

# Judicial Council of California • Administrative Office of the Courts

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## INVITATION TO COMMENT

### CA12-02

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| Title   | Action Requested   |
| Civil Jury Instructions (CA12) Revisions      | Review and submit comments by August 31, 2012                            |
| Proposed Rules, Forms, Standards, or Statutes | Proposed Effective Date  |
| Add, revise, and revoke jury instructions     | December 14, 2012  |
| Proposed by                                   | Contact  |
| Advisory Committee on Civil Jury Instructions | Bruce Greenlee, Attorney, 415-865-7698                                   |
| Hon. H. Walter Croskey, Chair                 | <a href="mailto:bruce.greenlee@jud.ca.gov">bruce.greenlee@jud.ca.gov</a> |

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### Executive Summary and Origin

The Judicial Council Advisory Committee on Civil Jury Instructions has posted proposed revisions, additions, and revocations to the Judicial Council civil jury instructions (CA12). Under Rule 10.58 of the California Rules of Court, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions.

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 These proposals are circulated for comment purposes only.*

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100. Preliminary Admonitions

You have now been sworn as jurors in this case. I want to impress on you the seriousness and importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a verdict based on the evidence presented. Before we begin, I need to explain how you must conduct yourselves during the trial.

Do not allow anything that happens outside this courtroom to affect your decision. During the trial do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.

This prohibition is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or ~~Web site~~website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

~~You may say you are on a jury and how long the trial may take, but that is all. You must not even talk about the case with the other jurors until after I tell you that it is time for you to decide the case.~~

During the trial you must not listen to anyone else talk about the case or the people involved in the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report the incident to the court [attendant/bailiff] as soon as you can.

After the trial is over and I have released you from jury duty, you may discuss the case with anyone, but you are not required to do so.

During the trial, do not read, listen to, or watch any news reports about this case. [I have no information that there will be news reports concerning this case.] This prohibition extends to the use of the Internet in any way, including reading any blog about the case or about anyone involved with it ~~or using Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony.~~ If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.

Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any

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event involved in this case or use any Internet maps or mapping programs or any other program or device to search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group under proper supervision.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

~~You must decide this case based only on the evidence presented in this trial and the instructions of law that I will provide. Nothing that you see, hear, or learn outside this courtroom is evidence unless I specifically tell you it is. If you receive any information about this case from any source outside of the courtroom, promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same evidence at the same time.~~

It is important that you keep an open mind throughout this trial. Evidence can only be presented a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with your fellow jurors in your deliberations.

Do not concern yourselves with the reasons for the rulings I will make during the course of the trial. Do not guess what I may think your verdict should be from anything I might say or do.

When you begin your deliberations, you may discuss the case only in the jury room and only when all the jurors are present.

You must decide what the facts are in this case. ~~And, I repeat, your verdict must be based only on the evidence that you hear or see in this courtroom.~~ Do not let bias, sympathy, prejudice, or public opinion influence your verdict.

At the end of the trial, I will explain the law that you must follow to reach your verdict. You must follow the law as I explain it to you, even if you do not agree with the law.

*New September 2003; Revised April 2004, October 2004, February 2005, June 2005, December 2007, December 2009, December 2011; December 2012*

### Directions for Use

This instruction should be given at the outset of every case, even as early as when the jury panel enters the courtroom (without the first sentence).

If the jury is allowed to separate, Code of Civil Procedure section 611 requires the judge to admonish the jury that “it is their duty not to converse with, or suffer themselves to be addressed by any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case

is finally submitted to them.”

### Sources and Authority

- Article I, section 16 of the California Constitution provides that “trial by jury is an inviolate right and shall be secured to all.”
- Code of Civil Procedure section 608 provides in part: “In charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it state the testimony of the case, it must inform the jury that they are the exclusive judges of all questions of fact.” (See also Evid. Code, § 312; Code Civ. Proc., § 592.)
- Code of Civil Procedure section 611 provides: “If the jury are permitted to separate, either during the trial or after the case is submitted to them, they shall be admonished by the court that it is their duty not to conduct research, disseminate information, or converse with, or permit themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them. The court shall clearly explain, as part of the admonishment, that the prohibition on research, dissemination of information, and conversation applies to all forms of electronic and wireless communication.”
- Code of Civil Procedure section 1209(a) provides in part:
  - (a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:
    - (1)–(5) omitted
    - (6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.
    - (7)–(12) omitted
- Under Code of Civil Procedure section 611, jurors may not “form or express an opinion” prior to deliberations. (See also *City of Pleasant Hill v. First Baptist Church of Pleasant Hill* (1969) 1 Cal.App.3d 384, 429 [82 Cal.Rptr. 1]. It is misconduct for a juror to prejudge the case. (*Deward v. Clough* (1966) 245 Cal.App.2d 439, 443-444 [54 Cal.Rptr. 68].)
- Jurors must not undertake independent investigations of the facts in a case. (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 36 [224 P.2d 808]; *Walter v. Ayvazian* (1933) 134 Cal.App. 360, 365 [25 P.2d 526].)
- Jurors are required to avoid discussions with parties, counsel, or witnesses. (*Wright v. Eastlick* (1899) 125 Cal. 517, 520-521 [58 P. 87]; *Garden Grove School Dist. v. Hendler* (1965) 63 Cal.2d 141, 144 [45 Cal.Rptr. 313, 403 P.2d 721].)

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- It is misconduct for jurors to engage in experiments that produce new evidence. (*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co.* (1991) 234 Cal.App.3d 1724, 1746 [286 Cal.Rptr. 435].)
- Unauthorized visits to the scene of matters involved in the case are improper. (*Anderson v. Pacific Gas & Electric Co.* (1963) 218 Cal.App.2d 276, 280 [32 Cal.Rptr. 328].)
- It is improper for jurors to receive information from the news media about the case. (*Province v. Center for Women’s Health & Family Birth* (1993) 20 Cal.App.4th 1673, 1679 [25 Cal.Rptr.2d 667], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 41 [32 Cal.Rptr.2d 200, 876 P.2d 999]; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 408 [196 Cal.Rptr. 117].)
- Jurors must avoid bias: “ ‘The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution.’ ” (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132], internal citations omitted.) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (*Ibid.*)
- An instruction to disregard any appearance of bias on the part of the judge is proper and may cure any error in a judge’s comments. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478 [6 Cal.Rptr. 289, 353 P.2d 929].) “It is well understood by most trial judges that it is of the utmost importance that the trial judge not communicate in any manner to the jury the judge’s opinions on the case submitted to the jury, because juries tend to attach inflated importance to any such communication, even when the judge has no intention whatever of influencing a jury’s determination.” (*Dorshkind v. Harry N. Koff Agency, Inc.* (1976) 64 Cal.App.3d 302, 307 [134 Cal.Rptr. 344].)

***Secondary Sources***

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.05

## 106. Evidence

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~~Sworn testimony, documents, or anything else may be admitted into evidence.~~ You must decide what the facts are in this case only from the evidence you see or hear during the trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider as evidence anything that you see or hear when court is 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 will 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 suggests that it is true. However, the attorneys for both sides can agree 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 has the right to object to evidence offered by the other side. If I do not agree with the objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you must ignore the question. 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 has already answered, you must ignore the answer.

An attorney may make a motion to strike testimony that you have heard. If I grant the motion, you must totally disregard that testimony. You must treat it as though it did not exist.

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*New September 2003; Revised February 2005, December 2010, December 2012*

### Directions for Use

This instruction should be given as an introductory instruction.

### Sources and Authority

- 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."
- 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.

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- (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.
- 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.
- 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 “attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- Courts have stated that “[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

***Secondary Sources***

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.56-322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

## 107. Witnesses

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A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? **For example, ~~Did~~ did the witness show any bias or prejudice? ~~Did the witness or~~ have a personal relationship with any of the parties involved in the case? ~~Does the witness or~~ have a personal stake in how this case is decided?**
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

~~You must not be biased in favor of or against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]].~~

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*New September 2003; Revised April 2004, June 2005, April 2007, December 2012*

### Directions for Use

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This instruction may be given as an introductory instruction or as a concluding instruction after trial. (See CACI No. 5003, *Witnesses*.)

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

**Sources and Authority**

- 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.
- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:
  - Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
    - (a) His demeanor while testifying and the manner in which he testifies.
    - (b) The character of his testimony.
    - (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
    - (d) The extent of his opportunity to perceive any matter about which he testifies.
    - (e) His character for honesty or veracity or their opposites.
    - (f) The existence or nonexistence of a bias, interest, or other motive.
    - (g) A statement previously made by him that is consistent with his testimony at the hearing.
    - (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
    - (i) The existence or nonexistence of any fact testified to by him.
    - (j) His attitude toward the action in which he testifies or toward the giving of testimony.

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(k) His admission of untruthfulness.

- Evidence Code section 411 provides that “[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact.” According to former Code of Civil Procedure section 2061, the jury should be instructed that “they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”
- The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: “It should certainly not be of importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar.” (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
- ~~Standard 10.20(a)(2) of the California Standards for Judicial Administration provides: “In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants.”~~
- ~~Canon 3(b)(5) of the California Code of Judicial Ethics provides: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.” Canon 3(b)(6) requires the judge to impose these standards on attorneys.~~

***Secondary Sources***

1A California Trial Guide, Unit 22, *Rules Affecting Admissibility of Evidence*, § 22.30 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.122 (Matthew Bender)

### 113. Bias

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Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]].

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

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*New June 2010; Revised December 2012*

#### Sources and Authority

- Standard 10.20(a)(2) of the California Standards of Judicial Administration provides: “In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants.”
- Canon 3(b)(5) of the California Code of Judicial Ethics provides: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.” Canon 3(b)(6) requires the judge to impose these standards on attorneys.

#### Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

**Preliminary Draft Only—Not Approved by Judicial Council**

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*,  
§ 6.21

## 202. Direct and Indirect Evidence

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Evidence can come in many forms. It can be testimony about what someone saw or heard or smelled. It can be an exhibit admitted into evidence. It can be someone's opinion.

**Direct evidence can prove a fact by itself. For example, if a witness testifies he saw a jet plane flying across the sky, that testimony is direct evidence that a plane flew across the sky. Some evidence proves a fact directly, such as testimony of a witness who saw a jet plane flying across the sky. Some evidence proves a fact indirectly. For example, a witness testifies that he saw only the white trail that jet planes often leave, such as testimony of a witness who saw only the white trail that jet planes often leave.** This indirect evidence is sometimes referred to as “circumstantial evidence.” In either instance, the witness's testimony is evidence that a jet plane flew across the sky.

As far as the law is concerned, it makes no difference whether evidence is direct or indirect. You may choose to believe or disbelieve either kind. Whether it is direct or indirect, you should give every piece of evidence whatever weight you think it deserves.

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*New September 2003; Revised December 2012*

### Directions for Use

An instruction concerning the effect of circumstantial evidence must be given on request when it is called for by the evidence. (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1084 [105 Cal.Rptr. 387]; *Calandri v. Ione Unified School Dist.* (1963) 219 Cal.App.2d 542, 551 [33 Cal.Rptr. 333]; *Trapani v. Holzer* (1958) 158 Cal.App.2d 1, 6 [321 P.2d 803].)

### Sources and Authority

- Evidence Code section 410 provides: “As used in this chapter, ‘direct evidence’ means evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.”
- Evidence Code section 600(b) provides: “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.”
- The Assembly Committee on Judiciary Comment to section 600 observes: “Under the Evidence Code, an inference is not itself evidence; it is the result of reasoning from evidence.”
- “[T]he fact that evidence is ‘circumstantial’ does not mean that it cannot be ‘substantial.’ Relevant circumstantial evidence is admissible in California. Moreover, the jury is entitled to accept persuasive circumstantial evidence even where contradicted by direct testimony.” (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

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- “The terms ‘indirect evidence’ and ‘circumstantial evidence’ are interchangeable and synonymous.” (*People v. Yokum* (1956) 145 Cal.App.2d 245, 250 [302 P.2d 406], *disapproved on other grounds*, *People v. Cook* (1983) 33 Cal.3d 400, 413 [189 Cal.Rptr. 159, 658 P.2d 86]; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152 [293 P.2d 495].)

***Secondary Sources***

1 Witkin, California Evidence (4th ed. 2000) Circumstantial Evidence, §§ 1, 2

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 138–141

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 19.12–19.18

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.62 (Matthew Bender)

## 205. Failure to Explain or Deny Evidence

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**If a party failed to explain or deny evidence against [him/her/it] when [he/she/it] could reasonably be expected to have done so based on what [he/she/it] knew, you may consider [his/her/its] failure to explain or deny in evaluating that evidence.**

**It is up to you to decide the meaning and importance of the failure to explain or deny evidence against the party. ~~You may consider whether a party failed to explain or deny some unfavorable evidence. Failure to explain or to deny unfavorable evidence may suggest that the evidence is true.~~**

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### Directions for Use

This instruction should be given only if there is a failure to deny or explain a fact that is material to the case.

### Sources and Authority

- Evidence Code section 413 provides: “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.”

### *Secondary Sources*

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 116

4 Johnson, California Trial Guide, Ch. 90, *Closing Argument*, § 90.30[2] (Matthew Bender)

## 208. Deposition as Substantive Evidence

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During the trial, you **received deposition** ~~heard~~ testimony **that was** [read from **a the** deposition **transcript**/[describe other manner presented, e.g., shown by video]]. A deposition is the testimony of a person taken before trial. At a deposition the person is sworn to tell the truth and is questioned by the attorneys. You must consider the deposition testimony that was **presented** to you in the same way as you consider testimony given in court.

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### Sources and Authority

- Code of Civil Procedure section 2002 provides:  
The testimony of witnesses is taken in three modes:
  1. By affidavit;
  2. By deposition;
  3. By oral examination.
- Code of Civil Procedure section 2025.620 provides, in part: “At the trial ... any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition ... so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following [rules set forth in this subdivision].”
- “Admissions contained in depositions and interrogatories are admissible in evidence to establish any material fact.” (*Leasman v. Beech Aircraft Corp.* (1975) 48 Cal.App.3d 376, 380 [121 Cal.Rptr. 768].)
- Evidence Code section 1291(a) provides:  
Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:
  - (1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or
  - (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

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- Evidence Code section 1292(a) provides:  
Evidence of former testimony is not made inadmissible by the hearsay rule if:
  - (1) The declarant is unavailable as a witness;
  - (2) The former testimony is offered in a civil action; and
  - (3) The issue is such that the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.
  
- Evidence Code section 1290(c) defines “former testimony” as “[a] deposition taken in compliance with law in another action.”
  
- “The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds the witness unavailable as a witness within the meaning of section 240 of the Evidence Code.” (*Chavez v. Zapata Ocean Resources, Inc.* (1984) 155 Cal.App.3d 115, 118 [201 Cal.Rptr. 887], citation omitted.)

***Secondary Sources***

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 153–163

7 Witkin, California Procedure (4th ed. 1997) Trial, § 304, p. 351

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, §§ 20.30–20.38, Unit 40, *Hearsay*, §§ 40.60-40.61 (Matthew Bender)

5 Levy et al., California Torts, Ch. 72, *Discovery*, § 72.41 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.90–193.96 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 6, *Oral Depositions in California*

## 211. Prior Conviction of a Felony

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**You have heard that a witness in this trial has been convicted of a felony. You were told about the conviction [only] to help you decide whether you should believe the witness. [You must not consider it for any other purpose.]**

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### **Directions for Use**

Include the word “only” and the last sentence unless the court has admitted the evidence for some other purpose. For example, a prior alcohol-related conviction might be relevant to show conscious disregard if the claim involves conduct while under the influence.

### **Sources and Authority**

- Evidence Code section 788 provides for the circumstances under which evidence of a prior felony conviction may be used to attack a witness’s credibility. This section is most often invoked in criminal cases, but it may be used in civil cases as well.
- The standards governing admissibility of prior convictions in civil cases are different from those in criminal proceedings. In *Robbins v. Wong* (1994) 27 Cal.App.4th 261, 273 [32 Cal.Rptr.2d 337], the court observed: “Given the significant distinctions between the rights enjoyed by criminal defendants and civil litigants, and the diminished level of prejudice attendant to felony impeachment in civil proceedings, it is not unreasonable to require different standards of admissibility in civil and criminal cases.” (*Id.* at p. 273.)

In *Robbins*, the court concluded that article I, section 28(f) of the California Constitution, as well as any Supreme Court cases on this topic in the criminal arena, does not apply to civil cases. (*Robbins, supra*, 27 Cal.App.4th at p. 274.) However, the court did hold that the trial court “may utilize such decisions to formulate guidelines for the judicial weighing of probative value against prejudicial effect under section 352.” (*Ibid.*)

### **Secondary Sources**

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, §§ 292, 294, 295, 308

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.123 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.64

### 213. Adoptive Admissions

You have heard evidence that [~~insert~~ name of declarant] made the following statement: [~~insert description of describe~~ statement]. You may consider that statement as evidence against [~~insert~~ name of party against whom statement was offered] only if you find that **both** all of the following conditions are true:

- 1. The statement was made to [name of party against whom statement was offered] or made in [his/her] presence;**
- 2. [Name of party against whom statement was offered] heard and understood the statement;**
- 3. [Name of party against whom statement was offered] would, under all the circumstances, naturally have denied the statement if [he/she] thought it was not true;**

**AND**

- 4. [Name of party against whom statement was offered] could have denied it but did not.**
  - 1. That [name of party against whom statement was offered] was aware of and understood the statement; and**
  - 2. That [name of party against whom statement was offered], by words or conduct, either**
    - (a) expressed [his/her] belief that the statement was true; or**
    - (b) implied that the statement was true.**

**If you decide that any of these conditions are not true, you must not consider for any purpose either the statement or [name of party against whom statement was offered]'s response.**

**[You must not consider this evidence against any other party.]If you do not decide that these conditions are true, you must not consider the statement at all.**

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#### Directions for Use

**The jury should be instructed on the doctrine of adoptive admissions if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104-105 [12 Cal.Rptr. 470].)**

Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence of an adoptive admissions if it finds that the preliminary facts do not exist.

For statements of a party opponent, see CACI No. 212, *Statements of a Party Opponent*. ~~For admissions~~

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~~by silence, see CACI No. 214, Admissions by Silence.~~ Evasive conduct falls under this instruction rather than under CACI No. 212 ~~or 214~~.

**Sources and Authority**

- Evidence Code section 1221 provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.”
- Evidence Code section 403(a)(4) provides: “The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.”
- ~~The basis for the doctrine of adoptive admissions has been stated as follows:~~ “When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party’s reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.” (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)
- In order for the hearsay evidence to be admissible, “it must have been shown clearly that [the party] heard and understood the statement.” (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine “does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him.” (*Southers v. Savage* (1961) 191 Cal.App.2d 100, 104 [12 Cal.Rptr. 470].)
- Adoption occurs “where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission.” (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)
- “The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing.” (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].)
- If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra*, 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)
- Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra*, 249 Cal.App.2d at p. 1009.)

*Secondary Sources*

1 Witkin, California Evidence (4th ed. 2000) Hearsay, §§ 102–105

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30

2 California Trial Guide, Unit 40, Hearsay, § 40.31 (Matthew Bender)

### ~~214. Admissions by Silence~~

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~~You have heard evidence that [insert name of declarant] made a statement in the presence of [insert name of party who remained silent] that [insert description of statement]. You have also heard that [insert name of party who remained silent] did not deny the statement.~~

~~You may treat the silence of [insert name of party who remained silent] as an admission that the statement was true only if you believe all of the following conditions are true:~~

- ~~1. That [insert name of party who remained silent] was aware of and understood the statement;~~
- ~~2. That [he/she], by either words or actions, could have denied the statement but [he/she] did not; and~~
- ~~3. That [he/she] would have denied the statement if [he/she] thought it was false. In determining this, you may consider whether, under the circumstances, a reasonable person would have denied the statement if he or she thought it was false.~~

~~If you do not decide that all three of these conditions are true, you must not consider [insert name of party who remained silent]'s silence as an admission.~~

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#### ~~Directions for Use~~

~~The jury should be instructed on the doctrine of adoptive admission by silence if the evidence giving rise to the doctrine is conflicting. (See *Southers v. Savage* (1961) 191 Cal.App.2d 100, 104-105 [12 Cal.Rptr. 470].)~~

~~Under Evidence Code section 403(c), the court must instruct the jury to disregard the evidence if it finds that the preliminary facts do not exist.~~

~~For statements of a party opponent, see CACI No. 212, *Statements of a Party Opponent*. For admissions by words or evasive conduct, see CACI No. 213, *Adoptive Admissions*.~~

#### ~~Sources and Authority~~

- ~~• Evidence Code section 1221 provides: “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.”~~
- ~~• Evidence Code section 403(a)(4) provides: “The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is~~

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~~inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [t]he proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself.”~~

- ~~The basis for the doctrine of adoptive admissions has been stated as follows: “When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party’s reaction to it. His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence.” (*In re Estate of Neilson* (1962) 57 Cal.2d 733, 746 [22 Cal.Rptr. 1, 371 P.2d 745].)~~
- ~~This instruction addresses adoption of an admission by silence. Adoption occurs “where declarations of third persons made in the presence of a party give rise to admissions, the conduct of the party in the face of the declaration constituting the adoption of the statement to form an admission.” (*In re Estate of Gaines* (1940) 15 Cal.2d 255, 262 [100 P.2d 1055].)~~
- ~~“The basis of the rule on admissions made in response to accusations is the fact that human experience has shown that generally it is natural to deny an accusation if a party considers himself innocent of negligence or wrongdoing.” (*Keller v. Key System Transit Lines* (1954) 129 Cal.App.2d 593, 596 [277 P.2d 869].) If the statement is not accusatory, then the failure to respond is not an admission. (*Neilson, supra*, 57 Cal.2d at p. 747; *Gilbert v. City of Los Angeles* (1967) 249 Cal.App.2d 1006, 1008 [58 Cal.Rptr. 56].)~~
- ~~Admissibility of this evidence depends upon whether (1) the statement was made under circumstances that call for a reply, (2) whether the party understood the statement, and (3) whether it could be inferred from his conduct that he adopted the statement as an admission. (*Gilbert, supra*, 249 Cal.App.2d at p. 1009.)~~
- ~~In order for the hearsay evidence to be admissible, “it must have been shown clearly that [the party] heard and understood the statement.” (*Fisch v. Los Angeles Metropolitan Transit Authority* (1963) 219 Cal.App.2d 537, 540 [33 Cal.Rptr. 298].) There must also be evidence of some type of reaction to the statement. (*Ibid.*) It is clear that the doctrine “does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him.” (*Southers, supra*, 191 Cal.App.2d at p. 104.)~~

***Secondary Sources***

~~1 Witkin, California Evidence (4th ed. 2000) Hearsay §§ 102–105~~

~~Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 3.23–3.30~~

~~2 California Trial Guide, Unit 40, Hearsay, § 40.31 (Matthew Bender)~~

## 215. Exercise of a Communication Privilege

~~*[Name of party/witness]* has an absolute~~ **People have a legal** right not to disclose what ~~*[he/she]*~~ **they** told ~~*[his/her]*~~ **their** ~~*[doctor/attorney/other]*~~ **], etc.** in confidence because the law considers this information privileged. **Do not consider, for any reason at all, the fact that *[name of party/witness]* did not disclose what *[he/she]* told *[his/her]* *[doctor/attorney/other]*. Do not discuss that fact during your deliberations or let it influence your decision in any way.** ~~People may exercise this privilege freely and without fear of penalty.~~

~~You must not use the fact that a witness exercised this privilege to decide whether he or she should be believed. Indeed, you must not let it affect any of your decisions in this case.~~

*New September 2003; Revised December 2012*

**Directions for Use**

This instruction must be given upon request, ~~where~~ **if** appropriate. (Evid. Code, § 913(b).)

**Sources and Authority**

- Evidence Code section 913(b), provides: “The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.”
- The comment to Evidence Code section 913 notes that this statute “may modify existing California law as it applies in civil cases.” Specifically, the comment notes that section 913 in effect overrules two Supreme Court cases: *Nelson v. Southern Pacific Co.* (1937) 8 Cal.2d 648 [67 P.2d 682] and *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350]. The *Nelson* court had held that evidence of a person’s exercise of the privilege against self-incrimination in a prior proceeding may be shown for impeachment purposes if he or she testifies in a self-exculpatory manner in a subsequent proceeding. Language in *Fross* indicated that unfavorable inferences may be drawn in a civil case from a party’s claim of the privilege against self-incrimination during the case itself.

**Secondary Sources**

2 Witkin, California Evidence (4th ed. 2000) Witnesses, §§ 95–97

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 35.26–35.27

3 California Trial Guide, Unit 51, *Privileges*, §§ 51.01–51.32 (Matthew Bender)

Matthew Bender Practice Guide: California Civil Discovery, Ch. 2, *Scope of Discovery*, 2.09–2.24

## 216. Exercise of ~~Witness'~~ Right Not to Incriminate Oneself (Evid. Code, § 913) ~~Testify~~

~~[Name of party/witness] has an absolute constitutional exercised [his/her] legal right not to give testimony that might tend to incriminate [himself/herself] testify concerning certain matters. Do not consider, for any reason at all, the fact that [name of party/witness] invoked the right not to testify. Do not discuss that fact during your deliberations or let it influence your decision in any way. draw any conclusions from the exercise of this right or let it affect any of your decisions in this case. A [party/witness] may exercise this right freely and without fear of penalty.~~

~~New September 2003; Revised December 2012~~

### Directions for Use

~~The privilege against self-incrimination may be asserted in a civil proceeding. (*Kastigar v. United States* (1972) 406 US 441, 444 [92 S. Ct. 1653; 32 L. Ed. 2d 212]; *People v. Merfeld* (1997) 57 Cal.App.4th 1440, 1443 [67 Cal.Rptr.2d 759].) Under California law, neither the court nor counsel may comment on the fact that a witness has claimed a privilege, and the trier of fact may not draw any inference from the refusal to testify as to the credibility of the witness or as to any matter at issue in the proceeding. (Evid. Code, § 913(a); see *People v. Doolin* (2009) 45 Cal.4th 390, 441–442 [87 Cal.Rptr.3d 209, 198 P.3d 11].)~~

~~Therefore, the issue of a witness' invocation of the Fifth Amendment right not to self-incriminate is raised outside the presence of the jury, and the jury is not informed of the matter. This instruction is intended for use if the circumstances presented in a case result in the issue being raised in the presence of the jury and a party adversely affected requests a jury instruction. (See Evid. Code, § 913(b).) Citing *Fross v. Wotton* (1935) 3 Cal.2d 384 [44 P.2d 350], courts have stated the following: "When a claim of privilege made on this ground in a civil proceeding logically gives rise to an inference which is relevant to the issues involved, the trier of fact may properly draw that inference." (*Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 117 [130 Cal.Rptr. 257, 550 P.2d 161], internal citation omitted.) However, Assembly Committee on the Judiciary's comment to Evidence Code section 913 states: "There is some language in *Fross v. Wotton* ... that indicates that unfavorable inferences may be drawn in a civil case from a party's claim of the privilege against self-incrimination during the case itself. Such language was unnecessary to that decision; but, if it does indicate California law, that law is changed by Evidence Code Sections 413 and 913. Under these sections, it is clear that, in civil cases as well as criminal cases, inferences may be drawn only from the evidence in the case, not from the claim of privilege."~~

### Sources and Authority

- Evidence Code section 913 provides:
  - (a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify with respect to any matter, or to refuse to disclose or to prevent another from disclosing any matter, neither the presiding officer nor counsel may comment thereon, no presumption shall arise because of the exercise of the privilege, and the trier of fact may not draw any inference therefrom as to the credibility of the witness or as to any

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matter at issue in the proceeding.

- (b) The court, at the request of a party who may be adversely affected because an unfavorable inference may be drawn by the jury because a privilege has been exercised, shall instruct the jury that no presumption arises because of the exercise of the privilege and that the jury may not draw any inference therefrom as to the credibility of the witness or as to any matter at issue in the proceeding.

- Evidence Code section 940 provides: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him.”
- ~~Evidence Code section 930 provides: “To the extent that such privilege exists under the Constitution of the United States or the State of California, a defendant in a criminal case has a privilege not to be called as a witness and not to testify.”~~
- ~~Evidence Code section 413 provides: “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.”~~
- “[I]n any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity.” (*Cramer v. Tyars* (1979) 23 Cal.3d 131, 137 [151 Cal.Rptr. 653, 588 P.2d 793], internal citation omitted.)
- “[T]he privilege may not be asserted by merely declaring that an answer will incriminate; it must be ‘evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.’ ” (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1010–1011 [231 Cal.Rptr. 108], internal citations omitted.)
- “The Fifth Amendment of the United States Constitution includes a provision that ‘[no] person ... shall be compelled in any criminal case to be a witness against himself, ... .’ Although the specific reference is to criminal cases, the Fifth Amendment protection ‘has been broadly extended to a point where now it is available even to a person appearing only as a witness in any kind of proceeding where testimony can be compelled.’ ” (*Brown v. Superior Court* (1986) 180 Cal.App.3d 701, 708 [226 Cal.Rptr. 10], citation and footnote omitted.)
- “There is no question that the privilege against self-incrimination may be asserted by civil defendants who face possible criminal prosecution based on the same facts as the civil action. ‘All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.’ ” (*Brown, supra*, 180 Cal.App.3d at p. 708, internal citations omitted.)
- “It is well settled that the privilege against self-incrimination may be invoked not only by a criminal defendant, but also by parties or witnesses in a civil action. However, while the privilege of a criminal

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defendant is absolute, in a civil case a witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it.” (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712 [204 Cal.Rptr. 864], internal citations omitted.)

- “The privilege against self-incrimination is guaranteed by both the federal and state Constitutions. As pointed out by the California Supreme Court, ‘two separate and distinct testimonial privileges’ exist under this guarantee. First, a defendant in a criminal case ‘has an absolute right not to be called as a witness and not to testify.’ Second, ‘in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him [or her] in criminal activity.’ ” (*People v. Merfeld, supra, (1997)* 57 Cal.App.4th at p.1440, 1443 ~~[67 Cal.Rptr.2d 759]~~, internal citations omitted.)
- “The jury may not draw any inference from a witness's invocation of a privilege. Upon request, the trial court must so instruct jurors. ‘To avoid the potentially prejudicial impact of having a witness assert the privilege against self-incrimination before the jury, we have in the past recommended that, in determining the propriety of the witness's invocation of the privilege, the trial court hold a pretestimonial hearing outside the jury's presence.’ Such a procedure makes sense under the appropriate circumstances. If there is a dispute about whether a witness may legitimately rely on the Fifth Amendment privilege against self-incrimination to avoid testifying, that legal question should be resolved by the court. Given the court's ruling and the nature of the potential testimony, the witness may not be privileged to testify at all, or counsel may elect not to call the witness as a matter of tactics.” (*People v. Doolin, supra*, 45 Cal.4th at pp. 441-442, original italics, internal citations omitted.)

***Secondary Sources***

2 Witkin, California Evidence (4th ed. 2000) Witnesses, § 96, p. 347

5 Levy et al., California Torts, Ch. 72, *Discovery*, §§ 72.20, 72.30 (Matthew Bender)

3 California Trial Guide, Unit 51, *Privileges*, § 51.32 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.30 et seq. (Matthew Bender)

1 California Deposition and Discovery Practice, Ch. 21, *Privileged Matters in General*, § 21.20, Ch. 22, *Privilege Against Self-Incrimination* (Matthew Bender)

### 306. Unformalized Agreement

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[Name of defendant] contends that the parties did not enter into a contract because they **had not signed a final written agreement** ~~was never written and signed~~. To **prove that a contract was created** ~~overcome this contention~~, [name of plaintiff] must prove both of the following:

1. That the parties understood and agreed to the terms of the agreement; and
  2. That the parties agreed to be bound ~~without a written agreement~~ ~~or before a written agreement was~~ **completed and signed** ~~prepared~~.
- 

*New September 2003; Revised December 2012*

#### Directions for Use

Give this instruction if the parties agreed to contract terms with the intention of reducing their agreement to a written and signed contract, but an alleged breach occurred before the written contract was completed and signed. For other situations involving the lack of a final written contract, see CACI No. 304, *Oral or Written Contract Terms*, and CACI No. 305, *Implied-in-Fact Contract*.

Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.

#### Sources and Authority

- “Where the writing at issue shows ‘no more than an intent to further reduce the informal writing to a more formal one’ the failure to follow it with a more formal writing does not negate the existence of the prior contract. However, where the writing shows it was not intended to be binding until a formal written contract is executed, there is no contract.” (*Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 307 [87 Cal.Rptr.2d 822], internal citations omitted.)
- The execution of a formalized written agreement is not necessarily essential to the formation of a contract that is made orally: “[I]f the respective parties orally agreed upon all of the terms and conditions of a proposed written agreement with the mutual intention that the oral agreement should thereupon become binding, the mere fact that a formal written agreement to the same effect has not yet been signed does not alter the binding validity of the oral agreement. [Citation.]” (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)
- If the parties have agreed not to be bound until the agreement is reduced to writing and signed by the parties, then the contract will not be effective until the formal agreement is signed. (*Beck v. American Health Group International, Inc.* (1989) 211 Cal.App.3d 1555, 1562 [260 Cal.Rptr. 237].)
- “Whether it was the parties’ mutual intention that their oral agreement to the terms contained in a proposed written agreement should be binding immediately is to be determined from the surrounding

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facts and circumstances of a particular case and is a question of fact for the trial court.” (*Banner Entertainment, Inc., supra*, 62 Cal.App.4th at p. 358.)

***Secondary Sources***

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 133, 134

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.22 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.350 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.07[3]

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

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

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

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

**Directions for Use**

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

**Sources and Authority**

- “There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)
- “ “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” ’ ’ [ ] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be exercised in good faith.” (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)

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- “The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party’s right to receive the *benefits of the agreement actually made*. The covenant thus cannot ‘ “ ‘be endowed with an existence independent of its contractual underpinnings.’ ” ’ It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted, original italics.)
- “The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. “The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract’s purpose.’ ... ‘In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031-1032 [14 Cal.Rptr.2d 335], internal citations omitted.)
- “There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract.” (*Racine & Laramie, Ltd., supra*, 11 Cal.App.4th at p. 1032, internal citations omitted.)
- “Although breach of the implied covenant often is pleaded as a separate count, a breach of the implied covenant is necessarily a breach of contract.” (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736].)
- “The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily ‘a question of fact unless only one inference [can] be drawn from the evidence.’ ” (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

***Secondary Sources***

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

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

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

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**380. Agreement Formalized by Electronic Means—Uniform Electronic Transactions Act (Civ. Code, § 1633.1 et seq.)**

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**[Name of plaintiff] claims that the parties entered into a valid contract in which [some of] the required terms were supplied by [specify electronic means, e.g., e-mail messages]. If both parties agree, a binding contract may be formed using an electronic record and signatures. An “electronic record” is one created, generated, sent, communicated, received, or stored by electronic means. [E.g., E-Mail] is an electronic record.**

**[Name of plaintiff] must prove, based on the context and surrounding circumstances, including the conduct of the parties, that the parties agreed to use [e.g., e-mail] to formalize their agreement. .**

**[[Name of plaintiff] must have sent the contract documents to [name of defendant] in an electronic record capable of retention by [name of defendant] at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system limits or prohibits the ability of the recipient to print or store it.]**

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*New December 2012*

**Directions for Use**

This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code, § 1633.1 et seq.) to prove contract formation. If there are other contested issues as to whether a contract was formed, also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The first paragraph asserts that electronic means were used to supply the essential elements of the contract. Give the third paragraph if a law requires a person to provide, send, or deliver information in writing to another person. (See Civ. Code, § 1633.8(a).)

The most likely jury issue is whether the parties agreed to rely on electronic records and signatures to finalize their agreement. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)

The UETA does not specify any particular transmissions that meet the definition of “electronic record,” such as e-mail or fax. (See Civ. Code, § 1633.2(g).) Nevertheless, there would seem to be little doubt that e-mail and fax meet the definition. The parties will probably stipulate accordingly, or the court may find that the particular transmission at issue meets the definition as a matter of law.

**Sources and Authority**

- Civil Code section 1633.2(g) provides: “ ‘Electronic record’ means a record created, generated, sent, communicated, received, or stored by electronic means.”
- Civil Code section 1633.2(h) provides: “ ‘Electronic signature’ means an electronic sound,

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symbol, or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record.

- Civil Code section 1633.3(b) provides:

(b) This title does not apply to transactions subject to the following laws:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts.

(2) Division 1 (commencing with Section 1101) of the Uniform Commercial Code, except Sections 1107 and 1206.

(3) Divisions 3 (commencing with Section 3101), 4 (commencing with Section 4101), 5 (commencing with Section 5101), 8 (commencing with Section 8101), 9 (commencing with Section 9101), and 11 (commencing with Section 11101) of the Uniform Commercial Code.

(4) A law that requires that specifically identifiable text or disclosures in a record or a portion of a record be separately signed, including initialed, from the record. However, this paragraph does not apply to Section 1677 or 1678 of this code or Section 1298 of the Code of Civil Procedure.

- Civil Code section 1633.5(b) provides: “This title [UETA] applies only to a transaction between parties each of which has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned upon an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. This subdivision may not be varied by agreement.”

- Civil Code section 1633.7 provides:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

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- Civil Code section 1633.8(a) provides: “If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, that requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.”

*Secondary Sources*

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**1730. Slander of Title—Essential Factual Elements**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **harmed [him/her] by [making a statement/taking an action] that cast doubts about** *[name of plaintiff]’s ownership of [describe real or personal property, e.g., the residence located at [address]]. To establish this claim, [name of plaintiff] must prove all of the following:*

- 1. That** *[name of defendant]* **[made a statement/[specify other act, e.g., recorded a deed] that cast doubts about** *[name of plaintiff]’s ownership of the property;*
  - 2. That the** **[statement was made to a person other than** *[name of plaintiff]/specify other publication, e.g., deed became a public record];*
  - 3. That [the statement was untrue and]** *[name of plaintiff]* **did in fact have good and clear title to the property;**
  - 4. That** *[name of defendant]* **[knew that/acted with reckless disregard of the truth or falsity as to whether]** *[name of plaintiff]* **had good and clear title to the property;**
  - 5. That** *[name of defendant]* **knew or should have recognized that a third person, acting in reliance on the** **[statement/e.g., deed], would cause** *[name of plaintiff]* **financial loss;**
  - 6. That** *[name of plaintiff]* **did in fact suffer immediate and direct financial harm because of an act of a third party taken in reliance on the** **[statement/e.g., deed];**
  - 7. That** *[name of defendant]’s conduct was a substantial factor in causing* *[name of plaintiff]’s harm.*
- 

*New December 2012*

**Directions for Use**

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege.

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The privilege of Civil Code section 47(c), applicable to communications between “interested” persons (see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(c) at issue.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson, supra* 46 Cal.2d at p. 381.) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683].) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

### Sources and Authority

- “The elements of a cause of action for slander of title are ‘(1) a publication, (2) which is without privilege or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.’ (*Alpha & Omega Development, LP, supra*, 200 Cal.App.4th at p. 664, internal citations omitted.)
- “ ‘Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.’ ‘However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.’ ” (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [– Cal.Rptr.3d –], internal citations omitted.)
- “Slander of title ‘occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]’ The false statement must be ‘ ‘maliciously made with the intent to defame.’ ’ ” (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)
- “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of

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its truth or falsity.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- “One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.” (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)
- “Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss.” (*Howard, supra*, 113 Cal.App.3d at ppl 263–264, footnote and internal citations omitted.)
- “Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code.” (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405], internal citations omitted.)
- “[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given.” (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767].)
- “The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege.” (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)
- “The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the

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legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c).” (*Lundquist, supra*, 7 Cal.4th at pp. 1202–1203.)

- “ ‘The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.’ ‘Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].’ Finally, ‘Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.’” (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339], internal citations omitted.)
- “[I]f the pleading filed by the claimant in the underlying action does not allege a real property claim, or the alleged claim lacks evidentiary merit, the *lis pendens*, in addition to being subject to expungement, is not privileged. It follows the *lis pendens* in that situation may be the basis for an action for slander of title.” (*Palmer, supra*, 109 Cal.App.4th at p. 1380.)
- “[T]he property owner may recover for the impairment of the vendibility ‘of his property’ without showing that the loss was caused by prevention of a particular sale. ‘The most usual manner in which a third person’s reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.’ ” (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

***Secondary Sources***

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1821. Damages for Use of Name or Likeness (Under Civil Civ. Code Section § 3344(a))

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

[Name of plaintiff] must prove the amount of [his/her] damages. ~~However,~~ [name Name of plaintiff] does not have to prove the exact amount of damages that will provide reasonable compensation for the harm. ~~However,~~ ~~y~~You must not speculate or guess in awarding damages.

The following are the specific items of damages claimed by [name of plaintiff]:

1. [Humiliation, embarrassment, and mental distress;]
2. [Harm to [name of plaintiff]’s reputation;] [and]
3. [Insert other item(s) of claimed harm].

~~If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than \$750, then you must award [him/her] \$750.~~

In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]’s [name/voice/signature/photograph/likeness] [that have not already been taken into account in computing the above damages]. To establish the amount of ~~such~~ these profits you must:

1. Determine the gross, or total, revenue that [name of defendant] received from ~~such~~ the use;
2. Determine the expenses that [name of defendant] had in obtaining the gross revenue; and
3. Deduct [name of defendant]’s expenses from the gross revenue.

[Name of plaintiff] must prove the amount of gross revenue, and [name of defendant] must prove the amount of expenses.

*New September 2003; Revised June 2012, December 2012*

### Directions for Use

Under Civil Code section 3344(a), an injured party may recover either actual damages or \$750, whichever is greater, as well as profits from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) If no actual damages are sought, the first part of the instruction may be deleted or

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modified to simply instruct the jury to award \$750.

The advisory committee recommends computing damages to recover the defendant’s wrongful profits separately from actual damages, that is, under the second part of the instruction and not under actual damages item 3 (“other item(s) of claimed harm”). See also CACI No. VF-1804, *Privacy—Use of Name or Likeness*. Give the bracketed phrase in the last full paragraph only if the plaintiff’s lost profits have been included in the calculation of actual damages.

### Sources and Authority

- Civil Code section 3344(a) provides: “Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney’s fees and costs.”
- “[Plaintiff] alleges, and submits evidence to show, that he was injured economically because the ad will make it difficult for him to endorse other automobiles, and emotionally because people may be led to believe he has abandoned his current name and assume he has renounced his religion. These allegations suffice to support his action. Injury to a plaintiff’s right of publicity is not limited to present or future economic loss, but ‘may induce humiliation, embarrassment, and mental distress.’ ” (*Abdul-Jabbar v. General Motors Corp.* (9th Cir. 1996) 85 F.3d 407, 416, internal citation omitted.)
- “We can conceive no rational basis for the Legislature to limit the \$750 as an alternative to all other damages, including profits. If someone profits from the unauthorized use of another's name, it makes little sense to preclude the injured party from recouping those profits because he or she is entitled to statutory damages as opposed to actual damages. Similar reasoning appears to be reflected in the civil jury instructions for damages under section 3344, which provides: ‘If [name of plaintiff] has not proved the above damages, or has proved an amount of damages less than \$750, then you must award [him/her] \$750. [¶] In addition, [name of plaintiff] may recover any profits that [name of defendant] received from the use of [name of plaintiff]'s [name ... ] [that have not already been taken into account in computing the above damages].’ (CACI No. 1821, italics omitted.)” (*Orthopedic Systems Inc.*, *supra*, 202 Cal.App.4th at p. 546.)

### *Secondary Sources*

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1548–1556

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Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.13 (Matthew Bender)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.35 (Matthew Bender)

California Civil Practice, Torts § 20:17 (Thomson Reuters West)

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VF-1804. Privacy—Use of Name or Likeness (Civ. Code, § 3344)

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* knowingly use *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* on merchandise or to advertise or sell products or services?  
 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]* have *[name of plaintiff]*'s consent?  
 Yes  No

If your answer to question 2 is no, then answer question 23. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Was *[name of defendant]*'s use of *[name of plaintiff]*'s *[name/voice/signature/photograph/likeness]* directly connected to *[name of defendant]*'s commercial purpose?  
 Yes  No

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

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

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

- 5. Did *[name of plaintiff]* suffer any actual damages?**  
 Yes  No

**If your answer to question 5 is yes, then answer questions 6 and 7. If you answered no, answer question 7.**

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

[a. Past economic loss

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

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

**[c. Past noneconomic loss, including humiliation/embarrassment/mental distress/physical  
~~\_\_\_\_\_pain/mental suffering:~~]**  
 \$ \_\_\_\_\_]

**[d. Future noneconomic loss, including humiliation/embarrassment/mental distress/physical  
~~\_\_\_\_\_pain/mental suffering:~~]**  
 \$ \_\_\_\_\_]

**TOTAL ACTUAL DAMAGES \$ \_\_\_\_\_**

**[7. Did [name of defendant] receive any profits from the use of [name of plaintiff]’s [name/voice/signature/photograph/likeness] that you did not include under [name of plaintiff]’s actual damages above?**  
Yes No

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

**8. What amount of those profits did [name of defendant] receive from the use of [name of plaintiff]’s [name/voice/signature/photograph/likeness]?**

**TOTAL PROFITS RECEIVED BY DEFENDANT \$ \_\_\_\_\_]**

**Signed:** \_\_\_\_\_

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**Presiding Juror**

**Dated:** \_\_\_\_\_

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

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*New September 2003; Revised April 2007, April 2008, December 2010, June 2012, December 2012*

**Directions for Use**

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

This verdict form is based on CACI No. 1804A, *Use of Name or Likeness*, and CACI No. 1821, *Damages for Use of Name or Likeness*~~*Under Civil Code Section 3344*~~.

Under Civil Code section 3344(a), the plaintiff may recover actual damages or \$750, whichever is greater. The plaintiff may also recover any profits that the defendant received from the unauthorized use that were not taken into account in calculating actual damages. (*Orthopedic Systems Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 547 [135 Cal.Rptr.3d 200].) The advisory committee recommends calculating profits to be recovered separately from actual damages. Questions 5 through 8 take the jury through the recommended course. If no actual damages are sought, question 5 may be omitted and \$750 entered as the total actual damages in question 6. If the jury awards actual damages of less than \$750, the court should raise the amount to \$750. If there is no claim to recover wrongful profits, questions 7 and 8 may be omitted.

Additional questions may be necessary if the facts implicate Civil Code section 3344(d) (see Directions for Use under CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*).

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

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

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

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[Name of plaintiff] claims that [he/she/it] was harmed by [name of defendant]’s breach of the obligation of good faith and fair dealing because [name of defendant] failed to accept a reasonable settlement demand in a lawsuit against [name of plaintiff]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff in underlying case] brought a lawsuit against [name of plaintiff] for a claim that ~~[[he/she/it] alleged]~~ was covered by [name of defendant]’s insurance policy;
2. That [name of defendant] failed to accept a reasonable settlement demand for an amount within policy limits; and
3. That a monetary judgment was entered against [name of plaintiff] for a sum greater than the policy limits.

“Policy limits” means the highest amount available under the policy for the claim against [name of plaintiff].

A settlement demand is reasonable if [name of defendant] knew or should have known at the time the settlement demand was rejected that the potential judgment was likely to exceed the amount of the settlement demand based on [name of plaintiff in underlying case]’s injuries or loss and [name of plaintiff]’s probable liability.

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*New September 2003; Revised December 2007, June 2012, [December 2012](#)*

**Directions for Use**

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

This instruction is intended for use if the insurer assumed the duty to defend the insured, but failed to accept a reasonable settlement offer. It may also be used if the insurer rejects the defense, but did in fact owe its insured a duty to indemnify (i.e., coverage can be established). (See *Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705].) For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

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

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

claimants.

### Sources and Authority

- “[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured’s interest requires the insurer to settle the claim.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)
- “Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing.” (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)
- “In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer.” (*Crisci, supra*, 66 Cal.2d at p. 429.)
- “[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim’s injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer.” (*Johansen v. California State Auto. Asso. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)
- “The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim.” (*Crisci, supra*, 66 Cal.2d at p. 431.)
- “The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer’s duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer’s gamble—on which only the insured might lose.” (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

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- “Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement.” (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)
- “Whether [the insurer] ‘refused’ the ‘offer,’ and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer’s terms, were questions for the jury.” (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)
- “A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable.” (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)
- “An insurer’s wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer’s misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment.” (*Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42], internal citations omitted.)
- “[A]n insurer who refused a reasonable settlement offer, on the ground of no coverage, does so at its own risk, so that the insurer has no defense that its refusal was in good faith if coverage is, in fact, found. However, where the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because ‘The insurer does not ... insure the entire range of an insured’s well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims....’ ” (*DeWitt, supra*, 204 Cal.App.4th at p. 244, original italics.)
- “A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer.” (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)
- “An insurer that breaches its duty of reasonable settlement is liable for all the insured’s damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded.” (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725 [117 Cal.Rptr.2d 318, 41 P.3d 128], internal citations omitted.)

### ***Secondary Sources***

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 257–258

Croskey et al., California Practice Guide: Insurance Litigation, ¶¶ 12:201–12:686 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to

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Settle, §§ 26.1–26.35

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

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

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

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**2440. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)**

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**[Name of plaintiff] claims that [name of defendant] discharged [him/her] because [he/she] acted in furtherance of a false claim action. A false claim action is a lawsuit against a person who is alleged to have submitted a false claim to a government agency for payment. In order to establish [his/her] unlawful discharge claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] was an employee of [name of defendant];**
- 2. That [name of false claimant] was [under investigation for/charged with/[other]] defrauding the government of money, property, or services by submitting a false or fraudulent claim to the government for payment;**
- 3. That [name of plaintiff] [specify acts done in furthering the false claim action];**
- 4. That [name of plaintiff]’s acts were in furtherance of a false claim action;**
- 5. That [name of defendant] discharged [name of plaintiff];**
- 6. [That [name of plaintiff]’s acts in furtherance of a false claim action were a motivating reason for [name of defendant]’s decision to discharge [him/her];**
- 7. That [name of plaintiff] was harmed; and**
- 8. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

**An act is “in furtherance of” a false claims action if:**

**[[Name of plaintiff] actually filed a false claims action [himself/herself].]**

**[or]**

**[Someone else filed a false claims action but [name of plaintiff] [specify acts in support of action, e.g., gave a deposition in the action], which resulted in the retaliatory acts.]**

**[or]**

**[No false claim action was ever actually filed, but [name of plaintiff] had reasonable suspicions of a false claim, and it was reasonably possible for [name of plaintiff]’s conduct to lead to a false claim action.]**

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**Directions for Use**

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who takes steps in furtherance of a false claims action. (See Gov. Code, § 12653(b).) In the opening paragraph and in element 3, specify the steps that the plaintiff did that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(b).) Elements 4 and 5 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, “*Adverse Employment Action*” Explained, and CACI No. 2510, “*Constructive Discharge*” Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses “motivating reason” to express both intent and causation. See CACI No. 2507, “*Motivating Reason*” Explained.

If the defendant alleges that the plaintiff participated in conduct that directly or indirectly resulted in a false claim being submitted, an additional instruction will be required. In such a case, the plaintiff is entitled to relief only if he or she (1) voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed; and (2) had been harassed, threatened with termination or demotion, or otherwise coerced by the defendant into engaging in the fraudulent activity in the first place. (Gov. Code, § 12653(d).)

**Sources and Authority**

- Government Code section 12653 provides:
  - (a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under Section 12652.
  - (b) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.
  - (c) An employer who violates subdivision (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs

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and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this subdivision.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies under subdivision (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

- “The False Claims Act prohibits a “person” from defrauding the government of money, property, or services by submitting to the government a ‘false or fraudulent claim’ for payment.” (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)
- “The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a ‘person’ being liable for defrauding the government, but of an ‘employer’ who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been ‘characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.’ ” (*Cordero-Sacks, supra*, 200 Cal.App.4th at p. 1274.)
- “[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged ‘in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.’ ” (*Cordero-Sacks, supra*, 200 Cal.App.4th at p. 1276.)
- “Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action.” (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)
- “There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra*, 179 Cal.App.4th at pp. 59–60.)

*Secondary Sources*

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**2441. Discrimination Against Member of Military—Essential Factual Elements (Mil. & Vet. Code, § 394)**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her]* **because of** *[his/her]* **[current/past] service in the** *[United States/California]* **military. To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of plaintiff]* **was an employee of** *[name of defendant]*;
  2. **That** *[name of plaintiff]* **[was serving/had served] in the** *[specify military branch, e.g., California National Guard]*;
  3. **That** *[name of defendant]* **discharged** *[name of plaintiff]*;
  4. **[That** *[name of plaintiff]***’s** **[[past/current] service in the armed forces/ need to report for required military [duty/training]] was a motivating reason for** *[name of defendant]***’s decision to discharge** *[name of plaintiff]***];]**
  5. **That** *[name of plaintiff]* **was harmed; and**
  6. **That** *[name of defendant]***’s conduct was a substantial factor in causing** *[name of plaintiff]***’s harm.**
- 

*New December 2012*

**Directions for Use**

Military and Veterans Code section 394 prohibits employment discrimination against members of the military on two grounds. First, discrimination is prohibited based simply on the plaintiff’s military membership or service. In other words, an employer, public or private, may not refuse to hire or discharge someone based on the fact that the person serves or has served in the armed forces. (Mil. & Vet. Code, § 394(a), (b).) Second, a military-member employee is protected from discharge or other adverse actions because of a requirement to participate in military duty or training. (Mil. & Vet. Code, § 394(d).) For element 4, choose the appropriate option.

The statute prohibits a refusal to hire based on military status, and also reaches a broad range of adverse employment actions short of actual discharge. (See Mil. & Vet. Code, § 394(a), (b), (d) [prohibiting prejudice, injury, harm].) Elements 1, 3, 4, and 6 may be modified to refer to seeking employment and refusal to hire. Elements 3, 4, and 6 may be modified to allege constructive discharge or adverse acts other than discharge. See CACI No. 2509, “*Adverse Employment Action*” *Explained*, and CACI No. 2510, “*Constructive Discharge*” *Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses “motivating reason” to express both intent and causation. See CACI No. 2507,

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*“Motivating Reason” Explained.*

**Sources and Authority**

- Military and Veterans Code section 394 provides in part:
  - (a) No person shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any person, employer, or officer or agent of any corporation, company, or firm with respect to that member's employment, position or status or be denied or disqualified for employment by virtue of membership or service in the military forces of this state or of the United States.
  - (b) No officer or employee of the state, or of any county, city and county, municipal corporation, or district shall discriminate against any officer, warrant officer or enlisted member of the military or naval forces of the state or of the United States because of that membership. No member of the military forces shall be prejudiced or injured by any officer or employee of the state, or of any county, city and county, municipal corporation, or district with respect to that member's employment, appointment, position or status or be denied or disqualified for or discharged from that employment or position by virtue of membership or service in the military forces of this state or of the United States.
  - (c) [omitted]
  - (d) No employer or officer or agent of any corporation, company, or firm, or other person, shall discharge any person from employment because of the performance of any ordered military duty or training or by reason of being an officer, warrant officer, or enlisted member of the military or naval forces of this state, or hinder or prevent that person from performing any military service or from attending any military encampment or place of drill or instruction he or she may be called upon to perform or attend by proper authority; prejudice or harm him or her in any manner in his or her employment, position, or status by reason of performance of military service or duty or attendance at military encampments or places of drill or instruction; or dissuade, prevent, or stop any person from enlistment or accepting a warrant or commission in the California National Guard or Naval Militia by threat or injury to him or her in respect to his or her employment, position, status, trade, or business because of enlistment or acceptance of a warrant or commission.
  - (e)–(h) [omitted]
- [I]ndividual employees may not be held personally liable under section 394 for alleged discriminatory acts that arise out of the performance of regular and necessary personnel management duties.” (*Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 998 [134 Cal. Rptr. 3d 214].)

***Secondary Sources***

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**2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **retaliated against [him/her] for** *[describe activity protected by the FEHA]*. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* *[describe protected activity]*;
2. **[That** *[name of defendant]* **[discharged/demoted/[specify other adverse employment action]]** *[name of plaintiff]*];

**[or]**

**[That** *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action;**

**[or]**

**[That** *[name of plaintiff]* **was constructively discharged;**

3. **That** *[name of plaintiff]*'s *[describe protected activity]* **was a motivating reason for** *[name of defendant]*'s **[decision to [discharge/demote/[specify other adverse employment action]]** *[name of plaintiff]*/conduct];
  4. **That** *[name of plaintiff]* **was harmed; and**
  5. **That** *[name of defendant]*'s **conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
- 

*New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012*

**Directions for Use**

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person “because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA].”

Read the first option for element 2 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of*

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*Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select “conduct” in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee’s position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Also select “conduct” in element 3 if the third option is included for element 2.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA. The jury in the case was instructed per element 3 “that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant.” The committee believes that the instruction as given is correct for the intent element in a retaliation case. However, in cases such as *Joaquin* in which the distinction between a prohibited motivating reason (based on a report of sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified) is a subtle one, the instruction may need to be modified to clarify this distinction, and to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

### Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
- The FEHA defines a “person” as “one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries.” (Gov. Code, § 12925(d).)
- The Fair Employment and Housing Commission’s regulations provide: “It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may

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make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs.” (Cal. Code Regs., tit. 2, § 7287.8(a).)

- “[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation “ ‘drops out of the picture,’ ” and the burden shifts back to the employee to prove intentional retaliation.” (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- “It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision.” (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- “Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)
- “Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)
- “Moreover, [defendant]’s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.” (*Wysinger, supra*, 157 Cal.App.4th at p. 424, internal citations omitted.)
- “A long period between an employer’s adverse employment action and the employee’s earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection.” (*Wysinger, supra*, 157 Cal.App.4th at p. 421, internal citation omitted.)
- “Both direct and circumstantial evidence can be used to show an employer’s intent to retaliate.

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‘Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.’ Circumstantial evidence typically relates to such factors as the plaintiff’s job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)

- “The retaliatory motive is ‘proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.’ ‘The causal link may be established by an inference derived from circumstantial evidence, “such as the employer’s knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.” ’ ” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- “[A]n employer generally can be held liable for the retaliatory actions of its supervisors.” (*Wysinger, supra*, 157 Cal.App.4th at p. 420.)
- “Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer’s harassment against those employees.” (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)
- “[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), ‘by permitting ... fellow employees to punish [him] for invoking [his] rights.’ We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct.” (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)
- “[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation.” (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)
- “[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446., 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “ ‘The legislative purpose underlying FEHA’s prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints ... .’ Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a

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complaint. To limit FEHA in such a way would be to condone ‘an absurd result’ that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer.” (*Steele, supra*, 162 Cal.App.4th at p. 1255, internal citations omitted.)

***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:680–7:841 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters West)

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

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**In this case, the decision to [discharge/[other adverse employment action]] [name of plaintiff] was made by [name of decision-maker]. Even if [name of decision maker] did not hold any [discriminatory/retaliatory] intent [or was unaware of [name of plaintiff]'s conduct on which the claim of retaliation is based], [name of defendant] may still be liable for [discrimination/retaliation] if [name of plaintiff] proves both of the following:**

- 1. That [name of plaintiff]’s [specify protected activity or attribute] was a motivating reason for [name of supervisor]’s [specify acts of supervisor on which decision maker relied]; and**
  - 2. That [name of decision maker] would not have [discharged/[other adverse employment action]] [name of plaintiff] had [name of supervisor] not [specify acts on which decision maker relied].**
- 

*New December 2012*

**Directions for Use**

Give this instruction if the “cat’s paw” rule is a factor in the case. Under the cat’s paw rule, the person who actually took the adverse employment action against the employee was not acting out of any improper animus. The decision-maker, however, acted on information provided by a supervisor who was acting out of discriminatory or retaliatory animus with the objective of causing the adverse employment action. The decision maker is referred to as the “cat’s paw” of the person with the animus. (See *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 100 [16 Cal.Rptr.3d 717].)

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

**Sources and Authority**

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

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- “This concept—which for convenience we will call the ‘defense of ignorance’—poses few analytical challenges so long as the ‘employer’ is conceived as a single entity receiving and responding to stimuli as a unitary, indivisible organism. But this is often an inaccurate picture in a world where a majority of workers are employed by large economic enterprises with layered and compartmentalized management structures. In such enterprises, decisions significantly affecting personnel are rarely if ever the responsibility of a single actor. As a result, unexamined assertions about the knowledge, ignorance, or motives of ‘the employer’ may be fraught with ambiguities, untested assumptions, and begged questions.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “[P]laintiff can establish the element of causation by showing that any of the persons involved in bringing about the adverse action held the requisite animus, provided that such person's animus operated as a ‘but-for’ cause, i.e., a force without which the adverse action would not have happened. Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation.” (*Reeves, supra*, 121 Cal.App.4th at p. 108.)
- “Here a rational fact finder could conclude that an incident of minor and excusable disregard for a supervisor's stated preferences was amplified into a ‘solid case’ of ‘workplace violence,’ and that this metamorphosis was brought about in necessary part by a supervisor's desire to rid himself of a worker who created trouble by complaining of matters the supervisor preferred to ignore. Since those complaints were protected activities under FEHA, a finder of fact must be permitted to decide whether these inferences should in fact be drawn.” (*Reeves, supra*, 121 Cal.App.4th at p. 121.)
- “Our emphasis on the conduct of supervisors is not inadvertent. An employer can generally be held liable for the discriminatory or retaliatory actions of supervisors. The outcome is less clear where the only actor possessing the requisite animus is a nonsupervisory coworker.” (*Reeves, supra*, 121 Cal.App.4th at pl 109 fn. 9.)

*Secondary Sources*

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**2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements  
(Gov. Code, § 12940(I))**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **wrongfully discriminated against** *[him/her]* **by failing to reasonably accommodate** *[his/her]* **religious** *[belief/observance]*. **To establish this claim,** *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of defendant]* **was** *[an employer/[other covered entity]]*;
2. **That** *[name of plaintiff]* **was an employee of** *[name of defendant]* **/applied to** *[name of defendant]* **for a job** *[other covered relationship to defendant]*;
3. **That** *[name of plaintiff]* **has a sincerely held religious belief that** *[describe religious belief, observance, or practice]*;
4. **That** *[name of plaintiff]*'s **religious** *[belief/observance]* **conflicted with a job requirement;**
5. **That** *[name of defendant]* **knew of the conflict between** *[name of plaintiff]*'s **religious** *[belief/observance]* **and the job requirement;**
6. **That** *[name of defendant]* **did not reasonably accommodate** *[name of plaintiff]*'s **religious** *[belief/observance]*;
7. **[That** *[name of defendant]* **[discharged/refused to hire/[other adverse employment action]]** *[name of plaintiff]* **for failing to comply with the conflicting job requirement;]**  
  
**[or]**  
  
**[That** *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action for failing to comply with the conflicting job requirement;]**  
  
**[or]**  
  
**[That** *[name of plaintiff]* **was constructively discharged for failing to comply with the conflicting job requirement;]**
8. **That** *[name of plaintiff]* **was harmed; and**
9. **That** *[name of defendant]*'s **failure to reasonably accommodate** *[name of plaintiff]*'s **religious** *[belief/observance]* **was a substantial factor in causing** *[his/her]* **harm.**

**If more than one accommodation is reasonable, an employer satisfies its obligation to make a reasonable accommodation if it selects one of those accommodations in good faith.**

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| *New September 2003; Revised June 2012, December 2012*

**Directions for Use**

If element 1 is given, the court may need to instruct the jury on the statutory definition of “employer” under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 7 if there is no dispute as to whether the employer’s acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, “*Adverse Employment Action*” Explained, if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 7 and also give CACI No. 2510, “*Constructive Discharge*” Explained.

Federal courts construing Title VII of the Civil Rights Act of 1964 have held that the threat of an adverse employment action is a violation if the employee acquiesces to the threat and foregoes religious observance. (See, e.g., *EEOC v. Townley Engineering & Mfg. Co.* (9th Cir.1988) 859 F.2d 610, 614 fn. 5.) While no case has been found that construes the FEHA similarly, element 7 may be modified if the court agrees that this rule applies. In the first option, a threat of discharge or discipline may be inserted as an “other adverse employment action.” Or in the second option, “subjected [name of plaintiff] to” may be replaced with “threatened [name of plaintiff] with.”

**Sources and Authority**

- Government Code section 12940(l) provides that it is an unlawful employment practice “[f]or an employer ... to refuse to hire or employ a person, ... or to discharge a person from employment, ... or to discriminate against a person in compensation or in terms, conditions, or privileges of employment because of a conflict between the person’s religious belief or observance and any employment requirement, unless the employer ... demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance ... but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business of the employer ... . Religious belief or observance ... includes, but is not limited to, observance of a Sabbath or other religious holy day or days, and reasonable time necessary for travel prior and subsequent to a religious observance.”
- Government Code section 12926(p) provides: “‘Religious creed,’ ‘religion,’ ‘religious observance,’ ‘religious belief,’ and ‘creed’ include all aspects of religious belief, observance, and practice.”
- The Fair Employment and Housing Commission’s regulations provide: “‘Religious creed’ includes any traditionally recognized religion as well as beliefs, observances, or practices which an individual sincerely holds and which occupy in his or her life a place of importance parallel to that of traditionally recognized religions. Religious creed discrimination may be established by showing: ... [t]he employer or other covered entity has failed to reasonably accommodate the applicant’s or employee’s religious creed despite being informed by the applicant or employee or otherwise having become aware of the need for reasonable accommodation.” (Cal. Code Regs., tit. 2, § 7293.1(b).)

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- The Fair Employment and Housing Commission’s regulations provide: “An employer or other covered entity shall make accommodation to the known religious creed of an applicant or employee unless the employer or other covered entity can demonstrate that the accommodation is unreasonable because it would impose an undue hardship.” (Cal. Code Regs., tit. 2, § 7293.3.)
- “In evaluating an argument the employer failed to accommodate an employee’s religious beliefs, the employee must establish a prima facie case that he or she had a bona fide religious belief, of which the employer was aware, that conflicts with an employment requirement ... . Once the employee establishes a prima facie case, then the employer must establish it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship.” (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370 [58 Cal.Rptr.2d 747], internal citation omitted.)
- “Any reasonable accommodation is sufficient to meet an employer’s obligations. However, the employer need not adopt the most reasonable accommodation nor must the employer accept the remedy preferred by the employee. The reasonableness of the employer’s efforts to accommodate is determined on a case by case basis ... . ‘[O]nce it is determined that the employer has offered a reasonable accommodation, the employer need not show that each of the employee’s proposed accommodations would result in undue hardship.’ ‘[W]here the employer has already reasonably accommodated the employee’s religious needs, the ... inquiry [ends].’ ” (*Soldinger, supra*, 51 Cal.App.4th at p. 370, internal citations omitted.)

***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 876, 922, 940, 941

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610–7:611, 7:631–7:634, 7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35[d], 115.91 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:71–2:73 (Thomson Reuters West)

1 Lindemann and Grossman, Employment Discrimination Law (3d ed. 1996) Religion, pp. 219–224, 226–227; *id.* (2000 supp.) at pp. 100–101

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VF-2500. Disparate Treatment (Gov. Code, § 12940(a))

**NOTE: The change to the Directions for Use proposed below would be made in all verdict forms in which multiple protected categories might be at issue.**

We answer the questions submitted to us as follows:

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

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

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

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

3. Did *[name of defendant]* **discharge/refuse to hire**/*[other adverse employment action]* *[name of plaintiff]*?
- \_\_\_ Yes \_\_\_ No

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

4. Was *[name of plaintiff]*'s *[protected status]* **a motivating reason for** *[name of defendant]*'s **discharge/refusal to hire**/*[other adverse employment action]*?
- \_\_\_ Yes \_\_\_ No

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

5. Was *[name of defendant]*'s **discharge/refusal to hire**/*[other adverse employment action]* **a substantial factor in causing harm to** *[name of plaintiff]*?
- \_\_\_ Yes \_\_\_ No

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

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

**[a. Past economic loss**

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other past economic loss \$ \_\_\_\_\_]

**Total Past Economic Damages: \$ \_\_\_\_\_]**

**[b. Future economic loss**

[lost earnings \$ \_\_\_\_\_]

[lost profits \$ \_\_\_\_\_]

[medical expenses \$ \_\_\_\_\_]

[other future economic loss \$ \_\_\_\_\_]

**Total Future Economic Damages: \$ \_\_\_\_\_]**

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

**\$ \_\_\_\_\_]**

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

**\$ \_\_\_\_\_]**

**TOTAL \$ \_\_\_\_\_**

**Signed:** \_\_\_\_\_

**Presiding Juror**

**Dated:** \_\_\_\_\_

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

*New September 2003; Revised April 2007, December 2010; December 2012*

**Directions for Use**

The special verdict forms in this section are intended only as models. They may need to be modified

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depending on the facts of the case. For example, if the plaintiff alleges discrimination on the basis of more than one protected status, question 4 will need to be modified so that the jury considers each status separately.

This verdict form is based on CACI No. 2500, *Disparate Treatment—Essential Factual Elements*.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

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

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

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

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**2620. CFRA Rights Retaliation—Essential Factual Elements**

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*[Name of plaintiff]* **claims that** *[name of defendant]* **retaliated against** **[him/her]** for **[[requesting/taking] [family care/medical] leave/[other protected activity]]**. To establish this claim, *[name of plaintiff]* **must prove all of the following:**

1. **That** *[name of plaintiff]* **was eligible for** **[family care/medical] leave;**
  2. **That** *[name of plaintiff]* **[[requested/took] [family care/medical] leave/[other protected activity]];**
  3. **That** *[name of defendant]* **[discharged/[other adverse employment action]]** *[name of plaintiff]*;
  4. **That** *[name of plaintiff]*'s **[[request for/taking of] [family care/medical] leave/[other protected activity]] was a motivating reason for** **[discharging/[other adverse employment action]]** **[him/her];**
  5. **That** *[name of plaintiff]* **was harmed; and**
  6. **That** *[name of defendant]*'s **retaliatory conduct was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
- 

*New September 2003; Revised December 2012*

**Directions for Use**

The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12945(l).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, "Adverse Employment Action" Explained, and CACI No. 2510, "Constructive Discharge" Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

**Sources and Authority**

- Government Code section 12945.2(l) provides:

It shall be an unlawful employment practice for an employer to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of any of the following:

- (1) An individual's exercise of the right to family care and medical leave ...

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- (2) An individual’s giving information or testimony as to his or her own family care and medical leave, or another person’s family care and medical leave, in any inquiry or proceeding related to rights guaranteed under this section.
- Government Code section 12945.2(t) provides: “It shall be an unlawful employment practice for an employer to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.”
  - Government Code section 12940(h) provides that it is an unlawful employment practice “[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under [Government Code sections 12900 through 12996] or because the person has filed a complaint, testified, or assisted in any proceeding under this part.”
  - “A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action *because he or she exercised the right to take CFRA leave.*” (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491 [130 Cal.Rptr.3d 350], original italics.)

***Secondary Sources***

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 943, 944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

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

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**2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption**

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

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

*New December 2012*

**Directions for Use**

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

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

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

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instruct further with details from the applicable wage order and regulations as to what constitutes “executive duties” in element 5.

**Sources and Authority**

- Labor Code section 515(a) provides in part: “The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.”
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption.” (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- “In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a ‘customarily recognized department or subdivision thereof’; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given ‘particular weight’; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., § 11090, subd. 1.(A)(1)].)
- “Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014.)
- “The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that ‘[t]he work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . . .’ No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. ‘A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations . . . .’ ” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014–1015.)

***Secondary Sources***

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

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

**Preliminary Draft Only—Not Approved by Judicial Council**

**2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption**

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

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

[or]

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

[or]

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

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

*New December 2012*

**Directions for Use**

This instruction is an affirmative defense to an employee’s claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc.* (2007) 151 Cal.App.4th 1363 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*.

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

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persons employed in professional, technical, clerical, mechanical, and similar occupations.).

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

**Sources and Authority**

- Labor Code section 515(a) provides in part: “The Industrial Welfare Commission may establish exemptions from the requirement that an overtime rate of compensation be paid pursuant to Sections 510 and 511 for executive, administrative, and professional employees, provided that the employee is primarily engaged in the duties that meet the test of the exemption, customarily and regularly exercises discretion and independent judgment in performing those duties, and earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.”
- “[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee’s exemption.” (*Ramirez, supra*, 20 Cal.4th at pp. 794–795.)
- “In order to establish that [plaintiff] was exempt as an administrative employee, [defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of UPS; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment.” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1.(A)(2)].)
- “Read together, the applicable Labor Code statutes, wage orders, and incorporated federal regulations now provide an explicit and extensive framework for analyzing the administrative exemption.” (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)
- “Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry.” (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].)

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- “The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that ‘[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job, shall be considered . . .*’ No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. ‘A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations . . . .’ ” (*United Parcel Service Wage & Hour Cases, supra*, 190 Cal.App.4th at p. 1014–1015.)
  
- “In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ‘ “administering the business affairs of the enterprise” ’ and production-level employees whose ‘ “primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.” [Citation.]’ ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments.” (*Harris, supra*, 53 Cal.4th at p. 183.)
  
- “[I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance . . . is it appropriate to reach out to other sources.” (*Harris, supra*, 53 Cal.4th at p. 190.)

***Secondary Sources***

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

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

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

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

- 1. That [name of plaintiff] was an employee of [name of defendant];**
- 2. [That [name of plaintiff] disclosed to a [government/law enforcement] agency that [specify information disclosed];]**  
  
[or]  
  
**[That [name of plaintiff] refused to [specify activity in which plaintiff refused to participate];]**
- 3. [That [name of plaintiff] had reasonable cause to believe that the information disclosed [a violation of/ noncompliance with] a [state/federal] rule or regulation;]**  
  
[or]  
  
**[That [specify activity] would result in [a violation of/noncompliance with] a [state/federal] rule or regulation;]**
- 4. That [name of defendant] [discharged/[other adverse employment action]] [name of plaintiff];**
- 5. That [name of plaintiff]'s [disclosure of information/refusal to [specify]] was a motivating reason for [name of defendant]'s decision to [discharge/[other adverse employment action]] [name of plaintiff];**
- 6. That [name of plaintiff] was harmed; and**
- 7. That [name of defendant]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.**

**[The disclosure of actions or policies believed to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [name of plaintiff] must have reasonably believed that the actions or policies violated federal or state statutes, rules or regulations.]**

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

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

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

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*New December 2012*

### **Directions for Use**

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

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

### **Sources and Authority**

- Labor Code section 1102.5 provides:
  - (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - (d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.
  - (e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).
  - (f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars (\$10,000) for each violation of this section.

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

- “The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.” (*Patten, supra*, 134 Cal.App.4th at p. 1384, internal citations omitted.)
- “As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute ‘disclosing information’ or a ‘protected disclosure’ under the California statutes.” (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 844 [136 Cal.Rptr.3d 259].)
- “[I]t is not the motive of the asserted whistleblower, but the nature of the communication that determines whether it is covered.” (*Mize-Kurzman, supra*, 202 Cal.App.4th at p. 852.)
- “[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, . . . , he or she will have to suffer any retaliatory conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results.” (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)
- “Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. ‘To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected ‘whistleblowers’ arising from the routine workings and communications of the job site. . . . ’ ” (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

*Secondary Sources*

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Series 3000 CIVIL RIGHTS

- 3000 (was 3000) Violation of Federal Civil Rights--In General--Essential Factual Elements (42 U.S.C. § 1983)
- 3001 (was 3007) Local Government Liability--Policy or Custom--Essential Factual Elements (42 U.S.C. § 1983)
- 3002 (was 3008) "Official Policy or Custom" Explained (42 U.S.C. § 1983)
- 3003 (was 3009) Local Government Liability--Failure to Train--Essential Factual Elements (42 U.S.C. § 1983)
- 3004 (was 3010) Local Government Liability--Act or Ratification by Official With Final Policymaking Authority--Essential Factual Elements (42 U.S.C. § 1983)
- 3005 (was 3017) Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

3007–3019 Reserved

- 3020 (was 3001) Excessive Use of Force--Unreasonable Arrest or Other Seizure--Essential Factual Elements (42 U.S.C. § 1983)
- 3021 (was 3014) Unlawful Arrest by Peace Officer Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)
- 3022 (was 3002) Unreasonable Search--Search With a Warrant--Essential Factual Elements (42 U.S.C. § 1983)
- 3023 (was 3003) Unreasonable Search--Search Without a Warrant--Essential Factual Elements (42 U.S.C. § 1983)
- 3024 (was 3004) Affirmative Defense--Search Incident to Lawful Arrest
- 3025 (was 3005) Affirmative Defense--Consent to Search
- 3026 (was 3006) Affirmative Defense--Exigent Circumstances

3027–3039 Reserved

- 3040 (was 3011) Violation of Prisoner's Federal Civil Rights--Eighth Amendment--General Conditions of Confinement Claim (42 U.S.C. § 1983)
- 3041 (was 3012) Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Medical Care (42 U.S.C. § 1983)
- 3042 (was 3013) Violation of Prisoner's Federal Civil Rights--Eighth Amendment--Excessive Force (42 U.S.C. § 1983)

3044–3049 Reserved for Future Use

- 3050 (was 3016) Retaliation--Essential Factual Elements (42 U.S.C. § 1983)

3051–3069 Reserved

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- 3070 (was 3020) Unruh Civil Rights Act--Essential Factual Elements (Civ. Code, §§ 51, 52)
- 3071 (was 3021) Discrimination in Business Dealings --Essential Factual Elements (Civ. Code, § 51.5)
- 3072 (was 3022) Gender Price Discrimination--Essential Factual Elements (Civ. Code, § 51.6)
- 3073 (was 3023A) Acts of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)
- 3074 (was 3023B) Threats of Violence--Ralph Act--Essential Factual Elements (Civ. Code, § 51.7)
- 3075 (was 3024) Sexual Harassment in Defined Relationship--Essential Factual Elements (Civ. Code, § 51.9)
- 3076 (was 3025) Bane Act--Essential Factual Elements (Civ. Code, § 52.1)
- 3077 (was 3026) Unruh Civil Rights Act--Damages (Civ. Code, §§ 51, 52(a))
- 3078 (was 3027) Ralph Act—Damages and Penalty (Civ. Code, §§ 51.7, 52(b))
- 3079 (was 3028) Harassment in Educational Institution (Ed. Code, § 220)

3080–3099 Reserved for Future Use

Verdict Forms Would be Similarly Reordered

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**3007. Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)**

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[Name of plaintiff] claims that [he/she] was deprived of [his/her] civil rights as a result of an official [policy/custom] of the [name of local governmental entity]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That the [name of local governmental entity] had an official [policy/custom] [specify policy or custom];
  - ~~2. That [name of local governmental entity] knew, or it should have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [specify right violated];~~
  - ~~32.~~ That [name of officer or employee] was an [officer/employee/[other]] of [name of local governmental entity];
  - ~~43.~~ That [name of officer or employee] [intentionally/[insert other applicable state of mind]] [insert conduct allegedly violating plaintiff's civil rights];
  - ~~54.~~ That [name of officer or employee]'s conduct violated [name of plaintiff]'s right [specify right];
  - ~~65.~~ That [name of officer or employee] acted because of this official [policy/custom].
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New September 2003; Revised December 2010, December 2012

**Directions for Use**

Give this instruction and CACI No. 3008, “Official Policy” Explained, if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity’s official policy or custom. First give CACI No. 3000, Violation of Federal Civil Rights—In General—Essential Factual Elements, and the instructions on the particular constitutional violation alleged.

~~The policy must amount to a deliberate indifference to constitutional rights. (Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725, 734.) Element 2 expresses this deliberate indifference standard. (See Clouthier v. County of Contra Costa (9th Cir. 2010) 591 F.3d 1232, 1249.)~~

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require “deliberate indifference.” (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an “unreasonable” search or seizure. (See *Sacramento County Deputy Sheriffs’ Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834].)

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For other theories of liability against a local governmental entity, see CACI No. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements*, and CACI No. 3010, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

**Sources and Authority**

- “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)
- ~~“To establish municipal liability under § 1983, a plaintiff ‘must show that (1) she was deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation.’” (*Burke, supra*, 586 F.3d at p. 734.)~~
- Local governmental entities “ ‘can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...’ ” Local governmental entities also can be sued “ ‘for constitutional deprivations visited pursuant to governmental “custom.” ’ ” In addition, “ ‘[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)
- “Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- “ ‘[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government’s policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)
- “Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie

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case, disposition by summary judgment is appropriate.” (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)

- “At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award.” (*Choate, supra*, 86 Cal.App.4th at p. 328.)
- “Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]’s injuries. [Plaintiff]’s recovery, if any, based upon a *Monell* claim would be limited to nominal damages.” (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)
- “Local governmental bodies such as cities and counties are considered ‘persons’ subject to suit under section 1983. States and their instrumentalities, on the other hand, are not.” (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)
- “A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights ‘implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers,’ or when the injury is in ‘execution of a [local] government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)
- “A municipality’s policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity.” (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)
- “No punitive damages can be awarded against a public entity.” (*Choate, supra*, 86 Cal.App.4th at p. 328, internal citation omitted.)

### *Secondary Sources*

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

17A Moore’s Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][a] (Matthew Bender)

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

**~~3015. Arrest by Peace Officer Without a Warrant—Probable Cause to Arrest (42 U.S.C. § 1983)~~**

~~[Name of plaintiff]'s arrest was not wrongful if [name of defendant] had probable cause to arrest [him/her] without a warrant.~~

~~[Name of defendant] had probable cause to arrest [name of plaintiff] without a warrant if at the time of the arrest [he/she] knew or had reasonably trustworthy information sufficient to lead a law enforcement officer of reasonable caution to believe that [name of plaintiff] had committed or was in the process of committing a crime.~~

~~Whether [name of defendant] had probable cause for the arrest must be determined by looking at all of the circumstances. Conclusive evidence of guilt is not necessary to establish probable cause. However, mere suspicion or common rumor is not enough. Whether the officer acted in good faith or bad faith is not relevant. There must be some evidence that would allow a reasonable officer to conclude that a particular individual has committed or is in the process of committing a criminal offense.~~

*New April 2009; Revised June 2012*

**Directions for Use**

~~Give this instruction in a false arrest case brought under Title 42 United States Code section 1983 in which the defendant asserts that there was probable cause to support the warrantless arrest. For an instruction for probable cause under California law, see CACI No. 1402, *False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest*.~~

~~There is perhaps some difference between the federal standard and the California standard with regard to the respective roles of judge and jury in determining probable cause to arrest. Under federal law construing section 1983, probable cause is usually a question for the jury. Summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest. (*McKenzie v. Lamb* (9th Cir. 1984) 738 F.2d 1005, 1007–1008.) Under California law, the court makes the final determination on probable cause as a matter of law. However, the jury may be called on to resolve any disputed facts before the court makes its determination. (See *Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535].)~~

~~There appears to be little or no actual difference in the two standards; both call for the jury to resolve disputed facts and for the court to decide the issue if there are none. Presumably, the case would not have made it to trial under either standard if there were no disputed facts and probable cause could be found as a matter of law. (See *Conner v. Heiman* (9th Cir. 2012) 672 F.3d 1126, — [probable cause found as a matter of law; summary judgment should have been entered].) The distinction is that under the federal standard, once the case makes it to trial, the jury is told to make the final determination on probable cause. Under the California standard, the jury is told only to find specified particular facts and must leave the conclusion to be drawn from those facts to the court. This is perhaps a distinction without a difference. If the plaintiff alleges counts under both section 1983 and California law, consider combining~~

~~this instruction with CACI No. 1402.~~

### ~~Sources and Authority~~

- ~~● “Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant.” (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)~~
- ~~● “Our task in determining whether probable cause to arrest existed as a matter of law in this § 1983 action is slightly different from a similar determination in the context of a direct review of a criminal arrest. In the latter situation, we are called upon to review both law and fact and to draw the line as to what is and is not reasonable behavior. ... By contrast, in a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, ...; and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause to arrest.” (*McKenzie, supra*, 738 F.2d at pp. 1007–1008, internal citations omitted.)~~
- ~~● “In reviewing the grant of a motion for judgment as a matter of law, we must determine whether a reasonable jury could have concluded that the detectives lacked probable cause to arrest [plaintiff].” (*Torres v. City of L.A.* (9th Cir. 2008) 548 F.3d 1197, 1208.)~~
- ~~● “Here, the district court found that a ‘reasonable jury could find a lack of probable cause at this stage,’ not because the parties disputed what [defendants] knew about [plaintiff]’s actions, but instead because, in the court’s view, those actions were ‘consistent’ with the inference that [plaintiff] had committed no crime. In doing so, the Court implicitly acknowledged that no material dispute existed concerning what facts [defendants] knew. Instead, the only material disputes concerned ‘what inferences properly may [have] be[en] drawn from those historical facts.’ Accordingly, ... the district court should have decided ‘whether probable cause existed’ when [defendants] arrested [plaintiff], and reserving this question for the jury was error.” (*Conner, supra*, F.3d —, —, internal citation omitted.)~~
- ~~● “The fact that reasonable people could draw different conclusions based on [plaintiff]’s behavior, however, is irrelevant to the probable cause analysis.. The only question is whether [defendants] could have reasonably concluded, under the totality of the circumstances, that a ‘fair probability’ existed that [plaintiff] knew that he controlled Harrah’s property and intended to deprive Harrah’s of that property. Whether the opposite conclusion was also reasonable, or even more reasonable, does not matter so long as the [defendant]’s conclusion was itself reasonable.” (*Conner, supra*, — F.3d —, —, internal citation omitted.)~~
- ~~● “Probable cause existed if ‘under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.’” (*United States v. Carranza* (9th Cir. 2002) 289 F.3d 634, 640.)~~

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- ~~“Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested.” “While conclusive evidence of guilt is of course not necessary under this standard to establish probable cause, “[m]ere suspicion, common rumor, or even strong reason to suspect are not enough.” Under the collective knowledge doctrine, in determining whether probable cause exists for arrest, we look to “the collective knowledge of all the officers involved in the criminal investigation[.]” (*Torres, supra*, 548 F.3d at pp. 1206–1207; internal citations omitted.)~~
- ~~“To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to” probable cause . . . .” (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 [124 S.Ct. 795, 157 L.Ed.2d 769], internal citation omitted.)~~
- ~~“There must be some objective evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense.” (*McKenzie, supra*, 738 F.2d at p. 1008.)~~
- ~~“The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.” (*Devenpeck v. Alford* (2004) 543 U.S. 146, 152 [125 S.Ct. 588, 160 L.Ed.2d 537], internal citations omitted.)~~
- ~~“[A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, “the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.” “[T]he Fourth Amendment's concern with “reasonableness” allows certain actions to be taken in certain circumstances, whatever the subjective intent.” “[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.” (*Devenpeck, supra*, 543 U.S. at p. 153, internal citations omitted.)~~
- ~~“We may assume that the officers acted in good faith in arresting the petitioner. But “good faith on the part of the arresting officers is not enough.” If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be “secure in their persons, houses, papers, and effects,” only in the discretion of the police.” (*Beck v. Ohio* (1964) 379 U.S. 89, 97 [85 S.Ct. 223, 13 L.Ed.2d 142], internal citation omitted.)~~
- ~~“Generally, officers need not have probable cause for every element of the offense, but they must have probable cause for specific intent when it is a required element. [¶] Because the probable~~

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~~cause standard is objective, probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest. Probable cause, however, must still exist under some specific criminal statute. It is therefore not enough that probable cause existed to arrest [plaintiff] for some metaphysical criminal offense; the Officers must ultimately point to a particular statutory offense.” (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 953–954, internal citations omitted.)~~

***Secondary Sources***

~~Witkin, Summary of California Law (10th ed. 2005) Torts, § 181~~

~~5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)~~

~~1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, ¶ 2.03 (Matthew Bender)~~

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

~~2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)~~

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3025. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[Name of plaintiff] claims that [name of defendant] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion~~ening or committing violent acts~~. To establish this claim, [name of plaintiff] must prove all of the following:

1. ~~That [name of defendant] interfered with [or attempted to interfere with] [name of plaintiff]’s right [insert alleged constitutional or statutory right] by threatening or committing violent acts;~~
21. [That [name of defendant] made threats of violence against [name of plaintiff] causing [him/her] to reasonably believe that if [he/she] exercised [his/her] right [insert right, e.g., “to vote”], [name of defendant] would commit violence against [him/her] or [his/her] property and that [name of defendant] had the apparent ability to carry out the threat;]

\_\_\_\_\_ [or]

[That [name of defendant] ~~injured~~acted violently against [name of plaintiff] ~~[and] or [his/her]~~[name of plaintiff]’s property] [to prevent [him/her] from exercising [his/her] right [insert right]]~~[to or retaliated~~ against [name of plaintiff] for having exercised [his/her] right [insert right]];

32. That [name of plaintiff] was harmed; and
43. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.

*New September 2003; Revised December 2012*

Directions for Use

Select the first option for element 1 if the defendant’s conduct involves threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we “need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1”];

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City and County of San Francisco v. Ballard (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address]. To assert such a claim, modify element 2 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of \$4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of \$4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195]. [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable. Therefore, ~~Unless plaintiff is claiming actual damages, omit elements 3-2 and 43 unless actual damages are sought. If actual damages are sought, combine CACI No. 3026, Unruh Civil Rights Act—Damages and CACI No. 3027, Ralph Act—Damages and Penalty, to recover damages under both subsections (a) and (b) of section 52.~~

### Sources and Authority

- Civil Code section 52.1 provides, in part:
  - (a) If a person or persons, whether or not acting under color of law, interferes by threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured.
  - (b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured.

[c)-(i) omitted]

(j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a

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specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

- Civil Code section 52~~(b)~~ provides:

(a) Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the amount of actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51, 51.5, or 51.6.

(b) Whoever denies the right provided by Section 51.7 or 51.9, or aids, incites, or conspires in that denial, is liable for each and every offense for the actual damages suffered by any person denied that right and, in addition, the following:

- (1) An amount to be determined by a jury, or a court sitting without a jury, for exemplary damages.
- (2) A civil penalty of twenty-five thousand dollars (\$25,000) to be awarded to the person denied the right provided by Section 51.7 in any action brought by the person denied the right, or by the Attorney General, a district attorney, or a city attorney.
- (3) Attorney's fees as may be determined by the court.

- “[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was ‘to fill in the gaps left by the Ralph Act’ by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3 706], internal citation omitted.)

- “The Legislature enacted section 52.1 to stem a tide of hate crimes.” (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)

- “However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons.” (*Shoyoye, supra*, 203 Cal.App.4th at p. 956.)

- “Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights.” (*In re M.S.*

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(1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- “[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion.” (*Jones, supra*, 17 Cal.4th at p. 334.)
- “The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence.” (*Shoyoye, supra*, 203 Cal.App.4th at p. 958.)
- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)
- “[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence.” (*Cabesuela, supra, v. Browning Ferris Industries (1998)* 68 Cal.App.4th ~~101~~, at p. 111 [~~80 Cal.Rptr.2d 60~~].)
- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Bocato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: “It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things.”
- “Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed ‘reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.’ ... The presence of the express ‘reasonable fear’ element, in addition to the ‘apparent ability’ element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature’s determination [that] a defendant’s civil liability should depend on the harm actually suffered by the victim.” (*In re M.S., supra*, 10 Cal.4th at p. 715, internal citation omitted.)
- “[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1.” (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

### **Secondary Sources**

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

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3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.27  
(Matthew Bender)

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**3205. Failure to Begin Repairs Within Reasonable Time or to Complete Repairs Within 30 Days—  
Essential Factual Elements (Civ. Code, § 1793.2(b))**

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*[Name of plaintiff]* **claims that [he/she] was harmed because [name of defendant] failed to [begin repairs on the [consumer good/new motor vehicle] in a reasonable time/ [or] repair the [consumer good/new motor vehicle] within 30 days]. To establish this claim, [name of plaintiff] must prove all of the following:**

- 1. That [name of plaintiff] [bought/leased] [a/an] [consumer good/new motor vehicle] [from/distributed by/manufactured by] [name of defendant];**
  - 2. That [name of defendant] gave [name of plaintiff] a written warranty that [describe alleged express warranty];**
  - 3. That the [consumer good/new motor vehicle] had [a] defect[s] that [was/were] covered by the warranty;**
  - 4. That [name of defendant] or its authorized repair facility failed to [begin repairs within a reasonable time/ [or] complete repairs within 30 days so as to conform to the applicable warranties].**
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*New December 2011; Revised December 2012*

**Directions for Use**

Give this instruction for the defendant’s alleged breach of Civil Code section 1793.2(b), which requires that repairs be commenced within a reasonable time and finished within 30 days unless the buyer otherwise agrees in writing. This instruction assumes that the statute contains two separate requirements, one for starting repairs and one for finishing them, either of which would be a violation.

A violation of Civil Code section 1793.2(b) would not entitle the consumer to the remedies of restitution or replacement for a new motor vehicle as provided in section 1793.2(d)(2). Before those remedies are available, the manufacturer is entitled to a reasonable number of repair opportunities as described in section 1793.22. Section 1793.2(b) presumes repairs that are unreasonably delayed but ultimately successful. Damages would be those caused by the delay.

**Sources and Authority**

- Civil Code section 1793.2(b) provides as follows: “Where those service and repair facilities are maintained in this state and service or repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative in this state. Unless the buyer agrees in writing to the contrary, the goods shall be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representatives shall serve to extend this 30-day requirement. Where delay arises, conforming

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goods shall be tendered as soon as possible following termination of the condition giving rise to the delay.”

- “Civil Code section 1793.22(b) provides:

(b) It shall be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs:

(1) The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(2) The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

(3) The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit shall be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer shall be required to directly notify the manufacturer pursuant to paragraphs (1) and (2) only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of this section and that of subdivision (d) of Section 1793.2, including the requirement that the buyer must notify the manufacturer directly pursuant to paragraphs (1) and (2). The notification, if required, shall be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual. This presumption shall be a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding.

- Civil Code section 1794(a) provides as follows: “Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.”
- “[T]he fifth cause of action in each complaint clearly stated a cause of action under Civil Code section 1794 . . . . Plaintiff had pleaded that he was such a buyer who was injured by a ‘willful’ violation of Civil Code section 1793.2, subdivision (b) which in pertinent part requires that with respect to consumer goods sold in this state for which the manufacturer has made an express warranty and service and repair facilities are maintained in this state (undisputed herein) and ‘repair of the goods is necessary because they do not conform with the applicable express warranties, service and repair shall be commenced within a reasonable time by the manufacturer or its representative.’ ” (*Gomez v. Volkswagen of Am.* (1985) 169 Cal.App.3d 921, 925 [215

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Cal.Rptr. 507], footnote omitted.)

- ~~“[Defendant] also argues it was incumbent on [plaintiff] to prove not only that the car leaked oil but also to show the cause of the leak, and that he failed to meet this burden because he produced no expert testimony proving the cause of the leak. However, the statute requires only that [plaintiff] prove the car did not conform to the express warranty, and proof that there was a persistent leak that [dealer] could not locate or repair suffices. We do not interpret the statute as depriving a consumer of a remedy if he cannot do what the manufacturer, with its presumably greater expertise, was incapable of doing, i.e. identify the source of the leak.” (Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)~~

***Secondary Sources***

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 317 et seq.

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.43, 502.161 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.103 (Matthew Bender)

30 California Legal Forms, Ch. 92, *Service Contracts*, § 92.52 (Matthew Bender)

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**4107. Duty of Disclosure by Real Estate Broker to Client**

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**As a fiduciary, a real estate broker must disclose to his or her client all material information that the broker knows or could reasonably obtain regarding the property or relating to the transaction.**

**The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of the transaction, the knowledge and experience of the client, the questions asked by the client, the nature of the property, and the terms of sale. The broker must place himself or herself in the position of the client and consider the type of information required for the client to make a well-informed decision.**

**A real estate broker cannot accept information received from another person, such as the seller, as being true, and transmit it to his or her client without either verifying the information or disclosing to the client that the information has not been verified.**

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*New April 2008; Revised December 2012*

**Directions for Use**

This instruction may be read after CACI No. 4101, *Failure to Use Reasonable Care—Essential Factual Elements*, if a real estate broker's duty of disclosure to the broker's own client is at issue.

**Sources and Authority**

- “Under the common law, ... a broker’s fiduciary duty to his client requires the highest good faith and undivided service and loyalty. ‘The broker as a fiduciary has a duty to learn the material facts that may affect the principal’s decision. He is hired for his professional knowledge and skill; he is expected to perform the necessary research and investigation in order to know those important matters that will affect the principal’s decision, and he has a duty to counsel and advise the principal regarding the propriety and ramifications of the decision. The agent’s duty to disclose material information to the principal includes the duty to disclose reasonably obtainable material information. [¶] . . . [¶] The facts that a broker must learn, and the advice and counsel required of the broker, depend on the facts of each transaction, the knowledge and the experience of the principal, the questions asked by the principal, and the nature of the property and the terms of sale. The broker must place himself in the position of the principal and ask himself the type of information required for the principal to make a well-informed decision. This obligation requires investigation of facts not known to the agent and disclosure of all material facts that might reasonably be discovered.’ ” (*Field v. Century 21 Klowden-Forness Realty* (1998) 63 Cal.App.4th 18, 25–26 [73 Cal.Rptr.2d 784, internal citations omitted].)
- “A fiduciary must tell its principal of all information it possesses that is material to the principal’s interests. A fiduciary’s failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent. (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)

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- “[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. . . .’ When the seller’s real estate agent or broker is also aware of such facts, ‘he [or she] is under the same duty of disclosure.’ ” (*Holmes v. Sumner* (2010) 188 Cal.App.4th 1510, 1518–1519 [116 Cal.Rptr.3d 419], internal citations omitted.)
- “ ‘A broker who is merely an innocent conduit of the seller’s fraud may be innocent of actual fraud [citations], but in this situation the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them.’ ” (*Salahutdin v. Valley of Cal.* (1994) 24 Cal.App.4th 555, 562 [29 Cal.Rptr.2d 463].)
- “[T]he broker has a fiduciary duty to investigate the material facts of the transaction, and he cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified. Because of the fiduciary obligations of the broker, the principal has a right to rely on the statements of the broker, and if the information is transmitted by the broker without verification and without qualification, the broker is liable to the principal for negligent misrepresentation.” (*Salahutdin, supra*, 24 Cal.App.4th at pp. 562–563.)
- “[T]he fiduciary duty owed by brokers to their own clients is substantially more extensive than the *nonfiduciary* duty codified in [Civil Code] section 2079 [duty to visually inspect and disclose material facts].” (*Michel, supra*, 156 Cal.App.4th at p. 763, original italics.)
- “The statutory duties owed by sellers’ brokers under section 2079 are separate and independent of the duties owed by brokers to their own clients who are buyers.” (*William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1305 [139 Cal.Rptr.3d 670].)
- “[Fiduciary] duties require full and complete disclosure of all material facts respecting the property or relating to the transaction in question.” (*Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1286 [63 Cal.Rptr.2d 373].)
- “Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency.” (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)
- “[R]eal estate brokers representing buyers of residential property are licensed professionals who owe fiduciary duties to their own clients. As such, this fiduciary duty is not a creature of contract and, therefore, did not arise under the buyer-broker agreement. Thus, the contractual limitations period in the buyer-broker agreement did not apply to the breach of the common law fiduciary duty owed by [broker] to [client buyer].” (*William L. Lyon & Associates, Inc., supra*, 204 Cal.App.4th at p. 1312.)

### Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

**Preliminary Draft Only—Not Approved by Judicial Council**

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:164 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.05, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

**Preliminary Draft Only—Not Approved by Judicial Council**

**4120. Affirmative Defense—Statute of Limitations**

**[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [name of plaintiff]’s claimed harm occurred before [insert date four years before complaint was filed] unless [name of plaintiff] proves that before [insert date four years before complaint was filed], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [name of defendant]’s wrongful act or omission.**

*New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012*

**Directions for Use**

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year “catch-all” statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra*, 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

**Sources and Authority**

- Code of Civil Procedure section 343 provides: “An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.”

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- “The statute of limitations for breach of fiduciary duty is four years. (§ 343.)” (Stalberg, *supra*, ~~v. Western Title Ins. Co. (1991)~~ 230 Cal.App.3d ~~at p. 1223~~, 1230 ~~[282 Cal.Rptr. 43]~~, internal citation omitted.)
- “ ‘[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,’ governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty.” (Thomson, *supra*, 198 Cal.App.4th at p. 607.)
- “Defendants argue on appeal that the gravamen of plaintiff’s complaint is that defendants’ acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff’s claim is not founded upon the concealment of facts but upon defendants’ alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud.” (Thomson, *supra*, ~~v. Canyon (2011)~~ 198 Cal.App.4th ~~at p. 594~~, 607 ~~[129 Cal.Rptr.3d 525]~~.)
- “Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year ‘catch-all statute’ of Code of Civil Procedure section 343 . . . . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. . . . [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud.” (William L. Lyon & Associates, Inc. v. Superior Court (2012) 204 Cal.App.4th 1294, 1312, 1313 [139 Cal.Rptr.3d 670].)
- “A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed.” (Stalberg, *supra*, 230 Cal.App.3d at p. 1230, internal citation omitted.)
- “Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist.” (Hobbs v. Bateman Eichler, Hill Richards, Inc. (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)
- “[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available.” (Hobbs, *supra*, 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)
- “The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation.” (Hobbs, *supra*, 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)

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- “ ‘[R]esolution of the statute of limitations issue is normally a question of fact ... .’ ” (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

***Secondary Sources***

3 Witkin, *California Procedure* (4th ed. 1996) Actions, §§ 617–619

Vapnek et al., *California Practice Guide: Professional Responsibility*, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., *California Torts*, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 *California Forms of Pleading and Practice*, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A *California Points and Authorities*, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

## 5002. Evidence

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~~Sworn testimony, documents, or anything else may be admitted into 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. 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.]

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*New September 2003; Revised April 2004, February 2007; [December 2012](#)*

### 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 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

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a 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.

- 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.
- 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 “attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
  - Courts have stated that “[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

### ***Secondary Sources***

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

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

## 5003. Witnesses

A witness is a person who has knowledge related to this case. You will have to decide whether you believe each witness and how important each witness's testimony is to the case. You may believe all, part, or none of a witness's testimony.

In deciding whether to believe a witness's testimony, you may consider, among other factors, the following:

- (a) How well did the witness see, hear, or otherwise sense what he or she described in court?
- (b) How well did the witness remember and describe what happened?
- (c) How did the witness look, act, and speak while testifying?
- (d) Did the witness have any reason to say something that was not true? **Did For example, did** the witness show any bias or prejudice? ~~Did the witness or~~ have a personal relationship with any of the parties involved in the case? ~~Does the witness or~~ have a personal stake in how this case is decided?
- (e) What was the witness's attitude toward this case or about giving testimony?

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

Do not make any decision simply because there were more witnesses on one side than on the other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

~~You must not be biased against any witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation, age, national origin, [or] socioeconomic status[, or [insert any other impermissible form of bias]].~~

*New September 2003; Revised April 2004, April 2007, December 2012*

## Directions for Use

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This instruction may be given as either an introductory instruction before trial (see CACI No. 107) or as a concluding instruction.

The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

In the last paragraph, the court may delete inapplicable categories of potential jury bias.

**Sources and Authority**

- 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.

- Considerations for evaluating the credibility of witnesses are contained in Evidence Code section 780:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

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- (i) The existence or nonexistence of any fact testified to by him.
  - (j) His attitude toward the action in which he testifies or toward the giving of testimony.
  - (k) His admission of untruthfulness.
- Evidence Code section 411 provides that “[e]xcept where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient proof of any fact.” According to former Code of Civil Procedure section 2061, the jury should be instructed that “they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds.”
  - The willfully false witness instruction was formerly codified at Code of Civil Procedure section 2061. This statute was repealed in 1965 to avoid giving undue emphasis to this rule compared to other common-law rules. Refusal to give an instruction on this point is not error: “It should certainly not be deemed of vital importance to tell the ordinary man of the world that he should distrust the statements of a witness whom he believes to be a liar.” (*Wallace v. Pacific Electric Ry. Co.* (1930) 105 Cal.App. 664, 671 [288 P. 834].)
  - ~~Standard 10.20(a)(2) of the Standards for Judicial Administration provides: “In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants.”~~
  - ~~Canon 3(b)(5) of the Code of Judicial Ethics provides: “A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.” Canon 3(b)(6) requires the judge to impose these standards on attorneys also.~~

**Secondary Sources**

- 1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence* (Matthew Bender)
- 14 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.110 et seq. (Matthew Bender)
- 1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 11, *Questioning Witnesses and Objections*, 11.03 et seq.

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**5004. Service Provider for Juror With Disability**

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[Name *or number* of juror] has been assisted by [a/an] [insert type of service provider] to communicate and receive information. The [service provider] will be with you during your deliberations. You may not discuss the case with the [service provider] ~~or in any way involve the [service provider] in your deliberations~~. The [service provider] is not a member of the jury and is not to participate in the deliberations in any way other than as necessary to provide the service to [name *or number* of juror].

All jurors must be able to fully participate in deliberations. In order to allow the [service provider] to properly assist [name or number of juror], jurors should not talk at the same time and should not have side conversations. Jurors should speak directly to [name or number of juror], not to the [service provider].

[Two [service providers] will be present during deliberations and will take turns in assisting [name or number of juror].]

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*New September 2003; Revised April 2004, December 2012*

**Directions for Use**

If this instruction is used, the advisory committee recommends that it be read to the jury before reading instructions on the substantive law.

**Sources and Authority**

- Code of Civil Procedure section 203(a)(6) provides: “All persons are eligible and qualified to be prospective trial jurors, except the following: ... Persons who are not possessed of sufficient knowledge of the English language, provided that no person shall be deemed incompetent solely because of the loss of sight or hearing in any degree or other disability which impedes the person’s ability to communicate or which impairs or interferes with the person’s mobility.”
- Code of Civil Procedure section 224 provides:
  - (a) If a party does not cause the removal by challenge of an individual juror who is deaf, hearing impaired, blind, visually impaired, or speech impaired and who requires auxiliary services to facilitate communication, the party shall (1) stipulate to the presence of a service provider in the jury room during jury deliberations, and (2) prepare and deliver to the court proposed jury instructions to the service provider.
  - (b) As used in this section, “service provider” includes, but is not limited to, a person who is a sign language interpreter, oral interpreter, deaf-blind interpreter, reader, or speech interpreter. If auxiliary services are required during the course of jury deliberations, the court shall instruct the jury and the service provider that the

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service provider for the juror with a disability is not to participate in the jury's deliberations in any manner except to facilitate communication between the juror with a disability and other jurors.

- (c) The court shall appoint a service provider whose services are needed by a juror with a disability to facilitate communication or participation. A sign language interpreter, oral interpreter, or deaf-blind interpreter appointed pursuant to this section shall be a qualified interpreter, as defined in subdivision (f) of Section 754 of the Evidence Code. Service providers appointed by the court under this subdivision shall be compensated in the same manner as provided in subdivision (i) of Section 754 of the Evidence Code.

***Secondary Sources***

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 331, 340

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.32 (Matthew Bender)

### 5014. Substitution of Alternate Juror

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One of your fellow jurors has been excused and an alternate juror has been selected to ~~take~~ his/her place to join the jury. Do not consider this substitution for any purpose.

The alternate juror must participate fully in the deliberations that lead to any verdict. The parties have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place.

Now, please return to the jury room and start your deliberations from the beginning. ~~The alternate juror must be given the opportunity to participate fully in your deliberations. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again.~~

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*New September 2003; Revised April 2004, December 2012*

#### Sources and Authority

- “Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member’s viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint. The result is a balance easily upset if a new juror enters the decision-making process after the 11 others have commenced deliberations.” (*People v. Collins* (1976) 17 Cal.3d 687, 693 [131 Cal.Rptr. 782, 552 P.2d 742].)
- “We agree with plaintiff that the principles set forth in *Collins* apply to civil as well as criminal cases. The right to a jury trial in civil cases is also guaranteed by article I, section 16 of the California Constitution, and the provisions of the statute governing the substitution of jurors in civil cases are the same as the ones governing criminal cases. The same considerations require that each juror engage in all of the jury’s deliberations in both criminal and civil cases. The requirement that at least nine persons reach a verdict is not met unless those nine reach their consensus through deliberations which are the common experience of all of them. Accordingly, we construe section 605 [now 234] of the Code of Civil Procedure to require that the court instruct the jury to disregard all past deliberations and begin deliberating anew when an alternate juror is substituted after jury deliberations have begun.” (*Griesel v. Dart Industries, Inc.* (1979) 23 Cal.3d 578, 584–585 [153 Cal.Rptr. 213, 591 P.2d 503], overruled on other grounds in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 702, fn. 4 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations and footnote omitted.)

#### Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 160

### 5015. Instruction to Alternate Jurors on Submission of Case to Jury

**The jury [will soon begin/is now] deliberating, but you are still alternate jurors and are bound by my earlier instructions about your conduct.**

**Until the jury is discharged, do not talk about the case or about any of the people or any subject involved in it with anyone, not even your family or friends[, and not even with each other]. Do not have any contact with the deliberating jurors. Do not decide how you would vote if you were deliberating. Do not form or express an opinion about the issues in this case, unless you are substituted for one of the deliberating jurors. As alternate jurors, you are bound by the same rules that govern the conduct of the jurors who are sitting on the panel. You should not form or express any opinion about this case until after you have been substituted in for one of the deliberating jurors on the panel or until the jury has been discharged.**

*New February 2005; Revised December 2012*

#### Directions for Use

If an alternate juror is substituted, see CACI No. 5014, *Substitution of Alternate Juror*.

#### Sources and Authority

- “Alternate jurors are members of the jury panel which tries the case. They are selected at the same time as the regular jurors. They take the same oath and are subject to the same qualifications as the regular jurors. Alternate jurors hear the same evidence and are subject to the same admonitions as the regular jurors and, unless excused by the court, are available to participate as regular jurors.” (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- Code of Civil Procedure section 234 provides:

Whenever, in the opinion of a judge of a superior court about to try a civil or criminal action or proceeding, the trial is likely to be a protracted one, or upon stipulation of the parties, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or more additional jurors, in its discretion, to be known as “alternate jurors.”

These alternate jurors shall be drawn from the same source, and in the same manner, and have the same qualifications, as the jurors already sworn, and shall be subject to the same examination and challenges. However, each side, or each defendant, as provided in Section 231, shall be entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called.

The alternate jurors shall be seated so as to have equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and shall, unless excused by the court, attend at all times upon the trial of the cause in company with the

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other jurors, but shall not participate in deliberation unless ordered by the court, and for a failure to do so are liable to be punished for contempt.

They shall obey the orders of and be bound by the admonition of the court, upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff or marshal during the trial of the cause, the alternate jurors shall also be kept in confinement with the other jurors; and upon final submission of the case to the jury, the alternate jurors shall be kept in the custody of the sheriff or marshal who shall not suffer any communication to be made to them except by order of the court, and shall not be discharged until the original jurors are discharged, except as provided in this section.

If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged and draw the name of an alternate, who shall then take his or her place in the jury box, and be subject to the same rules and regulations as though he or she had been selected as one of the original jurors.

All laws relative to fees, expenses, and mileage or transportation of jurors shall be applicable to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled.

***Secondary Sources***

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.44, 322.52, 322.101 (Matthew Bender)

1 California Trial Guide, Unit 10, *Voir Dire Examinations* (Matthew Bender)

# Guide for Using Judicial Council of California Civil Jury Instructions

Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of these Judicial Council instructions. A secondary goal is ease of use by lawyers. This guide provides an introduction to the instructions, explaining conventions and features that will assist in the use of both the print and electronic editions.

**Jury Instructions as a Statement of the Law:** While jury instructions are not a primary source of the law, they are a statement or compendium of the law, a secondary source. That the instructions are in plain English does not change their status as an accurate statement of the law.

**Instructions Approved by Rule of Court:** [Rule 2.1050](#) of the California Rules of Court provides: “The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California . . . The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law . . . Use of the Judicial Council instructions is strongly encouraged.”

## **Using the Instructions**

**Revision Dates:** The original date of approval and all revision dates of each instruction are presented. An instruction is considered as having been revised if there is a nontechnical change to the title, instruction text, or Directions for Use. Additions or changes to the Sources and Authority and Secondary Sources do not generate a new revision date.

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**Directions for Use:** The instructions contain Directions for Use. The directions alert the user to special circumstances involving the instruction and may include references to other instructions that should or should not be used. In some cases the directions include suggestions for modifications or for additional instructions that may be required. Before using any instruction, reference should be made to the Directions for Use.

**Sources and Authority:** Each instruction sets forth the primary sources that present the basic legal principles that support the instruction. Applicable statutes are presented along with quoted material from cases that pertain to the subject matter of the instruction. The Sources and Authority are not meant to provide a complete analysis of the legal subject of the instruction. Rather, they provide a starting point for further legal research on the subject. Secondary Sources are also provided for treatises and practice guides from a variety of legal publishers.

**Instructions for the Common Case:** These instructions were drafted for the common type of case and can be used as drafted in most cases. When unique or complex circumstances prevail, users will have to adapt the instructions to the particular case.

**Multiple Parties:** Because jurors more easily understand instructions that refer to parties by name rather than by legal terms such as “plaintiff” and “defendant,” the instructions provide for insertion of names. For simplicity of presentation, the instructions use single party plaintiffs and defendants as examples. If a case involves multiple parties or cross-complaints, the user will usually need to modify the parties in the instructions. Rather than naming a number of parties in each place calling for names, the user may consider putting the names of all applicable parties in the beginning and thereafter identifying them as “plaintiffs,” “defendants,” “cross-complaints,” etc. Different instructions often apply to different parties. The user should only include the parties to whom each instruction applies.

**Related California Jury Instructions, Civil, Book of Approved Jury Instructions (BAJI):** This publication includes, at the end of the instructions, [tables](#) of related

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BAJI instructions. However, the Judicial Council instructions include topics not covered by BAJI, such as antitrust, federal civil rights, lemon law, trespass and conversion and the California Family Rights Act.

**Reference to “Harm” in Place of “Damage” or “Injury”:** In many of the instructions, the word harm is used in place of damage, injury or other similar words. The drafters of the instructions felt that this word was clearer to jurors.

**Substantial Factor:** The instructions frequently use the term “substantial factor” to state the element of causation, rather than referring to “cause” and then defining that term in a separate instruction as a “substantial factor.” An instruction that defines “substantial factor” is located in the Negligence series. The use of the instruction is not intended to be limited to cases involving negligence.

**Listing of Elements and Factors:** For ease of understanding, elements of causes of action or affirmative defenses are listed by numbers (*e.g.*, 1, 2, 3) and factors to be considered by jurors in their deliberations are listed by letters (*e.g.*, a, b, c)

**Uncontested Elements:** ~~In many cases, elements that are uncontested may be omitted. For example, the requirement that the plaintiff in an age discrimination case must be age 40 or older may be obvious to the jury and safely omitted. In other cases, however,~~ Although some elements may be the subject of a stipulation that the element has been proven, the instruction should set forth all of the elements and indicate those that are deemed to have been proven by stipulation of the parties. Omitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff’s full burden of proof. ~~In these cases, it~~ is better to include all the elements and then indicate that one or more of them have been agreed to by the parties as not at issue. One possible approach is as follows:

To establish this claim, [Plaintiff] must prove all of the following:

1. That [Plaintiff] and [Defendant] entered into a contract (which is not disputed in this case);
2. That [Plaintiff] did all, or substantially all, of the significant things that the contract required it to do ~~(which is also not disputed in this case);~~
3. That all conditions required for [Defendant]’s performance had occurred (which is also not disputed in this case);

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**Irrelevant Factors:** Factors are matters that the jury might consider in determining whether a party’s burden of proof on the elements has been met. From a list of possible factors, there may be some that have no relevance to the case and on which no evidence was presented. These irrelevant factors may safely be omitted from the instruction.

**Burdens of Proof:** The applicable burden of proof is included within each instruction explaining a cause of action or affirmative defense. The drafters felt that placing the burden of proof in that position provided a clearer explanation for the jurors.

**Affirmative Defenses:** For ease of understanding by users, all instructions explaining affirmative defenses use the term “affirmative defense” in the title.

## Titles and Definitions

**Titles of Instructions:** Titles to instructions are directed to lawyers and sometimes use words and phrases not used in the instructions themselves. Since the title is not a part of the instruction, the titles may be removed before presentation to the jury.

**Definitions of Legal Terms:** The instructions avoid separate definitions of legal terms whenever possible. Instead, definitions have been incorporated into the language of the instructions. In some instances (*e.g.*, specific statutory definitions) it was not possible to avoid providing a separate definition.

## Evidence

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**Circumstantial Evidence:** The words “indirect evidence” have been substituted for the expression “circumstantial evidence.” In response to public comment on the subject, however, the drafters added a sentence indicating that indirect evidence is sometimes known as circumstantial evidence.

**Preponderance of the Evidence:** To simplify the instructions’ language, the drafters avoided the phrase preponderance of the evidence and the verb preponderate. The instructions substitute in place of that phrase reference to evidence that is “more likely to be true than not true.”

## Using Verdict Forms

**Verdict Forms are Models:** A large selection of special verdict forms accompany the instructions. Users of the forms must bear in mind that these are models only. Rarely can they be used without modifications to fit the circumstances of a particular case.

**Purpose of Verdict Forms:** The special verdict forms generally track the elements of the applicable cause of action. Their purpose is to obtain the jury’s finding on the elements defined in the instructions. “The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the court but to draw from them conclusions of law.” ([Code of Civil Procedure section 624](#); see [Trujillo v. North County Transit Dist. \(1998\) 63 Cal.App.4th 280, 285, \[73 Cal.Rptr.2d 596\]](#).) Modifications made to the instructions in particular cases ordinarily will require corresponding modifications to the special verdict form.

**Multiple Parties:** The verdict forms have been written to address one plaintiff against one defendant. In nearly all cases involving multiple parties, the issues and the evidence will be such that the jury could reach different results for different parties. The liability of each defendant should always be evaluated individually,

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and the damages to be awarded to each plaintiff must usually be determined separately. Therefore, separate special verdicts should usually be prepared for each plaintiff with regard to each defendant. In some cases, the facts may be sufficiently simple to include multiple parties in the same verdict form, but if this is done, the transitional language from one question to another must be modified to account for all the different possibilities of yes and no answers for the various parties.

**Multiple Causes of Action:** The verdict forms are self-contained for a particular cause of action. When multiple causes of action are being submitted to the jury, it may be better to combine the verdict forms and eliminate duplication.

**Modifications as Required by Circumstances:** The verdict forms must be modified as required by the circumstances. It is necessary to determine whether any lesser or greater specificity is appropriate. The question in special verdict forms for plaintiff's damages provides an illustration. Consistent with the jury instructions, the question asks the jury to determine separately the amounts of past and future economic loss, and of past and future noneconomic loss. These four choices are included in brackets. In some cases it may be unnecessary to distinguish between past and future losses. In others there may be no claim for either economic or noneconomic damages. In some cases the court may wish to eliminate the terms "economic loss" and "noneconomic loss" from both the instructions and the verdict form. Without defining those terms, the court may prefer simply to ask the jury to determine the appropriate amounts for the various components of the losses without categorizing them for the jury as economic or noneconomic. The court can fix liability as joint or several under Civil Code sections [1431](#) and [1431.2](#), based on the verdicts. A more itemized breakdown of damages may be appropriate if the court is concerned about the sufficiency of the evidence supporting a particular component of damages. Appropriate special verdicts are preferred when periodic payment schedules may be required by [Code of Civil Procedure section 667.7](#). (*Gorman v. Leftwich* (1990) 218 Cal.App.3d 141, 148–150, [266 Cal. Rptr. 671].)

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Hon. H. Walter Croskey

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Chair, Judicial Council Advisory Committee on Civil Jury Instructions