paw" of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717]; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154] [accepting the legal premise that an employer may be held liable on the basis of a non-supervisor's discriminatory motivation].) The cases have not yet defined the scope of the cat's paw rule when the decision maker relies on the acts of a nonsupervisory coworker or other person involved in the employment decision.

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

Element 1 requires that the protected activity or attribute be a substantial motivating reason for the retaliatory acts. Element 2 requires that the ~~supervisor's~~ other person's improper motive be a substantial motivating reason for the decision maker's action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th

203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

In both elements 1 and 2, all of the ~~supervisor's~~ other person's specific acts need not be listed in all cases. Depending on the facts, doing so may be too cumbersome and impractical. If the specific acts are listed, the list should include all acts on which plaintiff claims the decision maker relied, not just the acts admitted to have been relied on by the decision maker.

Sources and Authority

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

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

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

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

- "[S]howing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory,

even absent evidence that others in the process harbored such animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [87 Cal.Rptr.3d 99]).

- "[W]e accept Employee's implicit legal premise that Employer could be liable for [the outside investigator's] discriminatory motivation if the male executives who actually terminated Employee were merely the cat's paws of a biased female investigator." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1536 [152 Cal.Rptr.3d 154].)

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

- "Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a 'solid case' of 'workplace violence,' and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn." (*Reeves, supra,* 121 Cal.App.4th at p. 121.)

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The seriousness of the crime at issue [or other circumstances known to [*name of defendant*] at the time force was applied]; ~~[and]~~

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

(d) The amount of time [*name of defendant*] had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that time period[; and/.]

(e) The type and amount of force used[; and/.]

[~~(d)~~(f) [~~s~~*Specify other factors particular to the case*].]

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised

June 2015, June 2016, May 2020, November 2020

Directions for Use

The Fourth Amendment's "objective reasonableness" standard applies to all claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure brought under Title 42 United States Code section 1983, whether deadly or not. (*Scott v. Harris* (2007) 550 U.S. 372, 381–385 [127 S.Ct. 1769, 167 L.Ed.2d 686].)

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

~~The three f~~Factors (a), (b), and (c) ~~listed~~ are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) ~~661 F.3d 460, 467–468.)~~ 673 F.3d 864, 872.) Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given, and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. (*Id.*) These and other a~~A~~dditional factors may be added if appropriate to the facts of the case.

~~Claims of excessive force against law enforcement officers in the course of making an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment's "objective reasonableness" standard. (*Graham, supra,* 490 U.S. at pp. 388, 395 fn.10.)~~ Claims of excessive force brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause and are also analyzed under an objective reasonableness standard. (*Kingsley v. Hendrickson* (2015) ~~—~~576 U.S. ~~—~~, 389 [135 S.Ct. 2466, 2473, ~~]~~192 L.Ed.2d 416].) Modify the instruction for use in a case brought by a pretrial detainee involving the use of excessive force after arrest, but before conviction. For an instruction on an excessive force claim brought by a convicted prisoner, see CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force*.

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

For ~~an~~ instruction~~s~~ for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *~~Unreasonable~~ Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*, and CACI No. 441, *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Peace Officer—Essential Factual ~~Allegations~~Elements*.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the

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

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind? It is with respect to *this* question that we hold that courts must use an objective standard." (*Kingsley, supra,* 576 U.S. at p. 396 ~~*v. Hendrickson* (2015) -- U.S. --, 135 S.Ct. 2466, 2472–2473 [192 L.Ed.2d 416]~~, original italics.)

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

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

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

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

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

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force

employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* ~~661 F.3d at p. 467~~ 673 F.3d at p. 872, internal citations omitted.)

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

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

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

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

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

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

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

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

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

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

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

- "While a Fourth Amendment violation cannot be established 'based merely on bad tactics that result in a deadly confrontation that could have been avoided,' the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis." (*Vos, supra,* 892 F.3d at p. 1034, internal citations omitted.)

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

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

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

- "It is clearly established law that shooting a fleeing suspect in the back violates the suspect's Fourth Amendment rights. 'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.' "

(*Foster v. City of Indio* (9th Cir. 2018) 908 F.3d 1204, 1211.)

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

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

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

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

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

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* ~~661 F.3d at p. 468~~ 673 F.3d at p. 872.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and

one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

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

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

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

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

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

487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

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

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

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

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

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 981, 985

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

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

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

3801. Implied Contractual Indemnity

[*Name of indemnitee***] claims that [he/she/***nonbinary pronoun***] [is/was/may be] required to pay [***describe liability, e.g., "a court judgment in favor of plaintiff John Jones"***] because [***name of indemnitor***] [failed to use reasonable care in performing work under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]. In order for [***name of indemnitee***] to recover from [***name of indemnitor***], [***name of indemnitee***] must prove both of the following:**

1. **That [***name of indemnitor***] [failed to use reasonable care in [performing the work/[***describe work or services, e.g., testing the soil***]] under an agreement with [***name of indemnitee***]/[***specify other basis of responsibility***]]; and**

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

[[*Name of indemnitor***] claims that [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm. To succeed, [***name of indemnitor***] must prove both of the following:**

1. **That [[***name of indemnitee***] [and] [***insert identification of others***]] [was/were] [negligent/[***specify other basis of responsibility***]]; and**

2. **That [[***name of indemnitee***] [and] [***insert identification of others***]] contributed as [a] substantial factor[s] in causing [***name of plaintiff***]'s harm.**

You will be asked to determine the percentages of responsibility of [*name of indemnitor***][,/ and] [[***name of indemnitee***][, and] all other persons responsible] for [***name of plaintiff***]'s harm.]**

New September 2003; Revised December 2007, May 2020, November 2020

Directions for Use

The party identifications in this instruction assume a cross-complaint between indemnitor and indemnitee defendants. In a direct action by the indemnitee against the indemnitor, "*name of plaintiff*" will refer to the person to whom the indemnitee has incurred liability.

Implied contractual indemnity may arise for reasons other than the indemnitor's negligent performance under the contract. If the basis of the claim is other than negligence, specify the conduct involved. (See *Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 974 [56 Cal.Rptr.3d 177] [breach of warranty].)

Read the last bracketed portion if the indemnitor claims that the indemnitor was not the sole cause of the indemnitee's liability or loss. Select options depending on whether the indemnitor alleges contributory conduct of the indemnitee, of others, or of both. Element 1 will have to be modified if there are different

contributing acts alleged against the indemnitee and others; for example, if the indemnitee is alleged to have been negligent and another party is alleged to be strictly liable.

A special finding that an agreement existed may create a need for instructions, but it is a question of law whether an agreement implies a duty to indemnify. This instruction should be given only in cases in which the court has determined that the alleged indemnitor and the indemnitee have "a joint legal obligation to the injured party." (*Prince v. Pacific Gas & Electric Co.* (2009) 45 Cal.4th 1151, 1160 [90 Cal.Rptr.3d 732, 202 P.3d 1115].)

Sources and Authority

- "In general, indemnity refers to 'the obligation resting on one party to make good a loss or damage another party has incurred.' Historically, the obligation of indemnity took three forms: (1) indemnity expressly provided for by contract (express indemnity); (2) indemnity implied from a contract not specifically mentioning indemnity (implied contractual indemnity); and (3) indemnity arising from the equities of particular circumstances (traditional equitable indemnity). [¶] Although the foregoing categories of indemnity were once regarded as distinct, we now recognize there are only two basic types of indemnity: express indemnity and equitable indemnity. Though not extinguished, implied contractual indemnity is now viewed simply as 'a form of equitable indemnity.' " (*Prince, supra, ~~v. Pacific Gas & Electric Co.~~ (2009)* 45 Cal.4th ~~1151,~~ at p. 1157 ~~[90 Cal.Rptr.3d 732, 202 P.3d 1115]~~, internal citations omitted.)

- "The right to implied contractual indemnity is predicated upon the indemnitor's breach of contract, 'the rationale ... being that a contract under which the indemnitor undertook to do work or perform services necessarily implied an obligation to do the work involved in a proper manner and to discharge foreseeable damages resulting from improper performance absent any participation by the indemnitee in the wrongful act precluding recovery.' ... 'An action for implied contractual indemnity is not a claim for contribution from a joint tortfeasor; it is not founded upon a tort or upon any duty which the indemnitor owes to the injured third party. It is grounded upon the indemnitor's breach of duty *owing to the indemnitee* to properly perform its contractual duties.' " (*West v. Superior Court* (1994) 27 Cal.App.4th 1625, 1633 [34 Cal.Rptr.2d 409], internal citations omitted, original italics.)

- "[A]n implied contractual indemnity claim, like a traditional equitable indemnity claim, is subject to the *American Motorcycle* rule that a party's liability for equitable indemnity is based on its *proportional share of responsibility* for the damages to the injured party." (*Prince, supra,* 45 Cal.4th at p. 1165, original italics.)

- "[O]ur recognition that 'a claim for implied contractual indemnity is a form of equitable indemnity subject to the rules governing equitable indemnity claims' corrects any misimpression that joint liability is not a component." (*Prince, supra,* 45 Cal.4th at p. 1166, internal citation omitted.)

- "[U]nder [Code of Civil Procedure] section 877.6, subsection (c), ... an [implied contractual] indemnity claim, like other equitable indemnity claims, may not be pursued against a party who has entered into a good faith settlement." (*Bay Development, Ltd. v. Superior Court* (1990) 50 Cal.3d 1012, 1031 [269 Cal.Rptr. 720, 791 P.2d 290].)

- "We conclude the trial court erred in denying [the indemnitee's] implied contractual indemnity based on [indemnitee's] failure to prove [the indemnitor's] breach of warranty was the product of [indemnitor's] failure to use reasonable care in performing its contractual duties. [Indemnitee] does not need to prove a negligent breach of contract to be entitled to implied contractual indemnity." (*Garlock Sealing Technologies, supra,* 148 Cal.App.4th at p. 974, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§~~ 118, 178~~ 224, 229

Haning et al., California Practice Guide: Personal Injury, Ch. 4-D, *Techniques Where Settlement Not Forthcoming*, ¶ 4:~~189.6a~~ 784 (The Rutter Group)

5 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, § 74.03[6] (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Contribution and Indemnity*, § 300.61[5] (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.91[3][a] (Matthew Bender)

~~1~~ California Civil Practice: Torts § 4:1~~43~~ (Thomson Reuters)

3903C. Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3."**] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she/***nonbinary pronoun***] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] [he/she/***nonbinary pronoun***] will be reasonably certain to lose in the future as a result of the injury.]**

New September 2003; Revised November 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage).*

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

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

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures that the jury's fixing of damages is not wholly, and thus impermissibly, speculative.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.190 (Matthew Bender)

1 California Civil Practice: Torts, §§ 5:14, 5:15 (Thomson Reuters)

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff***] must prove:**

1. **That it is reasonably certain that the injury that [***name of plaintiff***] sustained will cause [him/her/***nonbinary pronoun***] to earn less money in the future than [he/she/***nonbinary pronoun***] otherwise could have earned; and**

2. **The reasonable value of that loss to [him/her/***nonbinary pronoun***].**

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff***] could have earned without the injury to what [he/she/***nonbinary pronoun***] can still earn with the injury. [Consider the career choices that [***name of plaintiff***] would have had a reasonable probability of achieving.] It is not necessary that [he/she/***nonbinary pronoun***] have a work history.**

New September 2003; Revised April 2004, April 2008, May 2017, November 2020

Directions for Use

This instruction is not intended for use in employment cases.

Use this instruction along with CACI No. 3906, *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage).*

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

- "Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the

injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- "Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- "[E]xpert testimony is not vital to a claim for loss of earning capacity." (*Lewis v. Ukran* (2019) 36 Cal.App.5th 886, 893 [248 Cal.Rptr.3d 839].)

- "A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference." (*Martinez v. State Dept. of Health Care Services* (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1666, 1667~~1842, 1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.140, 64.175 (Matthew Bender)

~~1~~ California Civil Practice: Torts § 5:1~~45~~ (Thomson Reuters)

3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damage)

In determining a reasonable amount of [*name of plaintiff*]'s [lost earnings/ [and] lost ability to earn money], you must not use race, ethnicity, or gender as a basis for reducing [*name of plaintiff*]'s [lost earnings/ [and] lost ability to earn money].

New November 2020

Directions for Use

Give this instruction in cases in which the plaintiff seeks damages for lost earnings and/or lost earning capacity from personal injury or wrongful death. Depending on the circumstances, select the type(s) of damages at issue: lost earnings, lost ability to earn money, or both. If this instruction is used, it should follow the applicable instruction(s) in the Items of Economic Damage series. See CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*, and CACI No. 3903D, *Lost Earning Capacity (Economic Damage)*.

Sources and Authority

- Estimations, Measures, or Calculations of Past, Present, or Future Damages. Civil Code section 3361.

Secondary Sources

6 Witkin, Summary of California Law (11th ed 2017) Torts, §§ 1843, 1871

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts*, ¶ 17:13 (The Rutter Group)

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expense and Economic Loss*, § 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.45, 177.46 (Matthew Bender)

4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements (Code Civ. Proc., § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance on the property/ [or] used the property for an illegal purpose]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] [***include one or both of the following:***]**

   created a nuisance on the property by [*specify conduct constituting nuisance***];**

   [or]

   used the property for an illegal purpose by [*specify illegal activity***];**

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

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[A "nuisance" is anything that [[is harmful to health]/ [or] [is indecent or offensive to the senses of an ordinary person with normal sensibilities]/ [or] [is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property]/ [or] [unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway]/ [or] [is [a/an] [fire hazard/*specify other potentially dangerous condition***] to the property]].]**

New December 2010; Revised June 2011, December 2011, May 2020, November 2020

Directions for Use

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, and "rented" in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

Include the optional last paragraph defining a nuisance if there is a factual dispute and the jury will determine whether the defendant's conduct constituted a nuisance. Omit any bracketed definitional options that are not at issue in the case. For additional authorities on nuisance, see the Sources and Authority to CACI No. 2020, *Public Nuisance—Essential Factual Elements*, and CACI No. 2021, *Private Nuisance—Essential Factual Elements*. Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

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

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

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

The Tenant Protection Act of 2019, local law, and/or federal law may impose additional requirements for the termination of a rental agreement based on nuisance or illegal activity. (See Civ. Code, § 1946.2(a) ["just cause" requirement for termination of certain residential tenancies], (b) ["just cause" defined], (b)(1)(C) [nuisance is "just cause"], (b)(1)(I) [unlawful purpose is "just cause"].) For example, if the property in question is subject to a local rent control or rent stabilization ordinance, the ordinance may provide further definitions or conditions under which a landlord has just cause to evict a tenant for nuisance or unlawful use of the property. This instruction should be modified accordingly if applicable.

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

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

Sources and Authority

- Unlawful Detainer Based on Tenant Conduct. Code of Civil Procedure section 1161(4).

- Tenant Protection Act of 2019. Civil Code section 1946.2.

- "Nuisance" Defined. Civil Code section 3479.

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457], internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2006~~2017) Real Property, §§ ~~674, 726~~ 701, 759

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.21 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 200, *Termination of Tenancies*, § 200.38 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

29 California Forms of Pleading and Practice, Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.28 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.11 (Matthew Bender)

Miller & Starr California Real Estate 4th, § 34:181 (Thomson Reuters)

4320. Affirmative Defense—Implied Warranty of Habitability

[*Name of defendant***] claims that [he/she/***nonbinary pronoun***] does not owe [any/the full amount of] rent because [***name of plaintiff***] did not maintain the property in a habitable condition. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] failed to provide one or more of the following:**

a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]

b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

f. [building, grounds, and all areas under the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or vacate the property cannot be a defense to the previous nonpayment.**

[Even if [*name of defendant***] proves that [***name of plaintiff***] substantially failed to meet any of these requirements, [***name of defendant***]'s defense fails if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the condition or interfered substantially with [***name of plaintiff***]'s ability to make the necessary repairs:**

[substantially failed to keep [his/her/*nonbinary pronoun*] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]

The fact that [*name of defendant*] has continued to occupy the property does not necessarily mean that the property is habitable.

New August 2007; Revised June 2010, June 2013, December 2014, November 2020

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].) The law on a landlord's notice in the unlawful detainer context, however, remains unsettled. (*Knight, supra*, 29 Cal.3d at p. 55, fn. 6.) A landlord has a duty to maintain the premises in a habitable condition irrespective of whether the tenant knows about a particular condition. (*Knight, supra,* 29 Cal.3d at p. 54.)

Sources and Authority

- Landlord's Duty to Make Premises Habitable. Civil Code section 1941.

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.

- Untenantable Dwelling. Civil Code section 1941.1(a).

- Effect of Tenant's Violations. Civil Code section 1941.2.

- Liability of Landlord Demanding Rent for Uninhabitable Property. Civil Code section 1942.4(a).

- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)

- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)

- "It follows that substantial noncompliance with applicable code standards could lead to a breach of the warranty of habitability." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298, fn. 9 [173 Cal.Rptr.3d 159].)

- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)

- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)

- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)

- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)

- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra,* 29 Cal.3d at p. 57.)

- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra,* 29 Cal.3d at p. 58.)

- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)

- "In the event of a landlord's breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed." (*Erlach, supra,* 226 Cal.App.4th at p. 1297.)

- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Real Property, §~~625~~ 651

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General,* ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109-8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

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

Miller & Starr, California Real Estate 4th~~Ch. 19, *Landlord-Tenant*~~, § 19:224 (Thomson Reuters)

4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was [performing services/supervising construction] for [***name of plaintiff***] ~~under their contract~~. To establish this claim and recover all compensation paid for these services, [***name of plaintiff***] must prove all of the following:**

1. **That ~~there was a contract between~~ [***name of plaintiff***] ~~and~~ [[engaged/hired]/ [or] contracted with] [***name of defendant***] ~~under which [***name of defendant***] was required~~ to perform services for [***name of plaintiff***];**

2. **That a valid contractor's license was required to perform these services; and**

3. **That [***name of plaintiff***] paid [***name of defendant***] for ~~contractor~~ services that [***name of defendant***] performed ~~as required by the contract;~~.**

[[*Name of plaintiff***] is not entitled to recover all compensation paid if [~~N~~*name of defendant*] ~~must then~~ proves that at all times while [performing/supervising] these services, [he/she/*nonbinary pronoun*/it] had a valid contractor's license as required by law.]**

New June 2016; Revised November 2020

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) Modify the instruction if the plaintiff claims the defendant did not perform services or supervise construction, but instead agreed to be solely responsible for completion of construction services. (See *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 940 [29 Cal.Rptr.2d 669].) It may also be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors' State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Modification to the optional paragraph may be required if substantial compliance with the licensing laws is alleged. (See Bus. & Prof. Code, § 7031(e).) Omit the final bracketed paragraph if the issue of licensure is not contested.

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco*

Sierra Grove (1997) 60 Cal.App.4th 374, 385−387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).
- Proof of Licensure. Business and Professions Code section 7031(d).
- "Contractor" Defined. Business and Professions Code section 7026.
- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)
- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties,* and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra,* 52 Cal.3d at p. 995, original italics.)
- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518, fn. 2.)
- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)
- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)
- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short,

those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra,* 178 Cal.App.4th at p. 520.)

- "In most cases, a contractor can establish valid licensure by simply producing 'a verified certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO." (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520−521, original italics, internal citation omitted.)

- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of 'sophisticated' persons. Reading that limitation into the statute would be inconsistent with its purpose of ' "deterring unlicensed persons from engaging in the contracting business." ' " (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 849 [219 Cal.Rptr.3d 775].)

- "By entering into the agreements to 'improve the Property' and to be '*solely responsible* for completion of' infrastructure improvements—including graded building pads, storm drains, sanitary systems, streets, sidewalks, curbs, gutters, utilities, street lighting, and traffic signals—[the plaintiff] was clearly contracting to provide construction services in exchange for cash payments by [the defendants]. The mere execution of such a contract is an act 'in the capacity of a contractor,' and an unlicensed person is barred by section 7031, subdivision (a), from bringing

claims based on the contract. [¶...¶] … Section 7026 plainly states that both the person who provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract." (*Vallejo Development Co., supra,* 24 Cal.App.4th at p. 940–941, original italics.)

- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc., supra,* 12 Cal.App.5th at p. 853.)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017) Contracts, § 491

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors*, § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

Instruction(s)	Commenter	Comment	Committee Response
430. *Causation: Substantial Factor*	John P. Blumberg, Attorney Long Beach	"There was no proposed change to the actual instruction; only a re-wording of one of the case references. My comment concerns the instruction itself. The word 'substantial' is universally understood to refer to something big. 'A substantial meal,' or 'a substantial raise' for example. Dictionary.com includes these words as similar: generous, extraordinary, solid, hefty, steady, valuable, large, sizable, massive, significant, big, consequential, serious, strong, meaningful, considerable, vast, positive, actual. But to define tort causation, lawyers, judges and legal scholars became enamored of a lesser-known definition -- not used in common discourse: substantial factor. Very few instructions generate more jury questions than CACI 430. Lawyers representing plaintiffs try, during final argument, to explain to jurors that the word substantial does not mean 'big' but the jurors will still cling to their previous understanding based on well-known cognitive science. Jurors will not abandon their understanding of the commonly-used word substantial, and substitute it with what seems to be the opposite definition, e.g., not imaginary or illusory. This flies in the face of reality. (Can you imagine an employee coming home to his or her spouse, saying, 'Honey, guess what? I got a raise that wasn't illusory or trivial!['] In Bockrath v. Aldrich Chemical Co. (1999) 21 Cal.4th 71, 79, the court said: 'The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a "substantial factor," but a very minor force that does cause harm is a substantial factor.['] So, why not eliminate the word substantial and just define factor: 'A factor in causing harm is one that is actual, real and not having merely an insignificant connection to the defendant's negligence. It need not be the only factor, and even a very minor force causing harm is a factor.' "	This comment is beyond the scope of the invitation to comment. The committee decided previously to use the term "substantial factor" in CACI as the standard formulation for the element of causation. As the User Guide notes, "substantial factor" is used throughout CACI "to state the element of causation, rather than referring to 'cause' and then defining that term in a separate instruction as a 'substantial factor.' "
	Bruce Greenlee, Attorney Richmond	I agree with the changes to the Directions for Use.	No response required.
		How about adding a parenthetical to the *Lopez* cite: "(citing previous discussion of issues related to asbestos cases in these Directions for Use)." (or something like that) If not to the citation in the Directions for Use, then at least in the excerpt in the Sources and Authority.	The committee agrees and has added a parenthetical to the

Instruction(s)	Commenter	Comment	Committee Response
			Lopez cite in the Directions for Use.
		"I would add an additional *Lopez* excerpt to the Sources and Authority on the 'but for' optional sentence: 'Giving CACI No. 430 in its entirety also would have meant instructing the jury on the principle of "but-for" causation. … 'If a plaintiff [or decedent] has developed an asbestos-related disease after having been exposed to multiple defendants' asbestos products, medical science [is] unable to determine which defendant's product included the specific fibers that caused the plaintiff's [or decedent's] disease. A "but-for" instruction is therefore inappropriate in the asbestos context, at least when there are multiple sources of exposure." (*Lopez, supra*, 41 Cal.App.5th at p. 688, internal citation omitted)' "	The committee has added to the Sources and Authority this excerpt from *Lopez*.
430. *Causation: Substantial Factor* and 435. *Causation for Asbestos-Related Cancer Claims*	3M Company, By Justin R. Sarno, Attorney, Dentons US LLP Los Angeles	"In 2007, the Judicial Council sought to revise CACI Nos. 430 and 435 (Winter 2007—CACI 07-03). At that time, 3M presented comments explaining that traditional principles of legal causation embodied in CACI No. 430 applied to claims concerning 3M respiratory protective equipment—which are not, and were never, asbestos-containing products. The Committee "agreed and added a brief reference to defendants who are not asbestos manufacturers or suppliers in the Directions for Use." (See, e.g., Page 20, at the document located at: http://www.courts.ca.gov/documents/120707item4.pdf). The Judicial Council now seeks to reverse course and mandate a single causation instruction for all asbestos-related claims and all defendants, even those that neither supplied nor manufactured asbestos-containing products. The Council's approach eliminates reference to CACI No. 430 altogether in an asbestos case. These changes are inconsistent with California law and should be rejected.	See the committee's responses to 3M Company's comments, below.
		First, both CACI No. 430 and 435 should be given in asbestos cases. The proposed changes conflict with California Supreme Court's decision in *Rutherford*, which remains controlling law. *Rutherford* held that general causation instructions "should be given" in an asbestos case.	The committee disagrees with the commenter's analysis. The committee believes that the instructions remain consistent with the law set out in *Rutherford*.

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		Second, CACI No. 430 should certainly be given in a case involving 3M respiratory equipment, which does not contain asbestos. There is no reason to treat 3M differently in an asbestos case than in a non-asbestos case, as the Judicial Council previously agreed.	The committee disagrees. Remittitur issued in *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679 on December 31, 2019. *Lopez* is, therefore, authority for the propositions cited.
		Third, the "Directions for Use" for CACI No. 435 should not eliminate reference to *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 299 ("*Petitpas*"). *Petitpas* correctly applied *Rutherford* and should be referenced and followed in the "Directions for Use." The decision in *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679 ("*Lopez*") conflicts with *Rutherford*, with respect to CACI No. 430, and it should not be the basis for changes to CACI Nos. 430 and 435. *Rutherford* remains controlling law in California and that decision, not *Lopez*, should be the basis for the instructions and the "Directions of Use" for CACI No. 435.	As reflected above, the committee disagrees. However, to the extent that arguments exist about the propriety of giving both CACI Nos. 430 and 435 in a case as discussed in *Petitpas v. Ford Motor Co.*, the committee has decided to retain *Petitpas* in the Directions for Use, and has added to the Sources and Authority a quotation from *Petitpas*.
		3M and all similarly situated defendants to asbestos actions are directly affected by the proposed changes to CACI Instructions Nos. 430 (substantial factor, generally) and 435 (substantial factor in asbestos cases), and the "Directions for Use." As held in *Rutherford*, both instructions can and should be given together. The omission of CACI No. 430 and the other proposed changes will result in a misleading causation standard that will unfairly penalize defendants whose alleged participation in causing harm is a "remote or trivial factor." In *Rutherford v. Owens-Illinois, Inc.* (1997) 16	The committee disagrees with the commenter's analysis.

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		Cal.4th 953, the California Supreme Court discussed the causation standard that is applicable in asbestos-related cancer cases, the standard of proof that applies, and the propriety of then-existing BAJI jury instructions. In *Rutherford*, an individual filed a personal injury action against an asbestos manufacturer and others, alleging that he had contracted lung cancer as a result of his exposure to asbestos products. At issue were causes of action for products liability, negligent and intentional infliction of emotional distress, and loss of consortium. After the individual died of lung cancer, the complaint was amended to allege a wrongful death action. The Court recognized that California had definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1044, fn. 2, 1052, fn. 7.) Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. (Id. at pp. 1052-1053; Rest.2d Torts, § 431, subd. (a), p. 428; BAJI No. 3.76 (8th ed. 1994).) The Court held that a plaintiff may prove causation by showing that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. Critically, the Court held that: > In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the plaintiff or decedent's risk of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation (BAJI	

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		Nos. 3.76 & 3.77) remain correct in this context and should also be given. (*Rutherford, supra*, 16 Cal.4th at pp. 982-983, emphasis added.) This holding remains the governing law in California. Instructions that omit CACI No. 430 would be contrary to the direction of the California Supreme Court. Omitting CACI No. 430 for a defendant like 3M, sued as a respiratory equipment manufacturer, is even more problematic as discussed below. 3M's respirators never contained asbestos and, in fact, reduce exposure to asbestos. The policies presented to support the causation standard as to manufacturers of asbestos-containing products are absent as to 3M. In any other case in California, 3M would be entitled to instruct the jury using CACI No. 430. Thus, it would be extremely prejudicial for 3M to be unable to have that instruction presented in asbestos cases, contrary to the practice for more than 10 years. And there certainly has been no change in the law to justify such a dramatic change by the Judicial Council. Rutherford specifically stated that the "standard instructions on substantial factor and concurrent causation"—which were then embodied in BAJI Nos. 3.76 and 3.77— "remain correct in this context and should also be given." (*Rutherford, supra*, 16 Cal.4th at pp. 982-983.) To highlight this point, in the official CACI correlation table, BAJI 3.76 is specifically correlated with CACI 430. (https://www.courts.ca.gov/partners/documents/correlation_tbl.pdf). The California Supreme Court's specific instruction to "also" give BAJI 3.76 in *Rutherford* demonstrates, by correlation, that CACI 430 "should also be given" in civil asbestos cases. At a minimum, *Rutherford* confirms that proof of causation cannot be limited to a single causation standard, as would be the case if the revisions to CACI No. 435 were to take effect. The proposed changes to the "Directions for Use" are based erroneously on the First District appellate decision in *Lopez*. Those proposed instructions conflict with *Rutherford*, which would create instructional error in civil cases throughout California. "Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales*	

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		v. Superior Court (1962) 57 Cal.2d 450, 455.) *Rutherford* remains the rule of causation in asbestos related cases in California, not *Lopez*. The Judicial Council should follow *Rutherford* and its mandate to use CACI No. 430, particularly in cases where defendants such as 3M are sued. The Judicial Council has already recognized that traditional principles of legal causation are applicable to cases involving 3M respiratory protective equipment. There is no basis or justification to change the standard. Over the years, largely due to the more than 100 bankruptcies of manufacturers of asbestos-containing products, there has been a proliferation of asbestos lawsuits against defendants that never manufactured, supplied or sold asbestos. In the case of 3M, it is often sued—along with asbestos "product" defendants—in connection with its masks or respirators, which never contained asbestos. Liability is nonetheless asserted, even though 3M's involvement and function is safety-related, i.e., to reduce (not eliminate) exposure to an existing or potential contaminant."	
		The proposed amendment to CACI No. 435 introduces new terminology into the text of the instruction, making it a single standard. In so doing, CACI No. 435 would be applicable to a class of defendants who, like 3M, are either safety-product manufacturers, premises owners, or other "conduct" based defendants—not manufacturers of asbestos-containing products. The Judicial Council already agreed in 2007 that defendants such as 3M are not traditional asbestos-product defendants and that CACI No. 430 should be given to the jury in conjunction with CACI No. 435. There is no basis to change course. The proposed amendment to CACI No. 435 improperly adds "[property [or] operations]" to the text of the instruction. For example, the proposed change reads as follows: "[Name of plaintiff] may prove that exposure to asbestos from **[name of defendant]'s [product/property [or] [operations]]** was a substantial factor causing [his/her/nonbinary pronoun/ [name of decedent]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her/nonbinary pronoun] risk of developing cancer." (Emphasis added.) This proposed change lumps together all	The committee disagrees. The court in *Lopez v. The Hillshire Brands Co.* resolved the open issue previously discussed in the Directions for Use for CACI No. 430 (citing *Petitpas v. Ford Motor Co.*). The court in *Lopez* stated: "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim,

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		classes of defendants into a single instruction, making them subject to the same causation standard. This is erroneous, because *Rutherford* stated that additional causation instructions—such as CACI No. 430—are indeed appropriate and "should" be given in asbestos cases where a defendant is not an asbestos manufacturer/supplier. (*Rutherford, supra*, 16 Cal.4th at pp. 982-983, emphasis added.) This is critical, because such ancillary defendants, like 3M, often have a tenuous connection to the alleged injuries—i.e., a connection that is provably "remote" and "trivial." That is why CACI No. 430 must remain applicable, as it states that: "[a] substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. **It must be more than a remote or trivial factor**." (CACI No. 430.)	even though Hillshire is not a manufacturer or supplier of asbestos." *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679, 687.
		"[T]he newly proposed 'Directions for Use' appear to contradict *Rutherford*. For example, the proposed Directions state as follows: CACI No. 435 was developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant. **These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos.** The Judicial Council relies on *Lopez, supra*, 41 Cal.App.5th 679 (emphasis added), but *Lopez* is not controlling (or correct) on that point. *Rutherford* explicitly stated that CACI No. 430 "should be" given in an asbestos case, in order to ensure that particular defendants may negate causation as a result of the "remote" and "trivial" nature of their conduct. Moreover, the note improperly eliminates any countervailing reference to *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 299, which held and confirmed that giving both CACI No. 430 and 435 instructions in a civil asbestos trial did not cause prejudicial error. Because both decisions are from appellate courts of equal stature, it is misleading and inappropriate to reference one and not the other. And even if they conflict, *Rutherford* must control.	The committee disagrees and concludes that this instruction remains consistent with the law set out in *Rutherford*. The committee, however, has agreed to retain the citation to *Petitpas* in the Directions from Use, and has added a quotation from the case to the Sources and Authority.

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		The Judicial Council previously agreed in 2007 that makers of safety products, like 3M, and other defendants who did not manufacture, sell, or supply asbestos-containing products, are differently situated from those that did. For this class of defendants, the general standard of causation in CACI No. 430 must remain applicable. The proposed amendments to CACI Nos. 430 and 435 are legally inconsistent with *Rutherford*. The new language under CACI No. 435 relies only upon *Lopez* and subjects all defendants in an asbestos action to the same causation standard, regardless of how remote their conduct may be in relationship to the injury. 3M respectfully requests that the Judicial Council reject the proposed changes, particularly in relation to defendants like 3M who are sued over respirators that were designed to reduce exposure to asbestos and never contained asbestos. To remain consistent with *Rutherford*, claims asserted against manufacturers of nonasbestos-containing products must remain subject to CACI Nos. 430 and 435.	As explained above, the committee disagrees, and believes that the instructions remain consistent with *Rutherford* and accurately reflect California law.

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	Association of Defense Counsel of Northern California and Nevada (ADCNCN) By Yakov P. Wiegmann, Attorney, Riley Safer Holmes & Cancila LLP San Francisco	"The Association of Defense Counsel of Northern California and Nevada (ADCNCN) wishes to voice its opposition to the proposed additions and revisions to the Judicial Council of California Civil Jury Instructions (CACI) 430 and 435. The proposed changes will make these instructions inconsistent with the case law on which they are based. *See Brandelius v. San Francisco*, 47 Cal. 2d 729, 738-39 (1957) (rejecting BAJI jury instruction that was an 'attempted amplification' of the case law). Specifically, the proposed changes threaten to render the word 'substantial' in 'substantial factor' meaningless, and significantly prejudice defendants in asbestos litigation – particularly those defendants whose products (or activities) contribute only an infinitesimal share of a plaintiff's alleged asbestos exposure. Instead of changing CACI 430 and 435 to deviate further from the supporting case law, the ADCNCN urges the Judicial Council to harmonize these instructions with the case law by adding language that will guide jurors in interpreting the term "substantial." The ADCNCN is the only organization in Northern California and the state of Nevada devoted exclusively to representing the interests of attorneys engaged in the defense of civil litigation. Many of its members have decades of experience representing defendants in asbestos litigation. Their list of clients includes not only manufacturers, but also contractors, premises owners, retailers, and other businesses. As more and more 'traditional' defendants – manufacturers of asbestos-containing products – exit the litigation through bankruptcy, the focus of the plaintiffs' bar turns more and more toward peripheral players whose contribution to a plaintiff's cumulative dose of asbestos exposure is minimal. See, e.g., American Academy of Actuaries, Mass Torts Subcommittee, Overview of Asbestos Claims Issues and Trends, Washington, D.C., August 2007, https://www.actuary.org/sites/default/files/pdf/casualty/asbestos_aug07.pdf. For defendants such as these, the integrity of the substantial factor causation test is acutely important. Because California law imposes joint and several liability for economic damages on defendants who are found even 0.0001% liable for a plaintiff's injuries (See Cal. Civ. Code §§ 1431, 1431.2), the principles of comparative fault provide little succor."	The committee disagrees with the commenter's analysis. See responses to ADCNCN's substantive comments, below.
		"The case that gave rise to CACI 435 – *Rutherford v. Owens-Illinois, Inc.* – stated that '[u]ndue emphasis should not be placed on the term	The committee believes that this instruction

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		'substantial.' " 16 Cal. 4th 953, 969 (1997). But there can be no dispute that the Supreme Court did not intend to do away with that term, or bring about a result where any factor – no matter how small – constitutes a legal cause. Hence, the Court indicated that 'a force which plays only an "infinitesimal" or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor.' *Id.* The Court further noted that the 'substantial factor' determination requires '[t]aking into account the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, any other potential causes to which the disease could be attributed (e.g., other asbestos products, cigarette smoking), and perhaps other factors affecting the assessment of comparative risk . . .' *Id*. at 975. And yet, none of these key terms are appear in CACI 435. Because CACI 435 does not contain *Rutherford*'s important qualifications with respect to the meaning of 'substantial,' CACI 430 serves the crucial purpose of reminding the jury that a substantial factor 'must be more than remote or trivial.' By telling courts not to give this instruction in asbestos cases, the proposed changes would deprive juries of any guidance as to the meaning of 'substantial,' falsely suggesting that any factor can be substantial. This would exacerbate the prejudice to defendants in asbestos cases, who already do not enjoy the protection of traditional causation principles, since CACI 435 only requires proof that a product 'contributed to the risk of developing cancer' – not proof that it actually caused the cancer. Eliminating CACI 430 from asbestos cases would further put a thumb on the scale in favor of plaintiffs, and help push additional companies into bankruptcy despite their attenuated connection to alleged asbestos exposures. Any potential confusion caused by the presence of the word 'remote' in CACI 430 can easily be remedied by modifying the instruction to make it clear to jurors that the word does not connote a time limitation where the plaintiff's disease has a long latency period. For instance, a court might add the word 'spatially' before 'remote.' Courts have found that spatial – as opposed to temporal – remoteness defeats causation. *See Smith v. ACandS, Inc.*, 31 Cal. App. 4th 77, 87 (1994) *overruled in part on other grounds by Camargo v. Tjaarda Dairy*, 25 Cal. 4th 1235 (2001) (evidence of a defendant's asbestos-related work at the same jobsite as plaintiff found insufficient to prove causation, where the jobsite was "mammoth"). This	remains consistent with the law set out in *Rutherford*. To the extent the commenter impliedly advocates against adding *Lopez* to CACI No. 430 and CACI No. 435, the committee declines to remove the proposed additions. To the extent the commenter suggests revising CACI No. 435 to refine the definition of substantial, this comment is beyond the scope of the proposed revisions circulated for comment. The committee will consider the suggestion in a future release cycle.

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		concern does not require banning CACI 430 from asbestos cases altogether. Rather than further alienate CACI 435 from *Rutherford* by eliminating CACI 430 from asbestos cases, the ADCNCN invites the Judicial Council to consider revising CACI 435 to make it more consistent with the Supreme Court's teachings. The instruction should indicate, as the *Rutherford* opinion does, that a substantial factor cannot be infinitesimal or theoretical. It should also tell jurors to consider 'the length, frequency, proximity, and intensity of exposure, the peculiar properties of the individual product, and any other potential causes to which the disease could be attributed.' Finally, CACI 435 should be amended to state that the exposure must be 'a substantial factor contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to [his/her/nonbinary pronoun] risk of developing cancer.' This addition will more accurately reflect the language of *Rutherford*, which emphasized the word 'dose.' 16 Cal. 4th at 976-77. Moreover, this addition would help make it clear that where a given defendant's product or activity accounts for only a tiny share of a long cumulative exposure history, it does not qualify as a substantial factor (as opposed to a situation where the exposure to the defendant's product was brief, but was one of only a few total exposures). 'Aggregate dose' is the trade-off in exchange for which *Rutherford* freed plaintiffs from having to prove that any particular asbestos fiber caused disease. In *Rutherford*, the Supreme Court softened the requirements of causation in order to help asbestos plaintiffs overcome the challenges of proving 'the scientifically unknown details of carcinogenesis, or trac[ing] the unknowable path of a given asbestos fiber.' *See id.* at 976. But the Court did not intend to do away with the word 'substantial' altogether, which is what the proposed CACI changes will effectively do. Causation standards do not need to be weakened any more than they already have been. The ADCNCN asks the Judicial Council to reject the proposed changes, and instead to harmonize CACI 435 with the authority on which it is based."	
	Association of Southern California Defense	The proposed edits to the Use Notes for CACI 430 and 435, which delete the cite to *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298-299, and include statements that CACI 430 should not be given in asbestos cases.	The court in *Lopez* resolved the open issue previously discussed in the Directions for Use for CACI No. 430

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	Counsel (ASCDC) By David K. Schultz, Attorney, Polsinelli LLP Los Angeles		(citing *Petitpas v. Ford Motor Co.*). The court in *Lopez* stated: "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though Hillshire is not a manufacturer or supplier of asbestos." *Lopez, supra,* 41 Cal.App.5th at p. 687. To the extent the commenter advocates for the inclusion of *Petitpas* in the Directions for Use and the Sources and Authority, the committee has done so.
		The proposed edits to the Use Note for CACI 430, in which a bullet point and paragraph is included that states the references to "remote or trivial" causation factors are "misleading in asbestos cases."	The new bullet point in the Sources and Authority is a direct quote from *Lopez*.
		The words "remote" and "trivial" in CACI 430 are not misleading. CACI 430 properly governs the causation rules for the liability claims involving a defendant's alleged wrongful conduct. Thus, there is nothing misleading about the references to remote or trivial causes in CACI 430, which is separate from the medical causation issue that is the subject of CACI 435.	The committee disagrees with the commenter's analysis. The committee believes that CACI No. 430 remains consistent

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		Even if the instructions are considered together, the references to remote or trivial causes not being a substantial factor is consistent with *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953. The California Supreme Court emphasized in *Rutherford* that asbestos exposures do not meet the "substantial factor" test for proving medical causation if they are "***negligible or theoretical.***" (Id. at 978.) To determine whether an alleged exposure was a "substantial factor in bringing about the injury" (*Id.* at 982), a jury must determine "whether the risk of cancer created by a plaintiff's exposure to a particular asbestos-containing product was ***significant enough*** to be considered a legal cause of the disease." (*Id.* at 975; emphasis added.) In *Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79, after citing to *Rutherford* and the rules above, the high court also stated: "Thus, a force which plays only ***an 'infinitesimal' or 'theoretical' part*** in bringing about injury, damage, or loss is ***not a substantial factor***." (Emphasis added.) Following the substantial factor requirement in *Rutherford*, appellate courts properly hold a plaintiff "cannot prevail against a defendant without evidence that the plaintiff was exposed to asbestos-containing materials manufactured or furnished by the defendant ***with enough frequency and regularity*** as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries." (*Weber v. John Crane, Inc.* (2006) 143 Cal.App.4th 1433, 1438, citing *Rutherford*, 16 Cal.4th at 975–976; See also *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th. 1078, 1084, 1093; *Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 251.) Consistent with the rules above, experts testify that "trivial" asbestos exposures are not significant enough to be a substantial factor. (See *Petitpas*, 13 Cal.App.5th at 283 ["Dr. Dyson testified that 'it takes a lot of chrysotile exposure to present a risk of asbestos-related mesothelioma,' and Marline's exposure to asbestos at the Enco station was ***'trivial, inconsequential,'*** because it was 'well less than the lowest exposure dose at which we've observed risk in the most sensitive person in the population for exposure to chrysotile and risk of mesothelioma.'"].) In light of the requirement that asbestos exposures must be significant enough to be considered substantial (*Rutherford*, 16 Cal.4th at 975, 982), and cannot be negligible or theoretical (*Id.* at 982), there is	with the law set out in *Rutherford*.

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		nothing misleading when CACI 430 also instructs that conduct cannot be considered a substantial factor in causing harm if it was trivial or remote."	
	Luis A. Barba, Attorney, CMBG3 Law Irvine	"We write this letter to express our agreement with the comments submitted by the Association of Southern California Defense Counsel (ASCDC) regarding the proposed modifications to CACI 430 and 435. CACI 430 is a proper jury instruction to be given in conjunction with CACI 435 so that the jury may be fully and properly instructed on the definition of the term 'substantial factor', which is commonly main crux of the issues to be decided in an asbestos trial."	See the committee's responses to the comments of ASCDC, above.
		"To modify the instruction and only provide the jury guidance that the term 'substantial factor' means "a factor that a reasonable person would consider to have contributed to the harm" does not provide any real guidance. As most people consider themselves to be 'reasonable', it's a circular instruction that tells the juror a "substantial factor" is whatever you reasonably think contributed to the harm. It makes the definition of 'substantial factor' completely subjective. Thus, we believe it necessary to include language that provides further definition of what 'substantial factor' objectively means. The inclusion of specific language stating that '[i]t must be more than a remote or trivial factor' assists the trier of fact in, at a minimum, setting a baseline for the juror to ultimately make a determination as to what exposures may be deemed a 'substantial factor'. We therefore respectfully request that the Judicial Council not make the proposed modifications to CACI 430 and 435."	The committee disagrees with the commenter's analysis. CACI No. 435 instructs that exposure to asbestos may be established as a substantial factor causing illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to their risk of developing cancer.
	Exxon Mobil Corporation and PBF Energy Inc., By Justin R. Sarno, Attorney,	The California Supreme Court's decision in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 defines the causation standard in asbestos cases. … In short, the standard instruction on substantial factor causation remained correct, because a defendant's conduct may nonetheless be 'remote' and 'trivial,' and thus, insufficient to establish causation. This holding remains governing law in California. Instructions that omit CACI No. 430 would be contrary to the direction of the California Supreme Court and should be rejected.	The committee disagrees with the commenter's analysis.

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	Dentons US LLP Los Angeles	"[T]he California Supreme Court's conclusion to 'also' give BAJI 3.76 in *Rutherford* demonstrates, by correlation, that CACI 430 'should also be given' with respect to premises defendants in civil asbestos cases. *Rutherford* confirms that proof of causation cannot be limited to a single causation standard, as would be the case if the erroneous revisions to CACI No. 435 were to take effect. Further, under *Privette v. Superior Court* (1993) 5 Cal.4th 689 and its progeny, there is a presumption of non-liability in favor a premises owner, unless the plaintiff establishes that the defendant's conduct caused the plaintiff's harm, for which CACI 430 defines how to assess causation. As a result, it would create instructional chaos for asbestos cases involving premises defendants, if the proposed changes were to take effect. For this reason, the proposed revisions raise serious concerns regarding stare decisis. The Council is proposing a single medical causation standard for numerous classes of defendants. Further, the new language for CACI No. 435 includes language that is not found in Rutherford, and instead borrows heavily from the First District appellate decision in *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679 ("*Lopez*"). 'Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California.' (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) *Rutherford* remains the rule of causation in asbestos related cases in California, not *Lopez*. To make matters more confusing, the proposed changes to the 'Directions for Use' for CACI No. 435 eliminate any countervailing reference to *Petitpas*, in which it was confirmed that giving both CACI No. 430 and 435 instructions in a civil asbestos trial did not cause prejudicial error. Because *Petitpas* and *Lopez* are from appellate courts of equal stature, it is misleading and inappropriate to reference one and not the other. The proposed amendments to CACI No. 435 present a distorted, one-dimensional portrait of existing law. *Rutherford* must control, and the Judicial Council should not backtrack from the position that it took back in 2007. The proposed changes should be rejected."	The committee disagrees with the commenter's analysis. The committee does not read *Lopez* to be inconsistent with *Rutherford*. The committee, however, has agreed to retain the citation to *Petitpas* in the Directions from Use, and has added a quotation from the case to the Sources and Authority.

Instruction(s)	Commenter	Comment	Committee Response
		The proposed changes to CACI No. 435 deviate inexplicably from the California Supreme Court's holding in *Rutherford*. The proposed amendment to CACI No. 435 introduces new terminology into the text of the instruction, making it applicable not simply to product manufacturers, but also a class of defendants who are either property owners or engaged in unspecified "operations." The proposed amendment states as follows: "[Name of plaintiff] may prove that exposure to asbestos from **[name of defendant]'s [product/property [or] [operations]]** was a substantial factor causing [his/her/nonbinary pronoun/[name of decedent]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her/nonbinary pronoun] risk of developing cancer." (Emphasis added.) *Rutherford* does not support this new, overbroad terminology. The California Supreme Court did not specify that non-product defendants—i.e., such as property owners, or other defendants who are engaged in unspecified "operations"—are to be subject to the same causation standard. The newly interlineated terms find no textual support in Rutherford, which related explicitly to products-based defendants and for whom a specific rule was fashioned. [Footnote omitted.] This same issue infects the proposed "direction for use." According to the newly proposed "direction for use": CACI No. 435 was developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant. **These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos.** (*Lopez, supra*, 41 Cal.App.5th at p. 687, internal citation omitted.) (Emphasis added.) *Rutherford* does not support this proposition. To the contrary, Rutherford states that additional causation instructions—such as CACI No. 430—are appropriate and "should" be given in circumstances where a defendant is not a manufacturer or supplier of an asbestos containing product. (*Rutherford, supra*, 16 Cal.4th at pp. 982-983.)	The committee disagrees with the commenter's analysis. The committee does not read *Lopez* to be inconsistent with *Rutherford*. The court in *Lopez* resolved the open issue previously discussed in the Directions for Use for CACI No. 430 (citing *Petitpas v. Ford Motor Co.*). The court in *Lopez* stated: "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though Hillshire is not a manufacturer or supplier of asbestos." *Lopez, supra,* 41 Cal.App.5th at p. 687. To the extent the commenter advocates for the inclusion of *Petitpas* in the Directions for Use and the Sources and Authority, the committee has done so.

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		The Second District's decision in *Petitpas* remains good law, and it was a decision that was consistent with *Rutherford*, whereas *Lopez* is not. Thus, the new language is flawed. Lastly, to eliminate reference to *Petitpas* altogether in the proposed additions and "Directions for Use" would only serve to perpetuate a flawed, one-sided standard.	
		"ExxonMobil and PBF respectfully contend that the proposed amendments to CACI Nos. 430 and 435 are legally inconsistent with binding California Supreme Court precedent. Because the proposed changes will drastically affect the standard of proof for causation in civil asbestos cases, the consequences are dangerous. The proposed changes are based exclusively on *Lopez*, a decision from the First District Court of Appeal. The "Directions for Use" fail to recognize the existence of *Petitpas*, contrary precedent from the Second District Court of Appeal. To the extent any conflict exists, it is best resolved by the California Supreme Court or the California Legislature. To remain consistent with *Rutherford* and established principles of stare decisis, claims asserted against premises defendants and manufacturers of non-asbestos-containing products must remain subject to CACI Nos. 430 and 431."	See responses to the comments, above.
	Metalclad Insulation LLC and J.T. Thorpe & Son, Inc. By Justin R. Sarno, Attorney, Dentons US LLP San Francisco	"[We] disagree with the proposed revisions by the Judicial Council to CACI Instructions Nos. 430 (substantial factor, generally) and 435 (substantial factor in asbestos cases), including proposed changes to the 'Directions for Use.' The proposed changes present a misleading portrait of the standards of proof for causation that affect a class of contractor defendants. CACI No. 430 must remain applicable for those defendants for whom a substantial factor in causing harm is 'more than a remote or trivial factor.' A. The California Supreme Court's decision in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 defines the causation standard in asbestos cases. In *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, the California Supreme Court discussed the causation standard that is applicable in asbestos-related cancer cases, the standard of proof that applies, and the propriety of then-existing BAJI jury instructions. An individual filed a personal injury action against an asbestos manufacturer and others, alleging that he had contracted lung cancer as a result of his exposure to asbestos	The committee disagrees with the commenter's analysis. To the extent that arguments exist about the propriety of giving both CACI Nos. 430 and 435 in a case, as discussed in *Petitpas v. Ford Motor Co.*, the committee has decided to retain *Petitpas* in the Directions for Use, and has added to the Sources and Authority a quotation from it.

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		products while on the job, and alleging causes of action for products liability, negligent and intentional infliction of emotional distress, and loss of consortium. After the individual died of lung cancer, the complaint was amended to allege a wrongful death action brought by his wife and their daughter. The Court stated that California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1044, fn. 2, 1052, fn. 7.) Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. (Id. at pp. 1052-1053; Rest.2d Torts, § 431, subd. (a), p. 428; BAJI No. 3.76 (8th ed. 1994).) The Court held that a plaintiff may prove causation by showing that exposure to defendant's defective asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer. Critically, the Court held that: In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of his injury, i.e., a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the plaintiff or decedent's risk of developing cancer. The jury should be so instructed. **The standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 & 3.77) remain correct in this context and <u>should also be given.</u>** (*Rutherford, supra*, 16 Cal.4th at pp. 982-983, emphasis added.) This holding remains governing law in California. Instructions that omit CACI No. 430 would be contrary to the direction of the California Supreme Court and should be rejected. B. *Rutherford* explicitly stated that the BAJI-equivalent to CACI 430 'should also be given' in asbestos cases. *Rutherford* specifically stated that	

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		the "standard instructions on substantial factor and concurrent causation"—which were then embodied in BAJI Nos. 3.76 and 3.77—"remain correct in this context and should also be given." (*Rutherford, supra*, 16 Cal.4th at pp. 982-983.) To highlight this point, in the official CACI correlation table, BAJI 3.76 is specifically correlated with CACI 430. (https://www.courts.ca.gov/partners/documents/correlation_tbl.pdf). Therefore, the California Supreme Court's specific instruction to 'also' give BAJI 3.76 in *Rutherford* signifies, by correlation, that CACI 430 'should also be given' in civil asbestos cases. At a minimum, *Rutherford* confirms that proof of causation cannot be limited to a single causation standard, as would be the case if the overbroad revisions to CACI No. 435 were to take effect. Additionally, the proposed 'Directions for Use' are based erroneously on a First District appellate decision in *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679. As a result, the proposed instruction deviates from principles of stare decisis, which would lead to instructional error in civil cases throughout California. 'Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of stare decisis makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California.' (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.) Rutherford remains the rule of causation in asbestos related cases in California, not *Lopez*. The Judicial Council is requested to follow the rule set forth in *Rutherford* and allow for the use of CACI No. 430 in appropriate cases where a defendant is not a manufacturer of products, and where the defendant's involvement is 'remote' or 'trivial.' Traditional principles of legal causation remain applicable. C. The proposed changes to CACI No. 435 deviate unjustifiably from the California Supreme Court's decision in *Rutherford*. The proposed changes are inconsistent with Rutherford. The California Supreme Court did not specify that non-product defendants—i.e., such as contractors or other defendants who are engaged in unspecified "operations"—are to be subject to the same causation standard. This same issue infects the proposed 'direction for use.' According to the newly proposed "direction for use" for CACI No. 435: CACI No. 435 was	

Instruction(s)	Commenter	Comment	Committee Response
		developed to address the special considerations that apply when the injury was allegedly caused by asbestos exposure. These include the long latency period, the occupational settings that often expose workers to multiple forms and brands of asbestos, and, in a case of exposure to asbestos from multiple sources, the difficulty of proving that a plaintiff's or decedent's illness was caused by particular asbestos fibers traceable to the defendant. **These considerations are similar whether the defendant was a manufacturer/supplier or otherwise created the exposure to asbestos.** (*Lopez, supra*, 41 Cal.App.5th at p. 687, internal citation omitted.) (Emphasis added.) This is incorrect. Rutherford states that additional causation instructions—such as CACI No. 430—are appropriate and "should" be given in circumstances where a defendant is not a manufacturer/supplier. (*Rutherford, supra*, 16 Cal.4th at pp. 982-983, emphasis added.) To make matters worse, the proposed changes to CACI No. 435's 'Directions for Use' cite only to *Lopez* from the First District Court of Appeal, Division 5. In so doing, the proposed use note eliminates any countervailing reference to *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, a decision from the Second District Court of Appeal, Division 4, in which it was confirmed that giving both CACI No. 430 and 435 instructions in a civil asbestos trial did not cause prejudicial error. In favoring *Lopez*, the proposed amendments to CACI No. 435 present a misleading, one-dimensional portrait of existing law. *Rutherford* must control, and the proposed changes must be rejected. III. CONCLUSION The Commenting Parties respectfully contend that the proposed amendments to CACI Nos. 430 and 435 are legally inconsistent with California Supreme Court precedent. Because the proposed changes will drastically affect the standard of proof for causation in civil asbestos cases, the consequences are dangerous. The proposed changes are based exclusively on *Lopez*, a decision from the First District Court of Appeal. Moreover, the 'Directions for Use' fail to recognize the existence of *Petitpas*, contrary precedent from the Second District Court of Appeal. To the extent any conflict exists, it is best resolved by the California Supreme Court or the California Legislature. To remain consistent with *Rutherford* and established principles of stare decisis, claims asserted against	

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		manufacturers of non-asbestos-containing products must remain subject to CACI Nos. 430 and 431."	
	Keith Reyen, Attorney, Oium Reyen & Pryor San Francisco	I am a trial practitioner who has been involved in litigating asbestos claims in California-North and South-for over 20 years. During that time, I have been involved in trials of cases in Alameda, Los Angeles, Placer and San Francisco County. The clients I represent and whom I have represented have been sued in cases that most often can be best categorized as low dose chrysotile exposure matters. The main question in every single one of those cases is whether or not the plaintiff was exposed to a sufficient quantity of chrysotile to have caused the disease or condition at issue. A secondary question is whether or not the plaintiff was exposed to what is universally acknowledged to be the more potent, carcinogenic amphibole forms of asbestos.	No response required.
		Neither the current version of CACI 435, nor the proposed revision thereof accurately or adequately state the law, as set forth in the controlling case of *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953. CACI 435 is an incomplete and inaccurate paraphrase of *Rutherford,* and can be misused by argument of counsel that plaintiffs' burden on causation is met if they show that the decedent was exposed to asbestos fibers released from a product distributed by defendants, no matter how small the exposure and no matter the fiber type. As set forth in *Rutherford,* the test for substantial factor in an asbestos cancer case involves a multifactorial analysis of the nature of a given plaintiff's exposure. Specifically, the Court in *Rutherford* observed: Finally, at a level of abstraction somewhere between the historical question of exposure and the unknown biology of carcinogenesis, the question arises whether the risk of cancer created by a plaintiff's exposure to a particular asbestos containing product was significant enough to be considered a legal cause of the disease. Taking into account the ***length, frequency, proximity and intensity of exposure***, the particular properties of the individual product, any other potential causes to which the disease could be attributed (e.g. other asbestos products, cigarette smoking) and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a **"substantial factor" in causing the cancer?**	The committee disagrees with the commentator's analysis. The committee believes that this instruction remains consistent with the law set out in *Rutherford*.

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		Rutherford, supra, 16 Cal.4th 953, 976. As stated in *Conservatorship of Gregor*y (2000) 80 Cal. App. 4th 514, 522: Although a party is entitled to instructions on his theory of the case, if reasonably supported by the pleadings and the evidence, instructions must be properly selected and framed. The trial court is not required to give instructions which are not correct statements of the law or are incomplete or misleading." (*Levy-Zentner Co. v. Southern Pac. Transportation Co*. (1977) 74 Cal. App. 3d 762, 782.) A more accurate statement on the law as set forth in *Rutherford* regarding causation in and asbestos cancer case was given in an Alameda County Case I tried in 2005, entitled *Rosen v. Asbestos Defendants*. After lengthy briefing and debate the following instruction was given: In an asbestos-related cancer, the Plaintiff need not prove that fibers from Defendant's product were the ones or among the ones that actually began the process of malignant cellular growth. Instead, the Plaintiffs may meet the burden of proving that exposure to the product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the decedent's risk of developing cancer. [P] In this regard, many factors are relevant in assessing the medical probability that an exposure contributed to Plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to the decedent are certainly relevant, although these considerations should not be determinative in every case. [P] Additional factors may also be significant in individual cases such as the type of asbestos product to which the decedent was exposed, the type of injuries suffered by him and other possible sources of the injury." An appeal ensued from a defense verdict in the *Rosen* matter. One of the issues on appeal was the propriety of the foregoing instruction. In rejecting the plaintiffs argument that the instruction was error because it added language to the standard instruction, which at the time was BAJI 3.78. The trial court noted that the added language was taken from	

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		key asbestos causation cases--denied their motion for new trial. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982; *Lineaweaver v. Plant Insulation Co., supra,* 31 Cal.App.4th at pp. 1416-1417.) *Rosen v. Regents of the Univ. of Cal*., (2007) Cal. App. Unpub. LEXIS 9172, *27.) In upholding the giving of the instruction on causation, the First District Court of Appeal noted in its unpublished decision: We also find no merit in the Rosens' challenge to the language advising the jury that exposure must be a "substantial factor in causing the illness." They assert that this language placed undue influence on the term "substantial" against the admonitions of the California Supreme Court. (See *Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th at p. 969.) They contend that the instruction should have required the asbestos exposure to be a "substantial factor contributing to the risk" instead, as they reason that this language would have taken into account the cumulative nature of asbestos-related diseases. (See *id.* at p. 979.) **The challenged language was taken from an appellate decision which has been endorsed by our Supreme Court.** (See *id.* at pp. 976-977 fn. 11; *Lineaweaver v. Plant Insulation Co., supra,* 31 Cal.App.4th at pp. 1416-1417.) **Thus, it reflects a correct statement of the law.** (*Id.* at 29-30; emphasis added.) CACI 435 as presently worded is both “incomplete and misleading.” The universe of asbestos cases has moved on from World War II era shipyard and other industrial exposures where workers were massively exposed to amphibole forms of asbestos which enter the body and stay for life. The cases I deal with invariably involve people with exposure to small amounts of chrysotile, which has a half-life in the body measured in months. The exposures often occurred over brief periods of time and/or involve alleged bystander or take-home exposures. The absence of language instructing a jury to consider the *length, frequency, proximity and intensity of exposure* results in needless and repetitive briefing on what *Rutherford* really said and, as in *Rosen*, leads to needless appeals. The failure to provide an instruction that fully states the factors a jury must consider on causation is	

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		highly prejudicial to defendants. Rather than perpetuate an inaccurate and incomplete statement of the law, the Judicial Council is encouraged to take this opportunity to bring CACI 435 into full alignment with the law as stated in *Rutherford*.	
	James Sinunu, Attorney, Sinunu Bruni LLP San Francisco	"Much of the impetus for the proposed changes to 430 and 435 stems from a jury trial and subsequent appeal in 2019 in the *Lopez v. Hillshire Brands* lawsuit. That was an asbestos lawsuit against defendant contractor and property owner. As part of the jury instruction process, the trial court amended CACI 435 to include contractors and property owners as well as product manufacturers usually named in the text. The problem is that the court then decided that in asbestos cases, CACI 430 need not be given. That presents a substantial problem for defendants. For years, ever since the decision in *Rutherford v. Owens-Illinois* in 1997, parties have struggled with the proper way to describe causation. It has been agreed that a tortfeasor must contribute substantially to the risk of disease to be held liable. To defendants, even the language of this instruction concerns us. In *Lopez*, at 688, the court stated: > additionally, giving CACI No. 430, which states that a factor is not substantial when it is "remote or trivial," could be misleading in an asbestos case, where the long latency period necessitates exposures will have been several years earlier. Jury instructions therefore should not suggest that a long latency period, in which the exposure was temporally "remote," precludes an otherwise sufficient asbestos claim." 'Remote' often connotes a time limitation. Nothing in Rutherford suggests such a limitation;	The committee disagrees with the commenter's analysis. The court in *Lopez* resolved the open issue previously discussed in the Directions for Use for CACI No. 430 (citing *Petitpas v. Ford Motor Co.*). The court in *Lopez* stated: "Squarely faced with the issue of CACI No. 435's correctness for a non-manufacturer/non-supplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though Hillshire is not a manufacturer or supplier of asbestos."

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		indeed, asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases." (CACI No. 430, Directions for Use (2019 ed.) p. 284.) It was not error for the court to give CACI No. 435 alone instead of CACI No. 430. There are other ways to deal with the possible ambiguity of remoteness than to remove it, along with the removal of triviality, from consideration. Spatially remote presence of asbestos at a work site should remove it from consideration. Even the temporally remote presence of asbestos at a jobsite should remove it from consideration. The *Lopez* court simply addressed the possible problem posed by the latency of many asbestos diseases. Details of causation in asbestos cases was addressed in three cases during the mid-1990's – *Lineaweaver v. Plant Insulation Co.*, 13 Cal.App.4th 1409 (1995); *Dumin v. Owens-Corning*, 28 Cal.App.4th 650 (1994); and *Smith v. ACandS, Inc.*, 31 Cal.App.4th 77 (1994). Those three cases provided scrupulous job site exposure analysis for asbestos plaintiffs. *Dumin* provides some guidance on remoteness: The uncertain dating of OCF Kaylo's presence at the Norfolk Naval Shipyard grows in significance when combined with other infirmities in Dumin's proof. Even if OCF Kaylo was at the Norfolk Naval Shipyard in 1953 and 1954, it was only one of many asbestos insulation products used at the shipyard. Dumin has pointed to no evidence that OCF Kaylo was a dominant product among the many used at the shipyard. While it is "probable" that the Pocono's supplies were obtained from the shipyard, there is no evidence that OCF Kaylo was among the supplies. Durham, the shipyard mechanic, said OCF Kaylo was used at the shipyard and listed the Pocono as one of hundreds of ships he worked upon, ….Dumin did say the Pocono was in the Norfolk Naval Shipyard for repairs during a tender period of one to three months. However, Dumin was aboard the Pocono from 1951 or 1952 until 1954, and Dumin did not specify whether the Norfolk tender period was during 1953 or 1954 when OCF was distributing Kaylo. In short, a conclusion that Dumin was exposed to OCF Kaylo while aboard the Pocono in 1953 and 1954 would require a stream of conjecture and surmise. Dumin misdirects his energy in denouncing the trial court's ruling as a rejection of circumstantial evidence and an unwarranted demand for	*Lopez, supra,* 41 Cal.App.5th at p. 687. To the extent that arguments exist about the propriety of giving both CACI Nos. 430 and 435 in a case, as discussed in *Petitpas v. Ford Motor Co.*, the committee has decided to retain *Petitpas* in the Directions for Use, and has added to the Sources and Authority a quotation from it.

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		direct evidence of causation. The trial court simply required — as we do — that the circumstantial evidence be of sufficient weight to support a reasonable inference of causation. The evidence fails to meet that requirement (emphasis added). If these jury instructions are allowed to be modified, then "a stream of conjecture and surmise" would be enough to establish causation. The *Smith* case similarly describes exposure considered insufficient: ACandS is an industrial insulation contractor. ACandS supplies and installs insulation materials according to customer specifications. Evidence of Smith's exposure to ACandS supplied insulation materials was circumstantial, based largely on evidence that Smith and ACandS were employed at the same job sites. The evidence focused on the Richmond refinery of Standard Oil (today's Chevron). Smith testified that he worked at the Standard Oil refinery, "probably close to ten times" from about 1947 through the late 1960's. Smith could not remember the names of any insulation companies on the jobs he worked at the Standard Oil refinery. A comparison of Smith's union dispatch slips and ACandS contract logs shows that, at most, ACandS installed insulation somewhere within the Standard Oil Refinery on two occasions when Smith was working at the refinery in 1959 and 1964. The maximum time ACandS and Smith both could be at the refinery was about four months. The refinery is "a mammoth," covering many acres and containing miles of piping. In testifying about refinery work in general, Smith explained that he worked near insulation contractors, including "Armstrong," and the air in refineries was sometimes "pretty bad," with "stuff flying all over the air." Smith would not allow evidence of a defendant's asbestos at a jobsite to be sufficient to prove causation to a plaintiff. It required more than exposure spatially remote. Removal of that term allows causation on historically insufficient evidence. That was not the intent of the court in *Lopez*. Notably, *Lopez* did not forbid giving CACI 430 in asbestos cases alongside CACI 435; it merely ruled that the trial court's failure to give the instruction was not reversible error. Nor did *Lopez* overrule or abrogate the Second District's decision in *Petitpas v. Ford Motor Co.*, 13 Cal.App.5th 261 (2017), which approved the giving of CACI 430 in some asbestos	

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		cases. The Judicial Council should reject the proposed changes to ensure that instructions are consistent with the case law."	
	Don Willenburg, Attorney, Gordon Rees Scully Mansukhani, LLP Oakland	"The proposed changes to CACI 430 and 435 over-read a single Court of Appeal decision, go astray from the governing Supreme Court decision, and in the main unfairly misstate the law. The Judicial Council should reject most if not all.	See responses to comments, below.
		The proposed changes are purportedly based on *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679. The proposed change to the text of CACI 435, to add 'property' and 'operations' to 'product' as a possible source of asbestos exposure, perhaps fairly reflects the holding and facts in *Lopez*. But none of the other changes are at all justified. The changes to CACI 435's use notes would erase references to Court of Appeal authority contrary to *Lopez* (e.g. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261), even though *Lopez* did not (and could not) overrule those decisions. The changes to CACI 430's use notes repeat this mistake. Worse, they eliminate the discussion of the governing decision, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, meaning that courts and juries will lose the guidance it provides. *Rutherford* expressly considered that not all exposure to asbestos is a 'substantial factor' in causing asbestos-related disease: 'a force [that] plays only an infinitesimal or theoretical part ... is not a substantial factor.' Some exposures are infinitesimal, particularly when compared to someone's aggregate lifetime dose (more on that below).	The committee concluded that the deletion of the prior discussion is appropriate. The Directions for Use had noted, "[w]hether the same causation standards from *Rutherford* would apply to defendants who are alleged to have created exposure to asbestos but are not manufacturers or suppliers of asbestos-containing products is not settled." As noted above, the court in *Lopez*

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			directly addressed that unsettled issue. The revisions proposed by the committee did not otherwise eliminate any discussion of the governing decision in *Rutherford v. Owens-Illinois, Inc.*
		Lopez ruled that failure to give CACI 435 was not reversible error. It did not hold that it is error to give CACI 430 in any asbestos case: that question is far beyond the procedural posture of that case.	To the extent arguments exist about the propriety of giving both CACI Nos. 430 and 435 in a case, as discussed in *Petitpas v. Ford Motor Co.*, the committee has decided to retain *Petitpas* in the Directions for Use, and has added to the Sources and Authority a quotation from it.
		Further, the *Lopez* quotation proposed to be added as a use note about use of the word "remote" is linguistic speculation, not the law. There is no evidence that juries do not understand that asbestos diseases have a long latency period: Every single asbestos case involves a long latency period, and plaintiffs prevail in many. There is no evidence juries have been misled by the use of the word remote in asbestos cases, or in any other cases. (Its primary connotation is geographical, for which it is appropriate to asbestos cases, where 'proximity' is critical to risk.)	The committee declines to remove from the Sources and Authority this direct quotation from *Lopez*.

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		The Council should, instead of the proposed changes, modify CACI 435 to faithfully reflect *Rutherford*, which addresses 'a substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested' (emphasis in original). The existing instruction refers to a substantial factor contributing to the risk of cancer, without grounding that medical opinion (as did *Rutherford*) in comparative *dose*. The difference is particularly significant for defendants with minimal or low-dose exposure in cases where there is abundant alternative exposure (e.g., one home remodel job but a lifetime career working near asbestos insulation).	This comment is beyond the scope of the revisions circulated for comment. The committee will consider the suggestion in a future release cycle.
		I support the comments of the Association of Defense Counsel of Northern California and Nevada, of which I am a board member, and the Association of Southern California Defense Counsel. I write separately as an attorney with two decades of experience representing defendants in asbestos and other personal injury and wrongful death claims.	See responses to the comments of ADCNCN, above.
435. *Causation for Asbestos-Related Cancer Claims*	Association of Southern California Defense Counsel (ASCDC) By David K. Schultz, Attorney, Polsinelli LLP Los Angeles	The proposed edits to CACI 435, which include reference to "property" or "operations" should instead be changed to "activities."	As reflected in the committee's responses below, the committee has added "activities" to the bracketed options, but the committee declines to remove either "property" or "operations."
		The Directions for Use under CACI 435 start with the following sentence and proposed edits: "This instruction is to be given in a case in which the plaintiff's claim is that the plaintiff contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product or asbestos-related activities." Respectfully, the proposed edits to the second paragraph of CACI 435 should be changed so that they likewise state: "[Name of plaintiff] may prove that exposure to asbestos from [name of defendant]'s product/or activities] was a substantial factor…."	As suggested by the commenter, the committee has added "activities" in the bracketed options to be more inclusive of other possible types of asbestos exposure.

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		The proposed edits should not include reference to "property" or "operations" because that will cause confusion and conflict with other instructions that govern tort claims against premises liability defendants. Including a reference to "activities" is also more neutral, which should be the goal of any jury instruction or proposed edit to such. As discussed above, premises liability claims against defendants for asbestos exposures at a parcel of "property" or "operations" on property are governed by instructions that include CACI 1009A, 1009B and 1009D. (See e.g. *Kinsman*, 37 Cal.4th at 665 [Premises liability asbestos exposure claim under the Privette doctrine for alleged unsafe concealed condition]; *Kesner*, 1 Cal.5th at 1140 [Take-home asbestos exposure claims are "subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability."].) For such claims, there is a "general rule of nonliability." (*Alvarez v. Seaside Transportation Services* (2017) 13 Cal.App.5th 635, 641.) The reason is because a property owner or hirer of a plaintiff's independent contractor employer "delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees." (*Id.* at 642, citing *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600.) They are "entitled to assume that the independent contractor will perform its responsibilities in a safe manner, taking proper care and precautions to [en]sure the safety of its employees." (*Laico v. Chevron U.S.A.* (2004) 123 Cal.App.4th 649, 660-661.) As further explained in *SeaBright*: "That implicit delegation includes any tort law duty the hirer owes to the contractor's employees to comply with applicable statutory or regulatory safety requirements." (52 Cal.4th at 594.) The rules above illustrate the need to enforce the requirement in a premises liability claim and any other tort claim that a plaintiff must prove the defendant's alleged wrongful conduct was a substantial factor in causing plaintiff's harm under the test set forth in CACI 430. It is particularly important to focus on causation from a defendant's conduct in a premises liability claim governed by the Privette doctrine because the property owner is not the one responsible for ensuring that a workplace is safe. Rather, it is the employer of the independent contractor who employs the plaintiff. The location of an alleged asbestos exposure and the fact it may	The committee has decided not to delete "property" or "operations" from CACI No. 435. The defendant in *Lopez v. The Hillshire Brands Company* advanced an argument similar to this comment, contending that "CACI No. 430 remains the appropriate instruction when the defendant is an employer/premises owner rather than a manufacturer or supplier." (*Lopez, supra*, 41 Cal.App.5th at p. 686.) The court rejected that argument, holding that CACI 435 should be given. See response above.

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		have occurred on a defendant landowner's property is not legally determinative. Whether considered in the context of asbestos cases or other tort cases, there is no liability unless the plaintiff establishes the defendant's alleged caused the plaintiff's harm under the limited Privette exceptions, for which CACI 430 properly defines how to assess and decide that causation requirement. The point above is illustrated by *Kinsman*, 37 Cal.4th at 659, which involved a premises liability claim for alleged asbestos exposures. The California Supreme Court confirmed that, "[b]ecause the landowner/hirer delegates the responsibility of employee safety to the contractor, the teaching of the Privette line of cases is that a hirer has no duty to act to protect the employee when the contractor fails in that task and therefore no liability." (*Id.* at 674.) Focusing on the defendant's conduct—not that alleged exposures occurred on defendant's property—*Kinsman* held the plaintiff must prove the defendant failed to warn the contractor of a concealed hazardous condition that the contractor did not know about or could not reasonably ascertain. (*Id.* at 674-674.) As discussed in the first section of this letter brief, for any such failure to warn claim, CACI 430 properly defines how a jury must decide if a defendant's conducted was a substantial factor in causing plaintiff's harm. Thus, the proper focus is on the conduct or activities engaged in by the defendant—not the location of where an alleged asbestos exposure occurs. Respectfully, the proposed edits to CACI 435 should therefore not refer to the words "property" or "operations" on property that a defendant might own. That is not the proper focus for a causation instruction and would foster confusion concerning the specific elements and rules governing premises liability claims—which include the "rule of nonliability" and delegation of tort duties under the Privette doctrine. (*Alvarez*, 13 Cal.App.5th at 641.) Thus, it is more advisable for proposed edits to reference a defendant's 'activities.' "	See response above. See response above.

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	Civil Justice Association of California (CJAC) By Jaime Huff, Vice President and Counsel Sacramento	CJAC recommends adding additional language to the Directions for Use under 435 to clarify that the instruction should only be given in asbestos related cases. As written, this instruction allows expert testimony to establish causation as it relates to asbestos claims. However, the instruction does not specifically point out that the instruction should not apply to non-asbestos cases. CJAC's concern is that a plaintiff in a non-asbestos case could seek the 435 instruction, which arguably tells the jury that the testifying expert is alone sufficient to establish causation — even though expert testimony alone would not be sufficient in non-asbestos cases. Based on this concern, CJAC recommends adding a sentence to the Directions for Use to make it clear that the instruction is only intended for asbestos specific cases, as follows: Directions for Use This instruction is to be given in a case in which the plaintiff's claim is that the plaintiff contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product or asbestos-related activities. A case in which the plaintiff's claim is based on anything other than disease resulting from asbestos exposure requires a different instruction.	The committee has added a caveat to the Directions for Use as suggested by the commenter.
	Bruce Greenlee, Attorney Richmond	1. I agree with all revisions and additions.	No response required.
		2. Again, I would note in a parenthetical that the court in *Lopez* cited and quoted the prior discussion in the Directions for Use.	The committee declines to make the suggested change.
		"3. And I would add this sentence to the first *Lopez* excerpt in the Sources and Authority: 'Squarely faced with the issue of CACI No. 435's correctness for a nonmanufacturer/nonsupplier, we conclude that CACI No. 435 applied to plaintiffs' asbestos-related claim, even though [defendant] is not a manufacturer or supplier of asbestos.' "	The committee has decided to add this sentence from *Lopez* to the excerpt in the Sources and Authority.
	Keith Reyen, Attorney, Oium Reyen & Pryor	I am a trial practitioner who has been involved in litigating asbestos claims in California-North and South-for over 20 years. During that time, I have been involved in trials of cases in Alameda, Los Angeles, Placer and San Francisco County. The clients I represent and whom I have represented have been sued in cases that most often can be best categorized as low dose	No response required.

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	San Francisco	chrysotile exposure matters. The main question in every single one of those cases is whether or not the plaintiff was exposed to a sufficient quantity of chrysotile to have caused the disease or condition at issue. A secondary question is whether or not the plaintiff was exposed to what is universally acknowledged to be the more potent, carcinogenic amphibole forms of asbestos.	
		Neither the current version of CACI 435, nor the proposed revision thereof accurately or adequately state the law, as set forth in the controlling case of *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953. CACI 435 is an incomplete and inaccurate paraphrase of *Rutherford,* and can be misused by argument of counsel that plaintiffs' burden on causation is met if they show that the decedent was exposed to asbestos fibers released from a product distributed by defendants, no matter how small the exposure and no matter the fiber type. As set forth in *Rutherford,* the test for substantial factor in an asbestos cancer case involves a multifactorial analysis of the nature of a given plaintiff's exposure. Specifically, the Court in *Rutherford* observed: Finally, at a level of abstraction somewhere between the historical question of exposure and the unknown biology of carcinogenesis, the question arises whether the risk of cancer created by a plaintiff's exposure to a particular asbestos containing product was significant enough to be considered a legal cause of the disease. Taking into account the ***length, frequency, proximity and intensity of exposure***, the particular properties of the individual product, any other potential causes to which the disease could be attributed (e.g. other asbestos products, cigarette smoking) and perhaps other factors affecting the assessment of comparative risk, should inhalation of fibers from the particular product be deemed a **"substantial factor" in causing the cancer?** *Rutherford, supra*, 16 Cal.4th 953, 976. As stated in *Conservatorship of Gregor*y (2000) 80 Cal. App. 4th 514, 522: Although a party is entitled to instructions on his theory of the case, if reasonably supported by the pleadings and the evidence, instructions must	The committee disagrees with the commenter's analysis. The committee believes that this instruction is consistent with the law set out in *Rutherford*.

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		be properly selected and framed. The trial court is not required to give instructions which are not correct statements of the law or are incomplete or misleading." (*Levy-Zentner Co. v. Southern Pac. Transportation Co*. (1977) 74 Cal. App. 3d 762, 782.) A more accurate statement on the law as set forth in *Rutherford* regarding causation in and asbestos cancer case was given in an Alameda County Case I tried in 2005, entitled Rosen v. Asbestos Defendants. After lengthy briefing and debate the following instruction was given: In an asbestos-related cancer, the Plaintiff need not prove that fibers from Defendant's product were the ones or among the ones that actually began the process of malignant cellular growth. Instead, the Plaintiffs may meet the burden of proving that exposure to the product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the decedent's risk of developing cancer. [P] In this regard, many factors are relevant in assessing the medical probability that an exposure contributed to Plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to the decedent are certainly relevant, although these considerations should not be determinative in every case. [P] Additional factors may also be significant in individual cases such as the type of asbestos product to which the decedent was exposed, the type of injuries suffered by him and other possible sources of the injury." An appeal ensued from a defense verdict in the Rosen matter. One of the issues on appeal was the propriety of the foregoing instruction. In rejecting the plaintiffs argument that the instruction was error because it added language to the standard instruction, which at the time was BAJI 3.78. The trial court noted that the added language was taken from key asbestos causation cases--denied their motion for new trial. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982; *Lineaweaver v. Plant Insulation Co., supra,* 31 Cal.App.4th at pp. 1416-1417.) *Rosen v. Regents of the Univ. of Cal*., (2007) Cal. App. Unpub.	

Instruction(s)	Commenter	Comment	Committee Response
		LEXIS 9172, *27.) In upholding the giving of the instruction on causation, the First District Court of Appeal noted in its unpublished decision: We also find no merit in the Rosens' challenge to the language advising the jury that exposure must be a "substantial factor in causing the illness." They assert that this language placed undue influence on the term "substantial" against the admonitions of the California Supreme Court. (See *Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th at p. 969.) They contend that the instruction should have required the asbestos exposure to be a "substantial factor contributing to the risk" instead, as they reason that this language would have taken into account the cumulative nature of asbestos-related diseases. (See *id.* at p. 979.) **The challenged language was taken from an appellate decision which has been endorsed by our Supreme Court.** (See *id.* at pp. 976-977 fn. 11; *Lineaweaver v. Plant Insulation Co., supra,* 31 Cal.App.4th at pp. 1416-1417.) **Thus, it reflects a correct statement of the law.** (*Id.* at 29-30; emphasis added.) CACI 4.35 as presently worded is both “incomplete and misleading.” The universe of asbestos cases has moved on from World War II era shipyard and other industrial exposures where workers were massively exposed to amphibole forms of asbestos which enter the body and stay for life. The cases I deal with invariably involve people with exposure to small amounts of chrysotile, which has a half-life in the body measured in months. The exposures often occurred over brief periods of time and/or involve alleged bystander or take-home exposures. The absence of language instructing a jury to consider the *length, frequency, proximity and intensity of exposure* results in needless and repetitive briefing on what *Rutherford* really said and, as in *Rosen*, leads to needless appeals. The failure to provide an instruction that fully states the factors a jury must consider on causation is highly prejudicial to defendants. Rather than perpetuate an inaccurate and incomplete statement of the law, the Judicial Council is encouraged to take this opportunity to bring CACI 435 into full alignment with the law as stated in *Rutherford*.	

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	Don Willenburg, Attorney, Gordon Rees Scully Mansukhani, LLP Oakland	[See comments to CACI No. 430, above.]	See responses, above, to comments on CACI No. 430.
		The proposed changes are purportedly based on *Lopez v. The Hillshire Brands Co.* (2019) 41 Cal.App.5th 679. The proposed change to the text of CACI 435, to add 'property' and 'operations' to 'product' as a possible source of asbestos exposure, perhaps fairly reflects the holding and facts in *Lopez*.	No further response required.
440. *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*	American Civil Liberties Union (ACLU) of California, By Peter Bibring, Attorney Los Angeles	"[T]he instruction makes the same troubling omission of key statutory language [], in setting forth the statement from § 835a(d) that officers have 'no duty to retreat,' without including the Legislature's language defining 'retreat' not to include 'tactical repositioning or other de-escalation tactics.' "	The committee agrees and has added to the new optional paragraph the language suggested, but the committee has rephrased the statutory language to avoid phrasing it in the negative.
		"The instruction also omits language important language currently in CACI 1305 that a person being arrested or detained may reasonably resist if an officer is using unreasonable force: ["Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force."]."	The committee agrees and has added the language as an optional bracketed sentence, as well as two quotations from *Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321 to the Sources and Authority.
		"The Proposed Instructions make a small but important misstatement related to federal excessive force standards under the Fourth Amendment. Although not strictly related to the implementation of AB 392, the error should be corrected. In both the proposed revisions to CACI 440 and the newly proposed CACI 441, the instructions state a distinction between state and federal law – but in so doing misstate federal law following the	The committee concludes that the Directions for Use accurately state that federal law and California negligence

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		Supreme Court's 2017 decision in *County of Los Angeles v. Mendez*. In both places, the instructions state: > It has been held that liability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) In this respect, California negligence law differs from the federal standard under the Fourth Amendment. (Cf. *County of Los Angeles v. Mendez* (2017) — U.S. —, 137 S.Ct. 1539, 1546–1547 [198 L.Ed.2d 52].) Proposed CACI 440, Proposed Instructions at 19. The clear implication of this paragraph is that federal law does not allow liability to arise under the Fourth Amendment if the 'officer's earlier tactical conduct and decisions' render the ultimate use of force unreasonable. But that is not the holding of *Mendez*, and indeed *Mendez* explicitly leaves this question open. In *Mendez* the Supreme Court addressed the Ninth Circuit's 'provocation rule,' which held that 'an officer's otherwise reasonable (and lawful) defensive use of force is unreasonable as a matter of law, if (1) the officer intentionally or recklessly provoked a violent response, and (2) that provocation is an independent constitutional violation.' *Mendez*, __ U.S. __, 137 S. Ct. at 1545. The Court rejected that rule, reasoning that its 'fundamental flaw is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist.' *Id.* at 1546. But holding that a prior unrelated constitutional violation does not render an otherwise reasonable use of force unconstitutional does not mean that an officers prior action actions are not considered at all, nor that an officers "earlier tactical conduct and decisions" cannot make the use of force unreasonable under the Fourth Amendment. In fact, the Supreme Court in *Mendez* specifically noted that question in a footnote and declined to resolve it, going on to explain that its holding was limited to rejecting "provocation rule": Respondents do not attempt to defend the provocation rule. Instead, they argue that the judgment below should be affirmed under *Graham* itself. *Graham* commands that an officer's use of force be assessed for reasonableness under the "totality of the circumstances." 490 U.S., at	law are not the same. To avoid ambiguity, the committee has removed from the Directions for Use a citation to *County of Los Angeles v. Mendez*, however, and has replaced it with more direct support from *Hayes v. County of San Diego* and *Vos v. City of Newport Beach*. The committee declines to add to the Directions for Use for a state law negligence claim the suggested reference to federal standards.

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		396, 109 S.Ct. 1865 (internal quotation marks omitted). ***On respondents' view, that means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it.*** Brief for Respondents 42–43. ***We did not grant certiorari on that question, and the decision below did not address it. Accordingly, we decline to address it here.*** See, *e.g., McLane Co. v. EEOC,* —— U.S. ——, ——, 137 S.Ct. 1159, 1170, 197 L.Ed.2d 500 (2017) ("[W]e are a court of review, not of first view" (internal quotation marks omitted)). All we hold today is that *once* a use of force is deemed reasonable under *Graham,* it may not be found unreasonable by reference to some separate constitutional violation. Any argument regarding the District Court's application of *Graham* in this case should be addressed to the Ninth Circuit on remand. *Mendez*, 137 S. Ct. at 1547, n.* (emphasis added). Since *Mendez*, the Ninth Circuit has held that, in fact, an officer's earlier tactical conduct and decisions *can* be a basis for holding the resulting use of force unreasonable: While a Fourth Amendment violation cannot be established "based merely on bad tactics that result in a deadly confrontation that could have been avoided," the events leading up to the shooting, including the officers tactics, are encompassed in the facts and circumstances for the reasonableness analysis. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018), *cert. denied sub nom. City of Newport Beach, Cal. v. Vos*, 139 S. Ct. 2613 (2019). **Recommendation:** The Advisory Committee should therefore address the inaccuracy in the proposed jury instruction by noting that federal law is consistent with California negligence law and citing *Vos*, along the following lines: It has been held that liability can arise if the officer's earlier tactical conduct and decisions show, as part of the totality of circumstances, that the ultimate use of deadly force was unreasonable. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.3d 684, 305 P.3d 252].) **In this respect, California negligence law differs from the**	

Instruction(s)	Commenter	Comment	Committee Response
		federal standard under the Fourth Amendment. (Cf. *County of Los Angeles v. Mendez* (2017) — U.S. —, 137 S.Ct. 1539, 1546–1547 [198 L.Ed.2d 52].) Federal law follows a similar rule for liability under the Fourth Amendment. *Vos v. City of Newport Beach*, 892 F.3d 1024, 1034 (9th Cir. 2018), *cert. denied sub nom. City of Newport Beach, Cal. v. Vos*, 139 S. Ct. 2613 (2019).	
		"Second, the Proposed CACI 440 also makes two important misstatements related to the consideration of officers' tactics leading up to a use of force, both under state negligence law and under the Fourth Amendment. …. B. The Proposed CACI 440 Inappropriately Limits the Reach of *Hayes* and *Grudt* to Deadly Force Cases Proposed CACI 440 changes the 'Directions for Use' to state that factor (d), regarding conduct leading up to the use of force, "is bracketed because no court has held that an officer's tactical decisions before using nondeadly force can be actionable negligence.' Proposed Instructions at 19. The element regarding consideration of the officers' conduct leading up to the use of force stems from the California Supreme Court decision in *Hayes v. County of San Diego*, in which the Court held that '[l]aw enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.' *Hayes v. Cty. of San Diego*, 57 Cal. 4th 622, 639 (2013). While *Hayes* involved a shooting, and used the term 'deadly force,' nothing in its logic would distinguish deadly from nondeadly force as the instruction suggests may be proper. Hayes applied ordinary negligence principles to the observation that 'peace officers have a duty to act reasonably when using deadly force,' and that officers' conduct is evaluated under negligence law based on the totality of the circumstances, to conclude that the 'totality' includes the officers' conduct prior to the use of force. *Id.* at 629. Nothing in either negligence law or use of force law would suggest that officers would have such a duty of care when using deadly force but not when using non-deadly force. And in at least one unpublished opinion, a court of appeal has explicitly held officers had such a duty of care in using nondeadly force in evaluating a negligence claim. *See Legaspi v. City of La Verne*, No. B295822, 2020 WL 5057345, at *3	The committee believes that CACI No. 440's Directions for Use fairly describe the state of California law, and that bracketing factor (d) is appropriate. The commenter cites persuasive authority only. But unpublished California cases and Ninth Circuit authority are not binding on California courts. The committee has revised the Directions for Use to state that "no reported California state court decision has held…"

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		(Cal. Ct. App. Aug. 27, 2020) (unpublished). And both deadly and nondeadly force claims are evaluated (under the Fourth Amendment, under AB 392 and under negligence law) based on the "totality of the circumstances." Moreover, the statement is factually incorrect, as a number of cases have actually applied *Hayes* to examine officers' conduct leading up to a use of nondeadly force. *See Hesterberg v. United States*, 71 F. Supp. 3d 1018, 1042 (N.D. Cal. 2014) (applying *Hayes* in finding officer was negligent in conduct leading up to use of TASER); *Mulligan v. Nichols*, 835 F.3d 983, 991 (9th Cir. 2016) (applying *Hayes* and analyzing claim of negligence based on officers' actions leading up nondeadly use of baton and physical force). Because nothing in the logic of *Hayes* suggests it would not apply to nondeadly force cases, and courts have in fact applied *Hayes* to examine officers' conduct leading up to a use of nondeadly force, the brackets from factor (d), and the explanation for them, should be removed."	
	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	Penal Code § 835a, subdivision (b) authorizes a law enforcement officer who has reasonable cause to believe a person has committed a public offense to use reasonable force "to effect the arrest, to prevent escape, or to overcome resistance." The statute does not authorize reasonable force for any other conduct or purpose. We would modify the first paragraph of this instruction to more closely track the statute and eliminate the references to other conduct not expressly authorized by the statute: "A law enforcement officer may use reasonable force to [arrest/~~detain/~~overcome resistance by/prevent escape of~~/specify other conduct relating to seizure~~] a person when the officer has reasonable cause to believe that the person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/~~detention/~~overcome resistance by/prevent escape of~~/specify other conduct relating to seizure~~].	The committee agrees in part. The committee has removed "other conduct relating to arrest or seizure" used in the instruction, but the committee concludes that the deletion of detain/detention is not supported because officers may use reasonable force to effect a temporary stop.
		In the second paragraph of the instruction, the phrase "[name of defendant] was negligent in using unreasonable force" is redundant. We recommend retaining the current language, "[name of defendant] used unreasonable force," without change.	The committee disagrees. The proposed new language ("was negligent") follows from a suggestion by a commenter in the last

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			release cycle. Because this instruction is often given with CACI No. 3020, the committee concluded that giving the jury a distinction between this state law claim and the federal claim would be helpful.
		We would also modify the following language for the reasons stated in (a) above: "[arrest/~~detain/~~prevent escape/overcome resistance~~/specify other conduct~~]"	See response to CLA's comment, above.
		The third paragraph of the instruction includes the bracketed language "[arrest/detention/*specify other conduct*]." We would either strike this language as unnecessary or modify this language by striking "*specify other conduct*" for the reasons stated above.	See response to CLA's comment, above.
		The Directions for Use states that additional factors may be added as appropriate, citing *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872. We believe other factors noted in *Glenn* and suggested by Penal Code section 835a, subdivisions (a)(2) (use of "other available resources and techniques"), (c)(1)(B) (giving proper warnings), and (a)(5) (mental health concerns) are often relevant and should be added as optional factors, as in CACI No. 441 (as to (e) and (f)). Although subdivisions (a)(2) and (c)(1)(B) relate to deadly force, the factors cited are relevant to the reasonableness of nondeadly force as well: "[(e) Whether [*name of defendant*] used other available resources and techniques as [an] alternative to the force used, if it was reasonably safe and feasible to do so[; and/.] "[(f) Whether [*name of defendant*] made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer [and, if possible, to give warning that deadly force would be used].] "[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"	The committee concludes that the Directions for Use adequately explains the possibility of users including additional factors.

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		We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).	The committee concludes that the Directions for Use adequately explains the possibility of users including additional factors.
		We recommend using the term "law enforcement officer" consistently throughout this instruction, rather than sometimes using "law enforcement officer" and at other times using "peace officer." We believe consistent use of the same term will facilitate understanding and avoid confusion, and we believe the term "law enforcement officer" is more neutral than the term "peace officer." Although it is beyond the scope of this invitation to comment, we recommend consistent use of the term "law enforcement officer" rather than "peace officer" throughout the CACI instructions.	The committee declines to make the suggested change. Under California law, not all law enforcement officers are peace officers. The committee has used the more general term "law enforcement officer" or "officer" in CACI No. 440, and has followed the legislature's chosen language for deadly force cases (see CACI No. 441).
		We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue: "The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
	Bruce Greenlee, Attorney Richmond	1. There's a language agreement problem at the end of the first paragraph. "To accomplish the" requires nouns in the brackets ("arrest", "detention"). You have added verbs: ("overcome," "prevent"). This problem can be fixed by deleting "accomplish the," change "detention" to "detain," and adding	The committee has revised the language to address the issue

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		"the person" at the end: "However, the officer may use only that degree of force necessary to [arrest/detain/overcome resistance by/ [or] prevent the escape of] the person."	identified by the commenter.
		2. The way it is presented, you can only pick one. Previously, "arrest" and "detention" were mutually exclusive. It seems to me that now you could have both an arrest with resistance and an escape attempt. So I'm suggesting adding the "[or]".	The committee has added brackets [,/or] to address the issue identified by the commenter.
		3. There is inconsistency with the use of "*specify other conduct*." It's not included at all in the first paragraph; it's included with only "arrest" and "detention" in the paragraph following the elements; and in the new last paragraph it's included along with all four options. I vote for doing it the way that it is done in the paragraph following the elements. Dropping the new options will avoid the problem in the first paragraph. Then in the DforU you could note that this "other conduct" might be overcoming resistance or preventing escape.	As noted above, the committee has revised the instruction's language.
		4. The new last paragraph needs to end with "the person."	The committee agrees and has added "the person" to the last paragraph.
		5. In the second paragraph of the DforU, I would keep the citation to Penal Code 835a, moving it to the end of the first sentence.	The committee has made this suggested change, adding to the Directions for Use a citation to Penal Code section 835a.
		6. I see no compelling need for the two additions to the SandA. The excerpts have nothing to do with police conduct. It would be different if the cases involve the pleading of causes of action under both negligence and 1983 for the same acts. But if that's the case, there should be a parenthetical to that effect.	The committee disagrees. *Grudt and Munoz* are controlling authority addressing negligence liability arising from an officer's

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			lack of due care under state negligence law. The committee decided to add these seminal cases as support for this negligence instruction.
	Orange County Bar Association (OCBA) By Scott B. Garner, President	Add to the introductory paragraph, "Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force."	See response to ACLU of California, above.
		Add "specify other conduct" to element 1 and to factor (c).	See response to CLA, above.
		Add "amount of" before "force" in the first sentence of the paragraph concerning the "totality of the circumstances" factors.	The committee agrees and has added the words "amount of" to this paragraph.
		Clarify that the officer need not choose the most reasonable action. Add to beginning of paragraph after the "totality of the circumstances" factors, "As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he/she/nonbinary pronoun choose the most reasonable action or the conduct that is the least likely to cause harm. Law enforcement personnel have discretion as to how they choose to address a particular situation."	This comment is beyond the scope of the invitation to comment. The committee will consider it in the next release cycle.
		Add to the penultimate Sources and Authority bullet: "(*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 537–538, 89 Cal.Rptr.3d 801.) Although preshooting conduct is included in the totality of circumstances, we do not want to suggest that a particular preshooting protocol (such as a background check or consultation with psychiatric experts) is always required. Law enforcement personnel have a degree of discretion as to how they choose to address a particular situation."	The committee declines to add the suggested source material because, although it is direct quotation from *Hayes*, the information more directly relates to deadly force (the subject of CACI No. 441).

Instruction(s)	Commenter	Comment	Committee Response
	Tony M. Sain, Attorney, Manning & Kass, Ellrod, Ramirez, Trester LLP Los Angeles	"As to CACI 440 Revisions, there is one MAJOR error in the text: 'However, the officer may use only that degree of force necessary to accomplish...' should more accurately reflect the language of Cal. Penal Code 835a(c)(1) (as recently modified): 'However, the officer may use only that degree of force that, based on the totality of the circumstances, the officer reasonably believes to be necessary to accomplish...'."	The committee concludes that the suggested change is not supported because the language cited from Penal Code § 835a(c)(1) concerns the use of deadly force. This instruction concerns nondeadly force.
		The Comment re optional factor (d) is better, but is still missing key information that is required under the case law arising from the *Hayes* case. (See *Hayes v. County of San Diego*, 57 Cal.4th 622, 625-640 (2013); *Grudt v. City of Los Angeles*, 2 Cal.3d 575, 587 (1970); *Mulligan v. Nichols*, 835 F.3d 983, 986-992 (9th Cir. 2016) (applying *Hayes*). Specifically, these and other cases interpreting *Hayes* have held that pre-force tactical negligence is only relevant if it caused the suspect to take the action that the officer (in turn) relied upon to use force. Such as where, in *Grudt*, the plainclothes officers approached a car at night without identifying themselves, prompting the suspect to think he was being robbed and to hide his wallet: the furtive movement the officers relied upon to justify their use of deadly force.	The committee considered this suggestion following the commenter's similar comment submitted during the last public comment cycle. The committee concluded that optional factor (d) and the Directions for Use accurately state the law.
		"At the end of the comment, after the *Mendez* cite, the Judicial Council should add the following clarification: 'Factor (d) should only be given in cases where the facts support a plaintiff's contention that pre-force tactical negligence by the officer caused or provoked the person upon whom force was used to take action that, in turn, the officer relies upon to justify such force.' with the *Hayes*, *Grudt*, and *Mulligan* citations added thereafter."	The committee considered this suggestion following the commenter's similar public comment submitted during the last public comment cycle. The committee concluded that optional factor (d) and the

Instruction(s)	Commenter	Comment	Committee Response
			Directions for Use accurately state the law.
		"At your request, I can submit a full brief with the leading authorities on point."	No response required.
441. *Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements*	American Civil Liberties Union (ACLU) of California, By Peter Bibring, Attorney Los Angeles	The Proposed Instruction for CACI 441 purportedly sets out the standard for negligence in the use of deadly force. But this proposed language omits key aspects of the new statutory standard, and improperly includes legal standards and authorities applicable to the "reasonable" force standard but not the new standard for deadly force of "necessary…to defend against an imminent threat death or serious bodily injury."	See substantive responses to the ACLU of California's comments on CACI No. 441, below.
		"Penal Code § 835a(c)(1)(B) (as modified by AB 392) newly specifies the circumstances under which deadly force may be used against a fleeing suspect, and requires that "[w]here feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts." (emphasis added.) The proposed instruction for CACI 441 includes instructions on when deadly force may be used against fleeing suspects, but inexplicably omits these two essential elements – identification as an officer and warning of deadly force. Instead, it sets them forth as factors to be considered in determining whether deadly force was "necessary," under either the defensive "imminent threat" prong or the "fleeing person" prong. But the statute uses the mandatory "shall," making these required elements of the "fleeing person" prong, not mere factors that may be outweighed by other aspects of the use of force. We urge that the instruction for the fleeing felon prong accurately reflect the statutory standard by including these elements are required. The easiest way to accomplish this may simply to include the statutory language verbatim in the fleeing felon prong: … **Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts**.]"	The committee agrees that adding language concerning the fleeing suspect rule is appropriate. The committee, however, has used plain English rather than the statutory language verbatim.

Instruction(s)	Commenter	Comment	Committee Response
		"The proposed CACI 441, after setting forth the essential elements required for deadly force to be authorized under Penal Code § 835a, proceeds to set forth a list of "factors [jurors] should consider in determining whether [a defendant's] use of deadly force was necessary in defense of human life." (Proposed Instructions at 22-23.) The factors as listed have serious problems. … Given the statute's formulation, we think that the Proposed Instruction is correct in formulating these last two as "factors" to consider in determining whether the use of force was necessary in defense of human life. In sum, the factors (a), (b), and (c) are inappropriate and should be removed, but factors (e) and (f) are proper and should remain."	The committee agrees and has revised the "totality of the circumstances" paragraph to remove references to the so-called *Graham* factors.
		Proposed factor (a) uses the term "immediate," when the statute uses (and carefully defines) "imminent threat."	This comment is moot because the committee has revised the "totality of the circumstances" paragraph to remove references to the so-called *Graham* factors.
		As set forth above, the central purpose of AB 392 was to replace the prior standard of allowing deadly force whenever "reasonable" under the Fourth Amendment, by establishing through statute a 'necessary' standard higher than the constitutional minimum. Case law governing the Fourth Amendment, or the 'reasonable' standard for nondeadly force under Penal Code § 835a, are simply irrelevant to interpretation of the new "necessary" standard for deadly force. The 'Sources and Authorities' confuses this fundamental distinction by citing to cases or statutory authority governing 'reasonable' force two places: • Cites to 'Use of Objectively Reasonable Force to Arrest. Penal Code section 835a(b)' – the statutory standard for nondeadly force, which is irrelevant to the instruction. The instruction should cite only the standard for deadly force in § 835a(c)." "• Cites a lengthy quotation to *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 that describes the *Graham* factors for evaluating a use of	The committee agrees and has removed from the Directions for Use a citation to *Hayes v. County of San Diego* and from the Sources and Authority both the citation to Penal Code 835a(b) and the quotation from *Hernandez*.

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		force under the "reasonableness" standard of the Fourth Amendment. As discussed in the previous section, those standards do not apply to the "necessary" standard for deadly force under AB 392. The quoted section of *Hernandez* (a case that pre-dates AB 392) expressly states that the state and federal standards are the same, when they no longer are after AB 392. The entire reference to *Hernandez* is inapposite and should be removed." [Footnote omitted.]	
		"**Recommendation: We urge the Advisory Committee in the strongest terms not to omit this key language**, but to set forth the full paragraph from the statute, section 835a(d) (as amended) regarding peace officers' duty to retreat, including the crucial sentence that clarifies that deescalation, as follows: A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. **For purposes of this instruction, "retreat" does not mean tactical repositioning or other deescalation tactics.** A peace officer does not lose (his/her) right to self-defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance. See Proposed Instructions, CACI 441 at 23. (See also Proposed CACI 440, at 18.)"	The committee agrees but has rephrased the statutory language to avoid phrasing it in the negative.
		"[T]he Proposed CACI 441 does not include the related, well-established rule, which appears in the current CACI 1305, that a person being arrested or detained may reasonably resist if an officer uses unreasonable force. CACI 1305 states, in the Sources and Authorities section: "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra*, 22 Cal.App.4th at p. 331, internal citation omitted.) The fact that an officer's excessive force may trigger a subject's right of self-defense is as relevant to negligence claims as to battery claims – perhaps even more so. The same note on this principle should therefore be included in Proposed CACI 441 as well."	The committee agrees and has added a bracketed sentence that may be included if the facts support including it. The committee also has added to the Sources and Authority two quotations from *Evans*.
	California Lawyers Association, Litigation	We would modify the following bracketed language in the first paragraph of the instruction as shown for the reasons stated in item 4(a) above: "[arrest/~~detain/~~overcome resistance to/prevent escape of~~/specify other conduct~~]"	See response to CLA's comment to CACI No. 440, above.

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	Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	We recommend that the brackets be removed from the paragraph stating "[Deadly force is force that . . . ." We believe this portion of the instruction should be given whenever deadly force is at issue, which is the only time CACI No. 441 will be given. Corresponding language in the fourth paragraph of the Directions for Use should be revised accordingly.	The committee disagrees. If there is no dispute, the jury does not need to be instructed on the definition of the term. The committee, however, has added a note to the Directions for Use about the court's need to instruct the jury on deadly force.
		We believe another factor noted in *Glenn v. Washington County, supra*, 673 F.3d at page 872, and suggested by Penal Code section 835a, subdivision (a)(5) is often relevant and should be added as an optional factor: "[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"	The committee has revised the "totality of the circumstances" paragraph to remove references to the so-called *Graham* factors or related factors. The committee has not included specific references to each of the legislative findings and declarations contained in Penal Code section 835a(a), opting instead to allow those and other case-specific facts to be considered under the "totality of the circumstances."
		We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e)	The committee has revised the "totality of the circumstances"

Instruction(s)	Commenter	Comment	Committee Response
		from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).	paragraph to remove references to the so-called *Graham* factors or related factors. The committee has not included specific references to each of the legislative findings and declarations contained in Penal Code section 835a(a), opting instead to allow those and other case-specific facts to be considered under the "totality of the circumstances."
		"For the reasons explained [] above, we recommend that the term 'peace officer' be replaced throughout the instruction with 'law enforcement officer.' "	The committee declines to make the suggested change. Under California law, not all law enforcement officers are peace officers. The committee has followed the legislature's chosen language for deadly force cases.
		We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue: "The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
	Consumer Attorneys of California ("CAOC") By Jacqueline Serna, Attorney Sacramento	"CAOC believes that the proposed changes to CACI 441 and 1305 are misleading in their statements that officers need not retreat. [Proposed CACI No. 441 and No. 1305 language omitted] Specific objection to proposed CACI 441 and 1305: Given the new 'necessary' standard, force is unnecessary and therefore unreasonable, if the officer had feasible and safe alternatives to the use of force, deadly or otherwise. This current language in the CACI instruction concerning officers having no duty to retreat is inconsistent with the new 'necessary' standard. New Penal Code 835a(d) provides: 'A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other de-escalation tactics.' If the new instructions are going to state that officers have no duty to retreat, then the instructions must include that last sentence from 835a (d), saying that 'retreat' does not mean tactical repositioning or other de-escalation tactics. If this addition to the proposed instructions is not made, then defendants will be able to mislead the jury in arguments claiming that they had no duty to tactically reposition or use other de-escalation tactics that may involve their movement before resorting to deadly force. Such situations have come up many times in deadly force cases where officers' poor tactical positioning, or refusal to get out of the way of a potentially threatening, often mentally ill, person, caused them to decide to shoot their way out of their own negligent tactics. Caselaw is also clear that even a more difficult to prove Fourth Amendment violation can be caused by such conduct: *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1146-47 (9th Cir. 1996), cert denied 519 U.S. 1009 (1996) (deadly force requires an immediate threat; excessive force verdict affirmed where officer, who shot the decedent allegedly for driving his car at officer, could have avoided any risk of injury "by simply stepping to the side."); *Orn v. City of Tacoma*, 949 F.3d 1167, 1176, fn 1 (9th Cir.	The committee agrees but has rephrased the statutory language to avoid phrasing it in the negative.

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		2020) (explaining that "several circuits have held that '[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive.'") (citations omitted). Real world examples: On April 15, 2017, Sergeant Ray Villalvazo of the Fresno Police Department fatally shot sixteen-year-old Isiah Murrietta-Golding in the back of the head as Isiah ran from him, unarmed. The shooting was recorded on video. Sgt. Villalvazo says he shot Isiah because Isiah reached for his waistband and looked back over his shoulder as he ran away, so Villalvazo assumed he was drawing a gun. Villalvazo admitted he could have taken a couple steps to his right and used a stone wall as cover, but he chose not to do so. This example fits squarely within new Penal Code 835a as an example where deadly force could be found unnecessary due to the officer's ability to tactically reposition to use available cover rather than kill a boy running away from him. On June 4, 2016, California Highway Patrol Officer Paul Shadwell shot Daniel Shaham, a shy, mentally ill man, suspected of being suicidal, as Daniel failed to drop a closed pocket knife he was holding. The officer and Daniel were on opposite sides of a car. Officer Shadwell chose not to use his own car to create additional distance and cover, in order to use the de-escalation tactics he had been taught to use with a mentally ill person. He shot and killed Daniel unnecessarily. Had he moved to a safer tactical position, as he had been trained, deadly force would have been even more unnecessary.Conclusion: [] Further, if the new instructions are going to state that officers have no duty to retreat, then the instructions must include that last sentence from 835a(d), saying that "retreat" does not mean tactical repositioning or other de-escalation tactics."	
		In light of the above, we respectfully request that the proposed change to CACI 441 and 1305 be amended to be consistent with Penal Code 835a(d) and to reflect that force is unnecessary and therefore unreasonable, if the officer had feasible and safe alternatives to the use of force, deadly or otherwise.	The committee agrees and has revised the "totality of the circumstances" paragraph to include the statutory language. To the extent the commenter advocates

Instruction(s)	Commenter	Comment	Committee Response
			for further changes to CACI No. 1305, the committee will consider the comments in the next release cycle.
	Bruce Greenlee, Attorney Richmond	"1. 440 title uses 'Law Enforcement Officer.' Both instructions should use the same term. Since PC 435a [sic] uses 'Peace Officer,' suggest changing 440.	The committee declines to make the suggested change. Under California law, not all law enforcement officers are peace officers. The committee has followed the legislature's chosen language for CACI No. 441.
		2. When I think of a deadly-force case, I assume somebody is dead. I think that's what most people would think. You note in the DforU that it is possible that one who is shot by a cop but not killed might bring a deadly-force claim and use this instruction. But I think that it would be best to draft the instruction for a wrongful death case. So except for the first instance at the beginning of the instruction, I would replace "name of plaintiff" with "name of decedent." Then elements 4 and 5 should reference death rather than harm. Then in the DforU, you could note that the instruction could be modified if the plaintiff was e.g., shot but not killed. If you leave the instruction as is, then the reference to modifying the instruction at the end of the DforU should be moved up to the first paragraph and clarified. The way it is currently stated, that the plaintiff is not the victim of deadly force, is confusing. Just who is the plaintiff then? I would simply say that the instruction will need to be modified in a wrongful death case.	The committee has added *name of decedent* or *decedent*, and added *killed* or *death* as bracketed options, where appropriate. The committee has revised the Directions for Use to reference both wrongful death and survival claims.

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		3. The second option for why deadly force was necessary: The statute is a bit of a mouthful, and I wouldn't mess with it too much. But a few things would make it a bit better. a. "Any" is a statutory word; it often causes problems in a jury instruction (though probably not here). Still, I would change "any felony" to just "a felony." b. In the same sentence, "[[threatened] [or] [resulted in]]" is formatted wrong. It should be: "[threatened/ [or] resulted in]." c. The statute does not use "so long as." The statutory "if" is better.	See responses to substantive comments, below. The committee has made this change. The committee has revised this language. The committee has revised this language.
		"4. Opening paragraph and last optional paragraph: Again inconsistency with including 'specify other conduct.' Conform to whatever you decide for 440."	The committee has revised the instruction to address the issue noted by the commenter.
		"5. DforU third paragraph: write out 'section' instead of using the section symbol in text."	The committee has made this change.
	Orange County Bar Association By Scott B. Garner, President	The instruction should be modified to state that deadly force may be used when "reasonably necessary" in view of the totality of the circumstance.	The committee disagrees. The statute uses the term "necessary."
		Add "Even if the officer is mistaken, a person being arrested or detained has a duty not to use force to resist the officer unless the officer is using unreasonable force."	The committee has added a bracketed sentence that addresses this duty.
		In the definition of deadly force paragraph, change "risk" to "likelihood."	The committee prefers the statutory term "risk" to the suggested term,

Instruction(s)	Commenter	Comment	Committee Response
			which may suggest that probabilities are issue.
		In the definition of deadly force paragraph, add "However, force that is unlikely to cause death or serious bodily injury is not 'deadly force', even if it actually results in death or serious bodily injury."	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
		In totality of the circumstances paragraph, add "or perceived by" and "The totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force."	The committee has added the commenter's suggested language "or perceived by." With respect to the second suggestion, although the language tracks the legislative findings and declarations, the committee has more closely tracked the statutory definition. See Pen. Code, § 835a(e)(3).
		Add to factor (b): "or other circumstances known to or perceived by the officer[s] at the time force was applied, rather than with the benefit of hindsight;".	This comment is moot. The committee has revised the "totality of the circumstances" paragraph to remove references to the so-called *Graham* factors.
		Add to factor (e): to an objectively reasonable officer to do so	The committee agrees. In the revised "totality of the circumstances"

Instruction(s)	Commenter	Comment	Committee Response
			paragraph, the committee has added the language concerning an objectively reasonable officer.
		Delete factor (f) and include the requirement that, where feasible, there is a need to identify self as a peace officer.	The committee agrees and has added the suggested language to the fleeing felon provision, as noted above in response to the comment of the ACLU of California.
		Add "As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he/she/nonbinary pronoun choose the most reasonable action or the conduct that is the least likely to cause harm. Law enforcement personnel have discretion as to how they choose to address a particular situation."	The committee disagrees. Penal Code section 835a supplants the reasonableness standard for deadly force cases.
		Add the following underlined substance: A peace officer <u>shall not be deemed an aggressor or</u> does not lose the right to self-defense <u>or defense of others</u> by using objectively reasonable force to… to the final paragraph of the instruction.	The committee disagrees. Although the statute uses the term "aggressor," the committee concludes that instructing the jury with that term would not assist the jury. The committee also declines to add "or defense of others" because Penal Code section 835a(d) only addresses an

Instruction(s)	Commenter	Comment	Committee Response
			officer's right to self-defense in this circumstance.
		Add the quotation from *Hayes v. County of San Diego* (2014) 57 Cal.4th 622, used in CACI No. 440, to the Sources and Authority.	The committee declines to add a quotation from *Hayes* because Penal Code section 835a, the primary authority for this instruction, supplants the reasonableness standard for deadly force cases.
		Add to the end of the final sentence of the Directions for Use: "i.e., when the plaintiff is decedent's successor-in-interest."	The committee has revised this sentence to give more guidance on when to modify this instruction.
1305. *Battery by Peace Officer—Essential Factual Elements*	American Civil Liberties Union (ACLU) of California, By Peter Bibring, Attorney Los Angeles	"The changes to the deadly force standard in AB 392 must be reflected in the instructions for battery by a peace officer. As set forth in our earlier letter, the authorization in the prior version of Penal Code section 835a for peace officers to use "reasonable force" provided the standard for civil battery claims against officers under California law. *See Edson v. City of Anaheim*, 63 Cal. App. 4th 1269, 1272-73 (1998) ("A police officer in California may use reasonable force to make an arrest, prevent escape or overcome resistance, and need not desist in the face of resistance. (Pen.Code, § 835a.) … By definition then, a prima facie battery is not established unless and until plaintiff proves unreasonable force was used.); *Venegas v. Cty. of Los Angeles*, 153 Cal. App. 4th 1230, 1248 (2007) ("[B]attery is not committed by a police officer unless the plaintiff proves the officer used unreasonable force." (citing Penal Code section 835a)); CACI 1305, Battery by Peace Officer (2017) ("To establish this claim, [plaintiff] must prove … [t]hat [defendant] used unreasonable force").	The Directions for Use note that Penal Code section 835a will require further modifications to the instruction. The committee will consider the commenter's suggestion to create a separate, standalone battery instruction for cases involving deadly force in a future release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		Because AB 392 changes that standard for deadly force from "reasonable" to "necessary," the bill changes the standard for battery by a peace officer when the battery involves the use of deadly force."	
		"Unfortunately, Proposed CACI 1305 (Battery By a Peace Officer) suffers from significant problems throughout that nearly completely confuse the standards for deadly and nondeadly force: the proposed instruction fails to capture the majority of essential elements of the deadly force standard, as well as includes mandatory references to the reasonable force standard that are inapposite to deadly force. While it might be possible to disentangle the standards within a single instruction, such an instruction would have a great deal of bracketed alternative material that would vary substantially depending whether the claim address deadly or nondeadly force. We respectfully suggest that the clearer course is to create a separate instruction for battery by a peace officer using deadly force, and resubmit our proposed instruction for that purpose."	The committee will consider a new battery instruction for use in deadly force cases in its next release cycle.
		The full extent of the proposed modifications to CACI 1305 to incorporate the new deadly force standard of AB 392 is the addition of a single bracketed statement that "A peace officer may use deadly force only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances … , that it was necessary in defense of human life." Proposed CACI 1305, at 26. This single additional sentence captures none of the essential elements of authority deadly force under by AB 392. Under the new law, Penal Code § 835a sets forth two prongs for authorized force: a defense prong requires that deadly force be necessary "to defend against an imminent threat of death or serious bodily injury," § 835a(c)(1)(A). And a second prong regarding use of deadly force on fleeing suspects itself requires several elements: (1) that the deadly force be "necessary …[t]o apprehend a fleeing person," (2) that the person "felony that threatened or resulted in death or serious bodily injury;" (3) that "he officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended;" and (4) that "[w]here feasible, the peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person	The committee will consider a new instruction in its next release cycle, and will consider the commenter's proposed revisions and proposed draft instruction at that time.

Instruction(s)	Commenter	Comment	Committee Response
		is aware of those facts." Penal Code § 835a(c)(1)(B). To accurately state the standard under AB 392, the standard for battery must state these elements where deadly force is used. The Proposed CACI 1305 also include the requirement, in element 2, that the defendant "used unreasonable force" to arrest or detain the plaintiff. As set forth at length above, "reasonable force" is not the proper standard for deadly force. Thus, while the element in the proposed instruction may be correct for nondeadly force, it is simply wrong for a deadly force claim. In addition to lacking the essential elements of an authorized use of deadly force, Proposed CACI 1305 also lacks many important requirements for police use of deadly force that are included in the proposed instruction for CACI 441.	
		The Proposed CACI 1305 also contains several mandatory (unbracketed) references throughout the instruction to "reasonable force" and "unreasonable force" that would state the wrong standard if the claim involved deadly force under Penal Code § 835a.	The committee will consider a new instruction in its next release cycle, and will consider the commenter's proposed revisions and proposed draft instruction at that time.
		Along with a new instruction, CACI 1305 (Battery by Peace Officer) should be modified to clearly distinguish it from the new instruction for battery using deadly force, and to make other changes required by AB 392. • The title of CACI 1305 should be changed to "Battery by Peace Officer – Nondeadly Force," to make clear it applies only to nondeadly force. Similarly, the "Directions for Use" should be modified to make the same clarification and to refer to the new instruction for battery involving deadly force. • The references to "unreasonable force" in the text of CACI 1305 should be changed to "unreasonable nondeadly force."	The committee will consider a new instruction in its next release cycle, and will consider the commenter's proposed revisions and proposed draft instruction at that time.
		• Finally, as discussed above, the Legislature's definition of "retreat" not to include "tactical repositioning or other deescalation tactics," while omitted elsewhere, is included here, but is bracketed. As a definition of the language that comes earlier, either it should not be bracketed, or the entire	The committee agrees but has rephrased the statutory language to

Instruction(s)	Commenter	Comment	Committee Response
		paragraph should be bracketed – if it is relevant for jurors to know that the officer has "no duty to retreat," then they should be given the defining limitation of that term.	avoid phrasing it in the negative.
	Consumer Attorneys of California ("CAOC") By Jacqueline Serna, Attorney Sacramento	[See comment re CACI No. 441.] "We respectfully request that the proposed change to CACI 441 and 1305 be amended to be consistent with Penal Code 835a(d) and to reflect that force is unnecessary and therefore unreasonable, if the officer had feasible and safe alternatives to the use of force, deadly or otherwise.	To the extent the commenter advocates for changes to CACI No. 1305, the committee will consider the comments in the next release cycle.
	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	The Directions for Use state that this instruction may require modifications if deadly force was used. We believe the instruction definitely will require modifications if deadly force was used and, for greater clarity, suggest that a separate instruction be drafted for battery by a law enforcement officer involving deadly force. The new instruction should incorporate content from CACI No. 441. If a new instruction for use in deadly force cases is drafted (for example, "Battery by Law Enforcement Officer—Use of Deadly Force—Essential Factual Elements"), the current No. 1305 should be retitled Battery by Law Enforcement Officer —Use of Non-deadly Force—Essential Factual Elements."	The committee will consider the commenter's suggestion for a new battery instruction in the next release cycle.
		We believe "the totality of the circumstances" is the touchstone and that language should be included in this instruction. (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 513 ["The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law"].) In the paragraph preceding the factors, we suggest: "In deciding whether [name of defendant] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [insert type of peace officer] in [name of defendant]'s position under the same or similar circumstances. You should consider~~,~~ the totality of the	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		circumstances known to or perceived by the officer at the time. ~~a~~Among the ~~other~~ factors, you should consider are the following:"	
		We believe another factor noted in *Glenn v. Washington County, supra*, 673 F.3d at page 872, and suggested by Penal Code section 835a, subdivision (a)(5) is often relevant and should be added as an optional factor: "[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"	The committee concludes that the Directions for Use adequately explains the possibility of users including additional factors.
		We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).	The committee concludes that the Directions for Use adequately explains the possibility of users including additional factors.
		The proposed new optional language in the final paragraph of the instruction introduces a double negative that may be confusing to the jury. We would omit this language.	The committee agrees in part and has rephrased the statutory language concerning "retreat" to avoid phrasing it in the negative.
		Consistent with our suggestion to create a separate instruction for battery involving deadly force, we would delete the first paragraph in the Directions for Use, starting, "Include the first bracketed sentence . . . ," and replace it with: "For battery cases involved the use of deadly force by a law enforcement officer, use CACI No. 1305B, Battery by Police Officer—Use of Deadly Force—Essential Factual Elements."	The committee will consider this suggestion in the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue: "The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
	Bruce Greenlee, Attorney Richmond	1. I would move the new sentence to follow the first paragraph rather than put it inside.	The committee has made this change.
		2. Last paragraph "de-escalation": CACI doesn't hyphenate prefixes, even if it results in two vowels together, unless unhyphenated makes a different word.	The committee agrees and has made this change.
	Orange County Bar Association By Scott B. Garner, President	Add "detain" to the first paragraph and factor (c), and add "overcome resistance" and "prevent escape" throughout.	The committee agrees and has added the suggested language.
		Add "The officer may use only that degree of force necessary to accomplish the arrest/detention/overcome resistance by/prevent escape of/specify…" to the paragraph after the elements.	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
		Move the new bracketed sentence to the end of the paragraph.	The committee agrees and has moved the new bracketed sentence.
		Add "or to prevent serious bodily injury" to the proposed new bracketed sentence.	The committee disagrees. The suggestion only partially reflects what necessary in defense of human life

Instruction(s)	Commenter	Comment	Committee Response
			means under Penal Code section 835a.
		Add a definition of "totality of the circumstances."	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
		Add after factors (a)–(c), "As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he/she/nonbinary pronoun choose the most reasonable action or conduct that is the least likely to cause harm. Law enforcement personnel have discretion as to how to address a particular situation."	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
		Add at the end of the instruction a sentence referencing an officer's right to self-defense.	The committee agrees and has added the language to the bracketed paragraph.
		Modify instruction and Directions for Use to include holding from *Hayes v. County of San Diego* that law enforcement personnel have a degree of discretion as to how they choose to address a particular situation	The comment is beyond the scope of the invitation to comment. The committee will consider this suggestion in the next release cycle.
1814. *Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud*	California Lawyers Association, Litigation Section, Jury	Penal Code section 502, subdivision (c) prohibits, without permission, certain conduct relating to computer data and computer systems. Some of the prohibited conduct clearly involves accessing a computer system; several of the prohibited acts in subdivision (c) are described using the word "accesses." Other acts are described without using the word "accesses." Those acts may or may not involve accessing computer data or	The committee declines to make the suggested change. The committee agrees that a violation of Penal Code section 502 may not involve access,

Instruction(s)	Commenter	Comment	Committee Response
Act (Pen. Code, § 502(e)(1))	Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	a computer system. For example, it is not clear that a person who "Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network" must access the computer data or computer system to do so. Because the prohibited conduct may not involve accessing computer data or a computer system, we would modify the bracketed language in the instruction: "[*specify wrongful conduct under section 502(c)* ~~*that led to accessing the plaintiff's computer system, computer network, or computer program*~~]"	but subdivision (c), which is the basis for this instruction, expressly limits the compensatory damages available for investigating a violation to instances where "a computer system, computer network, computer program, or data was or was not altered, damaged, or deleted *by the access*." Pen. Code section 502(c), emphasis added.
2204. *Negligent Interference With Prospective Economic Relations*	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	In the Sources and Authority, we recommend changing the short cite to the full cite for *J'aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804, because the case was not cited earlier.	The committee agrees and has revised the citation to reflect the full case information for this initial citation.
		We recommend adding to the Sources and Authority the new California Supreme Court case on intentional interference with contract, *Ixchel Pharma, LLC v. Biogen, Inc.* (Aug. 3, 2020) No. S256927, 2020 WL 4432623.	The committee will consider adding this new case in a future release cycle.
	Orange County Bar Association	"At 'Sources and Authority,' the fifth item: It is suggested the full citation for *J'Aire* be retained, as the case is not cited above. As such, the amendment should be modified to reflect the proper case citation as *J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804."	The committee agrees and has revised the citation to reflect a full citation.

Instruction(s)	Commenter	Comment	Committee Response
	By Scott B. Garner, President	"At 'Sources and Authority,' the tenth item: The proposed modification would replace a paraphrase from the *Lange* court with language quoted from the case, to supplement an existing quote from *Lange*. In doing so, citations to Witkin and to *J'Aire*, which follow the existing quote and appear in *Lange*, have been overlooked. It is suggested that these citations be included or their being omitted noted."	The committee has added "internal citations omitted" to the *Lange* citation.
2511. *Adverse Action Made by Decision Maker Without Animus (Cat's Paw)*	Civil Justice Association of California (CJAC) By Jaime Huff, Vice President and Counsel Sacramento	"CJAC recommends leaving the instruction as currently written without changes. The proposed revision to replace the word 'supervisor' with the words 'another person' or 'other person' would open up a very large universe of persons who would be subject to investigation and deposition under a Cat's Paw theory. Our recommendation would be to forgo this change to the jury instruction, and instead, leave the word 'supervisor' as previously written. … The Cat's Paw theory is based on the concept of respondent superior liability. In order to hold a company liable for acts of its employees, it requires some bad act/motivation by supervisory/managerial personnel. See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 116 ('We have no doubt that California law will follow the overwhelming weight of federal authority and hold employers responsible where discriminatory or retaliatory actions by supervisory personnel bring about adverse employment actions through the instrumentality or conduit of other corporate actors who may be entirely innocent of discriminatory or retaliatory animus.'). The proposed changes to the jury instruction as written would remove the element of a requisite bad act by a supervisory/managerial employee to hold the company liable. For example, if a manager terminated an employee acting in good faith based on a report of misconduct by an illegally motivated non-supervisory employee or non-employee (ex. customer), the company could still be held liable for wrongful termination/retaliation, even though the company's agents (i.e., supervisors or managers) had no bad intent or were not negligent. If the proposed changes are trying to capture the negligence of a manager/supervisor decision-maker who negligently relied on the report of a biased non-supervisor then the concept of negligence would have to be	The committee disagrees. The issue will not get to a jury if the "other person" did not play some role in the employment decision. As reflected below in response to comments from the County of Santa Clara, the committee has revised the Directions for Use to provide more guidance.

Instruction(s)	Commenter	Comment	Committee Response
		added to the jury instruction. However, that would make the jury instruction long, and potentially confusing, for jurors as 'negligence' as applied to a decision maker relying on a report of another person would have to be defined. Expanding the universe from 'supervisor' to 'another person' would in effect contravene the holding of *Cotran v. Rollins Hudig Hall Intern., Inc.* (1998) 17 Cal.4th 93 that a company's management is not liable for being wrong in a termination decision so long as they were acting in good faith and reasonably relied on an appropriate investigation (i.e., so long as they did not negligently rely on an investigation of another OR that another agent of the company with illegal intent had an influential role in the decision making process)."	
	County of Santa Clara, Office of the County Counsel, By Karan S. Dhadialla, Deputy County Counsel	"The proposed revisions would broaden the applicability of the cat's paw theory of liability in two respects unsupported by the law. First, by replacing the word "supervisor" with "another / other person," the proposed revision suggests that liability could be imputed to a defendant if a decision maker relied on a recommendation or facts provided by a person outside of an organization, even if he or she is not operating at the organization's direction. We are unaware of case law that supports the application of cat's paw liability so broadly as to impute the discriminatory animus of ***any*** person outside of an organization. The proposed revision appears to cite the Court of Appeal's decision *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510 (*McGrory*), in support of this change. While the Court in *McGrory* did accept the premise that an employer could be liable for the discriminatory motive of an outside investigator, the investigator had been hired by and thus was presumably operating as an agent or otherwise under the direction of the employer. (*See McGrory*, supra, 212 Cal.App.4th at p. 1516.) Second, the revision suggests that a defendant could be held liable when an adverse employment decision relies on facts from an individual with discriminatory animus even if that individual is not a significant participant in the employment decision. Extending liability in such cases is at odds with the substantial motivating factor requirement that the California Supreme Court articulated in *Harris v. City of Santa Monica* (2013) 56	The committee disagrees. The issue will not get to a jury if the "other person" did not play a role in the employment decision. The committee, however, has revised the Directions for Use to more clearly state that the scope of the cat's paw rule is not yet resolved.

Instruction(s)	Commenter	Comment	Committee Response
		Cal.4th 203, 232. Indeed, as noted in the proposed addition to the sources and authorities, the Court of Appeal has accordingly stated that—while not every individual participating in an employment decision has to share discriminatory animus—it is the showing that "***a significant participant*** in an employment decision exhibited discriminatory animus" that "raise[s] an inference that the employment decision itself was discriminatory animus." (*DeJung v. Superior Court* (2008) 169 Cal.App.4th 533, 551 [emphasis added]). While both CACI 2511 and its directions for use include the substantial motivating factor requirement, the broad statement that liability can be found if a decision maker "followed a recommendation from or relied on facts provided by another person who had [discriminatory/retaliatory] intent" creates unnecessary ambiguity on this point. To address these issues, while taking into account the fact that the discriminatory animus of a non-supervisor can be imputed to a defendant, we would propose making the following revisions to the language of CACI 2511 indicated in green."	
		The County's Proposed Revisions In this case, the decision to [discharge/[other adverse employment action]] [name of plaintiff] was made by [name of decision maker]. Even if [name of decision maker] did not hold any [discriminatory/retaliatory] intent [or was unaware of [name of plaintiff]'s conduct on which the claim of retaliation is based], [name of defendant] may still be liable for [discrimination/retaliation] if [name of decision maker] followed a recommendation from or relied on facts provided by a ~~supervisor~~ significant participant in the employment decision who had [discriminatory/retaliatory] intent. To succeed, [name of plaintiff] must prove both of the following: 1. That [name of plaintiff]'s [specify protected activity or attribute] was a substantial motivating reason for [name of ~~supervisor~~ the significant participant]'s [specify acts ~~of supervisor~~ on which decision maker relied]; and 2. That [name of ~~supervisor~~ the significant participant]'s [specify acts on which decision maker relied] was a substantial motivating reason for [name of decision maker]'s decision to [discharge/[other adverse employment action]] [name of plaintiff].	The committee agrees in part and has revised the Directions for Use to more clearly state that the scope of the cat's paw rule is not yet resolved. The committee has not revised the proposed language of the instruction, as suggested, because "significant participant in the employment decision" would be less clear that "another person" in relation to the decision maker referenced in the instruction, and "specify acts of other person" is

Instruction(s)	Commenter	Comment	Committee Response
			bracketed language this is not read to a jury.
		We would also propose substituting "supervisor" with "a significant participant in the employment decision" in the Directions for Use immediately following the instruction (on pages 36-37 of the CACI 20-02 "Invitation to Comment" PDF).	The committee disagrees but has revised the Directions for Use to more clearly state that the scope of the cat's paw rule is not yet resolved.
	William F. Murphy, Attorney, Dillingham & Murphy, LLP San Francisco	"I write to object to the proposed revision to CACI 2511, which addresses 'cat's paw' situations in employment discrimination cases. Currently, facts that were a substantial motivating reason for the innocent decision maker's decision must be provided by a biased supervisor for cat's paw liability to attach. The proposed revision to CACI 2511 expands the scope of the employer's liability to include situations where the innocent decision maker relies on information from a biased or supervisor or 'other person' – not necessarily a supervisor, and not necessarily even an employee of the employer – notwithstanding the Court's observation in the seminal cat's paw case, *Reeves v. Safeway Inc.* (2004) 120 Cal.App.4th 95, 109 n.9, that '[o]ur emphasis on the conduct of supervisors is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker.' The proposed revision, however, appears unfairly to make employers strictly liable for cat's paw discrimination if facts that are a substantial motivating reason are provided by an allegedly discriminatory nonsupervisory co-worker (or customer, or vendor, or whomever). This unfair liability would possibly attach even if the discriminatory bias of the information provider was unknown to and unknowable by the innocent decision maker! For example, under the existing instruction, a retail grocer could arguably be liable if it substantially relied on true information provided by a biased customer to terminate an Hispanic employee for grazing, if it could be shown that the customer was substantially motivated by race in making the	See response to the comments of Santa Clara County, above.

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		report in that he/she only reported grazing by Hispanic employees but ignored grazing by employees of other races. The potential imposition of this kind of liability on an innocent employer making an employment decision effectively makes employers insurers of the accuracy of the information on which they rely. This runs completely counter to the wisdom dispensed by the California Courts in other areas of employment litigation. For example, in employment discrimination cases, so long as the employer's decisions are not motivated by unlawful discriminatory animus the employer's true reasons for terminating an employee 'need not necessarily have been wise or correct' See, e.g., *Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 358. A better solution would be to follow the approach taken by California law in harassment cases, making the employer liable for employment discrimination based on information provided by non-supervisory parties only (a) if the employer knew or should have known of the non-supervisory actor's unlawful discriminatory animus, (b) failed to take adequate steps to insure that the facts on which the employer substantially relied were not false or tainted by unlawful bias, and (c) the information provided by the non-supervisory actor was in fact substantially inaccurate or substantially untrue.'	
	Orange County Bar Association By Scott B. Garner, President	"CACI 2511 provides a plaintiff with a mechanism to establish discriminatory animus where the actual decision maker acted without discriminatory or retaliatory intent, if the plaintiff can establish that the decision maker followed a recommendation from, or relied on facts provided by, another <u>supervisor</u> who had discriminatory or retaliatory intent. The proposed revision seeks to replace the term '<u>supervisor</u>' with the term '<u>person</u>' such that a plaintiff would no longer be required to establish discriminatory animus/intent by a supervisor. There does not appear to be any new case law or statute to warrant the proposed change. The following two 'new' cases are proposed to be added to the Sources and Authority section as follows: [Direct quotations from proposed Sources and Authorites omitted] However, [*DeJung v. Superior Court* and *McGrory v. Applied Signal Technology, Inc*.] are not new (one is from 2008 and the other from 2013) and it does not appear that either case addressed whether to eliminate the requirement that discriminatory animus must be tied to a supervisor or someone with similar authority. The replacement of the term	See response to the comments of Santa Clara County, above.

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		'supervisor' with 'person' is overbroad, as it suggests or implies that individuals who do not have supervisory authority or the ability to control or direct the decision-making process may supply discriminatory or retaliatory intent. We propose that the term 'supervisor' be modified appropriately to reflect that consideration."	
3020. *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)*	American Civil Liberties Union (ACLU) of California, By Peter Bibring, Attorney Los Angeles	'[T]he instruction on excessive force under the Fourth Amendment in CACI 3020 contains no reference to either *Mendez* or *Vos*, although the Sources and Authorities cites *Vos* on other points. The Advisory Committee should consider adding a citation to *Vos* on [liability for officer tactical conduct] in CACI 3020 as well."	The committee agrees in part and has added an excerpt from *Vos* to the Sources and Authority addressing this issue.
	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	"We believe the proposed references to the Fourth Amendment would not be helpful to jurors and would not assist them in their task, so we would delete those references from the instruction."	The committee appreciates the commenter's concern. On the suggestion of a commenter in the last public comment cycle, the committee decided to add the constitutional source for this claim so that jurors better understand the differences between this claim and state law claims (See, e.g., CACI Nos. 440 and 441).
		"We believe other factors supported by the cited authorities (*Glenn v. Washington County, supra*, 673 F.3d at p. 872) and frequently at issue should also be added: '(f) The availability of less intrusive alternatives to the force employed;	The committee concludes that the Directions for Use adequately explains the

Instruction(s)	Commenter	Comment	Committee Response
		'(g) Whether proper warnings were given; '[(h) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed;]' "	possibility of users including additional factors.
		"We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity)."	The committee concludes that the Directions for Use adequately explains the possibility of users including additional factors. With respect to adding factor (e) from CACI No. 3042, the committee is not aware of authority for this factor from the Eighth Amendment context.
		"We believe the 'seriousness' of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue: 'The language "seriousness of the crime" may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)' "	This comment is beyond the scope of the revisions circulated for comment. The committee will consider the suggestion in a future release cycle.
	Bruce Greenlee, Attorney Richmond	"Additional factors (d) and (e) and the additional factors from *Glenn* referenced in the Directions for Use: The DforU presents three additional factors from *Glenn*: alternatives available, warnings, and mental health issues. The instruction does not include any of these. Instead (d) is on the time available and (e) is on the type and amount of force used. So since the instruction has an 'other factors' option, what authority is there for adding (d) and (e) to the instruction? Why do these two get elevated to the same level as the *Graham* factors? To include (d) and (e), there should be *Graham* level authority for them in the DforU."	Based on a suggestion from a commenter in the last comment cycle, the committee reexamined the authority for this instruction. The committee determined that the Supreme Court has not limited the

Instruction(s)	Commenter	Comment	Committee Response
			reasonableness inquiry—whether an officer's actions are objectively reasonable considering all the facts and circumstances confronting the officer—to the so-called *Graham* factors. The committee decided to add factors (d) and (e) because they are at issue in virtually every excessive force case.
		"Nor do I see a compelling case for moving the additional *Glenn* factors into the DforU. They are currently in the SandA. Moving them to the DforU elevates a Ninth Circuit case to a higher level of importance than CACI normally accepts."	The committee has relied on *Glenn*, as well as other Ninth Circuit authority, because the instruction involves a claim under a federal statute.
	Orange County Bar Association By Scott B. Garner, President	Modify instruction to clarify concept in cases cited in Directions for Use holding that as long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances there is no requirement that she choose the lease intrusive degree of force available, e.g., "As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he/she/nonbinary pronoun choose the least intrusive degree of force available."	The committee declines to incorporate into the text of the instruction the discussion from *Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.
		Add reference to "totality of the circumstances"	The concept has been presented to the jury in plain English ("based on

Instruction(s)	Commenter	Comment	Committee Response
			all of the facts and circumstances").
3801. *Implied Contractual Indemnity*	Bruce Greenlee, Attorney Richmond	Change "in cases in which" to just "if."	The committee declines to make this nonsubstantive change.
3906. *Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender*	Bruce Greenlee, Attorney Richmond	"1. Reformat the bracket options to: [lost earnings/ [and] lost ability to earn money]. "And/or" is seldom right. Here, I question whether "or" would ever apply. If both claims are present in the case, then it's "and." If only one is present, then no conjunction is needed."	The committee has made the suggested changes.
		2. Directions for Use: Again, replace "in cases in which" with "if."	The committee declines to make this nonsubstantive change.
		3. It's not clear what authority supports this instruction. In the SandA, I would change the title to CC 3361 to "No reduction based on race, ethnicity, or gender."	The committee declines to make this change. The Sources and Authority cite Civil Code section 3361, the authority for this instruction.
4308. *Termination for Nuisance or Unlawful Use—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	"We agree with all the proposed changes."	No response required.
		"We note that the definition of 'nuisance' in the last paragraph is written in the present tense, which we support. For consistency (and clarity) we recommend that the nuisance definitions in CACI Nos. 2020 and 2021 also be changed to the present tense."	The commenter's suggestions for CACI Nos. 2020 and 2021 are beyond the scope of the invitation to comment. The committee will consider these suggestions in the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
	Disability Rights California By Lucia Choi, Attorney Los Angeles	"CACI 4308 provides instructions on the elements the plaintiff needs to meet to succeed on a claim of possession based on the tenant's alleged nuisance or unlawful use of the property. As with all of the instructions, it also provides directions for use and sources and authority. The Judicial Council's addition of the definition of nuisance to the body of the instructions helps provide clarity to the fact-finder regarding the high bar that a landlord needs to meet to evict a tenant based on this ground. We also recommend including in this definition the ordinary person standard that is required as an essential element in both public nuisance and private nuisance actions (see CACI 2020 and CACI 2021)." Suggested language: "… [is indecent or offensive <u>to the senses of an ordinary person with normal sensibilities</u>] …"	The committee has added the suggested language, which adds clarity to the definition of nuisance.
		"We further recommend that under "Directions for Use," the CACI instructions include a statement that local rent control ordinances may have specific conditions to evict a tenant based on nuisance or unlawful use. For example, some local jurisdictions such as the city of Los Angeles and the city and county of San Francisco preclude a landlord from evicting a tenant whose illegal use is based on residing in housing accommodation that lack legally approved use or that been cited for occupancy or other housing code violations. See Los Angeles Municipal Code § 151.09(A)(4). and San Francisco Administrative Code § 37.9(a)(4)(B). In the city of Santa Monica, it is not enough that the tenant is using the unit for an illegal purpose; the tenant must be convicted of using the unit for an illegal purpose for a just cause eviction to occur. Santa Monica Municipal Code art XVIII § 1806(a)(4) and art XXIII, § 2304(a)(4). State law does not limit local jurisdictions' power to regulate or monitor the basis for eviction. Civil Code § 1954.52(c). Thus, deference to local rent control ordinances should be given when determining whether the landlord has a just cause for eviction under that ordinance. [Suggested language:] If the property in question is subject to a local rent control or rent stabilization ordinance, the ordinance may provide further definitions or conditions under which a landlord has just cause to evict a tenant for nuisance or unlawful use of the property."	The committee agrees and has added to the Directions for Use language similar to the commenter's suggested language.
		"Finally, we suggest adding some language from various commonly cited cases on nuisance under 'Sources and Authority' to provide a fuller	The committee will consider adding the

Instruction(s)	Commenter	Comment	Committee Response
		analysis on nuisance and factors determining nuisance. We have included herein as "Attachment A" our additions and changes to this instruction, which are tracked and lined for your convenience."	cases suggested by the commenter in the next release cycle.
	Bruce Greenlee, Attorney Richmond	1. There's a bracketing problem, which can be fixed by using front slashes to separate bracketed options. Front slashes are the standard CACI format for separating options within brackets. They cut down on the number of brackets and make it easier on the HotDocs guys to know how to code. I'm assuming that "is harmful to health" is one of the options and not static text (text that should always be included). If so, it should be bracketed this way: [A nuisance is anything that [is harmful to health/ [or] is indecent or offensive to the senses/ [or] is an obstruction to the free use of property so as (etc.)/ [or] unlawfully obstructs (etc.)/ [or] is [a/an] [fire hazard/specify other potentially dangerous condition] to the property].] This approach also assumes that the specify other is a option only to "fire hazard" and not yet another option for the full definition.	The committee has revised the new paragraph to add front slashes.
		2. "Fire hazard" is not in the statute, though I would agree that it clearly would be a nuisance. So we can assume that the statute is not exclusive; there can be other nuisances. But it would be helpful to say this in the DforU, with at least a see, e.g., citation to a case finding some nonstatutory condition (e.g., a fire hazard) to be a nuisance.	The committee declines to add additional citations. As noted in the proposed revisions to the Directions for Use, users should refer to the Sources and Authority of the other nuisance instructions.
		3. In the DforU, I would add a paragraph break after the new material.	The committee has added a line break after the new sentence in the Directions for Use to improve readability.
		4. I would then move that paragraph to follow the sentence on element 4. CACI tries to present Directions for Use in the order that the points referenced appear in the instruction.	The committee declines to make this change. Although the optional

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			language is located at the end of the instruction, its substance relates to element 3.
		5. Maybe add CC 3479 to the parenthetical in the title.	The committee declines to make this nonsubstantive addition.
	Orange County Bar Association (OCBA) By Scott B. Garner, President	"The optimal [sic] new paragraph is consistent with the definition of a 'nuisance' as found at Civil Code §3479 and CACI 2020 (public nuisance) – 2021 (private nuisance) and is therefore agreeable to that extent."	No response required.
		"However, the OCBA strongly recommends that this CACI 4308 be substantially modified in order to cover all of the grounds for an unlawful detainer termination of a rental/lease set forth at CCP §1161(4). This current CACI only covers two (2) statutory grounds set forth at CCP §1161(4) and there is no other CACI instruction covering the other statutory grounds listed at CCP §1161(4) namely: (1) assigning or subletting contrary to the lease or (2) committing waste upon the property contrary to the lease. Since no other CACI addresses (1) or (2) above the parties, counsel, and the court are left with an incorrect impression by this citation to CCP §1161(4) that this instruction covers all provisions of the statute, which it does not. 'Waste' is set forth as a separate statutory ground for unlawful detainer termination, but this CACI seems to imply that only 'waste' which is a nuisance or an illegal act can be permissible ground. Both the breach of a lease by subletting/assigning or committing waste are permitted grounds for termination; see e.g. *Buchanan vs Banta* (1928) 204 Cal.73 and *Freeze vs Brinson* (1991) 3 Cal.App.4th Supp 1."	This comment is beyond the scope of the invitation to comment. The committee will consider the other grounds set forth in California Code of Civil Procedure section 1161(4) in the next release cycle.
	Richard L. Spix, Attorney Lake Forest	"ADD Paragraph 6 which states: In determining the extent to which the conditions constituted a nuisance, if any, you must consider their effect on a normal person of ordinary sensibility. AUTHORITY: Hutcherson v. Alexander (1968) 264 Cal.App.2d 126, 130; Shields v. Wondris (1957) 154 Cal.App.2d 249, 255; Hussel v. San Francisco (1938) 11 Cal.2d 168, 170; Carter v. Johnson	For additional clarity and as noted above in the committee response to the comment of the Disability Rights California, the

Instruction(s)	Commenter	Comment	Committee Response
		(1962) 209 Cal.App.2d 589; Fendley v. City of Anaheim (1931) 110 Cal.App. 731; Arcadia, California, Ltd. v. Herbert (1960) 54 Cal.2d 328, 337.	committee has added language to the optional definition.
4320. *Affirmative Defense—Implied Warranty of Habitability*	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	"We recommend adding a citation after the second sentence in the final paragraph of the Directions for Use to support the statement that the law remains unsettled, and a citation to Civil Code section 1941.3, subdivision (b), which qualifies that statement. Section 1941.3, subdivision (b) states that actual notice is required in the specified circumstances: 'The law on a landlord's notice in the unlawful detainer context, however, remains unsettled. (*Knight*, *supra*, 29 Cal.3d at p. 55, fn. 6; see Civ. Code, § 1941.3, subd. (b).)' "	The committee agrees in part and has added a citation to *Knight*. The committee declines to add a citation to Civil Code section 1941.3 to the Direction for Use.
	Bruce Greenlee, Attorney Richmond	"I would move the first sentence of the new text in the DforU, that the law is unsettled, to the beginning of the last paragraph, but without 'however.' "	The committee declines to make this nonsubstantive change.
	Richard L. Spix, Attorney Lake Forest	"ADD at end of instruction the following: Where the landlord has notice of alleged uninhabitable conditions not caused by the resident[']s neglect, the landlord's breach of the implied warranty of habitability exists whether or not the landlord has had a reasonable time to make repairs. AUTHORITY: Knight v. Hallsthammar (1981) 29 Cal.3d 46."	The committee declines to add the suggested language to the instruction. The Sources and Authority already include a direct quote from *Knight v. Hallsthammar* on this point.
4560. *Recovery of Payments to Unlicensed Contractor*	California Lawyers Association, Litigation	"*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, cited in the Sources and Authorities, indicates that supervising construction is simply a form of contractor services. Accordingly, we believe "performing services" in the first paragraph of the instruction is	The committee agrees that supervising construction is one kind of service that can be performed, but because

Instruction(s)	Commenter	Comment	Committee Response
(Bus. & Prof. Code, § 7031(b))	Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	sufficient, and we would not add "supervising construction" as an alternative."	supervising differs meaningfully from performing work, the committee concludes that including it as a bracketed option is preferable to omitting it from the text of the instruction.
		"In the new bullet quoting *Vallejo Development*, we recommend also adding the following quote from page 941 of the opinion: 'Section 7026 plainly states that both the person who provides construction services himself and one who does so "through others" qualifies as a "contractor." The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract.' "	The committee agrees that the additional language would be of interest to users and has added to the quoted language.
	Bruce Greenlee, Attorney Richmond	"1. I agree with the changes that remove reference to a contract. Technically, a hire without a written contract is still a contract, but that's more than the jury needs to have to think about."	No response required.
		"2. I see no need to add 'supervising construction' to 'performing services' in the opening paragraph. And you have not made this change to the elements, all of which refer to performing services. Supervising construction is one kind of service that can be performed. There are probably several hundred more specific services that could be added."	The committee agrees that supervising construction is one kind of service that can be performed, but because supervising differs meaningfully from performing work, the committee concludes that including it as a bracketed option is preferable to omitting it from the text of the instruction. For consistency, however,

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			the committee has added supervising to the instruction's elements.
		"3. Element 1: How is 'engaged' different from 'hired?' It's a fuzzy word with no clear meaning understandable to jurors. I would remove. But if there is something different about 'engaged,' it needs to be explained in the DforU."	The committee concludes that engaged is sufficiently clear. Generally, hiring is a more specific form of engagement. Element 1 offers users a bracketed choice: [engaged/hired]. The committee trusts that users will choose the appropriate term depending on the facts of the case.
		4. Last paragraph of instruction and second paragraph of the Directions for Use: In the DforU, one sentence refers to "the optional paragraph" and the other to "the final bracket paragraph." It's the same paragraph, no? If it is conceded that the defendant was unlicensed and there is no claim of substantial compliance, then it's game over; plaintiff wins. So I would not make this paragraph optional (the other changes are ok), and I would not include the "omit" sentence in the DforU. And my recollection is that substantial compliance is not a jury issue, so I would not include any of the proposed new text for this DforU paragraph.	The committee has revised the new sentence in the Directions for Use to make it clear that the material referenced is the same paragraph. The committee declines to make the other changes suggested, and notes that Directions for Use may address issues that must be decided by the court, not the jury.
		5. Directions for Use: first paragraph: At a minimum, I would put the new sentence last; the need to flip the instruction if the contractor is the plaintiff is much more likely to come up. And again, agreeing to be solely	The committee declines to make the suggested nonsubstantive changes.

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		responsible for completion of construction is just another way to "perform services," so I don't see any need to modify the instruction on the *Vallejo* facts.	
		Fine to add *Vallejo* to the SandA.	No response required.
	Orange County Bar Association (OCBA) By Scott B. Garner, President	"The OCBA recommends that this instruction be modified both in its new 'optional' language at the last paragraph and in its 'Sources and Authority' to more clearly reference the holdings that an unlicensed contractor may be found to have 'substantially complied' with the licensing requirements by acting reasonably and in good faith. An evidentiary hearing is required to make those determinations as set forth at Bus.& Prof. Code §7031(e) and *C.W. Johnson & Sons vs Carpenter* (August 7, 2020) 2020 Cal.App. LEXIS 742, 2020 DJDAR 8462, notwithstanding Bus.& Prof. Code §143(b). The optional language at the last paragraph of the instruction should have added at its ending the proposed new language: 'or proved substantial compliance with the licensing requirements.' "	The committee declines to expand the optional language because substantial compliance under subdivision (e) is a judicial doctrine and not a jury issue. With respect to the new case, the committee will consider adding *C.W. Johnson & Sons* to the Sources and Authority in the next release cycle.
All except as noted above	California Lawyers Association, Litigation Section, Jury Instructions Committee By Reuben A. Ginsburg, Chair, Sacramento	Agree (418, 430, 435, 2210, 2511, 3801, 3903C, 3903D, 3906)	No response required.
All except as noted above	Orange County Bar Association (OCBA)	Agree (418, 430, 435, 1814, 2210, 3801, 3903C, 3903D, 3906, 4320)	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	By Scott B. Garner, President		