JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on June 26, 2015

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms

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

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

Agenda Item Type
Action Required

Effective Date
June 26, 2015

Date of Report
May 12, 2015

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, revoked, and renumbered civil jury instructions prepared by the committee.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective June 26, 2015, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the midyear supplement to the official 2015 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new, revised, renumbered, and revoked civil jury instructions and verdict forms are attached at pages 32–154.

Previous Council Action

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

This is the 26th release of *CACI.* The council approved *CACI* release 25 at its December 2014 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 37 instructions and verdict forms: 201, 303, 328, VF-300, VF-303, VF-304, 456, 550, VF-501, 601, 1230, 1500, 1504, 1731, 1806, 1808, 2308, 2432, 2508, 2512, 2702, VF-2702, 3020, 3040, 3041, 3043, 3071, VF-3021, VF-3022, 3700, 3704, 4110, and 4600-4604. Of these, 27 are proposed to be revised, 4 are newly drafted, 1 is proposed to be revoked (CACI No. 1808), and 5 are proposed to be renumbered by moving them to a new series on Whistleblower Actions (CACI Nos. 4600−4604, discussed below).

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 56 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

New instructions

A recent case, *Holguin v. Dish Network LLC.,* suggested a new instruction in the Contracts series.[3] In this case, the satellite TV company did major damage to a home in the course of performing a contract for installation of a dish. The court held that there is implied in every

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

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

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

[3] *Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310.

contract a duty to perform the contract with due care. Not only was the company negligent, but the negligent performance was also a breach of contract. In response, the committee proposes new instruction CACI No. 328, *Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements*.

A judicial officer member of the committee noted that in the Malicious Prosecution series, CACI No. 1500, *Former Criminal Proceeding,* element 1 requires that the defendant have been "actively involved" in causing the prosecution. She suggested that it would be helpful to the courts and counsel to instruct on the substantial body of law as to what constitutes active involvement. The committee now proposes new CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained.*

In the last release, the committee revised CACI 1803, *Appropriation of Name or Likeness—Essential Factual Elements,* to remove a balancing of privacy rights and public interest as an optional element. The Directions for Use were revised to note that even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.[4] But it was further noted that if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense.[5]

In commenting on this change, the State Bar of California Litigation Section Jury Instructions Committee suggested that a new instruction be created on the affirmative defense that requires balancing the plaintiff's right of privacy against the public interest in the dissemination of news and information. In considering the suggestion, the committee decided that the First Amendment balancing test applies as an affirmative defense not only to misappropriation of name and likeness, but also to the other common law torts for invasion of privacy (false light, intrusion into private affairs, and public disclosure of private facts).[6] The committee now proposes new CACI No. 1806, *Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest*.

A recent case, *Kao v. University of San Francisco,* included a cause of action under Civil Code section 56.20(b) for retaliation against an employee for refusing to disclose medical information requested by the employer without good cause.[7] The committee proposes new instruction CACI No. 3071, *Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements,* for use in claims under this statute.

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[4] See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409.

[5] Cf. *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407; CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III).*

[6] See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214−242; *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278−279.

[7] *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437.

CACI currently includes three instructions on Eighth Amendment violations of prisoners' federal civil rights under title 42 United States Code section 1983. Until the last release, CACI No. 3040 addressed "general conditions of confinement."[8]

In reviewing the substantial case law coming from the federal courts in prisoner rights cases, the committee concluded that the "general conditions of confinement" cases really fell into two separate categories: those involving a substantial risk of serious harm to the prisoner (*risk* cases) and those involving depriving the prisoner of necessities of life (*deprivation* cases). And while there is considerable overlap in the elements of the two kinds of claims, there are also some differences.

Therefore, in the last release, the committee narrowed and renamed CACI No. 3040 to apply only to risk cases.[9] In this release, the committee now proposes new CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities,* for use in deprivation cases.

Revoked instruction (CACI No. 1808)

CACI No. 1808, *Stalking*, is for use in a statutory tort claim for stalking made under Civil Code section 1708.7. In 2014, the Legislature amended this statute substantially so that the current instruction no longer completely and accurately expresses the statutory elements.[10] The legislative amendments made the statute considerably more complex. For example, emotional distress is now presented not as the harm resulting from the stalking, but as an alternative to the element requiring reasonable fear for safety (current element 2 of 1808). Then both an objective "reasonable person" and a subjective standard are now required to constitute sufficient distress.[11]

Staff drafted a revision of CACI No. 1808 that addressed the statutory changes. The committee agreed that the draft accurately reflected the statute as amended but found the resulting instruction to be exceedingly complex and confusing. Efforts to make the draft more user-friendly in plain language proved unsuccessful.

Committee members noted that there are no annotations for this statute on Lexis.com. Further, no judicial officers on the committee had ever presided over or heard of an action brought under the statute. Stalking cases are commonly addressed under the various protective order statutes. Given the lack of any indication that the statute is ever used and the struggle to draft a comprehensible revision, the committee decided to present the possible revocation of the instruction for public comment.

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[8] The other two are CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care,* and CACI No. 3042, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force.*

[9] CACI No. 3040 is now titled *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm.*

[10] See Assem. Bill 1356 (Stats 2014, ch 853).

[11] Civ. Code, § 1708.7(a)(2)(B).

No comments were received objecting to the revocation of the instruction. Therefore, the committee proposes revocation of CACI No. 1808, either permanently or provisionally. Some members have not given up on drafting a usable replacement instruction, so it is possible that a proposal to revise and restore the instruction in the next release could be presented. However, such a course is in no way assured, and the assumption at this time is that revocation will most likely be permanent.

New series on Whistleblower Actions (CACI Nos. 4600−4604)

CACI currently has five instructions under three whistleblower statutes. CACI No. 2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements,* is based on Government Code section 12653 in the False Claims Act. It is currently located in the Wrongful Termination Series. CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements,* is based on Government Code section 8547.8(c); it is also in the Wrongful Termination Series.[12] CACI No. 2730, *Whistleblower Protection—Disclosure of Legal Violation—Essential Factual Elements,* is based on Labor Code section 1102.5; it is located in the Labor Code Actions series.[13]

The committee has struggled with the limitation imposed by the title Wrongful *Termination* for the 2400 series. Statutes protecting employees from wrongful termination, including these whistleblower statutes, also protect employees from other adverse employment actions other than termination. The committee's current approach is to limit the text of the instructions in the 2400 series to termination and then to mention in the Directions for Use that other adverse actions are within the statute.

Several members felt that the whistleblower statutes were not good fits in the Wrongful Termination series. Claims for whistleblower protection are becoming increasingly common, and there are other statutes that are candidates for instructions in the future.[14] Therefore, the committee proposes moving the current whistleblower instructions to their own series, CACI No. 4600 et seq.

Breach of contract—plaintiff's performance and conditions precedent

CACI No. 303, *Breach of Contract—Essential Factual Elements,* includes two optional elements. Optional element 2 requires that the plaintiff either have performed all of the significant things that the contract required him or her to do to trigger the defendant's duty to perform, or that the plaintiff was excused from having to do those things. Optional element 3 requires that all conditions precedent either have occurred or were excused. These same optional

[12] See also CACI No. 2443, *Affirmative Defense—Same Decision,* under Gov. Code, § 8547.8(e).

[13] See also CACI No. 2731, *Affirmative Defense—Same Decision,* under Lab. Code, § 1102.6.

[14] See, e.g., Health & Saf. Code, § 1278.5 (complaints about hospital patient care), Lab. Code, § 6310 (complaints about workplace health and safety conditions).

elements are presented as optional questions in CACI Nos. VF-300, *Breach of Contract*, and VF-303, *Breach of Contract—Contract Formation at Issue*.

In two recent unpublished cases, the jury struggled with these questions on the verdict form.[15] The jury appeared to confuse the occurrence or waiver of conditions precedent with waiver of the defendant's performance. In neither case was the court or counsel able to give proper guidance to the jury as to how to work through these questions on the verdict form.[16] From the facts presented, whether any conditions precedent actually were at issue in either case was unclear.

The committee was concerned that these cases indicated that there may be a lack of clarity as to how to address plaintiff's performance, conditions precedent, and defendant's performance, all of which present a possibility of excuse or waiver. It was noted that CACI No. 303 and verdict forms VF-300 and VF-303 were inconsistent in the way that these elements and questions are presented.

The committee concluded that part of the problem might be because the same verdict form question asked about both performance/occurrence and excuse/waiver as alternatives. It decided to divide the questions so as to first ask whether plaintiff performed the contractual requirements. If the jury answers no, it is then asked (if waiver is alleged) whether the plaintiff's performance was excused or waived. Similarly, the jury is first asked whether all of the conditions precedent required to trigger the defendant's obligation to perform occurred. If the jury answers no, it is then asked whether occurrence was waived or excused (if at issue). CACI No. 303 was conformed to present the elements in the same way as done in the verdict form questions.[17]

Finally, the committee decided that if the occurrence of conditions precedent is an issue in the case, it is important to let the jury know just exactly what those conditions precedent are. CACI No. 300 has been revised to require the drafter to specify the conditions precedent that must occur before the defendant's duty to perform the contract is triggered. The committee hopes that this revision will alert bench and bar not to include the conditions precedent element and question if no conditions precedent are at issue in the case.

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[15] See *Wang v. TDS Group* (2014) Cal.App.Unpub. Lexis 8109, and *Hines v. Premier Power Renewable Energy* (2014) Cal.App.Unpub. Lexis 8489. While the committee never cites unpublished cases in CACI, it does look to them for information about how CACI is being implemented in the courts.

[16] In *Wang*, the judge told the jury to continue to answer questions even if it found that conditions precedent neither occurred nor were waived, contrary to the transitional language in the verdict form, which tells the jury to stop if there is neither occurrence nor waiver (excuse). The appellate court found this to be reversible error.

[17] CACI No. VF-304, *Breach of Implied Covenant of Good Faith and Fair Dealing,* has also been conformed.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 19 to February 27, 2015. Comments were received from 10 different commentators. No proposal generated a particularly large number of comments. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 8–31.

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

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a midyear supplement to the 2015 edition and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments

1. Charts of comments, at pages 8–31
2. Full text of *CACI* instructions, at pages 32–154

Instruction	Commentator	Comment	Committee Response
201, *Highly Probable—Clear and Convincing Proof*	Kenneth N. Greenfield Attorney at Law, San Diego	Rather than simply have the term "highly probable," I believe the term should be "very highly probable." This is because the "clear and convincing" burden of proof generally applies to a finding of punitive damages. Punitive damages are a penalty and should be as close to the "beyond a reasonable doubt" standard.	*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 endorses the instruction as written. The court says it does not need to be augmented with stronger language.
	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I like the change in the title of CACI 201. Definitely clearer explanation of standard.	No response is necessary.
303, *Breach of Contract—Essential Factual Elements*	Kenneth N. Greenfield Attorney at Law, San Diego	Element 5: Rather than say just "that [*plaintiff*] was harmed," since causation is an important element in breach of contract cases, the element could read "that [*plaintiff*] was harmed by the defendant's breach of the contract."	The committee agreed with the comment and has made the proposed change.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The committee agrees with the revisions to element 2.	No response is necessary.
		We disagree with the revisions to the first option in element 3. We believe that listing all conditions precedent in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.	The committee was concerned that in two unpublished cases, *Wang v. TDS Group*, 2014 Cal. App. Unpub. LEXIS 8109 and *Hines v. Premier Power Renewable Energy*, 2014 Cal. App. Unpub. LEXIS 8489, the jury was unable to properly answer the verdict form question on conditions precedent and their waiver. In *Wang*, the court gave the jury incorrect information as to how to address this question, which was held to be reversible error. The committee's hope is that by requiring that the conditions actually be identified, this confusion will be eliminated.

Instruction	Commentator	Comment	Committee Response
		We agree with the proposed revisions to the second option in element 3, but we suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected.	There already is a cross reference to CACI No. 323, *Waiver of Condition Precedent.*
328, *Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that listing all conditions precedent in the first option in element 3 would be onerous and unnecessary. Counsel can specify the conditions at issue in their argument.	See response above to similar comment on CACI No. 303.
		We suggest that language be added to the Directions for Use stating to include an instruction defining the term "waiver" if "waiver" rather than "excuse" is selected in the second option in element 3.	The committee does not believe that the discussion in the Directions for Use to CACI No. 303 on the elements of a breach of contract needs to be repeated in other instructions. However, a cross reference to No. 303 for this discussion is appropriate and has been added.
		The first two sentences in the Directions for Use may be misconstrued to mean that this proposed new instruction should be given in every breach of contract case. We suggest adding an initial sentence to dispel that impression, stating, "Give this instruction if the plaintiff alleges a failure to perform a contractual obligation with reasonable care."	The committee agreed with the comment and has added a slightly modified version of the suggested opening sentence.
VF-300, VF-303: Breach of Contract Verdict Forms	Kenneth N. Greenfield Attorney at Law, San Diego	Question 7 (of VF-300) should follow the same language as CACI No. 303 in that there should be a finding that plaintiff was "harmed by defendant's breach of the contract."	The committee agreed with the comment and has made the change. The same change has also been made to CACI No. VF-303.
VF-300, VF-303, VF-304: Breach of Contract Verdict Forms	Orange County Bar Association, by Ashleigh E. Aitken, President	The proposed changes are acceptable, except for the "alternative" provisions dealing with performance/excused performance (VF 300 question 2, VF 303 question 4, VF 304 question 2), and satisfaction/excused conditions (VF 300 question 7, VF 303 question 7, VF 304 question 4). The existing language for these questions in verdict forms 300, 303 and 304 is somewhat confusing, but the	The committee appreciates that this comment shows clear understanding of the reasons for the proposed changes. But the only change proposed is to the transitional language between questions 2 and 3. The commentator's

Instruction	Commentator	Comment	Committee Response
		proposed changes do not really improve the verdict forms, and may confuse things even more. Specifically, the verdict forms attempt to address the fact that, in a contract case, a plaintiff must either have performed all, or substantially all, of the things required of him/her/it under the contract, OR must have been excused from performance in some way. Likewise, any conditions precedent for performance must have occurred OR have been excused. Using the question of "performance" as an example (the same analysis applies to the wording for the "conditions" question), the proposed new wording attempts to give the jury the ability to either find the plaintiff has performed, and thereby move on to other questions, or to find that the plaintiff has not performed, but then decide whether plaintiff's performance was excused before moving on to the next questions. However, the proposed wording and parenthetical alternatives are confusing, and although they may be no more confusing than the existing language, if the verdict forms are going to be revised, the revisions should accomplish the task. The recommended language for Paragraph 2 of VF-300 and VF-304, and Paragraph 4 of VF-303, would be as follows: 2. Did (plaintiff) do all, or substantially all, of the significant things that the contract required (him/her/it) to do? ____Yes ____No If your answer to question 2 is yes, skip question 3 and answer question 4. [(If excuse is at issue) (If you answered no, then answer question 3] [If excuse is not at issue) (If you	questions themselves are the same, and the transitional language between questions 3 and 4 is the same. The committee does not find that the commentator's proposed language is an improvement. And it is not completely correct because it does not bracket "skip question 3." If excuse is not at issue, there will be no question 3.

Instruction	Commentator	Comment	Committee Response
		answered no, then answer no further questions, and have the presiding juror sign and date this form.] The same type of clarification would be in order for the questions on conditions precedent met or excused.	
VF-303, VF-303. *Breach of Contract—Contract Formation at Issue*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest adding the words "waiver or" before "excuse" in the transitional language following question 6 because question 7 concerns not only excuse but also waiver.	The committee agreed and has added "waiver or."
		We agree with the other revisions to this verdict form and the Directions for Use.	No response is necessary.
456, *Defendant Estopped From Asserting Statute of Limitations Defense*	Arthur Curley, Attorney at Law, Bradley, Curley, Larkspur	CACI 456 element 5 is worse when substituting "facts". Better to simply say: "discovered #4 above."	The committee does not see any concerns with the requirement that the plaintiff have acted once the "need to proceed" was discovered.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that element 4 does not accurately state the law and that making it optional as proposed fails to solve this basic problem. Element 4 makes no allowance for the situation in which the defendant induces the plaintiff to refrain from filing a lawsuit, and the plaintiff discovers the falsity before the statute has run and proceeds diligently after discovering the facts, but files suit after the statute has run. *Lantzy v. Centex Homes* (2003) 31 Cal.4th 836 did not discuss this possibility. It seems unlikely that *Lantzy* at page 384 ("(3) the representation proves false after the limitations period has expired"), without even discussing this possibility, intended to preclude equitable estoppel in those circumstances. Other language in *Lantzy* suggests to the contrary that equitable estoppel may arise if the defendant induced the plaintiff to refrain from filing suit and the plaintiff acted diligently after he or she learned the true facts. (*Id.* at pp. 384-385.) *Superior Disptach, Inc. v. Insurance Corp. of New York* (2010) 181	The commentator's concern appears to be that that discovery might come so late that a complaint cannot be drafted before the statute runs. But to address what would seem to be a rare occurrence, the committee would need some direct authority. *Superior Dispatch* does not provide that authority. It does not involve "too late to respond" facts. Further, the language quoted is that "the defendant's act or omission caused the plaintiff to refrain from filing a *timely* suit." If the deadline is missed, the suit is not "timely."

Instruction	Commentator	Comment	Committee Response
		Cal.App.4th 175, 186 (citing *Lantzy* and other cases), stated the rule in language that does not require the plaintiff to discover the falsity after the limitations period has expired: "A defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable." We believe that this is correct and that *Lantzy* did not hold otherwise	
		We also believe that element 4 should be mandatory and should state the basic requirement that the defendant's representations by words or conduct were false. Accordingly, we would modify element 4 as follows: "~~[~~That ~~after the limitations period had expired,~~ [*name of defendant*]'s representations by words or conduct ~~proved to not be true~~ were false; and~~]~~"	The court in *J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323, 335 clearly pointed out that falsity is not required in all cases.
		We would prefer greater specificity in element 5 and consistent use of the term "lawsuit" rather than "suit." We would modify element 5 as follows: "That [*name of plaintiff*] proceeded to diligently file a lawsuit once [he/she/it] discovered that [*name of defendant*]'s representations were false ~~the need to proceed~~."	The committee does not believe that there is any need to avoid "file suit" in this element.
		We would delete the new language added at the end of the Sources and Authority for the reasons stated above.	The committee does not know what language the commentator is referring to. The only additions to the Sources and Authority are two excerpts from *JP*, one of which explains why element 4 is not mandatory.
		We note that a petition for review was filed in *J. P. v. Carlsbad Unified Sch. Dist.* (2014) 232 Cal.App.4th 323 and suggest keeping an eye on that.	Review was denied on February 25

Instruction	Commentator	Comment	Committee Response
601, *Negligent Handling of Legal Matter*	Hon. Harold W. Hopp, Judge of the Superior Court, Riverside County	The last sentence of instruction 601 is awkward. Either "[*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred anyway" OR "[*Name of plaintiff*] was not harmed by [*name of defendant*]'s conduct if the same harm would have occurred without that conduct" but not "if the same harm would have occurred anyway without that conduct." Including "anyway" and "without that conduct" seems unnecessary and to read poorly.	The committee believes that both "anyway" and "without that conduct" aid comprehension.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Under "Sources and Authority", the second bullet point citing *Namikas v. Miller*, add ", citing *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 591 [40 Cal.Rptr.3d 446].)	CACI format is to generally not to note that a case excerpt is citing another case. That is a very common situation, which would complicate citation format. The notation "internal citations omitted" sufficiently advises the user that the case is relying on prior authority.
1230, *Express Warranty—Essential Factual Elements*	Orange County Bar Association, by Ashleigh E. Aitken, President	New last case excerpt under Sources and Authority: should read: "Neither Magnuson–Moss nor the ~~California Uniform~~ Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song–Beverly." (*Orichian, supra*, 226 Cal.App.4th at 1331, **fn. 9**; see CACI No. 3204, "Substantially Impaired" Explained.)	The commentator is correct about adding fn. 9, but the words "California Uniform" are in the opinion.
1504, *Former Criminal Proceeding—"Actively Involved" Explained*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that this proposed new instruction does not clearly express the two requirements for "actively involved" as articulated in the case law: (1) seeking out the police or prosecuting authorities and (2) reporting false information to them. (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720; *Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481-1482.) We would prefer an	The committee agreed with the comment and has revised the instruction accordingly.

Instruction	Commentator	Comment	Committee Response
		instruction clearly enumerating these two requirements using similar language.	
		We also believe that the final sentence in the instruction could be misconstrued to mean that giving false testimony or providing false information to law enforcement cannot support active involvement. If the point is that giving false testimony or providing false information alone is insufficient if the person did not seek out the police or prosecuting authority, that should be stated more clearly.	This sentence is not about *false* testimony; just testimony in general. The word "merely" leaves open the possibility that giving false testimony could be "active involvement."
1731, *Trade Libel—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that this revised instruction does not clearly express the essential elements. The current instruction does not state that the disparagement must be either express or by clear implication. The proposed revision adds the optional language "[would be clearly or necessarily understood to have]" describing the disparaging statement. This covers by clear implication, but does not cover expressly. We suggest replacing element 1 with two elements stating: 1. That [*name of defendant*] made a statement that [expressly] [or] [by clear implication] specifically referred to [*name of plaintiff*]'s [product/service]. 2. That [*name of defendant*]'s statement [expressly] [or] [by clear implication] disparaged the quality of [*name of plaintiff*]'s [product/service]."	The committee believes that its proposed language is sufficiently clear and that two separate elements are unnecessary. If the statement "disparaged" the product, it implicitly "referred to" the product.
		We would modify the Directions for Use to state that one of the two alternatives in elements 1 and 2 should be selected, or select both in the disjunctive if the evidence could support either alternative.	As the committee disagrees with the above comment, this comment is moot.
		We suggest adding to the Sources and Authority the following language from *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277 stated: "We hold that a claim of disparagement	*Hartford* is cited in the Directions for Use, and there are four excerpts in the Sources and Authority. The committee believes that the case is sufficiently

Instruction	Commentator	Comment	Committee Response
		requires a plaintiff to show a false or misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication." (59 Cal.4th at p. 284.) ". . . The related requirements of derogation and specific reference may be satisfied by implication where the suit alleges that the . . . false and misleading statement necessarily refers to and derogates a competitor's product." (Id. at p. 294.) "A 'reasonable implication' in this context means a clear or necessary inference."	addressed.
2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*	David diRobertis, on behalf of the California Employment Lawyers Association	CELA commends and agrees with the concepts sought to be covered by the proposed revision to the last paragraph of CACI No. 2432. Consistent with *Turner v. Anheuser Busch, Inc.* (1994) 7 Ca1.4th 1238, the instruction should make clear that a constructive discharge can occur based on *either* an unusually aggravated situation *or* a continuous pattern of employer-created intolerable working conditions, as we believe the proposed change seeks to do.	No response is necessary.
		Nonetheless, CELA submits that the addition of the phrase "employer misconduct" results in a misstatement of law because it instructs the jury that the "continuous pattern" must be a "continuous pattern *of employer misconduct.*" The fact that the court in *Turner* recognized that an employer can be held to have constructively terminated an employee by merely *knowingly permitting intolerable working conditions to exist* reinforces the point that the employer itself need not actually commit any "misconduct" for a constructive discharge to be proven. (*Turner, supra,* 7 Cal.4th at p. 1250 [constructive termination can be established by proof that employer "created or knowingly permitted working conditions to remain intolerable"].)	The committee agreed with the comment and has replaced "employer misconduct" with "mistreatment." The "intentionally created or knowingly permitted" requirement is contained in element 3. That encompasses the level of involvement required to establish employer liability. *Turner* does not otherwise tie the continuous pattern to employer misconduct.
	Joseph M. Earley	I strongly oppose the addition of the	To the extent that the

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	III, Attorney at Law, Paradise	"continuous pattern of employer misconduct" language to the instruction. It is not only effectively a bar to most valid constructive discharge claims, but it is also inconsistent with very case from which the language arises. If anything, the instruction should clarify that "in some cases a single intolerable event ... may constitute a constructive discharge." That is also in the *Turner* case. Clearly someone is proposing that unreasonably difficult standard to prevent valid cases from going forward. It should not be considered.	commentator is making the same point that CELA made above about "employer misconduct," the committee agreed.
	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 2432 is an improvement that will make the instruction easier for jurors to understand.	No response is necessary.
2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation*	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 2508 is an improvement that will make the instruction easier for jurors to understand	No response is necessary.
2512, *Limitation on Remedies—Same Decision*	David diRobertis, on behalf of the California Employment Lawyers Association	CELA commends and agrees with the change to include the requirement that the employer would have made the same decision at the same time as consistent with *Harris v. City of Santa Monica* (2013) 56 Ca1.4th 203. This requirement is expressly stated in *Harris*, and it is key limitation on the defense, which must be incorporated into the instruction to ensure it accurately states the law. (*Harris, supra*, 56 Ca1.4th at 224 ["To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*."], italics added.)	No response is necessary.
2702, *Nonpayment of Overtime Compensatio*	Joseph M. Earley III, Attorney at Law, Paradise	I strongly oppose the addition of the nearly impossible to prove standard for unpaid overtime that the employer must have "known or should have known" its	This revision is compelled by a recent appellate opinion.. (See *Jong v. Kaiser*

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n—Essential Factual Elements		employee was not receiving legal compensation. The public policy is that employees are to be compensated fully and that should not depend on the employer's negligence. Whoever is suggesting this revision wants to prevent valid cases from going forward - and to prevent employees from getting paid for their work.	*Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 ["[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation"].)
3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P. Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	The proposed instruction incorrectly implies that the jury is to make a retrospective determination about what would have been the most appropriate use of force. This would be legal error as courts are instructed not to view events with new information or hindsight.	This comment is beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle. However, the committee notes that what the United States Supreme Court has said about hindsight is: "The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham v. Connor* (1989) 490 U.S. 386, 396.) So application of the objective "reasonable officer" standard is not a retrospective determination.

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		The proposed revisions to the instruction assume incorrectly that the existence of one reasonable use of force in response to a situation precludes the possibility that other responses might also have been in the range of reasonable responses.	This comment is also beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle.
		The proposed new paragraph for the Directions for Use incorrectly instruct juries not to consider the third element (whether force was used in the performance of official duties) in the context of a common-law negligent-use-of-force claim. While the elements of a general negligence claim do not include an "official duty," negligent use of force in the context of an arrest or other seizure is necessarily a function of law enforcement. For peace officers, the "duty" element of negligent use of force derives from their performance of "official" duties; hence, the third element should not be omitted.	The committee agreed with the comment and has removed the reference to deleting the third element in a negligence case.
		Revise paragraph between elements and factors as follows: Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine <u>whether a reasonable law enforcement officer could have used the same force</u> under the same or similar circumstances. <u>As long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.</u> You should consider, among other factors, the following:	This comment is also beyond the scope of the Invitation to Comment; and the committee has not yet expressly considered it. The committee may consider it in the next release cycle. The committee did make several minor clarifying revisions to this paragraph.
		Add to the *Graham* factors:	The committee agreed

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		(d). The amount of time during which the officer had to determine the type and amount of force that appeared to be necessary and any changing circumstances; (e). The type and amount of force used; [(f). The availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;] [(g). Other factors particular to the case.]	to add an "other" option per the comment's suggested optional factor (g). With regard to suggested additional factors (d), (e), and (f), the Directions for Use say: "The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case." The committee believes that specific additional factors are not appropriate as they would be seen as equal to the *Graham* factors.
		In Sources and Authority, delete excerpts from *Torres v. City of Madera* and *Sandoval v. Las Vegas Metro. Police Dep't*. These are jury instructions; for brevity, statements regarding whether summary judgment is appropriate should be omitted.	The committee is more concerned with providing guidance to CACI users rather than in brevity. The *Torres* excerpt is particularly appropriate because it states that the question of excessive force is one of fact, not of law. This is an important point for every jury instruction and a CACI standard for inclusion. The *Sandoval* excerpt also addresses the court's intrusion into the role of the factfinder.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Statement of law and citation to *Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F. 3d 1154, 1167 may need to be withdrawn as a Petition for Certiorari is pending (Nov. 6, 2014) and statement of law and citation to Sheehan v. City & County of San Francisco (9th Cir. 2014) 743 F.3d 1211 should be withdrawn as a Petition for Certiorari has been granted in *City & County of San*	The excerpt from *Sheehan* has been removed. The committee is not inclined to remove an excerpt solely on the filing of a petition for certiorari given the small number of

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		Francisco v. Sheehan (135 S. Ct. 702, 190 L. Ed. 2d 434, 2014 U.S. LEXIS 7830, 83 U.S.L.W. 3326).	certiorari grants.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The two cases cited in the new third paragraph both recognize a negligence claim based on a peace officer's unreasonable use of deadly force. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 628-639 [referred repeatedly to a duty relating to the use of deadly force]; *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 505-506, 512-514 [plaintiffs alleged unreasonable use of deadly force].) These cases support potential negligence liability in cases involving use of deadly force, but they do not necessarily support negligence liability in other excessive force cases. We would describe the potential negligence claim more specifically as a claim based on the use of deadly force, rather than "a negligence claim under California common law based on the same events and facts." The "same events and facts" as a section 1983 case may or may not involve the use of deadly force. Accordingly, we would modify this paragraph as follows: "This instruction may be used without element 3 in a negligence claim under California common law based on the ~~same event and facts~~ <u>use of deadly force</u>. The *Graham* factors apply under California negligence law <u>in those circumstances</u>. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if ~~earlier~~ tactical conduct and decisions <u>preceding the use of deadly force</u> show, as part of the totality of circumstances, <u>that the</u> ~~make the~~ ultimate use of deadly force <u>was</u> unreasonable."	*Hayes* and *Hernandez* are both deadly force cases, so the courts repeatedly refer to a duty relating to the use of deadly force. But nowhere do they expressly limit their scope to wrongful death cases. The committee believes that their holdings apply to other excessive force cases also. The result should not be different with an injured plaintiff rather than a decedent.
		We would note the potential need to modify this instruction in light of the differing state and federal standard. "Federal law under the Fourth Amendment, in contrast, "tends to focus	The committee agreed with the comment. The committee has revised the last paragraph along the lines of the suggested additional last

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		more narrowly on the moment when deadly force is used [citation]." (*Hayes v. County of San Diego* (2014) 57 Cal. 4th 622, 639 [160 Cal. Rptr. 3d 684, 305 P.3d 252].) In light of this difference, this instruction may be modified if the negligence claim is based in part on tactical conduct and decisions preceding the use of deadly force."	sentence, but with some specific directions on how to modify the instruction.
		We believe that the proposed new eighth bullet point in the Sources and Authority adds nothing of value to the other cases cited, so we would delete it.	The committee disagrees. As noted above, the committee believes that the excerpt from *Sandoval* appropriately notes the intrusion of the court into the proper role of the jury.
3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest that the first sentence in the second paragraph of the Directions for Use be modified in the same manner as in the Directions for Use for CACI No. 3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements*: "duties created ~~pursuant to~~ by any state county, or municipal law . . ."	The committee agreed and has made this change.
		The Directions for Use for CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*, include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction. with an appropriate citation.	The committee agreed and has added this introductory paragraph.
3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P.	The proposed revision breaks up the "deliberate indifference" inquiry into two elements, which is appropriate. But the text of the elements as proposed misstates the law. The proposed version does not make clear the true nature of the claim, i.e., that a prison official's deliberate indifference to a prisoner's serious medical need is a form of cruel and	The committee's view is that the term "deliberate indifference" should be avoided. All that the committee is proposing is to convert the explanation of "deliberate indifference" from an

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	Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	unusual punishment within the meaning of the Eighth Amendment. This is mitigated somewhat by the current specific references to deliberate indifference, most significantly in the third full paragraph ("To establish 'deliberate indifference'. . ."). However, deletion of these specific references to deliberate indifference would further widen the gap between the true nature of the claim and the description in CACI 3041. In fact, the proposed instruction would describe a claim closer to negligence than a federal constitutional violation. It could also confuse juries since the natural alternative claim is medical negligence. The revision focuses upon "treating" a condition, i.e., whether the need "went untreated" and whether the defendant failed to take "reasonable steps to treat" that need. But the concept of deliberate indifference in violation of the Constitution's Eighth Amendment is both broader and narrower than the revision reflects. Thus, the focus upon "reasonable steps to treat" a condition or whether such condition went untreated is both too narrow and too broad. It excludes defendants who may delay or interfere with medical treatment, and may encompass unreasonable, negligent conduct. Three alternative approaches are proposed. The first is to make no changes; the second is to adopt the 9th Circuit instruction. The third is to revise elements 2 and 3 as follows: ~~2. That [name of defendant] knew that [name of plaintiff] faced a substantial risk of serious harm if [his/her] medical need went untreated;~~ 2. The [*name of defendant*] knew of [*name of plaintiff*]'s serious medical need;	explanatory paragraph into elements so as to avoid use of the term. The commentator's preferred option is for no change to the instruction. This would seem to indicate acceptance of the current paragraph on deliberate indifference. The committed does not understand why the same language is unacceptable as converted into elements. The committee does not believe that CACI should adopt 9th Circuit instructions. Nor does the committee find the commentator's proposed language for deliberateindifference in elements 2 and 3, for the most part, to be an improvement. First, "substantial risk of serious harm" is omitted, which is the most important language for medical care cases. "Conscious disregard of an excessive risk" is proposed, and this language comes directly from the new case *Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066, which is now included in the Sources and Authority. Because "excessive" is not the same as "substantial," the committee does not

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		~~3. That [name of defendant] disregarded that risk by failing to take reasonable steps to treat [name of plaintiff]'s medical need;~~ 3. That, with conscious disregard for an excessive risk to [*name of plaintiff*]'s health or wellbeing, [*name of defendant*] failed to take reasonable measures to address that need;	agree that this language should be used. The committee does agree that perhaps its proposed language "[defendant] disregarded the risk by failing to take" sounds too much like negligence. Element 3 has been revised by adding "conscious" to "disregard" and replacing "failing to take" with "not taking." The committee believes that these changes move the language away from suggesting that nothing more than negligence is required.
		The proposed instruction also eliminates the passage "[n]egligence is not enough to establish deliberate indifference" under the Eighth Amendment. But this is an accurate statement of the law and so should remain. (See *Farmer v. Brennan* (1994) 511 U.S. 825, 835; *Estelle, supra,* 429 U.S. at 106; accord *Ochoa, supra,* 39 Cal.3d at 175 ["a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment."].)	The committee agreed and has restored this sentence, omitting use of "deliberate indifference."
		The instruction should include an explanation that a difference of opinion between medical providers, or between a physician and patient, regarding the appropriate course of treatment does not establish a claim for violation of the Eighth Amendment. (See *Sanchez v. Vild* (9th Cir. 1989) 891 F.2d 240, 242; *Franklin v. State of Oregon* (9th Cir. 1981) 662 F.2d 1337, 1344; see also *Estelle, supra,* 429 U.S. at 107 [whether additional tests were indicated is "a classic example of a matter for medical judgment" and not an Eighth Amendment	The committee has added reference to differences of opinion as not being sufficient.

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		violation].)	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The Directions for Use for CACI No. 3043, Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities, include an introductory paragraph stating when to give the instruction and cross-references to this instruction and CACI No. 3040, Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Harm. We find this helpful and believe that a similar paragraph should appear in the Directions for Use for this instruction.	The committee agreed and has added this introductory paragraph.
3071, *Retaliation for Refusing to Authorize Disclosure of Medical Information—Essential Factual Elements*	Orange County Bar Association, by Ashleigh E. Aitken, President and State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Reference to Civil Code § 52.20(b) in title should be Civil Code § 56.20(b)	This error has been fixed.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest adding the word "Even" at the beginning of the last paragraph in the instruction.	The committee agreed and added "Even."
		Although the trial court in *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 253, instructed that the refusal to release medical information must be "the motivating reason" for the retaliation and that necessity is a defense, and the Court of Appeal stated that the instruction was consistent with the statute and case authority, the issue in *Kao* was not the causation standard but the necessity defense. *Kao* held that the evidence supported the finding that the defendant's business necessity justified the plaintiff's discharge for refusing to release medical information. *Kao* did not hold that "the motivating reason" was the proper causation standard, and we believe that the opinion should not be cited on that point. Accordingly, we would modify the third paragraph of the	The committee does not see any reason to make this change. The fact that causation was not the issue in *Kao* does not mean that it is wrong or misleading to note that the instruction given in the case used "motivating reason."

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		Directions for use as follows: "The statute requires that the employer's retaliatory act be 'due to' the employee's refusal to release the medical information. (Civ. Code, § 56.20(b).) ~~One court has instructed the jury that the refusal to release must be 'a motivating reason' for the retaliation. (See *Kao, supra*, 229 Cal.App.4th at p. 452.) With regard to the causation standard under the Fair Employment an dHousing Act, t~~The California Supreme Court has held that the protected activity must have been a *substantial* motivating reason to establish causation under the Fair Employment and Housing Act. (~~See~~ *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49] see also CACI No. 2507, *'Substantial Motivating Reason' Explained*.)"	
VF-3022, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	California Department of Justice, by Misha D. Igra, Supervising Deputy Attorney General, Correctional Law Section; John P. Devine, Supervising Deputy Attorney General; Richard F. Wolfe, Supervising Deputy Attorney General; and Micah C.E. Osgood, Deputy Attorney General, Tort and Condemnation Section	Same issues as with CACI No. 3041	The committee has made the same minor changes to question 3 that it made to the corresponding element in 3041.
3700, *Introduction to Vicarious Responsibilit y* 56	Stephanie D. Rice, Attorney at Law, Spinelli Donald Nott, Sacramento	I think the revision to CACI 3700 is an improvement that will make the instruction easier for jurors to understand	No response is necessary.

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3704, *Existence of "Employee" Status Disputed*	Joseph M. Earley III, Attorney at Law, Paradise	I strongly oppose the suggested alteration of factor (i) from "acted as if" to "believed that". This creates a virtual impossibility to utilize this factor to prove a valid employment relationship if one must prove that both parties "believed" anything. Adding a requirement of that level of mental state will make that factor ALWAYS argue against an employer-employee relationship. The original standard of "acting as if" there was such a relationship makes infinite better sense – unless someone is trying to unfairly tilt the scales against a finding of an employer-employee relationship. Unfortunately, that seems to be the case here.	Both the Restatement and the California Supreme Court have phrased this factor in terms of beliefs, not acts. (See *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [factor (h) "whether or not the parties *believe* they are creating the relationship of employer-employee"]; Restatement 2d of Agency, § 220, factor (i).)
	Horvitz & Levy, by Robert H. Wright	The right to discharge does not tend to show an employment relationship because, both under the ordinary understanding of that term and under the case law addressing the right to discharge, employees and independent contractors are equally subject to discharge. A right of "discharge" is distinct from the "unlimited" right of discharge. The CACI instructions already provide that one factor tending to show an employer-employee relationship is the employer's "*unlimited* right to end the relationship." (CACI No. 3704, emphasis added.) Similar language can be found in case law. (*Burlingham v. Gray* (1943) 22 Cal.2d 87, 100 [" 'Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so' " (emphasis added)]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 875 ["the *unlimited right* to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment" (emphasis added)].) The courts have reasoned that an unlimited right to end the relationship shows the element of control that is the hallmark of an	The committee share's the commentator's concern that the statement from the California Supreme Court in *Ayala*: "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause," raises concerns. The committee agrees that the hirer of an independent contract can also terminate the relationship with or without cause. But the committee does not accept the comment's attempts to rationalize the statement on the basis of whether the right to terminate is "unlimited." Either relationship may include a contractual provision limiting this right of termination. So

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		employer-employee relationship. (*Press Pub. Co. v. Industrial Acc. Com.* (1922) 190 Cal. 114, 119-120.) Indeed, cases recognize that independent contractors, just like employees, are subject to discharge. Thus, an at-will clause in an independent contractor agreement "does not, in and of itself, change the independent contractor relationship into an employee-employer relationship. If it did, independent contractor arrangements could only be established through agreements which limited the right of a party, or perhaps both parties, to terminate the agreement. *This would be absurd, and it is not the law.*" (*Varisco v. Gateway Science & Engineering, Inc*. (2008) 166 Cal.App.4th 1099, 1107, emphasis added.) Whether an individual is subject to discharge has no significance in differentiating between his or her status as either an employee or an independent contractor. (*Varisco, supra*, 166 Cal.App.4th at p. 1107; *Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 589 ["a termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee"];)	the committee finds no significant distinction between the commentator's "unlimited" right to discharge (which means employment) and a "limited" right to discharge (which does not). For either employee or contractor, the right can be either unlimited, or limited by contract. Therefore, the committee has concluded that the best course is to closely track the *Ayala* language.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	In *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531, the court stated, "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause." We believe that the words "without cause" are essential in this statement. Discharging a worker for cause does not demonstrate the right to control supporting an employment relationship because any worker, employee or independent contractor, can be discharged for cause. Rather than make the words "without cause" optional, we believe that the entire sentence should be made optional: "[One indication of the right to	The committee does not agree that the whole sentence should be optional. There must be some language in the instruction about the right to end the relationship. The committee does agree, however, that bracketing "without cause" is not appropriate. The safest course is to closely track language from *Ayala*.

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		control is that the hirer can discharge the worker without cause.]"	
		We would delete the second paragraph in the Directions for Use and replace it with a statement that the optional sentence discussed above should be included unless a contract provides that the relationship may only be terminated for cause.	Because the committee has removed the brackets from "without cause," this paragraph is no longer needed and has been deleted.
4110, *Breach of Duty by Real Estate Seller's Agent—Inaccurate Information in Multiple Listing Service—Essential Factual Elements* 34	Orange County Bar Association, by Ashleigh E. Aitken, President	In *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077, after discussing negligent misrepresentation as a form actual fraud, the court noted that, "[a] real estate agent, <u>also</u> has a statutory liability for negligence … ." (emphasis added) In *Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568 a claim under Section 1088 was said to be for statutory negligence. While the proposed Instruction is titled, "Breach of Duty …," the second sentence of the paragraph states that the statutory remedy is, "… for a species of misrepresentation …." It seems that viewing this as a type of misrepresentation has resulted in drafting problems as to the element or elements regarding "reliance" by the plaintiff. Though Section 1088 deals with falsehoods or inaccuracies, it basically sets up a standard of conduct or a duty in the agent which, if violated, would be negligence – statutory negligence as the *Furla* and *Saffie* courts noted. This would seem to trigger the application of Evidence Code Section 669(a), which creates a presumption of negligence arising from a statutory violation. To raise this presumption, there is no requirement of "reliance," actual or reasonable, on the part of a plaintiff; he or she must only be a member of the class to be protected by the statute.	The committee does not believe Evidence Code section 669(a) is applicable.The rest of the *Furla* quote, represented by the elipsis in the comment, is "[i]f an agent . . . places a listing or other information in the multiple listing service, that agent . . . shall be responsible for the truth of all representations . . . of which that agent . . . had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy." Similarly the reference to "statutory negligence" in *Saffie* is followed by "for 'anyone injured' by the 'falseness or inaccuracy' of such representations and statements." Therefore, the "statutory negligence" is actually for negligent misrepresentation. And "injured by" requires actual reliance.
		The real concern with an Instruction based on Section 1088 is that the statute's language or requirement for MLS accuracy cannot be viewed in a vacuum. It would only apply in connection with	The committee believes that the instruction adequately and accurately conveys the requirement that there

Instruction	Commentator	Comment	Committee Response
		the purchase of real property. Before the adoption of an instruction on the cause of action under Section 1088, the exact nature of that action or theory of recovery should be determined, and necessary elements clearly set forth so that the instruction is an accurate and effective aid to users. Consideration should be given to the context of such actions and other applicable statutes as may impact elements and burdens of proof.	must be misinformation on the MLS listing, and that the plaintiff must have read it and done something that s/he otherwise would not have done.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that it is unnecessary to describe the alleged misstatement in the instruction (element 2). The MLS listing presumably will be in evidence, so there is no need to describe what it stated. We would combine elements 2 and 3 into a single element referring to the alleged misstatement generically, as in CACI No. 1903, *Negligent Misrepresentation,* and other instructions in the fraud series.	The committee agreed and has removed this requirement.
		We believe that actionable reliance under Civil Code section 1088 is not limited a buyer's decision whether to purchase, as suggested by element 5. A buyer could rely on a misstatement by paying more than he or she otherwise would have paid, and perhaps in other ways (e.g., incurring investigation costs or permit fees based on a misrepresentation that the property was suitable for a particular use). Perhaps other persons also could act in reliance on a misstatement and be entitled to damages under the statute. We would revise element 5 to make the required reliance less restrictive.	The committee agreed and has revised element 5 along the lines suggested.
		The proposed new instruction does not state that the plaintiff's reliance must be reasonable. Reasonable reliance is an essential element of negligent misrepresentation. (See CACI No. 1903, *Negligent Misrepresentation,* element 5.) *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077-1079, held that triable issues of fact on justifiable or reasonable reliance precluded summary judgment on the plaintiff's claims for negligence and negligent misrepresentation, which were based in	The committee agrees that *Furla* does require that the buyer reasonably and justifiably have relied on the MLS information. The instruction has been revised to remove discussion of this point as being unsettled.

Instruction	Commentator	Comment	Committee Response
		part on Civil Code section 1088. We believe that reasonable reliance is an element of a claim under Civil Code section 1088.	
		We believe that the substantial factor element (element 7) is more precisely and better stated in CACI No. 1903, Negligent Misrepresentation, element 7 ("That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm"). We would use similar language here	The committee did not agree with this comment. It is the totality of the defendant's conduct as expressed in all the elements that caused the harm, not just reliance.
4600 New Whistleblower Protection Series	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that it would be helpful to group together instructions on whistleblower protection that are currently included in other series, and agree with the creation of a new series on whistleblower protection.	No response is necessary.
4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest either adding optional language after the word "discharged" in the first and last sentences in the introductory paragraph in the instruction to allow for other adverse action, or adding language to the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.	The committee agreed with the comment. In the first sentence, optional "other" language has been added. In last sentence, "[his/her] unlawful discharge claim" has been changed to "this claim."
4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements* 12	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest either adding optional language after the word "discharged" in the introductory paragraph in the instruction to allow for other adverse action, or adding language to the Directions for Use stating that the word "discharged" in the introductory paragraph should be replaced by other words specifying the adverse action if some other adverse action is involved.	The committee agreed with the comment. In the introductory paragraph, optional "other" language has been added.
		We find the statement in the Directions for Use "These elements may be modified to allege constructive discharge" somewhat awkward because jury instructions do not "allege." We would modify this as follows:	The committee agreed and has adopted the commentator's suggested rewrite.

Instruction	Commentator	Comment	Committee Response
		"These elements may be modified ~~to allege~~ if constructive discharge is alleged."	
4604, *Affirmative Defense—Same Decision* 12	David deRobertis, on behalf of the California Employment Lawyers Association	For the same reasons set forth above in connection with the proposed change to CACI No. 2512, CELA commends and agrees with the proposed change in the proposed CACI No. 4604.	No response is necessary.
	Orange County Bar Association, by Ashleigh E. Aitken, President	The proposed revision adds the words "at that time" but those words do not appear in the language of Labor Code Section 1102.6 providing for this affirmative defense.	While it is true that the words do not appear in the statute, they do appear in *Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239. And while *Harris* is not a Labor Code 1102.6 case, the reasonable implication is that its standard applies whenever a same-decision defense is raised.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revision to the instruction. We suggest that a citation to *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 224, be added to the Sources and Authority with the following quotation: "To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision at the time it made its actual decision."	The committee agreed and has added the excerpt.
	Orange County Bar Association, by Ashleigh E. Aitken, President	Approve of all except as noted above	No response is necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Approve of all except as noted above	No response is necessary.

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Release 26: June 2015

BREACH OF FIDUCIARY DUTY SERIES

WHISTLEBLOWER ACTIONS (NEW) SERIES

201. ~~More Likely True~~Highly Probable—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.

New September 2003; Revised October 2004, June 2015

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Burden of Proof. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390).)
- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)
- "We decline to hold that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." ' Neither *In re Angelia P., supra*, 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases." (*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 [163 Cal.Rptr.3d 874].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 39, 40

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, *Burdens of Proof and Persuasion*, 9.16

303. Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant***] for breach of contract, [***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]

[2. That [*name of plaintiff***] ~~or that [he/she/it]~~ was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***~~doing those things~~];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***] ~~[had occurred;~~]**

[or]

[3. ~~/ [or]~~ That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

[4. That [*name of defendant***] failed to do something that the contract required [him/her/it] to do; and]**

[*or*]

[4. That [*name of defendant***] did something that the contract prohibited [him/her/it] from doing; and]**

5. That [*name of plaintiff***] was harmed by ~~that failure~~[***name of defendant***]'s breach of contract.**

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013; June 2015

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal. App. 4th 1131, 1147 (Cal. App. 1st Dist. 2014) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform~~may be needed if there is an issue of performance of the plaintiff's obligations under the contract~~. Include the second option if

the plaintiff alleges that he or she was excused from having to perform some or all of the contractual conditions ~~acts referenced in question 2~~.

Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material;* element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent,* meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered~~is needed if conditions for performance are at issue~~. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed,* CACI No. 322, *Occurrence of Agreed Condition Precedent,* and CACI No. 323, *Waiver of Condition Precedent.*

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Contract Defined. Civil Code section 1549.
- "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)
- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc., v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown, supra,* 192 Cal.App.4th at pp. 277–278, internal citations omitted.)

- "Whether breach of the agreement not to molest bars [plaintiff]'s recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. (*Verdier, supra,* 133 Cal.App.2d at p. 334.)

- "The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. The trial court relied upon parol evidence to determine the content and interpretation of the fee-sharing agreement between the parties. Accordingly, that determination is a question of fact that must be upheld if based on substantial evidence." (*Brown, supra,* 192 Cal.App.4th at p. 279, internal citation omitted.)

- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*, original italics.)

- "b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of ,'waiver' in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this

Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225.)

- " ' "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." [Citation.]' " ((*Stephens & Stephens XII, LLC, supra*, 231 Cal. App. 4th at p. 1144.)
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Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847

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

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.10 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.03–22.50

328. Breach of Implied Duty to Perform With Reasonable Care—Essential Factual Elements

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The parties' contract requires that [*name of defendant***] [***specify performance alleged to have been done negligently, e.g., install cable television service***]. It is implied in the contract that this performance will be done competently and with reasonable care. [***Name of plaintiff***] claims that [***name of defendant***] breached this implied condition. 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]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

4. That [*name of defendant***] failed to use reasonable care in [***specify performance***]; and**

5. That [*name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New June 2015

Directions for Use

Give this instruction if the plaintiff alleges harm from the defendant's failure to perform a contractual obligation with reasonable care. Every contract includes an implied duty to perform required acts competently. (*Holguin v. Dish Network LLC* (2014) 229 Cal.App.4th 1310, 1324 [178 Cal.Rptr.3d 100].) If negligent performance is alleged, the jury should be instructed that the contract contains this implied duty. The jury must then decide whether the duty has been breached. It must also find all of the other elements required for breach of contract. (See CACI No. 303, *Breach of Contract─Essential Factual Elements*.)

This instruction may be adapted for use as an affirmative defense if the defendant asserts that the plaintiff

is not entitled to recover on the contract because of the plaintiff's failure to perform its duties competently. (See *Roscoe Moss Co. v. Jenkins* (1942) 55 Cal.App.2d 369, 376−378 [130 P.2d 477].)

For discussion of issues with the options for elements 2 and 3, see the Directions for Use to CACI No. 303, *Breach of Contract, Essential Factual Elements*.

Sources and Authority

- "[E]xpress contractual terms give rise to implied duties, violations of which may themselves constitute breaches of contract. ' "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement [citation].' " (*Holguin, supra,* 229 Cal.App.4th at p. 1324.)

- "A contract to perform services gives rise to a duty of care which requires that such services be performed in a competent and reasonable manner." (*North American Chemical Co. v. Superior Court* (1997) 59 Cal.App.4th 764, 774 [69 Cal.Rptr.2d 466].)

- "[T]he statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use,' as stated by the trial court." (*Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2010) Contracts, §§ 798, 800

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

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Crompton et al., Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particle Construction of Contract*, 21.79

We answer the questions submitted to us as follows:

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

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

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

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**

[3. ~~[or]~~

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

If your answer to ~~[either option for]~~ question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no ~~[to both options]~~, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[~~3~~4. Did all the conditions that were required for [*name of defendant*]'s performance occur ~~or were they excused~~?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**

[5. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

If your answer to question ~~3~~ 5 is yes, then answer question ~~4~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~4~~6. [Did [*name of defendant*] fail to do something that the contract required [him/her/it]

to do?
____ Yes ____ No]

[or]

[Did [*name of defendant***] do something that the contract prohibited [him/her/it] from doing?**
____ Yes ____ No]

If your answer to [either option for] question ~~4~~ 6 is yes, then answer question ~~5~~7. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~7. **Was [***name of plaintiff***] harmed by [***name of defendant***]'s breach of contract~~that failure~~?**
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~8. **What are [***name of plaintiff***]'s damages?**

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, June 2011, June 2013, June 2015

Directions for Use

This verdict form is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow.

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.

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question ~~3~~ 4 if the occurrence of conditions for performance ~~are~~ is at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.)

Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 6. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse or waiver should be included after question 6.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question ~~6~~8.

If specificity is not required, users do not have to itemize the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

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

VF-303. Breach of Contract—Contract Formation at Issue

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?
____ 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 the parties agree to give each other something of value?
____ 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 the parties agree to the terms of the contract?
____ Yes ____ No

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

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

If your answer to question 4 is yes, [~~then~~ skip question 5 and] answer question 6. If you answered no, [answer question 5 *if excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date the form].]**

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

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

6. Did all the conditions ~~occur~~ that were required for [*name of defendant***]'s performance occur?**
____ Yes ____ No

If your answer to question 6 is yes, [skip question 7 and] ~~then~~ answer question ~~7~~8. If you answered no, [answer question 7 *if excuse or waiver is at issue*/stop here, answer no further questions, and have the presiding juror sign and date this form].

[7. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

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

~~7~~8. **[Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?**
____ Yes ____ No]

[or]

[Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?
____ Yes ____ No]

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

~~8~~9. **Was [*name of plaintiff*] harmed by [*name of defendant*]'s breach of contract~~that failure~~?**
____ Yes ____ No

If your answer to question ~~8~~ 9 is yes, then answer question ~~9~~10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~9~~10. **What are [*name of plaintiff*]'s damages?**

[a. Past [economic] loss [including] [*insert descriptions of claimed damages*]:

$ _____]

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New October 2004; Revised December 2010,, June 2015

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. 302, *Contract Formation—Essential Factual Elements*, and CACI No. 303, *Breach of Contract—Essential Factual Elements*. The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

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.

Optional questions 4 and 5 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 4 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 5 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 6 and 7 address conditions precedent to the defendant's performance. Include question 6 if the occurrence of conditions for performance are at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 7 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.)

Note that questions 6 and 7 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused. The defendant's nonperformance is the first option for question 8. If the defendant alleges that its nonperformance was excused or waived by the plaintiff, an additional question on excuse on waiver should be included after question 8.

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question 10.

If specificity is not required, users do not have to itemize all the damages listed in question ~~9~~10. The breakdown is optional depending on the circumstances.

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

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

We answer the questions submitted to us as follows:

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

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

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

If your answer to question 2 is yes, [skip question 3 and] answer question 4. If you answered no, [answer question 3 *if excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**
~~[or]~~

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

If your answer to ~~[either option for]~~ question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no ~~[to both options]~~, stop here, answer no further questions, and have the presiding juror sign and date this form.]

[~~3~~4. Did all the conditions that were required for [*name of defendant*]'s performance occur ~~or were they excused~~?
____ Yes ____ No

If your answer to question 4 is yes, [skip question 5 and] answer question 6. If you answered no, [answer question 5 *if waiver or excuse is at issue*/**stop here, answer no further questions, and have the presiding juror sign and date this form].]**

[5. Were the required conditions that did not occur [excused/waived]?
____ Yes ____ No

If your answer to question ~~3~~ 5 is yes, then answer question ~~4~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~4~~6. Did [*name of defendant*] unfairly interfere with [*name of plaintiff*]'s right to receive the benefits of the contract?

____ Yes ____ No

If your answer to question ~~4~~ 6 is yes, then answer question ~~5~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~7. Was [*name of plaintiff*] harmed by [*name of defendant*]'s interference?
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~8. What are [*name of plaintiff*]'s damages?

[a. Past [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

[b. Future [economic] loss [including [*insert descriptions of claimed damages***]]:**

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New June 2014; Revised June 2015

Directions for Use

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

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

Optional questions 2 and 3 address acts that the plaintiff must have performed before the defendant's duty to perform is triggered. Include question 2 if the court has determined that the contract included

dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.App.3d 893].) Include question 3 if the plaintiff claims that he or she was excused from having to perform an otherwise required obligation.

Optional questions 4 and 5 address conditions precedent to the defendant's performance. Include question 4 if the occurrence of conditions for performance are at issue. (See CACI No. 322, *Occurrence of Agreed Condition Precedent*.) Include question 5 if the plaintiff alleges that conditions that did not occur were excused. The most common form of excuse is the defendant's waiver. (See CACI No. 323, *Waiver of Condition Precedent*; see also Restatement Second of Contracts, section 225, Comment b.) Waiver must be proved by clear and convincing evidence. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515.) Note that questions 4 and 5 address conditions precedent, not the defendant's nonperformance after the conditions have all occurred or been excused.

~~Include question 2 if the court has determined that the contract included dependent covenants, such that the failure of the plaintiff to perform some obligation would relieve the defendant of the obligation to perform. (See *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) However, do not include question 2 if the plaintiff alleges that the reason for his or her nonperformance was because of the defendant's bad-faith interference (question 4).~~

~~Include question 3 if conditions for performance are at issue.~~

If the verdict form used combines other causes of action involving both economic and noneconomic damages, use "economic" in question ~~6~~8.

If specificity is not required, users do not have to itemize the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

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

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff*] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [*name of defendant*] did or said something that caused [*name of plaintiff*] to delay filing the lawsuit. In order to establish the right to proceed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] said or did something that caused [*name of plaintiff*] to believe that it would not be necessary to file a lawsuit;**

2. **That [*name of plaintiff*] relied on [*name of defendant*]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [*name of plaintiff*]'s position would have relied on [*name of defendant*]'s conduct; [and]**

4. **[That after the limitation period had expired, [*name of defendant*]'s representations by words or conduct proved to not be true; and]**

5. **That [*name of plaintiff*] proceeded diligently to file suit once [he/she/it] discovered the ~~actual facts~~need to proceed.**

It is not necessary that [*name of defendant*] have acted in bad faith or intended to mislead [*name of plaintiff*].

New October 2008; Revised December 2014, June 2015

Directions for Use

Equitable estoppel, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included. However, the California Supreme Court has stated that element 4 is to be given in a construction defect case in which the defendant has assured the plaintiff that all defects will be repaired. (See *Lantzy, supra*, 31 Cal.4th at p. 384.)

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel … ." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)

- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)

- "Equitable estoppel does not require factually misleading statements in all cases." (*J. P. v.*

Carlsbad Unified Sch. Dist. (2014) 232 Cal.App.4th 323, 335 [181 Cal.Rptr.3d 286].)

- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- " 'Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when the plaintiff establishes by a preponderance of the evidence: (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment.' " (*J.P. supra*, 232 Cal.App.4th at p. 333.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts,

representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation

are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations,* ¶ 5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

550. Affirmative Defense—Plaintiff Would Have Consented

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [***name of plaintiff***] would have consented to the procedure, even if [he/she] had been informed of the risks. To establish this defense, [***name of defendant***] must prove that had ~~even if a reasonable person in [***name of plaintiff***]'s position might not have consented to the [***insert medical procedure***] if he or she had been given enough information about its risks,~~ [***name of plaintiff***] been adequately informed about the risks of the [***insert medical procedure***], [he/she] ~~still~~ would have consented, even if a reasonable person in [***name of plaintiff***]'s position might not have consented.~~to the procedure.~~**

~~**If you decide [***name of defendant***] has proved that [***name of plaintiff***] would have consented, you must conclude that [his/her] failure to inform [***name of plaintiff***] of the risks was not a substantial factor in causing [***name of plaintiff***]'s harm.**~~

New September 2003; Revised June 2015

Directions for Use

~~"Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)~~

Give this instruction if the defendant asserts as an affirmative defense that the plaintiff would have consented (and thereby have suffered the same harm) had he or she been informed of the risks. This instruction ~~could~~ can be modified to cover "informed refusal" cases by redrafting it to state, in substance, that even if the plaintiff had known of the risks of refusal, he or she still would have refused the test.

Sources and Authority

- "Whenever appropriate, the court should instruct the jury on the defenses available to a doctor who has failed to make the disclosure required by law." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 245 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "The patient-plaintiff may testify on this subject but the issue extends beyond his credibility. Since at the time of trial the uncommunicated hazard has materialized, it would be surprising if the patient-plaintiff did not claim that had he been informed of the dangers he would have declined treatment. Subjectively he may believe so, with the 20/20 vision of hindsight, but we doubt that justice will be served by placing the physician in jeopardy of the patient's bitterness and disillusionment. Thus an objective test is preferable: i.e., what would a prudent person in the patient's position have decided if adequately informed of all significant perils." ~~The objective test is whether a reasonable person in plaintiff's position would have refused consent if he or she had been fully informed.~~ (*Cobbs, supra,* 8 Cal.3d at p. 245.)

- "The prudent person test for causation was established to protect defendant physicians from the

unfairness of having a jury consider the issue of proximate cause with the benefit of the '20/20 vision of hindsight . . .' This standard should not be employed to prevent a physician from raising the defense that even given adequate disclosure the injured patient would have made the same decision, regardless of whether a reasonably prudent person would have decided differently if adequately informed." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 294 fn. 5 [165 Cal. Rptr. 308, 611 P.2d 902 ~~However, the defendant can seek to prove that this particular plaintiff still would have consented even if properly informed (as an affirmative defense). (*Warren v. Schecter* (1997) 57 Cal.App.4th 1189, 1206 [67 Cal.Rptr.2d 573~~].)

Secondary Sources

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

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

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

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

VF-501. Medical Negligence—Informed Consent—Affirmative Defense—Plaintiff Would Have Consented Even If Informed

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] perform a [***insert medical procedure***] on [***name of plaintiff***]?**
   ____ Yes ____ No

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

2. **Did [***name of plaintiff***] give [his/her] informed consent for the [***insert medical procedure***]?**
   ____ Yes ____ No

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

3. **Would a reasonable person in [***name of plaintiff***]'s position have refused the [***insert medical procedure***] if he or she had been ~~fully~~adequately informed of the possible results and risks of [and alternatives to] the [***insert medical procedure***]?**
   ____ 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. **Would [***name of plaintiff***] have consented to the [***insert medical procedure***] even if [he/she] had been given ~~enough~~ adequate information about the risks of the [***insert medical procedure***]?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***] harmed as a consequence of a result or risk that [***name of defendant***] should have explained before the [***insert medical procedure***] was performed?**
   ____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2015

Directions for Use

This verdict form is based on CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual*

Elements, and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented.*

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. 533, *Failure to Obtain Informed Consent—Essential Factual Elements*, and CACI No. 550, *Affirmative Defense—Plaintiff Would Have Consented.*~~

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

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

If the affirmative defense, which is contained in question 4, is not an issue in the case, question 4 should be omitted and the remaining questions renumbered accordingly.

601. ~~Damages for~~ Negligent Handling of Legal Matter

To recover damages from [*name of defendant***], [***name of plaintiff***] must prove that [he/she/it] would have obtained a better result if [***name of defendant***] had acted as a reasonably careful attorney. [***Name of plaintiff***] was not harmed by [***name of defendant***]'s conduct if the same harm would have occurred anyway without that conduct.**

New September 2003; Revised June 2015

Directions for Use

In ~~*Matteo Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820 [60 Cal.Rptr.2d 780], the trial-within-a-trial method was applied to accountants.~~ In cases involving professionals other than attorneys, this instruction would need to be modified by inserting the type of the professional in place of "attorney." (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 829−830 [60 Cal.Rptr.2d 780] [trial-within-a-trial method was applied to accountants].)~~,~~

The plaintiff must prove that *but for* the attorney's negligent acts or omissions, he or she would have obtained a more favorable judgment or settlement in the underlying action. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1241 [135 Cal. Rptr. 2d 629, 70 P.3d 1046].) The second sentence expresses this "but for" standard.~~The issue of collectibility does not apply to every legal malpractice action: "It is only where the alleged malpractice consists of mishandling a client's claim that the plaintiff must show proper prosecution of the matter would have resulted in a favorable judgment and collection thereof." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506 [33 Cal.Rptr.2d 219].)~~

Sources and Authority

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 749−750 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "In the legal malpractice context, the elements of causation and damage are particularly closely linked." (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1582 [171 Cal.Rptr.3d 23].)

- "In a client's action against an attorney for legal malpractice, the client must prove, among other things, that the attorney's negligent acts or omissions caused the client to suffer some financial harm or loss. When the alleged malpractice occurred in the performance of transactional work (giving advice or preparing documents for a business transaction), must the client prove this causation element according to the 'but for' test, meaning that the harm or loss would not have occurred without the attorney's malpractice? The answer is yes." (*Viner*, *supra*, 30 Cal.4th at p. 1235.)

- "[The trial-within-a-trial method] is the most effective safeguard yet devised against speculative and

conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance." (*Mattco Forge Inc., supra,* 52 Cal.App.4th at p. 834.)

- " 'Damage to be subject to a proper award must be such as follows the act complained of *as a legal certainty* … .' Conversely, ' " '[t]he mere probability that a certain event would have happened, upon which a claim for damages is predicated, will not support the claim or furnish the foundation of an action for such damages.' " ' " (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 165−166 [149 Cal.Rptr.3d 422], original italics, footnote and internal citations omitted.)

- ~~"For the reasons given above, we conclude that, just as in litigation malpractice actions, a plaintiff in a transactional malpractice action must show that *but for* the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result." (*Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal.Rptr.2d 629, 70 P.3d 1046], original italics.)~~

- "One who establishes malpractice on the part of his or her attorney *in prosecuting a lawsuit* must also prove that careful management of it would have resulted in a favorable judgment and collection thereof, as there is no damage in the absence of these latter elements." (*DiPalma v. Seldman* (1994) 27 Cal.App.4th 1499, 1506−1507 [33 Cal.Rptr.2d 219]~~*DiPalma, supra,* 27 Cal.App.4th at pp. 1506-1507~~, original italics.)

- " 'The element of collectibility requires a showing of the debtor's solvency. " ['W]here a claim is alleged to have been lost by an attorney's negligence, … to recover more than nominal damages it must be shown that it was a valid subsisting debt, *and that the debtor was solvent*.' [Citation.]" The loss of a collectible judgment "by definition means the lost opportunity to collect a money judgment from a solvent [defendant] and is certainly legally sufficient evidence of actual damage." ' " (*Wise v. DLA Piper LLP (US)* (2013) 220 Cal.App.4th 1180, 1190 [164 Cal.Rptr.3d 54], original italics, internal citations omitted.)

- "Collectibility is part of the plaintiff's case, and a component of the causation and damages showing, rather than an affirmative defense which the Attorney Defendants must demonstrate." (*Wise, supra,* 220 Cal.App.4th at p. 1191.)

- "Because of the legal malpractice, the original target is out of range; thus, the misperforming attorney must stand in and submit to being the target instead of the former target which the attorney negligently permitted to escape. This is the essence of the case-within-a-case doctrine." (*Arciniega v. Bank of San Bernardino* (1997) 52 Cal.App.4th 213, 231 [60 Cal.Rptr.2d 495].)

- "Where the attorney's negligence does not result in a total loss of the client's claim, the measure of damages is the difference between what was recovered and what would have been recovered but for the attorney's wrongful act or omission. [¶] Thus, in a legal malpractice action, if a reasonably competent attorney would have obtained a $3 million recovery for the client but the negligent attorney obtained only a $2 million recovery, the client's damage due to the attorney's negligence would be $1 million-the difference between what a competent attorney would have obtained and what the negligent attorney obtained." (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1758 [30 Cal.Rptr.2d 217].)

- "[A] plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly* have received more money in settlement or at trial. [¶] The requirement that a plaintiff need prove damages to 'a legal certainty' is difficult to meet in any case. It is particularly so in 'settle and sue' cases … ." (*Filbin, supra,* 211 Cal.App.4th at p. 166, original italics, internal citation omitted.)

- "In a legal malpractice action, causation is an issue of fact for the jury to decide except in those cases where reasonable minds cannot differ; in those cases, the trial court may decide the issue itself as a matter of law." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- " 'The trial-within-a-trial method does not "recreate what a particular judge or fact finder would have done. Rather, the jury's task is to determine what a reasonable judge or fact finder would have done … ." … Even though "should" and "would" are used interchangeably by the courts, the standard remains an *objective* one. The trier of fact determines what *should* have been, not what the result *would* have been, or could have been, or might have been, had the matter been before a *particular judge* or jury. …' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710], original italics.)

- "If the underlying issue originally was a factual question that would have gone to a tribunal rather than a judge, it is the jury who must decide what a reasonable tribunal would have done. The identity or expertise of the original trier of fact (i.e., a judge or an arbitrator or another type of adjudicator) does not alter the jury's responsibility in the legal malpractice trial-within-a-trial." (*Blanks, supra,* 171 Cal.App.4th at pp. 357–358.)

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 319−322

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:322 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.10 et seq. (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.50 et seq. (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

1230. Express Warranty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by the [***product***] because [***name of defendant***] represented, either by words or actions, that the [***product***] [***insert description of alleged express warranty, e.g., "was safe"***], but the [***product***] was not as represented. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or more of the following:***]**

[gave [*name of plaintiff*] a written warranty that the [*product*] [*insert description of written warranty*];] [or]

[made a [statement of fact/promise] [to/received by] [*name of plaintiff***] that the [***product***] [***insert description of alleged express warranty***];] [or]**

[gave [*name of plaintiff***] a description of the [***product***];] [or]**

[gave [*name of plaintiff***] a sample or model of the [***product***];]**

2. **That the [***product***] [***insert one or more of the following:***]**

[did not perform as [stated/promised];] [or]

[did not meet the quality of the [description/sample/model];]

[3. ~~[~~**That [***name of plaintiff***] took reasonable steps to notify [***name of defendant***] within a reasonable time that the [***product***] was not as represented, whether or not [***name of defendant***] received such notice;]**

4. That [*name of defendant*] failed to [repair/*specify other remedy provided by warranty*] the [*product*] as required by the warranty;

4~~5~~. **That [***name of plaintiff***] was harmed; and**

5~~6~~. **That the failure of the [***product***] to be as represented was a substantial factor in causing [***name of plaintiff***]'s harm.**

[Formal words such as "warranty" or "guarantee" are not required to create a warranty. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. But a warranty is not created if [***name of defendant***] simply stated the value of the goods or only gave [his/her] opinion of or recommendation regarding the goods.]**

New September 2003; Revised February 2005, June 2015

Directions for Use

This instruction is for use if breach of an express warranty is alleged under the California Commercial Code. (See *Orichian v. BMW of North America, LLC* (2014) 226 Cal.App.4th 1322, 1333−1334 [172 Cal.Rptr.3d 876]; Comm. Code, § 2313.) If a breach of written warranty under the federal Magnuson-Moss Warranty Act (see 15 U.S. Code, § 2301 et seq.) is alleged, give the first option for element 1. (See 15 U.S.C. §§ 2310(d)(1), 2301(6).)

The giving of notice to the seller is not required in personal injury or property damage lawsuits against a manufacturer or another supplier with whom the plaintiff has not directly dealt. (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897]; *Gherna v. Ford Motor Co.* (1966) 246 Cal.App.2d 639, 652-653 [55 Cal.Rptr. 94].)

If an instruction on the giving of notice to the seller is needed, see CACI No. 1243, *Notification/Reasonable Time*.

Sources and Authority

- Express Warranties. Commercial Code section 2313.
- Applicable to "Transactions in Goods." Commercial Code section 2102.
- "Goods" Defined. Commercial Code section 2105.
- Damages Under Commercial Code. Commercial Code section 2714.
- "A warranty relates to the title, character, quality, identity, or condition of the goods. The purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 20 [220 Cal.Rptr. 392], internal citation omitted.)
- "The essential elements of a cause of action under the California Uniform Commercial Code for breach of an express warranty to repair defects are (1) an express warranty to repair defects given in connection with the sale of goods; (2) the existence of a defect covered by the warranty; (3) the buyer's notice to the seller of such a defect within a reasonable time after its discovery; (4) the seller's failure to repair the defect in compliance with the warranty; and (5) resulting damages." (*Orichian, supra*, 226 Cal.App.4th at pp. 1333−1334, internal citations omitted.)
- ~~"A warranty is a contractual term concerning some aspect of the sale, such as title to the goods, or their quality or quantity." (4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 51.)~~
- "Privity is not required for an action based upon an express warranty." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115, fn. 8 [120 Cal.Rptr. 681, 534 P.2d 377].)
- " 'The determination as to whether a particular statement is an expression of opinion or an affirmation of a fact is often difficult, and frequently is dependent upon the facts and circumstances existing at the time the statement is made.' " (*Keith, supra,* 173 Cal.App.3d at p. 21, internal citation omitted.)

- "Statements made by a seller during the course of negotiation over a contract are presumptively affirmations of fact unless it can be demonstrated that the buyer could only have reasonably considered the statement as a statement of the seller's opinion. Commentators have noted several factors which tend to indicate an opinion statement. These are (1) a lack of specificity in the statement made, (2) a statement that is made in an equivocal manner, or (3) a statement which reveals that the goods are experimental in nature." (*Keith, supra,* 173 Cal.App.3d at p. 21.)

- "It is important to note ... that even statements of opinion can become warranties under the code if they become part of the basis of the bargain." (*Hauter, supra,* 14 Cal.3d at p. 115, fn. 10.)

- ~~The California Supreme Court has stated that~~ "~~[t]~~The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof." (*Hauter, supra,* 14 Cal.3d at p. 115, internal citations omitted.) ~~However, the Court also noted that there is some controversy as to the role, if any, of reliance in this area.~~

- ~~The court in *Keith, supra,* 173 Cal.App.3d at p. 23, held that the seller has the burden of proving that the bargain did not rest at all on the representation, for example, by showing that the buyer inspected and discovered the defect before the contract was made.~~

- "It is immaterial whether defendant had actual knowledge of the contraindications. 'The obligation of a warranty is absolute, and is imposed as a matter of law irrespective of whether the seller knew or should have known of the falsity of his representations.' " (*Grinnell v. Charles Pfizer & Co.* (1969) 274 Cal.App.2d 424, 442 [79 Cal.Rptr. 369], internal citations omitted.)

- "[A] sale is ordinarily an essential element of any warranty, express or implied ... ." (*Fogo v. Cutter Laboratories, Inc.* (1977) 68 Cal.App.3d 744, 759 [137 Cal.Rptr. 417], internal citations omitted.)

- "Neither Magnuson-Moss nor the California Uniform Commercial Code requires proof that a defect substantially impairs the use, value, or safety of a vehicle in order to establish a breach of an express or written warranty, as required under Song-Beverly." (*Orichian, supra,* 226 Cal.App.4th at p. 1331; fn. 9, see CACI No. 3204, *"Substantially Impaired" Explained.*)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 56–66

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, §§ 2.31-2.33, Ch. 7, *Proof*, § 7.03 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, §§ 502.23, 502.42-502.50, 502.140-502.150 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.60 et seq. (Matthew Bender)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted;]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- ~~" 'One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding.' ' "The test is whether the defendant was actively instrumental in causing the prosecution." ' " (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 463-464 [156 Cal.Rptr.3d 901], internal citation omitted.)~~

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901]~~*Greene, supra*, 216 Cal.App.4th at p. 465~~.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra*, 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra*, 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action

would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745]~~, original italics, internal citations omitted~~, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 469–485, 511

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1504. Former Criminal Proceeding—"Actively Involved" Explained

[*Name of defendant*] was "actively involved" in causing [*name of plaintiff*] to be prosecuted [or in causing the continuation of the prosecution] if after learning that there was no probable cause that [*name of plaintiff*] had committed a crime, [he/she] sought out the police or prosecutorial authorities and falsely reported facts to them indicating that [*name of plaintiff*] had committed a crime. Merely giving testimony or responding to law enforcement inquiries is not active involvement.

New June 2015

Directions for Use

Give this instruction in a malicious prosecution case arising from an earlier criminal proceeding. This instruction explains what is meant by "active involvement" in a criminal prosecution, as used in element 1 of CACI No. 1500, *Former Criminal Proceeding—Essential Factual Elements*.

Sources and Authority

- "Although a criminal prosecution normally is commenced through the action of government authorities, a private person may be liable for malicious prosecution under certain circumstances based on his or her role in the criminal proceeding. 'The relevant law is clear: "One may be civilly liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding." "' " (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1481 [178 Cal.Rptr.3d 363, internal citation omitted.)

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under *lawful* process, but from *malicious* motives and without probable cause. . . . . [Italics in original.] The test is whether the defendant was actively instrumental in causing the prosecution.' " (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal. Rptr. 241, 527 P.2d 865].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 464 [156 Cal.Rptr.3d 901].)

- "Public policy requires that 'private persons who aid in the enforcement of the law should be given an effective protection against the prejudice which is likely to arise from the termination of the prosecution in favor of the accused.' " (*Cedars-Sinai Medical Ctr. v. Superior Court* (1988) 206 Cal.App.3d 414, 418 [253 Cal.Rptr. 561].)

- "[M]erely giving testimony and responding to law enforcement inquiries in an active criminal proceeding does not constitute malicious prosecution." (*Zucchet, supra*, 229 Cal.App.4th at p. 1482.)

- "[T]o create liability for malicious prosecution … [t]he person must 'take[some affirmative action to encourage the prosecution by way of advice or pressure, as opposed to merely providing information.' " (*Zucchet, supra,* 229 Cal.App.4th at p. 1485.)

- "According to section 655 of the Restatement, '[a] private person who takes an active part in continuing or procuring the continuation of criminal proceedings initiated by himself or by another is subject to the same liability for malicious prosecution as if he had then initiated the proceedings.' " (*Zucchet, supra,* 229 Cal.App.4th at p. 1483.)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [***name of plaintiff***]'s [***product/service***];**

2. **That the statement was made to a person other than [***name of plaintiff***];**

3. **That the statement was untrue;**

4. **That [***name of defendant***] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement;**

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

New December 2013; Revised June 2015

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram Records, Inc.*, *supra*, 170 Cal.App.3d at p. 548.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*, 224 Cal.App.2d at pp. 73−74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A "reasonable implication" means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is

required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) 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. For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, ~~*Qualified Privilege*~~*Common Interest Privilege—Malice*.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' … is a form of action somewhat related to trade libel … ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- "Confusion surrounds the tort of 'commercial disparagement' because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim." (*Hartford Casualty Ins. Co.*, *supra,* ~~*v. Swift Distribution, Inc.* (2014)~~ 59 Cal.4th at p.~~277,~~ 289 ~~[172 Cal. Rptr. 3d 653, 326 P.3d 253]~~.)

- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to

liability for pecuniary loss resulting to the other if [P] (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 [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- "According to section 629 of the Restatement Second of Torts (1977), '[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.' " (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 288.)

- "What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 294, original italics.)

- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- "While … general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,*

202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion─'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'─is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005), Torts, §§ 642-645

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation,* 9.04

1806. Affirmative Defense to Invasion of Privacy—First Amendment Balancing Test—Public Interest

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[*Name of defendant***] claims that [he/she] has not violated [***name of plaintiff***]'s right of privacy because the public interest served by [***name of defendant***]'s [***specify privacy violation, e.g., use of [name of plaintiff's name, likeness, or identity***] outweighs [***name of plaintiff***]'s privacy interests. In deciding whether the public interest outweighs [***name of plaintiff***]'s privacy interest, you should consider all of the following:**

a. Where the information was used;

b. The extent of the use;

c. The public interest served by the use;

d. The seriousness of the interference with [*name of plaintiff***]'s privacy; and**

e. [*specify other factors***].**

New June 2015

Directions for Use

This instruction sets forth a balancing test for a claim for invasion of privacy. A defendant's First Amendment right to freedom of expression and freedom of the press can, in some cases, outweigh the plaintiff's right of privacy (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409-410 [114 Cal.Rptr.2d 307]; see also *Gill v. Hearst Publishing Co. Inc.* (1953) 40 Cal.2d 224, 228−231 [253 P.2d 441].) This balancing test is an affirmative defense. (See *Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.)

A First-Amendment defense based on newsworthiness has been allowed for the defendant's use of the plaintiff's name or likeness. (See *Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-411; see CACI No. 1804A.) It has also been allowed for privacy claims based on intrusion into private affairs (see CACI No. 1800) and public disclosure of private facts (see CACI No. 1802) (See *Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 214−242 [74 Cal.Rptr.2d 843, 955 P.2d 469].) It has also been allowed for a claim that the plaintiff had been presented in a false light (see CACI No. 1802). (See *Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278−279 [239 P.2d 630] [magazine's use of plaintiffs' picture in connection with article on divorce suggested that they were not happily married].)

Sources and Authority

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury*

News, Inc. (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The sense of an ever-increasing pressure on personal privacy notwithstanding, it has long been apparent that the desire for privacy must at many points give way before our right to know, and the news media's right to investigate and relate, facts about the events and individuals of our time." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 208 [74 Cal. Rptr. 2d 843, 955 P.2d 469].)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "[T]he common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)

- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 687 [166 Cal.Rptr.3d 359].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2010) Torts, § 681 et seq.

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.35 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.27 (Matthew Bender)

1808. Stalking (Civ. Code, § 1708.7)

Revoked June 2015. See Stats 2014, Ch. 853 (AB 1356), substantially amending Civ. Code, § 1708.7. The committee may consider revising this instruction in the next release.

[*Name of plaintiff*] claims that [*name of defendant*] violated [his/her] right to privacy. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of defendant*] engaged in a pattern of conduct with the intent to [follow/alarm/harass] [*name of plaintiff*]. The pattern of conduct must be supported by evidence in addition to [*name of plaintiff*]'s testimony;

2. That as a result of this conduct [*name of plaintiff*] reasonably feared for [his/her] own safety [or for the safety of an immediate family member]; and

3. (a) That, as part of the pattern of conduct, [*name of defendant*] made a believable threat with the intent to place [*name of plaintiff*] in reasonable fear for [his/her] safety [or the safety of an immediate family member]; and

(b) That [*name of plaintiff*] clearly demanded at least once that [*name of defendant*] stop; and

(c) That [*name of defendant*] persisted in [his/her] pattern of conduct;

[or]

That [*name of defendant*] violated a restraining order prohibiting the pattern of 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.

["Harass" means a knowing and willful course of conduct directed at [*name of plaintiff*] that seriously alarms, annoys, torments, or terrorizes [him/her], and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to [*name of plaintiff*]].

A "pattern of conduct" means a series of words or actions over a period of time, however short, that reflects an ongoing purpose.

New September 2003

~~Sources and Authority~~

- ~~Stalking. Civil Code section 1708.7.~~

~~Secondary Sources~~

~~5 Witkin, Summary of California Law (10th edition 2005) Torts, §662~~

~~6 California Forms of Pleading and Practice, Ch. *Assault and Battery*, Ch. 58, § 58.28 (Matthew Bender)~~

~~2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.28 (Matthew Bender)~~

2308. Affirmative Defense—~~Rescission for~~ Misrepresentation or Concealment in Insurance Application~~—Essential Factual Elements~~

[*Name of insurer***] claims that no insurance contract was created because [***name of insured***] [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this ~~claim~~defense, [***name of insurer***] must prove all of the following:**

1. **That [***name of insured***] submitted an application for insurance with [***name of insurer***];**

2. **That in the application for insurance [***name of insured***], whether intentionally or unintentionally, ~~[intentionally]~~ [failed to state/represented] that [***insert omission or alleged misrepresentation***];**

3. **[That the application asked for that information;]**

4. **That [***name of insured***] knew that [***specify facts that were misrepresented or omitted***]; and~~[***select one of the following:***]~~**

   ~~[knew that [*insert omission***];]~~**

   ~~[knew that this representation was not true;]~~

5. **That [***name of insurer***] would not have issued the insurance policy if [***name of insured***] had stated the true facts in the application~~;~~.**

~~6. That [*name of insurer*] gave [*name of insured*] notice that it was rescinding the insurance policy; and~~

~~7. That [*name of insurer*] [returned/offered to return] the insurance premiums paid by [*name of insured*].~~

New September 2003; Revised April 2004, October 2004, June 2015

Directions for Use

This instruction presents an insurer's affirmative defense to a claim for coverage. The defense is based on a misrepresentation or omission made by the insured in the application for the insurance. (See *Douglas v. Fid. Nat'l Ins. Co.* (2014) 229 Cal.App.4th 392, 408 [177 Cal.Rptr.3d 271].) If the policy at issue is a standard fire insurance policy, replace "intentionally or unintentionally" in element 2 with "willfully." (See Ins. Code, § 2071.) Otherwise, the insurer is not required to prove an intent to deceive; negligence or inadvertence is enough if the misrepresentation or omission is material. (*Douglas, supra*, 229 Cal.App.4th at p. 408.) Element 5 expresses materiality.~~Use the bracketed word "intentionally" for cases involving Insurance Code section 2071.~~

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. ~~Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, § 1691.)~~

While no intent to mislead is required, the insured must know the facts that constitute the omission or misrepresentation (see element 4). For example, if the application does not disclose that property on which insurance is sought is being used commercially, the applicant must have known that the property is being used commercially. (See Ins. Code, § 332.) It is not a defense, however, if the insured gave incorrect or incomplete responses on the application because he or she failed to appreciate the significance of some information known to him or her. (See *Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].)~~If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.~~

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Time of Insurer's Rescission of Policy. Insurance Code section 650.
- Concealment by Failure to Communicate. Insurance Code section 330.
- Concealment Entitles Insurer to Rescind. Insurance Code section 331.
- Duty to Communicate in Good Faith. Insurance Code section 332.
- Materiality. Insurance Code section 334.
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Represe~~i~~ntation: Time for Rescission. Insurance Code section 359.
- "It is well established that material misrepresentations or concealment of material facts in an application for insurance entitle an insurer to rescind an insurance policy, even if the misrepresentations are not intentionally made. Additionally, '[a] misrepresentation or concealment of a material fact in an insurance application also establishes a complete defense in an action on the policy. [Citations.] As with rescission, an insurer seeking to invalidate a policy based on a material misrepresentation or concealment as a defense need not show an intent to deceive. [Citations.]' " (*Douglas*, *supra*, 229 Cal.App.4th at p. 408, internal citations omitted.)
- "When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under section 650 of the Insurance Code as an affirmative

defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- "[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson, supra, ~~v. Occidental Life Insurance Co. of California~~* ~~(1973)~~ 9 Cal.3d at pp.~~904,~~ 915-916 ~~[109 Cal.Rptr. 473, 513 P.2d 353]~~, internal citations omitted.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one, 'incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra,* 9 Cal.3d at p. 916, internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra,* 9 Cal.3d at p. 919.)

- "To prevail, the insurer must prove that the insured made a material 'false representation' in an insurance application. 'A representation is false when the facts fail to correspond with its assertions or stipulations.' The test for materiality of the misrepresentation or concealment is the same as it is for rescission, 'a misrepresentation or concealment is material if a truthful statement would have affected the insurer's underwriting decision.' " (*Douglas, supra,* 229 Cal.App.4th at p. 408, internal citations omitted.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished ... ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra,* 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation ~~(The Rutter Group)~~ ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract,* § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.18 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance,* §§ 120.250–120.251, 120.260 (Matthew Bender)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy

[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was treated required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually aggravated or involve a continuous pattern of mistreatment. Trivial acts are insufficient ~~or repeatedly offensive to a reasonable person in [*name of plaintiff*]'s position~~.

New September 2003; Revised December 2014, June 2015

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained.*

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66,

80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Whether conditions are so intolerable as to justify the employee's decision to quit rather than endure them is to be judged by an objective reasonable-employee standard. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1247 [32 Cal.Rptr.2d 223, 876 P.2d 1022].) This standard is captured in element 4. The paragraph at the end of the instruction gives the jury additional guidance as to what makes conditions intolerable. (See *id.* at p. 1247.) Note that in some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. (*Id.* at p. 1247, fn.3.)

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 91 [276 Cal.Rptr. 130, 801 P.2d 373].)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner, supra, ~~v. Anheuser-Busch, Inc.~~ (~~1994~~)* 7 Cal.4th at pp.~~1238,~~ 1244-1245 ~~[32 Cal.Rptr.2d 223, 876 P.2d 1022]~~, internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign

is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable. In general, '[s]ingle, trivial, or isolated acts of [misconduct] are insufficient' to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even when accompanied by reduction in pay, does not by itself trigger a constructive discharge~~In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' ~~" (*Turner, supra,* 7 Cal.4th at p. 1247, footnote and internal citation omitted~~fn. 3~~.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170,

5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:23–6:25 (Thomson Reuters)

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].**

[*Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as [***name of plaintiff***] proves that all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the DFEH was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

~~**The burden is on [***name of plaintiff/name of defendant***] to prove that the complaint [was/was not] filed on time with the department.**~~

New June 2010; Revised December 2011, June 2015

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

The plaintiff has the burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with the DFEH. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) This burden of proof would appear to extend to any excuse or justification for the failure to timely file, such as the continuing violation exception. (See *Holland v. Union Pacific Railroad Co.* (2007) 154 Cal.App.4th 940, 945 [65 Cal.Rptr.3d 145] [plaintiff's burden to establish an exception that would deem the administrative complaint to be timely].)~~No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.~~

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960.

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim*, *supra*, ~~*v. Konad USA* Distribution, Inc. (2014)~~ 226 Cal.App.4th at p.~~1336,~~ 1345 ~~[172 Cal.Rptr.3d 686]~~.)

- "Before maintaining a legal action, a plaintiff must exhaust the administrative remedy of filing a timely complaint with the DFEH and obtaining permission to pursue legal remedies. The one-year period specified in the statute begins to run when the administrative remedy accrues, which is the occurrence of the unlawful practice. In the present case, the allegedly unlawful suspension occurred on July 2, 2002, and therefore the one-year period began to run on that date. As a result, plaintiff's July 2003 administrative complaint was not timely on its face, his allegations to the contrary notwithstanding. This made it his burden to establish an exception that would deem the administrative complaint to be timely." (*Holland*, *supra*, 154 Cal.App.4th at p. 945, internal citations omitted.)

- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720–721, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies,* ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline,* § 100.59 (Matthew Bender)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she] was [discharged/[***other adverse employment action***]] because of [his/her] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time based on [***e.g., plaintiff's poor job performance***] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] only for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway at that time for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013; Revised June 2015

Directions for Use

Give this instruction along with CACI No. 2507, *"Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214−215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- "[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)

- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra,* 56 Cal.4th at p. 224, original italics.)

- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)

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

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of

discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214−215.)

- " '[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.' " (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra,* 56 Cal.App.4th at p. 240].)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- "Pretext may … be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005)~~,~~ Constitutional Law, §§ 928, 950

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] overtime pay as required by state law. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**
2. **That [***name of plaintiff***] worked overtime hours;**
3. **That [***name of defendant***] knew or should have known that [***name of plaintiff***] had worked overtime hours;**
4. **That [***name of plaintiff***] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**
5. **The amount of overtime pay owed.**

Overtime hours are the hours worked longer than [*insert applicable definition(s) of overtime hours***].**

Overtime pay is [*insert applicable formula***].**

An employee is entitled to be paid the legal overtime pay rate even if he or she agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the overtime compensation rate under applicable state or federal law. (See, e.g., Lab. Code, §§ 1173, 1182; Cal. Code Regs., tit. 8, § 11000, subd. 2, § 11010, subd. 4(A), and § 11150, subd. 4(A).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2014) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Both the Labor Code and the IWC wage orders provide for certain exemptions from overtime laws. (See e.g., Lab. Code, § 1171 [outside salespersons are exempt from overtime requirements]~~For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171~~).The assertion of an employee's exemption ~~from overtime laws~~ is an affirmative defense, which presents a mixed question of law and fact. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) ~~An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*)~~ For instructions on exemptions, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption,* and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*,

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- "Wages" Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Rate of Compensation. Labor Code section 515(d).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- "[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.)
- "[W]here an employer has no knowledge that an employee is engaging in overtime work and that employee fails to notify the employer or deliberately prevents the employer from acquiring knowledge of the overtime work, the employer's failure to pay for the overtime hours is not a violation … ." (*Jong v. Kaiser Foundation Health Plan, Inc.* (2014) 226 Cal.App.4th 391, 395 [171 Cal.Rptr.3d 874] [applying rule under federal Fair Labor Standards Act to claims under California Labor Code].)
- "[A]n employer's actual or constructive knowledge of the hours its employees work is an issue of fact … ." (*Jong, supra,* 226 Cal.App.4th at p. 399.)
- "The question whether [plaintiff] was an outside salesperson within the meaning of applicable statutes and regulations is … a mixed question of law and fact." (*Ramirez, supra,* 20 Cal.4th at p. 794.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1, 11:499 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955.2 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws*

Regulating Employee Compensation, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 3, *Overtime Compensation and Regulation of Hours Worked*, §§ 3.03[1], 3.04[1], 3.07[1], 3.08[1], 3.09[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

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

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

VF-2702. Nonpayment of Overtime Compensation (Lab. Code, § 1194)

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] perform work for [*name of defendant*]?
____ Yes ____ No

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

2. Did [*name of plaintiff*] work overtime hours?
____ 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*] know, or should [*name of defendant*] have known, that [*name of plaintiff*] had worked overtime hours?
____ 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.

~~2~~4. Was [*name of plaintiff*] paid at a rate lower than the legal overtime compensation rate for any overtime hours that [he/she] worked for [*name of defendant*]?
____ Yes ____ No

If your answer to question ~~2~~ 4 is yes, then answer question ~~3~~5. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~3~~5. What is the amount of wages owed? $_____

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 December 2010, June 2015

Directions for Use

This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements.*

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

~~This verdict form is based on CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements.*~~

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.

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

[*Name of plaintiff*] claims that [*name of defendant*] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

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

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

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

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

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

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

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

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

(d) (*specify other factors particular to the case*).

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015

Directions for Use

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

The three factors listed are often referred to as the "*Graham* factors." (See *Graham v. Connor* (1989) 490

U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

This instruction may be modified for use in a negligence claim under California common law based on the same event and facts. The *Graham* factors apply under California negligence law. (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506].) Liability under California negligence law can arise if tactical conduct and decisions preceding the use of force, as part of the totality of circumstances, make the ultimate use of force unreasonable. In this respect, California negligence law differs from the federal standard under the Fourth Amendment, which focuses more narrowly on the moment when force is used. (*Hayes v. County of San Diego* (2014) 57 Cal.4th 622, 639 [160 Cal.Rptr.-3d 684, 305 P.3d 252].) If the negligence claim is based in part on tactical conduct and decisions made before the use of force, this instruction may be modified to specifically instruct the jury to consider the officers' pre-force decisions and conduct.

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

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

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

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

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

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an

immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra*, 661 F.3d at p. 467, internal citations omitted.)

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

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

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra, ~~v. County of San Diego~~ (2013)* 57 Cal.4th at p.~~622,~~ 639 ~~[160 Cal.Rptr.3d 684, 305 P.3d 252]~~.)

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

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

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

2010) 610 F.3d 546, 550, internal citations omitted.)

- ~~"[O]fficers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation." (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1216.)~~

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

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

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

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

- "[W]e have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to

preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

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

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

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

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

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

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

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

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

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

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, ~~[***name of plaintiff***] was~~ [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That there was no reasonable justification for the conduct;**

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

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.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012~~,~~; Revised December 2014, June 2015

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer, supra, ~~v. Brennan (1994)~~* 511 U.S. at p.~~825,~~ 834 ~~[114 S.Ct. 1970, 128 L.Ed.2d 811]~~.) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the

prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety. Second, the inmate must show that the prison officials had no "reasonable" justification for the ~~deprivation~~conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The "official duties" referred to in element 5 must be duties created ~~pursuant to~~by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 5.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)

- ~~"A deprivation is sufficiently serious when the prison official's act or omission results 'in the denial of the minimal civilized measure of life's necessities.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)~~

- ~~"The objective question of whether a prison officer's actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt." (*Lemire, supra*, 726 F.3d at pp. 1075−1076.)~~

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra*, 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra*, 511 U.S. at p. 843 fn. 8.)

- ~~"The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's~~

~~health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra*, 611 F.3d at p. 1150, footnotes and internal citations omitted.)~~

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- ~~"[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)~~

- ~~"Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)~~

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. … The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

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

Secondary Sources

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

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

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

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

1. **That [***name of plaintiff***] had a serious medical need;**

2. **That [***name of defendant***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her] medical need went untreated~~acted with deliberate indifference to this need~~;**

3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**

4~~3~~. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

5~~4~~. **That [***name of plaintiff***] was harmed; and**

6~~5~~. **That [***name of defendant***]'s ~~deliberate indifference~~conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff***]'s constitutional rights.~~To establish "deliberate indifference," [*name of plaintiff*] must prove (1) that [*name of defendant*] knew [*name of plaintiff*] faced a substantial risk of serious harm and (2) that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.~~**

[In determining whether [*name of defendant***] consciously disregarded a substantial risk~~was deliberately indifferent~~, you should consider the personnel, financial, and other resources available to [him/her] or those that [he/she] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014, June 2015

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*."

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

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

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer*, *supra*, ~~*v. Brennan* (1994)~~ 511 U.S. at p.~~825,~~ 834 ~~[114 S.Ct. 1970, 128 L.Ed.2d 811]~~, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

- "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...'" (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

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

Secondary Sources

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

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

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

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

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

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

3043. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Deprivation of Necessities (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that deprived [him/her] of basic rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that deprived [him/her] of [***describe deprivation, e.g., clothing***];**

2. **That this deprivation was sufficiently serious in that it denied [***name of plaintiff***] a minimal necessity of life;**

3. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] knew that [his/her] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

5. **That there was no reasonable justification for the deprivation;**

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

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.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New June 2015

Directions for Use

Give this instruction in a prisoner case involving deprivation of something serious. (See *Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150-1151.) For an instruction involving the creation of a risk, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction on deprivation of medical care, see CACI no. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care.*

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials

were aware of a substantial risk of serious harm to the inmate's health or safety. Second, the inmate must show that the prison officials had no reasonable justification for the conduct, in spite of that risk. (*Thomas, supra,* 611 F.3d at p. 1150.) Elements 4 and 5 express the deliberate-indifference components.

The "official duties" referred to in element 6 must be duties created by any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 6.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities,'… ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "'[O]nly the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- "[A]n inmate seeking to prove an Eighth Amendment violation must 'objectively show that he was deprived of something "sufficiently serious," ' and 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnote and internal citations omitted.)

- "Next, the inmate must 'make a subjective showing that the deprivation occurred with deliberate indifference to the inmate's health or safety.' To satisfy this subjective component of deliberate indifference, the inmate must show that prison officials 'kn[e]w[] of and disregard[ed]' the substantial risk of harm, but the officials need not have intended any harm to befall the inmate; 'it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074, internal citations omitted.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra,* 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra,* 511 U.S. at p. 843 fn. 8.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2010) Constitutional Law, § 816

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.02 (Matthew Bender)

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

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

3071. Retaliation for Refusing to Authorize Disclosure of Medical Information−Essential Factual Elements (Civ. Code, § 56.20(b))

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her] because [he/she] refused to authorize disclosure of [his/her] medical information to [***name of defendant***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] asked [***name of plaintiff***] to sign an authorization so that [***name of defendant***] could obtain medical information about [***name of plaintiff***] from [his/her] health care providers;**

2. **That [***name of plaintiff***] refused to sign the authorization;**

3. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**

4. **That [***name of plaintiff***]'s refusal to sign the authorization was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**

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.**

Even if [*name of plaintiff***] proves all of the above, [***name of defendant***]'s conduct was not unlawful if [***name of defendant***] proves that the lack of the medical information made it necessary to [***e.g., terminate plaintiff's employment***].**

New June 2015

Directions for Use

An employer may not discriminate against an employee in terms or conditions of employment due to the employee's refusal to sign an authorization to release his or her medical information to the employer. (Civ. Code, § 56.20(b).). However, an employer may take any action that is necessary in the absence of the medical information due to the employee's refusal to sign an authorization. (*Ibid*.)

Give this instruction if an employee claims that his or her employer retaliated against him or her for refusing to authorize release of medical information. The employee has the burden of proving a causal link between the refusal to authorize and the employer's retaliatory actions. The employer then has the burden of proving necessity. (See *Kao v. University of San Francisco* (2014) 229 Cal.App.4th 437, 453 [177 Cal.Rptr.3d 145].) If necessary, the instruction may be expanded to define "medical information." (See Civ. Code, § 56.05(j) ["medical information" defined].)

The statute requires that the employer's retaliatory act be "due to" the employee's refusal to release the medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release

must be a "motivating reason" for the retaliation. (See *Kao, supra*, 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Sources and Authority

- Confidentiality of Medical Information Act. Civil Code section 56 et seq.

- Employee's Refusal to Authorize Release of Medical Records to Employer. Civil Code section 56.20(b).

- "An employer 'discriminates' against an employee in violation of section 56.20, subdivision (b), if it improperly retaliates against or penalizes an employee for refusing to authorize the employee's *health care provider* to disclose confidential medical information *to the employer or others* (see Civ. Code, § 56.11), or for refusing to authorize *the employer* to disclose confidential medical information relating to the employee *to a third party* (see Civ. Code, § 56.21)." (*Loder v. City of Glendale* (1997) 14 Cal.4th 846, 861 [59 Cal. Rptr. 2d 696, 927 P.2d 1200], original italics.)

- "[T]he jury was instructed that if [plaintiff] proved his refusal to authorize release of confidential medical information for the FFD [fitness for duty examination] was 'the motivating reason for [his] discharge,' [defendant] 'nevertheless avoids liability by showing that … its decision to discharge [plaintiff] was necessary because [plaintiff] refused to take the FFD examination.' " (*Kao, supra*, 229 Cal.App.4th at p. 453.)

Secondary Sources

Witkin, California Evidence (4th ed. 2012) Witnesses § 681

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.202 (Matthew Bender)

VF-3021. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. ~~**Was [***name of plaintiff***]**~~**While imprisoned,** ~~**under conditions that**~~ **[***describe violation that created risk of serious harm, e.g., was [name of plaintiff] placed in a cell block with rival gang members~~*deprived [him/her] of out-of-cell exercise*~~**]?**
   ____ 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***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ 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***] know** ~~**or was it obvious**~~ **that [his/her**~~**/its**~~**] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ 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 there a reasonable justification for the conduct?**
   ____ Yes ____ No

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

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

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

6. **Was [***name of defendant***]'s conduct a substantial factor in causing harm to [***name of*

plaintiff]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2011; Renumbered from CACI No. VF-3008 December 2012; Revised June 2015

Directions for Use

This verdict form is based on CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm*.

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

If specificity is not required, users do not have to itemize all the damages listed in question 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] have a serious medical need?
____ Yes ____ No

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

2. Did [*name of defendant*] know that [*name of plaintiff*] faced a substantial risk of serious harm if [his/her] medical need went untreated~~act with deliberate indifference to that medical need~~?
____ Yes ____ No

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

3. Did [*name of defendant*] consciously disregard the risk by not taking reasonable steps to treat [*name of plaintiff*]'s medical need?
____ 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.

~~3~~4. Was [*name of defendant*] acting or purporting to act in the performance of [his/her] official duties?
____ Yes ____ No

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

~~4~~5. Was [*name of defendant*]'s deliberate indifference a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

~~5~~6. What are [*name of plaintiff*]'s damages?

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3009 December 2012; Revised June 2014, June 2015

Directions for Use

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

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

depending on the facts of the case.

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

3700. Introduction to Vicarious Responsibility

[One may authorize another to act on his or her behalf in transactions with third persons. This relationship is called "agency." The person giving the authority is called the "principal"; the person to whom authority is given is called the "agent."]

~~A [person/partnership/corporation]~~[An employer/A principal] is responsible for harm caused by the wrongful conduct of [his/her/its] [employees/agents~~/[*insert other relationship, e.g., "partners"*]~~] while acting within the scope of their [employment/authority].

[An [employee/agent] is always responsible for harm caused by [his/her/its] own wrongful conduct, whether or not the [employer/principal] is also liable.]

New September 2003; Revised June 2015

Directions for Use

This instruction provides the jury with some basic background information about the doctrine of respondeat superior. Include the first paragraph if the relationship at issue is one of principal-agent. If the employee or agent is also a defendant, give the third paragraph.

This instruction should be followed by either CACI No. 3703, *Legal Relationship Not Disputed*, CACI No. 3704, *Existence of "Employee" Status Disputed*, or CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Sources and Authority

- "Agency" Defined. Civil Code section 2295.
- Principal's Responsibility for Acts of Agent. Civil Code section 2338.
- "Agency is the relation that results from the act of one person, called the principal, who authorizes another, called the agent, to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting the purpose of the principal." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 304 [1 Cal.Rptr.2d 680].)
- "Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on " 'a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." ' " (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)
- ~~Under the theory of respondeat superior, a principal/employer is vicariously liable for an agent/employee's torts committed within the scope of agency/employment. (*Perez v. Van Groningen*~~

~~*& Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106, 719 P.2d 676].)~~

- "[U]nder the Tort Claims Act, public employees are liable for injuries caused by their acts and omissions to the same extent as private persons. Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior. As the Act provides, '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would … have given rise to a cause of action against that employee,' unless 'the employee is immune from liability.' (Gov. Code, § 815.2, subds. (a), (b).)" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "[W]here the liability of an employer in tort rests solely on the doctrine of respondeat superior, a judgment on the merits in favor of the employee is a bar to an action against the employer … ." (*Hilts v. County of Solano* (1968) 265 Cal.App.2d 161, 176 [71 Cal.Rptr. 275]~~If a principal's potential liability is based solely on the acts of his or her agent, then the principal cannot be held liable if the agent is exonerated. (3 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 167~~.)

- "An agent or employee is always liable for his own torts, whether his employer is liable or not." (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1411 [178 Cal.Rptr.3d 18].)

- ~~Liability may result from a principal's authorization or direction to perform a tortious act, resulting in direct liability of the principal for his or her wrongful conduct. (3 Witkin, *supra*, § 167.) Such authorization may be found in ratification of the agent's conduct and in delegation of a nondelegable duty.~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163–168

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

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

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.14 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.24A (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:1–3:4 (Thomson Reuters~~ West~~)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] ~~claims~~ must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker without cause. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

~~**In addition to the right of control, you must also consider all of the circumstances in deciding whether [***name of agent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of agent***] was the employee of [***name of defendant***]:**~~

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d~~c~~) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

~~**(d)** **[***Name of defendant***] had an unlimited right to end the relationship with [***name of agent***];**~~

(e) ~~**The work being done by**~~ **[***~~name~~ Name of agent***] was ~~[his/her] only~~ not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) [*Name of defendant*] and [*name of agent*] ~~acted as if~~believed that they had an employer-employee relationship[./; and]

(j) [*Specify other factor*].

New September 2003; Revised December 2010, June 2015

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,)- They have been phrased ~~in a way~~ so that a yes answer~~o suggest whether or not they~~ points toward an employment relationship. Omit any that are not relevant~~supported by the evidence~~. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].) Therefore, an "other" option (j) has been included.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra, ~~v. Antelope Valley Newspapers, Inc.~~* ~~(2014)~~ 59 Cal.4th ~~522,~~at p. 528 ~~[173 Cal.Rptr.3d 332, 327 P.3d 165]~~.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)
- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by

the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without

supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability,* § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees,* § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts,* §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.41 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

4110. Breach of Duty by Real Estate Seller's Agent─Inaccurate Information in Multiple Listing Service─Essential Factual Elements (Civ. Code, § 1088)

[*Name of defendant***], as the real estate [broker/salesperson/appraiser] for [***name of seller***], listed the property for sale in a multiple listing service (MLS). [***Name of plaintiff***] claims that [he/she] was harmed because information in the MLS was false or inaccurate. [***Name of defendant***] is responsible for this harm if [***name of plaintiff***] proves all of the following:**

1. **That [***name of defendant***] listed the property for sale in a MLS;**

2. **That information posted on the MLS was false or inaccurate;**

3. **That [***name of defendant***] knew, or reasonably should have known, that the information was false or inaccurate;**

4. **That [***name of plaintiff***] reasonably relied on the false or inaccurate information in the MLS;**

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 June 2015

Directions for Use

A real estate agent or appraiser has a duty to a buyer of real estate to post only accurate information on a multiple listing service (MLS). The buyer has a right of action against an agent or appraiser for harm caused by inaccurate information on an MLS if the agent or broker knew or should have known that the information was false or inaccurate. (Civ. Code, § 1088; see *Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1077 [76 Cal.Rptr.2d 911].)

The statute provides a remedy for anyone "injured by" the false or inaccurate information. (Civ. Code, § 1088.) As a statutory remedy for a species of misrepresentation, the plaintiff must show causation in the form of both actual and justifiable reliance on the inaccurate information on the MLS (element 4). (See *Furla, supra,* 65 Cal.App.4th at p. 1078; CACI No. 1907, *Reliance;* CACI No. 1908, *Reasonable Reliance*.)

Sources and Authority

- False or Inaccurate Information in Multiple Listing Service. Civil Code section 1088.

- A real estate agent also has a statutory liability for negligence: '[i]f an agent . . . places a listing or

other information in the multiple listing service, that agent . . . shall be responsible for the truth of all representations . . . of which that agent . . . had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.' " (*Furla, supra,* 65 Cal.App.4th at p. 1077.

- "A broker's duties with respect to any listing or other information posted to an MLS are specified in section 1088. Section 1088 states in relevant part that the broker 'shall be responsible for the truth of all representations and statements made by the agent [in an MLS] … of which that agent … had knowledge or reasonably should have had knowledge,' and provides a statutory negligence claim for 'anyone injured' by the 'falseness or inaccuracy' of such representations and statements." (*Saffie v. Schmeling* (2014) 224 Cal.App.4th 563, 568 [168 Cal.Rptr.3d 766].)

- "There is nothing in section 1088, or any other source of law, imposing responsibility on a seller's broker to ensure that true statements in an MLS are not misconstrued, or to make certain that the buyer and the buyer's broker perform the appropriate due diligence to evaluate the significance of such true statements for the buyer's particular purposes." (*Saffie, supra,* 224 Cal.App.4th at p. 570.)

- "Defendants contend there is no triable issue of fact and as a matter of law plaintiff did not reasonably rely upon the misrepresentations, and plaintiff unreasonably failed to exercise due care for his own interest as buyer. They contend plaintiff was repeatedly warned by language in the Multiple Listing Service and the sales agreement that statements concerning square footage were approximations only, and that plaintiff could obtain accurate determinations of square footage by a professional pursuant to the buyer's right to inspect the property. But whether a plaintiff reasonably relied on a defendant's misrepresentations or failed to exercise reasonable diligence is also ordinarily a question of fact for the trier of fact." (*Furla, supra,* 65 Cal.App.4th at p. 1078.)

- "To be sure, an omission of information may sometimes render an otherwise true statement false or inaccurate, in the meaning of section 1088." (*Saffie, supra,* 224 Cal.App.4th at p. 570.)

- "Absent anything untrue or inaccurate about the statement seller's broker actually made in the MLS, and absent damage to buyer from such falsity or inaccuracy, seller's broker is not liable under section 1088." (*Saffie, supra,* 224 Cal.App.4th at pp. 571−572.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2010) Real Property, § 473.

3 California Real Estate Law and Practice, Ch. 61, *Employment and Authority of Brokers*, § 61.76 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salespersons,* § 31.147 (Matthew Bender)

~~2440~~4600. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/***specify other adverse action***] [him/her] because [he/she] acted [in furtherance of a false claims action/~~ ~~to stop a false claim by [***name of false claimant***]]. A false claims action is a lawsuit against a person or entity that is alleged to have submitted a false claim to a government agency for payment or approval. A false claim is a claim for payment with the intent to defraud the government. In order to establish ~~[his/her] unlawful discharge~~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 false claimant***] was alleged to have defrauded the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**
3. **That [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***];**
4. **That [***name of plaintiff***] acted [in furtherance of a false claims action/to stop a false claim];**
5. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**
6. **That [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] were a substantial motivating reason for [***name of defendant***]'s decision to [discharge/***other adverse action***] [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 claims 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 claims action.]**

The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff***] need only show a genuine and reasonable concern that the government was being defrauded.]**

New December 2012; Revoked June 2013; Restored and Revised December 2013; Renumbered from CACI No. 2440 and Revised June 2015

Directions for Use

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) takes steps in furtherance of a false claims action or (2) makes efforts to stop a false claim violation. (See Gov. Code, § 12653(a).)

The second sentence of the opening paragraph defines a false claims action in its most common form: a lawsuit against someone who has submitted a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the steps that the plaintiff took 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(a).) If the case involves an adverse employment action other than termination, specify the action in eElements 5 and 6. These elements may also 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 the term "substantial motivating reason" to express both intent and causation between the employee's actions and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases under the False Claims Act has not been addressed by the courts.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

Sources and Authority

- False Claims Act: Whistleblower Protection. Government Code section 12653.
- "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].)

- "To establish a prima facie case, a plaintiff alleging retaliation under the CFCA must show: '(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.' " (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455 [152 Cal.Rptr.3d 595].)

- " 'As a statute obviously designed to prevent fraud on the public treasury, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose.' " (*McVeigh, supra,* 213 Cal.App.4th at p. 456.)

- "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.)

- "We do not construe *Kaye's* requirement that it be 'reasonably possible for [the employee's conduct] to lead to a false claims action' to mean that a plaintiff is not protected under the CFCA unless he or she has discovered grounds for a *meritorious* false claim action. … [T]he plaintiff need only show a genuine and reasonable concern that the government was possibly being defrauded in order to establish that he or she engaged in protected conduct. Any more limiting construction or significant burden would deny whistleblowers the broad protection the CFCA was intended to provide." (*McVeigh, supra,* 213 Cal.App.4th at pp. 457−458, original italics.)

- "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

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 767

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

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

~~2442~~4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she] made a protected disclosure in good faith and that [***name of defendant***] [discharged***/specify other adverse action***] [him/her] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**
2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**
3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**
4. **That [***name of defendant***] [discharged***/specify other adverse action***] [***name of plaintiff***];**
5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to [discharge***/other adverse 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.**

New December 2014; Renumbered from CACI No. 2442 and Revised June 2015

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

The statute prohibits acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment. (See Gov. Code, § 8547.8(b).) If the case involves an adverse employment action other than termination, specify the action in elements 4 and 5. These elements may also be modified if constructive discharge is alleged.~~While retaliatory discharge is clearly within the statute, adverse employment actions short of discharge are also prohibited. For adverse actions other than termination, replace "discharged" in the opening paragraph and in element 4, and "discharge" in element~~

~~5, with the applicable action.~~ 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 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. ~~2443~~4602, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].), However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220

Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)

- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party …' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not … available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112−1113 [150 Cal.Rptr.3d 405], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005)~~,~~ Agency~~,~~ ~~§~~§ 284 et seq.

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

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

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

2443~~4~~4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her] [discharge/*specify other adverse action*], [*name of defendant*] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have discharged [*name of plaintiff*] anyway at that time, for legitimate, independent reasons.

New December 2014; Renumbered from CACI No. 2443 and Revised June 2015

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 2442~~4~~4601, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order. (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 2442~~4~~4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005)~~,~~ Agency, §~~§~~ 284 et seq.

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

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

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

~~2730~~4603. 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 defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*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 a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

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

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

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff***] must have reasonably believed that [***name of defendant***]'s policies violated federal, state, or local 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 disclosure is protected even though disclosing the information may be part of [*name of plaintiff***]'s job duties.]**

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No.2730 and Revised June 2015

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c).) Liabil~~i~~ity may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that protection is not limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)

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

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. ~~2731~~4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)
- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)
- "[T]he purpose of … section 1102.5(b) 'is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)
- "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, supra,* 202

Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict

the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550.)

- "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

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

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

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

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

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

~~2731~~4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff*] proves that [his/her] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her] [discharge/[*other adverse employment action*]], [*name of defendant*] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time for legitimate, independent reasons.

New December 2013; Renumbered from CACI No. 2731 and Revised June 2015

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. ~~2730~~4603, *Whistleblower Protection—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.)

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.

- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*." (*Harris, supra*, 56 Cal.4th at p. 224, original italics.)

Secondary Sources

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

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

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)