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INVITATION TO COMMENT

CACI14-01

Title	Action Requested
Civil Jury Instructions (CACI) Revisions	Review and submit comments by February 28, 2014
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Add, revise, and revoke jury instructions	June 27, 2014
Proposed by	Contact
Advisory Committee on Civil Jury Instructions	Bruce Greenlee, Attorney, 415-865-7698
Hon. H. Walter Croskey, Chair	bruce.greenlee@jud.ca.gov

Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions and additions to, and revocation of, the Judicial Council civil jury instructions (CACI). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in a mid-year supplement to the 2014 official LexisNexis CACI publication.

Request for Specific Comments

At this time, the advisory committee proposes removing from CACI statutory language that is set forth verbatim under Sources and Authority. Instead, there would be a brief description of the statute and the statute number, which would be linked to the instruction text on Lexis.com and Westlaw. Posted instructions CACI Nos. 1723, 1901, 2720, 2721, 3040, 3100, 3117, and 4328 demonstrate this proposed change. Comments are particularly solicited on this proposed change.

The committee proposes removing all statutory language from instructions included in the mid-year supplement and for all instructions in the 2015 full edition. The reason for this proposal is to eliminate the need to revise many pages solely because of changes to statutory language that have no effect on the substantive law supporting the instruction. This change would shorten the mid-year supplement by over 200 pages and streamline the publication process. It would also significantly reduce the size of future full editions. Note that the Judicial Council criminal jury instructions (CALCRIM) do not include statutory language.

The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.

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325. Breach of **Implied** Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract. *[Name of plaintiff]* claims that *[name of defendant]* violated the duty to act fairly and in good faith. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* and *[name of defendant]* entered into a contract;
 2. That *[name of plaintiff]* did all, or substantially all of the significant things that the contract required *[him/her/it]* to do [or that *[he/she/it]* was excused from having to do those things];
 3. That all conditions required for *[name of defendant]*'s performance [had occurred/ [or] were excused];
 4. That *[name of defendant]* unfairly interfered with *[name of plaintiff]*'s right to receive the benefits of the contract; and
 5. That *[name of plaintiff]* was harmed by *[name of defendant]*'s conduct.
-

New April 2004; Revised June 2011, December 2012, June 2014

Directions for Use

This instruction should be given if the plaintiff has brought a separate count for breach of the covenant of good faith and fair dealing. It may be given in addition to CACI No. 303, *Breach of Contract—Essential Factual Elements*, if breach of contract on other grounds is also alleged. For discussion of element 3, see the Directions for Use to CACI No. 303.

If a claim for breach of the implied covenant does nothing more than allege a mere contract breach and, relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous as no additional claim is actually stated. (Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element 5 may produce damages that are different from those claimed for breach of the express contract provisions. (See Digerati Holdings, LLC v. Young Money Entertainment, LLC (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that gravamen of the two claims rests on different facts and different harm].)

It has been noted that one may bring a claim for breach of the implied covenant without also bringing a claim for breach of other contract terms. (See Careau & Co., supra. 222 Cal.App.4th at p. 1395.) Thus it would seem that it should also be possible for a jury to find a breach of the implied covenant even if it

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finds for the defendant on all other breach of contract claims.

Sources and Authority

- “There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)
- “ “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” ’ ’ [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)
- “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made*. The covenant thus cannot “ “be endowed with an existence independent of its contractual underpinnings.’ ” ’ It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted, original italics.)
- “The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. ‘The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purpose.’ ... ‘In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 [14 Cal.Rptr.2d 335], internal citations omitted.)
- “There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract.” (*Racine & Laramie, Ltd., supra*, 11 Cal.App.4th at p. 1032, internal citations omitted.)
- “Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736].)
- “ ‘[B]reach of a specific provision of the contract is not ... necessary’ to a claim for breach of the implied covenant of good faith and fair dealing.” (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1244 [160 Cal.Rptr.3d 718].)

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- “The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily ‘a question of fact unless only one inference [can] be drawn from the evidence.’ ” (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)
- “If the allegations do not go beyond the statement of a mere contract breach and, relying on the same alleged acts, simply seek the same damages or other relief already claimed in a companion contract cause of action, they may be disregarded as superfluous as no additional claim is actually stated. Thus, absent those limited cases where a breach of a consensual contract term is not claimed or alleged, the only justification for asserting a separate cause of action for breach of the implied covenant is to obtain a tort recovery.” (*Careau & Co., supra*, 222 Cal.App.3d at p. 1395.)
- “[W]e believe that the gravamen of the two counts differs. The gravamen of the breach of contract count is [cross defendants’] alleged failure to comply with their express contractual obligations specified in paragraph 37 of the cross-complaint, while the gravamen of the count for breach of the implied covenant of good faith and fair dealing is their alleged efforts to undermine or prevent the potential sale and distribution of the film, both by informing distributors that the film was unauthorized and could be subject to future litigation and by seeking an injunction. (*Digerati Holdings, LLC, supra*, 194 Cal. App. 4th at p. 885.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 798, 800–802

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

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VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

We answer the questions submitted to us as follows:

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

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

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

[or]

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

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

- [3. Did all the conditions that were required for *[name of defendant]*'s performance occur or were they excused?
 Yes No

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

4. [Did *[name of defendant]* unfairly interfere with *[name of plaintiff]*'s right to receive the benefits of the contract?
 Yes No]

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

5. Was *[name of plaintiff]* harmed by *[name of defendant]*'s interference?
 Yes No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop

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here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past [economic] loss [including [insert descriptions of claimed damages]]: \$ _____]

[b. Future [economic] loss [including [insert descriptions of claimed damages]]: \$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New June 2014

Directions for Use

This verdict form is based on CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

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

Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].)

Include question 3 if conditions for performance are at issue.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use “economic” in question 6.

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

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breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. If counts for both breach of express contractual terms and breach of the implied covenant are alleged, this verdict form may be combined with CACI No. VF-300, *Breach of Contract*. Use VF-3920 to direct the jury to separately address the damages awarded on each count and to avoid the jury's awarding the same damages on both counts. (See *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].)

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433. Affirmative Defense—Causation: Intentional Tort/Criminal Act as Superseding Cause

[Name of defendant] claims that [he/she/it] is not responsible for [name of plaintiff]’s harm because of the later [criminal/intentional] conduct of [insert name of third party]. [Name of defendant] is not responsible for [name of plaintiff]’s harm if [name of defendant] proves **[both/all]** of the following:

- 1.** That [name of third party] [specify intentional or criminal act alleged to constitute superseding cause];~~That the [intentional/criminal] conduct of [name of third party] happened after the conduct of [name of defendant];~~ **and**
- 2.** That [name of third party]’s [intentional/criminal] conduct happened after the conduct of [name of defendant]; **and**
- 23.** That [name of defendant] did not know and could not have reasonably foreseen that another person would be likely to take advantage of the situation created by [name of defendant]’s conduct to commit this type of act.

New September 2003; Revised June 2014

Directions for Use

Give the optional first element if there is a dispute of fact as to whether the third party actually committed the criminal or intentional act that is alleged to constitute superseding cause.

Sources and Authority

- “California has adopted the modern view embodied in section 448 of the Restatement Second of Torts: ‘The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor’s negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.’ Present California decisions establish that a criminal act will be deemed a superseding cause unless it involves a particular and foreseeable hazard inflicted upon a member of a foreseeable class.” (*Kane v. Hartford Accident and Indemnity Co.* (1979) 98 Cal.App.3d 350, 360 [159 Cal.Rptr. 446].)
- “[A]n intervening act does not amount to a ‘superseding cause’ relieving the negligent defendant of liability if it was reasonably foreseeable: ‘[An] actor may be liable if his negligence is a substantial factor in causing an injury, and he is not relieved of liability because of the intervening act of a third person if such act was reasonably foreseeable at the time of his negligent conduct.’ Moreover, under section 449 of the Restatement Second of Torts that foreseeability may arise directly from the risk created by the original act of negligence: ‘If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for

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harm caused thereby.’ ” (*Landeros v. Flood* (1976) 17 Cal.3d 399, 411 [131 Cal.Rptr. 69, 551 P.2d 389], internal citations omitted.)

- “The trial court's modification of CACI No. 433 appears to have been intended to apply the principle of negligence law that unforeseeable criminal conduct cuts off a tortfeasor's liability. CACI No. 433 sets forth the heightened foreseeability that is required before an intervening criminal act will relieve a defendant of liability for negligence. A third party's criminal conduct becomes actionable if the negligent tortfeasor has created a situation that facilitated the crime.” (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1508 [155 Cal.Rptr.3d 137], internal citations omitted.)
- “Criminal conduct which causes injury will ordinarily be deemed the proximate cause of an injury, superseding any prior negligence which might otherwise be deemed a contributing cause.” (*Koepke v. Loo* (1993) 18 Cal.App.4th 1444, 1449 [23 Cal.Rptr.2d 34].)
- “The common law rule that an intervening criminal act is, by its very nature, a superseding cause has lost its universal application and its dogmatic rigidity.” (*Kane, supra*, 98 Cal.App.3d at p. 360.)
- “CACI No. 433 erroneously allowed [defendant] a complete defense based on a heightened standard of foreseeability inapplicable to plaintiffs' design defect claims. Specifically, CACI No. 433 allowed [defendant] to secure a defense verdict by showing it ‘could not have reasonably foreseen that another person would be likely to take advantage of the situation created by ... [defendant]’s conduct to commit this type of act.” However, [defendant] did not create a situation that [third party] took advantage of in order to commit a crime. [Third party] did not throw the concrete at [decedent]’s truck because he perceived a defective angle or composition of the windshield. CACI No. 433 erroneously introduced a test that does not make sense in this products liability case.” (*Collins, supra*, 214 Cal.App.4th at p. 1509.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1214–1216

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.303, 165.322 (Matthew Bender)

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VF-402. Negligence—Fault of Plaintiff and Others at Issue

We answer the questions submitted to us as follows:

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

Was [*name of second defendant*] negligent?
 Yes No

[Repeat as necessary for other defendants.]

If you answered yes **in any part of as to any defendant in** question 1, then answer question 2 **for that defendant. If you answered no as to any defendant in question 1, insert the number zero next to that defendant's name in question 8.** If you answered no **to all parts of as to all defendants in** question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. For each defendant that received a “yes” answer in question 1, answer the following:

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

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

[Repeat as necessary for other defendants.]

If you answered yes **in any part of as to any defendant in** question 2, then answer question 3. **If you answered no as to any defendant in question 2, insert the number zero next to that defendant's name in question 8.** If you answered no **to all parts of as to all defendants in** question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [*name of plaintiff*]'s total damages? Do not reduce the damages based on the fault, if any, of [*name of plaintiff*] or others.

[a. Past economic loss

[lost earnings	\$ _____]
[lost profits	\$ _____]
[medical expenses	\$ _____]
[other past economic loss	\$ _____]

Total Past Economic Damages: \$ _____]

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Yes No

[Repeat as necessary for other nonparties.]

If you answered yes **in any part of as to any person in question 6**, then answer question 7 **for that person**. **If you answered no as to any person in question 6, insert the number zero next to that person's name in question 8**. If you answered no ~~to all parts of~~ **as to all persons in question 6, skip question 7 and** answer question 8.

7. For each person who received a “yes” answer in question 6, answer the following:

Was [name/description of first nonparty]’s negligence a substantial factor in causing harm to [name of plaintiff]?

Yes No

Was [name/description of second nonparty]’s negligence a substantial factor in causing harm to [name of plaintiff]?

Yes No

[Repeat as necessary for other nonparties.]

If you answered yes **in any part of as to any person in question 7**, then answer question 8. If you answered no **regarding all as to any persons** in question 7, then insert the number zero next to ~~their names~~ **that person's name** in question 8 and answer question 8.

8. What percentage of responsibility for [name of plaintiff]’s harm do you assign to the following? Insert a percentage for only those who received “yes” answers in questions 2, 5, or 7:

[Name of first defendant]:	_____%
[Name of second defendant]:	_____%
[Name of plaintiff]:	_____%
[Name/description of first nonparty]:	_____%
[Name/description of second nonparty]:	_____%
TOTAL	100%

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014

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Directions for Use

~~This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*, CACI No. 405, *Comparative Fault of Plaintiff*, and CACI No. 406, *Apportionment of Responsibility*.~~

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

~~This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*, CACI No. 405, *Comparative Fault of Plaintiff*, and CACI No. 406, *Apportionment of Responsibility*.~~

This verdict form is designed for a single plaintiff, multiple defendants, and multiple nonparties who are alleged to have been negligent. If there are multiple plaintiffs, consider preparing a separate verdict form for each. If a coplaintiff is alleged to have been negligent and that coplaintiff's negligence is alleged to have harmed the plaintiff, treat the allegedly negligent coplaintiff as a nonparty in questions 6 and 7 and add his or her name to the list of contributing persons in question 8 of the plaintiff's verdict form.

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

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

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~Users may wish to have the jury specify the liability and causation of each nonparty actor.~~

~~If a second plaintiff is also alleged to have been negligent, add his or her name to the list of possible contributing persons, notwithstanding the fact that the bracket is currently designated as “nonparty.”~~

~~If superseding cause is an issue, insert a question on that issue after question 5.~~

~~This form may be modified if a nonparty is a product manufacturer.~~

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532. Informed Consent—Definition

A patient’s consent to a medical procedure must be “informed.” A patient gives an “informed consent” only after the [insert type of medical practitioner] has **fully** explained the proposed treatment or procedure.

[A/An] [insert type of medical practitioner] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. [A/An] [insert type of medical practitioner] must give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. [A/An] [insert type of medical practitioner] is not required to explain minor risks that are not likely to occur.

New September 2003; Revised December 2005, October 2008, June 2014

Directions for Use

This instruction should be read in conjunction with CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements*. Do not give this instruction with CACI No. 530A, *Medical Battery*, or CACI No. 530B, *Medical Battery—Conditional Consent*. (See *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

If the patient is a minor or is incapacitated, tailor the instruction accordingly. If a medical practitioner knows or should know of a patient’s unique concerns or lack of familiarity with medical procedures, this knowledge may expand the scope of required disclosures and require additional instructional language. (See *Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308, 611 P.2d 902].)

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- ~~A physician is required to disclose~~ “From the foregoing axiomatic ingredients emerges a necessity, and a resultant requirement, for divulgence by the physician to his patient of all information relevant to a meaningful decisional process.” (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505, 502 P.2d 1].)
- “ [A] physician has a fiduciary duty to disclose all information material to the patient’s decision, when soliciting a patient’s consent to a medical procedure. A cause of action premised on a physician’s breach of this fiduciary duty may alternatively be referred to as a claim for lack of informed consent.” (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1164 [155 Cal.Rptr.3d 7], internal citations omitted.)

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- “When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances.” (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819].)
- “A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment.” (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440 [174 Cal.Rptr. 642].)
- “First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure. Second, ‘[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.’” (*Cobbs, supra*, 8 Cal.3d at p. 244, internal citations omitted.)
- “Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient’s position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient’s unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure.” (*Truman, supra, v. Thomas* (1980) 27 Cal.3d 285, at p. 291 [~~165 Cal.Rptr. 308, 611 P.2d 902~~], internal citations omitted.)
- “Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure.” (*McKinney, supra*, 120 Cal.App.3d at p. 441.)
- “Where a shoulder is injured in an appendectomy, or a clamp is left in the abdomen, expert testimony is not required since the jury is capable of appreciating and evaluating the significance of such events. However, when a doctor relates the facts he has relied upon in support of his decision to operate, and where the facts are not commonly susceptible of comprehension by a lay juror, medical expert opinion is necessary to enable the trier of fact to determine if the circumstances indicated a need for surgery.” (*Cobbs, supra*, 8 Cal.3d at p. 236, internal citations omitted.)
- “We underline the limited and essentially subsidiary role of expert testimony in informed consent litigation. . . . [A] rule that filters the scope of patient disclosure entirely through the standards of the medical community ‘arrogate[s] the decision [of what to disclose] . . . to the physician alone.’” We explicitly rejected such an absolute rule as inimical to the rationale and objectives of the informed consent doctrine; we reaffirm that position. Nevertheless, . . . there may be a limited number of occasions in the trial of informed consent claims where the adequacy of disclosure in a given case may turn on the standard of practice within the relevant medical community. In such instances, expert testimony will usually be appropriate.” (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191 [23 Cal.Rptr.2d 131, 858 P.2d 598], internal citation omitted.)

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- “[A] physician must disclose personal interests unrelated to the patient’s health, whether research or economic, that may affect the physician’s professional judgment.” (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 129 [271 Cal.Rptr. 146, 793 P.2d 479], cert. denied, 499 U.S. 936 (1991).)
- “While ... there is no general duty of disclosure with respect to nonrecommended procedures, we do not conclude ... that there can never be such a duty. In an appropriate case there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure.” (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)
- “Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent.” (*Saxena, supra*, 159 Cal.App.4th at p. 324.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400–507

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.41 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, §§ 415.13, 415.20 (Matthew Bender)

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

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.28 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

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533. Failure to Obtain Informed Consent—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] performed [a/an] [insert medical procedure] on [name of plaintiff] without first obtaining [his/her] informed consent. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] performed [a/an] [insert medical procedure] on [name of plaintiff];
2. That **[name of defendant] did not disclose to [name of plaintiff] the important potential results and risks of, and alternatives to**[name of plaintiff] **did not give [his/her] informed consent for the [insert medical procedure];**
3. That a reasonable person in [name of plaintiff]’s position would not have agreed to the [insert medical procedure] if he or she had been **adequately**fully informed **of the results and risks of [and alternatives to] the procedure;** and
4. That [name of plaintiff] was harmed by a result or risk that [name of defendant] should have explained **before the [insert medical procedure] was performed.**

New September 2003; Revised June 2014

Directions for Use

This instruction should be read in conjunction with CACI No. 532, *Informed Consent—Definition*. See also the Directions for Use and Sources and Authority to that instruction.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- “First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure. Second, ‘[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.’ ” (A physician’s duty of reasonable disclosure for purposes of consent to a proposed medical procedure was established in *Cobbs v. Grant* (1972) 8 Cal.3d 229, 244 [104 Cal.Rptr. 505, 502 P.2d 1], internal citations omitted.)
- **On causation:** “There must be a causal relationship between the physician’s failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made consent to treatment would not have been given.” (*Cobbs, supra*, 8 Cal.3d at p. 245.)

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- ~~“[E]ven though a physician has no general duty of disclosure with respect to nonrecommended procedures, he nevertheless must make such disclosures as are required for competent practice within the medical community.” A doctor generally does not have a duty to disclose information concerning non-recommended procedures. (Vandi v. Permanente Medical Group, Inc. (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].) However, a doctor must make “such disclosures as are required for competent practice within the medical community.” (Ibid.)~~
- ~~“The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils.” The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed. (Cobbs, supra, 8 Cal.3d at p. 245.)~~
- ~~“[T]he objective test required of the plaintiff does not prevent the defendant-physician from showing, by way of defense, that even though a reasonably prudent person might not have undergone the procedure if properly informed of the perils, this particular plaintiff still would have consented to the procedure.” However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (Warren v. Schechter (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573], original italics.)~~
- “[A]n action for failure to obtain informed consent lies where ‘an *undisclosed* inherent complication ... occurs,’ not where a disclosed complication occurs.” (Warren, supra, 57 Cal.App.4th at p. 1202 (citation omitted).)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 397, 398, 400–507

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

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

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.23 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, §§ 175.23, 175.29 (Matthew Bender)

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535. Risks of Nontreatment—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent because [he/she] did not **adequately**~~fully~~ inform [name of plaintiff] about the risks of refusing the [insert medical procedure]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] did not perform the [insert medical procedure] on [name of plaintiff];
2. That [name of defendant] did not **disclose to fully inform** [name of plaintiff] **the important potential** ~~about the~~ risks of refusing the [insert medical procedure];
3. That a reasonable person in [name of plaintiff]’s position would have agreed to the [insert medical procedure] if he or she had been **fully adequately** informed about these risks; and
4. That [name of plaintiff] was harmed by the failure to have the [insert medical procedure] performed.

New September 2003; Revised June 2014

Directions for Use

~~This instruction presents This has been termed the “informed refusal” doctrine. (See *Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821].) It~~ **This instruction** should be ~~read in conjunction given~~ with CACI No. 534, *Informed Refusal—Definition*.

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- “Applying these principles, the court in *Cobbs* [*Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 [104 Cal.Rptr. 505, 502 P.2d 1]] stated that a patient must be apprised not only of the ‘risks inherent in the procedure [prescribed, but also] the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment.’ This rule applies whether the procedure involves treatment or a diagnostic test. On the one hand, a physician recommending a risk-free procedure may safely forego discussion beyond that necessary to conform to competent medical practice and to obtain the patient’s consent. If a patient indicates that he or she is going to decline the risk-free test or treatment, then the doctor has the additional duty of advising of all material risks of which a reasonable person would want to be informed before deciding not to undergo the procedure. On the other hand, if the recommended test or treatment is itself risky, then the physician should always explain the potential consequences of declining to follow the recommended course of

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~~action. The definition of “informed consent” in *Cobbs v. Grant* (1972) 8 Cal.3d 229 [104 Cal.Rptr. 505, 502 P.2d 1] applies “whether the procedure involves treatment or a diagnostic test.” (*Truman v. Thomas* (1980) 27 Cal.3d 285, 292 [165 Cal.Rptr. 308, 611 P.2d 902], internal citations omitted.)~~

- ~~In *Truman*, “The duty of reasonable disclosure was expanded in *Truman v. Thomas* [*supra*]. There, a doctor recommended that his patient undergo a risk-free diagnostic procedure but failed to advise her of the risks involved in the failure to follow his recommendation. The Supreme Court concluded that for a patient to make an informed choice to decline a recommended procedure the patient must be adequately advised of the risks of refusing to undergo the procedure. Thus, the high court extended the duty to make disclosure to include recommended diagnostic as well as therapeutic procedures and to include situations in which the patient declines the recommended procedure.” (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1069 [9 Cal.Rptr.2d 463].) This has been termed the “informed refusal” doctrine. (*Townsend v. Turk* (1990) 218 Cal.App.3d 278, 284 [266 Cal.Rptr. 821].)~~
- “In a nutshell, a doctor has a duty to disclose all material information to his patient which will enable that patient to make an informed decision regarding the taking or refusal to take such a test.” (*Moore v. Preventive Medicine Medical Group, Inc.* (1986) 178 Cal.App.3d 728, 736 [223 Cal.Rptr. 859].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 400–404, 406, 407, 409, 410

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.12

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13[2] (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.33 (Matthew Bender)

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552. Affirmative Defense—Simple Procedure

[Name of defendant] claims that [he/she] did not have to inform [name of plaintiff] of the risks of [a/an] [insert medical procedure]. [A/An] [insert type of medical practitioner] is not required to tell a patient about the dangers of a simple procedure if it is commonly understood that the dangers are not likely to occur.

If [name of defendant] has proved that [a/an] [insert medical procedure] is a simple procedure, and that it is commonly understood that any dangers are not likely to occur, then [name of defendant] was not required to inform [name of plaintiff] of the risks.

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Directions for Use

~~“Whenever appropriate, t~~The court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law.” (Cobbs v. Grant (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].) This instruction could be modified to cover “informed refusal” cases (see CACI No. 534, *Informed Refusal—Definition, and CACI No. 535, Risks of Nontreatment—Essential Factual Elements*) by redrafting it to state, in substance, that the risks of refusing the test were commonly understood to be unlikely to occur.

Sources and Authority

- ~~“[D]isclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote.[A] disclosure need not be made if the procedure is simple and the danger remote and commonly appreciated to be remote.”~~ (Cobbs, supra, 8 Cal.3d at p. 245.)
- “[T]here is no physician’s duty to discuss the relatively minor risks inherent in common procedures, when it is common knowledge that such risks inherent in the procedure are of very low incidence.” (Cobbs, supra, 8 Cal.3d at p. 244.)
- ~~This defense is considered a “justification.” Justification for failure to disclose is an affirmative defense on which the defendant has the burden of proof~~ “We note that under our law justification is regarded as an affirmative defense and that the defendant normally bears the burden of proof with respect to affirmative defenses.” (Mathis v. Morrissey (1992) 11 Cal.App.4th 332, 347, fn. 9 [13 Cal.Rptr.2d 819].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 395, 398

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.11

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3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.14 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.13 (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives*, § 104.11 (Matthew Bender)

1620. ~~Negligent Infliction of Negligence—Recovery of Damages for~~ Emotional Distress—~~No Physical Injury~~—Direct Victim—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant]’s conduct caused [him/her] to suffer serious emotional distress. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] was negligent;
2. That [name of plaintiff] suffered serious emotional distress; and
3. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff]’s serious emotional distress.

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

New September 2003; Revised June 2014

Directions for Use

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

A “direct victim” case is one in which the plaintiff’s claim of emotional distress is based on the violation of a duty that the defendant owes directly to the plaintiff. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 [147 Cal.Rptr.3d 41].) The California Supreme Court has allowed plaintiffs to ~~bring-recover damages negligent infliction of emotional distress actions~~ as “direct victims” in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien, supra, v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d at p.916, 923 ~~[167 Cal.Rptr. 831, 616 P.2d 813]~~); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

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~~This instruction is for use if the plaintiff is a “direct victim” of defendant’s negligent conduct. If the plaintiff witnesses the injury of another, use CACI No. 1621, *Negligent Infliction of Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.~~

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant’s defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

Sources and Authority

- “[The] negligent causing of emotional distress is not an independent tort but the tort of negligence’ ‘The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.’ ” (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], internal citations omitted.)
- “ ‘Direct victim’ cases are cases in which the plaintiff’s claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff.” (*Ragland, supra, v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th at p. 182, 205 [147 Cal.Rptr.3d 41].)
- “[D]uty is found where the plaintiff is a ‘direct victim,’ in that the emotional distress damages result from a duty owed the plaintiff ‘that is “assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two.” ’ ” (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1510 [97 Cal.Rptr.3d 555].)
- ~~In a negligence action, damages may be recovered for serious emotional distress unaccompanied by physical injury:~~ “We agree that the unqualified requirement of physical injury is no longer justifiable.” (*Molien, supra*, 27 Cal.3d at p. 928.)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.” (*Molien, supra*, 27 Cal.3d at pp. 927–928.)
- ~~“In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of~~

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emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (Wong v. Jing (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1004

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:215 et seq. (The Rutter Group)

1 California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (Matthew Bender)

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

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

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

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

1. That [name of defendant] negligently caused [injury to/the death of] [name of victim];
2. That when the [describe event, e.g., traffic accident] that caused [injury to/the death of] [name of victim] occurred, [name of plaintiff] was present at the scene;
3. That [name of plaintiff] was then aware that the [e.g., traffic accident] was causing [injury to/the death of] [name of victim];
4. That [name of plaintiff] suffered serious emotional distress; and
5. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s serious emotional distress.

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

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

New September 2003; Revised December 2013, June 2014

Directions for Use

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

A “bystander” case is one in which ~~This instruction is for use in bystander cases, where~~ a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to ~~others~~another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligent Infliction of Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements*. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages or Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, and CACI No. 1623,

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

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

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

Sources and Authority

- “California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter.” (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)
- “As an introductory note, we observe that plaintiffs ... framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, ‘the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort’ ” (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)
- “In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness.” (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)
- “[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative.” (*Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836 [151 Cal.Rptr.3d 320].)
- “[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim.” (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].)
- “*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the ‘event as causing harm to the victim.’ ” (*Fortman, supra*, 212 Cal.App.4th at p. 841, fn. 4.)
- “[W]e also reject [plaintiff]’s attempt to expand bystander recovery to hold a product manufacturer

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strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement.” (*Fortman, supra*, 212 Cal.App.4th at pp. 843–844.)

- “Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim.” (*Thing, supra*, 48 Cal.3d at p. 668, fn. 10.)
- “[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury..” (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr.254, 758 P.2d 582].)
- “Although a plaintiff may establish presence at the scene through nonvisual sensory perception, ‘someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.’ ” (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)
- “[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child.” (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)
- “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’ ” (*Molien, supra, v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d at pp.916; 927–928 [~~167 Cal.Rptr. 831, 616 P.2d 813~~].)
- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

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

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

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

1622. ~~Negligent Infliction of~~Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant]’s conduct caused [him/her] to suffer serious emotional distress by exposing [name of plaintiff] to [insert applicable carcinogen, toxic substance, HIV, or AIDS]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] was exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [name of defendant]’s negligence;
2. That [name of plaintiff] suffered serious emotional distress from a fear that [he/she] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure;
3. That reliable medical or scientific opinion confirms that it is more likely than not that [name of plaintiff] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure; and
4. That [name of defendant]’s negligence was a substantial factor in causing [name of plaintiff]’s serious emotional distress.

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

New September 2003; Revised June 2014

Directions for Use

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

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance, but only if the plaintiff can establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997 [25 Cal.Rptr.2d 550, 863 P.2d 795].) There may be other harmful agents and medical conditions that could support this ~~cause of action~~claim for damages.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If plaintiff alleges that defendant’s conduct constituted oppression, fraud, or malice, then CACI No. 1623,

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~~*Negligent Infliction of Emotional Distress*~~~~*Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*~~, should be read.

Sources and Authority

- “[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact” (*Potter, supra, v. Firestone Tire and Rubber Co. (1993)* 6 Cal.4th at p.965; 986 [25 Cal.Rptr.2d 550, 863 P.2d 795], internal citation omitted.)
- “[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance.” (*Potter, supra*, 6 Cal.4th at p. 990.)
- “[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant’s negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff’s fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.” (*Potter, supra*, 6 Cal.4th at p. 997.)
- ~~The California Supreme Court has acknowledged the Hawaii Supreme Court’s definition of “serious emotional distress”~~: “[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’” (*Molien, supra, v. Kaiser Foundation Hospitals (1980)* 27 Cal.3d at pp.916, 927-928 [167 Cal.Rptr. 831, 616 P.2d 813], quoting *Rodrigues v. State (1970)* 52 Haw. 156, 173 [472 P.2d 509].)
- ~~“In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.”~~ (*Wong v. Jing (2010)* 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)
- “[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff’s toxic exposure and that the recommended monitoring is reasonable.” (*Potter, supra*, 6 Cal.4th at p. 1009.)
- ~~“All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context.”~~ Courts have applied the reasoning of *Potter, supra*, to cases alleging that defendant’s conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley (1994)* 27 Cal.App.4th 1062, 1073-1075 [33 Cal.Rptr.2d 172].)
- ~~“[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of~~

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AIDS. We disagree.”; (Herbert v. Regents of University of California (1994) 26 Cal.App.4th 782, 785-788 [31 Cal.Rptr.2d 709].)

- “[W]hen a defendant demonstrates that a plaintiff’s smoking is negligent and that a portion of the plaintiff’s fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff’s emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility.”~~Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff’s smoking is negligent and a portion of the fear of cancer is attributable to the smoking.~~ (Potter, *supra*, 6 Cal.4th at pp. 965, 974.)

Secondary Sources

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

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

[Name of plaintiff] **claims that** *[name of defendant]* **acted with** *[malice/oppression/fraudulent intent]* **in exposing** *[name of plaintiff]* **to** *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* **and that this conduct caused** *[name of plaintiff]* **to suffer serious emotional distress. To establish this claim, *[name of plaintiff]* must prove all of the following:**

- 1. That *[name of plaintiff]* was exposed to *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* as a result of *[name of defendant]*'s negligent conduct;**
- 2. That *[name of defendant]* acted with *[malice/oppression/fraudulent intent]* because *[insert one or more of the following, as applicable]:***

***[[Name of defendant]* intended to cause injury to *[name of plaintiff];*] [or]**

***[[Name of defendant]*'s conduct was despicable and was carried out with a willful or conscious disregard of *[name of plaintiff]*'s rights or safety;] [or]**

***[[Name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in conscious disregard of *[name of plaintiff]*'s rights;] [or]**

***[[Name of defendant]* intentionally misrepresented or concealed a material fact known to *[name of defendant]*, intending to cause *[name of plaintiff]* harm;]**

- 3. That *[name of plaintiff]* suffered serious emotional distress from a fear that *[he/she]* will develop *[insert applicable cancer, HIV, or AIDS]* as a result of the exposure;**
- 4. That reliable medical or scientific opinion confirms that *[name of plaintiff]*'s risk of developing *[insert applicable cancer, HIV, or AIDS]* was significantly increased by the exposure and has resulted in an actual risk that is significant; and**
- 5. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s serious emotional distress.**

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

“Despicable conduct” is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

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Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. There is no separate tort or cause of action for “negligent infliction of emotional distress.” The doctrine is one that allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance. If the plaintiff can prove oppression, fraud, or malice, it is not necessary to establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 998 [25 Cal.Rptr.2d 550, 863 P.2d 795].) Use CACI No. 1622, ~~*Negligent Infliction of Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS*~~, if plaintiff alleges ~~the same tort~~ exposure without ~~punitive conduct~~ oppression, fraud, or malice.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

“Oppression, fraud, or malice” is used here as defined by Civil Code section 3294, except that the higher “clear and convincing” burden of proof is not required in this context. (See *Potter, supra*, 6 Cal.4th at p. 1000.)

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

Sources and Authority

- Punitive Damages: Malice, Oppression, and Fraud Defined: Civil Code section 3294(c)
- “ [D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact” (*Potter, supra, v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th at p.965, 986 [25 Cal.Rptr.2d 550, 863 P.2d 795], quoting *Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1074 [9 Cal.Rptr.2d 615, 831 P.2d 1197].)
- “[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant’s conduct in causing the exposure amounts to ‘oppression, fraud, or malice’ as defined in Civil Code section 3294.” (*Potter, supra*, 6 Cal.4th at p. 998.)
- ~~The California Supreme Court has acknowledged the Hawaii Supreme Court’s definition of “serious emotional distress”:~~ “ [S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.’ ” (~~*Molien, supra, v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d at pp. 916, 927-928 [167 Cal.Rptr. 831, 616 P.2d 813], quoting *Rodrigues v. State* (1970) 52 Haw. 156, 173~~

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[472 P.2d 509].)

- “In our view, this articulation of ‘serious emotional distress’ is functionally the same as the articulation of ‘severe emotional distress’ [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury.” (Wong v. Jing (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)
- “All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context.” Courts have applied the reasoning of *Potter, supra*, to cases alleging that defendant’s conduct caused plaintiff emotional distress based on fear of contracting AIDS. (See *Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1073-10754 [33 Cal.Rptr.2d 172].)
- “[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree.”; (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 785-7886 [31 Cal.Rptr.2d 709].)
- ~~Civil Code section 3294(c) provides:~~

~~As used in this section, the following definitions apply~~

- ~~(1) —“Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.~~
- ~~(2) —“Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.~~
- ~~(3) —“Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.~~

- “Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people.” (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)
- “Used in its ordinary sense, the adjective ‘despicable’ is a powerful term that refers to circumstances that are ‘base,’ ‘vile,’ or ‘contemptible.’ ” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894].)
- [Although] “Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by ‘clear and convincing evidence’ for purposes of punitive damages,” this higher burden of proof has not been applied to fear-of-cancer cases. (*Potter, supra*, 6 Cal.4th at p. 1000, fn. 20.)

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- “[W]hen a defendant demonstrates that a plaintiff’s smoking is negligent and that a portion of the plaintiff’s fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff’s emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility.”~~Comparative fault principles may be applied to reduce amount of recovery for emotional distress based on fear of developing cancer when plaintiff’s smoking is negligent and a portion of the fear of cancer is attributable to the smoking.~~ (*Potter, supra*, 6 Cal.4th at p. 9651011.)

Secondary Sources

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.38 (Matthew Bender)

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VF-1603. ~~Negligence—Recovery of Damages for Negligent Infliction of Emotional Distress—No Physical Injury~~—Direct Victim

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

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

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; June 2014

Directions for Use

~~This verdict form is based on CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.*~~

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

~~This verdict form is based on CACI No. 1620, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

We answer the questions submitted to us as follows:

1. Did [name of defendant] negligently cause [injury to/the death of] [name of ~~injury~~ victim]?
 Yes No

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

2. When the [describe event, e.g., traffic accident] that caused [injury to/the death of] [name of victim] occurred, Was/was [name of plaintiff] present at the scene?
 Yes No

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

3. Was [name of plaintiff] then aware that the [e.g., traffic accident] was causing [injury to/the death of] [name of victim] of the injury when it occurred, and Was [he/she] aware that [name of injury victim] was being injured?
 Yes No

If your answer to question ~~2-3~~ 3-4 is yes, then answer question ~~34~~ 45. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- ~~34~~ 45. Did [name of plaintiff] suffer serious emotional distress?
 Yes No

If your answer to question ~~3-4~~ 4-5 is yes, then answer question ~~45~~ 56. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- ~~45~~ 56. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff]'s serious emotional distress?
 Yes No

If your answer to question ~~4-5~~ 5-6 is yes, then answer question ~~56~~ 67. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2014

Directions for Use

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

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

~~This verdict form is based on CACI No. 1621, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements*.~~

If specificity is not required, users do not have to itemize all the damages listed in question 5-6 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

VF-1605. ~~Negligent Infliction of Negligence—Recovery of Damages for~~ Emotional Distress—~~No Physical Injury—~~Fear of Cancer, HIV, or AIDS

We answer the questions submitted to us as follows:

1. Was [name of plaintiff] exposed to [insert applicable carcinogen, toxic substance, HIV, or AIDS] as a result of [name of defendant]’s negligence?
___ Yes ___ No

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

2. Did [name of plaintiff] suffer serious emotional distress from a fear that [he/she] would develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure?
___ Yes ___ No

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

3. Does reliable medical or scientific opinion confirm that it is more likely than not that [name of plaintiff] will develop [insert applicable cancer, HIV, or AIDS] as a result of the exposure?
___ Yes ___ No

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

4. Was [name of defendant]’s negligence a substantial factor in causing [name of plaintiff]’s serious emotional distress?
___ Yes ___ No

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

5. What are [name of plaintiff]’s damages?

- [a. Past economic loss
- | | |
|---------------------------|-----------|
| [lost earnings | \$ _____] |
| [lost profits | \$ _____] |
| [medical expenses | \$ _____] |
| [other past economic loss | \$ _____] |

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Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; June 2014

Directions for Use

This verdict form is based on CACI No. 1622, Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS.

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

~~*This verdict form is based on CACI No. 1622, Negligent Infliction of Emotional Distress—Fear of*~~

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~~*Cancer, HIV, or AIDS.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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VF-1606. ~~Negligent Infliction of Negligence—Recovery of Damages for~~ Emotional Distress—~~No Physical Injury—~~Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct

We answer the questions submitted to us as follows:

1. Was *[name of plaintiff]* exposed to *[insert applicable carcinogen, toxic substance, HIV, or AIDS]* as a result of *[name of defendant]*'s conduct?
 Yes No

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

2. Did *[name of defendant]* act with *[malice/oppression/fraudulent intent]* because *[insert one or more of the following, as applicable:]*

[[name of defendant] intended to cause injury to [name of plaintiff]?] [or]

[[name of defendant]'s conduct was despicable and was carried out with a willful or conscious disregard of [name of plaintiff]'s rights or safety?] [or]

[[name of defendant]'s conduct was despicable and subjected [name of plaintiff] to cruel and unjust hardship in conscious disregard of [name of plaintiff]'s rights?] [or]

[[name of defendant] intentionally misrepresented or concealed a material fact known to [name of defendant], intending to cause [name of plaintiff] harm?]

Yes No

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

3. Did *[name of plaintiff]* suffer serious emotional distress from a fear, confirmed by reliable medical or scientific opinion, that *[name of plaintiff]*'s risk of developing *[insert applicable cancer, HIV, or AIDS]* was significantly increased by the exposure and has resulted in an actual risk that is significant?
 Yes No

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

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

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

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

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

Draft—Not Approved by Judicial Council

New September 2003; Revised April 2007, December 2010; June 2014

Directions for Use

This verdict form is based on CACI No. 1623, ~~Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct.~~

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

~~*This verdict form is based on CACI No. 1623, ~~Negligent Infliction of Emotional Distress—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct.~~*~~

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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1723. Qualified Privilege—Malice (Civ. Code, § 47(c))

Under the circumstances of this case, [name of plaintiff] cannot recover damages from [name of defendant], even if the statement(s) [was/were] false, unless [he/she] also proves **either**:

1. ~~that~~ **That** [name of defendant] acted with hatred or ill will toward [him/her]; **or**:
2. **That** ~~If~~ [name of defendant] acted **in reckless disregard of [name of plaintiff]’s rights.**
“Reckless disregard” means that [name of defendant] had no-without reasonable grounds for believing the truth of the statement(s), **this is a factor you may consider in determining whether [he/she] acted with hatred or ill will toward [name of plaintiff].**

New September 2003; Revised June 2014

Directions for Use

This instruction involves what is referred to as the “common interest” privilege of Civil Code section 47(c). This statute grants a conditional privilege against defamation to communications made without malice on subjects of mutual interest. The defendant bears the burden of showing facts to bring the communication within the privilege. The plaintiff then must prove malice. (Lundquist v. Reusser (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) ~~is applicable only if the judge determines that the conditions supporting the Civil Code section 47(c) privilege have arisen.~~

~~The judge determines all the other Civil Code section 47 privileges as a matter of law.~~

Sources and Authority

- ~~Common-Interest Privilege: Civil Code section 47(c) grants a conditional privilege against defamation to communications made without malice on subjects of mutual interest. A privileged publication is made “without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.”~~
- ~~Malice Not Inferred: Civil Code section 48 provides that, with respect to section 47(c), “malice is not inferred from the communication.”~~
- ~~“The malice necessary to defeat a qualified privilege is ‘actual malice’ which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.” (Taus v. Loftus (2007) 40 Cal.4th 683, 721 [54 Cal.Rptr.3d 775, 151 P.3d 1185], original italics.)~~
- ~~For purposes of this section “[M]alice [as used in Civil Code section 47(c)] has been defined as ‘a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another~~

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person.’ ” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406], internal citation omitted.)

- “For purposes of establishing a triable issue of malice, ‘the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth.’ A triable issue of malice would exist if [defendant] made a statement in reckless disregard of Employee's rights that [defendant] either did not believe to be true (i.e., he actually knew better) or unreasonably believed to be true (i.e., he should have known better). In either case, a fact finder would have to ascertain what [defendant] subjectively knew and believed about the topic at the time he spoke.” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [152 Cal.Rptr.3d 154].)
- “[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo.” (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)
- ~~Instructing the jury on “malice” as defined in the context of the common interest privilege is insufficient by itself to impose liability for defamation. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].) Even in matters of private interest, the jury must find that the defendant was at least negligent. (*Ibid.*)~~
- ~~While defendants have the burden of proving that an allegedly defamatory statement falls within the scope of the common interest privilege, plaintiffs have the burden of proving that that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].)~~
- “[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. ... [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible.” (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 163, 556, 585–600

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.66 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.53 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 21:40–21:41 (Thomson Reuters)

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1901. Concealment

[Name of plaintiff] claims that *[he/she]* was harmed because *[name of defendant]* concealed certain information. To establish this claim, *[name of plaintiff]* must prove all of the following:

[1. (a) That *[name of defendant]* and *[name of plaintiff]* were *[insert type of fiduciary relationship, e.g., ``business partners’’]*; and

(b) That *[name of defendant]* intentionally failed to disclose ~~an important fact~~certain facts to *[name of plaintiff]*;

[or]

[1. That *[name of defendant]* disclosed some facts to *[name of plaintiff]* but intentionally failed to disclose *[other/another]* ~~important fact~~fact[s], making the disclosure deceptive;]

[or]

[1. That *[name of defendant]* intentionally failed to disclose ~~certain important facts~~was were known only to *[him/her/it]* and that *[name of plaintiff]* could not have discovered;]

[or]

[1. That *[name of defendant]* ~~actively concealed an important fact from~~prevented *[name of plaintiff]* ~~or prevented~~him/her/it from discovering ~~that~~certain facts;]

2. That *[name of plaintiff]* did not know of the concealed facts;

3. That *[name of defendant]* intended to deceive *[name of plaintiff]* by concealing the facts;

4. That ~~had the omitted information been disclosed,~~ *[name of plaintiff]* reasonably would have behaved differently~~relied on~~ *[name of defendant]*'s deception;

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

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

New September 2003; Revised October 2004, December 2012, June 2014

Directions for Use

Draft–Not Approved by Judicial Council

Give this instruction ~~in a case in which~~if it is alleged that the defendant concealed certain information to the detriment of the plaintiff. (See Civ. Code, § 1710(3).) Element 2 may be deleted if the third option for element 1 is selected.~~If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*.~~

~~Regarding element 1, before there can be liability for concealment, there must usually be a duty to disclose arising from a fiduciary or confidential relationship between the parties. However, in transactions that do not involve fiduciary or confidential relations, a duty to disclose material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render his disclosure likely to mislead (option 2) (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff (option 3) (3) the defendant actively conceals discovery from the plaintiff (option 4).(See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal. Rptr. 444, 466 P.2d 996].) Under the second, third, and fourth bracketed options for element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, then the jury should also be instructed to determine whether the requisite relationship existed. Regarding the fourth option, the parties may need to consider whether active concealment alone is sufficient to support a cause of action for fraud in tort or whether it is merely grounds for voiding a contract under Civil Code section 1572. (See *Williams v. Graham* (1948) 83 Cal.App.2d 649, 652 [189 P.2d 324].)~~

~~If element 4 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*. To avoid any possible confusion created by using “rely on the concealment” (see *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].), CACI Nos. 1907 and 1908 may be modified to replace the words “rely”, “relied,” and “reliance,” with language based on “behave differently” from element 4.~~

~~Element 2 may be deleted if the third option for element 1 is used.~~

Sources and Authority

- Concealment: Civil Code section 1710(3) ~~provides:~~

~~A deceit, within the meaning of [section 1709], is either:~~

- ~~1.——The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;~~
- ~~2.——The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;~~
- ~~3.——The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,~~
- ~~4.——A promise, made without any intention of performing it.~~

- “[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to

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disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.” (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 [129 Cal.Rptr.3d 874].)

- “There are ‘four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. ... Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise.” (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 336–337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)
- “A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent.” (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 860 [143 Cal.Rptr.3d 711].)
- “Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose ... [however,] ‘[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.’ ” (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225], internal citations omitted.)
- “In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.” (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996], footnotes omitted.)
- “[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property.” (*La Jolla Village Homeowners’ Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)
- “Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)

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- “ [T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, “if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure.” ’ ”
(*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [7 Cal.Rptr.2d 859].)
- “[F]raudulent intent is an issue for the trier of fact to decide.” (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)
- “[T]here are two causation elements in a fraud cause of action. First, the plaintiff’s actual and justifiable reliance on the defendant’s misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage.” (*Beckwith, supra*, 205 Cal.App.4th at p. 1062.)
- “[P]laintiffs argue that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of the argument, plaintiffs cite *Affiliated Ute Citizens v. United States, supra*, 406 U.S. 128 (*Ute*) ... , Interpreting Rule 10b-5, the high court held that ‘positive proof of reliance is not a prerequisite to recovery’ in a case ‘involving primarily a failure to disclose’ [¶] Contrary to plaintiffs’ assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently.” (*Mirkin, supra, v. Wasserman* (1993) 5 Cal.4th at p.1082, 1093 [~~23 Cal.Rptr.2d 101, 858 P.2d 568~~].)
- “The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception.” (*Boschma, supra*, 198 Cal.App.4th at p. 249, original italics.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 793–799

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[2][b]
(Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.26 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.70 et seq. (Matthew Bender)

2 California Civil Practice: Torts § 22:16 (Thomson Reuters–~~West~~)

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VF-1900. Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] make a false representation **of an important fact** to [*name of plaintiff*]?
 Yes No

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

2. Did [*name of defendant*] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?
 Yes No

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

3. Did [*name of defendant*] intend that [*name of plaintiff*] rely on the representation?
 Yes No

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

4. Did [*name of plaintiff*] reasonably rely on the representation?
 Yes No

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

5. Was [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation a substantial factor in causing harm to [*name of plaintiff*]?
 Yes No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

\$ _____]

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

\$ _____]

TOTAL \$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014

Directions for Use

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

This verdict form is based on CACI No. 1900, *Intentional Misrepresentation*.

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

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

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both intentional misrepresentation and negligent misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1903, *Negligent Misrepresentation*, be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 2 above cannot be answered “yes” and question 3 of VF-1903 cannot also be answered “no.” The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made recklessly and without regard for the truth (see question 2 above) and one made without reasonable grounds for believing it is true (see CACI No. VF-1903, question 3). Question 2 of VF-1903 should be included to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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VF-1901. Concealment

We answer the questions submitted to us as follows:

1. Did [name of defendant] intentionally fail to disclose **[a]n important fact[s]** that [name of plaintiff] did not know and could not reasonably have discovered?
 Yes No

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

2. Did [name of defendant] intend to deceive [name of plaintiff] by concealing the fact?
 Yes No

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

3. **Had the omitted information been disclosed, would [name of plaintiff] reasonably have behaved differently**~~Did [name of plaintiff] rely on [name of defendant]’s deception and was such reliance reasonable under the circumstances?~~
 Yes No

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

4. Was [name of defendant]’s concealment a substantial factor in causing harm to [name of plaintiff]?
 Yes No

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

5. What are [name of plaintiff]’s damages?

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

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

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

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

TOTAL \$ _____

Signed: _____
 Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2014

Directions for Use

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

This verdict form is based on CACI No. 1901, *Concealment*.

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

Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of CACI No. 1901, *Concealment*, depending on which ground is applicable to the facts of the case.

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If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

~~Modify question 1 by referring to one of the other three grounds for concealment listed in element 1 of CACI No. 1901, *Concealment*, depending on which ground is applicable to the facts of the case.~~

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VF-1902. False Promise

We answer the questions submitted to us as follows:

1. Did [name of defendant] make a promise to [name of plaintiff] **that was important to the transaction?**
 Yes No

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

2. Did [name of defendant] intend to perform this promise when [he/she] made it?
 Yes No

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

3. Did [name of defendant] intend that [name of plaintiff] rely on this promise?
 Yes No

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

4. Did [name of plaintiff] reasonably rely on this promise?
 Yes No

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

5. Did [name of defendant] perform the promised act?
 Yes No

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

6. Was [name of plaintiff]'s reliance on [name of defendant]'s promise a substantial factor in causing harm to [name of plaintiff]?
 Yes No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop

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here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010

Directions for Use

Draft–Not Approved by Judicial Council

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

This verdict form is based on CACI No. 1902, *False Promise*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* make a false representation **of an important fact** to *[name of plaintiff]*?
 Yes No

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

2. Did *[name of defendant]* honestly believe that the representation was true when *[he/she]* made it?
 Yes No

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

3. Did *[name of defendant]* have reasonable grounds for believing the representation was true when *[he/she]* made it?
 Yes No

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

4. Did *[name of defendant]* intend that *[name of plaintiff]* rely on the representation?
 Yes No

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

5. Did *[name of plaintiff]* reasonably rely on the representation?
 Yes No

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

6. Was *[name of plaintiff]*'s reliance on *[name of defendant]*'s representation a substantial factor in causing harm to *[name of plaintiff]*?
 Yes No

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

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

[b. Future economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other future economic loss \$ _____]

Total Future Economic Damages: \$ _____]

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____

Presiding Juror

Dated: _____

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

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New September 2003; Revised April 2007, December 2009, December 2010, June 2014

Directions for Use

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

This verdict form is based on CACI No. 1903, *Negligent Misrepresentation*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation*, be kept separate and presented in the alternative. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

With respect to the same misrepresentation, question 3 above cannot be answered “no” and question 2 of VF-1900 cannot also be answered “yes.” The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see CACI No. VF-1900, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

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2303. Affirmative Defense—Insurance Policy Exclusion

[Name of defendant] claims that [name of plaintiff]’s [liability/loss] is not covered because it is specifically excluded under the policy. To succeed, [name of defendant] must prove that [name of plaintiff]’s [liability/loss] [arises out of/is based on/occurred because of] [state exclusion under the policy]. This exclusion applies if [set forth disputed factual issues that jury must determine].

New September 2003; Revised October 2008, June 2014

Directions for Use

The instructions in this series assume the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

Give this instruction if the court has determined that an exclusionary clause in an insurance policy might apply to foreclose coverage, but the applicability turns on a question of fact. This instruction can be used in cases involving either a third party liability or a first party loss policy.

Sources and Authority

- “The burden of bringing itself within any exculpatory clause contained in the policy is on the insurer.” (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 880 [151 Cal.Rptr. 285, 587 P.2d 1098].)
- “The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage. And, once an insured has made this showing, the burden is on the insurer to prove the claim is specifically excluded.” (*Aydin Corp. v. First State Insurance Co.* (1998) 18 Cal.4th 1183, 1188 [77 Cal.Rptr.2d 537, 959 P.2d 1213].)
- Once the insurer proves that the specific exclusion applies, the insured “should bear the burden of establishing the exception because ‘its effect is to reinstate coverage that the exclusionary language otherwise bars.’ ” (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.)
- “The interpretation of an exclusionary clause is an issue of law subject to this court’s independent determination.” (*Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc.* (2007) 153 Cal.App.4th 228, 233 [62 Cal.Rptr.3d 510].)
- “[T]he question of what caused the loss is generally a question of fact, and the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause.” (*State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1131-1132 [2 Cal.Rptr.2d 183, 820 P.2d 285].)

Secondary Sources

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Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 15:911–15:912

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Analyzing Coverage: Reading and Interpreting Insurance Policies, § 3.63

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.502 (Matthew Bender)

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2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

[Name of defendant] claims that *[he/she/it]* is not required to pay *[name of plaintiff]* for overtime because *[name of plaintiff]* is an executive employee. *[Name of plaintiff]* is exempt from overtime pay requirements as an executive if *[name of defendant]* proves all of the following:

1. *[Name of plaintiff]*'s duties and responsibilities involve management of *[name of defendant]*'s *[business/enterprise]* or of a customarily recognized department or subdivision of the *[business/enterprise]*;
2. *[Name of plaintiff]* customarily and regularly directs the work of two or more employees;
3. *[Name of plaintiff]* has the authority to hire or fire employees, or *[his/her]* suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight;
4. *[Name of plaintiff]* customarily and regularly exercises discretion and independent judgment;
5. *[Name of plaintiff]* performs executive duties more than half of the time; and
6. *[Name of plaintiff]*'s monthly salary is at least *[insert amount that is twice the state minimum wage for full time employment]*.

In determining whether *[name of plaintiff]* performs executive duties more than half of the time, the most important consideration is consider the work that *[he/she]* actually performs during the course of a workweek, not *[his/her]* job title. how *[he/she]* actually spends *[his/her]* time. But also consider whether *[name of plaintiff]*'s practice differs from *[name of defendant]*'s realistic expectations of how *[name of plaintiff]* should spend *[his/her]* time and the realistic requirements of the job.

Each of *[name of plaintiff]*'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which *[he/she]* undertook it at that time. Time spent on an activity is either exempt or nonexempt; not both.

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt executive. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].) For an instruction for the affirmative defense of administrative exemption, see CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the

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transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the executive exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.)

The exemption requires that the employee be primarily engaged in duties that “meet the test of the exemption.” (See 8 Cal. Code Regs., § 11090 sec. 1(A)(1)(e), sec. 2(J) (“primarily” means more than one-half the employee’s work time).) This requirement is expressed in element 5. However, the contours of executive duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes “executive duties” in element 5.

Sources and Authority

- ~~**Exemptions to Overtime Requirements:** Labor Code section 515(a) provides in part: “The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.”~~
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption.” (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- “In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a ‘customarily recognized department or subdivision thereof’; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given ‘particular weight’; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., § 11090, subd. 1(A)(1)].)
- “Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014.)
- “Review of the determination that [plaintiff] was not an exempt employee is a mixed question of

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law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently.” (*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 817 [157 Cal.Rptr.3d 280, internal citations omitted].)

- “The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that ‘[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered ...*’ No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. ‘A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations’ ” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)
- “[T]he federal regulations incorporated into Wage Order 7 do not support the ‘multi-tasking’ standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either ‘exempt’ or ‘nonexempt’ based on the purpose for which [plaintiff] undertook them.” (*Heyen, supra*, 216 Cal.App.4th at p. 826.)
- “Wage Order 4 refers to compensation in the form of a ‘salary.’ It does not define the term. The regulation does not use a more generic term, such as ‘compensation’ or ‘pay.’ Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. ‘Salary’ is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word ‘salary’ implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt.” (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397–398 [156 Cal.Rptr.3d 697, footnote omitted].)
- “The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective..” (*Negri, supra*, 216 Cal.App.4th at p. 398, internal citation omitted.)
- “Under California law, to determine whether an employee was properly classified as ‘exempt,’ the trier of fact must look not only to the ‘work actually performed by the employee during the ... workweek,’ but also to the ‘employer's realistic expectations and the realistic requirements of the job.’ ” (*Heyen supra*, 216 Cal.App.4th at p. 828.)
- “Having recognized California's distinctive quantitative approach to determining which

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employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC’s quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer’s job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee’s practice diverges from the employer’s realistic expectations, whether there was any concrete expression of employer displeasure over an employee’s substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.” (Ramirez, *supra*, 20 Cal.4th at p. 855.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 361

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

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

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

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2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

[Name of defendant] claims that *[he/she/it]* is not required to pay *[name of plaintiff]* for overtime because *[name of plaintiff]* is an administrative employee. *[Name of plaintiff]* is exempt from overtime pay requirements as an administrator if *[name of defendant]* proves all of the following:

1. *[Name of plaintiff]*'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of *[name of defendant]* or *[name of defendant]*'s customers;
2. *[Name of plaintiff]* customarily and regularly exercises discretion and independent judgment;
3. *[[Name of plaintiff]* performs, under general supervision only, specialized or technical work that requires special training, experience, or knowledge;]

[or]

[[Name of plaintiff] regularly and directly assists a proprietor or bona fide executive or administrator;]

[or]

[[Name of plaintiff] performs special assignments and tasks under general supervision only;]

4. *[Name of plaintiff]* performs administrative duties more than half of the time; and
5. *[Name of plaintiff]*'s monthly salary is at least *[insert amount that is twice the state minimum wage for full time employment]*.

In determining whether *[name of plaintiff]* performs administrative duties more than half of the time, consider the most important consideration is how *[he/she]* actually spends *[his/her]* time. But also consider whether *[name of plaintiff]*'s practice differs from *[name of defendant]*'s realistic expectations of how *[name of plaintiff]* should spend *[his/her]* time and the realistic requirements of the job.

Each of *[name of plaintiff]*'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which *[he/she]* undertook it at that time. Time spent on an activity is either exempt or nonexempt; not both.

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer

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claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363, 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*.

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the administrative exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.)

The exemption requires that the employee be “primarily engaged in duties that meet the test of the exemption.” (See 8 Cal. Code Regs., § 11090 sec. 1(A)(2)(f), sec. 2(J) (“primarily” means more than one-half the employee’s work time).) This requirement is expressed in element 4. However, the contours of administrative duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes “administrative duties” (element 4) and the meaning of “directly related” (element 1).

Sources and Authority

- ~~Exemptions to Overtime Requirements: Labor Code section 515(a) provides in part: “The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.”~~
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption.” (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- “In order to establish that [plaintiff] was exempt as an administrative employee, [defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [defendant]; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1(A)(2)].)
- “Read together, the applicable Labor Code statutes, wage orders, and incorporated federal

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regulations now provide an explicit and extensive framework for analyzing the administrative exemption.” (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)

- “Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014.)
- “Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently.” (*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, 817 [157 Cal.Rptr.3d 280, internal citations omitted].)
- “The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that ‘[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered’ No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. ‘A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations’ ” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)
- “In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ‘ “administering the business affairs of the enterprise” ’ and production-level employees whose ‘ “primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.” ’ [Citation.] ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments.” (*Harris, supra*, 53 Cal.4th at pp. 183, 188.)
- “We do not hold that the administrative/production worker dichotomy . . . can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. ¶¶ . . . [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance . . . is it appropriate to reach out to other sources.” (*Harris, supra*, 53 Cal.4th at p. 190.)
- “[T]he federal regulations incorporated into Wage Order 7 do not support the ‘multi-tasking’ standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either ‘exempt’ or ‘nonexempt’ based on the purpose for which [plaintiff] undertook them.” (*Heyen, supra*, 216 Cal.App.4th at p. 826.)

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- “Wage Order 4 refers to compensation in the form of a ‘salary.’ It does not define the term. The regulation does not use a more generic term, such as ‘compensation’ or ‘pay.’ Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. ‘Salary’ is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word ‘salary’ implies that an exempt employee’s pay must be something other than an hourly wage. California’s Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt.” (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397–398 [156 Cal.Rptr.3d 697, footnote omitted].)
- “The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective..” (*Negri, supra*, 216 Cal.App.4th at p. 398.)
- “Under California law, to determine whether an employee was properly classified as ‘exempt,’ the trier of fact must look not only to the ‘work actually performed by the employee during the ... workweek,’ but also to the ‘employer’s realistic expectations and the realistic requirements of the job.’ ” (*Heyen supra*, 216 Cal.App.4th at p. 828.)
- “Having recognized California’s distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC’s quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer’s job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the realistic requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee’s practice diverges from the employer’s realistic expectations, whether there was any concrete expression of employer displeasure over an employee’s substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job.” (*Ramirez, supra*, 20 Cal.4th at p. 855.)

Secondary Sources

Draft—Not Approved by Judicial Council

3 Witkin, *Summary of California Law* (10th ed. 2005) Agency and Employment, § 361

Chin et al., *California Practice Guide: Employment Litigation*, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, *California Employment Law*, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

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

Simmons, *Wage and Hour Manual for California Employers*, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, *Wage and Hour Manual for California Employers*, Ch. 10, *Exemptions* (Castle Publications Limited)

Draft—Not Approved by Judicial Council

2730. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

~~Revoked June 2014 (See Stats. 2013, ch. 781 (SB 496).)~~

~~This instruction may be revised and restored in the next release cycle.~~

~~**[Name of plaintiff] claims that [name of defendant] [discharged/[other adverse employment action]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [name of plaintiff] must prove all of the following:**~~

~~1. That [name of plaintiff] was an employee of [name of defendant];~~

~~2. [That [name of plaintiff] disclosed to a [government/law enforcement] agency that [specify information disclosed];]~~

~~{or}~~

~~[That [name of plaintiff] refused to [specify activity in which plaintiff refused to participate];]~~

~~3. [That [name of plaintiff] had reasonable cause to believe that the information disclosed [name of defendant]'s [violation of/noncompliance with] a [state/federal] rule or regulation;]~~

~~{or}~~

~~[That [specify activity] would result in [a violation of/noncompliance with] a [state/federal] rule or regulation;]~~

~~4. That [name of defendant] [discharged/[other adverse employment action]] [name of plaintiff];~~

~~5. That [name of plaintiff]'s [disclosure of information/refusal to [specify]] was a contributing factor in [name of defendant]'s decision to [discharge/[other adverse employment action]] [name of plaintiff];~~

~~6. That [name of plaintiff] was harmed; and~~

~~7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.~~

~~[The disclosure of policies that an employee believes to be unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [name of plaintiff] must have reasonably believed that [name of defendant]'s policies violated federal or state statutes, rules, or regulations.]~~

~~[It is not [name of plaintiff]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]~~

~~[A report made by an employee of a government agency to his or her employer may be a protected disclosure.]~~

[A report of publicly known facts is not a protected disclosure.]

New December 2012; Revised June 2013, December 2013

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses or refuses to participate in illegal activity. (Lab. Code, § 1102.5(b), (c).) Select the first option for elements 2 and 3 for disclosure of information; select the second options for refusal to participate. Also select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case.

“Adverse employment action” is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *“Adverse Employment Action” Explained*, and CACI No. 2510, *“Constructive Discharge” Explained*, for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 2731, *Affirmative Defense—Same Decision*.)

Sources and Authority

• Labor Code section 1102.5 provides:

(a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

(c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

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~~(d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.~~

~~(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).~~

~~(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.~~

~~(g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.~~

- ~~Labor Code section 1102.6 provides: “In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5.”~~
- ~~“The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.” (*Patten, supra*, 134 Cal.App.4th at p. 1384, internal citations omitted.)~~
- ~~“In 1984, our Legislature provided ‘whistle-blower’ protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature’s interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state’s whistle-blower statute includes administrative regulations as a policy source for reporting an employer’s wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies.” (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)~~

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- ~~“As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute ‘disclosing information’ or a ‘protected disclosure’ under the California statutes.” (Mize-Kurzman v. Marin Community College Dist. (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259].)~~
- ~~“The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct.” (Mize-Kurzman, supra, 202 Cal.App.4th at pp. 852–853.)~~
- ~~“[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered.” (Mize-Kurzman, supra, 202 Cal.App.4th at p. 852, original italics.)~~
- ~~“[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, . . . , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results.” (Gardenhire v. Housing Authority (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)~~
- ~~“Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer.” (McVeigh v. Recology San Francisco (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)~~
- ~~“We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law.” (Mize-Kurzman, supra, 202 Cal.App.4th at p. 858.)~~
- ~~“Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into~~

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~~micromanaging employment practices and create a legion of undeserving protected ‘whistleblowers’ arising from the routine workings and communications of the job site. ...’” (Mueller v. County of Los Angeles (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)~~

Secondary Sources

~~3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment § 349~~

~~Chin et al., California Practice Guide: Employment Litigation, Ch. 5 L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)~~

~~4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)~~

~~11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)~~

~~10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)~~

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3041. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of defendant] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of ~~defendant~~plaintiff] ~~had acted with deliberate indifference to~~ a serious medical need ~~of [name of plaintiff];~~
2. That [name of defendant] acted with deliberate indifference to this need;
23. That [name of defendant] was acting or purporting to act in the performance of [his/her] official duties;
34. That [name of plaintiff] was harmed; and
45. That [name of defendant]’s deliberate indifference was a substantial factor in causing [name of plaintiff]’s harm.

A serious medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and pointless infliction of pain.

To establish “deliberate indifference,” [name of plaintiff] must prove (1) that [name of defendant] knew [name of plaintiff] faced a substantial risk of serious harm and (2) that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012, June 2014

Directions for Use

The “official duties” referred to in element 2 must be duties created pursuant to any 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 2.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983 ~~provides, in part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law”~~

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- ~~“Section 1983 claims may be brought in either state or federal court.” (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)~~
- “[D]eliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under section 1983.” (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)
- “Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, ‘sufficiently serious.’ For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that ‘only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.’ To violate the Cruel and Unusual Punishments Clause, a prison official must have a ‘sufficiently culpable state of mind.’ In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety” (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)
- “ ‘To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant’s response to the need was deliberately indifferent.’ The ‘deliberate indifference’ prong requires ‘(a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need, and (b) harm caused by the indifference.’ ‘Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.’ ‘[T]he indifference to [a prisoner’s] medical needs must be substantial. Mere “indifference,” “negligence,” or “medical malpractice” will not support this [claim].’ Even gross negligence is insufficient to establish deliberate indifference to serious medical needs.” (*Lemire v. Cal. Dep’t of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081–1082, internal citations omitted.)
- “We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (*Farmer, supra*, 511 U.S. at p. 837.)
- “The subjective standard of deliberate indifference requires ‘more than ordinary lack of due care for the prisoner’s interests or safety.’ The state of mind for deliberate indifference is subjective recklessness. But the standard is ‘less stringent in cases involving a prisoner’s medical needs . . . because “the State’s responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns.” ’ ” (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985,

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internal citations omitted.)

- “[D]eliberate indifference ‘may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.’ . . . ‘[A] prisoner need not show his harm was substantial.’ ” (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)
- “[A]llegations that a prison official has ignored the instructions of a prisoner’s treating physician are sufficient to state a claim for deliberate indifference.” (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)
- “[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” (*Estelle, supra*, 429 U.S. at p. 106.)
- “It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia*, for example, the plaintiff alleged that defendants acted ‘carelessly, recklessly and negligently’ when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: ‘... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...’” (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)
- “Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are ‘serious.’ ” (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)
- “[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference.” (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)
- “A ‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’ The ‘routine discomfort’ that results from incarceration and which is ‘part of the penalty that criminal offenders pay for their offenses against society’ does not constitute a ‘serious’ medical need.” (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

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- “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.)

Secondary Sources

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners’ Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

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VF-3022. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. Did [*name of defendant*/~~*plaintiff*~~] ~~act with deliberate indifference to~~have a serious medical need ~~of~~ [*name of plaintiff*]?
 Yes No

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

2. Did [*name of defendant*] act with deliberate indifference to that medical need?
 Yes No

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

23. Was [*name of defendant*] acting or purporting to act in the performance of [*his/her*] official duties?
 Yes No

If your answer to question 2-3 is yes, then answer question 34. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

34. Was [*name of defendant*]'s deliberate indifference a substantial factor in causing harm to [*name of plaintiff*]?
 Yes No

If your answer to question 3-4 is yes, then answer question 45. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings \$ _____]

[lost profits \$ _____]

[medical expenses \$ _____]

[other past economic loss \$ _____]

Total Past Economic Damages: \$ _____]

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- [b. **Future economic loss**
- | | |
|-----------------------------|-----------|
| [lost earnings | \$ _____] |
| [lost profits | \$ _____] |
| [medical expenses | \$ _____] |
| [other future economic loss | \$ _____] |
- Total Future Economic Damages: \$ _____]**
- [c. **Past noneconomic loss, including [physical pain/mental suffering:]** \$ _____]
- [d. **Future noneconomic loss, including [physical pain/mental suffering:]** \$ _____]
- TOTAL \$ _____**

Signed: _____
Presiding Juror

Dated: _____

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

*New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3009
 December 2012, June 2014*

Directions for Use

This verdict form is based on CACI No. 3041, *Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 4-5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If

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

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3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[Name of plaintiff] **claims that** *[[name of individual defendant]/ [and] [name of employer defendant]]* **violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[name of decedent]]. To establish this claim, [name of plaintiff] must prove that all of the following are more likely to be true than not true:**

1. **That** *[[name of individual defendant]/[name of employer defendant]’s employee]* *[insert one of the following:]*

[[took/hid/appropriated/obtained/ [or] retained] [name of plaintiff/decedent]’s property;

[or]

[[assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [name of plaintiff/decedent]’s property;
2. **That** *[name of plaintiff/decedent]* **was [65 years of age or older/a dependent adult] at the time of the conduct;**
3. **That** *[[name of individual defendant]/[name of employer defendant]’s employee]* **[[took/hid/appropriated/obtained/ [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**
4. **That** *[name of plaintiff/decedent]* **was harmed; and**
5. **That** *[[name of individual defendant]’s/[name of employer defendant]’s employee’ s]* **conduct was a substantial factor in causing [name of plaintiff]’s harm.**

[One way *[name of plaintiff]* **can prove that** *[[name of individual defendant]/[name of employer defendant]’s employee]* **[took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that** *[[name of individual defendant]/[name of employer defendant]’s employee]* **knew or should have known that [his/her] conduct was likely to be harmful to [name of plaintiff/decedent].**

[[Name of individual defendant]/[Name of employer defendant]’s employee] **[took/hid/appropriated/obtained/ [or] retained] the property if [name of plaintiff/decedent] was deprived of the property by an agreement, gift, will, [or] trust[, or] [specify other testamentary instrument] regardless of whether the property was held by [name of plaintiff/decedent] or by [his/her] representative.]**

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New September 2003; Revised June 2005, October 2008, April 2009, June 2010, December 2013; June 2014

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent’s pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent’s Pain and Suffering*.

If the individual responsible for the financial abuse is a defendant in the case, use “[name of individual defendant]” throughout. If only the individual’s employer is a defendant, use “[name of employer defendant]’s employee” throughout.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

If “for a wrongful use” is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

If “by undue influence” is selected in element 3, also give CACI No. 3117, *Financial Abuse—“Undue Influence” Explained*.

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Financial Abuse of Elder or Dependent Adult: Welfare and Institutions Code section 15610.07 ~~provides:~~

~~“Abuse of an elder or a dependent adult” means either of the following:~~

- ~~(a) — Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.~~
- ~~(b) — The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.~~

- “Dependent Adult” Defined: Welfare and Institutions Code section 15610.23 ~~provides:~~

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~~(a) “Dependent adult” means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.~~

~~(b) “Dependent adult” includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.~~

- Financial Abuse of Elder or Dependent Adult: Welfare and Institutions Code section 15610.27 provides: ~~“ ‘Elder’ means any person residing in this state, 65 years of age or older.”~~

- ~~Welfare and Institutions Code section 15610.30 provides:~~

~~(a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following:~~

~~(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.~~

~~(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.~~

~~(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.~~

~~(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.~~

~~(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or person property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of the elder or dependent adult.~~

~~(d) For purposes of this section, "representative" means a person or entity that is either of the following~~

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~~(1) A conservator, trustee, or other representative of the estate of an elder or dependent adult.~~

~~(2) An attorney in fact of an elder or dependent adult who acts within the authority of the power of attorney.~~

- “The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect.” (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- “The Act was expressly designed to protect elders and other dependent adults who ‘may be subjected to abuse, neglect, or abandonment’ Within the Act, two groups of persons who ordinarily assume responsibility for the ‘care and custody’ of the elderly are identified and defined: health practitioners and care custodians. A ‘health practitioner’ is defined in section 15610.37 as a ‘*physician and surgeon, psychiatrist, psychologist, dentist, ...*’ etc., who ‘treats an elder ... for any condition.’ ‘Care custodians,’ on the other hand, are administrators and employees of public and private institutions that provide ‘care or services for elders or dependent adults,’ including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults.” (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

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3117. Financial Abuse—“Undue Influence” Explained

“Undue influence” means excessive persuasion that overcomes another person’s free will and causes that person to do something or to not do something that causes an unfair result. In determining whether [name of defendant] exerted undue influence on [name of plaintiff], you must consider all of the following:

- a. **[Name of plaintiff]’s vulnerability. Factors to consider may include, but are not limited to, [incapacity/illness/disability/injury/age/education/impaired mental abilities/emotional distress/isolation/ [or] dependency], and whether [name of defendant] knew or should have known of [name of plaintiff]’s vulnerability.**
- b. **{Name of defendant}’s apparent authority. Factors to consider may include, but are not limited to, [name of defendant]’s position as a [fiduciary/family member/care provider/health care professional/legal professional/spiritual adviser/expert/ [or] [specify other position]].**
- c. **The actions or tactics that [name of defendant] used. Actions or tactics used may include, but are not limited to, all of the following:**

[(1)Controlling [name of plaintiff]’s necessities of life, medications, interactions with others, access to information, or sleep;]

[(2)Using affection, intimidation, or coercion;].

[(3)Initiating changes in personal or property rights, using haste or secrecy in making those changes, making changes at inappropriate times and places, and claiming expertise in making changes.]

- d. **The unfairness of the result. Factors to consider may include, but are not limited to, [the economic consequences to [name of plaintiff]/any change from [name of plaintiff]’s prior intent or course of conduct or dealing/the relationship between any value that [name of plaintiff] gave up to the value of any services or other consideration that [name of plaintiff] received/ [or] the appropriateness of the change in light of the length and nature of the relationship between [name of plaintiff] and [name of defendant]].**

Evidence of an unfair result, without more, is not enough to prove undue influence.

New June 2014

Directions for Use

Give this instruction with CACI No. 3100, *Financial Abuse—Essential Factual Elements*, if undue influence is alleged in element 3 of No. 3100. The instruction assumes that the person alleged to be exerting undue influence is a named defendant. Insert that person’s name for “[name of defendant]”

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throughout even if the person is not a named defendant. Select relevant evidence in each of the factors.

Sources and Authority

- Undue Influence for Elder or Dependent Adult Abuse: Welfare and Institutions Code section 15610.70

Secondary Sources

Draft–Not Approved by Judicial Council

3723. Substantial Deviation

If [an employee/a representative] combines his or her personal business with the employer’s business, then the employee’s conduct is within the scope of [employment/authorization] unless the [employee/representative] substantially deviates from the employer’s business.

Deviations that do not amount to abandoning the employer’s business, such as incidental personal acts, minor delays, or deviations from the most direct route, are reasonably expected and within the scope of employment.

[Acts that are necessary for [an employee/a representative]’s comfort, health, and convenience while at work are within the scope of employment.]

New September 2003; Revised June 2006, April 2008, June 2014

Directions for Use

This instruction ~~is closely related to~~ may be given with CACI No. 3720, *Scope of Employment*— ~~if the facts indicate that the employee has combined business and personal activities. In such a situation, the employee’s personal activities must constitute a “substantial deviation” from or “abandonment” of the employer’s business in order to be outside of the scope of employment. (See *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].) The words “reasonably expected” express foreseeability.~~

~~It focuses on when an act is not within the scope of employment.—This instruction may be given with CACI No. 3725, *Going-and-Coming Rule—Vehicle Use Exception*, but not with CACI No. 3724, *Going-and-Coming Rule —Business-Errend Exception*. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907–908 [162 Cal.Rptr.3d 280].)~~

Give the optional third paragraph if the employee was at the work site when the act giving rise to liability occurred, but was not directly involved in performing job duties at the time (for example, at lunch or on break). (See *Vogt v. Herron Construction, Inc.* (2011) 200 Cal.App.4th 643, 651 [132 Cal.Rptr.3d 683].)

Sources and Authority

- “[C]ases that have considered recovery against an employer for injuries occurring within the scope and during the period of employment have established a general rule of liability ‘with a few exceptions’ in instances where the employee has ‘substantially deviated from his duties for personal purposes.’ ” (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 218 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)
- “An exception [to employer liability] is made when the employee has substantially deviated from his duties for personal purposes at the time of the tortious act. While a minor deviation is foreseeable and will not excuse the employer from liability, a deviation from the employee’s duties that is ‘so material or substantial as to amount to an entire departure’ ’ from those duties will take the

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employee's conduct out of the scope of employment.” (Halliburton Energy Services, Inc. v. Department of Transportation (2013) 220 Cal.App.4th 87, 95 [162 Cal.Rptr.3d 752], internal citations omitted.)

- “While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law.” (Moradi, supra, 219 Cal.App.4th at p. 907.)
- “In some cases, the relationship between an employee’s work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment.” (*Mary M.*, supra, 54 Cal.3d at p. 213, internal citations omitted.)
- “The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer.” (*Alma W. v. Oakland Unified School Dist.* (1981) 123 Cal.App.3d 133, 139 [176 Cal.Rptr. 287], internal citation omitted.)
- “One traditional means of defining this foreseeability is seen in the distinction between minor ‘deviations’ and substantial ‘departures’ from the employer's business. The former are deemed foreseeable and remain within the scope of employment; the latter are unforeseeable and take the employee outside the scope of his employment.” (Moradi, supra, 219 Cal.App.4th at p. 901.)~~[D]eviations which do not amount to a turning aside completely from the employer’s business, so as to be inconsistent with its pursuit, are often reasonably expected In order to release an employer from liability, the deviation must be so material or substantial as to amount to an entire departure.” (DeMirjian v. Ideal Heating Corp. (1954) 129 Cal.App.2d 758, 766 [278 P.2d 114], internal citation omitted.)~~
- “ “[W]here the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly nor indirectly could he have been serving his employer.” ’ ” (*Farmers Ins. Group, supra, v. County of Santa Clara (1995)* 11 Cal.4th at p.992, 1004 [47 Cal.Rptr.2d 478, 906 P.2d 440].)
- “Generally, ‘[i]f the main purpose of [the employee's] activity is still the employer's business, it does not cease to be within the scope of the employment by reason of incidental personal acts, slight delays, or deflections from the most direct route.” (Halliburton Energy Services, Inc., supra, 220 Cal.App.4th at p. 98.)
- “Important factors in determining whether there has been a complete departure or merely a deviation are those of time and place. Thus, the fact that the employee is on the same route of return which he would use for both his employer's mission and his own is a factor tending to show a combination of missions. The amount of time consumed in the personal activity is likewise to be weighed. The nature of the digression is also to be considered. If the digression was in itself an inducement for [employee] to undertake the special errand or was connected with the performance of the errand, for example, as a reward, the jury would be entitled to weigh these facts in deciding whether there had been the

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complete departure from duty which is requisite to terminate course of employment.” (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 496–497 [48 Cal.Rptr. 765].)

- “[A]cts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment.” (*Vogt, supra, v. Herron Construction, Inc.* (2011) 200 Cal.App.4th at p.643, 651, 132 Cal.Rptr.3d 683.)
- “Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]’s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer’s business—they were not; and whether they were necessary for [employee]’s comfort, convenience, health, and welfare—they were.” (*Moradi, supra*, 219 Cal.App.4th at pp. 907–908.)
- “We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis—one call of less than one minute eight or nine minutes before an accident while traveling on a personal errand of several miles’ duration heading neither to nor from a worksite. When that happens, we find no respondeat superior as a matter of law.” (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1063 [74 Cal.Rptr.3d 776].)
- ~~“While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law.” (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 933 [237 Cal.Rptr. 718], internal citations omitted.)~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 178–180

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

Draft–Not Approved by Judicial Council

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

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

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §§ 100A.28, 100A.35 (Matthew Bender)

| 1 California Civil Practice: Torts § 3:8 (Thomson Reuters ~~West~~)

Draft–Not Approved by Judicial Council

3724. Going-and-Coming Rule—Business-Errend Exception

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

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

- a. The intent of the employee;**
- b. The nature, time and place of the employee's conduct;**
- c. The work the employee was hired to do;**
- d. The incidental acts the employer should reasonably have expected the employee to do;**
- e. The amount of freedom allowed the employee in performing his duties; and**
- f. The amount of time consumed in the personal activity;**
- g. [specify other factors, if any].**

New September 2003; Revised June 2014

Directions for Use

This instruction sets forth the business or special-errand exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment*.

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

Scope of employment ends once the the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907 [162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business errand exception, CACI No. 3723, *Substantial Deviation*, should not be given].)

Sources and Authority

Draft–Not Approved by Judicial Council

- “ ‘An offshoot of the doctrine of respondeat superior is the so-called “going and coming rule.” Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. ... This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. ... ’ ” (*Jeewarat, supra, v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427 at p., 435 [98 Cal.Rptr.3d 837].)
- ~~“ ‘A well-known exception to the going and coming rule arises where the use of the car gives some incidental benefit to the employer. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]’ This exception to the going and coming rule ... has been referred to as the ‘required vehicle’ exception. The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has ‘reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.’ ” (*Lobo v. Tameo* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718], original italics, internal citations omitted.)~~
- ~~“If the employer requires or reasonably relies upon the employee to make his personal vehicle available to use for the employer’s benefit and the employer derives a benefit from the availability of the vehicle, the fact that the employer only rarely makes use of the employee’s personal vehicle should not, in and of itself, defeat the plaintiff’s case.” (*Lobo, supra*, 182 Cal.App.4th at p. 303.)~~
- ~~“ ‘The special-errand exception to the going-and-coming rule is stated as follows: “If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons” ’ ” (*Moradi, supra*, 219 Cal.App.4th at p. 906.)~~
- ~~“When an employee is engaged in a ‘special errand’ or a ‘special mission’ for the employer it will negate the ‘going and coming rule.’ ... An employee “coming from his home or returning to it on a special errand either as part of his regular duties or at a specific order or request of his employer ... is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons.”’ The employer is ‘liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. ... ’ ” (*Jeewarat, supra*, 177 Cal.App.4th at p. 436, internal citations omitted.)~~
 - ~~“[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee’s conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. ... While the question of whether an employee has departed from his special errand is~~

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normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law.” (Moradi, supra, 219 Cal.App.4th at p. 907.)

- ~~One specific exception to the going and coming rule is when the employer compensates the employee for travel time to and from work. (See *Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)~~
- “Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand.” Some examples of the special-errand exception include: (1) where an employee goes on a business errand for his employer, leaving from his workplace and returning to his workplace; (2) where an employee is called to work to perform a special task for the employer at an irregular time; and (3) where the employer asks an employee to perform a special errand after the employee leaves work but before going home. (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)
- “Plaintiffs contend an employee’s attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case.” (*Jeewarat, supra*, 177 Cal.App.4th at p. 436.)
- “An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip.”~~The employee is still within the scope of employment after the errand is completed.~~ (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

Secondary Sources

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

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

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

21 California Forms of Pleading and Practice, Ch. 248, *Employer’s Liability for Employee’s Torts*, §§

Draft–Not Approved by Judicial Council

248.11, 248.16 (Matthew Bender)

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

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

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

Draft—Not Approved by Judicial Council

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But ~~If~~ if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer’s business, then the drive to and from work is within the scope of employment. The employer’s requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee’s vehicle provides some direct or incidental benefit to the employer. ~~There may be a benefit to the employer if~~ (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle’s use and expects the employee to make it available regularly. The employee’s agreement may be either express or implied.

New September 2003; Revised June 2014

Directions for Use

This instruction sets forth the required-vehicle exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer’s business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

Sources and Authority

- “ ‘An offshoot of the doctrine of respondeat superior is the so-called “going and coming rule.” Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. ... This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. ...’ ” (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

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- “A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.] This exception to the going and coming rule ... has been referred to as the ‘required-vehicle’ exception. The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has ‘reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.’ ” (*Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718], original italics, internal citations omitted.)
- “If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment.” (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932 [237 Cal.Rptr. 718], internal citations omitted.)
- “To be sure, ordinary commuting is beyond the scope of employment Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an “essential instrumentality” for the performance of the employer’s work. ... When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.’ ” (*Moradi, supra*, 219 Cal.App.4th at p. 899.)
- “When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to forswear the use of carpooling, walking, public transportation, or just being dropped off at work.” (*Moradi supra*, 219 Cal.App.4th at p. 899.)
- “The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business.” (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)
- “Where the incidental benefit exception applies, the employee’s commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer’s business or is engaged in a purely personal activity at the time of the tortious injury.” (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)
- “Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception

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applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]’s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]’ s comfort, convenience, health, and welfare—they were.” (Moradi, supra, 219 Cal.App.4th at pp. 907–908.)

- While workers’ compensation cases have recognized an exception to the going and coming rule when the employer defrays travel expenses, this exception does not apply to the respondeat superior doctrine. Payment of a travel allowance, in and of itself is insufficient to impose liability on the employer. “[T]he employee's trip was outside the scope of his employment despite the payment of the travel allowance.” (Caldwell v. A.R.B., Inc. (1986) 176 Cal.App.3d 1028, 1041 [222 Cal.Rptr. 494].)
- Respondeat superior does apply where the employer pays wages for travel time. “[A]lthough the employment relationship is ordinarily suspended when the employee is going or coming, ‘the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of “going and coming,” Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident to the employment. [Citations.] It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work.’ ” (Hinman v. Westinghouse Electric Co. (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)
- “One exception to the going and coming rule has been recognized when the commute involves ‘ “an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.” [Citation.]’ When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle.” (Halliburton Energy Services, Inc., supra, 220 Cal.App.4th at p. 96, internal citation omitted.)
- The fact that an employee is on call does not automatically put their actions in the scope of employment. “Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident.” (Elder v. Rice (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749]).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 184

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

Draft—Not Approved by Judicial Council

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

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

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

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

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

Draft–Not Approved by Judicial Council

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

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

1. That *[[name of defendant]/ [or] a member of [name of defendant]'s household]* was a victim of *[domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult];*
2. That the act[s] of *[domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] [was/were] documented in a [court order/law enforcement report];*
3. That the person who committed the act[s] of *[domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] is not also a tenant of the same living unit as *[name of defendant]; and**
4. That *[name of plaintiff]* filed this lawsuit because of the act[s] of *[domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult].*

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

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

[or]

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

and

2. ***[Name of plaintiff]* previously gave at least three days' notice to *[name of defendant]* to correct this situation.**

New December 2011; Revised June 2013, June 2014

Draft–Not Approved by Judicial Council

Directions for Use

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

All protected statuses are defined by statute. (See Civ.Code, § 1708.7 [stalking], Fam. Code, §§ 1219, 6211 [sexual assault and domestic violence], Pen. Code, § 236.1 [human trafficking], Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider an additional instruction defining the protected status to make the meaning clear to the jury.

Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord’s response, this group has been expressed as “other persons with a right to be on the property.” If more specificity is required, use the appropriate words from the statute.

The tenant must prove that the perpetrator is not a tenant of the same “dwelling unit” (see Code Civ. Proc., § 1161.3(a)(2)), which is expressed in element 3 as “living unit.” Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. "The term “dwelling unit” is not defined. In a multi-unit building, the policies underlying the statute would support defining “dwelling unit” to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.

Sources and Authority

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

~~(a) Except as provided in subdivision (b), a landlord shall not terminate a tenancy or fail to renew a tenancy based upon an act or acts against a tenant or a tenant’s household member that constitute domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 1219, stalking as defined in Section 1708.7 of the Civil Code or Section 646.9 of the Penal Code, human trafficking as defined by 236.1 of the Penal Code, or abuse of an elder or a dependent adult as defined in Section 15610.07 of the Welfare and Institutions Code, if both of the following apply:~~

~~(1) The act or acts of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or a dependent adult have been documented by one of the following:~~

~~(A) A temporary restraining order, emergency protective order, or protective order~~

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~~lawfully issued within the last 180 days pursuant to Section 527.6, Part 3 (commencing with Section 6240), Part 4 (commencing with Section 6300), or Part 5 (commencing with Section 6400) of Division 10 of the Family Code, Section 136.2 of the Penal Code, or Section 213.5 or 15657.03 of the Welfare and Institutions Code that protects the tenant or household member from domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or a dependent adult.~~

~~(B) A copy of a written report, written within the last 180 days, by a peace officer employed by a state or local law enforcement agency acting in his or her official capacity, stating that the tenant or household member has filed a report alleging that he or she or the household member is a victim of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult.~~

~~(2) The person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult is not a tenant of the same dwelling unit as the tenant or household member.~~

~~(b) A landlord may terminate or decline to renew a tenancy after the tenant has availed himself or herself of the protections afforded by subdivision (a) if both of the following apply:~~

~~(1) Either of the following:~~

~~(A) The tenant allows the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult to visit the property.~~

~~(B) The landlord reasonably believes that the presence of the person against whom the protection order has been issued or who was named in the police report of the act or acts of domestic violence, sexual assault, stalking, human trafficking, or abuse of an elder or dependent adult poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to Section 1927 of the Civil Code.~~

~~(2) The landlord previously gave at least three days' notice to the tenant to correct a violation of paragraph (1).~~

~~(c) Notwithstanding any provision in the lease to the contrary, the landlord shall not be liable to any other tenants for any action that arises due to the landlord's compliance with this section.~~

~~(d) For the purposes of this section, "tenant" means tenant, subtenant, lessee, or sublessee.~~

~~(e) The Judicial Council shall, on or before July 1, 2014, develop a new form or revise an existing form that may be used by a party to assert in the responsive pleading the grounds set forth in this~~

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~~section as an affirmative defense to an unlawful detainer action.~~

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 683A

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

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

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

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

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

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

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

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

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

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5002. Evidence

You must decide what the facts are in this case only from the evidence you have seen or heard during the trial, including any exhibits that I admit into evidence. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you saw or heard when court was not in session, even something done or said by one of the parties, attorneys, or witnesses.

What the attorneys say during the trial is not evidence. In their opening statements and closing arguments, the attorneys talk to you about the law and the evidence. What the lawyers say may help you understand the law and the evidence, but their statements and arguments are not evidence.

The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should not think that something is true just because an attorney's question suggested that it was true. [However, the attorneys for both sides have agreed that certain facts are true. This agreement is called a stipulation. No other proof is needed and you must accept those facts as true in this trial.]

Each side had the right to object to evidence offered by the other side. If I sustained an objection to a question, **you must ignore the question and do not guess as to why I sustained the objection**. If the witness did not answer, you must not guess what he or she might have said ~~or why I sustained the objection~~. If the witness already answered, you must ignore the answer.

[During the trial I granted a motion to strike testimony that you heard. You must totally disregard that testimony. You must treat it as though it did not exist.]

New September 2003; Revised April 2004, February 2007, December 2012, June 2014

Directions for Use

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law. For a similar instruction to be given before trial, see CACI No. 106, *Evidence*.

Include the bracketed language in the third paragraph if the parties have entered into any stipulations of fact.

Read the last bracketed paragraph if a motion to strike testimony was granted during the trial.

Sources and Authority

- **“Evidence Defined:** Evidence Code section 140 ~~defines “evidence” as “testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence~~

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~~or nonexistence of a fact.”~~

- Jury to Decide Questions of Fact: Evidence Code section 312 ~~provides:~~
~~Except as otherwise provided by law, where the trial is by jury:~~
 - ~~(a) All questions of fact are to be decided by the jury.~~
 - ~~(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.~~
- Miscarriage of Justice: Evidence Code section 353 ~~provides:~~
~~A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed by reason of the erroneous admission of evidence unless:~~
 - ~~(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and~~
 - ~~(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.~~
- “Unless the trial court, in its discretion, permits a party to withdraw from a stipulation, it is conclusive upon the parties, and the truth of the facts contained therein cannot ~~A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not~~ be contradicted.” (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].)
- ~~Courts have held that~~ “[A]ttempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- ~~Courts have stated that~~ “[~~t~~]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 22 et seq.

7 Witkin, California Procedure (5th ed. 2008) Trial, § 272

Cotchett, California Courtroom Evidence, § 2.09 (Matthew Bender)

Draft—Not Approved by Judicial Council

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.61 (Matthew Bender)

5021. Electronic Evidence

Some exhibits will be provided to you electronically. The equipment necessary to view these exhibits will be available to you in the jury room. Do not use the equipment for any purpose other than to view the electronic exhibits. Do not use it to access the Internet or any other source of information. Do not use it for any personal reason whatsoever, including but not limited to reviewing email, entertainment, or engaging in social media.

If you need technical assistance or additional equipment or supplies, you may make a request by sending me a note through the [clerk/bailiff/court attendant]. Should it become necessary for a technician to enter the jury room, stop your deliberations until the technician has left. Do not discuss with him or her, or with each other, any exhibit or any aspect of the case while the technician is present. Do not say anything to the technician other than to (1) describe the technical problem(s) and/or to (2) request instruction on how to operate the equipment.

[You may request a paper copy of an exhibit received in evidence. One will be supplied, if possible.]

New June 2014

Directions for Use

Give this instruction if there are exhibits that have been introduced only in electronic format. Modify or expand the instruction as necessary to set forth the particular process for the viewing of electronic exhibits in the particular courtroom. Give the last paragraph if a paper copy will be available.

Secondary Sources