Previous Council Action

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

This is the 24th release of *CACI.* The council approved *CACI* release 23 at its December 2013 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 36 instructions and verdict forms: 325, VF-304, 433, VF-402, 532, 533, 535, 552, 1620, 1621, 1622, 1623, VF-1603, VF-1604, VF-1605, VF-1606, 1723, 1901, VF-1900, VF-1901, VF-1902, VF-1903, 2303, 2720, 2721, 2730, 3041, VF-3022, 3100, 3117, 3723, 3724, 3725, 4328, 5002, and 5021. Of these, 32 are proposed to be revised, 3 are newly drafted, and 1 is proposed to be temporarily revoked (CACI No. 2730).

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 83 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

New instructions

The committee proposes adding two new instructions and one new verdict form. One new instruction, CACI No. 3117, *Financial Abuse—"Undue Influence" Explained,* is based on new legislation. The other new instruction, CACI No. 5021, *Electronic Evidence,* and the new verdict

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

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

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

form, CACI No. VF-304, *Breach of Implied Covenant of Good Faith and Fair Dealing,* were requested by CACI users.

"Undue influence" is now specifically defined under the Elder Abuse and Dependent Adult Prevention Act.[3] Previously, the Directions for Use to CACI No. 3100, *Financial Abuse—Essential Factual Elements,* suggested that the Contracts series instruction CACI No. 334, *Affirmative Defense—Undue Influence,* might be used to define undue influence for elder abuse. The committee now proposes new CACI No. 3117, which presents the standard of the new statute.

A retired appellate justice suggested that CACI should include an instruction on electronic evidence, addressing the process by which a jury can review it during deliberations. She directed the committee to the federal Ninth Circuit instruction on this subject. The committee agreed that such an instruction would be useful, but found the Ninth Circuit instruction to be too specific to the procedure in the circuit's district courts. Instead, the committee proposes new CACI No. 5021, which provides general guidance, but not specific procedures.

An assigned judge requested guidance on the question of the respective damages recoverable for breach of express contract provisions and for breach of the implied covenant of good faith and fair dealing. She also requested that a verdict form be added to include questions on breach of the implied covenant. In response, the committee expanded the Directions for Use to CACI No. 325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements,* to address the damages recoverable in a breach of contract action involving both claims for breach of express terms and breach of the implied covenant. New verdict form CACI No. VF-304 is also proposed as the judge requested.

Revoked instruction

The committee proposes temporarily revoking CACI No. 2730, *Whistleblower Protection—Essential Factual Elements,* in the Labor Code Actions series. Labor Code section 1102.5, on which the instruction is based, was amended by the Legislature.[4] The current instruction is no longer complete because the amended statute contains additional matters that the jury must consider in applying it. The committee intends to restore the instruction in the next release, revising it in conformity with the amended statute.

Negligent Infliction of Emotional Distress (CACI Nos. 1620–1623, VF-1603–VF-1606)

Plaintiffs continue to plead a cause of action for "negligent infliction of emotional distress" to the frustration of the trial courts because there is no such thing. The doctrine that has come to bear this name is one that, under limited circumstances, allows recovery of emotional distress

[3] See Welf. & Inst. Code, § 15610.70, added by Assem. Bill 140 (Stats. 2013, ch. 668).

[4] See Sen. Bill 666 (Stats. 2013, ch. 577), § 5; Assem. Bill 263 (Stats. 2013, ch. 732), § 6; and Sen. Bill 496 (Stats. 2013, ch. 781), § 4.1.

damages on a negligence cause of action even though there has been no physical injury.[5] Some trial judges who are members of the committee thought that CACI should entirely eliminate use of the phrase "negligent infliction of emotional distress" in hopes of reducing the instances of this pleading error. Other members thought that the problem could be addressed by more directly explaining the doctrine in the Directions for Use without the need to abandon the term entirely, because it has become a convenient label for a fairly complex rule of law.

After considerable discussion, in the end the abolitionists garnered the majority. Therefore, the committee now proposes changing the titles of all CACI instructions and verdict forms that previously included "negligent infliction of emotional distress."[6] The new term selected is "Negligence—Recovery of Damages for Emotional Distress—No Physical Injury." Although perhaps a bit lengthy, it emphasizes the crucial point: that the cause of action is simply one for negligence, and that it is a special rule for recoverable damages. The committee also expanded the Directions for Use to emphasize that there is no cause of action for "negligent infliction of emotional distress."[7]

Fraud: Concealment; materiality/importance; reasonable reliance (CACI Nos. 1901, VF-1900, VF-1901, VF-1902, VF-1903)

In the previous release, the advisory committee revised several instructions in the Fraud or Deceit series to present the question of the materiality (or importance) in a way that is more in line with case authority. The instructions were inconsistent in the way that materiality was presented.[8] The committee concluded that materiality was actually an aspect of justifiable reliance and should be incorporated into CACI No. 1908, *Reasonable Reliance.*[9]

Some members, however, were not ready to make this change with regard to CACI No. 1901, *Concealment*. They were uncomfortable with the concept of reliance on an omission. Therefore, revisions to CACI No. 1901 were deferred for further research and consideration.

But in fact, this exact point was addressed by the California Supreme Court in *Mirkin v. Wasserman,*[10] in which the court held:

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[5] See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928.

[6] See CACI Nos. 1620, 1621, 1622, 1623, VF-1603, VF-1604, VF-1605, VF-1606.

[7] The Directions for Use now state: "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."

[8] See the committee's report to the Judicial Council for the December 2013 meeting.

[9] See *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977.

[10] *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082.

[I]t 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.[11]

Therefore, the committee now proposes conforming CACI No. 1901 to the fraud instructions revised in the previous release. The reasonable-reliance element has been recast in the words of *Mirkin*. Instead of "reasonably relied on [the defendant's] deception," the proposed revision would state that "had the omitted information been disclosed, [the plaintiff] would have behaved differently." All fraud verdict forms have also been revised to conform to the revisions made to the instructions in the previous release.

A commentator noted that the court in *Mirkin* omitted the word "reasonable" from its elucidation of the reliance element. The commentator suggested that authority for a "reasonable" reliance requirement be included, or if none could be found, authority for reasonable reliance in fraud causes of action generally be added. The committee could find no direct authority on point and has taken this second course. The question of whether the "different behavior" in a concealment case has to be reasonable apparently has not been addressed in any published opinion. Nevertheless, the committee believes that reasonableness is required. The general rule for fraud is that there must be reasonable reliance.[12] To dispense with this requirement in a concealment case should require direct authority on point. In the absence of this authority, the committee presumes that reasonable reliance is required per the general rule for fraud.

Vicarious Responsibility: Going and coming rule (CACI Nos. 3723, 3724, 3725)

Two recent cases addressed the question of scope of employment during commute time under the so-called "going and coming" rule of nonliability and its exceptions.[13] Although these cases did not suggest any serious errors or omissions in any CACI instructions, they led the committee to conclude that several instructions would benefit from some enhancements. The committee now proposes (1) expanded Directions for Use to CACI No. 3723, *Substantial Deviation*; (2) a title change, additional instruction text, and adding Directions for Use to CACI No. 3724, to be renamed *Going-and-Coming Rule—Business Errand Exception*; and (3) a title change, additional instructional text, and adding Directions for Use to CACI No. 3725, to be renamed *Going-and-Coming Rule—Vehicle-Use Exception.*

CACI No. 3723 addresses the rule that vicarious liability attaches for combined business and personal activities until the employee has "substantially deviated from" or "abandoned" the

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[11] *Id.* at p. 1093.

[12] *Hackethal v. Nat'l. Casualty Co.* (1987) 189 Cal.App.3d 1102, 1111 ["The elements of fraud, which give rise to the tort action for deceit, are (1) misrepresentation (false representation, *concealment* or non-disclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, i.e., to induce reliance; (4) *justifiable reliance;* and (5) resulting damage," emphasis added].

[13] See *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87; *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886.

employer's business. Although the rule most often comes into play in driving cases, it is not so limited.[14] The Directions for Use now provide greater assistance on when the instruction should be used.

CACI No. 3724, previously entitled *Going-and-Coming Rule,* actually sets forth one of the exceptions to the rule's general nonliability for commute-time driving torts: when the employee may be considered on a "business errand." The title has been expanded to clarify that the instruction addresses the exception, not the general rule. The text has been expanded to include special abandonment rules that apply to business errands. Directions for Use have been added (currently there are none) to explain the use of the instruction.

CACI No. 3725 addresses another exception to the going-and-coming rule: when the employer requires or expects the employee to have a car available for business purposes. The title has been expanded to clarify that the "exception" is to the going-and-coming rule. The instruction text has been expanded to present more explanation of when the use of a car is a benefit to the employer. And, again, Directions for Use have been added to explain the use of the instruction.

Elimination of statutory language from Sources and Authority

In the process of developing Judicial Council pattern jury instructions to replace BAJI and CALJIC, the civil instructions (CACI) were completed first (2003). The criminal instructions (CALCRIM) followed in 2005. The CACI task force decided that the Sources and Authority should set forth the complete text of statutes that were relevant to the instructions.[15] The CALCRIM task force made a different decision; in CALCRIM, only a brief description of the source and a citation are included, not actual language.

The inclusion of statutory language in CACI has had some unanticipated consequences. All legislative enactments need to be reviewed after each legislative session to see if there have been amendments revising language for the many statutes quoted in CACI. And because the Governor's October deadline for signing or vetoing legislation falls very near the date by which CACI content must be final for the next year's full edition, only the most urgent of changes get included in the edition. Very few changes to statutory language have any effect on the actual instructions, much less an urgent one. Therefore, many minor statutory revisions are left to the midyear supplement. For 2013, 936 instances of legislation amending statutes were cited in CACI. These amendments affected 42 instructions.[16] If all of these changes were to be made in

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[14] See, e.g., *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992 [sexual harassment not within scope of employment].

[15] Regulations and court rules are also sometimes quoted in their entirety. Further references below to statutory language also apply to regulations and rules.

[16] Also, the regulations under the Fair Employment and Housing Act were renumbered. This change affected another 15 instructions.

this supplement release, an additional 214 pages would be included. None of these pages would present information that would have any actual effect on any instruction.[17]

The committee voted not to include these 214 pages in this release. Instead, it proposes removing verbatim quotations of statutory language from CACI's Sources and Authority, conforming to the CALCRIM format. The instructions appended to this report reflect this proposal, replacing statutory language with a simple title and citation. The committee believes that any benefit derived from including statutory language does not justify the amount of work required to keep statutory language up to date and the amount of pages that must be replaced for nonsubstantive changes.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 20 to February 28, 2014. Comments were received from only 10 different commentators. No particular instruction or issue garnered any inordinate number of comments or attention. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 9–29.

In posting this release for public comment, the committee specifically requested comments on its proposal to remove verbatim quotations of statutory language from CACI's Sources and Authority. Only two comments were received, both opposing the change. The commentators noted that including the statutory language is of value to those using CACI in print because the statutory language is at hand, and another source such as a code book may not be needed.

The committee recognizes that this is a valid concern. However, it again voted unanimously to continue to recommend removal of statutory language. On a cost-benefit analysis, the committee believes that the benefits do not justify the burdens. Further, the elimination of statutory language throughout CACI will significantly reduce the number of pages in the print edition.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. The proposed new, revised, and revoked instructions are presented to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a midyear supplement to the 2014

[17] One instruction would be pulled into the supplement simply to change a *which* to a *that*.

edition and pay royalties to the Administrative Office of the Courts (AOC). Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. Charts of comments, at pages 9–29
2. Full text of new and revised *CACI* instructions, at pages 30–148

Instruction	Commentator	Comment	Committee Response
Removal of Statutory Language From Sources and Authority	Orange County Bar Association, by Thomas Bienert, Jr., President	The advisory committee proposes removing from the civil jury instructions (CACI) statutory language that is often set forth verbatim under the various Sources and Authority sections included with the instructions. The reason for the proposed change is principally to promote efficiency by eliminating the need to revise many pages in the CACI supplements and updates when the revisions would be made solely because of changes to statutory language. The committee in requesting comments indicates the change would shorten the mid-year supplement by over 200 pages, streamline the publication process, and significantly reduce the size of future full editions. The committee further notes that "the Judicial Council criminal jury instructions (CALCRIM) do not include statutory language." While the reasons for the proposed change are certainly laudable, we believe the benefits of removing the statutory language are outweighed by the advantages of maintaining it. Continued inclusion of the verbatim statutory language allows for efficient access to a consolidated "one-stop-shop," rather than requiring one to rely on multiple reference books in situations in which reference to multiple sources is often impractical, uneconomical, and inefficient (e.g., in chambers conference with judge and counsel).	The committee recognizes the legitimacy of the concerns of print users as expressed in the comment. Nevertheless, the committee voted nearly unanimously to proceed with removing statutory language from CACI. Statutes in CACI and CALCRIM online and in document assembly products are linked to a data base where they can be accessed with a click or two. The considerable time required to review all legislation and capture all statutory language changes weighs strongly in favor of removal. In this release, instructions would appear in the supplement sometimes for a matter as insignificant as changing a "which" to a "that." Users expect that instructions appearing in the supplement are there for some important substantive reason. Including instructions solely to update statutory language that has no effect on the content of or law supporting the instruction both confuses users and adds many pages to the releases.
		Whether the verbatim statutory language is removed or continues to be included, if hyperlinks are included in the Sources and Authority section as proposed, we recommend they include not only the hyper-links to publishers' websites but also http://leginfo.legislature.ca.gov/faces/codes.xhtml, the "California Law" section of that website	The creation of hyperlinks to statutory sources is done exclusively by publishers. The committee has no authority to direct the creation of hyperlinks.

Instruction	Commentator	Comment	Committee Response
		maintained by the State of California as its "Official California Legislative Information." This site is the official law site and is accessible to a broader set of people than the subscription services.	
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee believes that continuing to set forth statutory language verbatim in the CACI Sources and Authority would be preferable to providing only a brief description with a link. We believe that the convenience to the court and counsel of having the statutory language in print together with the instructions while discussing the instructions is substantial and justifies the effort required to revise the affected pages when statutes are amended. We therefore oppose the proposal to remove the statutory language.	See response above to comment of the Orange County Bar Association
325, *Breach of Implied Covenant of Good Faith and Fair Dealing—Essential Factual Elements*	California Chamber of Commerce, by Jennifer Barrera, Policy Advocate	We are concerned with proposed comments under "Directions for Use" with regard to the fact that "element 5 may produce damages that are different from those claimed for breach of the express contract provisions." While we agree that a breach of implied covenant of good faith and fair dealing may be based upon different facts, the damages are still limited to the contract, with minor exceptions for insurance related contracts. (See *Foley v. Interactive Data Corporation* (1988) 47 Cal.3d 654, 683−696 [affirming that contractual damages are the sole remedy for breach of implied covenant of good faith and fair dealing in employment contracts]; *Sutherland v. Barclays American Mortgage Corporation* (1997) 53 Cal.App.4th 299, 314 [specifying that for noninsurance contracts, breach of implied covenant of good faith and fair dealing is limited to contractual remedies, unless there is evidence of an independent duty arising in tort law].).	The committee agrees with the comment and has added the word "contract" to modify damages in the Directions for Use.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	Element 2 of this instruction includes two alternatives, only the second of which is optional. The same two alternatives appear in the corresponding verdict form (VF-304), but in the verdict form both alternatives are optional. We believe that element 2 in its entirety should be bracketed and optional, as in the verdict form. The verdict form and the instruction on which it is based should be consistent as to which elements and which parts of each element are optional. The Directions for Use of the verdict form explain the circumstances in which optional question 2 should be given. We believe that similar language should be added to the Directions for Use for this instruction explaining when to give optional element 2	All of element 2 should be optional as shown in the verdict form. The omission of an open bracket was inadvertent and has been fixed.
		The committee believes that the language "a mere contract breach" in the first sentence of the new second paragraph of the Directions for Use, which appears in *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, refers to a breach of an express contract provision. The second sentence in the same paragraph in fact refers to "breach of the express contract provisions." We would replace "a mere contract breach" in the first sentence with "a breach of an express contract provision" for greater clarity, as shown below. A breach of the implied covenant is a breach of contract (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885), so "a mere contract breach" is not as clear as it could be.	The words "mere contract breach" comes directly from *Careau*. The committee prefers to conform to the case language.
		Change "rests" to "rested" in the parenthetical description of *Digerati* in the second sentence of the same paragraph. The point of that opinion was not	The committee believes that the holding of *Digerati* is that for there to be separate claims for breach of contract and breach of the implied

Instruction	Commentator	Comment	Committee Response
		that the gravamen of a claim for breach of the implied covenant necessarily differs from that of a claim for breach of an express contract provision, but that the gravamen of the two claims in that case differed.	covenant, there must be different "gravamen." This is a general principle not limited to the facts of *Digerati*.
VF-304, *Breach of Implied Covenant of Good Faith and Fair Dealing*	Orange County Bar Association, by Thomas Bienert, Jr., President	VF-304 is a new verdict form. As proposed, it is confusing in that Question 2 asks if plaintiff did all, or substantially all, of the significant things the contract required plaintiff to do, or was excused from doing those things. If the answer is "yes", the jury goes on to the remaining questions, including Question 4, which asks if the defendant "unfairly" interfered with plaintiff's right to receive the benefits of the contract. However, if the answer to Question 2 is "no", then the jury just signs and returns the verdict form -- i.e. a defense verdict. This seems to eliminate the possibility that the reason the plaintiff did not perform was in fact the interference by the defendant, which the jury doesn't get to until Question 4. One could construe that the "unfair interference" by the defendant would be the basis for "excused performance" under Question 2, but it would be clearer if the verdict form included the "unfair interference" based on the covenant of good faith and fair dealing as one possible "excuse" for plaintiff's nonperformance.	The committee agrees with the issue raised in the comment. The Directions for Use have been revised to alert the user to omit question 2 if the plaintiff alleges that his or her nonperformance was caused by the defendant's bad faith.
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee believes that question 4 is essential and should not be bracketed as optional. The Directions for Use do not state that question 4 is optional. The brackets around question 4 appear to be unintended and should be deleted.	This was an error in the file posted for the Invitation to Comment. It has now been fixed.
		It seems that the bracketed words "[to both options]" in the directions below question 4 do not belong, because there are no options in question 4, and should be deleted.	This is also an error that has now been fixed

Instruction	Commentator	Comment	Committee Response
433, *Affirmative Defense—Causation: Intentional Tort/Criminal Act as Superseding Cause*	Orange County Bar Association, by Thomas Bienert, Jr., President	The first element should be identified specifically as ("Optional: 1 ...") because it clarifies that this issue may not be in controversy.	The Directions for Use make it clear that the element is optional and why.
		The underlining for the substance of the second element should be removed as no change was made here except for the numbering.	The commentator is correct that no change was made to the text..
		The various changes to the Sources and Authority must be underlined or lined through to show all changes.	There are no changes to the Sources and Authority other than to fix an errant quotation mark from double to single.
		Similar changes and citations to the 2013 case of *Collins vs. Navistar, Inc.* (2013) 214 Cal.App. 4th 1486 should be added to CACI Nos. 411, 432, and 1207B, especially since the *Collins* case was a strict liability products case apparently made applicable to negligence cases in general;	The committee does not believe that *Collins* is particularly relevant to these other instructions.
		The *Collins* case specifically disapproved of CACI 433 as improperly placing a heightened standard of foreseeability in favor of defendants in these contexts.	*Collins* did not disapprove CACI No. 433. It held that 433 should not have been given in that products liability case.
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The proposed revision to element 1 requires a description of the alleged act. But describing the alleged act is likely to be a contentious issue, so requiring such a description may cause more problems than it solves. We would prefer to refer to the alleged act as an "[intentional/criminal]" act or conduct, as in the current instruction. Moreover, the proposed revision also moves element 1 further from what we believe the core of this element should be, which is whether a third party committed an intentional or criminal act. The proposed revision seems to omit this requirement.	The committee has made the proposed revision to element 1. The nature of the act might require a narrative rather than a few words.
		We suggest adding language to the Directions for Use stating that the parties can modify the instruction by describing the alleged act more particularly if desired.	The committee agrees and has expanded the Directions for Use as proposed.

Instruction	Commentator	Comment	Committee Response
		This instruction does not state that the act of a third party must have been a cause of injury. We suggest adding language to the Directions for Use stating that if this if the parties dispute whether the third party act was a cause of injury, the instruction should be modified to state this requirement.	This instruction is an affirmative defense that would negate the plaintiff's causation element if proved.
VF-402, *Negligence—Fault of Plaintiff and Others at Issue*	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee believes that "as to any defendant [or person] in." is not familiar phrasing for most jurors and may give them pause. We prefer the current language "in any part of."	The committee believes that the reference to "part" is confusing as the questions don't have identifiable "parts." However, "as to" has been replaced by "for."
		The committee believes that asking the jury repeatedly to jump forward to question 8 to fill in zeros and then back to the prior questions complicates the verdict form and the jurors' task unnecessarily. We would eliminate this language throughout the verdict form and instead add language to question 8 to clarify what numbers to put in the list. This change also makes it unnecessary to say anything after questions 5 and 7 other than to answer the next question, so we would make these changes as well.	The committee believes that the commentator's proposal would simply invert the order of the "jumping" from forward to backward. One would get to question 8 without jumping, but then would have to look back to questions 2, 5, and 7. The change has not been made.
		If the jury answers no for any defendant in question 1, the jury will not answer question 2 for that defendant. So the condition stated after question 2 "If you answered no as to all defendants in question 2" will not be satisfied. The same is true with respect to similar language in question 7. The jury will answer question 7 only for those defendants for whom the answer was yes in question 6. We would modify the quoted language in questions 2 and 7, and in question 6 (for consistency) to avoid this problem.	The committee sees that the commentator is correct as to question 2. However, the committee does not see a problem in questions 1, 6, or 7. All defendants are to be considered at question 1. If none are negligent, then it is correct to say "no as to all." The same is true for question 6 for nonparties. Question 7 does not tell the jury what to do if no nonparties are negligent; question 8 still must be answered. Therefore, it does not contain the same error as question 2.

Instruction	Commentator	Comment	Committee Response
		We would insert "skip question 5 and" before "answer question 6" after question 4.	The committee agrees and has made this addition.
		We would retain rather than delete the language "If superseding cause is an issue, insert a question on that issue after Question 5" in the Directions for Use. Particularly in light of the fact that CACI includes instructions on superseding cause, we would consider it appropriate to modify this verdict form to cover that issue and believe that this language is helpful.	CACI contains instructions on many other tort doctrines that might come into play in a negligence case. This verdict form focuses on the basic process of collecting the jury's decisions on the negligence, of the defendant(s), the plaintiff(s), and other nonparties. There is no reason to suggest that just one of many other instructions that might also be needed.
		The result of our proposed changes is a significantly shorter verdict form with fewer directions and no need for the jury to jump forward to question 8 and then back again. [CACI Committee note: The commentator has included both a clean version and a tracked version of how the verdict form would read if all of its changes were to be accepted.]	The verdict form would be slightly (rather than "significantly") shorter if the "jump around" revisions were to be made. The other proposed changes would either have no effect on or actually lengthen the form.
532, *Informed Consent—Definition*; 533, *Failure to Obtain Informed Consent—Essential Factual Elements*; 535, *Risks of Nontreatment—Essential Factual Elements*	Megan Braswell, member of public	I am commenting on the proposal involving the jury instructions on civil suits for medical malpractice consent issues. Wow, if this comment is getting read, then I would like to shed light on a case that prompted this need for change. Absolutely identical. Please contact me, as I am able to attach 2 different reports that I was presented from the same doctor, and it contains in it all and everything that this proposal encompasses. Very scary.	It is not clear how this comment is related to the proposal that was posted for comment. The committee did not request reports described in the comment.
	California Judges Association, by Lexi Howard, Legislative Director	There are inconsistencies regarding the burdens to explain and inform in CACI Nos. 532, 533, and 535. Although consistency is the essential point, we recommend that these instructions use identical language throughout by using the qualifying adverb "adequately" wherever the instructions use "explain" and "inform" or variations thereof. If these inconsistencies are not resolved, then we	For CACI No. 532: "adequately" has been added to the introductory paragraph. Nos. 533 and 535 are parallel. Each has an element 2 that speaks to what the medical professional did not do. There is no adverb in element 2. Then element 3 speaks to what s/he should have done. Both elements 3 include

Instruction	Commentator	Comment	Committee Response
		would oppose the modified instructions.	"adequately." The committee does not believe that "adequately" needs to also be used in elements 2.
	Hon. Kirk H. Nakamura, Judge of the Superior Court, Orange County	Using the word "adequate" without a reference (as CACI 533 and 535 do) is misleading. In order to understand what "adequately informed" means in CACI 533 and 535 one must refer to the definition of "informed consent" in CACI 532. CACI 532 defines "informed consent" as "as much information as [he/she] needs to make an informed decision." This is consistent with *Cobbs* (*Cobbs v. Grant* (1972) 8 Cal.3d 229), but I think it creates confusion. I believe that element 3 in both CACI 533 and 535 should have the language: "if [he/she] had been given as much information as [he/she] needed to make an informed decision." This creates consistency throughout all these jury instructions and does not require the jury to refer back to CACI 532 in order to determine what the misleading word "adequate" or "adequately" means.	CACI Nos. 532 and 533 are to be given together; the Directions for Use to 533 say to also give 532. CACI Nos. 534 and 535 are to be given together; the Directions for Use to 535 say to also give 534. Both Nos. 532 and 534 include the "as much information as needed" language. The committee sees no need to repeat it in 533 and 535.
Negligent Infliction of Emotional Distress instructions: 1620, 1621, 1622, 1623, VF-1605, VF-1606	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions, but notes that the cross-references to the other CACI instructions in the Directions for Use do not accurately state the revised titles of those instructions and should be corrected.	These errors were previously noted and fixed.
1623, *Negligence—Recovery of Damages for Emotional*	State Bar of California, Litigation Section, Jury	The Sources and Authority cite no authority for element 4, which states that reliable medical or scientific opinion confirms that the plaintiff's risk of developing the disease was significantly increased	The element is supported by *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997, which is included in the Sources and Authority to CACI No. 1622, *Negligence—Recovery of*

Instruction	Commentator	Comment	Committee Response
Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements	Instructions Committee; by Reuben A. Ginsberg, Chair	and is a significant risk. We believe that authority should be cited for this point.	*Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*. The committee has added this excerpt to 1623 also.
1723, *Common Interest Privilege—Malice*	California Employment Lawyers Association, by David M. deRubertis	CELA commends the proposed change that would establish a disjunctive test for malice permitting malice to be shown by proof either of "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person" (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203-1204) or a "reckless disregard of rights" (*McGrory v. Applied Signal Technologies* (2013) 212 Cal.App.4th 1510, 1540. Treating these two ways of establishing malice as separate and independent methods of proof (rather than linking them together as the previous instruction did) is consistent with defamation law and more accurately states the law.Thus, CELA fully supports this proposed change.	The committee notes the commentator's support for the revisions.
		The instruction's use of the phrase "hatred or ill will" is incomplete without explaining that the prohibited "state of mind arising from hatred or ill will" is shown or evidenced by "a willingness to vex, annoy or injure." Defining malice by use of the phrase "hatred or ill will" without including the "willingness to vex, annoy or injure" language inadvertently distorts the actual test and, in many employment cases, the distortion is outcome-determinative. There are many situations- particularly, in the employment context-	To the extent that the commentator is arguing that "vex, annoy, or injure" is an alternative to "hatred or ill will," it misreads the cases. *Lundquist, Argaral,* and *Brown* (which are excerpted in the Sources and Authority), all say that "malice has been defined as 'a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." So malice first must arise from hatred or ill will. So vex, etc. are not an alternative to hatred and ill will; they are explanatory as to how

Instruction	Commentator	Comment	Committee Response
		in which the alleged defamer does not overtly harbor (or admit to harboring) "hatred or ill will" but the defamer's actions nonetheless evidence a "willingness to vex, annoy or injure." But, Supreme Court case law makes clear that malice is shown by evidence of a "willingness to vex, annoy or injure" so that the absence of express or admitted "hatred or ill will" should not end the inquiry. *Davis v. Hearst* (1911) 160 Cal. at 157-158; *Lundquist v. Reusser* (1994) 7 Ca1.4th at 1203-1204; *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 944; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723.	hatred and ill will are to be applied. The committee, however, does agree that "vex" etc. should be included in the instruction, but as explanatory of hatred or ill will, not as an alternative to it. (*Davis* is weak authority because it addresses malice for punitive damages, not the common-interest privilege.)
		The "Directions for Use" should make clear that this instruction may need to be modified if the evidence of malice does not fit properly into either "hatred or ill will" or "reckless disregard," which is often the case. In addition to proof of "hatred or ill will, evidencing a willingness to vex, annoy or injure" and "reckless disregard," case law recognizes many other permissible forms of evidence of malice, including inter alia: • excessive publication of the defamatory statements (*Lundquist, supra,* 7 Cal.4th at 1203 ["Once the existence of the privilege is established, the burden is upon the plaintiff to prove that it has been abused by excessive publication .... "]); • reliance on sources known to be hostile to or biased against the plaintiff (*Reader's Digest Assn. v. Superior Court* (1984) 3 7 Cal.3d 244 [malice shown by evidence of reliance upon a source	All of these examples involve evidence of malice. The committee does not believe that any of them obviate the need to show either hatred/ill will or reckless disregard. Rather, they constitute evidence that the standard has been met.

Instruction	Commentator	Comment	Committee Response
		"known to be biased against the plaintiff']; • prior quarrels or rivalries (*Larrick v. Gilloon* (1959) 176 Cal.App.2d 408, 416 ["Any previous quarrel, rivalry or ill feeling between plaintiff and defendant- in short, almost everything defendant has ever said or done with reference to the plaintiff- may be urged as evidence of malice."]); and • purposeful avoidance of the truth (*Christian Research Inst. v. Alnor* (2007) 148 Cal.App.4th 71, 90 [malice may be shown by the "purposeful avoidance of the truth" or the "product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges"]).	
	Orange County Bar Association, by Thomas Bienert, Jr., President	The revision proposes that the word "malice" be inserted into the title. No reason is given for this, and it seems to add little. At common law, from which the subject privilege codified in Civil Code section 47(c) directly derives, it was referred to as the "common-interest" privilege. In the Directions for Use and the Sources and Authority, it is referred to as the common-interest privilege. Finally, as the Supreme Court noted in *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 fn. 7, which is cited in the Sources and Authority, " … characterization of the privilege as qualified or conditional is incorrect …". For these reasons, it is suggested that "Qualified" be deleted from the title and the Instruction re-titled "Common-Interest Privilege," with the reference to Civil Code section 47(c) retained. While it still is believed inclusion of the word "Malice" is unnecessary, this title change would provide a more meaningful context for	The purpose of the instruction is to set forth the malice exception to the common-interest privilege. The committee believes that "malice" should be in the title. But the committee does agree that "Common-Interest" is more descriptive than "Qualified," and has made this change to the title.

Instruction	Commentator	Comment	Committee Response
		reference to malice	
		As proposed, the second sentence of the Use Note is incorrect. Civil Code Section 47(c), the "statute" to which reference is made, does not grant "a conditional privilege … to communications made without malice …". To innocent common-interest communications, the statute grants a solid privilege. For this reason, it is suggested that the word "conditional" be deleted.	The committee agrees with the comment and has removed "conditional."
		The balance of the Use Note is accurate; however, its import may be lost in its brevity. The word "initial" should be inserted to describe defendant's burden and flag the two-step analysis as to the subject privilege. This is consistent with the discussion of the privilege and its analysis in *Lundquist, supra,* 7 Cal.4th at p. 1208.	The committee agrees with the comment and has added "initial."
	John Scheppach, Attorney at Law, Irvine	I think that element 1 erroneously allows the jury to find that the defendant acted with malice if, at some point in time, he/she acted with hatred or ill will toward the plaintiff. In other words, the instruction does not appropriately limit the jury's consideration to whether the defendant acted with hatred or ill will toward the plaintiff when the defendant made the alleged defamatory statement(s). Timing matters in this context. The Supreme Court has stated: "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	The committee agrees with the comment and has added language connecting the hatred/ill will to the making of the statements.

Instruction	Commentator	Comment	Committee Response
		reckless disregard of the plaintiff's rights." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721, bold italics added.)	
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee believes that enumerating the two alternative showings to establish malice is an improvement, but we would modify the description of the second alternative. Rather than use and then define the term "reckless disregard," we believe that the instruction would be better understood by jurors if it explained the requirement without using "reckless disregard,' but just stating that the defendant "had no reasonable grounds for believing the truth of the statement(s)."	The committee agrees with the comment and has made this change.
		The words "Under the circumstances of this case" add nothing to this instruction and probably have no significance to jurors. We would delete these words.	The committee agrees with the comment and has deleted "Under the circumstances."
1901, *Concealment*	California Judges Association, by Lexi Howard, Legislative Director	The second paragraph of the Directions for Use contains references to (Option 1, 2, 3, and 4). This is not substantive but it appears these references may have made sense in an earlier draft and could now be deleted or more clearly tied to the instruction.	The committee does not discern any lack of clarity. The paragraph in question begins: "Regarding element 1." There are four options for element 1, which seem to be clearly noted.
	Orange County Bar Association, by Thomas Bienert, Jr., President	In discussing the types of undisclosed facts that may give rise to a cause of action for concealment, the proposed instruction eliminates the word "important" from the existing instruction (modifying "facts") and replaces it with the word "certain." It is unclear what prompted the idea to remove the concept of "important" or "material" from the description of the fact that is concealed. There is no change in the law cited. Although Civil Code section 1710 does not use the term "material" or	In its last release, the committee determined that materiality (or importance) is part of the reasonable-reliance analysis rather than a separate element of the causes of action for fraud. Changes were made to CACI Nos. 1900, *Intentional Misrepresentation,* 1902, *False Promise,* and 1903, *Negligent Misrepresentation* to remove importance as an element. 1905, *Definition of Important Fact/Promise,* was revoked, and the materiality requirement was added to 1908, *Reasonable Reliance*.

Instruction	Commentator	Comment	Committee Response
		"important" in describing the concealed fact, cases cited in the Sources and Authority for this instruction specify that the fact must be material. (See *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 ["the defendant must have concealed or suppressed a material fact"].) In addition, proposed additions to the Directions for Use for this instruction also refer to "duty to disclose material facts."	The committee, however, deferred making this change to 1901, *Concealment,* because some members had concerns about how one could rely on an omission. But *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 addresses the members' concerns by clarifying that in a concealment claim, reliance is established if the plaintiff "would have behaved differently" had the concealed information been disclosed. The current proposed change brings 1901 in line with the other fraud instructions. Users are told to give 1907 and 1908 if reliance is at issue, so they will present the materiality requirement as an aspect of reliance.
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee agrees that element 4 should be revised to explain what reliance means in the concealment context. But we believe that the proposed revision may be difficult for the jury to understand, particularly with respect to what it means that the plaintiff "reasonably would have behaved differently." We suggest revising this language to refer to how "a reasonable person" in the plaintiff's position would have behaved if the concealed facts had been disclosed, taking into account the plaintiff's intelligence, knowledge, education, and experience (see CACI 1908, Reasonable Reliance).	The standard is not what a reasonable person would have done. It is what the plaintiff would have done.
		No authority is cited in the Sources and Authority for the requirement that the plaintiff *reasonably* would have behaved differently. *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093, and *Boschma v. Home Loan Center, Inc.* (2011) 198	*Hackethal v. Nat'l Casualty Co.* (1987) 189 Cal.App.3d 1102, 1110 meets the commentator's second option: "authority requiring reasonable reliance in fraud cases generally." The court sets out the elements of

Instruction	Commentator	Comment	Committee Response
		Cal.App.4th 230, 248, quoted in the Sources and Authority, state the reliance requirement without the word "reasonably." We suggest that either (1) authority for a reasonableness requirement in the concealment context be added to the Sources and Authority; (2) authority requiring reasonable reliance in fraud cases generally be added to the Sources and Authority, if you would rely on such authority; or (3) the word "reasonably" be deleted if there is no authority for such a requirement.	fraud as: (1) misrepresentation (false representation, *concealment or non-disclosure*); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, i.e., to induce reliance; (4) *justifiable reliance;* and (5) resulting damage. The court does not develop the issue of the reasonableness of reliance in a concealment case. However, the committee believes that there would have to be authority holding that reliance (i.e, different behavior) need not be reasonable before it can be concluded that this otherwise applicable element of fraud does not apply to concealment.
VF-1900, *Intentional Misrepresentation;* VF-1901, *Concealment* VF-1902, *False Promise* VF-1903, *Negligent Misrepresentation*	Orange County Bar Association, by Thomas Bienert, Jr., President	In question No. 1, the proposed change to the verdict forms deletes the phrase "of an important fact" from question 1 ("Did [defendant] make a false representation of an important fact to [plaintiff]?"). It is unclear what prompted the idea to remove the concept of "important or "material" from the description of the fact that is intentionally misrepresented	As noted above, in the last release the committee determined that importance should be included as part of the determination of justifiable reliance. In this release, the verdict forms are simply conformed to the changes made to the instructions in the last release.
	State Bar Committee on Administration of Justice	CAJ does not agree with the proposed deletion of all references to "important" in the fraud and deceit series. CAJ understands that revisions are being proposed to these verdict forms to make them consistent with the related jury instructions, previously modified to delete references to "important." The proposed changes to CACI 1901 and VF-1901 would make that jury instruction and verdict form consistent with the others. CAJ understands that the rationale behind the deletion of "important" is the fact that these jury	While the cases cited in the comment do include "material fact" in the list of elements, the point is not developed. Cases that are cited in CACI No. 1908, *Reasonable Reliance,* we cite in 1908, including a California Supreme Court case *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977, treat materiality as an aspect of justifiable reliance.

Instruction	Commentator	Comment	Committee Response
		instructions and verdict forms include an element of reasonable reliance. Under this line of thinking, "reasonable reliance" necessarily presumes that the fact is "important." Although CAJ sees that there is a certain logic to this idea, it does not believe the element of "important" should effectively be merged with "reasonable reliance." Materiality (importance) is treated as a separate element in at least some of the cases. (See, e.g., *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 [negligent misrepresentation]; *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 [concealment].). Even if arguably redundant, CAJ believes inclusion of the word "important" in all of these jury instructions and verdict forms will make the instructions and verdict forms consistent with these cases and clearer to the average juror.	
2303, *Affirmative Defense—Insurance Policy Exclusion*	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The proposed new final sentence in the instruction requires a description of the factual dispute. We believe that it is likely that counsel will dispute how to describe the factual dispute, which can create not only more disputes in the trial court but also issues for appeal. We would make this new sentence optional and add language to the Directions for Use stating that counsel may describe the factual dispute in this instruction if desired.	Because exclusionary clauses are construed as a matter of law, the only way that this instruction would ever be given is if there is a dispute of fact. So the new sentence should not be optional.
2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption* 2721, *Affirmative*	California Chamber of Commerce, by Jennifer Barrera, Policy Advocate	We agree and support the proposed revisions to these jury instructions that set forth the proper inquiry regarding whether an employee is engaged more than half of his/her time in executive or administrative duties. Specifically, these revisions reinforce existing law that the jury must consider both how the employee actually spent his/her time,	The committee notes the commentator's support for the revisions.

Instruction	Commentator	Comment	Committee Response
Defense—Nonpayment of Overtime—Administrative Exemption		as well as how the employer realistically expected the employee to spend his/her time. As the "Directions of Use" note, an employee may not be allowed to evade a valid exemption due to substandard performance.	
	John Scheppach, Attorney at Law, Irvine	*Heyen v. Safeway Inc.* (2013) 216 Cal.App.4th 795, which is cited in the "Sources and Authority," did not necessarily adopt or endorse the concept that the "most important consideration" is how the employee actually spends his or her time. And *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 (which deals with the outside salesperson exemption), from the California Supreme Court, did not expressly state this either. Rather, both cases indicate that the trier of fact should consider "first and foremost" how the employee actually spends his or her time. The instruction approved by the *Heyen* court had this "first and foremost" language in it, and I believe this language better reflects the status of the law than the "most important consideration" language used in the proposed instruction. "First and foremost" expresses a rule of analytical progression – the analysis should start with a focused consideration of the how the employee actually spends his or her time. But the analysis does not stop there, and other factors, such as the employer's realistic expectations and the employee's job requirements, can be critically important, and, in some cases, determinative. If an employee wholly deviates from their written job requirements, the verbal instructions given to him/her by the employer, and the employer's realistic expectations (e.g., the employee ends up spending most of their time selling marijuana on their outside sales visits,	The word "forermost" means "most important." The committee believes that "most important" is more easily understood and applied by a jury.

Instruction	Commentator	Comment	Committee Response
		rather than the employer's widgets), how an employee actually spends his or her time may not necessarily be the most important factor. In essence, I do not believe it is accurate to say, as a per se rule, that how the employee actually spends his or her time is always the "most important" consideration. Others may disagree with me, but I believe the safer course is to track the "first and foremost" language in *Heyen* and *Ramirez*.	
		I would slightly modify the second paragraph of the proposed language to read: "Time spent by [*name of plaintiff*] on an activity is either exempt or nonexempt; not both. 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."	This suggestion would essentially just switch the order of the two sentences (plus adding "[*name of plaintiff*]" to what is currently the second sentence. The committee sees no benefit in making this change.
	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions to the penultimate paragraph of the instruction, except that we would retain the language ", not [his/her] job title" at the end of the first sentence. We believe that this sentence conveys an important point more effectively with this language than without it.	The committee believes that this point should focus on what is important; it is not necessary to advise as to what is not important.
		We believe that the final paragraph of the instruction will not be helpful in every case and should be made optional. Such an instruction will be helpful only if the plaintiff was engaged in work arguably serving more than one purpose at the same time. The jury need not grapple with this issue in every case. We would add language to the Directions for Use explaining when to use the optional final paragraph	The committee agrees with this comment and has made the paragraph optional. The suggested addition to the Directions for Use has also been made.

Instruction	Commentator	Comment	Committee Response
		of the instruction, such as: "Include the last optional paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt depending on its primary purpose."	
		We would modify this paragraph as follows for greater clarity: "[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~~ the activity. ~~Time spent on a~~An activity is either exempt or nonexempt; not both.]"	The committee believes that the question to be resolved is the allocation of *time* not of *activities*.
		We would add language to the Directions for Use stating that the instruction can be modified to provide examples of typically exempt and nonexempt activities relevant to the work at issue, as in the instructions given in *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808-809.	The committee agrees with the comment and has added the suggested sentence.
2730, *Whistleblower Protection—Essential Factual Elements* (presumably)	Megan Braswell, member of public	What is up with some parts that will be omitted and then added in the next cycle? It sounds like a temporary type of deal; it makes no sense why it would be omitted for six months.	It is not clear to what the commentator is referring, but it is most likely the proposed temporary revocation of CACI No. 2730. Labor Code section 1102.5 was amended by the Legislature in ways that make the current instruction no longer complete. The committee did not become aware of the revisions until after the working group meetings for this release had occurred. The committee has a policy not to consider any proposal that has not first been vetted by a working group.
3041, *Violation of Prisoner's Federal*	California Judges	The proposed change did not address the change of the number of elements in the "Directions for Use"	This omission has been fixed.

Instruction	Commentator	Comment	Committee Response
Civil Rights—Eighth Amendment—Medical Care	Association, by Lexi Howard, Legislative Director	section. It should now refer to Element 3 rather than Element 2 as to the "official duties" element.	
3117, *Financial Abuse—"Undue Influence" Explained*	Ingrid M. Evans, Attorney at Law, San Francisco	I recommend taking out the word "excessive" in this new instruction. "Excessive" will confuse a jury and is not necessary because the definition of undue influence is very specific and requires some very specific characteristics of the abused. Further, experts have opined that undue influence does not need to be excessive. If an elderly widow is treated nicely by an individual, often times the very characteristics that make her susceptible to undue influence, (poor eyesight, elderly, cognitive problems) etc. will make her susceptible to undue influence without the perpetrator doing any excessive actions. Usually once they get their trust they can influence the elderly with very little persuasion.	"Excessive" is used in the statute. (See Welf. & Inst. Code, § 15610.70(a).)
3723, *Substantial Deviation*	California Chamber of Commerce, by Jennifer Barrera, Policy Advocate	While we agree with the proposed additional comments under the "Directions for Use" for this jury instruction, we believe an additional statement of the law should be included as well. Specifically, with regard to the issue of "foreseeability" for purposes of respondeat superior, the general definition used by courts is: "that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." See *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 98 (2013) (citations omitted); *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 901 (2013).	The suggested language comes from the seminal California Supreme Court case of *Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 968. Foreseeability is addressed in factor (b) of CACI No. 3720, *Scope of Employment*. The committee does not see any reason to include it also in this instruction, which presents an exception to the general rule of 3720.
3725, *Going-and-*	State Bar of	The committee believes that adding the sentence	The committee believes that the fact that the

Instruction	Commentator	Comment	Committee Response
Coming Rule—Vehicle-Use Exception	California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	"The employer's requirement may be either express or implied" creates more problems than it solves. We believe that an instruction on this point ordinarily is unnecessary because the jury will understand that whether an employer "requires" an employee to drive to work so as to have a vehicle available for business use encompasses both express and implied requirements, even if the jury is not familiar with those two terms. That some jurors will be unfamiliar with those terms is a distinct possibility. We believe that the quotation from *Lobo v. Tomco* (2010) 182 Cal.App.4th 297, 301, in the Sources and Authority is enough to alert counsel to the issue and the need to modify the instruction if desired.	requirement to provide a vehicle may be implied is an important aspect of this exception, which should be in the instruction.
5021, *Electronic Evidence*	State Bar of California, Litigation Section, Jury Instructions Committee; by Reuben A. Ginsberg, Chair	The committee agrees with this proposed new instruction, but would insert the words "that have been admitted in evidence" after "Some exhibits" at the beginning of the instruction to make it clear that the instruction applies to electronic exhibits admitted in evidence, as distinguished from other materials that might have been displayed electronically.	The committee agrees with this comment and has added the proposed new language to the instruction.
All except as noted above	Orange County Bar Association, by Thomas Bienert, Jr.,President	Agree	No response is necessary.

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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 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 826

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

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)

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.

~~2~~3. 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 ~~3~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~3~~4. Was [*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 ~~4~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~5. What are [*name of plaintiff*]**'s damages?**

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

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

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

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*.

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.]**

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:~~

~~(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~~

~~(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.)

- "The probate court cited Welfare and Institutions Code section 15610.30 to impose financial elder abuse liability as to plaintiffs' first cause of action for fiduciary abuse of an elder. This liability is supported by the court's findings that '[decedent] did not know the extent of [defendant's] spending,' and that '[w]hile it is not uncommon for a spouse to spend money or purchase items of which the other is unaware, and the line between such conduct and financial abuse is not always clear, what [defendant] did in this case went well beyond the line of reasonable conduct and constituted financial abuse,' and the court's further conclusion that much of defendant's credit card spending and writing herself checks from decedent's bank account during the marriage amounted to financial abuse." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 [167 Cal.Rptr.3d 50].)

Secondary Sources

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

Balisok, Elder Abuse Litigation, §§ 5:1 et seq., 22:9−22:12 (The Rutter Group)

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)

3117. Financial Abuse—"Undue Influence" Explained

"Undue influence" means excessive persuasion that overcomes another person's free will and causes the 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 necessaries 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*]"

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.

- "During the pendency of this appeal, the Legislature amended Welfare and Institutions Code section 15610.30, subdivision (a)(3) replacing 'by undue influence, as defined in Section 1575 of the Civil Code' with 'by undue influence, as defined in Section 15610.70.' The Legislature added a new section 15610.70 to the Welfare and Institutions Code, defining undue influence as 'excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity,' and listing factors to be considered in making an undue influence determination under section 15610.30. … Although the new reference to 'excessive persuasion' may not be entirely clear, perhaps calling to mind Aristophanes's Lysistrata, the Legislature declared that the newly applied definition is not intended to supersede or interfere with the common law meaning of undue influence." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 fn.3 [167 Cal.Rptr.3d 50], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005), Torts § 147

Balisok, Elder Abuse Litigation, §§ 5:1 et seq., 22:9−22:12 (The Rutter Group)

30 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.49 (Matthew Bender)

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-Errand 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

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, original italics.)~~[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

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~~
3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 176–194

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

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶ 2:716, 2:735 (The Rutter Group)

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

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

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

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

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

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

a. The intent of the employee;

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

c. The work the employee was hired to do;

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

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

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

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

New September 2003; Revised June 2014

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

Sources and Authority

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

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' …~~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 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

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

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

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

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

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

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

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

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].)

- " '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, supra*, 182 Cal.App.4th at p. 297, 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 foreswear 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 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." (*Le 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

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery--Vicarious Liability*, ¶ 2:803 (The Rutter Group)

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

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

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

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

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

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

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

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]; Code Civ. Proc., § 1219 [sexual assault]; Fam. Code, § 6211 [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~~

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

~~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

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~~

~~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]~~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]~~The 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~~ 5th ed. ~~2000~~2012) Presentation at Trial, § ~~22~~ 34 et seq.

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

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

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

5021. Electronic Evidence

Some exhibits that have been admitted into evidence 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 exhibits have been introduced in electronic format only. 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

8 Witkin, California Procedure (5th ed. 2008) Trial, § 161

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-C, *Matters Allowed In Jury Room During Deliberations,* ¶ 15:83 et seq. (The Rutter Group)

Cotchett, California Courtroom Evidence, Ch. 27 *Demonstrative and Experimental Evidence,* § 27.01 (Matthew Bender)

Johnson, California Trial Guide, Unit 65, *Presentation of Demonstrative Evidence*, § 65.10 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 11, *Questioning Witnesses and Objections*, 11.09 et seq.