Item number: 01

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 04/05/2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Appellate Procedure: Costs on Appeal

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 8.278 and 8.891

Committee or other entity submitting the proposal:
Appellate Advisory Committee

*Staff contact (*name, phone and e-mail*): Kendall Hannon, 415-865-7653, kendall.hannon@jud.ca.gov; Heather Anderson, 415-865-7803, heather.anderson@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/01/2022
Project description from annual agenda: Rule 8.278 generally provides that the prevailing party in the Court of Appeal is entitled to costs. However, Pollock v. Tri-Modal Distribution Services (2021) 11 Cal.5th 918 recently held that an appellate court may not award costs or fees on appeal to a prevailing FEHA defendant without first making certain determinations. The project involves amending rule 8.278 to avoid conflict with the FEHA and other statutes requiring a particular analysis for awarding costs. Costs on appeal are an ongoing issue for appellate courts; clarifying the rule will increase efficiency and the accuracy of these determinations.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
Costs are an issue in every appeal. An earlier effective date will alert courts sooner and assist courts in making costs awards that do not follow the general rule.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-
For business meeting on May 12, 2023

Title
Appellate Procedure: Costs on Appeal

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.278 and 8.891

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 13, 2023

Contact
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Kendall W. Hannon, 415-865-7653
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Executive Summary

The Appellate Advisory Committee recommends amending the rules governing costs on appeal in civil actions to clarify that the general rule for awarding costs to the prevailing party is subject to exception for statutes requiring a different or additional finding, determination, or analysis. The proposal is responsive to a recent Supreme Court decision and the constitutional principle that rules of court may not be inconsistent with statute.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective September 1, 2023:

1. Amend rules 8.278 and 8.891 of the California Rules of Court to state that the general rule for awarding costs to the prevailing party is subject to exceptions established by statutes; and

2. Amend the advisory committee comments accompanying rules 8.278 and 8.891 to indicate that subdivision (a)(1) reflects the holding of *Pollock v. Tri-Modal Distribution Services, Inc.*

(2021) 11 Cal.5th 918 and the constitutional principle that rules of court may not be inconsistent with statute.

The proposed amended rules are attached at pages 5–6.

Relevant Previous Council Action

The Judicial Council adopted the predecessor to rule 8.278,[1] which addresses costs on appeal in civil appeals in the Court of Appeal, effective September 1, 1928, as part of the original Rules for the Supreme Court and District Courts of Appeal. Since 1928, the council has amended and renumbered the rule on numerous occasions, generally to add or clarify recoverable costs. The most recent amendments, in 2013, 2016, and 2018, have no bearing on this proposal.

The Judicial Council adopted the predecessor to rule 8.891, regarding costs on appeal in appellate division proceedings, effective September 15, 1945. The Judicial Council repealed all rules relating to the superior court appellate division and replaced them with new rules, effective January 1, 2009. The language of new rule 8.891 was modeled on rule 8.278. Rule 8.891 was amended in 2011 and 2013, but these amendments are not relevant to this proposal.

Analysis/Rationale

Background

Under rule 8.278, "[e]xcept as provided in this rule, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal." (Rule 8.278(a)(1).) As noted above, the parallel rule for limited civil actions in the appellate division was modeled on rule 8.278 and thus similarly provides: "Except as provided in this rule, the prevailing party in a civil appeal is entitled to costs on appeal." (Rule 8.891(a).) Both rules also define *prevailing party* and allow the court to award costs in its discretion. (Rule 8.278(a)(2)–(4) and rule 8.891(a)(2), (4).)

Neither of these rules specifically addresses statutes that require a different or additional finding, determination, or analysis before awarding costs on appeal. In a recent case under the California Fair Employment and Housing Act (FEHA), *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (*Pollock*), the Supreme Court addressed whether costs on appeal were governed by rule 8.278(a) or by the FEHA provision that authorizes the recovery of fees and costs (Gov. Code, § 12965(c)). Under the statute, the court, in its discretion, may award reasonable fees and costs "to the prevailing party . . . except that . . . a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." (*Id.*, § 12965(c)(6).) In *Pollock*, the Court of Appeal awarded fees and costs on appeal to the prevailing defendant under rule 8.278; it made no additional findings.

[1] This and all subsequent rule references are to the California Rules of Court.

In reversing the award of fees and costs, the Supreme Court found that the statute was not limited to proceedings in the trial court, either by its terms or by its legislative intent to encourage litigation of potentially meritorious claims. The court also rejected the argument that rule 8.278 should control because it "does not include the phrase 'except as otherwise expressly provided by statute.' " (*Pollock, supra,* 11 Cal.5th at p. 950.) "[E]ven without such language," the court stated, "a rule of court must yield to an applicable statute when 'it conflicts with either the statute's express language or its underlying legislative intent.' " (*Ibid*.; Cal. Const., art. VI, § 6(d) [rules adopted by the Judicial Council "shall not be inconsistent with statute"].) "Section 12965(b) expressly governs 'the court' in FEHA actions without limitation, and allowing an award of costs on appeal to a prevailing defendant without a finding that the plaintiff's action was objectively groundless would undermine the statute's purpose." (*Pollock, supra,* 11 Cal.5th at p. 950.)

To reflect the holding in *Pollock* and the constitutional principle on which it is based, the Appellate Advisory Committee recommends amending rules 8.278 and 8.891 to clarify that the general rule for awarding costs on appeal to the prevailing party is subject to exception for statutory provisions that require the court to conduct a different or additional finding, determination, or analysis. The committee also recommends amending the accompanying advisory committee comments to both rules to cite to these authorities.

Comments

This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the regular winter comment cycle. Given that the *Pollock* case only addressed rule 8.278, the invitation to comment specifically asked whether the proposal should include amending rule 8.891. The invitation to comment also specifically asked whether any other appellate rules pertaining to costs should be similarly amended.

Only one comment was received. The Orange County Bar Association (OCBA) submitted a comment agreeing that the proposal appropriately addresses its stated purpose. The OCBA supported amending rule 8.891 and responded that there are no other appellate rules pertaining to costs that should be similarly amended. A chart with the full text of the comment received and the committee's response is attached at page 7.

Alternatives considered

Given that the *Pollock* case specifically addressed only rule 8.278, the committee considered whether to recommend amending only that rule. Given that the reasoning of the court in *Pollock* appears applicable to both rules and the comment received supported amending rule 8.891 too, the committee concluded that recommending amendments to both rule 8.278 and rule 8.891 was best.

The committee also considered taking no action but rejected this option in favor of clarifying the rules to provide additional guidance to appellate courts in addressing claims for costs.

Fiscal and Operational Impacts

This proposal would impose no fiscal or operational impacts on the courts, other than making judicial officers aware of the changes. It is not expected to result in any costs to the courts.

Attachments and Links

1. Cal. Rules of Court, rules 8.278 and 8.891, at pages 5–6
2. Chart of comments, at page 7

Rules 8.278 and 8.891 of the California Rules of Court are amended, effective September 1, 2023, to read:

Rule 8.278. Costs on appeal

(a) Award of costs

(1) Except as provided in this rule or by statute, the party prevailing in the Court of Appeal in a civil case other than a juvenile case is entitled to costs on appeal.

(2) The prevailing party is the respondent if the Court of Appeal affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the court reverses the judgment in its entirety.

(3) If the Court of Appeal reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the opinion must specify the award or denial of costs.

(4) In probate cases, the prevailing party must be awarded costs unless the Court of Appeal orders otherwise, but the superior court must decide who will pay the award.

(5) In the interests of justice, the Court of Appeal may also award or deny costs as it deems proper.

(b)–(d) * * *

Advisory Committee Comment

This rule is not intended to expand the categories of appeals subject to the award of costs. See rule 8.493 for provisions addressing costs in writ proceedings.

Subdivision (a). The subdivision (a)(1) exception to the general rule of awarding costs to the prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an action under the California Fair Employment and Housing Act) and the constitutional mandate that rules of court "shall not be inconsistent with statute" (Cal. Const., art. VI, § 6(d)).

Subdivision (c). * * *

Subdivision (d). * * *

Rule 8.891. Costs and sanctions in civil appeals

(a) Right to costs

(1) Except as provided in this rule or by statute, the prevailing party in a civil appeal is entitled to costs on appeal.

(2) The prevailing party is the respondent if the appellate division affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the appellate division reverses the judgment in its entirety.

(3) If the appellate division reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the appellate division must specify the award or denial of costs in its decision.

(4) In the interests of justice, the appellate division may also award or deny costs as it deems proper.

(b)–(e) * * *

Advisory Committee Comment

Subdivision (a). The subdivision (a)(1) exception to the general rule of awarding costs to the prevailing party for statutes that require further analysis or findings reflects the holding of *Pollock v. Tri-Modal Distribution Services, Inc.* (2021) 11 Cal.5th 918 (regarding costs on appeal in an action under the California Fair Employment and Housing Act) and the constitutional mandate that rules of court "shall not be inconsistent with statute" (Cal. Const., art. VI, § 6(d)).

Subdivision (d). * * *

W23-01

Appellate Procedure: Costs on Appeal (amend Cal. Rules of Court, rules 8.278 and 8.891)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Michael A. Gregg, President	NI	• Does the proposal appropriately address the stated purpose? **Yes.** • Should the proposal include amending rule 8.891? **Yes.** • Are there any other appellate rules pertaining to costs that should be similarly amended? **No.**	No response required.

Item number: 02

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Appellate Procedure: Reporters' Transcripts

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 8.130, 8.144, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919

Committee or other entity submitting the proposal:
Appellate Advisory Committee

*Staff contact (*name, phone and e-mail*): Kendall W. Hannon, (415) 865-7653, kendall.hannon@jud.ca.gov; Heather Anderson, (415) 865-7803, heather.anderson@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 1, 2022
Project description from annual agenda: Consider amending 12 appellate rules to increase the transmission and use of electronic reporter's transcripts. The proposed amendments are based on changes to Code of Civil Procedure section 271, which imposes a January 2023 deadline for all courts to be ready to accept electronic reporter's transcripts. The goal of the project is to make it easier for court reporters to send, and for appellate courts to receive, electronic reporter's transcripts. Increased use of electronic transcripts would improve efficiencies, expand the potential for remote access, result in cost savings, and assist courts and court reporters in continuing to transition from paper to electronic transcripts as required by section 271. Source: California Court Reporters Association

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
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  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: May 11–12, 2023

Title
Appellate Procedure: Reporters' Transcripts

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.130, 8.144, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919

Recommended by
Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2024

Date of Report
March 23, 2023

Contact
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Executive Summary

The Appellate Advisory Committee recommends amending several rules relating to the format of reporters' transcripts and borrowing the record on appeal. Code of Civil Procedure section 271 requires that as of January 1, 2023, a reporter's transcript must be delivered in electronic form unless a party or person entitled to the transcript requests it in paper format. In recognition that most reporters' transcripts will be in electronic form, the committee recommends allowing transcripts to be in a single volume in most cases. In addition, the committee recommends clarifying that, to be accepted in lieu of depositing the estimated cost of the transcript with the court, a certified transcript submitted by a party must comply with specified format requirements. The committee also recommends creating an exception to the requirement that the page numbering in an electronic format reporter's transcript match the electronic page counter in PDF view in certain cases involving multiple-reporter cases. This proposal originated with suggestions from the California Court Reporters Association.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2024:

1. Amend rules 8.130, 8.834, 8.866, and 8.919 of the California Rules of Court to state that a certified transcript submitted by a party in lieu of depositing the cost of preparing a reporter's transcript must not be accepted unless it complies with the applicable format requirements.

2. Amend the advisory committee comments accompanying rules 8.130, 8.866, and 8.919 to:

    a. Provide examples of the types of changes that would need to be made to comply with the applicable format requirements;
    b. State that parties submitting certified transcripts in lieu of a deposit are responsible for ensuring that such transcripts are in the proper format; and
    c. Indicate that the parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves.

3. Add an advisory committee comment, modeled on the comments accompanying rules 8.130, 8.866, and 8.919, to rule 8.834 to address the use of certified transcripts in lieu of a deposit for a reporter's transcript.

4. Amend rule 8.144 to:

    a. Provide that, if a clerk's or reporter's transcript is being delivered in electronic form to all courts, parties, and persons entitled to the transcript, it may be produced in a single volume but must comply with the requirements of rule 8.74(a)(5);
    b. Provide an exception for reporters' transcripts in multiple-reporter cases in which a segment of the reporter's transcript is either longer or shorter than the number of pages assigned by the primary reporter from the requirement that, in transcripts in electronic form, the electronic page counter in the PDF file viewer must match the transcript page numbering.

5. Further amend rule 8.144 and amend rules 8.204 and 8.622 to replace references to reporters' transcripts or the record on appeal being in "electronic format" with "electronic form."

6. Amend rules 8.452 and 8.456 to modify the requirements for augmentation motions in the juvenile proceedings addressed by these rules by:

    a. Providing an exception for reporters' transcripts in multiple-reporter cases from the requirement that documents attached to such motions be consecutively paginated; and
    b. Adding references to the specific subdivisions of rules 8.122 and 8.130 that explain how to identify documents or transcripts that are not attached to such motions.

7. Further amend rule 8.838 to:

a. Add a cross-reference to rule 8.144(a); and
b. Replace the provision relating to the 300-page volume limit with a cross-reference to the relevant subdivision of rule 8.144.

8. Amend rule 8.866 and further amend rule 8.919 to replace references to the format requirements of rule 8.144 with references to the format requirements of rule 8.834.

The proposed amended rules are attached at pages 15-24.

Relevant Previous Council Action

The predecessor to rule 8.130, relating to reporters' transcripts in civil appeals to the Court of Appeal, was adopted by the Judicial Council as part of the Rules on Appeal effective July 1, 1943. The predecessor to rule 8.834, relating to reporters' transcripts in civil appeals to the superior court appellate division, was adopted by the Judicial Council effective September 15, 1945. As adopted, both rules (1) required appellants who wished to use a reporter's transcript to file a notice with the trial court designating the oral proceedings to be included in the transcript, (2) allowed respondents to designate additional proceedings for inclusion in the transcript, and (3) required appellants to deposit with the trial court either the estimated cost of transcribing the designated proceedings or a waiver of this deposit signed by the court reporter. These rules have been amended and renumbered many times since their adoption.

Effective January 1, 1993, the Judicial Council amended rule 8.130 to permit as substitute for a required deposit an original transcript of proceedings specified in the designation notice. Effective January 1, 2014, the Judicial Council amended rule 8.130 to, among other things, limit the use of transcripts in lieu of a deposit to situations in which the transcripts include all of the designated proceedings and to require that these transcripts meet the format requirements for reporters' transcripts under rule 8.144. The council also amended rules 8.834, 8.866, and 8.919 effective January 1, 2014, to, among other things, allow the same procedure for submitting certified transcripts in lieu of a deposit for a reporter's transcript as permitted under rule 8.130.

The Judicial Council adopted the predecessor to rule 8.144, regarding the format of the record on appeal, effective July 1, 1943. This rule has been amended and renumbered many times since its adoption. Effective January 1, 2018, to make the rules regarding reporters' transcripts consistent with amendments to Code of Civil Procedure section 271[1] taking effect on that date, the Judicial Council amended rule 8.144 to incorporate format requirements for transcripts that are delivered in electronic form, including the requirement that the pagination of a transcript be the same as the pagination that appears in the PDF viewer. At the same time, the council also amended rules 8.130, 8.834, 8.838, 8.866, and 8.919 (among others) to make them consistent with the amended section 271.

[1] All further unspecified statutory references are to the Code of Civil Procedure.

Analysis/Rationale

Background

Effective January 1, 2018, Code of Civil Procedure section 271 was amended to change the default format for reporters' transcripts from paper to electronic. The statute generally requires a court reporter to "deliver a transcript in electronic form, in compliance with the California Rules of Court, to any court, party, or person entitled to the transcript." (§ 271(a).) As amended, the statute contains three exceptions allowing for paper transcripts, two of which expired at the end of 2022:

- The party or person entitled to the transcript requests the reporter's transcript in paper form;
- Prior to January 1, 2023, the court lacks the technical ability to use or store a transcript in electronic form and provides advance notice to the court reporter; and
- Prior to January 1, 2023, the court reporter lacks the technical ability to deliver a transcript in electronic form and provides advance notice of this fact to the court, party, or person entitled to the transcript. (*Ibid*.)

Thus, effective January 1, 2023, court reporters must deliver reporters' transcripts in electronic form unless a party or person entitled to the transcript requests it in paper format. Based primarily on suggestions received from the California Court Reporters Association, the committee is recommending rule amendments that reflect the fact that most reporters' transcripts will now be delivered in electronic form, as well as other changes to the rules regarding the format of transcripts.

Transcript volume page limit

Rule 8.144 of the California Rules of Court establishes the general requirements for the format of clerks' and reporters' transcripts in civil appeals to the Court of Appeal. Through cross-references in rules 8.336(f), 8.395(g), 8.409(b), 8.610(d), 8.838(a), 8.862(b), 8.866(b), 8.913(b), and 8.919(b), these format requirements also apply to transcripts in criminal appeals to the Court of Appeal, appeals from superior court decisions in death penalty–related habeas corpus proceedings, in juvenile appeals, in capital appeals to the Supreme Court, and in superior court appellate division appeals, respectively.

Rule 8.144(b)(6) currently requires that clerks' and reporters' transcripts must be produced in volumes of no more than 300 pages. As noted above, most reporters' transcripts will now be in electronic form. Rule 8.74, relating to the format of electronic documents filed in the appellate courts, also acknowledges that clerks' transcripts may be in electronic form.[2] The current 300-page volume limit does not appear to be necessary for transcripts in electronic form. A single electronic volume would also have one set of indexes and may be easier for courts and parties to navigate and cite. The committee is therefore recommending that rule 8.144 be amended to allow

[2] Rule 8.74(c)(5) states, "The format for an electronic clerk's transcript must comply with this rule and rule 8.144."

clerks' and reporters' transcripts that are in electronic form be produced in a single volume, with two limitations.

First, to avoid the potential confusion that would be caused by differences in page numbering and citation if a transcript in a case were delivered in both paper and electronic form, the committee recommends the amendments to rule 8.144 provide that a single-volume transcript only be permitted when that transcript is being delivered in electronic form to all courts, parties, and persons entitled to the transcript. Thus the 300-page volume limit would be retained in cases in which a party or person entitled to a reporter's transcript requests that the transcript be provided in paper form.

Second, the committee recommends that the amendments to rule 8.144 require that electronic transcripts produced in a single volume comply with the requirements of rule 8.74(a)(5). Rule 8.74(a)(5), relating to the format of electronic documents for purposes of e-filing in the appellate courts, provides that electronic documents may not be larger than 25 megabytes and specifies what must be done if documents exceed this size. This megabyte limit is important for functionality of documents within the appellate case management system and the appellate courts.

References to "electronic format"

Code of Civil Procedure section 271 refers to reporters' transcripts being delivered in "electronic form." Rules 8.144(d), 8.204(a), and 8.622(a) currently have references to reporters' transcripts or the record on appeal being in "electronic format." To ensure consistency of language between section 271 and the appellate rules, the committee recommends changing these references to "electronic form."

Pagination of reporters' transcripts in cases in which there are multiple reporters

Background

Rule 8.144(f) addresses the pagination of reporters' transcripts in cases in which more than one court reporter reported portions of the proceedings. Subdivision (1) of this provision requires that each reporter estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment of the transcript.

Current rule 8.144(f)(2) and (3) address what a court reporter in a multiple-reporter case should do if a segment is either longer or shorter than the assigned number of pages. If the segment exceeds the assigned number of pages, the rule currently requires that the reporter number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively. For example, if the last page number assigned to a segment was 300, additional pages in this segment would be numbered 300-1, 300-2, 300-3, etc.

If a segment has fewer than the assigned number of pages, the rule currently requires that on the certificate page, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number. For example, if the last page number assigned to a

segment was 300, but only 256 pages were used, the certificate would identify the last page in the segment as 256-300. Note that when the pagination methods authorized under rule 8.144(f)(2) and (3) are used, the transcript will not be consecutively paginated and the page numbers on the transcript will not match the page numbers that appear in the PDF viewer.

As discussed further below in the Comments section of this report, courts, court reporters, and attorneys have various concerns about the existing rules relating to pagination of transcripts in multiple-reporter cases. These concerns include delay in the preparation of transcripts when court reporters are unavailable to provide page estimates for their segments and difficulties in navigating within transcripts that are not consecutively paginated and in which the page numbers on the transcript do not match those in the PDF viewer. The committee believes that further research and work should be done to try to address these concerns and develop an overall improved approach to pagination of transcripts in these situations. In the meantime, the committee is recommending rule amendments intended to provide some internal consistency within the rules about transcripts paginated as currently authorized.

Recognizing that transcripts in multiple-reporter cases may not be consecutively numbered
Rule 8.144(b)(2)(D), which generally requires that the pages of clerks' and reporters' transcripts be consecutively numbered, includes an exception for the multiple-reporter situations described above: "The pages must be consecutively numbered, except as provided in (f)." This existing exception recognizes that, because of the possibility of segments being longer or shorter than the assigned number of pages in multiple-reporter cases, the pages of the reporter's transcripts in such cases may not be consecutively numbered. However, there are other rules that do not recognize this. Rules 8.452(e) and 8.456(e), relating to augmenting the record in certain writ proceedings juvenile dependency cases, both require that copies of items to be added to the record, including transcripts, be consecutively numbered. To make these provisions consistent with rule 8.144(f), the committee recommends amending rules 8.452(e)(3) and 8.456(e)(3) to provide an exception to the consecutive pagination requirement, modeled on the language of rule 8.144(b)(2)(D), for reporters' transcripts in multiple-reporter situations.

The committee also recommends additional, clarifying amendments to rules 8.452 and 8.456. Rules 8.452(e)(4) and 8.456(e)(4) use cross-references to rule 8.122 (relating to a clerk's transcripts) and rule 8.130 (relating to a reporter's transcripts) to explain how parties must identify documents and transcripts that they are unable to attach to their augmentation motion. Rules 8.122 and 8.130 both contain many subdivisions, so readers of rules 8.452 and 8.456 may have difficulty identifying the provisions relevant to identifying items for an augmentation motion. The committee therefore recommends that rules 8.452 and 8.456 be amended to provide more specific citations to the particular subdivisions of rules 8.122 and 8.130 that explain how to identify documents to be included in a clerk's transcript and proceedings to be included in a reporter's transcript.

Recognizing that the page numbers on transcripts in electronic form in multiple-reporter cases may not match the page numbers in the PDF viewer

Rule 8.144(d)(1)(C) requires that transcripts in electronic form ensure that the electronic page counter in the PDF file viewer matches the transcript page numbering. Having the pagination match that in the PDF viewer generally makes it easier to navigate to or print particular pages. However, if, as recognized by rule 8.144(f), a segment of a reporter's transcript in a multiple-reporter case is longer or shorter than the number of pages assigned, then the page numbers on the transcript will not match the electronic page counter in the PDF file viewer. In recognition of this existing discrepancy, the committee recommends amending rule 8.144(d)(1)(C) to add an exception to the requirement that the electronic page counter in the PDF file viewer match the transcript page numbering in the circumstance covered by rule 8.144(f)(2) or (3).

Requirement that certified transcripts comply with formatting requirements when submitted in lieu of making a deposit for a reporter's transcript

Background

Rule 8.130 establishes procedures relating to designating and paying for reporters' transcripts in civil appeals to the Court of Appeal. Under this rule, appellants who wish to use a reporter's transcript must file a notice with the trial court that designates which of the oral proceedings from the trial court they want included in the reporter's transcript. Respondents may then designate additional proceedings to be included in the transcript. Rule 8.130(b) requires that, with its notice designating proceedings to be included in a reporter's transcript, each designating party must deposit with the superior court clerk the approximate cost of transcribing the proceedings, or it may substitute one of the items permitted by 8.130(b)(3): a reporter's written waiver of deposit, a copy of a Transcript Reimbursement Fund application, or a certified transcript of all the proceedings designated by the party.

The last of these authorized substitutes is included in recognition of the fact that parties may already have purchased the transcripts that they need for an appeal. Sometimes a party in a trial court proceeding will purchase reporters' transcripts of the proceedings before any appeal is filed, such as when a party needs a transcript as part of a writ petition during the trial court proceedings. Similar provisions allowing the filing of a certified transcript of all the designated proceedings in lieu of a deposit for a reporter's transcript also appear in rules 8.834, 8.866, and 8.919 relating to reporters' transcripts in appeals to the superior court appellate division in civil, misdemeanor, and infraction cases, respectively.

As discussed above, under rule 8.144, there are format requirements for reporters' transcripts used as part of the record on appeal. Rules 8.130, 8.834, 8.866, and 8.919 all require that a certified reporter's transcript submitted in lieu of depositing the cost for transcribing designated proceedings must comply with these format requirements. Among other things, rule 8.144 requires that:

- The pages in reporters' transcripts be consecutively numbered;

- The cover of each volume identify the page numbers within that volume and the case name, number, and appellate counsel contact information; and

- The transcript include chronological and alphabetical indexes to the entire reporter's transcript.

However, transcripts prepared during the trial court proceedings do not comply with some or all of these format requirements. To comply with rules 8.130, 8.834, 8.866, and 8.919, such certified transcripts must typically be repaginated and new covers and indexes created.

The California Court Reporters Association indicates that despite the requirement in these existing rules that transcripts submitted in lieu of a deposit comply with the format requirements of rule 8.144, in some cases some courts have accepted them as a substitute for deposit transcripts that are not in the appropriate format. The association further indicates that when this happens, court reporters have sometimes been tasked with fixing these transcripts to comply with the rule requirements.

The advisory committee comment to rule 8.130 makes clear that the intent of subdivision (b) is that certified transcripts submitted by a party only be accepted by a court as a substitute for a deposit if these transcripts meet the format requirements of rule 8.144:

> [S]ubdivision (b) makes clear that the certified transcript may be filed in lieu of a deposit for the transcript only where the certified transcript contains all of the proceedings identified in the notice of designation *and the transcript complies with the format requirements of rule 8.144*. (emphasis added)

Furthermore, the 2013 report to the Judicial Council that recommended adoption of this requirement states that this requirement would "clearly place responsibility on the designating party for ensuring that such transcripts are in the proper format."[3]

Clarifying responsibility for compliance with formatting requirements

To further clarify and implement the policy reflected in the 2013 report to the Judicial Council, the committee recommends amending rules 8.130, 8.834, 8.866, and 8.919 to state that a certified transcript submitted by a party must not be accepted as a substitute for a deposit under these rules unless it complies with the applicable format requirements. The committee also recommends amending the advisory committee comments accompanying rules 8.130, 8.866, and 8.919 to:

[3] Judicial Council of Cal., Advisory Com. Rep., *Appellate Procedure: Reporter's Transcripts in Civil Appeals* (Aug. 2, 2013), p. 7, *www.courts.ca.gov/documents/jc-20131025-itemA7.pdf*. See also discussion on page 14 of this report: "The committees note that . . . the proposed amendments would require that transcripts that a party deposits in lieu of depositing funds for a reporter's transcript be in the format required by rule 8.144."

- Provide examples of the types of formatting changes that would need to be made to comply with the rules—consecutive pagination, required appellate cover information, and indexes;

- State that parties using this alternative to a deposit are responsible for ensuring that such transcripts are in the proper format; and

- Indicate that parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves.

The committee also recommends adding an advisory committee comment modeled on those accompanying the above rules to rule 8.834.

Note that, under rules 8.130(d)(3), 8.140, 8.842, 8.874, and 8.924, if a party fails to submit an authorized substitute for a deposit, the clerk will send the party notice of this default and the party will have an opportunity to correct the problem.

Other clarifications to transcript format requirements in appellate division proceedings
The committee is also recommending several additional clarifying amendments to rules 8.834, 8.838, 8.866, and 8.919 relating to the format of transcripts in appellate division proceedings:

- Amending rule 8.838 to add a cross-reference to rule 8.144(a) to specify section 271's application in limited civil appeals, and to replace a provision relating to the 300-page volume limit with a cross-reference to the relevant subdivision of rule 8.144; and

- Amending rules 8.834, 8.866, and 8.919 to replace cross-references to rule 8.144 with references to rule 8.834 to ensure consistency of transcript format in appellate division proceedings.

Policy Implications
This proposal furthers the Judicial Council's mission to improve access to justice by facilitating the use of electronic transcripts and by reducing costs for courts, litigants, and court reporters.

Comments
This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the regular winter comment cycle. Six comments related to this proposal were received: three from superior courts, one from the Appellate Court Clerk Executive Officers, one from the California Court Reporters Association, and one from the Orange County Bar Association. Two commentors indicated that they agreed with the proposal, two indicated that they did not agree with the proposal, one indicated that they agreed with the proposal if amended, and one did not indicate an overall position on the proposal. The invitation to comment asked for specific input on several questions. Most of the comments received were in response to these questions. A chart with the full text of the comments received, organized by issue, and the committee's responses is attached at page 27. The principal comments and responses are summarized below.

Rules 8.130(b)(3)(C), 8.834(b)(2)(D), 8.866(a)(2)(C) and (D), and 8.919(a)(2)(C) and (D)—Use of certified transcripts as substitute for deposit for reporter's transcript

One commentor, the California Court Reporters Association, expressed support for these proposed amendments. Another, the Appellate Court Clerk Executive Officers, expressed concern about amending these rules to clarify that certified transcripts submitted by a party may not be accepted as a substitute for a deposit for the cost of preparing a reporter's transcript unless they are in the required appellate format for transcripts on appeal. This second commentor's main concern appears to be that self-represented appellants and smaller firms may not be able to make the necessary format changes themselves and therefore might end up not being able to use a reporter's transcript in the appeal.

The committee's view is that it is appropriate to amend this rule to clarify and further implement the policy, reflected in the 2014 amendments adopted by the Judicial Council, that a party wishing to use this substitute is responsible for putting the certified transcripts it submits in the appropriate format. However, the committee notes, as discussed above, that this does not mean that such parties must make the necessary format changes themselves. They can engage a court reporter to make these format changes. To clarify this, the committee has revised its proposed amendments to the advisory committee comments to state that such parties can engage a court reporter to make the changes or make the changes themselves. The committee is also recommending that a similar advisory committee comment addressing the filing of certified transcripts in lieu of a deposit be added for rule 8.834, which did not previously have any advisory committee comment.

Thus, appellants who have previously purchased all the necessary transcripts for an appeal (note that this is likely to be a very small proportion of appellants) have options: They can attempt to put these transcripts in the necessary format themselves, they can engage a court reporter to put the transcripts in the necessary format, or they can deposit funds with the court to cover the costs of a court reporter preparing a new transcript containing all of the required proceedings (at a reduced per page rate that recognizes that the proceedings were previously transcribed by the court reporter). In addition, as noted in the invitation to comment, if an appellant attempts to use the first option and fails to put the transcript in the required format, this does not mean that the litigant will be forced to go forward with an appeal without a reporter's transcript. The appellant will receive a default notice from the court and be given an opportunity to correct the problem.

Rule 8.144(b)(6)—Allowing a reporter's transcript in electronic form to be in a single volume

One commentor, the California Court Reporters Association, expressed support for these proposed amendments. Another commentor, the Superior Court of San Diego County, raised concerns about allowing transcripts in multiple-reporter cases to be produced in a single volume. To the extent that this latter comment addressed the proposed amendments to rule 8.144(b)(6), rather than the existing procedures relating specifically to multiple-reporter cases, the committee notes that amendments to rule 8.144(b)(6) would permit, not require, that transcripts in electronic form be in a single volume. Thus, if producing a transcript in a single volume would be

problematic for a court reporter, the reporter could choose to produce the transcript in the historic 300-page volume format.

The invitation to comment asked for comments about whether the 300-page volume limit should also be changed for clerks' transcripts that are in electronic form. Four commentors responded to this question. All four supported changing this limit for clerks' transcripts as well as reporters' transcripts. In response to these comments, the committee is recommending that the changes to rule 8.144(b)(6) allowing single-volume transcripts be applied to both clerks' and reporters' transcripts.

Rule 8.144(f)—Pagination of reporters' transcripts in multiple-reporter cases

The original suggestion considered by the committee included a proposal that the rule regarding pagination of reporters' transcripts in multiple-reporter cases be amended to allow the primary reporter to assign beginning and ending page numbers to each segment of a transcript without getting estimates from the court reporters (block numbering). Although the committee did not propose such an amendment after considering concerns raised on that point, the invitation to comment included several questions regarding pagination of reporters' transcripts in multiple-reporter cases to attempt to gather more information. The specific responses to those questions can be viewed in the comment chart.[4] Taken as a whole, however, the comments received, as well as the reasons given for the original suggestion, all point to ongoing difficulties with pagination in multiple-reporter cases,[5] with no consensus as to a solution.

[4] The comments regarding pagination can be viewed at Issues 4 though 8 of the comment chart.

[5] This input indicates that:

- Waiting to assign page numbers until estimates for the pages in individual segments have been received from all court reporters in a case, as required by the current rule, can cause delay in the preparation of transcripts because reporters may not be readily accessible due to illness, vacation, or other reasons.
- The current pagination format required by the rules when a segment has either more or fewer pages than assigned by the primary reporter is problematic for several reasons. However, commentors had mixed views about whether the alternative proposed in the invitation to comment would be preferable.
- Allowing any nonconsecutive pagination, regardless of the format used for the nonconsecutive page numbers, creates problems in navigating within transcripts and thus finding and printing specific pages in transcripts. When pages are not consecutively numbered, the page numbers used in the transcript will not match the page number shown in the PDF viewer and thus a user cannot easily use the Adobe reader to navigate to a specific page number.
- Allowing block numbering might address some of the potential delay in the preparation of reporters' transcripts in multiple-reporter cases, although it seems likely that there would still be some delay if individual court reporters were late in submitting their segments of a transcript. However, authorizing block numbering without establishing some method of ensuring consecutive pagination would likely increase the number of cases in which courts and litigants would experience the above-described difficulties in navigating within transcripts.

Based on this input, the committee believes that this issue would benefit from further study and is therefore not recommending at this time that the rules be amended either to authorize block numbering or to alter the current numbering format when a segment has either more or fewer pages than assigned by the primary reporter at this time.

In the meantime, the committee concluded that it would be appropriate to recommend the amendments to rules 8.144(d)(1)(C), 8.452(e), and 8.456(e) that were circulated for public comment. These amendments do not authorize any expansion in the situations, identified as problematic by several commentors, in which the page numbers on the transcript will not match the page numbers shown in the PDF viewer. Instead, these recommended amendments are intended to provide internal consistency within the existing rules by acknowledging that, under these existing rules, the page numbers on a transcript may not match the page numbers shown in the PDF viewer.

Alternatives considered

Rule 8.153. Lending the record

The proposal that was circulated for public comment included a potential amendment to rule 8.153, which permits a party that has not purchased its own copy of the record on appeal to request another party, in writing, to lend it that party's copy of the record. Under this existing rule, after it has prepared its brief, the lending party must send its copy of the record, including any electronic or paper reporter's transcript, to the borrowing party. Based on a suggestion from the California Court Reporters Association, the committee proposed amending rule 8.153(a) to provide lending parties with the additional option of asking the court reporter to provide a read-only electronic copy of the reporter's transcript to the borrowing party.

The invitation to comment included several questions regarding lending the record, and the commenters differed in their responses. [6] In addition, the California Court Reporters Association

- Block-numbering might also create problems in accurately identifying the size of the record on appeal because it may inflate the apparent number of pages in the reporter's transcript. This, in turn, may impact the appellate project's ability to identify appointed counsel for such cases.
- There is not consensus among the commentors about whether, given existing software, transcript segments can easily be repaginated or a single, consecutive pagination applied over the top of existing pagination.

[6] The invitation to comment asked three specific questions about lending the record. General comments on the lending rule plus the answers to those questions are in the comment chart at Issues 9 through 12. The responses to the questions are summarized below:

- *Whether the option of asking a court reporter to send the borrowing party a copy of the reporter's transcript in read-only electronic form should be available in all cases or only when the lending party's copy of the reporter's transcript is in paper form.* Four commentors responded to this question. Two, the Appellate Court Clerk Executive Officers and the Orange County Bar Association, supported making this option available in all cases. The California Court Reporters Association suggested that this option be mandatory if the lending party received its transcript in electronic form and unavailable if the lending party received its transcript in paper

submitted a suggestion for different language for rule 8.153.[7] Those suggested amendments would be important substantive changes to the committee's original proposal and they would have to be circulated for public comment before being recommended to the council. To avoid the possibility of amending this rule multiple times, in light of these new suggestions and the split among the comments received in response to the specific questions in the invitation to comment, the committee decided not to recommend amendments to rule 8.153 at this time, but to consider potentially developing a proposal for a later rules cycle.

Other alternatives considered

The committee considered suggestions to add references to Code of Civil Procedure section 271 to several rules that address reporters' transcripts. The stated purpose of these suggestions was to ensure that court reporters follow the requirements of section 271 to send transcripts electronically. The committee concluded that adding references to the statute in these rules was not necessary. As noted above, rule 8.144 establishes the format requirements for reporters' transcripts in appellate proceedings, both directly and through cross-references in other rules.

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form. Another commentor objected to having this option in any cases, as well as to the concept of lending reporters' transcripts that are in electronic format.

- *What format requirements should be applied to a transcript sent by a court reporter to a borrowing party?* Three commentors responded. The Orange County Bar Association recommended that the borrowing party should receive the same format as the appellant, not just a read-only copy. The California Court Reporters Association suggested that the borrowing party should receive a transcript in read-only format and that the court reporter should have the option of setting an expiration date for the transcript. Superior Court of San Diego County suggested that the transcript should be read-only with no ability to print, comment, or draft.
- *Whether it is necessary for a party borrowing the record from another party to return an electronic copy of either the clerk's transcript or an administrative record provided by the lending party or a read-only electronic copy of the reporter's transcript provided by the court reporter.* Three commentors responded. The California Court Reporters Association indicated that it would not be necessary to return a reporter's transcript provided to a borrowing party by a court reporter given its suggestion that the court reporter be permitted to give the transcript an expiration date. The Orange County Bar Association expressed the view that the borrowing party should not be required to return the items. Superior Court of San Diego County did not comment on the items but expressed doubt about how or whether an electronic copy of a reporter's transcript would be returned.

[7] This suggested language from the reporters' association included three main substantive changes from the language circulated for public comment:

- It would establish separate procedures for lending parties who received their reporters' transcripts in electronic form and paper form:
  - Those with reporters' transcripts in electronic form would be required to ask the court reporter to send the borrowing party a read-only electronic transcript. In contrast, the rule proposed in the invitation to comment would have allowed, but not required, lending parties to do this.
  - Those with reporters' transcripts in paper form would be required to send their copy of the transcript to the borrowing party. In contrast, the rule proposed in the invitation to comment would have also allowed lending parties with transcripts in paper format to ask the court reporter to send the borrowing party a read-only electronic transcript.
- It would authorize a court reporter sending a transcript to a borrowing party to put an expiration date on the transcript.

Subdivision (a) of this rule already provides that its provisions must be applied in a manner consistent with Code of Civil Procedure section 271.

The committee also considered suggestions to amend several rules that address sending the record to, or filing it with, the reviewing court, to provide that if the trial court lacks the technical ability to deliver the reporter's transcript in electronic form to the reviewing court and all the parties, the court reporter may send the reporter's transcript. The stated purpose of these suggested amendments was to allow reviewing courts to receive electronic transcripts while trial courts were working on changes to their document management systems that would allow them to receive, use, store, and transmit a transcript in electronic form. It is the committee's understanding that trial courts now have tools available to them to handle reporters' transcripts delivered to them in electronic form. Given this, the committee determined that these suggested rule amendments were not necessary at this time.

The committee considered the alternative of not taking any action but concluded that the proposed amendments relating to the use of a single volume for reporters' transcripts in electronic form and format requirements for certified transcripts submitted in lieu of a deposit for a reporter's transcript would be helpful to courts, litigants, and court reporters.

Fiscal and Operational Impacts

The committee anticipates that fiscal and operational impacts of this proposal on courts will be minimal. The comments received suggest that there may be some additional education required for court staff related to not accepting a certified transcript in lieu of a deposit if the transcript is not in the appropriate format. The committee also anticipates that reviewing courts may find single-volume electronic clerks' or reporters' transcripts more efficient to use, and the other proposed changes may reduce errors and questions regarding transcript format.

Two commentors suggested that four months would not be sufficient time to implement these rule amendments. One of these commentors, the Superior Court of Los Angeles County, suggested that the rule amendments not take effect until January 1, 2024. In response to these comments, the committee is recommending that the recommended rule amendments take effect January 1, 2024, rather than September 1, 2023, as proposed in the invitation to comment.

Attachments and Links

1. Cal. Rules of Court, rules 8.130, 8.144, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919, at pages 15-24
2. Chart of Comments, at pages 25-46

Rules 8.130, 8.144, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919 of the California Rules of Court are amended, effective January 1, 2024, to read:

Rule 8.130. Reporter's transcript

(a) * * *

(b) Deposit or substitute for cost of transcript

(1)–(2) * * *

(3) Instead of a deposit under (1), the party may substitute:

(A) The reporter's written waiver of a deposit. A reporter may waive the deposit for a part of the designated proceedings, but such a waiver replaces the deposit for only that part.

(B) A copy of a Transcript Reimbursement Fund application filed under (c)(1).

(C) A certified transcript of all of the proceedings designated by the party. The transcript submitted by the party must not be accepted as a substitute for a deposit under (1) unless it complies ~~must comply~~ with the format requirements of rule 8.144.

(c)–(h) * * *

Advisory Committee Comment

Subdivision (a). * * *

Subdivision (b). Where a certified transcript has been previously prepared, subdivision (b) makes clear that the certified transcript may be filed in lieu of a deposit for the transcript only where the certified transcript contains all of the proceedings identified in the notice of designation and the transcript complies with the format requirements of rule 8.144 (e.g., cover information, renumbered pages, required indexes). Parties using this alternative to a deposit are responsible for ensuring that such transcripts are in the proper format. Parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves. Otherwise, where a certified transcript has been previously prepared for only some of the designated proceedings, subdivision (b)(1) authorizes a reduced fee to be deposited for those proceedings. This reduced deposit amount was established in recognition of the holding in *Hendrix v. Superior Court of San Bernardino County* (2011) 191 Cal.App.4th 889 that the statutory rate for an original transcript only applies to the first transcription of the reporter's notes. The amount of the deposit is based on the rate established by Government Code section 69950(b) for a first copy of

a reporter's transcript purchased by any court, party, or other person who does not simultaneously purchase the original.

* * *

Rule 8.144. Form of the record

(a) * * *

(b) Format

(1)–(5) * * *

(6) *Volumes*

(A) Except as provided in (B), ~~C~~clerks' and reporters' transcripts must be produced in volumes of no more than 300 pages.

(B) If a clerk's or reporter's transcript is being delivered in electronic form to all courts, parties, and persons entitled to the transcript, it may be produced in a single volume but must comply with the requirements of rule 8.74(a)(5).

(7) * * *

(c) * * *

(d) Additional requirements for reporter's transcript delivered in electronic form

(1) *General*

In addition to complying with (b), a reporter's transcript delivered in electronic ~~format~~ form must:

(A)–(B) * * *

(C) Ensure that the electronic page counter in the PDF file viewer matches the transcript page numbering except as provided in (f)(2) or (3).

(D)–(G) * * *

(2) *Multivolume or multireporter transcripts*

In addition to the requirements in (1), for multivolume or multireporter transcripts delivered in electronic ~~format~~ form, each individual reporter must provide a digitally and electronically signed certificate with his or her respective portion of the transcript. If the court reporter lacks the technical ability to provide a digital signature, then only an electronic signature is required.

(3) * * *

(e) * * *

(f) Pagination in multiple reporter cases

(1) In a multiple reporter case, each reporter must promptly estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment.

(2) If a segment exceeds the assigned number of pages, the reporter must number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively.

(3) If a segment has fewer than the assigned number of pages, on the last page of the segment, before the certificate page, the reporter must state in parentheses "(next volume and page number is ____)," and on the certificate page~~,~~ the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number.

(g) * * *

Rule 8.204. Contents and format of briefs

(a) Contents

(1) Each brief must:

(A)–(B) * * *

(C) Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. If any

part of the record is submitted in an electronic ~~format~~ form, citations to that part must identify, with the same specificity required for the printed record, the place in the record where the matter appears.

(2) * * *

(b)–(e) * * *

Rule 8.452. Writ petition to review order setting hearing under Welfare and Institutions Code section 366.26

(a)–(d) * * *

(e) Augmenting or correcting the record in the reviewing court

(1)–(2) * * *

(3) A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. Except as provided in rule 8.144(f) for reporters' transcripts in multiple reporter cases, the pages of the attachment must be consecutively numbered, beginning with the number one. If the reviewing court grants the motion, it may augment the record with the copy.

(4) If the party cannot attach a copy of the matter to be added, the party must identify it as required under rules 8.122(a)(1) and 8.130(a)(1).

(5)–(6) * * *

(f)–(i) * * *

Rule 8.456. Writ petition under Welfare and Institutions Code section 366.28 to review order designating or denying specific placement of a dependent child after termination of parental rights

(a)–(d) * * *

(e) Augmenting or correcting the record in the reviewing court

(1)–(2) * * *

(3) A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. Except as provided in rule 8.144(f) for reporters' transcripts in multiple reporter cases, the pages of the attachment must be consecutively numbered, beginning with the number one. If the reviewing court grants the motion, it may augment the record with the copy.

(4) If the party cannot attach a copy of the matter to be added, the party must identify it as required under rules 8.122(a)(1) and 8.130(a)(1).

(5)–(6) * * *

(f)–(i) * * *

Rule 8.622. Certifying the trial record for accuracy

(a) Request for corrections or additions

(1) Within 90 days after the clerk delivers the record to defendant's appellate counsel:

(A) Any party may serve and file a request for corrections or additions to the record. Immaterial typographical errors that cannot conceivably cause confusion are not required to be brought to the court's attention. Items that a party may request to be added to the clerk's transcript include a copy of any exhibit admitted in evidence, refused, or lodged that is a document in paper or electronic ~~format~~ form. The requesting party must state the reason that the exhibit needs to be included in the clerk's transcript. Parties may file a joint request for corrections or additions.

(B) * * *

(2)–(4) * * *

(b)–(e) * * *

Rule 8.834. Reporter's transcript

(a) * * *

(b) Deposit or substitute for cost of transcript

(1) * * *

(2) Within 10 days after the clerk notifies the appellant of the estimated cost of preparing the reporter's transcript—or within 10 days after the reporter notifies the appellant directly—the appellant must do one of the following:

(A) Deposit with the clerk an amount equal to the estimated cost and a fee of $50 for the superior court to hold this deposit in trust;

(B)–(C) * * *

(D) File a certified transcript of all of the designated proceedings. The transcript submitted by the party must not be accepted as a substitute for a deposit under (A) unless it complies ~~must comply~~ with the format requirements of rule ~~8.144~~ 8.838; or

(E) * * *

(3) * * *

(c)–(f) * * *

Advisory Committee Comment

Subdivision (b). Sometimes a party in a trial court proceeding will purchase a reporter's transcript of all or part of the proceedings before any appeal is filed. In recognition of the fact that such transcripts may already have been purchased, this rule allows an appellant, in lieu of depositing funds for a reporter's transcript, to deposit with the trial court a certified transcript of the proceedings necessary for the appeal. Subdivision (b)(2)(D) makes clear that the certified transcript may be filed in lieu of a deposit for a reporter's transcript only where the certified transcript contains all of the proceedings designated, and the transcript complies with the format requirements of rule 8.838 (e.g., cover information, renumbered pages, required indexes). Parties using this alternative to a deposit are responsible for ensuring that such transcripts are in the proper format. Parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves.

Rule 8.838. Form of the record

(a) Paper and format

Except as otherwise provided in this rule, ~~clerk's~~ clerks' and ~~reporter's~~ reporters' transcripts must comply with the requirements of rule 8.144(a), (b)(1)–(4) and (6), (c), and (d).

(b) * * *

(c) Binding and cover

(1) If filed in paper form, clerks' and ~~reporter's~~ reporters' transcripts must be bound on the left margin ~~in volumes of no more than 300 sheets~~, except that transcripts may be bound at the top if required by a local rule of the appellate division.

(2)–(3) * * *

Rule 8.866. Preparation of reporter's transcript

(a) When preparation begins

(1) * * *

(2) If the notice sent to the reporter by the clerk under rule 8.864(a)(1) indicates that the appellant is the defendant and that the defendant was not represented by appointed counsel at trial:

(A) * * *

(B) The clerk must promptly notify the appellant and his or her counsel of the estimated cost of preparing the reporter's transcript. The notification must show the date it was sent.

(C) Within 10 days after the date the clerk sent the notice under (B), the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii)–(iii) * * *

(iv) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.865. The transcript submitted by the appellant must not be accepted as a

substitute for a deposit under (i) unless it complies ~~must comply~~ with the format requirements of rule ~~8.144~~ 8.838;

(v)–(vii) * * *

(D) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk sends notice of this determination to the appellant, the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii) * * *

(iii) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.865. The transcript submitted by the appellant must not be accepted as a substitute for a deposit under (i) unless it complies ~~must comply~~ with the format requirements of rule ~~8.144~~ 8.838;

(iv)–(vi) * * *

(E) * * *

(b) Format of transcript

The reporter's transcript must comply with rule ~~8.144~~ 8.838.

(c)–(f) * * *

Advisory Committee Comment

Subdivision (a). If the appellant was not represented by the public defender or other appointed counsel in the trial court, the appellant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to show indigency. This form is available at any courthouse or county law library or online at www.courts.ca.gov/forms.

Subdivisions (a)(2)(C)(iv) and (a)(2)(D)(iii). Sometimes a party in a trial court proceeding will purchase a reporter's ~~transcripts~~ transcript of all or part of the proceedings before any appeal is filed. In recognition of the fact that such transcripts may already have been purchased, this rule allows an appellant, in lieu of depositing funds for a reporter's transcript, to deposit with the trial court a certified transcript of the proceedings necessary for the appeal. Subdivisions (a)(2)(C)(iv)

and (a)(2)(D)(iii) make clear that the certified transcript may be filed in lieu of a deposit for a reporter's transcript only where the certified transcript contains all of the proceedings required under rule 8.865 and the transcript complies with the format requirements of rule ~~8.144~~ 8.838 (e.g., cover information, renumbered pages, required indexes). Parties using this alternative to a deposit are responsible for ensuring that such transcripts are in the proper format. Parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves.

Rule 8.919. Preparation of reporter's transcript

(a) When preparation begins

(1) * * *

(2) If the notice sent to the reporter by the clerk under rule 8.915(a)(3) indicates that the appellant is the defendant:

(A) * * *

(B) The clerk must promptly notify the appellant and his or her counsel of the estimated cost of preparing the reporter's transcript. The notification must show the date it was sent.

(C) Within 10 days after the date the clerk sent the notice under (B), the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii)–(iii) * * *

(iv) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.918. The transcript submitted by the appellant must not be accepted as a substitute for a deposit under (i) unless it complies ~~must comply~~ with the format requirements of rule ~~8.144~~ 8.838;

(v)–(vii) * * *

(D) If the trial court determines that the appellant is not indigent, within 10 days after the date the clerk sends notice of this determination to the appellant, the appellant must do one of the following:

(i) Deposit with the clerk an amount equal to the estimated cost of preparing the transcript;

(ii) * * *

(iii) File a certified transcript of all of the proceedings required to be included in the reporter's transcript under rule 8.918. The transcript submitted by the appellant must not be accepted as a substitute for a deposit under (i) unless it complies ~~must comply~~ with the format requirements of rule ~~8.144~~ 8.838;

(iv)–(vi) * * *

(E) * * *

(b) Format of transcript

The reporter's transcript must comply with rule ~~8.144~~ 8.838.

(c)–(f) * * *

Advisory Committee Comment

Subdivision (a). The appellant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to show indigency. This form is available at any courthouse or county law library or online at www.courts.ca.gov/forms.

Subdivisions (a)(2)(C)(iv) and (a)(2)(D)(iii). Sometimes a party in a trial court proceeding will purchase a reporter's ~~transcripts~~ transcript of all or part of the proceedings before any appeal is filed. In recognition of the fact that such transcripts may already have been purchased, this rule allows an appellant, in lieu of depositing funds for a reporter's transcript, to deposit with the trial court a certified transcript of the proceedings necessary for the appeal. Subdivisions (a)(2)(C)(iv) and (a)(2)(D)(iii) make clear that the certified transcript may be filed in lieu of a deposit for a reporter's transcript only where the certified transcript contains all of the proceedings required under rule 8.865 and the transcript complies with the format requirements of rule ~~8.144~~ 8.838 (e.g., cover information, renumbered pages, required indexes). Parties using this alternative to a deposit are responsible for ensuring that such transcripts are in the proper format. Parties may arrange with a court reporter to do the necessary formatting of the transcript or may do the formatting themselves.

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All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	N	**Does the proposal appropriately address the stated purpose?** It shifts much of the burden relating to the format of electronic transcripts from Court Reporters to courts or filers. See comments on specific issues below	
2.	California Court Reporters Association	NI	**Does the proposal appropriately address the stated purpose?** Yes. See comments on specific issues below	
3.	Orange County Bar Association By Michael A. Gregg, President Newport Beach	A	**Does the proposal appropriately address the stated purpose?** Yes. See comments on specific issues below	
4.	Susan L. Rocha		Comments not related to proposal.	
5.	Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	A	See comments on specific issues below	
6.	Superior Court of Orange County By Elizabeth Flores, Operations Analyst	AM	**Does the proposal appropriately address the stated purpose?** Yes. See comments on specific issues below	
7.	Superior Court of San Diego County By Michael Roddy, Executive Officer	N	**Does the proposal appropriately address the stated purpose?** No See comments on specific issues below	

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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All comments are verbatim unless indicated by an asterisk (*).

Issue 1. Rules 8.130(b)(3)(C), 8.834(b)(2)(D), 8.866(a)(2)(C) and (D), and 8.919(a)(2)(C) and (D) – Use of Transcripts as Substitute for Deposit for Reporter's Transcript		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	The other area of concern is with the change to the requirement that certified transcripts submitted in lieu of making a deposit for the reporter's transcript must not be filed by the trial court unless they are in the proper format. Currently, rule 8.144(e) allows daily or other certified transcripts to be used for all or part of the reporter's transcript, but the pages must be renumbered consecutively, and the required indexes and covers must be added. The amendment makes it clear that the trial court is not to accept these transcripts unless they comply with rule 8.144. These are civil transcripts, and besides the training the trial court appeals clerks would be required to have to assess whether a transcript complies with the rules, there is potentially an access to justice component that needs to be considered. Up to 25% of civil filers are in pro. per., and their ability to comply with this rule is limited. A large law firm with a well-trained staff may be able to reformat a daily transcript so it contains a proper cover sheet, indexes that comply with the formatting rules, and consecutive pagination beginning with page one and ending with the page certifying the daily transcript. However, a pro. per. litigant or even a solo practitioner with limited legal staff will have difficulty complying. An appeal may proceed without the reporter's transcript, but at the appellant's risk of failure to provide an adequate record. A professional court reporter is in the best position to provide a properly formatted transcript to the appellate courts. In addition, determining whether to accept a reporter's transcript not in compliance with the appellate rules is best	The committee appreciates this comment. The committee's view is that the recommended amendments to rule 8.130(b)(3)(C) (and similar rules) are clarifying and implementing the intent of amendments to this rule that were adopted by the Judicial Council effective January 1, 2014. In response to this comment, the committee has revised its recommended amendment to the advisory committee comments to these rules to make this existing intent clearer and to further clarify that parties who wish to use this substitute for a deposit may either arrange with a court reporter to put the previously purchased transcripts in the required format or may reformat the transcripts themselves. The committee also recommends that a similar advisory committee comment addressing the filing of certified transcripts in lieu of a deposit be added for rule 8.834, which did not previously have any advisory committee comment. As recognized by both the commentator and the organization that suggested amending this rule, the California Court Reporters Association, there are challenges associated with using previously purchased certified transcripts as a substitute for depositing funds to purchase a new transcript. This provision is designed to benefit litigants by giving them a way to use already purchased transcripts and thus lowering their litigation costs. But the appellate courts and litigants need transcripts to be formatted so that they are navigable and contain necessary information and court reporters (who

Issue 1. Rules 8.130(b)(3)(C), 8.834(b)(2)(D), 8.866(a)(2)(C) and (D), and 8.919(a)(2)(C) and (D) – Use of Transcripts as Substitute for Deposit for Reporter's Transcript		
Commenter	**Comment**	**Committee Response**
	left to the discretion of the appellate court. The reporter's transcript is an appellate court filing, but if the trial court is not to accept a noncompliant transcript, then the appellate court is deprived of its discretion to determine whether it will accept a noncompliant daily reporter's transcript in the interests of justice.	are acting as independent contractors when preparing transcripts) should not be asked to work on transcripts without appropriate compensation. When the committee recommended adoption of the existing rule language in 2013, it tried to find the appropriate balance for all of these interests. As noted in this invitation to comment, the 2013 report to the Judicial Council noted that the current rule language specifically stated that this rule language is intended to "clearly place responsibility on the designating party for ensuring that such transcripts are in the proper format." The amendments to rule 8.130 and related rules and advisory committee comments now being recommended by the committee are meant to further implement this existing policy in light of continuing challenges with this procedure. The committee agrees with the commentator that some parties who have previously purchased all of the necessary transcripts for an appeal (note that this is likely to be a very small proportion of litigants) may have difficulty putting these transcripts in the appropriate format themselves. But these parties have options beyond reformatting the transcripts themselves. In addressing public comments similar to these in 2013, the report to the Judicial Council notes that depositing parties who wish to use this procedure can either engage court reporters to do the necessary reformatting or reformat the transcripts themselves: "[I]it is the committees' understanding that under the current rules some parties have successfully repaginated and prepared

Issue 1. Rules 8.130(b)(3)(C), 8.834(b)(2)(D), 8.866(a)(2)(C) and (D), and 8.919(a)(2)(C) and (D) – Use of Transcripts as Substitute for Deposit for Reporter's Transcript		
Commenter	**Comment**	**Committee Response**
		indices for previously purchased transcripts and submitted these in lieu of a deposit for a reporter's transcript. The committees' view is that the amendments to these rules should not take this option away from parties, particularly since this is the lowest-cost option available to parties who have the necessary transcripts for the appeal." Thus, litigants who have previously purchased all the necessary transcripts for an appeal have options – they can attempt to put these transcripts in the necessary format themselves, they can engage a court reporter to put the transcripts in the necessary format, or they can deposit funds with the court to cover the costs of a court reporter preparing a new transcript containing all of the required proceedings (at a reduced per page rate that recognizes that the proceedings were previously transcribed by the court reporter). As noted in this invitation to comment, if a litigant attempts to use the first option and fails to put the transcript in the required format, this does not mean that the litigant will be forced to go forward with an appeal without a reporter's transcript. The litigant will receive a default notice from the trial court (as they do with other errors relating to deposits for reporter's transcripts) and will have an opportunity to correct the formatting issues using any of the three options identified above.
California Court Reporters Association	**Rule 8.130** - CCRA concurs with the changes proposed by the committee.	The committee appreciates these comments.

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All comments are verbatim unless indicated by an asterisk (*).

Issue 1. Rules 8.130(b)(3)(C), 8.834(b)(2)(D), 8.866(a)(2)(C) and (D), and 8.919(a)(2)(C) and (D) – Use of Transcripts as Substitute for Deposit for Reporter's Transcript		
Commenter	**Comment**	**Committee Response**
	Rule 8.834 - CCRA concurs with the changes proposed by the committee. **Rule 8.866** - CCRA concurs with the changes proposed by the committee. **Rule 8.919** - CCRA concurs with the changes proposed by the committee.	

Issue 2. Rule 8.144(b)(6) – Allowing a Reporter's Transcripts in Electronic Form to Be in a Single Volume		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	CCRA concurs with the changes proposed by the committee.	The committee appreciates this comment.
Superior Court of San Diego County By Michael Roddy, Executive Officer	**Other Comments**: Having multiple reporters merge their transcripts into one single electronic volume is concerning because, in this court, a primary reporter is able to "block number," meaning the primary reporter can assign each reporter a certain number of pages and a volume number. All of the reporters are then able to work on their transcripts immediately. In the proposal, if block numbering is not allowed, the primary reporter needs to contact every reporter on the case to find out how many pages each reporter has. Some reporters are quick to respond; for a variety of reasons, some aren't. This will delay reporters in being able to get their transcripts out timely.	To the extent that this comment is addressing the proposal to amend rule 8.144(b)(6) allow reporter's transcripts in electronic form to be in a single volume, rather than in volumes of 300 pages, the committee notes that amendment being recommended would make use of a single volume optional; a court reporter—including reporters in a multiple-reporter case—could choose to produce the transcript in separate volumes not exceeding 300 pages.

Issue 2. Rule 8.144(b)(6) – Allowing a Reporter's Transcripts in Electronic Form to Be in a Single Volume		
Commenter	**Comment**	**Committee Response**
	In addition, under a one-volume rule, if one reporter requested and received an extension of time from the Court of Appeal, every reporter involved would then be delayed. Extensions are requested for a variety of reasons, such as workload, illness, or computer issues. Extensions of time would also then raise questions as to who is responsible for the master index and merging of all transcripts. Similarly, some reporters start working on appeal transcripts immediately after receiving a Notice to Prepare and turn them in well before the due date. Other reporters consistently turn their transcripts in on the due date. The primary reporter needs time to comply with the requirements, whatever they may be. Which reporter will be responsible in these situations for the merging? Another issue is that reporters use many different software systems which will make it difficult, if not impossible, to run an index once all transcripts are merged. Finally (on having one volume), if a reporter makes a mistake in his/her portion, every reporter would possibly have to redo page numbering on their volume. If that were to happen, it may cause delay and it is unclear who is responsible for paying for all of the other reporters' time.	

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All comments are verbatim unless indicated by an asterisk (*).

Issue 3. Should the 300-page volume limit be changed for clerk's transcripts that are in electronic form?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	We currently get many transcripts containing multiple volumes combined in a single filing as long as it meets the requirement of less than 25 MB and 300 pages. Lifting the 300-page volume limit while keeping the 25 MB limit for a filing would not pose a problem. However, if the filing contains more than one volume, the separate volumes must be electronically bookmarked accordingly.	The committee appreciates this comment. The recommended amendment does not alter requirements regarding bookmarking.
California Court Reporters Association	Does not pertain to reporter's transcripts; no comment.	No response required.
Orange County Bar Association By Michael A. Gregg, President	Yes	In response to this and other comments, the committee is recommending that the 300-page volume limit be changed for clerk's, as well as reporter's, transcripts that are in electronic form.
Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	The Court agrees that the 300-page volume limit should also be eliminated for electronic clerk's transcripts, to conform with the proposed rule change for electronic reporter's transcripts.	Please see response to the comments of the Orange County Bar Association above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Yes, to comply with rule stating that electronic transcripts should be in a single electronic volume that may not be larger than 25 megabytes.	Please see response to the comments of the Orange County Bar Association above.
Superior Court of San Diego County By Michael Roddy, Executive Officer	No opinion	No response required.

 Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated

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Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 4. Rule 8.144(d) and (f) – Pagination of transcripts in multiple reporter cases		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	**(d) -** CCRA concurs with the changes proposed by the committee so long as CCRA's proposed change to (f)(3) is accepted by the committee, as described below: **(f)(1) -** CCRA concurs with the changes proposed by the committee **(f)(2) -** CCRA concurs with the changes proposed by the committee **(f)(3)** CCRA concurs with the changes proposed by the committee except that in (f)(3), instead of again using the "plus" sign here, a "greater than sign" (>) should be used. CCRA has determined that the a "greater than sign" (>) is best compatible with submitting transcripts in electronic form when a segment of a transcript has fewer than the assigned number of pages. For example, as the committee proposes in (f)(2), if a segment is assigned through page 300 and exceeds that range, the following page numbers would read 300+1, 300+2, etc., and the next page would start on page 301. In CCRA's proposal, if the segment is assigned through pages 300 and the last page actually ended on page 296, the last page number would be 296>300, and the next page would be 301. CCRA anticipates that PDF viewer would be able to "jump" to either symbol for purposes of viewing or printing pages.	Based on the totality of the comments received regarding pagination of transcripts in multiple reporter cases (see additional comments in Issues 5 through 7 below), the committee concluded that additional study of this topic is needed and is therefore not recommending changes to rule 8.144(f)(2) and (3) at this time.

Issue 5. Do transcript users anticipate any difficulties printing, or navigating to, pages numbered using the plus-sign format?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	Yes. Of particular import to the appellate courts is the issue of pagination in multiple-reporter transcripts. For an electronic reporters' transcript to be fully navigable by the court, the first page must begin with the number one and pages numbered consecutively to the end. This allows the court to use the Adobe page finder to easily navigate to the transcript page cited by the attorney. The transcript filed with the court should neither have a hyphen nor a plus sign in the pagination. Rather, the lead reporter should repaginate the transcript, so it is numbered consecutively from page one to the end. The Adobe page counter converts both the hyphen and the plus sign to the beginning number, so 4-1 becomes 4 and 4+1 becomes 4. If an attorney cites to a record with a page number using either a hyphen or a plus sign, e.g., 4+1, the page finder will take you to page four, when, the page number is 5. This leads to the page finder being obsolete, resulting in additional scrolling to find the actual page the cite is on. In other words, if the cite is to page 4+10, the page finder would take you to page 4 but you would have to continue searching for the citation until you got to the actual page of the citation, which in this instance is page 14. This then puts the remainder of the pages out of order as well. Our recommendation is that you change rule 8.144(b)(2)(D) to remove "except as provided in (f)," and have the transcript repaginated by the lead reporter, which is easily done in Adobe by using the Bates stamp functionality. The original page numbers submitted by the certifying reporter remains, and a Bates number is applied, allowing the filer to	The comments received regarding pagination in multiple reporter cases suggest that there are ongoing concerns about how best to address these situations in general and commentors had mixed views about whether the alternative pagination format proposed in the invitation to comment when a segment has either more or fewer pages than assigned by the primary reporter would be preferable to the current format. The committee believes that this issue would benefit from further study and is therefore not recommending that the rules be amended to alter the current page numbering format at this time. In the meantime, the committee concluded that it would be appropriate to recommend the amendments to rules 8.144(d)(1)(C), 8.452(e), and 8.456(e) that were circulated for public comment. These amendments do not authorize any expansion in the situations, identified as problematic by several commentors, in which the page numbers on the transcript will not match the page numbers shown in the PDF viewer. Instead, these recommended amendments are intended to provide internal consistency within the existing rules by acknowledging when, under these existing rules, the page numbers on a transcript may not match the page numbers shown in the PDF viewer.

Issue 5. Do transcript users anticipate any difficulties printing, or navigating to, pages numbered using the plus-sign format?		
Commenter	**Comment**	**Committee Response**
	cite to the Bates number and the Adobe page finder to work correctly.	
California Court Reporters Association	CCRA anticipates that the PDF viewer will detect the usage of the plus sign (+) and the greater than sign (>) and allow the PDF viewer to "jump" to a page containing those symbols for viewing and/or printing and therefore anticipates no difficulties with the use of such symbols.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Orange County Bar Association By Michael A. Gregg, President	Yes, it will be more difficult to navigate within a PDF if the page numbers don't match the page counter in the PDF file viewer. We would encourage the reporters and rules committee come up with a more creative solution to this problem. E.g., perhaps the reporter on the first hearing can be designated to renumber all the pages so that they are consecutive.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	No	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of San Diego County By Michael Roddy, Executive	Unknown. It is untested in this court whether using the plus sign will cause problems with any of the different software programs used by the reporters. However, some might find it confusing for the plus sign to mean one thing for additional pages, yet mean another thing for a remaining block of pages.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.

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All comments are verbatim unless indicated by an asterisk (*).

Issue 6. Should the rules permit block numbering?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	No. The Court Reporter in a multi-reporter transcript has sufficient technology to provide an accurate estimate to the lead reporter about the number of pages needed to transcribe their portion of the transcript. Block numbering wreaks havoc on the navigability of electronic transcripts. For example, using the 300-page volume limit as an example, block numbering allows the lead reporter to assign pages 1-300 to reporter one, 301-600 to reporter two, 601-900 to reporter three and so on. None of the reporters is required to estimate the number of pages they actually need for their portion of the transcript, and reporter one may only need 25 pages. Thus, this transcript, which may only have 100 pages of actual transcript, is filed as three volumes, 900 pages, when the actual transcript is three volumes, 100 pages. The Clerk's Office is required to put the page numbers of the record on the docket for purposes of assignment. A 100-page transcript is a small record, while a 900-page transcript along with the size of the clerk's transcript may be either a medium or large record. In some districts, court appointed counsel may be willing to accept a small-record case but not a large-record case, so this type of transcript is misleading. In addition, block number eliminates the usefulness of the Adobe page finder. If court reporters want to use block number, the lead reporter must be required to renumber the pages to maintain the navigability of the transcript. Programs such as YesLaw already have this functionality. Adobe also would allow renumbering using the Bates numbering functionality.	The comments received regarding pagination in multiple reporter cases (see comments in Issues 4 through 7 in this chart) suggest that there are ongoing concerns about how best to address these situations. The committee believes that this issue would benefit from further study and is therefore not recommending that the rules be amended to authorize block numbering at this time.
California Court Reporters Association	If by "block numbering," the committee means that the primary reporter will assign each reporter in a multiple reporter case a block of numbers (for example, 1-300) even before the individual reporter has replied to the primary reporter with their	Please see response to the comments of the Appellate Court Clerk Executive Officers above.

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All comments are verbatim unless indicated by an asterisk (*).

Issue 6. Should the rules permit block numbering?		
Commenter	**Comment**	**Committee Response**
	estimated page court, then, yes, this should be allowed for in the rules. There are some circumstances where block numbering is necessary because a reporter has moved or retired or is otherwise unavailable in a timely manner and the primary may need to "block" that reporter.	
Orange County Bar Association By Michael A. Gregg, President	A single numbering system should be chosen and used consistently.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	No	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of San Diego County By Michael Roddy, Executive	Yes.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.

Issue 7. Can transcripts in multiple reporter cases easily include the equivalent of Bates-stamped page numbers or easily be repaginated to avoid the navigational problems that occur when the pagination of such transcripts is not consecutive and does not match the page number shown in the PDF viewer?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	Yes, and this is preferable to either the hyphen or plus sign or block numbering.	The comments received regarding pagination in multiple reporter cases suggest that there are ongoing concerns about how best to address these situations. The committee believes that this issue would benefit from further study.
California Court Reporters Association	If CCRA understands this question correctly, i.e., can an electronic Bates-stamp be placed in the transcript by the primary reporter in addition to the page numbering system	Please see response to the comments of the Appellate Court Clerk Executive Officers above.

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All comments are verbatim unless indicated by an asterisk (*).

Issue 7. Can transcripts in multiple reporter cases easily include the equivalent of Bates-stamped page numbers or easily be repaginated to avoid the navigational problems that occur when the pagination of such transcripts is not consecutive and does not match the page number shown in the PDF viewer?		
Commenter	**Comment**	**Committee Response**
	described and proposed in item 3 above, then the answer is no. CCRA welcomes clarification to the question if we have misunderstood the intent of this question.	
Orange County Bar Association By Michael A. Gregg, President	See comment above [A single numbering system should be chosen and used consistently**]**	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	Regarding the discrepancies in consecutive paginations exhibited across multiple-reporter cases and PDF viewer, the Court does not believe these navigational issues can be resolved via repagination or by including a Bates stamped page equivalent.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Yes	Please see response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of San Diego County By Michael Roddy, Executive	Repagination would not be easy.	Please see response to the comments of the Appellate Court Clerk Executive Officers above.

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All comments are verbatim unless indicated by an asterisk (*).

Issue 8. Rules 8.144(d), 8.204(a), and 8.622(a) - Changing references to the "electronic format" of reporter's transcripts or the record on appeal		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	**Rule 8.204** - CCRA concurs with the changes proposed by the committee. **Rule 8.622** - CCRA concurs with the changes proposed by the committee.	The committee appreciates these comments.

Issue 9. Rule 8.153 - Lending the Record - General		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	Alternative rule language suggested: **Rule 8.153. Lending the Record** **(a) Request** Within 20 days after the record is filed in the reviewing court, a party that has not purchased its own copy of the record may request another party, in writing, to lend it that party's copy of the record. (1) If the lending party has received their copy of the reporter's transcript in electronic form, in lieu of lending its copy of the reporter's transcript to the borrowing party, within 5 days of receiving a request to borrow the record, the lending party shall ask the court reporter, in writing, to send an electronic read-only copy of the reporter's transcript to the borrowing party. The court reporter must promptly send the copy to the borrowing party. The court reporter may set an	This alternative rule proposal includes important substantive changes to the proposal that was circulated for public comment. Under the rule that governs the Judicial Council rule-making process, California Rules of Court, rule 10.22, only a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy may be recommended for adoption by the Judicial Council without first being circulating it for comment. Therefore, the committee cannot recommend adoption of this alternative rule regarding lending the record at this time; any such proposal must first be circulated for public comment. Based on this and the other comments received regarding the proposed amendments to this rule, the committee has decided not to recommend any changes to rule 8.153 at this time. Possible amendments will be considered for a later rules cycle.

Issue 9. Rule 8.153 - Lending the Record - General		
Commenter	**Comment**	**Committee Response**
	expiration date to the viewing of the read-only copy to a time after the borrowing party serves its brief or the time to file its brief has expired. (2) If the lending party has received their copy of the reporter's transcript in paper form, the lending party must then lend its copy of the reporter's transcript when it serves its brief to the borrowing party. The borrowing party must return the copy of the record to the lending party when it serves its brief or the time to file its brief has expired. The borrowing party must bear the cost of sending the copy of the record to and from the borrowing party. CCRA believes that the above proposal addresses the committee's concern about whether the lend/borrow option should be available in all cases or only when the lending party's copy of the reporter's transcript is in paper form (by proposing options for both paper and electronic transcripts) and the committee's concern about what format requirements should be applied to a transcript sent to a borrowing party in read-only format. CCRA offers the above proposal as clear direction to the reporter and clear direction to the lending and borrowing party in such instances where this rule is utilized. The above proposal also addresses the committee's concern regarding whether it is necessary for the borrowing party to return an electronic copy of the reporter's transcript by allowing for an expiration date, which is currently common practice for reporter's transcripts for depositions when the deponent does not wish to purchase a copy of the transcript, but	

Issue 9. Rule 8.153 - Lending the Record - General		
Commenter	**Comment**	**Committee Response**
	receives an electronic read-only copy to view and sign their deposition without retaining a copy they did not pay for. CCRA believes the above proposal encourages compliance with Government Code section 69954(d) regarding not providing copies of reporter's transcripts to those who have not paid for a copy while balancing the need for a party to reference a reporter's transcript in order to serve a responsive brief.	
Superior Court of San Diego County By Michael Roddy, Executive Officer	On lending copies generally, Government Code section 69954(d) states: "Any court, party, or person who has purchased a transcript may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, *but shall not otherwise provide* or sell a copy or copies to any other party or person." (Emphasis added.)	Based on this and the other comments received on the committee has decided not to recommend any changes to rule 8.153 at this time. Possible amendments will be considered for a later rules cycle.

Issue 10. Lending the Record - Should the option of asking a court reporter to send the borrowing party a copy of the reporter's transcript in electronic form be available in all cases or only when the lending party's copy of the reporter's transcript is in paper form?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	It makes sense to have it available in all cases.	Based on this and the other comments received on the committee has decided not to recommend any changes to rule 8.153 at this time. Possible amendments will be considered for a later rules cycle.
California Court Reporters Association	In all cases, both electronic and paper, as proposed in item 3 above [please see comments in preceding table "Rule 8.153 - Lending the Record – General"]	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 10. Lending the Record - Should the option of asking a court reporter to send the borrowing party a copy of the reporter's transcript in electronic form be available in all cases or only when the lending party's copy of the reporter's transcript is in paper form?		
Commenter	**Comment**	**Committee Response**
Orange County Bar Association By Michael A. Gregg, President	All cases	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Case Processing does not believe we have the jurisdiction to request this.	No response required.
Superior Court of San Diego County By Michael Roddy, Executive Officer	No, the additional option should not be added, and lending of electronic copies should not be allowed at all. Once an electronic copy is sent, the receiver could keep it in perpetuity. In addition, requiring court reporters to respond "promptly," or to respond at all, to requests for electronic copies would place an additional burden on an already strained workpool.	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.

Issue 11. Lending the Record – What format requirements should be applied to a transcript sent by a court reporter to a borrowing party?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	No comment.	Based on this and the other comments received on the committee has decided not to recommend any changes to rule 8.153 at this time. Possible amendments will be considered for a later rules cycle.
California Court Reporters Association	Read-only format with expiration date, as proposed in item 3 above [please see comments in preceding table "Rule 8.153 - Lending the Record – General"]	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 11. Lending the Record – What format requirements should be applied to a transcript sent by a court reporter to a borrowing party?		
Commenter	**Comment**	**Committee Response**
Orange County Bar Association By Michael A. Gregg, President	The borrowing respondent should receive the same format as the appellant, not just a read-only copy.	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	N/A	No response required.
Superior Court of San Diego County By Michael Roddy, Executive	Read-only; no ability to print, comment, or highlight.	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.

Issue 12. Lending the Record – Is it necessary for a party borrowing the record from another party to return an electronic copy of either the clerk's transcript or an administrative record provided by the lending party or a read-only electronic copy of the reporter's transcript provided by the court reporter?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	No comment.	No response required.
California Court Reporters Association	No, because the read-only format with expiration date, as proposed in item 3, addresses this issue [please see comments in preceding table "Rule 8.153 - Lending the Record – General"]	Based on this and the other comments received on the committee has decided not to recommend any changes to rule 8.153 at this time. Possible amendments will be considered for a later rules cycle.
Orange County Bar Association By Michael A. Gregg, President	No.	Please see response to comments of the California Court Reporters Association above.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 12. Lending the Record – Is it necessary for a party borrowing the record from another party to return an electronic copy of either the clerk's transcript or an administrative record provided by the lending party or a read-only electronic copy of the reporter's transcript provided by the court reporter?		
Commenter	**Comment**	**Committee Response**
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Case Processing does not believe we have the jurisdiction to request this.	No response required.
Superior Court San Diego County By Michael Roddy, Executive	It is unclear how "returning" an electronic copy would be accomplished. If it is allowed to be lent, there's nothing preventing the borrower from keeping the email with the electronic copy.	Please see response to comments of the California Court Reporters Association above.

Issue 13. Rules 8.452 and 8.456		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	**Rule 8.452** - CCRA concurs with the changes proposed by the committee. **Rule 8.456** - CCRA concurs with the changes proposed by the committee.	The committee appreciates these comments.

Issue 14. Rules 8.834, 8.838, 8.866 and 8.919		
Commenter	**Comment**	**Committee Response**
California Court Reporters Association	**Rule 8.834** - CCRA concurs with the changes proposed by the committee **Rule 8.838** - CCRA concurs with the changes proposed by the committee.	The committee appreciates these comments.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 14. Rules 8.834, 8.838, 8.866 and 8.919		
Commenter	**Comment**	**Committee Response**
	Rule 8.866 - CCRA concurs with the changes proposed by the committee. **Rule 8.919** - CCRA concurs with the changes proposed by the committee.	

Issue 15. Would the proposal provide cost savings?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	No	The committee appreciates this input.
Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	With respect to implementation, the Court does not see any cost savings from this proposal.	The committee appreciates this input.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Yes, the process would be more efficient as it has the potential to reduce errors and processing time for staff.	The committee appreciates this input.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 16. What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	If the trial court clerk is not to accept a daily transcript that does not comply with the formatting requirements of rule 8.144, it would require training for the trial courts.	The committee appreciates this input.
Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	Instead, it anticipates there will be implementation costs associated with staff training and with resources required to update reference materials.	The committee appreciates this input.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Minimal training for staff on updated procedures.	The committee appreciates this input.
Superior Court of San Diego County By Michael Roddy, Executive	Fiscal impact: while the fiscal impact on the court may be minimal, the impact on the reporters may be more substantive.	The committee appreciates this input.

Issue 17. Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	No, it would depend on the ability to get proper training developed and out to the trial courts, and the trial courts' ability to have staff attend training and the technology and resources to implement the changes.	Based on this comment and the comment of the Superior Court of Los Angeles County, the committee is recommending that the recommended rule amendments take effect January 1, 2024, rather than September 1, 2023, as proposed in the invitation to comment.

W23-02

Appellate Procedure: Reporter's transcripts (amend Cal. Rules of Court, rules 8.130, 8.144, 8.153, 8.204, 8.452, 8.456, 8.622, 8.834, 8.838, 8.866, and 8.919)

All comments are verbatim unless indicated by an asterisk (*).

Issue 17. Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?		
Commenter	**Comment**	**Committee Response**
Superior Court of Los Angeles County By Bryan Borys, Director of Research and Data Management	For those reasons [in the previous two charts], the Court requests an effective date of January 1, 2024 to allow for staff training and to allow eCART time to implement the proposed changes.	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	Yes	Please see the response to the comments of the Appellate Court Clerk Executive Officers above.

Issue 18. How well would this proposal work in courts of different sizes?		
Commenter	**Comment**	**Committee Response**
Appellate Court Clerk Executive Officers By Colette M. Bruggman Sacramento	It is less about the size of the court and more about the size of the staff assigned to appeals and the quality of their training.	The committee appreciates this input.
Superior Court of Orange County By Elizabeth Flores, Operations Analyst	The proposal will have minimal impact to courts of different sizes.	The committee appreciates this input.

Item number: 03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/5/23

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Jury Instructions: Civil Jury Instructions (Release 43)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Judicial Council of California Civil Jury Instructions (CACI), Add CACI Nos. VF 2708 and VF 2709; and revise CACI Nos. 403, 512, 513, 904, 1010, 2508, 2541, 2600, and 4603.

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

*Staff contact (*name, phone and e-mail*): Eric Long, 415-865-7691, eric.long@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/01/22
Project description from annual agenda: 1. Maintenance—Case Law; 2. Maintenance—Legislation; 3. New Instructions and Expansion into New Subject Matter Areas; 4. Maintenance—Comments from Users; 5. Maintenance—Sources and Authority; 6. Maintenance—Secondary Sources

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-091
For business meeting on: May 11–12, 2023

Title
Jury Instructions: Civil Jury Instructions (Release 43)

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

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Agenda Item Type
Action Required

Effective Date
May 12, 2023

Date of Report
March 28, 2023

Contact
Eric Long, 415-865-7691
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of new and revised civil jury instructions and verdict forms prepared by the committee. Among other things, these changes bring the instructions up to date with developments in the law over the previous six months and add new verdict forms in the Labor Code Actions series. Upon Judicial Council approval, the instructions will be published in the midyear supplement to the official 2023 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 12, 2023, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the following civil jury instructions prepared by the committee:

1. Addition of 2 new verdict forms in the Labor Code Actions series: CACI Nos. VF-2708 and VF-2709; and

2. Revisions to 9 instructions: CACI Nos. 403, 512, 513, 904, 1010, 2508, 2541, 2600, and 4603.

A table of contents and the proposed new and revised civil jury instructions and verdict forms are attached at pages 6–44.

Relevant Previous Council Action

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

This is release 43 of *CACI*. The council approved release 42 at its December 2022 meeting.

Analysis/Rationale

A total of 11 instructions and verdict forms are presented in this release. The Judicial Council's Rules Committee has also approved, at its meeting on April 5, 2023, changes to 23 additional instructions under a delegation of authority from the council to the Rules Committee.[2]

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

New verdict forms

Meal break violations. The committee recommends two new verdict forms based on CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Along with the adoption of new instructions in the meal break area in the last release, the committee recommended companion verdict forms. At that time, the committee did not recommend a verdict form for meal break claims involving employer records and the rebuttable presumption of a violation based on those records (CACI No. 2766B). A commenter suggested during public

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

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

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

comment that the committee develop another new verdict form for meal break violations based on employee records. The committee now recommends two verdict forms for different scenarios: employer records showing noncompliance (VF-2708) and employer records that are inaccurate or missing (VF-2709). The committee acknowledges that claims involving both scenarios may be common. The committee will continue to monitor the law as it develops in this area and will propose additional instructions and verdict forms and revisions to existing content as appropriate. The committee welcomes suggestions from the bench and bar, especially those suggestions that follow from a jury trial.[3]

Revised instructions

Language referring to persons with disabilities (CACI Nos. 403, 512, 513, 904, 2508, and 2541). In 1990, the federal government passed the Americans with Disabilities Act (ADA), which prohibits discrimination against individuals with disabilities in all areas of public life.[4] The ADA National Network (ADANN) provides information, guidance, and training on implementing the ADA to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." [5] The ADANN has published *Guidelines for Writing About People With Disabilities*, which encourages the use of language consistent with the principles of the ADA, including "portraying individuals with disabilities in a respectful and balanced way by using language that is accurate, neutral and objective."[6]

The guidelines provide that, generally, the person should be referred to first and the disability second: "People with disabilities are, first and foremost, people. Labeling a person equates the person with a condition and can be disrespectful and dehumanizing. A person isn't a disability, condition or diagnosis; a person *has* a disability, condition or diagnosis. This is called Person-First Language."[7] For example, instead of writing that a person is "mentally ill," write that a person "has a mental health condition"; instead of "[d]isabled person," write "[p]erson with a disability."[8]

Based principally on these guidelines, the committee recommends removing outdated or disfavored terms in several instructions and replacing them with more respectful language. The committee received only comments agreeing with the proposed person-first replacement language.

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[3] Suggestions and proposals for new model jury instructions may be emailed to *civiljuryinstructions@jud.ca.gov*.

[4] See 42 U.S.C. § 12101 et seq.

[5] See ADA National Network, *https://adata.org/national-network*.

[6] The guidelines may be accessed at *https://adata.org/factsheet/ADANN-writing*.

[7] ADA National Network, *Guidelines for Writing About People With Disabilities* (2018), guideline no. 3, *https://adata.org/factsheet/ADANN-writing*, original italics.

[8] *Id.* at guideline nos. 3 & 11.

CACI No. 1010, *Affirmative Defense—Recreation Immunity—Exceptions*.[9] The committee recommends changes to the Directions for Use to reflect the holding of the Supreme Court in *Hoffmann v. Young*.[10] The court in *Hoffmann* clarified that an invitation to enter property from someone other than the landowner does not abrogate the immunity of the landowner unless that person is an agent of the landowner.

CACI No. 2600, *Violation of CFRA Rights—Essential Factual Elements*. Effective January 1, 2023, an employee's right to take protected leave under the California Family Rights Act (CFRA) includes leave to care for a "designated person" who may or may not be a family member. Assembly Bill 1041 adds a definition of designated person as "any individual related by blood or whose association with the employee is the equivalent of a family relationship."[11] The committee recommends a fourth alternative option for element 2 to address leave for a designated individual who has a serious health condition.

CACI No. 4603, *Whistleblower Protection—Essential Factual Elements*. The committee recommends adding additional information to the introductory paragraph about the plaintiff's burden of proof for establishing the essential factual elements of a whistleblower protection claim. To establish the claim, an employee must prove all elements by a preponderance of the evidence. This standard is expressed as "more likely true than not true." The committee believes including this information is appropriate for this claim because a different standard of proof applies if the employer seeks to prove that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. The committee also recommends adding a definition of "contributing factor" derived from the Supreme Court's decision in *Lawson v. PPG Architectural Finishes, Inc.*[12]

Policy implications

The committee endeavors to express the law in plain English. Except for language choices, there are generally no policy implications. With respect to the language referring to persons with disabilities, modernizing the language of *CACI*'s instructions is also consistent with *The Strategic Plan for California's Judicial Branch*, specifically the goals of Access, Fairness, Diversity, and Inclusion (Goal I) and Quality of Justice and Service to the Public (Goal IV).[13]

Comments

The proposed additions and revisions in *CACI* circulated for comment from February 1 through March 14, 2023. Comments were received from 7 commenters: a lawyer, a law firm, 2 bar

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[9] The version of CACI No. 1010 that circulated for public comment showed content that the council had already approved in May 2021 as proposed changes. That inadvertent designation has been corrected in the instruction attached to this report.

[10] (2022) 13 Cal.5th 1257, 1270 [297 Cal.Rptr.3d 607, 515 P.3d 635].

[11] Stat. 2022; ch. 748, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1041*.

[12] (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659].

[13] The council's strategic plan may be accessed at *https://www.courts.ca.gov/3045.htm*.

associations, and 3 other organizations. Most commenters submitted comments on multiple instructions and verdict forms. No particular instruction garnered any unusual attention or opposition.

The committee evaluated all comments and, as a result, refined some of the instructions and verdict forms in this release. A chart of the comments received and the committee's responses is attached at pages 45–77.

Alternatives considered

Rules 2.1050(e) and 10.58(a) of the California Rules of Court require the committee to update, revise, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. There are no alternative actions for the committee to consider. The committee did, however, consider suggestions received from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration while other suggested revisions were declined for lack of support.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. Jury instructions, at pages 6–44
2. Chart of comments, at pages 45–77

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Release 43; May 2023

403. Standard of Care for Person with a Physical Disability (Revise) p. 7

512. Wrongful Birth—Essential Factual Elements (Revise) p. 9

513. Wrongful Life—Essential Factual Elements (Revise) p. 11

904. Duty of Common Carrier Toward Passengers With Illness or Disability (Revise) p. 14

1010. Affirmative Defense—Recreation Immunity—Exceptions (Revise) p. 15

2508. Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation (Revise) p. 20

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Revise) p. 24

2600. Violation of CFRA Rights—Essential Factual Elements (Revise) p. 31

VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (New) p. 34

VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (New) p. 37

4603. Whistleblower Protection—Essential Factual Elements (Revise) p. 39

403. Standard of Care for ~~Physically Disabled~~ Person with a Physical Disability

A person with a physical disability is required to use the amount of care that a reasonably careful person who has the same physical disability would use in the same situation.

New September 2003; Revised May 2023

Directions for Use

By "same" disability, this instruction is referring to the effect of the disability, not the cause.

Sources and Authority

- Liability of Person of "Unsound Mind." Civil Code section 41.

- "[A] person [whose faculties are impaired] is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances."
- ~~Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." (See also~~ *Conjorsky v. Murray* (1955) 135 Cal.App.2d 478, 482 [287 P.2d 505].~~);~~

- "The jury was properly instructed that negligence is failure to use ordinary care and that ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs. A person with faculties impaired is held to the same degree of care and no higher. He is bound to use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances." (*Jones v. Bayley* (1942) 49 Cal.App.2d 647, 654 [122 P.2d 293].)

- "We conclude sudden mental illness may not be posed as a defense to harmful conduct and that the harm caused by such individual's behavior shall be judged on the objective reasonable person standard in the context of a negligence action as expressed in Civil Code section 41." ~~Persons with mental illnesses are not covered by the same standard as persons with physical illnesses.~~ (~~See~~ *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, 1323 [53 Cal.Rptr.2d 635].)

- ~~Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances."~~

~~As to contributory negligence, the courts agree with the Restatement's position that mental deficiency that falls short of insanity does not excuse conduct that is otherwise contributory negligence. (*Fox v. City and County of San Francisco* (1975) 47 Cal.App.3d 164, 169 [120 Cal.Rptr. 779]; Rest.2d Torts, § 464, com. g.~~

- Restatement Second of Torts, section 283B, provides: "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform

to the standard of a reasonable man under like circumstances."

- Restatement Second of Torts, section 283C, provides: "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability."

Secondary Sources

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.20

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

512. Wrongful Birth—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [*name of defendant*] failed to inform [him/her/*nonbinary pronoun*] of the risk that [he/she/*nonbinary pronoun*] would have a ~~[genetically impaired/disabled]~~ child with a [genetic impairment/disability]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*] of] the risk that [*name of child*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*] of tests] that would more likely than not have disclosed the risk that [*name of child*] would be born with a [genetic impairment/disability];]

2. That [*name of child*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*] had known of the [genetic impairment/disability], [*insert name of mother*] would not have conceived [*name of child*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*] to have to pay extraordinary expenses to care for [*name of child*].

New September 2003; Revised April 2007, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 513, *Wrongful Life—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

Sources and Authority

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22

Cal.Rptr.2d 819].) ~~Since the wrongful life action corresponds to the wrongful birth action, it is reasonable to conclude that this principle applies to wrongful birth actions.~~

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- ~~Regarding wrongful-life actions, courts have observed:~~ "[A]s in any medical malpractice action, the plaintiff must establish: '(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.' " (*Gami, supra,* 18 Cal.App.4th at p. 877.)

- ~~The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality.~~ "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a genetic] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra*, 212 Cal.App.3d at pp. 702–703.)

- ~~Both parent and child may recover damages to compensate for~~ "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 239 [182 Cal.Rptr. 337, 643 P.2d 954].)

- ~~In wrongful-birth actions, parents are permitted to recover the medical expenses incurred on behalf of a disabled child. The child may also recover medical expenses in a wrongful-life action, though both parent and child may not recover the same expenses.~~ "Although the parents and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care." (*Turpin, supra,* 31 Cal.3d at pp. 238~~–239~~.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1118

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.17 (Matthew Bender)

513. Wrongful Life—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent because [he/she/*nonbinary pronoun*] failed to inform [*name of plaintiff*]'s parents of the risk that [he/she/*nonbinary pronoun*] would be born with a [genetic~~ally impaired~~impairment/~~disabled~~disability]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of defendant*] negligently failed to [diagnose/ [or] warn [*name of plaintiff*]'s parents of] the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

[*or*]

[1. That [*name of defendant*] negligently failed to [perform appropriate tests/advise [*name of plaintiff*]'s parents of tests] that would more likely than not have disclosed the risk that [*name of plaintiff*] would be born with a [genetic impairment/disability];]

2. That [*name of plaintiff*] was born with a [genetic impairment/disability];

3. That if [*name of plaintiff*]'s parents had known of the risk of [genetic impairment/disability], [his/her/*nonbinary pronoun*] mother would not have conceived [him/her/*nonbinary pronoun*] [or would not have carried the fetus to term]; and

4. That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s parents to have to pay extraordinary expenses for [*name of plaintiff*].

New September 2003; Revised April 2007, April 2008, November 2019, May 2023

Directions for Use

The general medical negligence instructions on the standard of care and causation (see CACI Nos. 500–502) may be used in conjunction with this instruction. Read also CACI No. 512, *Wrongful Birth—Essential Factual Elements*, if the parents' cause of action for wrongful birth is joined with the child's cause of action for wrongful life.

In element 1, select the first option if the claim is that the defendant failed to diagnose or warn the plaintiff of a possible genetic impairment. Select the second option if the claim is that the defendant failed to order or advise of available genetic testing. In a testing case, there is no causation unless the chances that the test would disclose the impairment were at least 50 percent. (See *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702–703 [260 Cal.Rptr. 772].)

In order for this instruction to apply, the genetic impairment must result in a physical or mental disability. This is implied by the fourth element in the instruction.

Sources and Authority

- No Wrongful Life Claim Against Parent. Civil Code section 43.6(a).

- "[I]t may be helpful to recognize that although the cause of action at issue has attracted a special name—'wrongful life'—plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action. The gist of plaintiff's claim is that she has suffered harm or damage as a result of defendants' negligent performance of their professional tasks, and that, as a consequence, she is entitled to recover under generally applicable common law tort principles." (*Turpin v. Sortini* (1982) 31 Cal.3d 220, 229 [182 Cal.Rptr. 337, 643 P.2d 954].)

- "Claims for 'wrongful life' are essentially actions for malpractice based on negligent genetic counseling and testing." (*Gami v. Mullikin Medical Center* (1993) 18 Cal.App.4th 870, 883 [22 Cal.Rptr.2d 819].)

- ~~General damages are not available:~~ "[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment." (*Turpin, supra,* 31 Cal.3d at p. 239.)

- ~~A child may not recover for loss of earning capacity in a wrongful-life action.~~ "There is no loss of earning capacity caused by the doctor in negligently permitting the child to be born with a genetic defect that precludes earning a living." (*Andalon v. Superior Court* (1984) 162 Cal.App.3d 600, 614 [208 Cal.Rptr. 899].)

- ~~The negligent failure to administer a test that had only a 20 percent chance of detecting Down syndrome did not establish a reasonably probable causal connection to the birth of a child with this genetic abnormality.~~ "A mere 20 percent chance does not establish a 'reasonably probable causal connection' between defendants' negligent failure to provide [a] test and plaintiffs' injuries. A less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." (*Simmons, supra,* 212 Cal.App.3d at pp. 702–703, internal citations omitted.)

- "Wrongful life claims are actions brought on behalf of children, while wrongful birth claims refer to actions brought by parents. California courts do recognize a wrongful life claim by an 'impaired' child for special damages (but not for general damages), when the physician's negligence is the proximate cause of the child's need for extraordinary medical care and training. No court, however, has expanded tort liability to include wrongful life claims by children born without any mental or physical impairment." (*Alexandria S. v. Pac. Fertility Medical Ctr.* (1997) 55 Cal.App.4th 110, 122 [64 Cal.Rptr.2d 23], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1112–1123

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.21–9.22

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, §§ 31.15, 31.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

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

904. Duty of Common Carrier Toward ~~Disabled/Infirm~~ Passengers With Illness or Disability

If a common carrier voluntarily accepts ~~an ill or a disabled~~ a person with an illness or a disability as a passenger and is aware of that person's condition, it must use as much additional care as is reasonably necessary to ensure the passenger's safety.

New September 2003; Revised May 2023

Sources and Authority

- ~~If a carrier voluntarily accepts an ill or disabled person as a passenger and is aware of the passenger's condition, it must exercise as much care as is reasonably necessary to ensure the safety of the passenger, in view of his mental and physical condition.~~ "[I]f the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a duty required by law as well as the dictates of humanity." (*McBride v. Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966], internal citation omitted.)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02[6] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

California Civil Practice: Torts § 28:6 (Thomson Reuters)

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [*name of defendant*] proves that [*name of plaintiff*]'s harm resulted from [his/her/*nonbinary pronoun/name of person causing injury's*] entry on or use of [*name of defendant*]'s property for a recreational purpose. However, [*name of defendant*] may be still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that

[*Choose one or more of the following three options*:]

[[*name of defendant*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]

[or]

[a charge or fee was paid to [*name of defendant/*the owner] for permission to enter the property for a recreational purpose.]

[or]

[[*name of defendant*] expressly invited [*name of plaintiff*] to enter the property.]

If you find that [*name of plaintiff*] has proven one or more of these three exceptions to immunity, then you must still decide whether [*name of defendant*] is liable in light of the other instructions that I will give you.

New September 2003; Revised October 2008, December 2014, May 2017, November 2017, May 2021, May 2023

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461], disapproved on other grounds in *Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1270, fn. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635].)

Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a ~~comprehensive~~ nonexhaustive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely

clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select "the owner." (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

For the third exception involving an express invitation onto the property, "a qualifying invitation under [Civil Code] section 846(d)(3) may be made by a landowner's authorized agent who issued the invitation on the landowner's behalf." (*Hoffmann, supra,* 13 Cal.5th at pp. 1276–1277.) The plaintiff bears the burden of proving the invitation was made by a properly authorized agent or otherwise making "the showing that a nonlandowner's invitation operates as an invitation by the landowner." (*Id.* at p. 1275, 1277, fn. 16.) In some cases, it may be necessary to modify the third exception to identify the person who extended the invitation on behalf of the defendant.~~Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.~~ California law, however, does not require a "direct, personal request" from the landowner to the injured entrant. (*Id.* at p. 1270, fn. 13.)

Sources and Authority

- Recreational Immunity. Civil Code section 846.

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099–1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "To the extent plaintiff suggests that 'jogging' is not an activity with a recreational purpose because it is not specifically enumerated in section 846, subdivision (b), her suggestion is plainly without merit,

as section 846, subdivision (b) is an illustrative, not exhaustive, list." (*Rucker v. WINCAL, LLC* (2022) 74 Cal.App.5th 883, 889 [290 Cal.Rptr.3d 56].)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra,* 4 Cal.App.5th at p. 17.)

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]'s fee for recreational access to the campground was not paid to it … . We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature's purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature's chosen means, not an end unto itself." (*Pacific Gas & Electric Co., supra,* 10 Cal.App.5th at p. 566.)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315, disapproved on other grounds in *Hoffmann, supra,* 13 Cal.5th at p. 1270, fn. 13.)

- "The language of section 846, item (c), which refers to '*any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner*' does not say a person must be invited for a *recreational* purpose. The exception instead defines a person who is 'expressly invited' by distinguishing this person from one who is 'merely permitted' to come onto the land." (*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394], original italics.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

- "[W]e hold that a plaintiff may rely on the exception and impose liability if there is a showing that a landowner, or an agent acting on his or her behalf, extended an express invitation to come onto the property. (*Hoffmann, supra,* 13 Cal.5th at p. 1263.)

- "[T]he general rule of section 846(a) relieves a landowner of any duty to keep his or her premises safe for recreational users. Section 846(d)(3) creates an exception to the rule of section 846(a) for those persons who are expressly invited to come upon the premises by the landowner. Plaintiff seeks the shelter of this exception. Accordingly, she should bear the burden of persuasion on the point." (*Hoffmann, supra,* 13 Cal.5th at p. 1275.)

- "[W]e do not foreclose other ways that a plaintiff might 'make the showing that a nonlandowner's invitation operates as an invitation by the landowner.' Rather, we 'conclude that *one way* for a plaintiff invoking section 846(d)(3) to meet [the burden of showing the exception applies] would be to rely on agency principles.' " (*Hoffmann, supra,* 13 Cal.5th at p. 1277, fn. 16, original italics, second alteration original, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1245–1253

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

California Civil Practice: Torts § 16:34 (Thomson Reuters)

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

[*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)~~ California Civil Rights Department (CRD). A complaint is timely if it was filed within three years of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the ~~DFEH~~ CRD on [***date***]. [***Name of plaintiff***] may recover for acts of alleged [***specify the unlawful practice, e.g., harassment***] that occurred before [***insert date three years before the ~~DFEH~~ CRD complaint was filed***], only if [he/she/***nonbinary pronoun***] proves all of the following:**

1. **That [***name of defendant***]'s [***e.g., harassment***] that occurred before [***insert date three years before the ~~DFEH~~ CRD complaint was filed***] was similar or related to the conduct that occurred on or after that date;**

2. **That the conduct was reasonably frequent; and**

3. **That the conduct had not yet become permanent before that date.**

"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.**

New June 2010; Revised December 2011, June 2015, May 2019, May 2020, May 2023

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 three years within which to file an administrative complaint. (See Gov. Code, § 12960(e).) Although the continuing -violation doctrine is labeled an equitable exception, 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~~ CRD. (*Kim v. Konad USA Distribution, Inc.* (2014) 226

Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].) (Use "Department of Fair Employment and Housing" or "DFEH" as appropriate if the case was filed before the agency's name change.) This burden of proof extends to any excuse or justification for the failure to timely file, such as the continuing -violation exception. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1402 [194 Cal.Rptr.3d 689].)

Sources and Authority

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

- "At a jury trial, the facts are presented and the jury must decide whether there was a continuing course of unlawful conduct based on the law as stated in CACI No. 2508." (*Jumaane, supra,* 241 Cal.App.4th at p. 1401.)

- "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 [CRD, formerly known as DFEH] and obtaining a right-to-sue letter.' " (*Kim, supra,* 226 Cal.App.4th at p. 1345.)

- "[W]hen defendant has asserted the statute of limitation defense, plaintiff has the burden of proof to show his or her claims are timely under the continuing violation doctrine." (*Jumaane, supra,* 241 Cal.App.4th at p. 1402.)

- "Under the continuing violation doctrine, a plaintiff may recover for unlawful acts occurring outside the limitations period if they continued into that period. The continuing violation doctrine requires proof that (1) the defendant's actions inside and outside the limitations period are sufficiently similar in kind; (2) those actions occurred with sufficient frequency; and (3) those actions have not acquired a degree of permanence." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 850–851 [234 Cal.Rptr.3d 712] , 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, [the plaintiff] 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

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1065

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)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she/***nonbinary pronoun***] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **[That [***name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential duties of [[his/her/***nonbinary pronoun***] current position or a vacant alternative position to which [he/she/***nonbinary pronoun***] could have been reassigned/the position for which [he/she/***nonbinary pronoun***] applied] with reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, §

12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2 and 5 depending on the plaintiff's status.

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide the employee with other suitable job positions that the employee might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to any other ~~disabled or nondisabled~~ employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a

reasonable accommodation could have been made, i.e., that the employee was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "There are three elements to a failure to accommodate action: '(1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability. [Citation.]' " (*Hernandez v. Rancho Santiago Cmty. College Dist.* (2018) 22 Cal.App.5th 1187, 1193–1194 [232 Cal.Rptr.3d 349].)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential

function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)

- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- "Failure to accommodate claims are not subject to the *McDonnell Douglas* burden-shifting framework." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 926 [227 Cal.Rptr.3d 286].)

- "The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of 'reasonable accommodation' by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- " 'If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if "there is no vacant position for which the employee is qualified." [Citations.] "The responsibility to reassign a disabled employee who cannot otherwise be accommodated does 'not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .' " [Citations.] "What is required is the 'duty to reassign a disabled employee if an already funded, vacant position at the same level exists.' [Citations.]" [Citations.]' " (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- "[A]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the

employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation." ' … [¶] 'While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the *only* reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations under the [FEHA]." ' " (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- "In other words, so long as the employer is aware of the employee's condition, there is no requirement that the employer be aware that the condition is considered a disability under the FEHA. By the same token, it is insufficient to tell the employer merely that one is disabled or requires an accommodation." (*Cornell, supra,* 18 Cal.App.5th at p. 938, internal citation omitted.)

- " ' " 'This notice then triggers the employer's burden to take "positive steps" to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.' " ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- "Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an 'undue hardship.' " (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- " 'Ordinarily the reasonableness of an accommodation is an issue for the jury.' " (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- "[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA." (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "[A]n employer is relieved of the duty to reassign a disabled employee whose limitations cannot be

reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations … ." (*Atkins, supra,* 8 Cal.App.5th at p. 721.)

- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m) … ." (*Atkins, supra,* 8 Cal.App.5th at p. 717.)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra,* 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra,* 234 Cal.App.4th at pp. 377−378.)

- "While 'a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform … her duties,' a finite leave is not a reasonable accommodation when the leave leads directly to termination of employment because the employee's performance could not be evaluated while she was on the leave." (*Hernandez, supra,* 22 Cal.App.5th at p. 1194.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 977

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And*

Housing Act (FEHA), ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2600. Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her/***nonbinary pronoun***] [family care/medical] leave] [refused to return [him/her/***nonbinary pronoun***] to the same or a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse/domestic partner /grandparent/grandchild/sibling] who had a serious health condition;]**

   [to care for an individual designated by [*name of plaintiff***] [who is a blood relative/whose association to [***name of plaintiff***] is equivalent to a family relationship] who had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that made [him/her/***nonbinary pronoun***] unable to perform the functions of [his/her/***nonbinary pronoun***] job with [***name of defendant***];]**

   [for [*specify qualifying military exigency related to covered active duty or call to covered active duty of a spouse, domestic partner, child, or parent, e.g., [name of plaintiff]'s spouse's upcoming military deployment on short notice***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her/***nonbinary pronoun***] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/***nonbinary pronoun***/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she/***nonbinary pronoun***] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she/***nonbinary pronoun***] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave/refused to return [***name of plaintiff***] to the same or a comparable job when [his/her/***nonbinary pronoun***] [family care/medical] leave ended/***other violation of CFRA rights***];**

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

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

New September 2003; Revised October 2008, May 2021, May 2023

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

In the fourth bracketed option of element 2, if the plaintiff's relationship or association with the designated individual is contested, select either a blood relative or an associated person, or both, as applicable. (Gov. Code, § 12945.2(b)(2).) Omit both options if the plaintiff's relationship or association with the designated individual is not contested.

The second-to-last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. (Gov. Code, § 12945.2(b)~~(4)~~(5)(C).) If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2(b)~~(12)~~(13).) If there is no dispute concerning the relevant individual's condition qualifying as a "serious health condition," it is appropriate for the judge to instruct the jury that the condition qualifies as a "serious health condition."

The last bracketed option in element 2 requires a qualifying exigency for military family leave related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. That phrase is defined in the Unemployment Insurance Code. (See Unemp. Ins. Code, § 3302.2.)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.
- "Designated Person" Defined. Government Code section 12945.2(b)(2).
- "Employer" Defined. Government Code section 12945.2(b)~~(3)~~(4).
- "Parent" Defined. Government Code section 12945.2(b)~~(10)~~(11) (Assem. Bill 1033; Stats. 2021, ch. 327) [adding parent-in-law to the definition of parent].
- "Serious Health Condition" Defined. Government Code section 12945.2(b)~~(12)~~(13).

- "An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted, superseded on other grounds by statute.)

- "A CFRA interference claim ' "consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)

- "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438].)

- "An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee's entitlement to CFRA-qualifying leave. A CFRA interference claim 'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.' " (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)

- "The right to reinstatement is unwaivable but not unlimited." (*Richey, supra,* 60 Cal.4th at p. 919.)

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision ... .' " (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' … ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes,* ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B*, Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA),* ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

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

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**
   ____ 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. **Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday?**
   ____ 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. **How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?**

   ____ meal breaks

   Answer question 4.

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   ____ Yes ____ No

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

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ meal breaks that comply with the law?**

   ____ workdays

   Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. ~~2566B~~2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 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 the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*.~~

If the jury is asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this ~~This~~ verdict form may ~~need to~~ be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)

We answer the questions submitted to us as follows:

1. **Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours?**
   ____ 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*] keep [accurate] records of the start and end times for meal breaks?**
   ____ 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. **For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?**

   ____ meal breaks

   Answer question 4.

4. **For each meal break included in your answer to question 3, did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law?**

   ____ Yes ____ No

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

5. **Considering by workday the meal breaks determined in question 3, for how many workdays did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ meal breaks that comply with the law?**

   ____ workdays

   Answer question 6.

6. For the workdays determined in question 5, what is the amount of pay owed?

$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New May 2023

Directions for Use

This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. ~~2566B~~2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's inaccurate or missing records. If only missing records are at issue, omit "accurate" from questions 2 and 3. See also verdict form CACI No. VF-2707, *Meal Break Violations*.

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 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 the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.~~ If the jury is asked to determine prejudgment interest for any meal or rest break violations (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121–122 [293 Cal.Rptr.3d 599, 509 P.3d 956]), this verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

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/***nonbinary pronoun***] in retaliation for [his/her/***nonbinary pronoun***] [disclosure of information of/refusal to participate in] an unlawful act. To establish this claim, [***name of plaintiff***] must prove all of the following are more likely true than not true:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [[***name of plaintiff***] disclosed/[***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***]]/[***name of defendant***]'s belief that [***name of plaintiff***] [had disclosed/might disclose] information] 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.**

A "contributing factor" is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. A contributing factor can be proved even when other legitimate factors also contributed to the employer's decision.

[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/*nonbinary pronoun*] 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; Revised June 2016, November 2019, May 2020, December 2022, May 2023

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Select any of the optional paragraphs as appropriate to the facts of the case. For claims under Labor Code section 1102.5(c), the plaintiff must show that the activity in question actually would result in a violation of or noncompliance with a statute, rule, or regulation, which is a legal determination that the court is required to make. (*Nejadian v. County of Los Angeles* (2019) 40 Cal.App.5th 703, 719 [253 Cal.Rptr.3d 404].)

Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for claims based on actual disclosure of information or a belief that plaintiff disclosed or might disclose information. (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 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, and instruct the jury that the court has made the determination that the specified activity would have been

unlawful.

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 held that protection is not necessarily 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], disapproved on other grounds by *Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; see Lab. Code, § 1102.5(b), (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], disapproved on other grounds by *Lawson, supra,* 12 Cal.5th at p. 718; 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. (*Lawson, supra,* 12 Cal.5th at p. 718.) 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. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.

- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson, supra,* 12 Cal.5th at p. 712.)

- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra,* 12 Cal.5th at p. 712, internal citation omitted.)

- "In order to prove a claim under section 1102.5(b), the plaintiff must establish a prima facie case of retaliation. It is well-established that such a prima facie case includes proof of the plaintiff's employment status." (*Bennett v. Rancho California Water Dist.* (2019) 35 Cal.App.5th 908, 921 [248 Cal.Rptr.3d 21], internal citations omitted.)

- "To prove a claim of retaliation under this statute, the plaintiff 'must demonstrate that he or she

has been subjected to an adverse employment action that materially affects the terms, conditions, or privileges of employment.' 'Minor or relatively trivial adverse actions by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee do not materially affect the terms or conditions of employment.' This requirement " 'guards against both "judicial micromanagement of business practices" [citation] and frivolous suits over insignificant slights.' " (*Francis v. City of Los Angeles* (2022) 81 Cal.App.5th 532, 540–541 [297 Cal.Rptr.3d 362], 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].)

- "Once it is determined that the activity would result in a violation or noncompliance with a statute, rule, or regulation, the jury must then determine whether the plaintiff refused to participate in that activity and, if so, whether that refusal was a contributing factor in the defendant's decision to impose an adverse employment action on the plaintiff." (*Nejadian, supra,* 40 Cal.App.5th at p. 719.)

- "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, disapproved on other grounds in *Lawson, supra,* 12 Cal.5th at p. 718.)

- "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, disapproved on other grounds in *Lawson, supra,* 12 Cal.5th at p. 718.)

- "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].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

- "Although [the plaintiff] did not expressly state in his disclosures that he believed the County was violating or not complying with a specific state or federal law, Labor Code section 1102.5, subdivision (b), does not require such an express statement. It requires only that an employee disclose information and that the employee reasonably believe the information discloses unlawful activity." (*Ross v. County of Riverside* (2019) 36 Cal.App.5th 580, 592–593 [248 Cal.Rptr.3d 696].)

- "Section 1102.6 requires whistleblower plaintiffs to show that retaliation was a 'contributing factor' in their termination, demotion, or other adverse action. This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action." (*Lawson, supra,* 12 Cal.5th at 713–714.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302, 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (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*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42, 100.60–100.61A (Matthew Bender)

ITC CACI 23-01
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions (CACI)
All comments are paraphrased unless indicated by quotation marks.

Instruction(s)	Commenter	Comment	Committee Response
403. Standard of Care for Physically Disabled Person (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 23-01) and appreciates the opportunity to submit these comments.	No response required.
		Agree	No response required.
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	Thank you for the opportunity to comment on proposed revisions to California Civil Jury Instructions – CACI 23-01. Civil Justice Association of California (CJAC) is a more than 40- year-old nonprofit organization representing a broad and diverse array of businesses and professional associations. A trusted source of expertise in legal reform and advocacy, we confront legislation, laws, and regulations that create unfair litigation burdens on California businesses, employees, and communities. The American Property Casualty Insurance Association (APCIA) is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe. We have concerns about the proposed changes to CACI Sections 403, 512, 904, VF 2508, VF 2509, and 4603. We respectfully request that you address these concerns as recommended below.	See the committee's responses to CJAC's and APCIA's substantive comments below.
		CACI 403. Standard of Care for Person with a Physical Disability **Sources and Authorities**	The committee thanks the commenters for noting an issue the committee will consider in a future release, as time and resources

Instruction(s)	Commenter	Comment	Committee Response
		In this section, the Restatement Second of Torts is listed as a primary Source and Authority. In fact, Restatements are secondary sources and should be referred to as such. Accordingly, we request that the references to the Restatement Second of Torts be moved to Secondary Sources.	allow. *CACI* has included excerpts from Restatements in its Sources and Authority (see, e.g., 323, 374, 401, 403, etc.) since they were first adopted in 2003 but will revisit this position in light of the comment.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
512. Wrongful Birth—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Civil Justice Association of California by Lucy Chinkezian, Counsel and	**CACI 512. Wrongful Birth — Essential Factual Elements and CACI 513. Wrongful Life—Essential Factual Elements** **Sources and Authorities** Our next concern pertains to the "proximate cause" standard in the Wrongful Birth and Wrongful Life sections. The sources and authorities in both sections cite to *Simmons v. West Covina*	The committee does not clarify direct quotations from cases that are excerpted in the Sources and Authority of CACI. To the extent the commenter is asking for a clarification in the instruction, the comment is beyond the scope of the invitation to comment. The

Instruction(s)	Commenter	Comment	Committee Response
	American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	*Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] to instruct that "a less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." However, per *Simmons*, "a possible cause only becomes probable when in the absence of other reasonable causal explanations, it becomes *more likely than not* that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (emphasis added). [FN 1 *Simmons*, supra, 212 Cal.App.3d at pp. 700] We recommend clarifying the proximate cause standard to be consistent with *Simmons*, particularly to address that "more likely than not" means a greater than 50-50 possibility.	committee will consider it in a future release.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
513. Wrongful Life—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Civil Justice Association of	**CACI 512. Wrongful Birth — Essential Factual Elements and CACI 513. Wrongful Life—Essential Factual Elements**	See the committee's response to CJAC's and APCIA's same

Instruction(s)	Commenter	Comment	Committee Response
	California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**Sources and Authorities** Our next concern pertains to the "proximate cause" standard in the Wrongful Birth and Wrongful Life sections. The sources and authorities in both sections cite to *Simmons v. West Covina Medical Clinic* (1989) 212 Cal.App.3d 696, 702-703 [260 Cal.Rptr. 772] to instruct that "a less than 50-50 possibility that defendants' omission caused the harm does not meet the requisite reasonable medical probability test of proximate cause." However, per *Simmons*, "a possible cause only becomes probable when in the absence of other reasonable causal explanations, it becomes *more likely than not* that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. [Citation.]" (emphasis added). [FN 1 *Simmons*, supra, 212 Cal.App.3d at pp. 700] We recommend clarifying the proximate cause standard to be consistent with *Simmons*, particularly to address that "more likely than not" means a greater than 50-50 possibility.	comment on CACI No. 512, above.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
904. Duty of Common Carrier Toward Disabled/Infirm	California Lawyers Association, Litigation Section, Jury Instructions	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
Passengers (Revise)	Committee by Reuben A. Ginsburg, Chair Sacramento		
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**CACI 904. Duty of Common Carrier Toward Passengers With Illness or Disability** **Jury Instructions** There appears to be an inconsistency in the duty of the common carrier between the jury instruction and the authority. The jury instruction states that a common carrier must use additional care when the carrier is *aware* of a passenger's illness or disability. Yet, the cited authority states that the carrier must exercise additional care when a passenger's illness or disability is *apparent* or *made known*. Further we note that the authority addresses a common carrier's duty of care when the passenger is *without an attendant*, but the jury instruction is not similarly limited. Accordingly, we see a need to resolve the inconsistencies.	The comment is beyond the scope of the invitation to comment. The committee will consider the suggestion in a future release cycle.
		Sources and Authorities Furthermore, we note that the quoted text of this section cites to a California Supreme Court case, McBride v. *Atchison, Topeka & Santa Fe Ry. Co.* (1955) 44 Cal.2d 113, 119–120 [279 P.2d 966]. Attribution should be made also to the Minnesota case – *Croom v. Chicago, M. & St. P. Ry. Co.* (1893) 52 Minn. 296, 298 [53 N.W. 1128, 1128–1129] – which is the actual source of the quote.	The committee has added "internal citation omitted" to the citation. Users may examine the case for more information.
	Bruce Greenlee Attorney Richmond	Excellent job of converting general statements to exact case excerpts.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
1010. Affirmative Defense—Recreation Immunity—Exceptions (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Bruce Greenlee Attorney Richmond	1. The deletion of "for a recreational purpose" from the third exception: Add to the Directions for Use: With regard to the third exception, it has been held that the invitation need not be for a recreational purpose. [*Calhoon v. Lewis* (2000) 81 Cal.App.4th 108, 114 [96 Cal.Rptr.2d 394]. The Supreme Court has stated that if an owner expressly invites someone onto the property and the person is injured while using the land for a recreational purpose, then the general release from liability is abrogated. [*Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1268-1269. 13 [297 Cal.Rptr.3d 607, 515 P.3d 635]. But a landowner owes a general duty of care to those invited onto the property regardless of the purpose of the invitation. [See Sources and Authority to CACI Nos. 1000, *Premises Liability—Essential Factual Elements*, and 1001, *Basic Duty of Care*; see also *Hoffman, supra*, 13 Cal.5th at p 1286; concurring opinion of Kruger, J., suggesting the possibility that the personal social guests of household members were never intended to fall within	The committee does not believe that further explanation is called for at this time about the third exception in the Directions for Use. The committee will continue to monitor developments in the law in this area and will refine the instruction and its Directions for Use as appropriate.

Instruction(s)	Commenter	Comment	Committee Response
		the category of recreational users or entrants to whom section 846, subdivision (a) applies in the first place]. I have previously argued …[*] that despite *Calhoon*, it makes no sense if the invitation was not for a recreational purpose as landowners are generally liable for negligently caused injuries to their guests on their property. The exception to recreational immunity is not required to establish landowner liability if the entry is not for a recreational purpose. But the above sentence from the Supreme Court's opinion suggests how a general invitation might apply. The invitation might be general, as to a weekend guest. But if I negligently shoot the guy while we are duck hunting, then the exception to recreational immunity applies because I invited him, albeit not for a recreational purpose. Still, the *Calhoon* rule is dubious because on these facts, the plaintiff doesn't need to rely on recreational immunity; I'm liable anyway, whether I shoot him negligently while duck hunting or on the patio having cocktails. Justice Kruger's concurrence gets close to addressing this issue by suggesting that a social guest may not be within the scope of the statute at all. She agrees to leave it for another day.	
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2508. Failure to File Timely Administrative Complaint (Gov. Code,	California Lawyers Association, Litigation Section, Jury Instructions Committee	Agree	No response required.

Instruction(s)	Commenter	Comment	Committee Response
§ 12960(e))—Plaintiff Alleges Continuing Violation (Revise)	by Reuben A. Ginsburg, Chair Sacramento		
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
2600. Violation of CFRA Rights—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree	No response required.
	Bruce Greenlee Attorney Richmond	1. Third option for element 2: I don't see any reason to make any changes to this option. The newly added fourth option addresses "an individual designated by plaintiff" and sets forth the requirements to qualify as one. The instructions for element 2 are to pick one option only. So if you pick the new one, you will not pick the third one. And if you	To improve clarity, the committee has deleted the addition to the third option, refined the fourth option, and refined the accompanying Directions for Use to allow the new content to cover all possible variations for an individual

Instruction(s)	Commenter	Comment	Committee Response
		pick the third one and choose "an individual designated by plaintiff," you won't have the qualifying requirements. I see the point made in the Directions for Use, that you don't need the qualifying requirements unless they are contested. But the instruction is more understandable without the change to the third option, even if it means giving the qualifying requirements even though they are not contested.	designated by plaintiff, including where the relationship or association is not contested.
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (New)	California Employment Lawyers Association by Laura L. Horton, Chair Woodland Hills	We at the California Employment Lawyers Association ("CELA") write to comment on the additional CACI 23-01 proposals for wage-and-hour jury instructions. CELA is a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA's mission is to help our members protect and expand the legal rights of workers through litigation, education, and advocacy. Today, CELA submits comments on the proposals for VF-2708 and VF-2709. CELA also proposes an instruction for prejudgment interest applicable to wage and hour violations. We have reviewed the remaining proposed instructions and believe they are appropriate for adoption in current form. CELA recognizes and appreciates the Committee's consideration of our prior proposals and comments.	See the committee's responses to CELA's substantive comments, below.
		I. VF-2708 and VF-2709 Directions for Use Here in redline form we present proposed corrections.	The committee agrees that the paragraph of the Directions for Use concerning prejudgment interest, as it was circulated for

Instruction(s)	Commenter	Comment	Committee Response
		VF-2708 Directions for Use This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*. 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 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~~ augment the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. ~~If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.~~ Plaintiffs who are owed meal break pay or rest break pay are entitled to prejudgment interest. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121-122. This verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest, in the event of any factual disputes that affect the calculation.	public comment, does not reflect the holding of *Naranjo v. Spectrum Security Services, Inc.* The committee recommends replacing the existing paragraph, which is standard content across the verdict forms in CACI, with new content that acknowledges *Naranjo*. The committee also has updated the cross-references to CACI No. 2766B.

Instruction(s)	Commenter	Comment	Committee Response
		The Directions for Use in proposed VF-2708 and VF-2709 do not reflect the law on prejudgment interest for meal and rest break violations. An award of prejudgment interest for meal break pay is not discretionary. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 122 [293 Cal.Rptr.3d 599, 618] established that plaintiffs prevailing on missed-break violations are entitled to prejudgment interest of 7 percent under Article XV, § 1 of the California Constitution. In resolving a dispute over whether the applicable interest rate was 10 percent or 7 percent, the California Supreme Court underscored that "[p]revailing civil parties are entitled to this interest rate in the calculation of prejudgment interest absent a statute specifying a higher rate." (*Id.* at 121.) In addition, Civil Code section 3287, not 3288, applies because the premium wage is a liquidated damage capable of being made certain. Notably, in *Naranjo,* the Court of Appeal's decision to award Civil Code section 3287 prejudgment interest as of right was not disturbed on appeal. The underlying Court of Appeal decision held that prevailing plaintiffs were entitled to a seven percent prejudgment interest under Civil Code section 3287, rejecting defendant Spectrum's position that the class was not entitled to prejudgment interest. (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 476, as modified on denial of reh'g (Oct. 10, 2019), aff'd in part, rev'd in part and remanded (2022) 13 Cal.5th 93 ["Civil Code section 3287 establishes a default interest rate of seven percent for litigants 'entitled to recover damages certain, or capable of being made certain,' calculated from the day that the right to recover the damages vests."]) Therefore, in no case should a court vest the jury with discretion to determine whether to award prejudgment interest	

Instruction(s)	Commenter	Comment	Committee Response
		for meal and rest break violations. At most, juries may be instructed to make factual findings necessary to resolve factual disputes that affect the mathematical calculations necessary for determination of prejudgment interest. In our experience such disputes at trial are rare.	
		Finally, we wish to bring attention to the need for correction of verdict forms VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707. These existing models contain the same incorrect direction for use insofar as they suggest that juries may be given discretion to award prejudgment interest for nonpayment of wages or nonprovision of meal and rest periods. California Labor Code section 218.6 mandates a court award of interest on unpaid wages at the rate of 10 percent for the violations covered by VF-2700, VF-2701 and VF-2702. With respect to meal and rest break premium wages, as well as overtime, minimum wage and other contractual or statutory wages, the award of prejudgment interest is a nondiscretionary award. The only difference is that the 7 percent rate applies to meal and rest break premium wages awarded for the nonprovision of meal and rest periods, and the 10 percent rate applies to actions brought for nonpayment of wages. (*Naranjo*, *supra*, 13 Cal.5th 93, 122.)	This comment is beyond the scope of the invitation to comment. The committee will consider the Directions for Use of the other verdict forms mentioned (VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707) in a future release cycle.
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. Because damages for meal break violations are based on the number of workdays the employer failed to comply with the law rather than the number of missed or noncompliant meal breaks, the latter is unnecessary information. An unnecessary factual finding would complicate the jury's task and could support a challenge to the verdict if the finding arguably is inconsistent with another finding. We would modify question 3 to ask for the number of workdays on which there was a meal break violation rather than the number of meal break violations, as shown below.	The committee acknowledges that question 3 may be asking for more information than is necessary but the committee believes that the extra question will assist the jury in making the later determinations that are necessary, including defendant's need to prove that, despite the records, a meal break was provided and then ultimately for any meal break violations that

Instruction(s)	Commenter	Comment	Committee Response
			were not rebutted, on how many workdays did those meal break violations occur.
		b. CACI Nos. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records* and 2767, *Meal Break Violations—Pay Owed*, approved in December 2022, state that for each meal break violation plaintiff is entitled to one additional hour of pay at plaintiff's regular rate of pay and include optional language on "regular rate of pay." The Directions for Use for both instructions state, "The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges." Thus, according to CACI Nos. 2766B and 2767, the court determines the method for calculating the regular rate of pay. We understand the "method" to mean the "applicable formula" to be inserted in the instruction. The formula should yield a pay rate expressed in dollars per hour, which the jury then multiplies by the number of workdays on which there was a meal break violation to yield a dollar figure. Regular rate of pay must be expressed in dollars per hour if regular rate of pay times number of workdays is to yield one additional hour of pay per workday, as intended. For the jury to determine damages, the court must either instruct the jury on the pay rate (i.e., $/hr.) or instruct the jury on the formula to determine the pay rate and instruct the jury to decide the pay rate. Yet the applicable language on regular rate of pay in CACI Nos. 2766B and 2767 is optional, and there is no mandatory instruction on pay rate.	The committee does not believe an extra question on the rate of pay is appropriate.

Instruction(s)	Commenter	Comment	Committee Response
		Neither the optional language on regular rate of pay nor the Directions for Use state that the jury should calculate the pay rate using the formula, which is what the jury should do. Only then can the jury multiply the regular pay rate by the number of workdays as instructed. We would add a question to the two meal break verdict forms asking the jury to calculate the pay rate, as shown below. Although it is beyond the scope of the current invitation to comment, we believe the same question should be added to VF-2707, *Meal Break Violations* and VF-2706, *Rest Break Violations*.	
		c. We believe the language "one or more meal breaks that comply with the law" in question 5 could be misconstrued to mean there was no violation if the employer provided at least one break in each workday. We would change this language to "a meal break that complies with the law" and add language to the Directions for Use stating the language should be modified if the plaintiff claims to be entitled to more than one meal break per workday.	The committee has refined question 5 to eliminate "one or more." The Directions for Use already note that the verdict forms are intended as models and may need to be modified.
		d. Our proposed revision: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance (Lab. Code, §§ 226.7, 512)** 1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours? __ Yes __ No	The committee thanks the commenter for the suggested language.

Instruction(s)	Commenter	Comment	Committee Response
		If your answer to question 1 is yes, then answer question. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 2. Do [*name of defendant*]'s records show any missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday? __ 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. How many meal breaks do the records show as missed, less than 30 minutes, or taken too late in a workday?~~ ~~__ meal breaks~~ ~~Answer question 4.~~ 4<u>3</u>. For each meal break ~~included in your answer to question 3,~~ <u>[*name of defendant*]'s records show as missed, less than 30 minutes, or taken too late in a workday,</u> did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law? __ Yes __ No If your answer to question 4<u>3</u> is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question ~~5~~<u>4</u>.	

Instruction(s)	Commenter	Comment	Committee Response
		~~5~~4. ~~Considering by workday the meal breaks determined in question 3, f~~For how many workdays for which [*name of defendant*]'s records show a missed meal break, meal break of less than 30 minutes, or delayed meal break did [*name of defendant*] fail to prove that [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ a meal breaks that ~~comply~~ complies with the law? Answer question ~~6~~5. 5. What was the regular rate of pay for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*]? _____ dollars/hour [*Repeat as necessary for date ranges with different regular rates of pay.*] Answer question 6. 6. For the workdays ~~determined~~ included in your answer to question ~~5~~4, what is the total amount of pay owed?	
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance	**CACI VF-2708. Meal Break Violations—Employer Records Showing Noncompliance and CACI VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records.** **Jury Instructions** The list of questions provided in the verdict form of this section do not specify whether it applies to an exempt or nonexempt employee.	The underlying meal break instructions assume that the case involves a nonexempt employee who is entitled to one or more meal breaks. (See CACI No. 2765.) If there is a dispute about the employee's exempt status, both the jury instruction and the verdict form will need to be modified. The Directions for Use of VF-2708 and VF-2709 already note that the

Instruction(s)	Commenter	Comment	Committee Response
	Association by Mark Sektnan, Vice President, State Government Relations	To align with California law, we recommend specifying that the list applies only to employees who are nonexempt in the headline of CACI VF-2708 and VF-2709 as follows: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance Toward Nonexempt Employees (Lab. Code, §§ 226.7, 512).** and **Meal Break Violations—Inaccurate or Missing Employer Records of Nonexempt Employees.**	verdict forms are intended as models and may need to be modified.
		Alternatively, we recommend adding a new question to both verdict forms about the classification of the employee, making it the first question asked and continuing with the other questions: 1. Was [name of plaintiff] a nonexempt employee? Nonexempt employees generally earn an hourly wage rather than a set salary. ____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 for [name of defendant] for one or more workdays for a period lasting longer than five hours? ____ Yes ____ No … Again, the new question should also be added to verdict form 2709.	See the committee's response to CJAC's and APCIA's alternative comment, above.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney Richmond	General Comment Regarding Pronoun Options Noticed in New Verdict Forms on Meal Breaks 1. When "it" is needed as a pronoun option because the antecedent may be a nonperson, I think it would be better if "it" preceded "*nonbinary pronoun:"* "[he/she/it/*nonbinary pronoun*]." In fact, it could be argued that in these verdict forms, "it" should go first as the majority of employers are more likely to be entities than people.	The committee prefers to offer standardized variable text options for the pronouns in all *CACI* instructions regardless of which option may be the most used.
	Orange County Bar Association by Michael A. Gregg, President	In the Directions for Use, an instruction should be added regarding question number 1 which states that if the employee worked more than five hours, but less than 6 hours, and entered into a meal period waiver with the defendant, that any such meal periods should not be included. *See* Cal. Lab. Code § 512 ("An employer shall not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer shall not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.") Similar instruction should be provided for second meal period break waivers in situations where the plaintiff worked more than 10 hours but less than 12 hours, had a meal period waiver agreement regarding second breaks, and was provided with a first meal period. *Id.*	*CACI*'s verdict forms generally do not address in the Direction for Use the substance of the underlying jury instruction. Special circumstances may require modification. As the Directions for Use state, verdict forms are intended only as models and may need to be modified depending on the facts of the case.
VF-2709. Meal Break	California Employment	We at the California Employment Lawyers Association ("CELA") write to comment on the additional CACI 23-01	See the committee's responses to CELA's comments, below.

Instruction(s)	Commenter	Comment	Committee Response
Violations—Inaccurate or Missing Employer Records (New)	Lawyers Association by Laura L. Horton, Chair Woodland Hills	proposals for wage-and-hour jury instructions. CELA is a statewide organization of more than 1,200 private attorneys who practice primarily employment law on behalf of workers. CELA was established to assist California lawyers representing employees and unions in matters related to employment. CELA's mission is to help our members protect and expand the legal rights of workers through litigation, education, and advocacy. Today, CELA submits comments on the proposals for VF-2708 and VF-2709. CELA also proposes an instruction for prejudgment interest applicable to wage and hour violations. We have reviewed the remaining proposed instructions and believe they are appropriate for adoption in current form. CELA recognizes and appreciates the Committee's consideration of our prior proposals and comments.	
		II. VF-2708 and VF-2709 Directions for Use Here in redline form we present proposed corrections. **VF-2708 Directions for Use** This verdict form is based on CACI No. 2765, *Meal Break Violations—Introduction*, and CACI No. 2766B, *Meal Break Violations—Rebuttable Presumption—Employer Records*. Use this verdict form if the plaintiff's meal break claims involve the rebuttable presumption of a violation based on an employer's records showing missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late in a workday. See also verdict form CACI No. VF-2707, *Meal Break Violations*. 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.	See the committee's response to CELA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		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~~ augment the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*. ~~If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.~~ Plaintiffs who are owed meal break pay or rest break pay are entitled to prejudgment interest. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 121-122. This verdict form may be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest, in the event of any factual disputes that affect the calculation. The Directions for Use in proposed VF-2708 and VF-2709 do not reflect the law on prejudgment interest for meal and rest break violations. An award of prejudgment interest for meal break pay is not discretionary. *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 122 [293 Cal.Rptr.3d 599, 618] established that plaintiffs prevailing on missed-break violations are entitled to prejudgment interest of 7 percent under Article XV, § 1 of the California Constitution. In resolving a dispute over whether the applicable interest rate was 10 percent or 7 percent, the California Supreme Court underscored that "[p]revailing civil parties are entitled to this interest rate in the calculation of prejudgment interest absent a statute specifying a higher rate." (*Id.* at 121.)	

Instruction(s)	Commenter	Comment	Committee Response
		In addition, Civil Code section 3287, not 3288, applies because the premium wage is a liquidated damage capable of being made certain. Notably, in *Naranjo,* the Court of Appeal's decision to award Civil Code section 3287 prejudgment interest as of right was not disturbed on appeal. The underlying Court of Appeal decision held that prevailing plaintiffs were entitled to a seven percent prejudgment interest under Civil Code section 3287, rejecting defendant Spectrum's position that the class was not entitled to prejudgment interest. (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 476, as modified on denial of reh'g (Oct. 10, 2019), aff'd in part, rev'd in part and remanded (2022) 13 Cal.5th 93 ["Civil Code section 3287 establishes a default interest rate of seven percent for litigants 'entitled to recover damages certain, or capable of being made certain,' calculated from the day that the right to recover the damages vests."])	
		Therefore, in no case should a court vest the jury with discretion to determine whether to award prejudgment interest for meal and rest break violations. At most, juries may be instructed to make factual findings necessary to resolve factual disputes that affect the mathematical calculations necessary for determination of prejudgment interest. In our experience such disputes at trial are rare.	See the committee's response to CELA's same comments to VF-2708, above.
		Finally, we wish to bring attention to the need for correction of verdict forms VF-2700, VF-2701, VF-2702, VF-2706 and VF-2707. These existing models contain the same incorrect direction for use insofar as they suggest that juries may be given discretion to award prejudgment interest for nonpayment of wages or nonprovision of meal and rest periods. California Labor Code section 218.6 mandates a court award of interest on unpaid wages at the rate of 10 percent for the violations covered by VF-2700,	See the committee's response to CELA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		VF-2701 and VF-2702. With respect to meal and rest break premium wages, as well as overtime, minimum wage and other contractual or statutory wages, the award of prejudgment interest is a nondiscretionary award. The only difference is that the 7 percent rate applies to meal and rest break premium wages awarded for the nonprovision of meal and rest periods, and the 10 percent rate applies to actions brought for nonpayment of wages. (*Naranjo*, *supra*, 13 Cal.5th 93, 122.)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Same comments as for VF-2708, above.	See the committee's response to CLA's same comments to VF-2708, above.
		Our proposed revision: **VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records (Lab. Code, §§ 226.7, 512)** 1. Did [*name of plaintiff*] work for [*name of defendant*] for one or more workdays for a period lasting longer than five hours? ____ 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*] keep [accurate] records of the start and end times for meal breaks? ____ Yes ____ No	The committee thanks the commenter for the proposed language.

Instruction(s)	Commenter	Comment	Committee Response
		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. For how many meal breaks were [accurate] records of the start and end times for meal breaks not kept?~~ ~~____ meal breaks~~ ~~Answer question 4.~~ ~~4~~3. For each meal break ~~included in your answer to question 3,~~ for which [*name of defendant*] failed to keep [accurate] records of the start and end times], did [*name of defendant*] prove [he/she/*nonbinary pronoun*/it] provided a meal break that complies with the law? ____ Yes ____ No If your answer to question ~~4~~3 is yes, stop here, answer no further questions, and have the presiding juror sign and date this form. If you answered no, then answer question ~~5~~4. ~~5~~4. ~~Considering by workday the meal breaks determined in question 3, f~~For how many workdays for which [*name of defendant*] failed to keep [accurate] records of the meal break start and end times did [*name of defendant*] fail to prove [he/she/*nonbinary pronoun*/it] provided ~~one or more~~ a meal break~~s~~ that ~~comply~~ complies with the law? __ workdays Answer question ~~6~~5.	

Instruction(s)	Commenter	Comment	Committee Response
		5. What was the regular rate of pay for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*]? _____ dollars/hour [*Repeat as necessary for date ranges with different regular rates of pay.*] Answer question 6 6. For the workdays ~~determined~~ included in your answer to question ~~5~~4, what is the amount of pay owed? $ _____	
	Civil Justice Association of California by Lucy Chinkezian, Counsel and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	**CACI VF-2708. Meal Break Violations—Employer Records Showing Noncompliance and CACI VF-2709. Meal Break Violations—Inaccurate or Missing Employer Records.** **Jury Instructions** The list of questions provided in the verdict form of this section do not specify whether it applies to an exempt or nonexempt employee. To align with California law, we recommend specifying that the list applies only to employees who are nonexempt in the headline of CACI VF-2708 and VF-2709 as follows: **VF-2708. Meal Break Violations—Employer Records Showing Noncompliance Toward Nonexempt Employees (Lab. Code, §§ 226.7, 512).** and	See the committee's response to CJAC's and APCIA's same comments to VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
		Meal Break Violations—Inaccurate or Missing Employer Records of Nonexempt Employees.	
		Alternatively, we recommend adding a new question to both verdict forms about the classification of the employee, making it the first question asked and continuing with the other questions: 1. Was [name of plaintiff] a nonexempt employee? Nonexempt employees generally earn an hourly wage rather than a set salary. ____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 for [name of defendant] for one or more workdays for a period lasting longer than five hours? ____ Yes ____ No … Again, the new question should also be added to verdict form 2709.	See the committee's response to CJAC's and APCIA's same comments to VF-2708, above.
	Bruce Greenlee Attorney Richmond	General Comment Regarding Pronoun Options Noticed in New Verdict Forms on Meal Breaks When "it" is needed as a pronoun option because the antecedent may be a nonperson, I think it would be better if "it" preceded "*nonbinary pronoun:"* "[he/she/it/*nonbinary pronoun*]." In fact, it could be argued that in these verdict forms, "it" should go first as the majority of employers are more likely to be entities than people.	See the committee's response to Mr. Greenlee's same comment for VF-2708, above.

Instruction(s)	Commenter	Comment	Committee Response
	Seyfarth Shaw LLP by Michael Afar Los Angeles	This public comment is submitted on behalf of Seyfarth Shaw for consideration by the Advisory Committee on Civil Jury Instructions, in connection with the Committee's Invitation To Comment, CACI 23-01, on proposed additions and revisions to the Judicial Council of California Civil Jury Instructions ("CACI").	See the committee's responses to Seyfarth Shaw's substantive comments, below.
		I. VF-2709 Misrepresents The Holding And Context In Donohue Regarding "Inaccurate" Meal Period Records VF-2709 creates a verdict form for meal break violations where there are purportedly "inaccurate or missing employer records." The verdict form relies on CACI jury instructions about meal breaks and a new "rebuttable presumption" created by the California Supreme Court's decision in *Donohue v. AMN Servs., LLC*, 11 Cal. 5th 58, 76 (2021). However, the *Donohue* decision did not stand for proposition that there is now a rebuttable presumption of meal period violations where an employer's records are "inaccurate." The context of the *Donohue* decision is important – it involved a situation where the employer impermissibly rounded time punches at the start and end of an employee's meal periods, which resulted in the time punches being "inaccurate." This was specifically due to the employer's rounding practices, not a general claim that time punches were inaccurate for other reasons (e.g., a manager altered time, or the employer failed to accurate keep time punches). There is simply no blanket rule from the *Donohue* decision that an employee can claim time punches are "inaccurate" – for whatever reason – to then trigger a rebuttable presumption against the employer for meal period violations. A verdict form such as VF-2709 would mean that, in addition to the *Donohue* burden-shifting that occurs when time records show	The committee appreciates the commenter's concern. The holding of *Donohue* and its scope was debated by the committee both last year when it recommended new instructions on meal breaks (CACI Nos. 2765, 2766, and 2767) and this year when proposing VF-2708 and VF-2709. The committee voted to recommend VF-2709 so that it may be used in cases involving missing records and so-called inaccurate meal break records. Although the committee believes there is room for debate on the scope of *Donohue*, the committee does not share the commenter's concern that an employee's bare allegation will automatically shift the burden to an employer. Question 2 of VF-2709 asks, "Did defendant keep accurate records of the start and end times for meal breaks?" If the answer to question 2 is Yes, then the jury is told to answer no further questions and the

Instruction(s)	Commenter	Comment	Committee Response
		that the meal period rules were not met, the burden-shifting also occurs when the records shows that the rules were satisfied – simply because an employee can make a boilerplate claim, without support, that the time records were "inaccurate." Thus, under such a jury instruction, every employer would be required to prove that every employee during the three-year statute of limitations period (or four years, if an unfair business practice is alleged) had a full and timely meal period without the ability to rely upon its own timekeeping records. Under this scenario an employer would be not better off maintaining totally accurate pay records than one who kept no records at all. Additionally, the logic of such an argument would suggest that the employer bears the burden of proof in any case, such as one involving a claim of off-the-clock work, in which the employee asserts that the employer's timekeeping records are inaccurate. There is nothing in *Donohue* or the United States Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946) that supports such a radical burden-shifting proposition.	rebuttable presumption does come into play. In any event, the committee will continue to monitor developments in the law in this area and will refine the instructions and verdict forms as appropriate.
		II. The "Rebuttable Presumption" Created By *Donohue* Must Be Limited To Facial Noncompliance Or Facial Nonexistence Of Meal Period Records, Not "Inaccurate" Records Nowhere in the *Donohue* Court's opinion is there any language that claims of inaccurate records also create a rebuttable presumption that shifts the burden to the employer to prove meal periods were provided. In fact, the decision mentions the word "inaccurate" only four times – and none of the references support this type of interpretation by the proposed verdict form. To the contrary, *Donohue* explicitly holds that the rebuttable presumption applies only where time records explicitly show	See the committee's response to the comment, above.

Instruction(s)	Commenter	Comment	Committee Response
		missed, short, or delayed meal periods, not where an employee otherwise claims that the time records are inaccurate: "**If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises.** Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. *Donohue*, 11 Cal. 5th at 77 (emphasis added). Plainly put, *Donohue* does not—and cannot—support any argument or verdict form, such as VF-2709, that an employer now has the burden of proof whenever the employee says their timecard punches are "inaccurate." The proposal offered by CACI would essentially render time punches and recordkeeping to **always** be inaccurate, based on a self-serving claim by the employee. The holding in *Donohue* is merely that "[i]If time records show **noncompliant** meal periods, then a rebuttable presumption of liability arises." *Donohue*, 11 Cal. 5th at 78 (emphasis added). This holding cannot—and should not—be expanded into an unsupported verdict form that if time records show **compliant** meal periods, a rebuttable presumption of liability also arises. To be clear, a verdict form limited to just instances of facially noncompliant or facially nonexistent meal period records would not prejudice the plaintiff or moving party. A plaintiff would not be prohibited from prosecuting their case-in-chief and claiming that the records are still somehow inaccurate – for example, by arguing that a manager unlawfully edited their time without consent – and presenting evidence to meet his or her burden. A	

Instruction(s)	Commenter	Comment	Committee Response
		plaintiff can introduce witness testimony or obtain documentary evidence like time punch audit trails, in order to support a theory of inaccurate records, if they so choose. However, the plaintiff cannot – and should not – be able to rely on a "rebuttable presumption" based on an "inaccuracy" theory of liability.	
		III. The Verdict Forms In VF-2708 And VF-2709 Create A Serious Risk Of Impermissible Duplicative Damages In addition to the significant substantive issues with VF-2709, there is also a serious risk of impermissible duplicative damages, if verdict forms VF-2708 and VF-2709 are allowed to both become final. The verdict forms contain the same general structure, with the main difference being that VF-2708 focuses on "missed meal breaks, meal breaks of less than 30 minutes, or meal breaks taken too late," whereas VF-2709 focuses on "inaccurate or missing" records. But these categories can inherently overlap with each other, and a plaintiff is likely to insist on presenting both verdict forms to a trier of fact. This necessarily means that a trier of fact may award duplicative damages, for the same alleged violations, without recognizing or understanding the overlap. For example, if a plaintiff claims that his time punch records inaccurately reflect that a meal period was actually taken, and that in reality he had a short meal period, this is just a single violation for a single meal period, that can only result in a singular damages recovery. But with the current structure of the two verdict forms, how is a jury layperson supposed to understand whether it falls under VF-2708 for a short break, or VF-2709 for an inaccurate break? There is a serious risk that a jury will treat this incorrectly as two violations – one under each verdict form – and award two penalty payments, when only one is allowed.	As the Directions for Use state, "[t]he 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 both theories are presented to the jury, the committee would expect the parties and the court to adapt the verdict forms as necessary to the case.

Instruction(s)	Commenter	Comment	Committee Response
		The multiple verdict forms only create confusion and an extra risk for unjustified and unsupported penalties against defendants.	
	Orange County Bar Association by Michael A. Gregg, President	Agree	No response required.
4603. Whistleblower Protection—Essential Factual Elements (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We suggest adding to Sources and Authority some or all of the following quote from *Lawson v. PPG Architectural Finishes, Inc*. (2022) 12 Cal.5th 703, 713-714, to support the new language in the instruction defining "contributing factor": This means plaintiffs may satisfy their burden of proving unlawful retaliation even when other, legitimate factors also contributed to the adverse action. (See, e.g., *State Comp. Ins. Fund v. Ind. Acc. Com.* (1959) 176 Cal.App.2d 10, 17, 1 Cal.Rptr. 73 (*State Comp. Ins. Fund*) [describing a contributing factor standard as one in which the conduct at issue need not be the "exclusive cause" of the plaintiff's injuries]; *Rookaird v. BNSF Ry. Co.* (9th Cir. 2018) 908 F.3d 451, 461 (*Rookaird*) [" 'A "contributing factor" includes "any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision" ' "].)	The committee agrees and recommends adding another excerpt from *Lawson v. PPG Architectural Finishes, Inc*. to the Sources and Authority.
	Civil Justice Association of California by Lucy Chinkezian, Counsel	**CACI 4603. Whistleblower Protection—Essential Factual Elements.** **Jury Instructions and Directions for Use** Our concerns about this section pertain to the "contributing factor" definition offered within the jury instruction. This	The committee believes that the definition of *contributing factor* is best located within the text of the instruction. A definition would not assist a jury if placed in the Directions for Use. To the extent the commenters have suggested

Instruction(s)	Commenter	Comment	Committee Response
	and American Property Casualty Insurance Association by Mark Sektnan, Vice President, State Government Relations	definition is best placed in the Directions for Use and/or Sources and Authorities section, consistent with the placement of other terms, such as "adverse employment action." More importantly, we urge citing to the authority for the specific definition being proposed by the committee. Alternatively, consider the following definition that makes clear that a "contributing factor" is not dispositive in nature: A "contributing factor" is any factor, which alone or in connection with other factors, tends to affect the outcome of a decision. ~~A contributing factor can be proved even when other legitimate factors also contributed to the employer's decision.~~ *A "contributing factor" is not a conclusive factor as an employer may prove by clear and convincing evidence that its 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. 4604, *Affirmative Defense—Same Decision*.) For the forgoing reasons, CJAC and APCIA respectfully ask that the jury instructions be amended to address the concerns that we have raised.	adding authority to the Sources and Authority, the committee recommends adding another excerpt from *Lawson*, as suggested by the California Lawyers Association, above. Finally, the committee has not endorsed the commenters' suggestion to add content about the employer's affirmative defense, which is the subject of a separate instruction (CACI No. 4604, *Affirmative Defense—Same Decision*) that should be given as appropriate. The committee believes that the Directions for Use appropriately cross-reference CACI No. 4604.
	Bruce Greenlee Attorney Richmond	1. Opening paragraph: the addition of "are more likely true than not true:" These words merely state the "preponderance of the evidence" burden of proof. They would apply to every "must prove" throughout CACI. No need to add them here. The point is covered by CACI No. 200, *Obligation to Prove—More Likely True Than Not True*.	The committee considered not including additional detail about the preponderance of the evidence standard here for the reasons stated by the commenter, especially in light of CACI No. 200. The committee nevertheless decided that the information would be helpful to jurors for this instruction because of the shifting burdens

Instruction(s)	Commenter	Comment	Committee Response
			and different standards of proof that apply.
		2. Definition of "Contributing Factor:" Revise second sentence to say: "A factor may contribute to an outcome even if other legitimate factors also contributed to it."	The committee does not see improved clarity in the suggested language, which changes the focus to an outcome rather than the employer's decision.
		3. Sources and Authority: Why was the *Green* excerpt removed? Normally, excerpts from the Supreme Court are not deleted unless the Supremes themselves say something that makes the excerpt no longer good law.	The committee chose to remove the excerpt from *Green v. Ralee Engineering Co.* because statutory changes since 1984 have made the excerpted language no longer accurate. The committee considered using an ellipsis to excise the inaccurate language but concluded that removing the case from the Sources and Authority would create less confusion.
	Orange County Bar Association by Michael A. Gregg, President	Since "contributing factor" and "substantial factor" are both used in the instruction, both terms should be defined in the body of the instruction. CACI 430 defines substantial factor ("A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.")	The committee does not agree that the instruction would be improved by adding another definition in the body of the instruction. As stated in the User Guide, although located in the Negligence series, use of CACI No. 430 "is not intended to be limited to cases involving negligence."

Item number: 04

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/5/23

Rules Committee action requested [Choose from drop down menu below]**:**
Approve

Title of proposal: Civil Jury Instructions: Instructions With Minor or Nonsubstantive Revisions (Release 43)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Judicial Council of California Civil Jury Instructions (CACI) Nos. 221, 425, 610, 1100, 2101, 2500, 2540, 2548, 2601, 2603, 2610, 2611, 2704, 2740, 3103, 3200, 3210, 3714, 3948, 4562, 4602, 4604, and 4700.

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

*Staff contact (*name, phone and e-mail*): Eric Long, 415-865-7691, eric.long@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/1/22
Project description from annual agenda: 5. Maintenance—Sources and Authority;
6. Maintenance—Secondary Sources; and
7. Technical Corrections

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)
California Rules of Court, rules 2.1050 and 10.58, require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. The Judicial Council has given the Rules Committee final authority to approve instructions with changes to the Directions for Use or additions to the Sources and Authority under the provisions of the guidelines adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes. Pursuant to this delegation of authority, the advisory committee requests that the Rules Committee give final approval to 23 revised CACI instructions for release 43.

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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M E M O R A N D U M

Date
March 23, 2023

To
Members of the Rules Committee

From
Advisory Committee on Civil Jury Instructions
Hon. Adrienne M. Grover, Chair

Subject
Civil Jury Instructions: Instructions With Minor or Nonsubstantive Revisions (Release 43)

Action Requested
Review and Approve Publication of Instructions

Deadline
April 5, 2023

Contact
Eric Long, Attorney
Legal Services
415-865-7691 phone
eric.long@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 23 instructions in this release, prepared by the advisory committee, contain the types of revisions that the Judicial Council has given the Rules Committee final authority to approve—primarily changes to the Sources and Authority that are nonsubstantive and unlikely to cause controversy. Also included within these instructions are grammatical, typographical, and citation corrections for which the Rules Committee has delegated authority to the Advisory Committee on Civil Jury Instructions.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Rules Committee approve for publication revisions to 23 civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or full Judicial Council approval: CACI Nos. 221, 425, 610, 1100, 2101, 2500, 2540, 2548, 2601, 2603, 2610, 2611, 2704, 2740, 3103, 3200, 3210, 3714, 3948, 4562, 4602, 4604, and 4700.

These instructions will be published in the midyear supplement to the 2023 edition of *CACI* and posted online on the California Courts website.

The revised instructions are attached at pages 5–86.

Relevant Previous Council Action

In 2003, the Judicial Council approved civil jury instructions—drafted by the Task Force on Jury Instructions—for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[1]

In 2006, the Judicial Council approved the Rules Committee's delegation of authority to the Advisory Committee on Civil Jury Instructions to review and approve nonsubstantive grammatical and typographical corrections to the jury instructions, and authority for the Rules Committee to "[r]eview and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM)."[2]

Under the implementing guidelines that the Rules Committee (known at the time as the Rules and Projects Committee, or RUPRO) adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes*, the Rules Committee has final approval authority over the following:

a) Additions of cases and statutes to the Sources and Authority;

b) Changes to statutory language quoted in Sources and Authority that are required by legislative amendments, provided that the amendment does not affect the text of the instruction itself;[3]

c) Additions or changes to the Directions for Use;[4]

[1] Cal. Rules of Court, rules 2.1050(d), 10.58(a).

[2] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sept. 12, 2006), p. 1.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] The committee presents only nonsubstantive changes to the Directions for Use for the Rules Committee's final approval. Substantive changes are posted for public comment and presented to the Judicial Council for approval.

d) Changes to instruction text that are nonsubstantive—that is, changes that do not affect or alter any fundamental legal basis of the instruction—and are unlikely to create controversy

e) Changes to instruction text required by subsequent developments (such as new cases or legislative amendments), provided that the change, though substantive, is both necessary and unlikely to create controversy; and

f) Revocation of instructions for which any fundamental legal basis of the instruction is no longer valid because of statutory amendment or case law.

Analysis/Rationale

Overview of revisions

Eighteen instructions in this release (Release 43) have proposed revisions under category (a) above (additions of cases and statutes to the Sources and Authority). Five instructions (CACI Nos. 2548, 2601, 2603, 2610, and 2611) have revisions to the Directions for Use that fall under categories (d) and (e) above.

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

- *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
- Each legal component of the instruction should be supported by authority—either statutory or case law.
- Authority addressing the burden of proof should be included.
- Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
- Only one case excerpt should be included for each legal point.
- California Supreme Court authority should always be included, if available.
- If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
- A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
- A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
- Other cases may be included if deemed particularly useful to the users.

- The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

Policy implications

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, revise, and add topics to *CACI* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

Because the revisions to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Alternatives considered

California Rules of Court, rules 2.1050 and 10.58 specifically charge the advisory committee to regularly review case law and statutes; to make recommendations to the Judicial Council for updating, amending, and adding topics to *CACI*; and to submit its recommendations to the council for approval. The proposed revisions and additions meet this responsibility. There are no alternatives to be considered.

Fiscal and Operational Impacts

There are no implementation costs.

Attachments and Links

1. Proposed revised *CACI* instructions, at pages 5–86

CIVIL JURY INSTRUCTIONS
(Release 43: Nonsubstantive Changes)
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221. Conflicting Expert Testimony

If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters that each witness relied on. You may also compare the experts' qualifications.

New September 2003

Directions for Use

Unless the issue is one that can be resolved only with expert testimony, the jury should not be instructed that they must accept the entire testimony of the expert whose testimony appears to be entitled to greater weight. (*Santa Clara County Flood Control and Water Conservation Dist. v. Freitas* (1960) 177 Cal.App.2d 264, 268–269 [2 Cal.Rptr. 129].)

For an instruction on expert witnesses generally, see CACI No. 219, *Expert Witness Testimony*. For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*.

Sources and Authority

- "[C]redibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)

- "[W]e rely upon the rule of *Sargon* [*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 [149 Cal.Rptr.3d 614, 288 P.3d 1237]] that although trial courts 'have a substantial "gatekeeping" responsibility' in evaluating proposed expert opinion, the gate tended is not a partisan checkpoint." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 492 [199 Cal.Rptr.3d 583], internal citation omitted.)

- "Complex questions of medical causation are prone to uncertainty. … It is therefore imperative that the party without the burden of proof be allowed to suggest alternative causes, or the uncertainty of causation, to less than a reasonable medical probability. To withhold such information from the jury is to deprive it of relevant information in assessing whether the plaintiff has met its ultimate burden of persuasion. And, it would improperly transfer from the jury to the court the responsibility for resolving conflicts between competing expert opinions." (*Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123, 133–134 [294 Cal.Rptr.3d 500], internal citation and footnote omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § ~~292~~ 307

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.70 (Matthew Bender)

425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements*, but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk*.) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff's showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638−639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)

- "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for 'gross negligence' the plaintiff must allege extreme conduct on the part of the defendant." (*Rosencrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)

- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)

- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)

- "[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 777, original italics.)

- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either -- sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257

Cal.Rptr. 356], original italics, internal citations omitted.)

- "In assessing where on the spectrum a particular negligent act falls, ' "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it." ' " (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 32 [236 Cal.Rptr.3d 682].)

- ~~"Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [189 Cal.Rptr.3d 449].)~~ "[A]lthough the existence of gross negligence is a matter generally for the trier of fact, it may be determined as a matter of law on summary judgment in an appropriate case." (*Joshi v. Fitness Internat., LLC* (2022) 80 Cal.App.5th 814, 828 [295 Cal.Rptr.3d 572], internal citation omitted.)

- "The Legislature has enacted numerous statutes … which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra,* 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence

means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 331–1000

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability*, § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***] [***name of plaintiff***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following three options:***]**

[that [he/she/*nonbinary pronoun***/it] did not sustain actual injury until on or after [***insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/***nonbinary pronoun***/it] was under a legal or physical disability that restricted [his/her/***nonbinary pronoun***/its] ability to file a lawsuit[,/;]]**

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009, May 2020

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*, if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that the person had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Summary judgment was proper under section 340.6, subdivision (a)'s one-year limitations period only if the undisputed facts compel the conclusion that [plaintiff] was on inquiry notice of his claim more than one year before the complaint was filed. Inquiry notice exist where 'the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them.' ' "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." [Citation.]' " (*Genisman v. Carley* (2018) 29 Cal.App.5th 45, 50–51 [239 Cal.Rptr.3d 780], internal citation omitted.)

- " ' "[S]ubjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation." [Citation.]' " (*Genisman, supra,* 29 Cal.App.5th at p. 51.)

- "For purposes of section 340.6, 'actual injury occurs when the plaintiff sustains any loss or injury legally cognizable as damages in a legal malpractice action based on the acts or omissions that the plaintiff alleged.' While 'nominal damages will not end the tolling of section 340.6's limitations period,' it is 'the fact of damage, rather than the amount, [that] is the critical factor.' " (*Genisman, supra,* 29 Cal.App.5th at p. 52, internal citation omitted.)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the

plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "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. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra,* 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[A]n attorney may withdraw from representation within the meaning of the statute, 'even absent a client's consent.' Such withdrawal 'does not depend on whether the attorney has formally withdrawn from representation, such as by securing a court order granting permission to withdraw.' ' " '[I]n the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. [Citations.] That may occur upon the attorney's express notification to the client that the attorney will perform no further services.' " ' " (*Wang v. Nesse* (2022) 81 Cal.App.5th 428, 440 [297 Cal.Rptr.3d 149], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra,* 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude,* a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services,* however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective* … ." (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- "[A] would-be plaintiff is 'imprisoned on a criminal charge' within the meaning of section 352.1 if he or she is serving a term of imprisonment in the state prison." (*Austin v. Medicis* (2018) 21 Cal.App.5th 577, 597 [230 Cal.Rptr.3d 528].)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra,* 61 Cal.4th at p. 1238.)

- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

- "In sum, consistent with *Lee,* section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." (*Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799 [245 Cal.Rptr.3d 452].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ ~~626–655~~679–702

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

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

1100. Dangerous Condition on Public Property—Essential Factual Elements (Gov. Code, § 835)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by a dangerous condition of [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owned [or controlled] the property;**

2. **That the property was in a dangerous condition at the time of the injury;**

3. **That the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred;**

4. **[That negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of employment created the dangerous condition;]**

   [or]

   [That [*name of defendant***] had notice of the dangerous condition for a long enough time to have protected against it;]**

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

6. **That the dangerous condition was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised October 2008, December 2015, June 2016, May 2020

Directions for Use

For element 4, choose either or both options depending on whether liability is alleged under Government Code section 835(a), 835(b), or both.

See also CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*.

Sources and Authority

- Liability of Public Entity for Dangerous Condition of Property. Government Code section 835.
- Actual Notice. Government Code section 835.2(a).
- Constructive Notice. Government Code section 835.2(b).
- Definitions. Government Code section 830.

- "The Government Claims Act (§ 810 et seq.; the Act) 'is a comprehensive statutory scheme that sets forth the liabilities and immunities of public entities and public employees for torts.' Section 835 … prescribes the conditions under which a public entity may be held liable for injuries caused by a dangerous condition of public property. Section 835 provides that a public entity may be held liable for such injuries 'if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, [and] that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred.' In addition, the plaintiff must establish that either: (a) '[a] negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition,' or (b) '[t]he public entity had . . . notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.' " (*Cordova v. City of Los Angeles* (2015) 61 Cal.4th 1099, 1104 [190 Cal.Rptr.3d 850, 353 P.3d 773], internal citations omitted.)

- "[A] public entity may be liable for a dangerous condition of public property even when the immediate cause of a plaintiff's injury is a third party's negligent or illegal act (such as a motorist's negligent driving), if some physical characteristic of the property exposes its users to increased danger from third party negligence or criminality. Public entity liability lies under section 835 when some feature of the property increased or intensified the danger to users from third party conduct." (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457−1458 [192 Cal.Rptr.3d 376], internal citation omitted.)

- "Subdivisions (a) and (b) of section 835 obviously address two different types of cases. However, what distinguishes the two types of cases is not simply whether the public entity has notice of the dangerous condition. Instead, what distinguishes the two cases in practice is who created the dangerous condition. Because an entity must act through its employees, virtually all suits brought on account of dangerous conditions created by the entity will be brought under subdivision (a). In contrast, subdivision (b) can also support suits based on dangerous conditions not created by the entity or its employees." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 [15 Cal.Rptr.2d 679, 843 P.2d 624].)

- "[T]he res ipsa loquitur presumption does not satisfy the requirements for holding a public entity liable under section 835, subdivision (a). Res ipsa loquitur requires the plaintiff to show only (1) that the accident was of a kind which ordinarily does not occur in the absence of negligence, (2) that the instrumentality of harm was within the defendant's exclusive control, and (3) that the plaintiff did not voluntarily contribute to his or her own injuries. Subdivision (a), in contrast, requires the plaintiff to show that an employee of the public entity 'created' the dangerous condition; in view of the legislative history … ,the term 'created' must be defined as the sort of involvement by an employee that would justify a presumption of notice on the entity's part." (*Brown, supra,* 4 Cal.4th at p. 836.)

- "Focusing on the language in *Pritchard, supra,* 178 Cal. App. 2d at page 256, stating that where the public entity 'has itself created the dangerous condition it is per se culpable,' plaintiff argues that the negligence that section 835, subdivision (a), refers to is not common law negligence, but something that exists whenever the public entity creates the dangerous condition of property. We disagree. If the Legislature had wanted to impose liability whenever a public entity created a dangerous condition, it

would merely have required plaintiff to establish that an act or omission of an employee of the public entity within the scope of his employment created the dangerous condition. Instead, section 835, subdivision (a), requires the plaintiff to establish that a '*negligent or wrongful* act or omission of an employee of the public entity within the scope of his employment created the dangerous condition.' (Italics added.) Plaintiff's interpretation would transform the highly meaningful words 'negligent or wrongful' into meaningless surplusage, contrary to the rule of statutory interpretation that courts should avoid a construction that makes any word surplusage." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135 [72 Cal.Rptr.3d 382, 176 P.2d 654], original italics, internal citation omitted.)

- "In order to recover under Government Code section 835, it is not necessary for plaintiff to prove a negligent act *and* notice; either negligence *or* notice will suffice." (*Curtis v. State of California* (1982) 128 Cal.App.3d 668, 693 [180 Cal.Rptr. 843], original italics.)

- "A public entity may not be held liable under section 835 for a dangerous condition of property that it does not own or control." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 359 [196 Cal.Rptr.3d 625].)

- "For liability to be imposed on a public entity for a dangerous condition of property, the entity must be in a position to protect against or warn of the hazard. Therefore, the crucial element is not ownership, but rather control." (*Mamola v. State of California ex rel. Dept. of Transportation* (1979) 94 Cal.App.3d 781, 788 [156 Cal.Rptr. 614], internal citation omitted.)

- "Liability for injury caused by a dangerous condition of property has been imposed when an unreasonable risk of harm is created by a combination of defect in the property and acts of third parties. However, courts have consistently refused to characterize harmful third party conduct as a dangerous condition-absent some concurrent contributing defect in the property itself." (*Hayes v. State of California* (1974) 11 Cal.3d 469, 472 [113 Cal.Rptr. 599, 521 P.2d 855], internal citations omitted.)

- "[P]laintiffs in this case must show that a dangerous condition of property--that is, a condition that creates a substantial risk of injury to the public--proximately caused the fatal injuries their decedents suffered as a result of the collision with [third party]'s car. But nothing in the statute requires plaintiffs to show that the allegedly dangerous condition also caused the third party conduct that precipitated the accident." (*Cordova, supra,* 61 Cal. 4th at p. 1106.)

- "~~The existence of a dangerous condition is ordinarily a question of fact but 'can be decided as a matter of law if reasonable minds can come to only one conclusion.' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [75 Cal.Rptr.3d 168].)~~Although generally a question of fact, a property defect is not a dangerous condition as a matter of law if the court determines, 'viewing the evidence most favorably to the plaintiff, … that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury … .' " (*Nunez v. City of Redondo Beach* (2022) 81 Cal.App.5th 749, 757 [297 Cal.Rptr.3d 461].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ ~~301–341~~425–426

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-C, *Immunity From Liability*, ¶ 6:91 et seq. (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2785 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.9–12.55

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, §§ 61.01–61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, ~~§ 464.81~~§§ 464.80–464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196*, Public Entities*, § 196.11 (Matthew Bender)

2101. Trespass to Chattels—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully trespassed on [his/her/***nonbinary pronoun***/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] a [***insert item of personal property***];**

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

   [interfered with [*name of plaintiff***]'s use or possession of the [***insert item of personal property***];]**

   [*or*]

   [damaged the [*insert item of personal property***];]**

3. **That [***name of plaintiff***] did not consent;**

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

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

New September 2003

Sources and Authority

- "Trespass to chattel, although seldom employed as a tort theory in California ... , lies where an intentional interference with the possession of personal property has proximately caused injury. Prosser notes trespass to chattel has evolved considerably from its original common law application-concerning the asportation of another's tangible property-to include even the unauthorized use of personal property: 'Its chief importance now,' according to Prosser, 'is that there may be recovery ... for interferences with the possession of chattels which are not sufficiently important to be classed as conversion, and so to compel the defendant to pay the full value of the thing with which he has interfered. Trespass to chattels survives today, in other words, largely as a little brother of conversion.' " (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1566–1567 [54 Cal.Rptr.2d 468], footnotes and internal citations omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551 [176 P.2d 1], internal citations omitted.)

- " 'Though not amounting to conversion, the defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiff's rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury*." In cases of interference with possession of personal property not amounting to conversion, "the owner has a cause of action for trespass or case, *and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use*." … ' " (*Jamgotchian v. Slender* (2009) 170 Cal.App.4th 1384, 1400–1401 [89 Cal.Rptr.3d 122], original italics, internal citations omitted.)

- "It is well settled that a person having neither the possession nor the right to the possession of personal chattels, cannot maintain trespass or trover for an injury done to the property." (*Triscony v. Orr* (1875) 49 Cal.-612, 617, internal citations omitted.)

- ~~"In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." (*eBay, Inc. v. Bidder's Edge* (N.D. Cal. 2000) 100 F.Supp.2d 1058, 1069–1070, internal citations omitted.)~~"[A] plaintiff alleging trespass to chattels based on unauthorized access to a computer system must allege damage or disruption to that computer system." (*Casillas v. Berkshire Hathaway Homestate Ins. Co.* (2022) 79 Cal.App.5th 755, 764 [294 Cal.Rptr.3d 841].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1608 [146 Cal.Rptr.3d 585].)

- Restatement Second of Torts, section 218, provides: "One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

    (a) he dispossesses the other of the chattel, or

    (b) the chattel is impaired as to its condition, quality, or value, or

    (c) the possessor is deprived of the use of the chattel for a substantial time, or

    (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest."

- Restatement Second of Torts, section 222, comment (a), states: "Normally any dispossession is so clearly a serious interference with the right of control that it amounts to a conversion; and it is frequently said that any dispossession is a conversion. There may, however, be minor and unimportant dispossessions, such as taking another man's hat by mistake and returning it within two minutes upon discovery of the mistake, which do not seriously interfere with the other's right of control, and so do not amount to conversion. In such a case the remedy of the action of trespass remains, and will allow recovery of damages for the interference with the possession."

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 16, *Landlord-Tenant Tort Liabilities*, §§ 16.07, 40.43 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.13 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, ~~§ 225.262~~ §§ 225.260–225.262 (Matthew Bender)

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

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

   [or]

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

4. **That [***name of plaintiff***]'s [***protected status–for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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 September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer"

under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because the plaintiff was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- Perception and Association. Government Code section 12926(o).

- "Race," ~~and~~ "Protective Hairstyles~~.~~," and "Reproductive Health Decisionmaking." Government Code section 12926(w), (x), (y).

- "[C]onceptually the theory of '[disparate] treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.*

(2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' " (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist*. (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)

- "We conclude that where a plaintiff establishes a prima facie case of discrimination based on a failure to interview her for open positions, the employer must do more than produce evidence that the hiring authorities did not know why she was not interviewed. Nor is it enough for the employer, in a writ petition or on appeal, to cobble together after-the-fact *possible* nondiscriminatory reasons. While the stage-two burden of production is not onerous, the employer must clearly state the *actual* nondiscriminatory reason for the challenged conduct." (*Dept. of Corrections & Rehabilitation v. State Personnel Bd.* (2022) 74 Cal.App.5th 908, 930 [290 Cal.Rptr.3d 70], original italics.)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably

than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally … must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought … , (3) he [or she] suffered an adverse employment action, such as … denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)

- "Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim." (*Abed, supra,* 23 Cal.App.5th at p. 740, original italics.)

- "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." (*Abed, supra,* 23 Cal.App.5th at p. 741.)

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "[W]e hold that a residency program's claim that it terminated a resident for academic reasons is not entitled to deference. … [T]he jury should be instructed to evaluate, without deference, whether the program terminated the resident for a genuine academic reason or because of an impermissible reason such as retaliation or the resident's gender." (*Khoiny v. Dignity Health* (2022) 76 Cal.App.5th 390, 404 [291 Cal.Rptr.3d 496].)

- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two."

(*Swanson, supra,* 232 Cal.App.4th at p. 966.)

- "Evidence that an employer's proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ' " '[I]t is not enough … to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' " ' However, evidence of pretext is important: ' "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." ' " (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

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

- "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.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "In no way did the Court of Appeal in *Reeves* overturn the long-standing rule that comparator evidence is relevant and admissible where the plaintiff and the comparator are similarly situated in all relevant respects and the comparator is treated more favorably. Rather, it held that in a job hiring case, and in the context of a summary judgment motion, a plaintiff's weak comparator evidence 'alone' is insufficient to show pretext." (*Gupta v. Trustees of California State University* (2019) 40 Cal.App.5th 510, 521 [253 Cal.Rptr.3d 277].)

- "[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has 'created only a weak issue of fact.' However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the "stray remarks doctrine"].)

- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered … .' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)

- "Discrimination on the basis of an employee's foreign accent is a sufficient basis for finding national origin discrimination." (*Galvan v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 549, 562 [250 Cal.Rptr.3d 16].)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1025 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 43.01, 43.10 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] [history of [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [***name of defendant***] knew that [***name of plaintiff***] had [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

4. **That [***name of plaintiff***] was able to perform the essential job duties of [his/her/***nonbinary pronoun***] [current position/the position for which [he/she/***nonbinary pronoun***] applied], either with or without reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., condition***];**

5. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

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

   [or]

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

6. **That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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.**

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her/***nonbinary pronoun***] personally because [he/she/***nonbinary pronoun***] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or animosity toward [***name of plaintiff***] because [he/she/***nonbinary pronoun***] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of***

plaintiff]/**conduct].]**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016, May 2019, May 2020

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

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

This instruction is for use by both an employee and a job applicant. Select the appropriate options in elements 2, 5, and 6 depending on the plaintiff's status.

Modify elements 3 and 6 if the plaintiff was not actually disabled or had a history of disability, but alleges discrimination because the plaintiff was perceived to be disabled. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she/*nonbinary pronoun*] ..." and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of the plaintiff's association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job, with or without reasonable accommodation, is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an

adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of the plaintiff's disability.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Association With ~~Disabled~~ Person Who Has or Is Perceived to Have Disability Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-*

Listug, Inc. (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)

- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]." (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)

- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra,* 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace,* in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made, the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra,* 245

Cal.App.4th at p. 122.)

- "[Defendant] argues that, because [it] hired plaintiffs as recruit officers, they must show they were able to perform the essential functions of a police recruit in order to be qualified individuals entitled to protection under FEHA. [Defendant] argues that plaintiffs cannot satisfy their burden of proof under FEHA because they failed to show that they could perform those essential functions. [¶] Plaintiffs do not directly respond to [defendant]'s argument. Instead, they contend that the relevant question is whether they could perform the essential functions of the positions to which they sought reassignment. Plaintiffs' argument improperly conflates the legal standards for their claim under section 12940, subdivision (a), for discrimination, and their claim under section 12940, subdivision (m), for failure to make reasonable accommodation, including reassignment. In connection with a discrimination claim under section 12940, subdivision (a), the court considers whether a plaintiff could perform the essential functions of the job held—or for job applicants, the job desired—with or without reasonable accommodation." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 716–717 [214 Cal.Rptr.3d 113].)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope, supra,* 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term

medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra,* 220 Cal.App.4th at p. 659, internal citations omitted.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.3d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court*

(2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

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

- "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.)

- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms 'animus,' 'animosity,' or 'ill will.' The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- "Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. … [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra,* 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*." (*Wallace, supra,* 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)

- " '[W]eight may qualify as a protected "handicap" or "disability" within the meaning of the FEHA if medical evidence demonstrates that it results from a physiological condition affecting one or more of the basic bodily systems and limits a major life activity.'… '[A]n individual who asserts a violation of the FEHA on the basis of his or her weight must adduce evidence of a physiological, systemic basis for the condition.' " (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 928 [227 Cal.Rptr.3d 286].)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~1045–1049~~ 1049–1051

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ ~~115.14,~~ 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her/***nonbinary pronoun***] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her/***nonbinary pronoun***] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**

6. **That it was reasonable to [***specify accommodation***];**

7. **That [***name of defendant***] refused to make this accommodation.**

New May 2017; Revised May 2020

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the "refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what the plaintiff did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if the plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because the plaintiff was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- "Discrimination" Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).

- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.

- "Housing" Defined. Government Code section 12927(d).

- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p.1592.)

- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188

Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1599, internal citation omitted.)

- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004), www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~1063~~ 1073–1076

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.14 (Matthew Bender)

2601. Eligibility

To show that [he/she/*nonbinary pronoun*] was eligible for [family care/medical] leave, [*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 defendant*] directly employed five or more employees for a wage or salary;]

3. **That at the time [*name of plaintiff*] [requested/began] leave, [he/she/*nonbinary pronoun*] had more than 12 months of service with [*name of defendant*] and had worked at least 1,250 hours for [*name of defendant*] during the previous 12 months; and**

4. **That at the time [*name of plaintiff*] [requested/began] leave [*name of plaintiff*] had taken no more than 12 weeks of family care or medical leave in the 12-month period [*define period*].**

New September 2003; Revised June 2011, May 2021

Directions for Use

The CFRA applies to employers who directly employ five or more employees (and to the state and any political or civil subdivision of the state and cities of any size). (Gov. Code, § 12945.2(b)~~(3)~~(4).) Include element 2 only if there is a factual dispute about the number of people the defendant directly employed for a wage or salary.

Sources and Authority

- Right to Family Care and Medical Leave. Government Code section 12945.2(a).

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview of Key Leave Laws*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶, 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2603. "Comparable Job" Explained

"Comparable job" means a job that is the same or close to the employee's former job in responsibilities, duties, pay, benefits, working conditions, and schedule. It must be at the same location or a similar geographic location.

New September 2003; Revised May 2021

Directions for Use

Give this instruction only if comparable job is an issue under the plaintiff's CFRA claim.

Sources and Authority

- Comparable Position. Government Code section 12945.2(b)~~(5)~~(6).
- Comparable Position. Cal. Code Regs., tit. 2, § 11087(g).
- "[W]hile we will accord great weight and respect to the [Fair Employment and Housing Commission]'s regulations that apply to the necessity for leave, along with any applicable federal FMLA regulations that the Commission incorporated by reference, we still retain ultimate responsibility for construing [CFRA]." (*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 994-995 [94 Cal.Rptr.2d 643].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1138–12:1139, 12:1150, 12:1154–12:1156 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.30, 8.31~~[1] [2]~~ (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][h] (Matthew Bender)

2610. Affirmative Defense—No Certification From Health -Care Provider

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] denied [*name of plaintiff*]'s request for leave because [he/she/*nonbinary pronoun*] did not provide a health -care provider's certification of [his/her/*nonbinary pronoun*] need for leave. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] told [*name of plaintiff*] in writing that [he/she/*nonbinary pronoun*/it] required written certification from [*name of plaintiff*]'s health -care provider to [grant/extend] leave; and**

2. **That [*name of plaintiff*] did not provide [*name of defendant*] with the required certification from a health -care provider [within the time set by [*name of defendant*] or as soon as reasonably possible].**

New September 2003

Directions for Use

The time set by the defendant described in element 2 must be at least 15 days.

Sources and Authority

- Certification of Health Care Provider. Government Code section 12945.2(j).
- Certification of Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- "Health Care Provider" Defined. Government Code section 12945.2(b)~~(9)~~(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ ~~1056–1060~~1058

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:883–12:884, 12:905, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, *Leaves of Absence*, § 8.26 (Matthew Bender)

2611. Affirmative Defense—Fitness for Duty Statement

[*Name of defendant*] claims that [he/she/*nonbinary pronoun*/it] refused to return [*name of plaintiff*] to work because [he/she/*nonbinary pronoun*] did not provide a written statement from [his/her/*nonbinary pronoun*] health-care provider that [he/she/*nonbinary pronoun*] was fit to return to work. To succeed, [*name of defendant*] must prove both of the following:

1. **That [*name of defendant*] has a uniformly applied practice or policy that requires employees on leave because of their own serious health condition to provide a written statement from their health-care provider that they are able to return to work; and**

2. **That [*name of plaintiff*] did not provide [*name of defendant*] with a written statement from [his/her/*nonbinary pronoun*] health-care provider of [his/her/*nonbinary pronoun*] fitness to return to work.**

New September 2003

Sources and Authority

- Certification on Health Care Provider: Child Care. Government Code section 12945.2(i).
- Certification of Health Care Provider: Return to Work. Government Code section 12945.2(j)(4).
- "Health Care Provider" Defined. Government Code section 12945.2(b)~~(9)~~(10).
- Notice and Certification. Cal. Code Regs., tit. 2, § 11088(b).

Secondary Sources

~~8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1056–1060~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:311, 12:880, 12:884, 12:915 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § ~~8.26~~ 8.28 (Matthew Bender)

2704. Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] is entitled to recover a penalty based on [***name of defendant***]'s failure to pay [his/her/***nonbinary pronoun***] [wages/***insert other claim***] when due after [***name of plaintiff***]'s employment ended. [***Name of defendant***] was required to pay [***name of plaintiff***] all wages owed [on the date that/within 72 hours of the date that] [***name of plaintiff***]'s employment ended.**

You must decide whether [*name of plaintiff***] has proved [he/she/***nonbinary pronoun***] is entitled to recover a penalty. I will decide the amount of the penalty, if any, to be imposed. To recover this penalty, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of plaintiff***]'s employment with [***name of defendant***] ended; and**

2. **That [***name of defendant***] willfully failed to pay [***name of plaintiff***] all wages when due.**

The term "willfully" means only that the employer intentionally failed or refused to pay the wages. It does not imply a need for any additional bad motive.

[*Name of plaintiff***] must also prove the following:**

1. **[***Name of plaintiff***]'s daily wage rate at the time [his/her/***nonbinary pronoun***] employment with [***name of defendant***] ended; and**

2. **[The date on which [***name of defendant***] finally paid [***name of plaintiff***] all wages due/That [***name of defendant***] never paid [***name of plaintiff***] all wages].**

[The term "wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.]

New September 2003; Revised June 2005, May 2019, May 2020, November 2021

Directions for Use

The first part of this instruction sets forth the elements required to obtain a waiting time penalty under Labor Code section 203. The second part is intended to instruct the jury on the facts required to assist the court in calculating the amount of waiting time penalties. Some or all of these facts may be stipulated, in which case they may be omitted from the instruction. Select between the factual scenarios in element 2 of the second part: the employer eventually paid all wages due or the employer never paid the wages due.

The court must determine when final wages are due based on the circumstances of the case and applicable law. (See Lab. Code, §§ 201, 202.) Final wages are generally due on the day an employee is discharged by the employer (Lab. Code, § 201(a)), but are not due for 72 hours if an employee quits without notice. (Lab. Code, § 202(a).)

If there is a factual dispute, for example, whether plaintiff gave advance notice of the intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury.

The definition of "wages" may be deleted if it is included in other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Wages of Employee on Quitting. Labor Code section 202.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- "Wages" Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- "Labor Code section 203 empowers a court to award 'an employee who is discharged or who quits' a penalty equal to up to 30 days' worth of the employee's wages '[i]f an employer *willfully* fails to pay' the employee his full wages immediately (if discharged) or within 72 hours (if he or she quits). It is called a waiting time penalty because it is awarded for effectively making the employee wait for his or her final paycheck. A waiting time penalty may be awarded when the final paycheck is for less than the applicable wage—whether it be the minimum wage, a prevailing wage, or a living wage." (*Diaz v. Grill Concepts Services, Inc.* (2018) 23 Cal.App.5th 859, 867 [233 Cal.Rptr.3d 524], original italics, internal citations omitted.)
- " '[T]he public policy in favor of full and prompt payment of an employee's earned wages is fundamental and well established …' and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy." (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)
- " 'The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.' The prompt payment of an employee's earned wages is a

fundamental public policy of this state." (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580], internal citation omitted.)

- "The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons." (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)

- "[M]issed-break premium pay constitutes wages for purposes of Labor Code section 203, and so waiting time penalties are available under that statute if the premium pay is not timely paid." (*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93, 117 [293 Cal.Rptr.3d 599, 509 P.3d 956].)

- "[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be 'undercut' by company payroll practices or 'any industry habit or custom to the contrary.' " (*Kao, supra,* 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)

- " ' "[T]o be at fault within the meaning of [section 203], the employer's refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, 'willful' merely means that the employer intentionally failed or refused to perform an act which was required to be done." …' " (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- "In civil cases the word 'willful' as ordinarily used in courts of law, does not necessarily imply anything blameable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done, was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (*Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 883, 891 [236 Cal.Rptr.3d 626].)

- "[A]n employer's reasonable, good faith belief that wages are not owed may negate a finding of willfulness." (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)

- "A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist." (*Kao, supra,* 12 Cal.App.5th at p. 963.)

- "A 'good faith dispute' excludes defenses that 'are unsupported by any evidence, are unreasonable, *or* are presented in bad faith.' Any of the three precludes a defense from being a good faith dispute. Thus, [defendant]'s good faith does not cure the objective unreasonableness of its challenge or the lack of evidence to support it." (*Diaz, supra,* 23 Cal.App.5th at pp. 873–874, original italics, internal citations omitted.)

- "A proper reading of section 203 mandates a penalty equivalent to the employee's daily wages for each day he or she remained unpaid up to a total of 30 days. … [¶] [T]he critical computation

required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days." (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)

- " 'A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.' " (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)

- "[Plaintiff] fails to distinguish between a request for statutory penalties provided by the Labor Code for employer wage-and-hour violations, which were recoverable directly by employees well before the Act became part of the Labor Code, and a demand for 'civil penalties,' previously enforceable only by the state's labor law enforcement agencies. An example of the former is section 203, which obligates an employer that willfully fails to pay wages due an employee who is discharged or quits to pay the employee, in addition to the unpaid wages, a penalty equal to the employee's daily wages for each day, not exceeding 30 days, that the wages are unpaid." (*Caliber Bodyworks, Inc. v. Superior Court* (2005) 134 Cal.App.4th 365, 377–378 [36 Cal.Rptr.3d 31].)

- "In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant's interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee's claim for penalties is accompanied by a claim for unpaid final wages." (*Pineda, supra,* 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 437–439

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*, ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.16[2][d], 250.30 et seq. (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of plaintiff***] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [***name of defendant***];**

2. That [*name of plaintiff***] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and**

3. That [*name of plaintiff***] was working under similar working conditions as the other person[s].**

New May 2018; Revised January 2019, November 2019, May 2020

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which the employee is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).) There is no requirement that an employee show discriminatory intent as an element of the claim. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 622–625, 629 [3 Cal.Rptr.3d 844].)

This instruction presents singular and plural options for the comparator, the employee or employees whose pay and work are being compared to the plaintiff's to establish a violation of the Equal Pay Act. The statute refers to *employees* of the opposite sex or different race or ethnicity. There is language in cases, however, that suggests that a single comparator (e.g., one woman to one man) is sufficient. (See *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324 [55 Cal.Rptr.3d 732] [plaintiff had to show that she is paid lower wages than *a male comparator*, italics added]; *Green, supra,* 111 Cal.App.4th at p. 628 [plaintiff in a section 1197.5 action must first show that the employer paid *a male employee* more than a female employee for equal work, italics added].) No California case has expressly so held, however.

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI No. 2741, *Affirmative Defense—Different Pay Justified,* and CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).

- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).

- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)

- ~~"To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator. 'The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.' " (*Hall, supra,* 148 Cal.App.4th at pp. 324–325.)~~ "To prove a prima facie case of wage discrimination, 'a plaintiff must establish that, based on gender, the employer pays different wages to employees doing substantially similar work under substantially similar conditions. [Footnote omitted.]' 'If that prima facie showing is made, the burden shifts to the employer to prove the disparity is permitted by one of the EPA's [four] statutory exceptions—[such as,] that the disparity is based on a factor other than sex.' But a plaintiff must show 'not only that she [was] paid lower wages than a male comparator for equal work, but that she has selected the proper comparator.' 'The [EPA] does not prohibit variations in wages; it prohibits *discriminatory* variations in wages. … [Accordingly,] "a comparison to a specifically chosen employee should be scrutinized closely to determine its usefulness." ' " (*Allen v. Staples, Inc.* (2022) 84 Cal.App.5th 188, 194 [299 Cal.Rptr.3d 779], original italics, internal citations omitted.)

- "[T]he plaintiff in a section 1197.5 action must first show that the employer paid a male employee more than a female employee ' "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." ' " (*Green, supra,* 111 Cal.App.4th at p. 628.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes*, § 250.14 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her/***nonbinary pronoun***] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she/***nonbinary pronoun***] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [***name of plaintiff/decedent***]'s basic needs, including [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008, January 2017

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage),* in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2; Civ. Code, § 3333.2(c)(2).)

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

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "The Elder Abuse Act does not 'apply *whenever* a doctor treats any elderly patient. Reading the act in such a manner would radically transform medical malpractice liability relative to the existing scheme.' " (*Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 223 [232 Cal.Rptr.3d 733], original italics.)

- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn, supra,* 63 Cal.4th at p. 155.)

- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra,* 63 Cal.4th at p. 152.)

- "It must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship. The fact that [another caregiver] provided for a large number of decedent's basic needs does not, in itself, serve to insulate defendants from liability under the Elder Abuse Act if the services they provided were sufficient to give rise to a substantial caretaking or custodial relationship." (*Oroville Hospital v. Superior Court* (2022) 74 Cal.App.5th 382, 405 [289 Cal.Rptr.3d 430].) ~~].)~~

- "[E]ven where statutory definitions of 'dependent adult' or 'care custodian' are satisfied, '[i]t must be determined, on a case-by-case basis, whether the specific responsibilities assumed by a defendant were sufficient to give rise to a substantial caretaking or custodial relationship.' " (*Kruthanooch v. Glendale Adventist Medical Center* (2022) 83 Cal.App.5th 1109, 1131 [299 Cal.Rptr.3d 908], internal citation omitted.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at p. 159, internal citation omitted.)

- " '[I]t is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect.' For these reasons, *Winn* better supports the conclusion that the majority of [defendant]'s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court's focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities

that comprised the patient-provider relationship counsels against adopting such an approach." (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103–104 [224 Cal.Rptr.3d 219].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "Neglect includes the failure to assist in personal hygiene, or in the provision of food, clothing, or shelter; the failure to provide medical care for physical and mental health needs; the failure to protect from health and safety hazards; and the failure to prevent malnutrition or dehydration." (*Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835, 843 [230 Cal.Rptr.3d 42].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "It seems to us, then, that respecting the patient's right to consent or object to surgery is a necessary component of 'provid[ing] medical care for physical and mental health needs.' Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component of what we think of as 'medical care.' " (*Stewart, supra,* 16 Cal.App.5th at p. 107, internal citation omitted.)

- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 345].)

- "Disagreements between physicians and the patient or surrogate about the type of care being provided does not give rise to an elder abuse cause of action." (*Alexander, supra,* 23 Cal.App.5th at p. 223.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1865–1871

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3200. Failure to Repurchase or Replace Consumer Good After Reasonable Number of Repair Opportunities—Essential Factual Elements (Civ. Code, § 1793.2(d))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of defendant***]'s failure to repurchase or replace [a/an] [***consumer good***] after a reasonable number of repair opportunities. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought [a/an] [***consumer good***] [from/distributed by/manufactured by] [***name of defendant***];**

2. **That [***name of defendant***] gave [***name of plaintiff***] a warranty by [***insert at least one of the following:***]**

   [making a written statement that [*describe alleged express warranty***];] [or]**

   [showing [him/her/*nonbinary pronoun***] a sample or model of the [***consumer good***] and representing, by words or conduct, that [his/her/***nonbinary pronoun***] [***consumer good***] would match the quality of the sample or model;]**

3. **That the [***consumer good***] [***insert at least one of the following:***]**

   [did not perform as stated for the time specified;] [or]

   [did not match the quality [of the [sample/model]] [or] [as set forth in the written statement];]

4. **[That [***name of plaintiff***] delivered the [***consumer good***] to [***name of defendant***] or its authorized repair facilities for repair;]**

   [*or***]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair because [he/she/***nonbinary pronoun***] reasonably could not deliver the [***consumer good***] to [***name of defendant***] or its authorized repair facilities because of the [size and weight/method of attachment/method of installation] [or] [the nature of the defect] of the [***consumer good***]]; [and]**

5. **That [***name of defendant***] or its representative failed to repair the [***consumer good***] to match the [written statement/represented quality] after a reasonable number of opportunities; [and]**

6. **[That [***name of defendant***] did not replace the [***consumer good***] or reimburse [***name of plaintiff***] an amount of money equal to the purchase price of the [***consumer good***], less the value of its use by [***name of plaintiff***] before discovering the defect[s].]**

[A written statement need not include the words "warranty" or "guarantee," but if those words are used, a warranty is created. It is also not necessary for [*name of defendant***] to have specifically intended to create a warranty. A warranty is not created if [***name of defendant***] simply stated the value of the [***consumer good***] or gave an opinion about the [***consumer good***]. General statements concerning customer satisfaction do not create a warranty.]**

New September 2003; Revised April 2007, December 2007, December 2011

Directions for Use

An instruction on the definition of "consumer good" may be necessary if that issue is disputed. Civil Code section 1791(a) provides: " 'Consumer goods' means any new product or part thereof that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables. 'Consumer goods' shall include new and used assistive devices sold at retail."

Select the alternative in element 4 that is appropriate to the facts of the case.

Regarding element 4, if the plaintiff claims that the consumer goods could not be delivered for repair, the judge should decide whether written notice of nonconformity is required. The statute, Civil Code section 1793.2(c), is unclear on this point.

Depending on the circumstances of the case, further instruction on element 6 may be needed to clarify how the jury should calculate "the value of its use" during the time before discovery of the defect.

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] [did not match the quality [of the [sample/model]]/as set forth in the written statement];

See also CACI No. 1243, *Notification/Reasonable Time*.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect in the [*consumer good*]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving an express warranty in a lease of consumer goods.

See also CACI No. 3202, "*Repair Opportunities" Explained.*

Sources and Authority

- Song-Beverly Consumer Warranty Act: Right of Action. Civil Code section 1794(a).
- "Express Warranty" Defined. Civil Code section 1791.2.
- Express Warranty Made by Someone Other Than Manufacturer. Civil Code section 1795.
- Replacement or Reimbursement After Reasonable Number of Repair Attempts. Civil Code section 1793.2(d).
- Extension of Warranty. Civil Code section 1793.1(a)(2).
- Buyer's Delivery of Nonconforming Goods. Civil Code section 1793.2(c).
- Distributor or Seller of Used Consumer Goods. Civil Code section 1795.5.
- Song-Beverly Does Not Preempt Commercial Code. Civil Code section 1790.3.
- Extension of Warranty Period for Repairs. Civil Code section 1793.1(a)(2).
- Tolling of Warranty Period for Nonconforming Goods. Civil Code section 1795.6.
- " 'The Song-Beverly Act is a remedial statute designed to protect consumers who have purchased products covered by an express warranty. … One of the most significant protections afforded by the act is … that "if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer … ." …' In providing these remedies, the Legislature has not required that the consumer maintain possession of the goods at all times. All that is necessary is that the consumer afford the manufacturer a reasonable number of attempts to repair the goods to conform to the applicable express warranties." (*Martinez v. Kia Motors America, Inc.* (2011) 193 Cal.App.4th 187, 191 [122 Cal.Rptr.3d 497], internal citation omitted.)
- "Broadly speaking, the Act regulates warranty terms; imposes service and repair obligations on manufacturers, distributors and retailers who make express warranties; requires disclosure of specified information in express warranties; and broadens a buyer's remedies to include costs, attorney fees and civil penalties. ... [¶] [T]he purpose of the Act has been to provide broad relief to purchasers of consumer goods with respect to warranties." (*National R.V., Inc. v. Foreman* (1995) 34 Cal.App.4th 1072, 1080 [40 Cal.Rptr.2d 672].)
- "[S]ection 1793.2, subdivision (d)(2), differs from section 1793.2, subdivision (d)(1), in that it gives the new motor vehicle consumer the right to elect restitution in lieu of replacement; provides specific procedures for the motor vehicle manufacturer to follow in the case of replacement and in the case of restitution; and sets forth rules for offsetting the amount attributed to the consumer's use of the motor

vehicle. These 'Lemon Law' provisions clearly provide greater consumer protections to those who purchase new motor vehicles than are afforded under the general provisions of the Act to those who purchase other consumer goods under warranty." (*National R.V., Inc., supra,* 34 Cal.App.4th at p. 1079, internal citations and footnotes omitted.)

- "[I]t is reasonable to conclude that all of the section 1780, subdivision (a) remedies, save for injunctive relief, are encompassed within section 1782, subdivision (b)'s reference to an 'action for damages … under Section 1780.' [¶] While it is true that damages and restitution are different remedies, serving different purposes, section 1780, subdivision (a)'s use of the broader term 'any damage' followed by the narrower term 'actual damages' within the list of specific potential remedies suggests that the CLRA takes a more expansive view of what constitutes 'damages' pursuant to its terms." (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 379–380 [291 Cal.Rptr.3d 480].)

- ~~The act does not require a consumer to give a manufacturer, in addition to its local representative, at least one opportunity to fix a problem. Regarding previous repair efforts entitling an automobile buyer to reimbursement,~~ "~~[t]~~The legislative history of [Civil Code section 1793.2] demonstrates beyond any question that ... a differentiation between manufacturer and local representative is unwarranted." (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 888 [263 Cal.Rptr. 64].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 52, 57, 321–334

1 California UCC Sales and Leases (Cont.Ed.Bar) Warranties, §§ 3.4, 3.8, 3.15, 3.87

2 California UCC Sales and Leases (Cont.Ed.Bar) Prelitigation Remedies, § 17.70

2 California UCC Sales and Leases (Cont.Ed.Bar) Litigation Remedies, § 18.25

2 California UCC Sales and Leases (Cont.Ed.Bar) Leasing of Goods, § 19.38

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, § 91.15 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.100 et seq. (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27 (Thomson Reuters)

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

[*Name of plaintiff***] claims that the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers/manufacturing [***consumer goods***]];**

3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label;]

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

5. **That [***name of defendant***]'s breach of the implied warranty was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, December 2014, November 2018

Directions for Use

If remedies are sought under the California Uniform Commercial Code, the plaintiff may be required to prove reasonable notification within a reasonable time. (Cal. U. Com. Code, § 2607(3).) If the court determines that proof of notice is necessary, add the following element to this instruction:

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the California Uniform Commercial Code.

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases. (See Civ. Code, §§ 1791(g)–(i), 1795.4.) This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a).
- Damages. Civil Code section 1794(b).
- Implied Warranties. Civil Code section 1791.1(a).
- Duration of Implied Warranties. Civil Code section 1791.1(c).
- Remedies. Civil Code section 1791.1(d).
- Implied Warranty of Merchantability. Civil Code section 1792.
- Damages for Breach; Accepted Goods. California Uniform Commercial Code section 2714.
- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purposes" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)
- "Here the alleged wrongdoing is a breach of the implied warranty of merchantability imposed by the Song-Beverly Consumer Warranty Act. Under the circumstances of this case, which involves the sale of a used automobile, the element of wrongdoing is established by pleading and proving (1) the plaintiff bought a used automobile from the defendant, (2) at the time of purchase, the defendant was in the business of selling automobiles to retail buyers, (3) the defendant made express warranties with respect to the used automobile, and (4) the automobile was not fit for ordinary purposes for which the goods are used. Generally, '[t]he core test of merchantability is fitness for the ordinary purpose for which such goods are used.' " (*Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1246 [228 Cal.Rptr.3d 699] [citing this instruction], internal citations omitted.)
- "[T]he buyer of consumer goods must plead he or she was injured or damaged by the alleged breach of the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1247.)
- "Unless specific disclaimer methods are followed, an implied warranty of merchantability

accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454].)

- "The Song-Beverly Act incorporates the provisions of [California Uniform Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects … are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)

- "[Defendant] suggests the 'implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand, supra,* 226 Cal.App.4th at p. 1546.)

- "[A]llegations showing an alleged defect that created a substantial safety hazard would sufficiently allege the vehicle was not 'fit for the ordinary purposes for which such goods are used' and, thus, breached the implied warranty of merchantability." (*Gutierrez, supra,* 19 Cal.App.5th at pp. 1247–1248.)

- "We recognize that 'an important consideration under the implied warranty is consumer safety.' However, 'vehicle safety is [not] the sole or dispositive criterion in implied warranty cases, which may turn on other facts.' " (*DeNike v. Mathew Enterprise, Inc.* (2022) 76 Cal.App.5th 371, 384–385 [291 Cal.Rptr.3d 480].)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule,

> designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, §§ 71, 72

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties*, § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.106 (Matthew Bender)

California Civil Practice: Business Litigation §§ 53:5–53:7 (Thomson Reuters)

3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of physician***]'s [***insert tort theory, e.g., negligence***].**

[*Name of plaintiff***] also claims that [***name of hospital***] is responsible for the harm because [***name of physician***] was acting as its [agent/employee/[***insert other relationship***]] when the incident occurred.**

If you find that [*name of physician***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of hospital***] is responsible for the harm. [***Name of hospital***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of hospital***] held itself out to the public as a provider of care; and**

2. **That [***name of plaintiff***] looked to [***name of hospital***] for services, rather than selecting [***name of physician***] for services.**

A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [agent/employee] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. You must take into consideration [*name of plaintiff***]'s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [***name of plaintiff***]'s condition notice of the disclaimer.**

New November 2021; Revised May 2022

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct as an ostensible agent.

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and

(2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)

- "[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)

- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884~~.)~~; see *Franklin v. Santa Barbara Cottage Hospital* (2022) 82 Cal.App.5th 395, 405 [297 Cal.Rptr.3d 850].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ ~~1–4~~ 105

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her/***nonbinary pronoun***] rights.**

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

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of corporate defendant***] who was acting on behalf of [***name of corporate defendant***] at the time of the conduct constituting malice, oppression, or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her/***nonbinary pronoun***] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***]**

knew of [*name of individual defendant*]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]

An employee is a "managing agent" if the employee exercises substantial independent authority and judgment in corporate decisionmaking such that the employee's decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005, May 2020

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)*, for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase)*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant] and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d

258].)

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital~~,~~ Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "[T]o support an award of punitive damages, the evidence must allow a reasonable person to conclude it is highly probable that an officer, director, or managing agent of defendant was ' " 'aware of the probable dangerous consequences' " ' of his conduct in connection with the company's distribution of its [product] to [plaintiff], and ' " 'willfully fail[ed] to avoid' " ' those consequences." (*McNeal v. Whittaker, Clark & Daniels, Inc.* (2022) 80 Cal.App.5th 853, 873 [296 Cal.Rptr.3d 394].)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting *as the organization's representative*, not in some other capacity." (*College Hospital~~, Inc.~~, supra,* 8 Cal.4th at p. 723, original italics.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital~~, Inc.~~, supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital~~, Inc.~~, supra*, 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A*. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decision making so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital~~, Inc.~~, supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital~~, Inc.~~, supra,* 8 Cal.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13–14.14, 14.23

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

4562. Payment for Construction Services Rendered—Essential Factual Elements (Bus. & Prof. Code, § 7031(a), (e))

[*Name of plaintiff***] claims that [***name of defendant***] owes [***name of plaintiff***] money for construction services rendered. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [[engaged/hired]/ [or] contracted with] [***name of plaintiff***] to [***specify contractor services***];**

2. **That [***name of plaintiff***] had at all times during the performance of construction services a valid contractor's license;**

3. **That [***name of plaintiff***] performed these services;**

4. **That [***name of defendant***] has not paid [***name of plaintiff***] for the construction services that [***name of plaintiff***] provided; and**

5. **The amount of money [***name of defendant***] owes [***name of plaintiff***] for the construction services provided.**

New May 2021

Directions for Use

Give this instruction in a case in which the plaintiff-contractor seeks to recover compensation owed for services performed for which a license is required. (Bus. & Prof. Code, § 7031(a).)

For element 2, licensure requirements may be satisfied by substantial compliance with the licensure requirements. (Bus. & Prof. Code, § 7031(e).) If the court has determined the defendant's substantial compliance, modify element 2 accordingly, and instruct the jury that the court has made the determination.

When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).) Proof must be made by producing a verified certificate of licensure from the Contractors State License Board.

For a case involving recovery of payment for services provided by an allegedly unlicensed contractor, give CACI No. 4560, *Recovery of Payments to Unlicensed Contractor—Essential Factual Elements*.

Sources and Authority

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 853 [219 Cal.Rptr.3d 775].)

- "Section 7031, subdivision (e) states an exception to the license requirement of subdivision (a). Subdivision (e) provides in part: '[T]he court may determine that there has been substantial compliance with licensure requirements under this section if it is shown at an evidentiary hearing that the person who engaged in the business or acted in the capacity of a contractor (1) had been duly licensed as a contractor in this state prior to the performance of the act or contract, (2) acted reasonably and in good faith to maintain proper licensure, and (3) acted promptly and in good faith to remedy the failure to comply with the licensure requirements upon learning of the failure.' " (*C. W. Johnson & Sons, Inc. v. Carpenter* (2020) 53 Cal.App.5th 165, 169 [265 Cal.Rptr.3d 895].)

- "[S]ection 7031 bars even a licensed general contractor in California from bringing an action for compensation for an act or contract performed by an unlicensed subcontractor where a license is required." (*Kim v. TWA Construction, Inc.* (2022) 78 Cal.App.5th 808, 831 [294 Cal.Rptr.3d 140].)

Secondary Sources

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

California Civil Practice: Real Property Litigation §§ 10:26–10:38 (Thomson Reuters)

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

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

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

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

Miller & Starr, California Real Estate 4th §§ 32:68–32:84

4602. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her/*nonbinary pronoun*] [discharge/*specify other adverse action*], [*name of defendant*] is not liable if [he/she/*nonbinary pronoun*/it] proves by clear and convincing evidence that [he/she/*nonbinary pronoun*/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. 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. 4601.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).
- "Guided by *Lawson* [*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703 [289 Cal.Rptr.3d 572, 503 P.3d 659]] and applying its reasoning, we conclude that Government Code section 8547.10, subdivision (e), rather than *McDonnell Douglas*, provides the relevant framework for analyzing claims under Government Code section 8547.10." (*Scheer v. Regents of University of California* (2022) 76 Cal.App.5th 904, 916 [291 Cal.Rptr.3d 822].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 302–307A

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Under Other Whistleblower Statutes*, ¶ 5:1790 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)

4604. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff*] proves that [his/her/*nonbinary pronoun*] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her/*nonbinary pronoun*] [discharge/[*other adverse employment action*]], [*name of defendant*] is not liable if [he/she/*nonbinary pronoun*/it] proves by clear and convincing evidence that [he/she/*nonbinary pronoun*/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, December 2022

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. 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.) For an instruction on the clear and convincing standard of proof, see CACI No. 201, *Highly Probable—Clear and Convincing Proof*.

Sources and Authority

- Same-Decision Affirmative Defense. Labor Code section 1102.6.
- "[W]e now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims." (*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 712 [289 Cal.Rptr.3d 572, 503 P.3d 659].)
- "By its terms, section 1102.6 describes the applicable substantive standards and burdens of proof for both parties in a section 1102.5 retaliation case: First, it must be 'demonstrated by a preponderance of the evidence' that the employee's protected whistleblowing was a 'contributing factor' to an adverse employment action. Then, once the employee has made that necessary threshold showing, the employer bears 'the burden of proof to demonstrate by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." (*Lawson, supra,* 12 Cal.5th at p. 712, internal citation omitted.)
- "It is not enough…that an employer shows it had a legitimate, nondiscriminatory reason for the adverse employment action. Were that the standard, then an employer could satisfy its burden simply by showing it had one legitimate reason for its action, even if several illegitimate reasons principally motivated its decision. But that is not the applicable standard here. Under section 1102.6, the employer must instead show 'the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.' " (*Vatalaro v. County of Sacramento* (2022) 79 Cal.App.5th 367, 379 [294 Cal.Rptr.3d

389], internal citation omitted.)

- "[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, §§ 373, 374

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(II)-A, *Retaliation Under Title VII and FEHA*, ¶ 5:1538 (The Rutter Group)

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

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.60 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**

2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**

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

4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her/***nonbinary pronoun***] decision. [He/She/***Nonbinary pronoun***] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. Give these paragraphs in a case sounding in fraud. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].)

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607],

disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [228 Cal.Rptr.3d 699]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- "The Legislature enacted the CLRA 'to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection.' " (*Valdez v. Seidner–Miller, Inc.* (2019) 33 Cal.App.5th 600, 609 [245 Cal.Rptr.3d 268].)
- " 'Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires "consideration and weighing of evidence from both sides" and which usually cannot be made on demurrer.' " (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)
- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may

recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)

- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. … Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- " 'To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the … practice declared to be unlawful." ' Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase … is not synonymous with "actual damages," which generally refers to pecuniary damages.' Rather, the consumer must merely 'experience some [kind of] damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)

- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)

- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)

- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not … necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra,* 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra,* 186 Cal.App.4th at p. 1022.)

- ~~"A ' "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' … ." [Citation.]' " (*Moran,*~~

~~*supra,* 3 Cal.App.5th at p. 1152.)~~ "[T]he failure to disclose *material* facts may be actionable under the CLRA in certain situations. For purposes of the CLRA, 'a fact is "material" if a reasonable consumer would deem it important in determining how to act in the transaction at issue.' The concept of materiality is related to the issue of causation. A causal link between the deceptive practice and damage to the plaintiff is a necessary element of a CLRA cause of action. A misrepresentation or an omission of fact is material only if the plaintiff relied on it—that is, the plaintiff would not have acted as he or she did without the misrepresentation or the omission of fact." (*Torres v. Adventist Health System/West* (2022) 77 Cal.App.5th 500, 513 [292 Cal.Rptr.3d 557], original italics, internal citations omitted.)

- "[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1262, internal citations omitted.)

- "If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation." (*Brady, supra,* 26 Cal.App.5th at p. 1165.)

- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra,* 202 Cal.App.4th at p. 256.)

- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1295.)

- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)

- "In California … product mislabeling claims are generally evaluated using a 'reasonable consumer' standard, as distinct from an 'unwary consumer' or a 'suspicious consumer' standard." (*Brady, supra,* 26 Cal.App.5th at p. 1174.)

- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1258.)

- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some

material fact.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1260.)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra,* 237 Cal.App.4th Supp. at p. 11.)

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

- "[A] 'reasonable correction offer prevent[s] [the plaintiff] from maintaining a cause of action for damages under the CLRA, but [does] not prevent [the plaintiff] from pursuing remedies based on other statutory violations or common law causes of action based on conduct under those laws.' " (*Valdez, supra,* 33 Cal.App.5th at p. 612.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

Item number: 05

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/5/23

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Criminal Procedure: Mental Competency Proceedings

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 4.130

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

*Staff contact (*name, phone and e-mail*): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/1/22
Project description from annual agenda: Develop a proposal to amend rule to 4.130 to reflect changes to Penal Code section 1369 et seq., by (1) SB 184 (Stats. 2022, ch. 47), regarding the court's finding on whether antipsychotic medication is appropriate for the defendant; and (2) SB 1223 regarding mental health diversion eligibility.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The committee requests an immediate effective date of May 15, 2023 because the proposed revisions are based on current law.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-
For business meeting on May 11–12, 2023

Title
Criminal Procedure: Mental Competency Proceedings

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 4.130

Recommended by
Criminal Law Advisory Committee
Hon. Brian. M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
May 15, 2023

Date of Report
March 23, 2023

Contact
Sarah Fleischer-Ihn, 415-865-7702
sarah.fleischer-ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends amendments to rule 4.130 of the California Rules of Court to reflect statutory changes to Penal Code section 1369(a) regarding treatment with antipsychotic medication of a defendant found incompetent to stand trial, statutory changes to Penal Code section 1370 deleting language that the presumption of competency does not apply to a posttrial hearing on competence, the relettering of subdivisions in Penal Code section 1001.36, and to make technical revisions.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council amend rule 4.130 of the California Rules of Court, effective May 15, 2023, as follows:

1. Subdivision (d)(2)(E) to reflect statutory changes to Penal Code section 1369(a) regarding a recommendation by a psychologist or psychiatrist about treating with antipsychotic medication a defendant found incompetent to stand trial;

2. Subdivision (g) to correct the references to recently relettered subdivisions in Penal Code sections 1001.36;

3. Subdivision (d)(2)(F) to clarify which collateral sources were considered by the examiner and to replace gendered pronouns; and

4. Subdivision (h)(2) to reflect statutory changes to Penal Code section 1370(a)(1)(G) on posttrial hearings on competence by deleting the phrase "except that a presumption of competency does not apply."

The proposed amended rule is attached at pages 4–5.

Relevant Previous Council Action

Rule 4.130 was adopted effective January 1, 2007. It was most recently amended, effective May 13, 2022, to reflect legislative changes to procedures regarding defendants found incompetent to stand trial in a misdemeanor criminal proceeding (Senate Bill 317; Stats. 2021, ch. 599), and to implement statutory authorization of reevaluations performed by the Department of State Hospitals. (Assembly Bill 133; Stats. 2021, ch. 143.)

Analysis/Rationale

The recommended amendments to rule 4.130 regarding mental competency proceedings reflect statutory changes to Penal Code sections 1369(a) and 1370(a)(1)(G), the relettering of Penal Code section 1001.36(d)–(g), and technical amendments to remove gendered pronouns and clarify which collateral sources were considered by the examiner.

Penal Code section 1369 applies to criminal cases in which a defendant is found to be mentally incompetent. Effective June 30, 2022, this statute was amended in relevant part to revise the respective roles of a psychologist or psychiatrist in recommending treatment with antipsychotic medication of a defendant found incompetent to stand trial, including the requirements for a hearing to determine the defendant's capacity to make decisions regarding antipsychotic medication. (Sen. Bill 184; Stats. 2022, ch. 47, § 41.)

In accordance with the statutory amendments to Penal Code section 1369, this recommendation amends rule 4.130(d)(2)(E) regarding the requirements of the recommendation by a psychologist or psychiatrist. Specifically, the recommendation deletes the requirement that an examining psychologist inform the court if the psychologist believes that a psychiatrist should examine the defendant to assess whether antipsychotic medication is appropriate. The recommendation also adds provisions around what is required in an opinion from a licensed psychologist or psychiatrist regarding the medical appropriateness of antipsychotic medication.

SB 184 also amended Penal Code section 1370(a)(1)(G) on posttrial hearings on competence. This subdivision permits the court to conduct a subsequent competency hearing if there is substantial evidence of a change in the defendant's condition, provided by defense counsel or jail medical or mental health staff. Prior to the amendment, the statute directed the court to hold the subsequent competency hearing as if a certificate of restoration had been returned under Penal Code section 1372(a)(1), "except that a presumption of competency shall not apply." A

presumption of competency applies to hearings under Penal Code section 1372, which details the procedures for determining a defendant's restoration of mental competence in the course of receiving treatment. (See *People v. Mixon* (1990) 225 Cal.App.3d 1471.) SB 184 deleted the exception from Penal Code section 1370 to align the standards for a subsequent competency hearing with those for a certificate of restoration. This statutory amendment requires deletion of the phrase "except that a presumption of competency does not apply" from rule 4.130(h)(2) on posttrial hearings on competence. Because this deletion is a minor change needed to conform the rule to the statute, the committee is recommending it now even though it was not circulated for public comment.[1]

Effective January 1, 2023, Penal Code section 1001.36 was amended to expand eligibility for mental health diversion and to reletter existing subdivisions. (Sen. Bill 1223; Stats. 2022, ch. 735). This recommendation updates the references to the subdivisions in this Penal Code statute.

Policy implications

This proposal has no major policy implications because the recommendation is to implement new legislation. It aligns with the Judicial Council's policy to keep the California Rules of Court consistent with related statutes.

Comments

The proposal (other than the change recommended to rule 4.130(h)(2)) circulated for comment from December 9, 2022, to January 20, 2023. Two comments were received. The Superior Court of Orange County and the Orange County Bar Association agreed with the proposal.

Alternatives considered

The committee did not consider the alternative of taking no action, determining that it was important to amend the rule to implement legislative changes.

Fiscal and Operational Impacts

Any impacts will arise from the new statutory provisions rather than council action. The committee does not anticipate fiscal impacts from the rule revisions.

Attachments and Links

1. Cal. Rules of Court, rule 4.130, at pages 4–6
2. Chart of comments, at page 7

[1] A recommendation for a minor substantive change unlikely to create controversy may be adopted without circulation for comment. Cal. Rules of Court, rule 10.22(d). This change was brought to the attention of the committee only after the rest of the proposal had already circulated.

Rule 4.130 of the California Rules of Court is amended, effective May 15, 2023, to read:

Rule 4.130. Mental competency proceedings

(a)–(c) * * *

(d) Examination of defendant after initiation of mental competency proceedings

(1) * * *

(2) Any court-appointed experts must examine the defendant and advise the court on the defendant's competency to stand trial. Experts' reports are to be submitted to the court, counsel for the defendant, and the prosecution. The report must include the following:

(A)–(D) * * *

(E) Under Penal Code section 1369, a statement on whether treatment with antipsychotic or other medication is medically appropriate for the defendant~~, whether the treatment is likely to restore the defendant to mental competence, a list of likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, whether it is medically appropriate to administer antipsychotic or other medication in the county jail,~~ and whether the defendant has capacity to make decisions regarding antipsychotic or other medication as outlined in Penal Code section 1370. ~~If an examining psychologist is of the opinion that a referral to a psychiatrist is necessary to address these issues, the psychologist must inform the court of this opinion and his or her recommendation that a psychiatrist should examine the defendant;~~ If a licensed psychologist examines the defendant and opines that treatment with antipsychotic medication may be appropriate, the psychologist's opinion must be based on whether the defendant has a mental disorder that is typically known to benefit from that treatment. A licensed psychologist's opinion must not exceed the scope of their license. If a psychiatrist examines the defendant and opines that treatment with antipsychotic medication is appropriate, the psychiatrist must inform the court of their opinion as to the likely or potential side effects of the medication, the expected efficacy of the medication, and possible alternative treatments, as outlined in Penal Code section 1370;

(F) A list of all sources of information considered by the examiner, including legal, medical, school, military, regional center, employment, hospital, and psychiatric records; the evaluations of other experts; the

results of psychological testing; police reports; criminal history; statement of the defendant; statements of any witnesses to the alleged crime; booking information, mental health screenings, and mental health records following the alleged crime; consultation with the prosecutor and defendant's attorney; and any other collateral sources considered by the examiner in reaching ~~his or her~~ a conclusion;

(G)–(H) * * *

(3) * * *

(e)–(f) * * *

(g) Reinstatement of felony proceedings under section 1001.36~~(d)~~(g)

If a defendant eligible for commitment under section 1370 is granted diversion under section 1001.36, and during the period of diversion~~,~~ the court determines that criminal proceedings should be reinstated under section 1001.36~~(d)~~(g), the court must, under section 1369, appoint a psychiatrist, licensed psychologist, or any other expert the court may deem appropriate, to examine the defendant and return a report opining on the defendant's competence to stand trial. The expert's report must be provided to counsel for the People and to the defendant's counsel.

(1) * * *

(2) If the court finds by a preponderance of the evidence that the defendant is mentally competent, the court must hold a hearing as set forth in Penal Code section 1001.36~~(d)~~(g).

(3)–(4) * * *

(h)

(1) * * *

(2) On receipt of an evaluation report under (h)(1) or an evaluation by the State Department of State Hospitals under Welfare and Institutions Code section 4335.2, the court must direct the clerk to serve a copy on counsel for the People and counsel for the defendant. If, in the opinion of the appointed expert or the department's expert, the defendant has regained competence, the court must conduct a hearing~~,~~ as if a certificate of restoration of competence had been filed under section 1372(a)(1)~~, except that a presumption of competency does not apply~~. At the hearing, the court may

consider any evidence, presented by any party, that is relevant to the question of the defendant's current mental competency.

(A)–(C) * * *

W23-04

Mental Competency Proceedings (Cal. Rules of Court, rule 4.130)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Superior Court of Orange County by Elizabeth Flores, Operations Analyst	A	*Does the proposal appropriately address the stated purpose?* Yes *Would the proposal provide cost savings? If so, please quantify.* No *What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?* Not applicable to this modification other than related action (training and procedures) based on the legislation itself. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes *How well would this proposal work in courts of different sizes?* This proposal will have minimal impact to courts of different sizes.	No response required.
2.	Orange County Bar Association by Michael A. Gregg, President	A	*Does the proposal appropriately address the stated purpose?* Accurately reflects changes to PC 1369 and 1001.36. The proposal appropriately addresses the stated purpose.	No response required.

Item number: 06

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/5/2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Criminal Procedure: Defendant's Financial Statement

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Revise form CR-105

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

*Staff contact (*name, phone and e-mail*): Sarah Fleischer-Ihn, 5-7702, sarah.fleischer-ihn@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): 11/1/22
Project description from annual agenda: Develop a proposal to revise Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (form CR-105) to reflect the repeal of Penal Code section 987.8 by AB 1869 (Stats. 2020, ch. 92).

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The committee requests an effective date of September 1, 2023 because the proposed revisions are based on current law.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-084
For business meeting on May 11–12, 2023

Title
Criminal Procedure: Defendant's Financial Statement

Rules, Forms, Standards, or Statutes Affected
Revise form CR-105

Recommended by
Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 21, 2023

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends revisions to the optional Judicial Council form used by defendants to state financial eligibility for appointment of counsel and for the record on appeal at public expense to reflect statutory changes removing the authority of the court to make a post-proceeding determination of the defendant's ability to pay and to order the defendant to reimburse the county for the costs of the public defender.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council revise form CR-105, effective September 1, 2023, to:

1. Change the form title to "Defendant's Financial Statement on Eligibility for Appointment of Counsel and Record on Appeal at Public Expense" (formerly "Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense");

2. Change the form's short title to "Defendant's Financial Statement" (formerly "Defendant's Financial Statement and Notice to Defendant");

3. Delete item 13, Eligibility for Appointment of Counsel and Notice to Defendant, a notice to the defendant stating that if an attorney was appointed to represent the defendant, the court could hold a hearing to determine the defendant's ability to pay all or a portion of the cost of the attorney and order the defendant to pay all or part of such cost (former Pen. Code, § 987.8(f));

4. Delete a statement under Declaration of Defendant that the defendant understands the notice contained in item 13; and

5. Delete a reference to Penal Code section 987.8 in the footer and replace it with a reference to section 987, which allows the court to require a defendant to file a financial statement to determine whether the defendant is able to employ counsel in a criminal case.

The proposed revised form is attached at pages 4–5.

Relevant Previous Council Action

Form CR-105 was adopted by the Judicial Council as form MC-210 and renumbered, effective September 1, 2018, as part of a larger effort to limit the use of the *Miscellaneous* designation. Form CR-105 was most substantially revised, effective January 1, 2009, to accommodate its use by defendants seeking a record of the oral proceedings in the trial court at public expense.

Analysis/Rationale

The recommended revisions to form CR-105 reflect the repeal of Penal Code section 987.8 by Assembly Bill 1869 (Stats. 2020, ch. 92).

Penal Code section 987.8 authorized the court to order a defendant to reimburse the county all or a portion of the cost of appointed counsel. If made, this order would occur at the conclusion of criminal proceedings, after notice and hearing, and upon a determination of the defendant's ability to pay. Subdivision (f) required the court to notify the defendant, prior to the appointment of counsel or legal assistance, that reimbursement to the county could be ordered.

In light of the statute's repeal, this recommendation (1) removes the notice to the defendant stating that if an attorney was appointed to represent the defendant, the court could hold a hearing to determine the defendant's ability to pay all or a portion of the cost of the attorney and order the defendant to pay all or part of such cost; (2) revises the form title and short title to reflect this change; and (3) replaces the reference to Penal Code section 987.8 with Penal Code section 987. Penal Code section 987(c) authorizes the court to "require a defendant to file a financial statement or other financial information under penalty of perjury" as part of the court's determination whether to appoint counsel.

Policy implications

This proposal has no major policy implications because the recommendation is to implement new legislation.

Comments

The proposal circulated for comment from December 9, 2022, to January 20, 2023. The committee received one comment from the Orange County Bar Association agreeing with the proposal.

Alternatives considered

The committee did not consider the alternative of taking no action, determining that it was important to revise the form to implement legislative changes.

Fiscal and Operational Impacts

Any impacts will arise from the repealed statutory provisions, rather than council action.

Attachments and Links

1. Form CR-105, at pages 4–5
2. Chart of comments, at page 6
3. Assembly Bill 1869 (Stats. 2020, ch. 92), *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1869*

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* DRAFT Not approved by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. **DEFENDANT:**	
DEFENDANT'S FINANCIAL STATEMENT *(check all that apply)* ☐ **ELIGIBILITY FOR APPOINTMENT OF COUNSEL** ☐ **ELIGIBILITY FOR RECORD ON APPEAL AT PUBLIC EXPENSE**	CASE NUMBER:

1. a. Defendant's name:
   b. Other names used:
   c. Address:
   d. Date of birth:
   e. Telephone number:
   f. Driver's license number:

2. Defendant's present employment
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union:
   g. Name of credit union:

3. If defendant is not now working, state the name and address of defendant's last employer and the last date defendant was employed.
   a. Name:
   b. Address:
   c. Last date of employment:

4. Defendant ☐ is ☐ is not married.

5. a. Spouse's name:
   b. Other names used:
   c. Address:
   d. Date of birth:
   e. Telephone number:
   f. Driver's license number:

6. Spouse's present employment
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union:
   g. Name of credit union:

7. If spouse is not now working, state the name and address of spouse's last employer and the last date spouse was employed.
   a. Name:
   b. Address:
   c. Last date of employment:

8. Dependents

Name	Address	Relationship	Age

Form Approved for Optional Use
Judicial Council of California
CR-105 [Rev. September 1, 2023]

DEFENDANT'S FINANCIAL STATEMENT ON ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND RECORD ON APPEAL AT PUBLIC EXPENSE

Pen. Code, § 987
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

OTHER MONTHLY INCOME

9.

Defendant		Spouse	
a. Unemployment and disability	$	a. Unemployment and disability	$
b. Social Security	$	b. Social Security	$
c. Welfare, TANF	$	c. Welfare, TANF	$
d. Veteran's benefits	$	d. Veteran's benefits	$
e. Worker's compensation	$	e. Worker's compensation	$
f. Child support payments	$	f. Child support payments	$
g. Spousal support payments	$	g. Spousal support payments	$
h. All other income not elsewhere listed	$	h. All other income not elsewhere listed	$
Total:	$	**Total:**	$

EXPENSES

10. Monthly expenses being paid by defendant alone or by defendant and spouse

a. Rent or house payments	$	f. Clothing and laundry	$
b. Car payments	$	g. Food	$
c. Transportation payments	$	h. Support payments	$
d. Medical and dental payments	$	i. Insurance payments	$
e. Loan payments	$	j. Other payments (union, taxes, utilities)	$
		Total (a-j):	$

11. Installment payments other than those listed in item 10.

	Name of Creditor	Monthly Payment	Balance Owed
a.		$	$
b.		$	$
c.		$	$
d.		$	$
e.		$	$
		Total: $	**Total:** $

ASSETS

12. What do you own? *(State value):*

a. Cash	$	
b. House equity	$	
c. Cars, other vehicles and boat equity *(List make, year, and license number of each)*	$	
d. Checking, savings, and credit union accounts *(List name and account number of each)*	$	
e. Other real estate equity	$	
f. Income tax refunds due	$	
g. Life insurance policies (ordinary life, face value)	$	Length of ownership
h. Other personal property (jewelry, furniture, furs, stocks and bonds, etc.)	$	
Total:	$	

Declaration of Defendant

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Date:

▶ _____
SIGNATURE OF DEFENDANT

W23-06

Defendant's Financial Statement (Revise form CR-105)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association by Michael A. Gregg, President	A	• *Does the proposal appropriately address the stated purpose?* Accurately reflects changes to PC 987.8 deleting ability of court to order Defendant to reimburse county for legal expenses. The proposal appropriately addresses the stated purpose.	No response required.

Item number: 07

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Juvenile Law: Changes to Implement New Disposition for Serious Offenses

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt Cal. Rules of Court, adopt rules 5.804, 5.807, and 5.808; amend rules 5.663, 5.670, 5.790, and 5.820; repeal rule 5.805; approve form JV 733; revise forms JV-060-INFO, JV-618, JV-665, JV-667, JV-690, JV-692, JV-735, JV-751; and repeal form JV-732

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

*Staff contact (*name, phone and e-mail*): Tracy Kenny (916)263-2838, tracy.kenny@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 2, 2021
Project description from annual agenda: 3. DJJ Realignment Implementation
Legislation enacted in 2020 (SB 823) and follow up trailer bill legislation (SB 92) enacted in 2021 establish the framework for juvenile courts and counties to take over all responsibility for juvenile justice dispositions and require them to implement new procedures to commit serious offenders to an SYTF in anticipation of the complete closure of DJJ on June 30, 2023. The committee will update rules and forms to remove DJJ references and adapt them to incorporate SYTF requirements.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This proposal is to have a July 1, 2023 effective date to be lined up with the imminent closure of the Division of Juvenile Justice which will occur on June 30, 2023.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☒ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☒ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

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REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on May 11–12, 2023

Title
Juvenile Law: New Disposition for Serious Offenses

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rules 5.804, 5.807, and 5.808; amend rules 5.663, 5.670, 5.790, and 5.820; repeal rule 5.805; approve form JV-733; revise forms JV-060-INFO, JV-618, JV-665, JV-667, JV-690, JV-692, JV-735, and JV-751; revoke form JV-732

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
July 1, 2023

Date of Report
March 22, 2023

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov

Stephanie Lacambra, 415-865-7481
stephanie.lacambra-t@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends adopting three rules of court, amending four rules of court, and repealing one rule of court, as well as approving one optional form, revising eight forms, and revoking one form to reflect the closure of the Department of Juvenile Justice and create new procedures to assist courts in using the new secure youth treatment facility disposition. These revisions would become effective on July 1, 2023, to align with the closure of the Division of Juvenile Justice on June 30, 2023.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective July 1, 2023:

1. Adopt Cal. Rules of Court, rules 5.804, 5.807, and 5.808 to implement the provisions of Welfare and Institutions Code section 875;

2. Amend Cal. Rules of Court, rules 5.663, 5.670, 5.790, and 5.820 to delete obsolete references to the Division of Juvenile Justice (DJJ) and update them to conform to recent statutory changes;

3. Repeal Cal. Rules of Court, rule 5.805 to reflect the closure of the DJJ;

4. Approve *Commitment to Secure Youth Treatment Facility* (form JV-733) for courts to use when committing youth to a secure youth treatment facility (SYTF);

5. Revise the following forms to reflect the closure of the DJJ, the new SYTF disposition, and recent legislative changes:

   - *Juvenile Justice Court: Information for Parents* (form JV-060-INFO);
   - *Waiver of Rights—Juvenile Justice* (form JV-618);
   - *Disposition—Juvenile Delinquency* (form JV-665);
   - *Custodial and Out-of-Home Placement Disposition Attachment* (form JV-667);
   - *School Notification of Court Adjudication (Welfare & Institutions Code Section 827(b) and Education Code Section 48267)* (form JV-690);
   - *Notification to Sheriff of Juvenile Delinquency Felony Adjudication (Welfare & Institutions Code Section 827.2)* (form JV-692);
   - *Juvenile Notice of Violation of Probation* (form JV-735); and
   - *Citation and Written Notification for Deferred Entry of Judgment—Juvenile* (form JV-751); and

6. Revoke *Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities* (form JV-732) to reflect the closure of the DJJ.

The proposed rules and forms are attached at pages 11–45.

Relevant Previous Council Action

The Judicial Council approved a new rule of court, rule 5.806, at its March 24, 2023, meeting to be effective July 1, 2023, to implement the statutory directive in Welfare and Institutions Code section 875(h) that the council adopt an offense-based classification matrix to set the baseline terms for youth committed to an SYTF.

Analysis/Rationale

Background

In 2020, the Governor and the Legislature reached agreement on a framework to close the Division of Juvenile Justice (DJJ) and reallocate funding to counties to allow them to meet the needs of youth who would previously have been committed to the DJJ in local or regional programs. The details of this framework were spelled out in Senate Bill 92 (Stats. 2021, ch. 18), which was enacted in May 2021. Senate Bill 92 adds a new article, Secure Youth Treatment Facilities, to the Welfare and Institutions Code that sets forth a new dispositional option for juveniles ages 14 and over who are adjudicated for a Welfare and Institutions Code section 707(b) offense and for whom a less restrictive alternative disposition is unsuitable.

The proposal

The recommendations would amend and revise existing rules and forms to replace references to "Division of Juvenile Justice" with "secure youth treatment facility," as appropriate. The recommendations would also repeal the current rule of court and revoke the form used to commit a youth to the DJJ and replace them with a set of rules and an optional form to be used by the court for the new SYTF disposition.

Changes to existing rules and forms to reflect closure of Division of Juvenile Justice

Numerous rules and forms currently refer to the Division of Juvenile Justice; those references must be removed and, where appropriate, replaced. In addition, with the closure of the DJJ, there will no longer be any juvenile sex offenses requiring registration as juvenile registration was only required for youth committed to DJJ, so those references must be deleted.

Rule 5.663

Rule 5.663, which sets forth the duties of counsel in juvenile justice matters, would be amended consistent with the provisions of Welfare and Institutions Code section 634.3. The legislation that enacted section 634.3 was passed in 2015, and while the council did implement the requirement that training standards and requirements be adopted by rule of court, the council did not revise rule 5.663 to clarify that attorneys in juvenile justice matters must represent the expressed interests of the child rather than their "best interests." Rule 5.663 is referenced on form JV-665, which is proposed to be revised, and thus the committee wants to ensure that rule 5.663 accurately reflects the current state of the law and does not cause unnecessary confusion.

Rule 5.670

This rule, which contains the factors for the court to consider at a detention hearing, would be amended to require the court to consider whether a youth had been committed to an SYTF rather than to the DJJ. In addition, the rule would be amended to update internal cross-references.

Rule 5.790

Rule 5.790 would be amended to delete subdivision (i), concerning youths who were committed to the DJJ at the time of the disposition, and to re-letter the subsequent subdivision.

Rule 5.805
The committee recommends that rule 5.805 (commitment to the DJJ) be repealed because the DJJ would no longer be a dispositional option for juvenile courts.

Rule 5.820
Rule 5.820 would be amended to replace a reference to a commitment to the DJJ with a reference to an SYTF commitment.

Juvenile Justice Court: Information for Parents **(form JV-060-INFO)**
This form would be revised to remove language about the DJJ and substitute information about the SYTF disposition. The form would also be revised to reflect recent statutory changes concerning the interrogation of juveniles and a requirement that the public defender be notified within two hours of a youth being taken into custody. Revisions concerning the role of appointed counsel reflect recent changes to the law described above with reference to rule 5.663. In addition, information about transfer to adult court would be updated to reflect that only youth 16 and older are eligible for transfer. Also, a section is proposed to be added to the form to highlight that some juvenile adjudications will result in a prohibition on possessing firearms until age 30, as provided in Penal Code section 29820. Finally, all gendered pronouns and language would be made gender neutral consistent with the council's efforts to remove gendered language from rules and forms where it is not required.

Waiver of Rights—Juvenile Justice **(form JV-618)**
Form JV-618 would be revised to remove references to the DJJ in item 4b and substitute a reference to the SYTF disposition. In addition, item f would be revised to delete the check box for sex offender registration because it applies only to commitments to the DJJ, which cannot occur after June 30, 2023.

Disposition—Juvenile Delinquency **(form JV-665)**
Form JV-665 would be revised to remove item 18, the check box for the court to require sex offender registration; to renumber the remaining items; and to revise the reference to attached form JV-732 (commitment to the DJJ) to substitute proposed new form JV-733 (commitment to an SYTF).

Custodial and Out-of-Home Placement Disposition Attachment **(form JV-667)**
Form JV-667 would be revised to replace a reference to commitment to the DJJ with commitment to an SYTF in item 9, revise item 6h to remove check boxes for "mother" and "father" as superfluous in this context, and remove gendered pronouns in item 7b.

School Notification of Court Adjudication (Welfare & Institutions Code Section 827(b) and Education Code Section 48267) **(form JV-690)**
Form JV-690 would be revised to delete the check box for the DJJ and substitute one for an SYTF in item 2b. In addition, gendered pronouns would be replaced by gender-neutral terms on the form.

Notification to Sheriff of Juvenile Delinquency Felony Adjudication (Welfare & Institutions Code Section 827.2) **(form JV-692)**
Form JV-692 would be revised to remove a check box for a DJJ commitment and add one for an SYTF commitment.

Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities **(form JV-732)**
The commitment form for the DJJ would be revoked and a new, optional form approved for commitment to an SYTF (see form JV-733).

Juvenile Notice of Violation of Probation **(form JV-735)**
Form JV-735 would be revised to replace a reference to the DJJ in item 3e with a reference to an SYTF. In addition, the notice to parents about financial liability would be revised to reflect recent changes in the law taking away financial liability for the cost of appointed counsel for a child and for the costs of the child's placement and supervision.

Citation and Written Notification for Deferred Entry of Judgment—Juvenile **(form JV-751)**
Form JV-751 would be revised to remove references to DJJ commitment as a possible consequence in items 8 and 9; delete item 10, concerning transfer to criminal court jurisdiction, because it is not an accurate statement of the law; and rewrite items 4a and 11 (to be renumbered as item 10) to remove gender-specific language.

New rules and form to implement new SYTF disposition

The committee recommends adopting three new rules (in addition to proposed rule 5.806, which contains the matrix for setting baseline terms and which the council has already approved after it was circulated for comment in a special cycle) and one optional form to commit youth to an SYTF.

Rule 5.804
The committee recommends a new rule of court to replace the DJJ commitment rule. Proposed new rule 5.804 restates the statutory criteria that youth must meet to be eligible for an SYTF commitment, as well as the finding the court must make before committing a youth to an SYTF. It also clearly lays out the statutorily required steps the court must take when making an SYTF commitment including setting the baseline term and maximum confinement term for the youth; ordering and approving an individualized rehabilitation plan within the statutory timeline; and setting a progress review hearing for the youth no later than six months from the date of commitment. In order to ensure that the court will have all necessary information to approve the individualized rehabilitation plan by the statutory deadline, the rule requires that the court set a hearing to review and approve the plan no later than the statutory deadline, and that the proposed plan be filed with the court and a copy provided to the parties by probation at least five calendar days before the hearing.

Rule 5.807
The committee recommends a new rule of court setting forth the statutory requirements for the court to set and conduct each six-month progress review hearing. It also includes the statutory requirements for when the court is considering transferring a youth from an SYTF to a less restrictive program, and procedures requiring that a motion for a transfer to a less restrictive placement be filed on all parties. The rule also clearly lays out the statutory process for the court to monitor the progress of a youth transferred to a less restrictive program and to address any failure by the youth to meet the terms and conditions of placement in the program.

Rule 5.808
The committee recommends a new rule of court that sets forth the statutorily required process for holding a discharge hearing at the end of the youth's baseline term of commitment, as well as the required findings for additional confinement if the youth poses a substantial risk of imminent harm at the time the baseline term is complete.

Commitment to Secure Youth Treatment Facility **(form JV-733)**
The committee proposes an optional form for courts to use when committing a youth to an SYTF disposition that includes the statutory requirements for an SYTF commitment, including the baseline term, maximum confinement term (which is identical to the similar item on form JV-732), and other information that was included on the JV-732 and will be useful to ensure that the treatment of the youth in the SYTF is well informed. The form also provides a means for a court to set a hearing to review the individualized rehabilitation plan and to order the first progress review hearing. The committee is proposing that this form be optional in contrast to the JV-732, which was mandatory, because that form was setting forth uniform statewide procedures to meet the needs of DJJ, while SYTFs are operated locally and thus each county and court may wish to create its own procedures for making a commitment order and providing information to the SYTF about the youth's needs.

Policy implications
Legislation enacted in 2020 (SB 823) and follow-up trailer bill legislation (SB 92) enacted in 2021 establish the framework for juvenile courts and counties to take over all responsibility for juvenile justice dispositions and require them to follow a new statutory process to commit serious offenders to a secure youth treatment facility in anticipation of the complete closure of the DJJ on June 30, 2023. This proposal would implement the new statutory requirements and provide some procedural guidance to the juvenile courts to ensure that they can implement the statutory intent.

Comments
This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the winter rules and forms comment cycle. Six organizations and two individuals submitted comments on this proposal. Two organizations agreed with the proposal. Four organizations, including the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, agreed if the proposal were modified. One commenter did not indicate a position but provided suggested revisions to one

form in the proposal. One individual indicated disagreement with the proposal but did not indicate why. A chart with the full text of the comments received and the committees' responses is attached at pages 46–61.

Comments on updating rule 5.663

The Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee raised concerns about the changes made to rule 5.663, which contains the standards for attorneys appointed to represent youth in juvenile justice matters. They are concerned that replacing the best interest standard of representation with the expressed interest standard is a substantive change that will be harmful to the court and suggest instead that expressed interest be added to the existing text of the rule. The committee, however, concluded that the change had to be made because of the enactment in 2015 of Welfare and Institutions Code section 634.3, which provides that counsel appointed to represent youth in juvenile justice matters must "[p]rovide legal representation based on the client's expressed interests, and maintain a confidential relationship with the minor."

When the council first adopted rule 5.663 in 2003 (as rule 1479) there was no statute outlining the duties of counsel in these cases and the council selected the best interest standard for representation based on its reading of the distinct purposes of the juvenile court relative to criminal courts.[1] With the enactment of section 634.3 the legislature has now made it clear that the standard should not be best interest, but rather expressed interest, as is the case in criminal proceedings. Including both standards in the rule would be inconsistent with statute because it would cause confusion in those instances when the attorney concludes that the best interest of the client and their expressed interest are at odds, and the attorney would then be unable to determine how to proceed and how to protect the confidentiality of their relationship with the client.

Comments on making the SYTF commitment form mandatory

The committee sought specific comment on whether the new *Commitment to Secure Youth Treatment Facility* **(**form JV-733) should be mandatory, as the form for commitment to DJJ has been. One commenter suggested that it should be mandatory for consistency of practice across the state, but the two courts who commented both agreed that an optional form would be preferable so that their courts could continue with the approach that was working locally. Because these facilities are locally run, the committee concurred that it was preferable to make the form optional. This ensures that every court would have a form available, but that courts with alternate means of documenting these dispositions could continue with or choose to implement the practice that is effective in their jurisdiction and not use the new form. The committee did adopt a suggestion to modify a provision on the circulated form to correctly reflect current law on calculating the maximum term of confinement for a youth committed to an SYTF.

[1] Judicial Council of Cal., Advisory Com. Rep., *Juvenile law : Responsibilities of attorneys for children in delinquency proceedings*, (October 21, 2003), p. 3.

Comments on adopting rules of court to implement an SYTF disposition
The committee sought specific comment on whether draft rules largely reiterating the statutory requirements for committing, reviewing, and discharging youth in secure youth treatment dispositions were of value on top of the text of the statute. All commenters agreed that the rules would be of benefit to the courts and the committee has included them with minor revisions based on the comments as described below.

Comments on clarifying statutory language on extending an SYTF commitment beyond the baseline term
The proposal includes a rule, rule 5.808, setting forth the procedures for discharging a youth from an SYTF commitment based on section 875(e)(3). Those requirements include authority for the court to extend the custody of a youth in an SYTF for a year beyond the baseline term set by the court if the court finds that the youth "constitutes a substantial risk of imminent harm to others in the community if released from custody." Two commenters asked the committee to clarify or further define that standard as well as the burden of proof for the court to make that finding. The Orange County District Attorney proposed that the committee define the standard based on provisions in existing law for placing someone under an involuntary psychiatric hold, minus the provisions concerning a threat to the youth's own safety. Building on this suggestion, he also suggested that the standard for making the finding be probable cause, as it is for Welfare and Institutions Code section 5150. The Pacific Juvenile Defender Center also suggested further clarity on this standard and that a burden of proof be included in the rule but did not provide a concrete suggestion for revising the rule. The committee, which had previously considered this question when it developed rule 5.806 for setting and reviewing the baseline term for an SYTF disposition, concluded that the statutory standard was sufficiently clear that further definition was not required, and that section 5150 was not a close analog. Moreover, the committee opted not to specify a burden of proof because the statute was silent, and thus under Evidence Code section 115, the default burden of proof of preponderance of the evidence would apply. Given the significance of the finding for the youth's liberty, the committee did adopt a suggestion to revise the rule to require the court to recite the basis for finding that the youth poses a substantial risk of imminent harm to others on the record when it makes such a finding.

Comments on determining eligibility for an SYTF commitment
A commenter proposed that the committee amend rule 5.804 to include five enumerated statutory criteria (see section 875(a)(3)(A)–(E)) that the court must consider before it finds that a youth should be committed to an SYTF. The committee agreed that the statutory criteria were important but has a practice of avoiding extensively reiterating statutory provisions in the rules of court. The committee notes that these rules are largely a restatement of the key steps in the statutorily identified process but wanted to limit the inclusion of extended passages of statutory text, electing instead to redraft the rule text to highlight the consideration of the criteria as a distinct task and clarifying the statutory cross-reference.

Comments on individualized rehabilitation plans
Section 875 and rule 5.804 require the court to approve an individualized rehabilitation plan (IRP) for a youth committed to an SYTF within 30 judicial days of the commitment order. A commenter proposed including more of the statutory requirements for the IRP in the rule, rather than a statutory reference, and proposed that the rule require that the IRP be provided to all parties and counsel at least five days before the plan is approved. The committee opted not to add in the additional statutory text but concurred that a requirement that all parties have an opportunity to review the IRP at least five days before it is considered by the court would be beneficial to the court in ensuring that the IRP meets the needs of the youth. The recommended rule has been modified to include this requirement. In addition, the committee concluded that the court must set a hearing to review and approve the plan for all youth committed to an SYTF because that is the most efficient and effective means to fulfill the statutory obligation that the court obtain input from the prosecutor and the counsel for the youth and determine if any modifications to the plan are appropriate. Therefore, the proposed rule has been modified to require a hearing, and an item including the date and time of that hearing has been added to form JV-733.

Comments on progress review hearing requirements
Section 875 and rule 5.807 set forth the requirements for the court when reviewing the progress of a youth committed to an SYTF at hearings that must occur at least every six months. A commenter proposed a number of revisions to those rules that would have placed additional duties and requirements on the court that were not included in the statute to make it more likely that a court would reduce the baseline term of a youth for compliance with their case plan or transfer the youth to a less restrictive placement as soon as possible. The committee considered these suggestions but concluded that they went beyond the statute and were thus not authorized or required. The committee did make one change to these provisions to clarify that when the court is evaluating the progress of the youth relative to the IRP, that it do so in light of the programming made available to the youth so that progress is measured relative to the opportunities for programming that were offered. With regard to the need for further guidance, the committee can revisit these rules in a future cycle if it appears that courts are seeking direction in exercising their discretion or obtaining information from probation departments.

Additional information for parents of nonminors in the juvenile justice system
A comment was submitted with regard to *Juvenile Justice Court: Information for Parents* (form JV-060-INFO) and the need to let parents whose children have reached the age of majority understand that they would only have access to their children's cases as authorized by the youth. The committee added a question to this information form to remind parents that once the child is 18, they have rights to privacy and to meet separately with probation and other service providers.

Alternatives considered
The committee considered limiting the proposal solely to existing rules and forms that needed to be revised to reflect the closure of the DJJ and the new option of the SYTF disposition but determined that rules that clearly set forth the statutory requirements to commit a youth to an

SYTF would be of value to the courts as they implement the recently enacted statute. The committee also considered making the commitment form for the SYTF mandatory, but concluded that since these programs are run locally, it might be beneficial for courts to have the option to create a local form, use a minute order, or create another process to accommodate the specific needs of their programs.

Fiscal and Operational Impacts

Courts that make copies of form JV-060-INFO available to parents on paper may incur additional costs to print the updated form. Training and case management system update costs to the courts are also anticipated. Courts that commented indicated that these costs would be relatively minor and are required to implement the legislation.

Attachments and Links

1. Cal. Rules of Court, rules 5.663, 5.670, 5.790, 5.804, 5.805, 5.807, 5.808, and 5.820, at pages 11–19
2. Forms JV-060-INFO, JV-618, JV-665, JV-667, JV-690, JV-692, JV-732, JV-733, JV-735, and JV-751, at pages 20–45
3. Chart of comments, at pages 46–61
4. Link A: Welf. & Inst. Code, § 875, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=875.&lawCode=WIC*
5. Link B: Welf. & Inst. Code, § 634.3, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=634.3.&lawCode=WIC*

Rules 5.804, 5.807, and 5.808 of the California Rules of Court are adopted, rules 5.663, 5.670, 5.790, and 5.820 are amended, and rule 5.805 is repealed, effective July 1, 2023, to read:

Rule 5.663. Responsibilities of children's counsel in delinquency proceedings (§§ 202, 265, 633, 634, 634.3 634.6, 679, 700)

(a) ***

(b) Responsibilities of counsel

A child's counsel is charged ~~in general~~ with ~~defending the child against the allegations in all petitions filed in delinquency proceedings and with~~ ~~advocating,~~ providing effective, competent, diligent, and conscientious advocacy and making rational and informed decisions founded on adequate investigation and preparation. Counsel must maintain a confidential relationship with the child and provide legal representation ~~within the framework of the delinquency proceedings, that the child receive care, treatment, and guidance consistent with his or her best interest~~ based on the child's expressed interests.

(c) Right to representation

A child is entitled to have ~~the child's~~ their interests represented by counsel at every stage of the proceedings, including in the postdispositional ~~hearings~~ phase. Counsel must continue to represent the child unless relieved by the court upon the substitution of other counsel, or for cause.

(d) ***

Rule 5.760. Detention hearing; report; grounds; determinations; findings; orders; factors to consider for detention; restraining orders

(a)–(f) ***

(g) Factors—violation of court order

Regarding the ground for detention in (c)(1)(A), the court must consider:

(1)–(8) ***

(h) Factors—escape from commitment

Regarding the ground for detention in (c)~~(2)~~(1)(B), the court must consider whether or not the child:

(1) Was committed to ~~the California Department of Corrections and Rehabilitation, Division of Juvenile Justice; or~~ a county juvenile home, ranch, camp, forestry camp, secure youth treatment facility, or juvenile hall; and

(2) Escaped from the facility or the lawful custody of any officer or person in which the child was placed during commitment.

(i) Factors—likely to flee

Regarding the ground for detention in (c)~~(3)~~(1)(C), the court must consider whether or not:

(1)–(8) ***

(j) Factors—protection of child

Regarding the ground for detention in (c)~~(4)~~(1)(D), the court must consider whether or not:

(1)–(3) ***

(k) Factors—protection of person or property of another

Regarding the ground for detention in (c)~~(5)~~(1)(E), the court must consider whether or not:

(1)–(3) ***

(*l*) ***

Rule 5.790. Orders of the court

(a)–(h) ***

~~(i) California Department of Corrections and Rehabilitation, Division of Juvenile Justice~~

~~If, at the time of the disposition hearing, the child is a ward of the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) under a prior commitment, the court may either recommit or return the child to the DJJ. If the child is returned to the DJJ, the court may:~~

~~(1) Recommend that the ward's parole status be revoked;~~

~~(2) Recommend that the ward's parole status not be revoked; or~~

~~(3) Make no recommendation regarding revocation of parole.~~

~~(j)~~(i) Fifteen-day reviews (§ 737)

If the child or nonminor is detained pending the implementation of a dispositional order, the court must review the case at least every 15 days as long as the child is detained. The review must meet all the requirements in section 737.

Rule 5.804. Commitment to secure youth treatment facility

As provided in Welfare and Institutions Code section 875, the following applies if a court orders a youth to a secure youth treatment facility.

(a) Eligibility (§ 875(a))

A youth may be committed to a secure youth treatment facility as defined in section 875 if:

(1) The youth committed an offense listed in section 707(b) when the youth was 14 years of age or older; and

(2) The offense is the most recent offense for which the youth has been adjudicated; and

(3) The court finds on the record that a less restrictive alternative disposition is unsuitable for the youth after considering all relevant and material evidence, including the recommendations of counsel, the probation department, and any other agency or individual designated by the court to advise on the appropriate disposition of the case. To make this finding the court must consider each of the criteria set forth in section 875(a)(3)(A)–(E).

(b) Setting baseline term (§ 875(b))

The court must set a baseline term for the youth as provided in rule 5.806.

(c) Setting the maximum term of confinement (§ 875(c))

The court must set a maximum term of confinement as provided in section 875(c) based on the facts and circumstances of the matter or matters that brought or continued the youth under the jurisdiction of the court and as deemed appropriate to achieve rehabilitation. The court must apply the youth's precommitment credits to the maximum term.

(d) Individualized rehabilitation plan (§ 875(d))

The court must, at the time of the commitment, order the probation department to prepare a proposed individualized rehabilitation plan for the youth as provided by section 875(d). The court must approve a plan for the youth no later than 30 court days after the order of commitment.

(1) The court must set a hearing to review and approve the plan no later than 30 court days from the date of the commitment order.

(2) The proposed plan must be filed with the court and a copy of the plan must be provided to the prosecuting attorney, the youth, and counsel for the youth at least 5 calendar days before the hearing.

(e) Setting the progress review hearing (§ 875(e))

The court must set a progress review hearing no later than six months from the date of the commitment order to evaluate the youth's progress in relation to the rehabilitation plan and to determine whether the baseline term of confinement is to be modified.

Rule 5.805. California Department of Corrections and Rehabilitation, Division of Juvenile Justice, commitments [Repealed]

~~If the court orders the youth committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ):~~

~~(1) The court must complete Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (form JV-732).~~

~~(2) The court must specify whether the offense is one listed in section 707(b) or subdivision (c) of Penal Code section 290.008.~~

~~(3) The court must order the probation department to forward to the DJJ all required medical information, including previously executed medical releases.~~

~~(4) If the youth is taking a prescribed psychotropic medication, the DJJ may continue to administer the medication for up to 60 days, provided that a physician examines the youth on arrival at the facility, and the physician recommends that the medication continue.~~

~~(5) The court must provide to the DJJ information regarding the youth's educational needs, including the youth's current individualized education program if one exists. To facilitate this process, the court must ensure that the probation officer communicates with appropriate educational staff.~~

Rule 5.807. Secure youth treatment facility progress review process

(a) Application

This rule sets forth the statutory requirements for the court's review of a youth's progress under section 875(e) and (f) and rule 5.806(c) for youth committed to secure youth treatment facilities to evaluate the youth's progress in relation to the rehabilitation plan approved under section 875(d) and rule 5.804(d).

(b) Setting a progress review hearing (§ 875(e))

The court must, during the term of commitment, set and hold a progress review hearing for the youth not less frequently than once every six months.

(c) Findings and orders (§ 875(e))

At the progress review hearing, after having considered the recommendations of the probation department and any recommendations of counsel and any behavioral, educational, or other specialists having information relevant to the youth's progress, the court must:

(1) Make a finding on the record supporting an order as to whether the youth is to remain committed to the secure youth treatment facility for the remainder of the baseline term or if the baseline term is to be reduced after considering:

(A) the progress of the youth in relation to the rehabilitation plan in light of the programming made available to the youth, and

(B) the recommendations of probation concerning the youth's positive behavior in the secure youth treatment facility program as required by rule 5.806(c); and

(2) Set a progress review hearing or, if the baseline term remaining is six months or less, a discharge hearing, no more than six months from the date of the current hearing.

(d) Transfer to a less restrictive program (§ 875(f))

(1) Upon a motion by the probation department or the youth that the youth be transferred from the secure youth treatment facility to a less restrictive program, the court must consider such a transfer at the youth's next progress review hearing or may set a separate hearing to consider the motion. The moving party must serve the motion on the prosecution, the youth if the youth is not the moving party, and the probation department if the probation department is not the moving party.

(2) In making its determination, the court must consider:

(A) The youth's overall progress in relation to the rehabilitation plan in light of the programming made available to the youth during the period of confinement in a secure youth treatment facility; and

(B) The programming and community transition services to be provided, or coordinated by the less restrictive program, including any educational, vocational, counseling, housing, or other services made available through the program.

(3) If the court orders the youth transferred to a less restrictive program:

(A) The court must set the length of time the youth is to remain in a less restrictive program, not to exceed the remainder of the baseline or modified baseline term, prior to a discharge hearing; and

(B) The court may require the youth to observe any conditions of performance or compliance with the program that are reasonable and appropriate in the individual case and that are within the capacity of the youth to perform.

(4) If, after transfer to a less restrictive program, the court determines that the youth has materially failed to comply with the court-ordered conditions of the program, the court may:

(A) Modify the terms and conditions of placement in the program; or

(B) Order the youth to be returned to a secure youth treatment facility for the remainder of the baseline term, or modified baseline term, subject to further progress review hearings as required in this rule.

(5) If the court orders a youth returned to a secure youth treatment facility from a less restrictive program the court must adjust the youth's baseline or modified baseline term to include credit for the time served by the youth in the less restrictive program.

Rule 5.808. Discharge from secure youth treatment facility (§ 875(e)(3) & (4))

(a) Application

This rule sets forth the statutory provisions that apply to any youth committed to a secure youth treatment facility, or who has been transferred from a secure youth treatment facility to a less restrictive program under section 875(f) and rule 5.807(d), and who has reached the end of their baseline term, including any modifications to that term made during progress review hearings.

(b) Conduct of the hearing

At the discharge hearing the court must review the progress of the youth toward meeting the goals of the individual rehabilitation plan and the recommendations of counsel, the probation department, and any other agencies or individuals having information the court deems necessary.

(c) Findings and orders

(1) The court must order that the youth be discharged to a period of probation supervision in the community, unless the court finds that the youth poses a substantial risk of imminent harm to others in the community if released from custody. If a discharge is ordered, the court:

(A) Must determine and order the reasonable conditions of probation that are suitable to meet the developmental needs and circumstances of the youth and that will facilitate the youth's successful reentry into the community.

(B) Must periodically review the youth's progress under probation supervision and make any additional orders deemed necessary to modify the program of supervision in order to facilitate the provision of

services or to otherwise support the youth's successful reentry into the community.

(C) May, if the court finds that the youth has failed materially to comply with the reasonable orders of probation imposed by the court, order that the youth be returned to a juvenile facility or to a less restrictive program for a period not to exceed either the remainder of the baseline term, including any court-ordered modifications, or six months, whichever is longer, subject to the maximum confinement limits of section 875(c).

(2) If the court finds that the youth poses a substantial risk of imminent harm to others in the community if released from custody, the court must recite the basis for that finding on the record and may order that the youth be retained in custody in a secure youth treatment facility for up to one additional year of confinement, subject to the maximum confinement provisions of section 875(c). If the court orders that the youth is to be confined, it must set a progress review hearing under section 875(d) and rule 5.807, or if the period of confinement is six months or less, a discharge hearing under section 875(e) and this rule for a date not to exceed six months from the date of the initial discharge hearing.

Rule 5.820. Termination of parental rights for child in foster care for 15 of the last 22 months

(a) ***

(b) Calculating time in foster care (§ 727.32(d))

The following guidelines must be used to determine if the child has been in foster care for 15 of the most recent 22 months:

(1)–(3) ***

(4) Exclude time during which the child was detained in the home of a parent or guardian; the child was living at home on formal or informal probation, at home on a trial home visit, or at home with no probationary status; the child was a runaway or "absent without leave" (AWOL); or the child was out of home in a non–foster care setting, including juvenile hall~~; California Department of Corrections and Rehabilitation, Division of Juvenile Justice;~~, a ranch~~;~~, a camp~~;~~, a school~~;~~, a secure youth treatment facility, or any other locked facility.

(5)–(6) ***

JV-060-INFO Juvenile Justice Court: Information for Parents

Juvenile justice court (sometimes called delinquency court) is a court that decides if a child broke the law. The juvenile justice court helps to protect, guide, and rehabilitate children. And it helps keep the community safe.

This information sheet answers common questions that many parents have. It has three sections:

1. What Happens When Your Child Is Arrested
2. Your Child's Court Hearings and Orders
3. How to Keep Your Child's Juvenile Court Records Private

This form describes the juvenile justice court process. Some children who have contact with law enforcement or probation never need to go to court, even if it is believed that they broke the law.

1 What Happens When Your Child Is Arrested

This section is about:

- What to expect when your child is arrested,
- What your child's legal rights are,
- What the *notice to appear* and the *petition* are,
- What it means to transfer your child to adult court, and
- What a *probation officer* does.

My child was arrested. What happens next?

Your child might be brought home or allowed to go home with you.

You will be given or mailed a notice to appear that tells you the date, time, and place you and your child need to go to the probation department or juvenile court. You may want to talk to a qualified juvenile defense lawyer about your child's case. You can call your local public defender's office before your child goes to court. If your child has to go to court, the court will appoint a lawyer to represent your child at no cost to you if you do not hire a lawyer.

Warning! You and your child *must* go to the meeting listed on the notice to appear even if no one contacts you again. Sometimes the meeting will be at probation. Sometimes the notice will order you to go to the juvenile court.

Your child might NOT be sent home immediately after the arrest.

If that happens, the officer who arrested your child may:

- Let your child go later, without going to juvenile hall.
- Take your child to juvenile hall and keep them there. This is called *in-custody detention.* If this happens, the arresting officer *must* try to contact you immediately to tell you where your child is and that your child is in custody.

What are my child's legal rights after arrest?

Your child has the right to make at least **two phone calls** within **1 hour** of being arrested.

- One call must be a *completed* call to a parent, guardian, responsible relative, or employer.
- The other call must be a *completed* call to a lawyer.
- If your child is currently in court-ordered foster care, your child may also be allowed to call a foster parent or social worker.

What if the police want to question my child?

If your child is under 18, and in custody, your child must have a confidential consultation with an attorney. Your child cannot decide to answer questions or give up rights without first talking to a lawyer. This right to speak to an attorney cannot be given up. After that consultation, and before any officer asks your child about what happened, the officer must first tell your child about your child's *Miranda* rights:

- "You have the right to remain silent.
- Anything you say will be used against you in court.
- You have a right to have a lawyer with you during questioning.
- If you or your parents cannot afford a lawyer, one will be appointed for you."

Does my child need a lawyer?

If a petition is filed, your child has a right to an *effective* and *prepared* lawyer, who must have specific education and training in juvenile justice cases. The lawyer will be appointed at your child's first hearing unless you hire an attorney for your child.

Your child's lawyer represents only your child, not you, even if you are paying for that lawyer. Your child's lawyer is required to have a confidential relationship with your child. That means the lawyer cannot talk to you about your child's case unless the child agrees and allows it.

Do I need a lawyer for myself?

The court can order you to do things for your child and can order you to pay *restitution* to the *victim.* Some parents hire lawyers for legal advice about these issues.

NOTE: If you think you need your own lawyer and cannot afford to hire one, you can ask the court to appoint a lawyer for you. The court will decide whether to appoint you a lawyer. If it does, you might be ordered to pay back the cost of the lawyer if the court decides you can afford to pay that cost.

If my child is required to meet with probation, how can we get ready?

It's a good idea to get legal advice. A defense lawyer who specializes in juvenile justice cases can help you understand your child's rights and know what to expect. Try to find school records and other information that shows what you and your child are doing to get back on track.

At the meeting, the probation officer will talk with you and your child about the next steps in your child's case.

NOTE: At this meeting, the probation officer must tell you and your child about the *Miranda* rights. Any information you or your child share with the probation officer might be shared with the court or the prosecuting attorney (D.A.).

- If the alleged offense is not serious or it's the first time your child has been accused of breaking the law, the probation officer might just tell your child what they did was wrong (reprimand them) and let your child go.
- The probation officer might offer to let your child do a special *diversion program* instead of going to court. Each county has different rules and different programs. If you and your child agree to the program and your child does everything the program requires, the juvenile court does not need to get involved.
- If the offense is more serious, the probation officer might refer your child's case to the prosecuting attorney (D.A.). If the prosecutor decides to file charges, they will file a petition in juvenile court. That's what the rest of this form is about.

What happens if my child is taken to juvenile hall after getting arrested?

The probation officer can decide to:

- Keep your child in custody, or
- Let your child go home with you.

If the probation officer lets your child go, the officer may still:

- Ask the D.A. to file a petition, and
- Set limits on what your child is allowed to do while at home.

If the probation officer does *not* let your child go, the officer must notify the public defender that your child is in custody within two hours. If the D.A. decides to file charges, a petition *must* be filed within 48 hours of the arrest. A detention hearing must be held the next day the court is in session. The courts are closed on Saturdays, Sundays, and holidays. You and your child *must* be given a copy of the petition.

How long can they keep my child in juvenile hall?

The judge will decide at the detention hearing. The judge may release your child or keep your child in juvenile hall until the next hearing or until the whole case is over.

Can I visit my child in juvenile hall?

Yes, but before you go, contact the juvenile hall or the probation officer to find out how to set up a visit.

What if the probation officer says a petition will be filed?

The petition states the things your child is accused of or charged with. It means your child's case will be sent to juvenile court. You have the right to receive a copy of the petition. If you have not received a copy of the petition, ask the probation officer or the court clerk for one.

The petition says your child did something against the law and asks the juvenile court to decide that what it says is true, but it does not prove anything.

Read the Petition Carefully! It is important to know what your child is accused of.

Are all petitions the same?

No. Each petition is tailored to the child and the alleged offense. There are two kinds of petitions:

A **601 Petition** is filed when a child has:

- Run away,
- Skipped school a lot,
- Violated a curfew, or
- Regularly disobeyed a parent or guardian.

These petitions are filed by the probation department at the juvenile court. If the court decides the charges are true, your child can become a "ward" of the court. That means the court will supervise your child, and your child must obey the court's orders.

A **602 Petition** is for a charge that would be a *misdemeanor* (like shoplifting or simple assault) or *felony* (like stealing a car, selling drugs, rape, or murder) if an adult had done it.

These petitions are filed by the prosecuting attorney (D.A.). If the court decides the charges are true, the judge can:

- Order your child put on probation,
- Make your child a "ward" of the court, and
- Order your child placed out of your home or committed to (locked up in) a juvenile facility.

NOTE: If your family is involved with the child welfare system, talk with your lawyer about what your child's arrest means for that case. Depending on everything that has happened, the court might decide that it's best for your child to stay in the child welfare system, to be supervised in the juvenile justice system, or to be supervised and served in both systems.

Can my child's case be moved to adult court?

In cases with felony charges, the prosecuting attorney (D.A.) can ask the juvenile court to transfer your child's case to adult criminal court. If that happens, talk to your child's lawyer right away. Adult criminal cases are handled very differently and there may be very serious consequences for your child.

Your child's case can only be transferred to adult court if your child is 16 years old or older, charged with a felony, and the court finds that the juvenile system cannot rehabilitate your child.

What does the probation officer do?

Probation officers investigate children's situations and backgrounds and write reports for the court. They also supervise children to see if they are doing what the court has ordered them to do.

Why does the probation officer write reports?

The probation officer writes reports to give the court information about your child. The reports give the judge a description of your child's situation, including life at home and school, the current charges, and any previous arrests or petitions. It can also include:

- Statements from your child, you, your family, and other people who know your child well;
- A school report;
- A statement by the victim; and
- Recommendations about what the court should do if the judge finds that your child did what the petition says.

When does the judge see the reports?

The probation officer presents a report at the *detention hearing*, *disposition hearing*, and each *review hearing*. The judge uses the reports to help decide how to handle your child's case.

2 Your Child's Court Hearings and Orders

If a petition is filed in your child's case, you and your child will have to go to juvenile court. Each time you go to court is called a "hearing." You may have to go to several court hearings. This section is about:

- What happens at the different court hearings,
- What happens after the hearings,
- What happens if your child becomes a ward of the court, and
- What your duties and responsibilities as a parent are.

Get Ready for Court

When is the first court hearing?

If your child is in custody, the first hearing, called the detention hearing, must take place on the court day immediately after the petition is filed. The probation officer or prosecuting attorney (D.A.) must tell you when and where the hearing will be. You will also get a copy of the petition. At this hearing, the court decides only whether your child can go home or needs to stay in custody until the next hearing.

If your child is* not *in custody, the first hearing, often called the initial hearing or "arraignment," must take place no more than 30 days after the petition is filed. In addition to the notice described earlier, you and your child will get a copy of the petition at least 10 days before the date of this hearing.

How will I find out about other court hearings?

If your child is in custody, both you and your child will get notice at least 5 days before the hearing. Someone will deliver it personally or by certified mail.

If your child is* not *in custody, both you and your child will get notice of each court hearing at least 10 days before the date of the hearing. Someone will deliver it personally, by first-class mail, or, if you agree, electronically.

Can I go to my child's court hearings?

Yes. In fact, the law says you *must* go. The judge decides what is best for your child. Depending on the charges, if you can show that your child will listen to you and follow your rules, and that you will hold your child accountable and be supportive at home, the judge may let your child go home with you.

How many times will we have to go to court?

You and your child will probably need go to court several times. There will be different kinds of hearings where the court makes different decisions. *See page 8 for a table of different hearing types.*

Do we have the right to an interpreter?

Both you and your child have a right to an interpreter if needed. Ask for one if you do not speak English well and don't understand everything being said in court.

Can I speak at the court hearings?

Yes. You may speak when:

- The judge asks you questions,
- You are called as a witness, or
- The judge gives you permission.

Who else speaks at the court hearings?

Your child's lawyer will speak for your child. The prosecuting attorney (D.A.) will speak for the government. The probation officer may speak for the probation department.

Can the victim go to the hearings?

Yes. A crime victim has a right to go to and speak at any court hearing about the effect the crime had on them. The victim and the victim's parents (if the victim is under 18) will get notice of the hearing. Do not talk to the victim unless your lawyer tells you to.

What is a jurisdiction hearing?

The jurisdiction hearing or "trial" is when the judge decides if your child actually did what it says in the petition. Before a jurisdiction hearing the judge may set a pre-jurisdiction hearing to decide if your child's case can be resolved without a contested jurisdiction hearing.

Here's what to expect:

- The judge will ask your child to *admit* or *deny* the charges listed in the petition.
- Your child's lawyer will consider the evidence and the possible outcomes, and then advise your child what to do.
- If your child *admits* some or all of the charges, your child gives up the right to a trial. The judge will decide that the petition is true.
- If your child *denies* the charges, there will be a trial (called a *contested hearing*). The court may hold the trial on another day to give your child's lawyer time to get ready.

What happens at the "trial"?

At the trial, the prosecuting attorney (D.A.) will call witnesses and present evidence to prove the charges. Then your child's lawyer may call witnesses and present evidence in your child's defense. The judge will consider all the evidence and decide if the charges are true "beyond a reasonable doubt."

If there is not enough proof to decide the charges are true, the judge will dismiss individual charges or the entire case. If your child is in custody and the entire case is dismissed, your child will be let go. If this happens, skip ahead to section 3 of this form.

If the judge decides some or all of the charges are true, there will be a *disposition hearing*. That's when the judge will say what your child will need to do and where your child will live. Sometimes this hearing is right after the jurisdiction hearing, but usually it is 2–4 weeks later.

If your child is in custody, the judge can order your child to stay in custody or be released until the disposition hearing.

If you live in a different county, the court can transfer the case to your local court for the disposition hearing.

What happens at the disposition hearing?

The judge will decide what orders to make to protect and rehabilitate your child and to protect the community.

The judge might order your child to:

- Live at home and obey informal probation rules for up to six months.
- Live at home, be supervised by a probation officer, and obey rules set by the judge.
- Live at a relative's home, a foster family home, a private group home, or a residential treatment program; be supervised by a probation officer; and obey rules set by the judge.
- Spend time in a county camp, home, ranch, juvenile hall, or secure youth treatment facility (in custody) and on probation.

The judge may also order *you*, the parent, to get counseling or parent training or do other activities.

What if the judge puts my child on probation?

If your child is put on probation, the probation officer will supervise and work with your child to make sure that your child follows:

- The law,
- The court's orders, and
- All the rules of probation.

The probation officer will also encourage your child to do well in school and participate in job training, counseling, and community programs.

How often will the probation officer see my child?

Each case is different. The probation officer will meet regularly with your child during their case.

What if the judge makes my child a *ward* of the court?

The juvenile law uses special language. Children who have committed offenses may become wards of the court, but are not "convicted." If your child becomes a ward of the court, that means the court is in charge of some of your child's care and conduct. The court does this to protect your child and the community.

What if the judge orders my child placed in foster care?

If the judge orders suitable out-of-home or foster placement, the probation officer may place your child in:

- An adult relative's home,
- An approved foster family home,
- A licensed private group home, or
- A residential treatment program.

What if the court sends my child to a secure county facility?

Most wards of the court who need secure confinement are sent to county facilities, like a ranch, camp, or juvenile hall, where they can be close to their families and local rehabilitative services. Ask the probation department about your child's program and how you can visit, stay in touch, and help your child's rehabilitation.

Some of these secure confinement programs may be for an extended period of time and may be located in another county. They are called secure youth treatment facilities and can hold your child until age 25 or up to two years from the date your child was sent to the secure youth treatment facility, if that is later.

If my child's case was moved to adult court, can my child be sent to adult prison?

Yes, but between the ages of 16 and 18, your child must stay at a juvenile facility even if sentenced to adult prison.

Important! **If your child's case gets moved to adult court, talk to your child's lawyer right away.**

Do I have to pay for what my child did?

The court may order you to pay fines or penalties.

If the court decides that the victim is entitled to restitution, you and your child are equally responsible for paying the victim back. *Restitution* is money that pays the victim to make up for the damage or harm your child caused. Restitution can pay the victim back for:

- Stolen or damaged property,
- Medical expenses, and
- Lost wages.

If restitution is not completely paid when your child's case is closed, it will become a *civil judgment,* which can affect your credit score.

Do I have to pay fees for services my child receives from the court or county?

No. You do not have to pay fees or pay back the cost of services, support, or an attorney *given to your child* by the county or court as part of this case.

What are my responsibilities as a parent?

Your parental duties do not end when the court gets involved. Your child may need you now more than ever.

If the judge decides the charges in the petition are true, you may be ordered to do things to:

- Help make up for harm your child caused, and
- Keep your child out of trouble in the future.

The court may order you to:

- Take classes,
- Go to counseling, or
- Do other activities that will help you and your child.

Can I be part of my child's case after my child turns 18?

When your child becomes a legal adult you will need to have your child's permission to be actively involved in their case. You will still receive notice of hearings but it will be up to your child to invite you to meetings with probation or other service providers.

What if my child is in foster care or in custody?

Wherever your child goes, stay in touch as much as you can, however you can. Visit your child as often as you can. Support your child's programs and activities. Encourage your child to obey the court's orders and not to leave the placement without permission.

Find out what is happening in your child's life so that you can get ready for your child to return home. Learn how to make a protective and supportive environment for your child's return to school or work. Develop plans to hold your child accountable for their actions.

Where can I find parenting resources?

Contact your child's probation officer. Ask for referrals to community organizations, such as parents' groups or counseling services, that can help you. Your school district and local hospital or mental health department may also have useful programs.

If you have any questions that have not been answered, you may want to contact a lawyer for help.

3 How to Keep Your Child's Juvenile Court Records Private

Will anyone be able to look at my child's juvenile records?

Maybe. Although most juvenile court records are confidential, the law sometimes allows government officials to look at them.

However, in many cases the court will "seal" your child's juvenile records. Once the records are sealed, the law treats the arrest and court case as if they never happened. That means your child can truthfully say that your child does not have a criminal or juvenile record.

Exception: If your child wants to join the military, get a federal security clearance, or become a law enforcement officer your child may need to disclose information about the juvenile record. Your child's lawyer can provide advice about that.

How can I seal my child's juvenile records?

It depends on your child's situation.

Sealing at dismissal. If the juvenile court dismisses your child's case without making your child a ward of the court, the court must seal your child's records.

If the court does make your child a ward and later dismisses the case because your child has satisfactorily completed probation, the court will also seal your child's records and send your child copies of the sealing order and form JV-596-INFO, *Sealing of Records for Satisfactory Completion of Probation.*

If your child completes a probation diversion program, the probation department will seal those records and give notice to your child.

Sealing on request. If your child does *not* satisfactorily complete probation or the probation diversion program, the court may *not* dismiss the case and your child's records will not be automatically sealed. Your child can either:

- Ask the court to review the probation department's decision and order the records sealed, or
- Ask the court later to seal the records. (See form JV-595-INFO, *How to Ask the Court to Seal Your Records,* for more information.)

If your child is made a ward for an offense listed in Welfare and Institutions Code section 707(b), your child can ask the court to seal the records at age 18.

Even sealed records can be viewed by the prosecuting attorney (D.A.) in some cases.

Can my child's juvenile court record be used against them as an adult?

Under the three-strikes law, some serious or violent felonies committed by a child at age 16 or 17 can be counted as strikes and used against the child in the future.

Will my child's right as an adult to possess a firearm be restricted?

If your child is made a ward of the court for certain offenses, your child is not allowed to have a firearm until reaching age 30. The Department of Justice can look at your child's sealed records to prevent your child from buying a firearm.

Court Hearings in Juvenile Justice Court

You and your child may have go to court several times. Each time you go is called a "hearing." Depending on your case, there may be different kinds of hearings where the judge makes different decisions. Here are some of them. Each time you have to go to court, you and your child (if 8 or older) will get a notice. The notice will tell you the date, time, and place to go.

Kind of hearing	What happens at this hearing
Detention	The judge will decide if your child can go home or must stay in custody until the next hearing.
Transfer to criminal court	The juvenile court judge will decide if the case of a child who is 16 or older should be transferred to adult criminal court. Children under 16 cannot have their cases transferred to adult court. This hearing usually happens for very serious or violent charges and only if the prosecuting attorney (D.A.) asks for the transfer.
Pre-jurisdiction (pretrial or settlement conference)	The judge, lawyers, and probation officer try to resolve the case without having a trial. The D.A. may make an "offer" to reduce or dismiss some of the charges. The judge will ask your child to *admit* or *deny* the charges listed in the petition. Your child's lawyer will consider the evidence and possible outcomes, and then advise your child what to do. Whether to admit a charge is your child's decision. If your child **admits** the charges, your child will give up the right to a trial. The judge will decide that the petition is true. If your child **denies** the charges, there will be a trial, usually a week or two later.
Jurisdiction (trial)	At the trial, the prosecuting attorney will present evidence to prove the charges. Then your child's lawyer will decide whether to present evidence in your child's defense. The law does not require a defense to be presented. The judge will consider all the evidence and decide if the charges are true "beyond a reasonable doubt." – ***If there is not enough proof to decide the charges are true,*** the judge will dismiss the case. If your child is in custody, your child will be let go. – ***If the judge decides the charges are true,*** there will be a disposition hearing.
Disposition	This happens *only* if the judge decides that one or more charges in the petition are true. The judge then decides what orders to make for your child. This hearing is sometimes right after the jurisdiction hearing but is often postponed for another day.
Hearing on motions	The court decides legal questions that affect the case.
Review hearings	This hearing provides a way for the court to check how your child is doing on probation or in placement. If your child is placed in foster care or in a secure youth treatment facilty, the court must hold a review hearing at least once every six months.

GLOSSARY OF TERMS

Civil judgment: A court order requiring a person to pay money to another person.

Detention hearing: The first court hearing after an arrest if the child is detained in custody.

Felony: An action that would be a serious crime if committed by an adult.

In-custody detention: Keeping a person in a secure place and not letting them go free or go home.

Juvenile delinquency: See *juvenile justice,* below.

Juvenile justice: The legal system designed to guide, rehabilitate, and protect children who break the law, and to keep the community safe. Also known as "juvenile delinquency."

Miranda: The U.S. Supreme Court case that requires law enforcement to tell persons detained in custody their rights before asking them questions.

Misdemeanor: An action that would be a less serious crime if committed by an adult.

Notice to appear: A paper telling you and your child to meet with a probation officer or go to juvenile court at a specific time and place.

Notice of hearing: A paper telling you the date, time, and place of a court hearing, and what will happen there.

Petition: A paper filed with the court that says your child did something against the law.

601 petition: A petition filed by the probation officer that accuses your child of something that's against the law for a child to do, for example, skipping school or breaking curfew.

602 petition: A petition filed by the prosecuting attorney that accuses your child of doing something that would be a crime if an adult did it.

Probation officer: A law enforcement officer who advises the court about the orders the child needs to protect and rehabilitate the child, and supervises the child as ordered by the court.

Restitution: Money owed to the victim of an act to make up for the damage or harm done.

Terms* or *terms and conditions of probation: Court orders that tell a person on probation what they must and must not do.

Ward: A child whom the court has decided to supervise because the child did something against the law.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CHILD'S NAME:		
WAIVER OF RIGHTS—JUVENILE JUSTICE		CASE NUMBER:

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the Judicial Council
JV-618.v4.022323.cz

Read this form carefully. The judge will ask you if you understand each right and if you want to give up that right.

1. I am the child in this case. My attorney's name is:
2. I have talked with my attorney about what happened in my case and why I am being charged in this case. I have been told what the district attorney would have to prove at a trial and the possible ways to fight my case. I want to
   a. ☐ admit the charge(s), which means that I am agreeing that I did what the petition says.
   b. ☐ plead no contest, which means that I do not want to fight my case at a trial, but I'm not agreeing that I did what the petition says I did. I am letting the judge decide whether the charges are true and know that the judge will probably find them true.
3. ☐ The charge(s) I am admitting or pleading no contest to are:

For the items below, write your initials on each line that applies to your case. If you have a question about an item, ask your attorney or the judge before you initial that item.

4. **I understand the following consequences of my admission:** *Initial*
   a. If I plead no contest or submit the petition on the report, the court will probably find that the petition is true. _____
   b. The most that I can be punished for my admitting to these charges is a commitment (to be locked up) to a secure youth treatment facility or a local confinement facility like juvenile hall or ranch for (months/years): _____
   c. If I am not a United States citizen, my admission or no contest plea may mean that I will have to leave the country (be deported) and never allowed to return (exclusion) and/or never be allowed to become a United States citizen. _____
   d. If I am declared a ward of the court, a violation of: will prohibit me from owning, possessing, or having in my custody or control any gun or firearm until I am 30 years old. (Pen. Code, § 29820.) _____
   e. The court may order that my driver's license be restricted, delayed, or suspended. _____
   f. ☐ I may be required to register under Penal Code section 186.30 (gang). _____
   g. My parents or legal guardians and I may have to pay for the things I did that hurt others and caused them to lose money, including paying for things I took, broke, or damaged. We may also have to pay fines.
5. **Waiver of Rights.** I understand that I have all of the rights below and that by admitting the charge(s) in the petition, or pleading no contest, I will not have a trial or hearing and I will give up all of these rights: *Initial*
   a. The right to a speedy court trial or hearing where the judge would listen to all the evidence and decide if the district attorney has enough evidence to prove that I did what the petition says I did. _____
   b. The right to see, hear, and have my attorney question witnesses, including the officer who wrote the report, and any of the people who provided information that is written in the report. _____
   c. The right to testify or speak up for myself in court. _____
   d. The right to be silent and not say anything that might hurt myself or my case. _____
   e. The right to have witnesses come to court, even if they don't want to, and talk to the judge about my case. _____
   f. The right to appeal, or ask another court to look at, decisions by the judge that I disagree with. _____

Form Approved for Optional Use
Judicial Council of California
JV-618 [Rev. July 1, 2023]

Cal. Rules of Court, rule 5.778
www.courts.ca.gov

CHILD'S NAME: CASE NUMBER:

6. My attorney has explained that when I admit to: , listed Count(s) as: , I will have crime(s) on my record that are "strike" offenses under the three-strikes law. I have talked with my attorney about what this could mean in my future and how I may have to spend much more time in jail or prison if I get in trouble again because I am admitting to these offenses today. *Initial* _____

7. I have talked to my lawyer about the charge(s) in the petition, the facts of what happened, and any possible defenses. We have talked about what could happen if I admit, including what could happen if I break the rules of probation. _____

I declare under penalty of perjury, which means that I am guilty of a crime if I am lying, that my attorney has gone over this form with me, explained what it means, and answered my questions. I understand the rights I am giving up, I know what could happen because of my admission, and I am admitting to doing what the petition says because I want to and not because someone is forcing me to do this.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF CHILD)

DECLARATION OF INTERPRETER

The primary language of the child is

☐ Spanish.
☐ other *(specify):* _____

I certify that I interpreted this form for the parent or legal guardian in that person's primary language to the best of my ability.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF INTERPRETER)

DECLARATION OF ATTORNEY

I am the attorney for the child. I have explained and discussed with my client the above rights, the facts of my client's case, possible defenses, and the consequences of my client's decision to enter an admission. Based on my conversation with the minor, I am satisfied that my client's admission to the petition is knowingly, intelligently, and voluntarily made, and I consent to the admission.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY)

ORDER AND FINDING

I have spoken with the child, reviewed the waiver form, and find that the child has been fully informed of the constitutional rights and the consequences of the admission in this case and understands them. I further find that the child has knowingly, intelligently, and voluntarily waived their rights and that there is a factual basis for the minor's admission.

IT IS ORDERED that the minor's admission be accepted and entered in the minutes of this court. This executed waiver of rights form is filed in the records of this court and incorporated in the above-numbered case by reference.

Date:

_____
JUDICIAL OFFICER

CHILD'S NAME:	CASE NUMBER:

DISPOSITION—JUVENILE DELINQUENCY

☐ The court has read and considered the social study prepared by the probation officer and any other relevant evidence.

☐ The child has been detained and is at risk of entering foster care. The probation officer believes that child will be able to return home, and the social study includes a case plan as described in Welfare and Institutions Code section 636.

☐ The probation officer has recommended initial or continuing placement in foster care, and the social study includes a case plan as described in Welfare and Institutions Code section 706.6.

THE COURT FINDS AND ORDERS

1. ☐ Notice has been given as required by law.
2. ☐ The court takes judicial notice of all prior findings, orders, and judgments in this proceeding.
3. ☐ The court previously sustained the following counts. As to any offense that could be considered a misdemeanor or a felony, the court is aware of and exercises its discretion to determine the offense as follows:

Count number	Statutory violation	Misdemeanor	Felony		Enhancement *(specify)*
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	

4. ☐ The child resides in *(specify):* County.
5. ☐ The case is transferred to *(specify):* County for disposition. *Juvenile Court Transfer-Out Orders* (form JV-550) will be completed and transmitted.
6. ☐ For the reasons stated on the record, the petition is dismissed ☐ in the interests of justice ☐ because the child does not need treatment or rehabilitation.
7. ☐ The child is placed on probation for up to six months under Welfare and Institutions Code section 725(a) under conditions described in an attachment to this form.
8. ☐ Deferred entry of judgment is ☐ granted ☐ denied.
9. ☐ The child is ☐ declared ☐ continued as a ward of the court.
10. ☐ The recommended findings and orders contained in the probation report dated at pages are adopted ☐ as modified by the court as its own, a copy of which is attached and incorporated herein.
11. ☐ The child is declared a ward and placed on probation
    a. ☐ under the supervision of the probation officer ☐ without probation supervision
    b. in the custody of
        (1) ☐ parent *(name):* ☐ mother ☐ father
        (2) ☐ parent *(name):* ☐ mother ☐ father
        (3) ☐ legal guardian *(name):*
        (4) ☐ probation for out-of-home placement or confined commitment. Form JV-667, *Custodial or Out-of-Home Placement Disposition Attachment,* is completed and attached.
    c. ☐ under terms and conditions described on the attached form.
12. ☐ The child and legal parent are to pay a restitution fine ☐ of $ ☐ as specified on the attached form.
13. ☐ The child, with their parent, is to pay restitution
    ☐ as described on the attached restitution order.
    ☐ to each victim *(name each):*
    a. c.
    b. d.
    ☐ in the amount of $ ☐ in the amount and manner determined by the probation office, with the opportunity for review by the court if disputed by the child or the parents.

Form Approved for Optional Use
Judicial Council of California
JV-665 [Rev. July 1, 2023]

Welfare and Institutions Code, §§ 702, 706.6, 725, 727, 727.2;
Cal. Rules of Court, rules 5.785, 5.790, 5.795
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

14. ☐ The child, with the child's parents, is to pay a fine in the amount of $, plus a penalty assessment in the amount of $, for a total of $

15. ☐ Terms regarding vehicles. The child must
   a. ☐ participate in and successfully complete *(specify):*
   b. ☐ only drive to and from school, work, and/or counselling programs.
   c. ☐ surrender license to ☐ court ☐ probation officer.

16. ☐ The child's driver's license is
   ☐ suspended.
   ☐ revoked.
   ☐ delayed
      ☐ for a period of months years.
      ☐ until the child attains 18 years of age.

17. ☐ The court will notify the Department of Motor Vehicles of the judgment. The DMV has independent authority to suspend, revoke, or delay driving privileges.

18. ☐ The child is ordered to submit to DNA collection under Penal Code section 296.

19. ☐ Other *(specify):*

20. ☐ **The next hearing will be:**

Date:	Time:	Dept:
Date:	Time:	Dept:

21. ☐ The child is ordered to return to court on the above date and time.

22. ☐ The child is advised of their right to appeal.

23. ☐ The child is advised that their appointed attorney has a continuing obligation to represent them on this case, until counsel is relieved by the court under California Rules of Court, rule 5.663.

24. ☐ All prior orders not in conflict, including any terms and conditions of probation, remain in full force and effect.

Date:

JUDICIAL OFFICER

The following attachments are incorporated by reference as findings and orders:

- ☐ *Custodial and Out-of-Home Placement Disposition Attachment* (JV-667)
- ☐ *Terms and Conditions* (JV-624)
- ☐ *Juvenile Court Transfer-Out Orders* (JV-550)
- ☐ *Notice of Hearing and Temporary Restraining Order—Juvenile* (JV-250)
- ☐ *Commitment to Secure Youth Treatment Facility* (JV-733)
- ☐ *Order for Victim Restitution* (CR-110/JV-790)
- ☐ *Order Regarding Application for Psychotropic Medication* (JV-223)
- ☐ *Order Designating Educational Rights Holder* (JV-535)
- ☐ *Parentage—Findings and Judgment* (JV-501)

Additional attachments:

- ☐ Indian Child Welfare Act responses from tribes or BIA
- ☐ *Order for Repayment of Cost of Legal Services* (JV-135)
- ☐ Victim Identification Form
- ☐ Probation officer's case plan approved by the court
   - ☐ As submitted
   - ☐ As amended and stated on the record
- ☐ Other (specify):

CHILD'S NAME:	CASE NUMBER:

CUSTODIAL AND OUT-OF-HOME PLACEMENT DISPOSITION ATTACHMENT

THE COURT FINDS AND ORDERS

1. ☐ The maximum time the child may be confined
   a. ☐ in secure custody for the offenses sustained in the petition before the court is *(specify)*:
   b. ☐ in the petition before the court, with the terms of all previously sustained petitions known to the court aggregated, is (*specify*):

2. ☐ The child is committed to (*specify)*: days months in juvenile hall
   a. ☐ and is remanded forthwith. Continuance in the home is contrary to the child's welfare.
   b. ☐ and is to report to *(name)*: by ☐ a.m. ☐ p.m. on *(date):*
   c. ☐ with credit for *(specify)*: days served.

3. ☐ The welfare of the child requires that physical custody be removed from the parent or guardian. *(Check only if applicable):*
   a. ☐ The child's parent or guardian has failed or neglected to provide, or is incapable of providing, proper maintenance, training, and education for the child.
   b. ☐ The child has been on probation in the custody of the parent or guardian and has failed to reform.
   c. Continuance in the home is contrary to the child's welfare.

4. ☐ Probation is granted the authority to authorize medical, surgical, or dental care under Welfare and Institutions Code section 739.

5. ☐ Reasonable efforts to prevent or eliminate the need for removal
   a. ☐ have been made.
   b. ☐ have not been made.

6. a. ☐ The probation officer will ensure provision of reunification services, and the following are ordered to participate in the reunification services specified in the case plan:
   ☐ Mother ☐ Biological father ☐ Legal guardian ☐ Presumed father
   ☐ Alleged father ☐ Indian custodian ☐ Other *(specify):*

   b. ☐ Reunification services do not need to be provided to *(name):* because the court finds by clear and convincing evidence that *(check one)*
      (1) ☐ reunification services were previously terminated for that parent or not offered under section 300 et seq. of the Welfare and Institutions Code.
      (2) ☐ that parent has been convicted of ☐ murder of another child of the parent ☐ voluntary manslaughter of another child of the parent ☐ aiding, abetting, attempting, conspiring, or soliciting to commit murder or manslaughter of another child of the parent ☐ felony assault resulting in serious bodily injury to the child or another child of the parent.
      (3) ☐ the parental rights of that parent regarding a sibling of the child have been terminated involuntarily.

   c. ☐ The child is ☐ ordered to ☐ continued in the care, custody, and control of the probation officer for placement in a suitable relative's home or in a foster or group home.

   d. ☐ The following are ordered to meet with the probation officer on a monthly basis:
   ☐ Mother ☐ Biological father ☐ Legal guardian ☐ Presumed father
   ☐ Alleged father ☐ Indian custodian ☐ Other *(specify)*:

   e. ☐ The child is ordered to obey all reasonable directives of placement staff and probation. The child is not to leave placement without the permission of probation or placement staff.

Form Approved for Optional Use
Judicial Council of California
JV-667 [Rev. July 1, 2023]

Welfare and Institutions Code, §§ 702, 706.6, 725, 727, 727.2;
Cal. Rules of Court, rules 5.785, 5.790, 5.795
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

6. f. ☐ The child is to be placed out of state at the following *(name and address)*:

(1) ☐ In-state facilities are unavailable or inadequate to meet the needs of the child.

(2) ☐ The state Department of Social Services or its designee has performed initial and continuing inspection of the facility and has certified that it meets all California licensure standards, or has granted a waiver based on a finding that there is no adverse impact to health and safety.

(3) ☐ The requirements of the Family Code section 7911.1 are met.

g. ☐ Pending placement, the child is detained in juvenile hall. If being housed in another county, please specify county:

h. ☐ The child is placed on home supervision in the home of

(1) ☐ parent *(name):*

(2) ☐ parent *(name):*

(3) ☐ legal guardian *(name):*

(4) ☐ other *(name and address):*

☐ and is subject to electronic monitoring.

i. ☐ The parent or legal guardian must cooperate in the completion and signing of necessary documents to qualify the child for any medical or financial benefits to which the child may be entitled.

j. ☐ The county is authorized to pay for care, maintenance, clothing, and incidentals at the approved rate.

k. ☐ The likely date by which the child may be returned to and safely maintained in the home or another permanent plan selected is *(specify date):*

l. ☐ The right of the parent or guardian to make educational decisions for the child is specifically limited. *Order Designating Educational Rights Holder* (form JV-535) will be completed and transmitted.

7. ☐ The child has been ordered into a placement described by title IV-E of the Social Security Act.

a. ☐ The date the child entered foster care is: , which is 60 days after the day the child was removed from his or her home.

b. ☐ An exception applies to the standard calculation of the date the child entered foster care because

(1) ☐ the child has been detained for more than 60 days. Therefore, the date the child entered foster care is today's date of: .

(2) ☐ the child has been in a ranch, camp, or other institution for more than 60 days and is now being ordered into an eligible placement. The date the child enters foster care will be the date the child is moved into the eligible placement facility, which is anticipated to be: .

(3) ☐ at the time the wardship petition was filed, the child was a dependent of the juvenile court and in an out-of-home placement. Thus, the date entered foster care is unchanged from the date the child entered foster care in dependency court. That date is: .

8. ☐ The child is committed to the care, custody, and control of the probation office for placement in the county juvenile ranch camp, forestry camp, or:

a. ☐ for: months days.

b. ☐ until the requirement of the program has been satisfactorily completed.

c. ☐ if being housed in another county, please specify:

9. ☐ The child is committed to a secure youth treatment facility and *Commitment to Secure Youth Treatment Facility* (form JV-733) or similar local form will be completed.

10. ☐ The minor is placed in a short-term residential therapeutic program. A hearing to review the placement under Welfare and Institutions Code section 727.12 was held on or is set for *(date):*

Date:

JUDICIAL OFFICER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

SCHOOL NOTIFICATION OF COURT ADJUDICATION

(Welfare & Institutions Code Section 827(b) and Education Code Section 48267)

TO SUPERINTENDENT:

SCHOOL DISTRICT:

MAILING ADDRESS:

CITY, STATE, ZIP CODE:

1. YOU ARE HEREBY NOTIFIED that *(child's name):* _____ , born on: _____ , is currently enrolled in your public school and that under:

   a. ☐ Education Code section 48267, the child is in a grade 7 through 12 and is described by Welfare and Institutions Code section 602, and a condition of probation requires that the minor attend a school program approved by the probation officer.

   b. ☐ Welfare and Institutions Code section 827(b), the child is in a grade kindergarten through grade 12 and was found by a court of competent jurisdiction to have committed a felony or misdemeanor involving:

   (1) ☐ gambling *(code section optional):*

   (2) ☐ alcohol *(code section optional):*

   (3) ☐ drugs *(code section optional):*

   (4) ☐ graffiti *(code section optional):*

   (5) ☐ carrying of weapons *(code section optional):*

   (6) ☐ a sex offense listed in Penal Code section 290 *(code section optional):*

   (7) ☐ assault or battery *(code section optional):*

   (8) ☐ larceny *(code section optional):*

   (9) ☐ vandalism *(code section optional):*

   (10) ☐ distribution of tobacco products *(code section optional):*

2. THE COURT-ORDERED DISPOSITION of the child's case is *(complete only for Welf. & Inst. Code, § 827(b)):*

   a. ☐ wardship probation

   b. ☐ secure youth treatment facility

   c. ☐ nonwardship probation

   d. ☐ Other:

Date:

_____

CLERK OF THE SUPERIOR COURT

For more information, contact the probation officer for the child.

WARNING: UNLAWFUL DISSEMINATION OF THIS INFORMATION IS A MISDEMEANOR

Any information received from this court is to be kept in a separate confidential file at the school of attendance. This record must be destroyed when the child graduates from high school, reaches the age of 18, or is released from court jurisdiction, whichever occurs first.

Form Approved for Optional Use
Judicial Council of California
JV-690 [Rev. July 1, 2023]

Welfare and Institutions Code, § 827(b)
Education Code, § 48267
www.courts.ca.gov

FURTHER INSTRUCTIONS

This form serves two purposes. It is primarily designed to provide the notice required by Welfare and Institutions Code section 827(b). The form can also be used to provide notice under Education Code section 48267. In addition, the form can be used to provide notice under both. If the form is providing notice for both section 827(b) and section 48267, the rules of section 827(b) on its dissemination, listed below, should be followed.

PURPOSE AND DISSEMINATION UNDER EDUCATION CODE SECTION 48267

Education Code section 48267 requires that if the child is in a grade from 7 through 12, the juvenile court must notify the superintendent of the child's school district when the child is described by Welfare and Institution Code section 602 and a condition of probation requires attendance in a school program approved by the probation officer.

If the form is being used to provide notice under Education Code section 48267, the juvenile court must provide the written notice to the superintendent of the school district of attendance within seven days of the disposition order, which must be expeditiously transmitted to the principal or to one person designated by the principal of the school that the minor is attending. The principal or the principal's designee must not disclose this information to any other person except as otherwise required by law.

PURPOSE AND DISSEMINATION UNDER WELFARE AND INSTITUTIONS CODE SECTION 827(b)

Welfare and Institutions Code section 827(b) requires that when a child is found to have committed a felony or misdemeanor for certain offenses, the court must send this form to inform the school of the underlying offense and the outcome of the case. The form is intended to encourage communication between the courts, law enforcement, and schools to ensure rehabilitation of the child and to promote public safety.

Juvenile court proceedings and information related to the case are confidential, and disclosure of this form is governed by the rules of confidentiality found in Welfare and Institutions Code section 827. Information related to a child's juvenile case is strictly confidential; the disclosure on this form is a limited exception. It is to be provided only to select individuals in the child's school district. An intentional violation of these rules is a misdemeanor.

Welfare and Institutions Code section 827(b) provides specific instructions for the school on how the form should be disseminated when it is sent by the court:

- The court will send this form to the district superintendent of the child's school district.
- The district superintendent must expeditiously transmit it to the principal at the school of attendance.
- The principal must then expeditiously disseminate the information to those counselors directly supervising or reporting on the behavior or progress of the child. In addition, the principal must disseminate the information to any teachers or administrators directly supervising or reporting on the behavior or progress of the child, if the principal believes they need the information to work with the child in an appropriate fashion or to promote school safety.

Any information received from the court by a teacher, counselor, or administrator must be received in confidence for the limited purpose of rehabilitating the child and protecting students and staff.

A teacher, counselor, or administrator who receives the information in the form must *not* disclose the information or disseminate the form unless it is communication with the child, the child's parents or guardians, law enforcement personnel, or the juvenile probation officer and is necessary to effectuate the child's rehabilitation or to protect students and staff.

An intentional violation of the confidentiality provisions of Welfare and Institutions Code section 827(b) is a misdemeanor punishable by a fine not to exceed $500.

If a child is removed from public school because of the court's finding described in this form, the superintendent must maintain the information in a confidential file and must defer transmitting the form received from the court until the child is returned to public school. If the child is returned to a school district other than the one from which the child came, the parole or probation officer having jurisdiction over the child must notify the superintendent of the last district of attendance, who must transmit the notice received from the court to the superintendent of the new district of attendance.

The form is required to be destroyed when the child graduates from high school, reaches the age of 18, or is released from court jurisdiction, whichever occurs first. At any time after the form is required to be destroyed, the child or the child's parent or guardian has the right to make a written request to the principal of the school to review the child's school records to verify that the form has been destroyed. After this requested review, the principal or the principal's designee must respond in writing to the written request and either confirm or deny that the form has been destroyed, or explain why destruction has not yet occurred.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF:
MAILING ADRESS:
CITY AND ZIP CODE:
BRANCH NAME:

NOTIFICATION TO SHERIFF OF JUVENILE DELINQUENCY FELONY ADJUDICATION (Welfare & Institutions Code Section 827.2)

TO THE SHERIFF OF THE COUNTY OF:
MAILING ADRESS:
CITY AND ZIP CODE:

ATTENTION, COUNTY SHERIFF:

Pursuant to Welfare and Institutions Code section 827.2, you are hereby notified that

CHILD'S NAME:

CHILD'S DATE OF BIRTH :

was found by a court of competent jurisdiction to have committed at least one offense which would have been a felony if committed by an adult. The child was found to have committed the following felony offenses:

(List statutory violations)

YOU ARE BEING NOTIFIED BECAUSE *(Check all that apply):*

- ☐ The offenses occurred in your county
- ☐ The child is a resident of your county.
- ☐ The child's disposition has been modified.

THE COURT–ORDERED DISPOSITION of the child's case is:

- ☐ Wardship probation
- ☐ Secure youth treatment facility commitment
- ☐ Nonwardship probation
- ☐ Other:

Date: _____ Clerk of the Superior Court: _____

WARNING: UNLAWFUL DISSEMINATION OF THIS INFORMATION IS A MISDEMEANOR

Any information received from this court is to be received in confidence for the limited law enforcement purpose for which it was provided and shall not be further disseminated except as provided by the provisions of Welfare and Institutions Code section 827.2. An intentional violation of the confidentiality provisions of this section is a misdemeanor.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY:	ZIP CODE:	
BRANCH NAME:		
YOUTH'S NAME:		
COMMITMENT TO THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF JUVENILE FACILITIES		CASE NUMBER: JUVENILE:

DRAFT
Not approved by the Judicial Council
JV-732.v1.91422.cz
REVOKED

1. a. Youth's name:
   b. Youth's date of birth:
   c. Parent's/guardian's name: Address: Phone No.:
   d. Educational rights/developmental rights holder *(if applicable):*
2. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present
   ☐ Youth ☐ Youth's attorney ☐ Mother ☐ Father ☐ Guardian ☐ Deputy district attorney
   ☐ Others as reflected on the attached minute order

THE COURT FINDS AND ORDERS:

3. The youth was under the age of 18 years at the time of the commission of the offense for which the youth is being committed to the Division of Juvenile Facilities.
4. The mental and physical condition and qualifications of this youth render it probable that the youth will benefit from the reformatory discipline or other treatment provided by the Division of Juvenile Facilities.
5. a. ☐ The youth is committed to the Division of Juvenile Facilities for acceptance.
   b. ☐ The youth is returned to the Division of Juvenile Facilities for a modification, as a sanction for a serious violation or a series of repeated violations of the conditions of supervision, under Welfare and Institutions Code section 1767.35. The court-ordered release date is: .
   c. ☐ The youth is committed to the Division of Juvenile Facilities for a 90-day period of observation and diagnosis.
6. The youth has been declared a ward of the court and is committed based on the most recent offense(s) listed in Welfare and Institutions Code section 707(b) or Penal Code section 290.008:

	Code section		Enhancements *(code section and max. term)*	Total
Principal felony:		with a max term of:	+	=
		Sentencing options		
Subordinate offense(s):		☐ Felony	+	=
		☐ Felony	+	=
		☐ Felony	+	=
		☐ Misdemeanor	+	=
		☐ Misdemeanor	+	=

☐ Continued on attachment 6.

The maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court is:

7. After having considered the individual facts and circumstances of the case under section 731(c), the court orders that the maximum period of confinement is: ☐

(If lower than the total in number 6, the court has used its discretion to modify the maximum confinement period under section 731(c).)

Form Adopted for Mandatory Use
Judicial Council of California
JV-732 [Rev. September 1, 2017]

Welfare and Institutions Code, §§ 707.2, 731 et seq., 1730 et seq., 1755.3, 1755.4;
Cal. Rules of Court, rules 5.790, 5.795, 5.805
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER: JUVENILE:

8. ☐ The youth has credit for time served at the Division of Juvenile Facilities of *(number):* days.
   ☐ The youth has credit for time served at a local holding facility of *(number):* days.
9. The youth is ordered to pay a restitution fine of: $
10. ☐ The youth is ordered to pay victim restitution as stated on attachment 10.
11. Exceptional needs *(a, b, or c must be checked)*
    a. ☐ The youth has been identified as an individual with exceptional needs under Welfare and Institutions Code section 1742 and has an individualized education program under Education Code 56340 et seq. which *(check one)*
       (1) ☐ is included as attachment 11a.
       (2) ☐ will be furnished to the Division of Juvenile Facilities upon delivery of the youth.
    b. ☐ The youth is not an individual with exceptional needs.
    c. ☐ No determination has been made regarding whether the youth has any exceptional needs.
12. ☐ The court requests that a copy of the Clinical Summary Report be sent to the youth's attorney *(name and address of attorney):*
13. The probation officer is directed to forward a copy of the youth's medical records to the Division of Juvenile Facilities before delivery.
14. The youth ☐ has ☐ has not been prescribed psychotropic medication. If form JV-220 has been completed for the youth, it is attached on attachment 14. Such psychotropic medication, if still necessary based on an evaluation by a Division of Juvenile Facilities physician, may be continued for a period not to exceed 60 days from the date of delivery of the youth to the Division of Juvenile Facilities reception center and clinic.
    If no form JV-220 accompanies this form, the types and dosages of medication is/are *(specify):*

    ☐ Continued on attachment 14.
15. The youth is ordered to submit to AIDS testing
    a. ☐ under Welfare and Institutions Code section 1768.9.
    b. ☐ under Penal Code section 1202.1 due to a sustained offense listed in Penal Code section 1202.1(e).
16. ☐ The youth was committed for a sex offense under Penal Code section 290.008 requiring registration as a sex offender:
    a. ☐ The youth was 18 years of age or older at the time of assessment, 15 years of age or younger at the time of the offense, or is a female; no SARATSO tool was ordered.
    b. ☐ The appropriate SARATSO score, selected under Penal Code section 290.04(d) or (e), was used to assess the youth. The court has read and considered the following risk assessment and received it into evidence:
       (1) ☐ The youth was under 18 at the time of assessment and offense; the JSORRAT-II was considered.
       (2) ☐ The youth was 18 years of age at the time of assessment and 16 or 17 at the time of the offense; the Static-99 was considered.
17. ☐ The court has determined that the youth has been in at least one foster care or other title IV-E eligible placement (Part E of subchapter IV of chapter 7 of title 42 of the United States Code) during the course of a dependency or delinquency case.
18. ☐ Other findings and orders
    a. ☐ See attachment 18a
    b. ☐ *(Specify):*

Date: _____

▶ _____
JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	**DRAFT Not approved by the Judicial Council JV-733.v8.032223.cz**
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR *(name):*		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
YOUTH'S NAME:		
COMMITMENT TO SECURE YOUTH TREATMENT FACILITY		CASE NUMBER:

1. a. Youth's name:
   b. Youth's date of birth:
   c. Parent's or guardian's name:
      Address: Phone No.:
   d. Educational rights or developmental rights holder *(if applicable):*
2. a. Date of hearing: Dept: Room:
   b. Judicial officer *(name):*
   c. Persons present
      ☐ Youth ☐ Youth's attorney ☐ Mother ☐ Father ☐ Guardian ☐ Deputy district attorney
      ☐ Others as reflected on the attached minute order

THE COURT FINDS AND ORDERS:

3. ☐ The youth was at least 14 years of age, and under the age of 18, at the time of the commission of the offense for which the youth is being committed to a secure youth treatment facility.
4. ☐ That a less restrictive, alternative disposition for the youth has been considered and is found to be unsuitable.
5. ☐ The youth is committed to a secure youth treatment facility.
6. ☐ The youth has been declared a ward of the court and is committed based on the most recent offenses listed in Welfare and Institutions Code section 707(b):
   a. Commitment offense: Category: Baseline term:
   b. Calculation of maximum confinement time:

	Penal Code section		Sentencing options		Enhancements *(code section and middle term)*		Total
Principal felony:		with a max term of:		+		=	
Subordinate offense(s):		☐	Felony	+		=	
		☐	Felony	+		=	
		☐	Felony	+		=	
		☐	Misdemeanor	+		=	
		☐	Misdemeanor	+		=	

☐ Continued on Attachment 6.

The maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court is:

Form Approved for Optional Use
Judicial Council of California
JV-733 [New July 1, 2023]

COMMITMENT TO SECURE YOUTH TREATMENT FACILITY

Welfare and Institutions Code, §§ 707.2, 875 et seq., 1730 et seq., 1755.3, 1755.4
Cal. Rules of Court, rules 5.790, 5.795, 5.806
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER:

7. After having considered the individual facts and circumstances of the case under section 875(c), the court orders that the maximum period of confinement is:

   (If lower than the total in item 6, the court has used its discretion to modify the maximum confinement period under section 875(c).)

8. ☐ The youth has credit for time served of *(number):* days.

9. ☐ The youth is ordered to pay a restitution fine of: $

10. ☐ The youth is ordered to pay victim restitution as stated on Attachment 10.

11. Exceptional needs *(check a, b, or c)*

   a. ☐ The youth has been identified as an individual with exceptional needs and has an individualized education program under Education Code section 56340 et seq., which *(check one)*

      (1) ☐ is included as Attachment 11a.

      (2) ☐ will be furnished to the secure youth treatment facility upon delivery of the youth.

   b. ☐ The youth is not an individual with exceptional needs.

   c. ☐ No determination has been made regarding whether the youth has any exceptional needs.

12. The court orders that an individualized rehabilitation plan be developed and submitted to the court by *(date):* _____

   ☐ A hearing on the individualized rehabilitation plan is set for *(date):* *(time):* in Department:

13. The youth ☐ has ☐ has not been prescribed psychotropic medication. If form JV-220, *Application for Psychotropic Medication,* has been completed for the youth, it is attached as Attachment 13.

   If no form JV-220 accompanies this form, the types and dosages of medication are *(specify):*

   ☐ Continued on Attachment 13.

14. ☐ The youth is ordered to submit to AIDS testing under Penal Code section 1202.1 due to a sustained offense listed in Penal Code section 1202.1(e).

15. ☐ The court has determined that the youth has been in at least one foster care or other title IV-E-eligible placement (Part E of subchapter IV of chapter 7 of title 42 of the United States Code) during the course of a dependency or delinquency case.

16. ☐ Other findings and orders

   a. ☐ See Attachment 16.

   b. ☐ *(Specify)*

17. ☐ A progress review hearing is set for *(date):* *(time):* *(location):*

Date: _____

▶ _____
JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CHILD'S NAME:		

DRAFT
Not approved by the Judicial Council
JV-735.v5.022323.cz

JUVENILE NOTICE OF VIOLATION OF PROBATION
☐ § 725 ☐ § 777(a)

CASE NUMBER:

1. Petitioner on information and belief alleges the following:

a. ☐ Under a previous order of this court, dated , the child was declared a ward under Welfare and Institutions Code section ☐ 601(a) ☐ 601(b) ☐ 602.

b. ☐ Under a previous order of this court, dated , the child was NOT declared a ward and was placed on summary probation under Welfare and Institutions Code section 725(a).

c. Child's name and address	d. Age:	e. Date of birth:	f. Sex:

g. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

h. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

i. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

j. Other *(state name, address, and relationship to child):*

☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.

k. Attorney for child *(if known):*
Address:

Phone number:

l. Child is
☐ not detained ☐ detained

Date and time of detention *(custody):*
Current place of detention *(address):*

(See important notice on page 2.)

Form Approved for Optional Use
Judicial Council of California
JV-735 [Rev. July 1, 2023]

Welfare and Institutions Code, § 600 et seq;
Cal. Rules of Court, rule 5.504
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

2. The child is a ☐ probationer or ☐ ward of the court under Welfare and Institutions Code section ☐ 601 ☐ 602 ☐ 725(a) and the child has violated a condition of probation or order of the court.
(State supporting facts concisely, and number them 1, 2, etc.)
☐ See Attachment 2.

3. The recommended ☐ modification ☐ consequence is:
   a. ☐ Removal from the custody of a ☐ parent ☐ guardian ☐ relative ☐ friend
   b. ☐ Placement in a foster home or relative's home
   c. ☐ Commitment to a private institution
   d. ☐ Commitment to a county institution
   e. ☐ Commitment to a secure youth treatment facility
   f. ☐ To be determined
   g. ☐ Other *(specify):*

4. ☐ The child violated nonwardship probation. Petitioner requests a hearing be set under Welfare and Institutions Code section 725(a) to decide if the child should be a ward and determine the appropriate disposition.

5. ☐ Number of pages attached: _____

TO PARENTS OR OTHERS LEGALLY RESPONSIBLE FOR THE SUPPORT OF THE CHILD

You and the estate of your child may be jointly and severally liable for the cost of legal services for you by a court-appointed attorney if one is appointed to represent you, and the cost of any restitution owed to the victim.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR *(name):*		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF:		
DEFENDANT:		
CITATION AND WRITTEN NOTIFICATION FOR DEFERRED ENTRY OF JUDGMENT—JUVENILE ☐ Notice of Hearing		CASE NUMBER:

DRAFT
Not approved by the Judicial Council
JV-751.v4.022423.cz

CITATION

TO *(Name of youth):*

(Name of custodial parent, guardian, or caregiver):

(Address):

1. The district attorney has determined that this youth is eligible to be considered by the juvenile court for a deferred entry of judgment on the offense or offenses alleged in the petition filed *(date):*

2. **YOU ARE ORDERED TO APPEAR AT A HEARING**

on *(date):*	at *(time):*	in Dept.:	Room:

located at: ☐ courthouse address above ☐ other *(specify address):*

At the hearing the court will consider whether or not to grant a deferred entry of judgment.

NOTICE

To Parent and Others Legally Responsible for the Care and Support of the Youth

If the court grants a DEFERRED ENTRY OF JUDGMENT, you may be required to participate in a counseling or education program with the youth.

Form Adopted for Mandatory Use
Judicial Council of California
JV-751 [Rev. July 1, 2023]

Welfare and Institutions Code, §§ 790, 791
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER:

WRITTEN NOTIFICATION

3. A DEFERRED ENTRY OF JUDGMENT will mean that the youth will be on probation for a specific length of time (between 12 and 36 months). Upon successful completion of probation:
   a. The petition that has been filed will be dismissed.
   b. The arrest for the offenses will be considered to NEVER have occurred.
   c. All records in the court, probation department, and law enforcement agencies regarding the petition will be sealed, although the district attorney and the probation department may have access for the limited purpose of determining future eligibility for deferred entry of judgment.
4. If the court grants a DEFERRED ENTRY OF JUDGMENT instead of normal court proceedings, the youth will be required to do all of the following:
   a. To admit that they committed the offense or offenses alleged to have been committed.
   b. To agree to postpone the final determination of the case.
   c. To satisfactorily complete a program of probation.
   d. To obey all laws, follow all of the orders of the court, and the directions of the probation officer.
5. At the hearing, the court will consider the information provided by the district attorney, any report by a probation officer, and other evidence presented. The youth or the youth's attorney may submit written or oral evidence or statements.
6. If the court grants a DEFERRED ENTRY OF JUDGMENT, it must impose the following probation condition: Submission to a search of the youth's person, residence, and property under the youth's control, without a warrant, by a police or probation officer.
7. The court may also consider imposing other conditions of probation, such as:
   a. A curfew.
   b. Regular attendance at school or an education or training program, or employment.
   c. Prohibiting the consumption or possession of alcoholic beverages, controlled substances, and tobacco and requiring submission to chemical tests to determine the use of any of these items, if appropriate.
   d. Restitution to a victim.
   e. Any other orders the court finds would assist the youth and protect the community, including orders for the parent, guardian, or caregiver of the youth to participate in a counseling or education program.
   f. Counseling or treatment that the court finds will benefit the youth.
8. IF AT ANY TIME DURING THE PERIOD OF PROBATION
   a. the youth is found to have committed a felony,
   b. the youth is found to have committed misdemeanor offenses on more than one occasion, or
   c. the district attorney or the probation officer notifies the court that the youth is not complying with the conditions of probation, or the orders are not benefiting the youth,

   the court will lift the deferred entry of judgment and set a hearing to conclude the case, with consideration of all possible consequences under the law.
9. IF AT ANY TIME DURING THE PERIOD OF PROBATION the youth is found to have committed one misdemeanor or more on only one occasion, the court may set a hearing to determine if the deferred entry of judgment should be lifted and other orders, including punishment, should be made, or if the deferred entry of judgment should be continued with additional or different conditions of probation. If the court terminates the deferred entry of judgment, the court will then conclude the case, with consideration of all possible consequences.
10. During this proceeding, the youth will be represented by an attorney acting on the youth's behalf. The district attorney will act for the state, prosecuting the case. The probation department will supervise the youth during the period of the deferred entry of judgment. The court's role is to ensure that the procedures are properly followed.

W23-07

Juvenile Law: New Disposition for Serious Offenses (Adopt Cal. Rules of Court, rules 5.804, 5.807, and 5.808; amend rules 5.663, 5.670, 5.790, and 5.820; repeal rule 5.805; approve form JV 733; revise forms JV-060-INFO, JV-618, JV-665, JV-667, JV-690, JV-692, JV-735, and JV-751; and repeal form JV-732)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees	AM	The JRS notes that the proposal is required to conform to a change of law.	The committee concurs that the proposal is required by July 1 to conform the rules and forms to recent legislative changes.
			The JRS suggests the following changes: The statement "within the framework of the delinquency proceedings…" should not be deleted. The JRS approves of adding "…and based on the child's expressed interests", but deleting the other considerations is a major philosophical shift in Juvenile Justice dynamics that seems to exceed the scope of the new legislation.	The committee notes that the changes to Rule 5.663 were made to implement legislation enacted in 2015 which created Welfare and Institutions Code section 634.3. The council did implement a rule of court pursuant to the directive of that statute to set minimum training hours, but failed to update rule 5.663 to reflect the specific standards in section 634.3(a) which defines the responsibilities of counsel appointed to represent youth in juvenile justice proceedings. The language circulated for comment reflects the statutory text and adding back in the requirement to represent the child's best interest would be at odds with the requirement to represent the child's expressed interests and thus cause confusion for attorneys appointed to represent youth in juvenile justice matters.
2.	Orange County Bar Association By Michael A. Gregg, President	A	These proposed deletions, amendments and revocations to the rules of court and Judicial Council Forms are consistent with the required SB 92 revisions. The proposal adequately addresses the stated purpose.	The committee appreciates the support for the proposed changes to implement the closure of the Division of Juvenile Justice (DJJ) and implement the new secure track disposition.
			For the sake of clarity and uniformity, the proposed commitment form JV-733 should be mandatory.	The committee appreciates the value of consistency but has opted to keep this form optional to allow each court and county to determine the best way to document a

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commenter	Position	Comment	Committee Response
				commitment to its Secure Youth Treatment Facility (SYTF).
			New rules of court setting forth the SYTF commitment process rather than reliance on the directives of W&I §875 are preferable in that such rules will: 1) foster uniform implementation and practice among the counties; 2) give guidance to counsel and the court, and; 3) reduce the need for unnecessary litigation and appellate review.	The committee concurs that the rules are of value, as all commenters were in favor of their adoption and thus they are included in the proposal.
3.	Orange County District Attorney's Office By Todd Spitzer, District Attorney	AM	In response to the Judicial Council of California - Invitation to Comment W23-07 "Juvenile Law: New Disposition for Serious Offenses," the Office of the District Attorney of Orange County has the following requests with respect to proposed Rule 5.808: I. **Provide a definition of "Substantial Risk of Imminent Harm" within Rule 5.808 as contemplated by W.I.C. §875(e)(3).** **II. Articulate and define the petitioner's burden of proof within Rule 5.808.**	The committee appreciates the time taken by the commenter to review the proposal and responses to both comments are below.
			Define "Substantial Risk of Imminent Harm" within Rule 5.808, per W.I.C. §875(e)(3), with the proposed definition, included below and	

	Commenter	Position	Comment	Committee Response
			highlighted in yellow, and articulate petitioner's burden of proof as Probable Cause. **Discussion of the proposed definition:** I. **"Substantial Risk of Imminent Harm" Requires Definition Within Rule 5.808.** Rule 5.808 provides a cogent outline of the procedure for discharging youth from SYTF and placing them on probation. The procedure is consistent with §875(e)(3-4). Furthermore, the Rule restates the findings necessary to extend commitment to SYTF for up to one year in the event the youth presents a "substantial risk of imminent harm if released." However, the Rule does not articulate (1) the definition of "substantial risk of imminent harm" or (2) the burden of proof for further commitment. As a result, our concern is that courts and/or involved parties will not be able to effectively utilize §875(e)(3) when appropriate. Under §5150/ 5585.50 a person may be involuntarily detained if there is a rational belief the individual is a danger to themselves or others. However, W.I.C. §875(e)(3) does not extend the basis for detention to self, therefore the following definition is proposed: **Proposed Definition:**	The committee considered a suggestion to further define substantial risk of imminent harm when reviewing the comments received on California Rule of Court, rule 5.806 and determined that the statutory language was sufficiently clear for courts to make this determination. In addition, the committee does not agree that there is a clear nexus between the standard in Welfare and Institutions Code section 5150/5585.50 and the review being undertaken pursuant to section 875(e)(3) to infer that the legislature intended to apply that definition in this context without an express cross-reference in the statutory language. Section 5150 addresses the need for a temporary involuntary psychiatric hold for a person who needs to be assessed for mental health treatment, while section 875(e)(3) relates to youth who will have been in custody for an extended period of time and whose behavior will be well documented by the agency overseeing the SYTF.

	Commenter	Position	Comment	Committee Response
			"The ward constitutes a substantial risk of imminent harm to others in the community if released from custody if: a state of facts known to the court would lead a person of ordinary care and prudence to believe, or entertain a strong suspicion, that the person detained is a danger to others."	
			I. **Rule 5.808 Should Articulate that "Probable Cause" is the Burden of Proof Required to Extend SYTF Commitments Under W.I.C. §875(e)(3).** Rule 5.808, as drafted, is silent as to the burden of proof required to extend a minor's commitment to SYTF when they present a substantial risk of imminent harm. However, using W.I.C. §5150/ 5585 for guidance, probable cause for involuntary detention is satisfied if the person knew of facts that would lead a person of ordinary care and prudence to believe or entertain a strong suspicion that the detained person is a danger to others. *Heater v. Southwood Psychiatric Ctr. (1996) 42 CA **4th** 1068. 1080, 49 CR 2d 880, citing People v. Tripplett (1983) 144 CA 3d 283, 288, 192 CR 537.* The facts must be specific and articulable, and taken together with rational inferences, must support the belief or suspicion. *Id.* at 1080. Accordingly, Rule 5.808 should articulate that the	As noted, rule 5.808 is silent on the burden of proof to extend the confinement of a youth beyond the baseline term as authorized in section 875(e)(3), but the committee did not specify such a burden because the statute is also silent on this point. Evidence Code section 115 provides that when a statute is silent on the burden of proof, the burden of proof is the preponderance of the evidence. Given this long standing evidentiary rule, the committee is not persuaded that the legislature intended that the burden of proof in this context should be probable cause rather than the typical default standard of preponderance of the evidence.

	Commenter	Position	Comment	Committee Response
			burden of proof required for continued commitment is "probable cause" when the court finds that a ward presents a substantial risk of imminent harm.	
			Thank you for allowing us to address our concerns and for considering our recommended modifications to proposed Rule 5.808. Please contact our office if you have would like us to provide further information or comment.	The committee is grateful for the review and comments even as it deems them outside of its purview to specify absent legislative direction.
4.	Pacific Juvenile Defender Center By Brooke Harris, Executive Director, and Laurel Arroyo, President	AM	The Pacific Juvenile Defender Center (PJDC) submits this letter as comment on the proposed changes regarding New Dispositions for Serious Offenses, first introduced by the adoption of Senate Bill 92 (Stats. 2021, ch 18). We support adoption of the three new proposed rules, and amendment of four existing rules in their current form, with the additions and clarifications explained below. Specifically, we will focus on Rule 5.804, Rule 5.807, and Rule 5.808.	The committee appreciates the support for many of the components of the proposal as they were circulated for comment, and addresses the specific issues raised by PJDC below.
			The Pacific Juvenile Defender Center (PJDC) was founded in 1999 as an affiliate of the National Juvenile Defender Center (now the Gault Center) with an overall mission to promote justice for all youth by ensuring excellence in juvenile defense and advocating for systemic reforms to the delinquency system. Today, PJDC has a	No response required.

	Commenter	Position	Comment	Committee Response
			membership of over 1,600 defenders and advocates across California. To further its mission, PJDC engages its members through training and technical assistance, communications and outreach, research, and policy and legal reform.	
			Proposed Rule 5.804. Commitment to secure youth treatment facility **(a) Eligibility** The Committee should expand on this section to incorporate the number of criteria enumerated in Welfare and Institutions Code section 875(a)(3), which provide meaningful guidance to the court making a determination about eligibility that are not reflected in the proposed rule as currently written. The court's determination required under §875(a)(3) strikes at the heart of DJJ "realignment" – that California is committed to moving away from long term imprisonment of young people, and that youth are better served in rehabilitative, community oriented programs close to home. Accordingly, the legislature adopted specific language to further these aims, including the requirement that the court consider a less restrictive alternative disposition before determining that a young person receive an SYTF disposition. (Welf. & Inst. § 875(a)(3)(D).) Likewise, the statutory language requiring that the programs that a particular youth needs are both available and appropriate to the youth's	The committee agrees that the criteria in section 875(a)(3)(A-E) are important but does not wish to include such a lengthy restatement in the rule. The committee however has clarified this section of the rule by dividing paragraph (3) of subdivision (a) of the rule into separate sentences so that the requirement to evaluate the criteria in §875(a)(3)(A-E) is specifically referenced and are not subjugated to the other eligibility determinations.

	Commenter	Position	Comment	Committee Response
			rehabilitation is fundamental to better serving youth. (Welf. & Inst. § 875(a)(3)(C).) In counties across the state, our constituency has seen a rote determination of eligibility and/or available, alternative programming required by §875(a). Elaborating on this section while referencing §875(a)(3)(A-E) will help to ensure the courts undertake a deeper and more robust analysis of eligibility in each case coming before them.	
			Proposed Rule 5.804. Commitment to secure youth treatment facility **(b) Individualized Rehabilitation Plan (§ 875(d))** The Committee should expand on this section of proposed Rule 5.804, and add and adopt language from Welfare and Institutions Code §875(d) specifying the components of an Individualized Rehabilitation Plan (IRP). The IRP process is a crucial component of a youth's rehabilitation, and serves not only as a benchmark for the youth and court to determine a young person's progress at six month review hearings, but also holds service providers accountable for delivering appropriate programs and doing so in a timely and clear manner. Regrettably, this process has become all too rote. Our membership has reported that in several counties, the IRP consists mainly of check boxes as to whether a youth needs, or is eligible, for	Although the SYTF rules in this proposal largely set forth statutory provisions, they are intended to clearly lay out each of the courts required steps in making a commitment and reviewing the progress of a youth. They are not intended to completely restate all of the provisions of section 875. Any juvenile court judicial officer and any stakeholder who assists in developing or implementing an individualized rehabilitation plan (IRP) should be very familiar with the provisions of section 875, and there is no reason to think that they would be relying primarily on the rule of court to guide the development and approval of the content of the plan. As a result, the committee believes that the addition of a statutory cross reference noted above is appropriate and adequate to address these requirements.

	Commenter	Position	Comment	Committee Response
			certain services, with no clear follow-through or accountability for provision of those services. The language in §875(d)(1)(2)(A-D) elaborates that an IRP identify the youth's treatment, education and development needs with input from the youth and family, and the programs and supports that will meet those needs through trauma-informed, evidence-based, and culturally responsive care. The statutory parameters of an IRP also provide guidance on further issues such as who should be at an IRP hearing, including defense counsel, family, and other relevant community members and a thorough, trauma informed and evidence based approach to the provision of services. Rule 5.804 should reflect the important guidance set forth in §875(d).	
			This body should also require that a copy of the IRP be provided to all parties, including counsel, five days prior to the 30 day review hearing so that counsel and the young person have an opportunity to meaningful review the IRP prior to the Court's approving the plan.	The committee agrees that this suggestion will ensure that all parties have an opportunity to review the IRP and provide input before it is approved by the court and has modified the proposed rule to include this requirement. In addition the rule now includes a requirement for a hearing to finalize the IRP to ensure that a court can obtain the required input from the prosecutor, the youth, and counsel for the youth.
			Proposed Rule 5.807. Secure youth treatment facility progress review hearing With respect to proposed rule 5.807, PJDC urges the Committee to make a number of changes	Responses to each of these issues are provided below in response to their more detailed explication.

	Commenter	Position	Comment	Committee Response
			based on feedback from juvenile defense lawyers across the state. First, a common concern is that young people are getting zero days of commitment credit, even when they are doing well with respect to their IRP. Second, there is concern that no mechanism exists to ensure that probation or other service providers are providing the court with adequate information about their ability to provide the programs adopted in the IRP. Third, there are concerns that when courts do award credits or time cuts, they do so only when an IRP is completed and not while they are in progress.	
			(a) Findings and orders The Committee should add and adopt language that makes explicit the types of information, documents, and certifications that should be provided to the Court to more accurately inform its determination of credits or time cuts to the baseline term. Examples of this type of information include: the number of sessions of a particular program offered, required, and completed by the young person; copies of certificates highlighting positive behavior, accomplishments, school progress; and information from outside services providers such as DMH, behavioral treatment specialists, and community based organizations.	The committee notes that rule 5.806(c), which was approved by the council on March 24, 2023, specifically requires the probation agency to track the youth's positive behavior and gather information from all services providers and report to the court, including a recommendation for the amount of time that should be reduced from the baseline term. The committee believes that the language in rule 5.806(c) strikes the appropriate balance between allowing local flexibility in determining how to evaluate the youth's behavior, and ensuring that the court has the information it needs to make its determination regarding the baseline term. A reference to that new rule has been added to the one recommended here. The committee notes that this process is entirely new, and thus it is premature to determine that the existing statute and rule of court are inadequate,

	Commenter	Position	Comment	Committee Response
				but the committee will consider revisiting it in a future cycle should it be deemed appropriate.
			In this section, the Judicial Council should add and adopt language instructing the court to determine whether the probation department or any other service providers have considered that the identified needs of the youth could be met in a non-custodial or less restrictive program, and what programs have been considered.	Section 875(e)(1) provides that the court is required to make a finding about the baseline term at each review hearing and either reduce it by up to six months or keep it at the current level. It also provides that the court "may additionally order that the ward be assigned to a less restrictive program" and section 875(f) provides that the court must consider making such an order if probation or the youth makes a motion asking for the youth to be transferred to a less restrictive setting. Given this structure in the statute, the committee believes that there is no affirmative duty on the court to make such a determination if no motion has been filed.
			Probation should have an affirmative duty to determine whether they *cannot* serve an identified need and bring this conclusion to the Court's attention as soon as they are aware that they are unable to serve.	Even before the enactment of the SYTF disposition, probation has been serving the needs of the vast majority of youth in the juvenile justice system and the committee is not persuaded that it is necessary to adopt rules of court directing the probation agency to responsibly manage the case plans of the youth subject to its supervision. The committee trusts that probation agencies will oversee youth in SYTF commitments and report to the court if they believe that they are unable to serve an identified need without this specific requirement being in a rule of court.

	Commenter	Position	Comment	Committee Response
			(b) Transfer to a less restrictive placement Adopting a new "Matrix" with ranges for baseline terms will promote greater individualized treatment of youth and reduce overincarceration. In keeping with these principles, the Committee should add and adopt language that credits are earned, and not discretionary, and fall squarely within the principles of adolescent development. We urge the Committee to include language clarifying that the IRP does not need to be *completed* in order for a young person to be placed in a step-down program, and that step-downs are contemplated to continue to provide necessary services and programs related to the IRP, as they youth transitions and acclimates to a less restrictive setting. We propose the following language: "If the court finds that substantial progress has been made, the court *shall* (award credits, or release to a step-down)."	As noted above, rule 5.806, which was adopted by the council on March 24 and becomes effective on July 1, 2023, does require that probation agencies systematically track the positive behavior of the youth and report to the court at each progress review hearing. The suggestion here is that rule 5.807 go further and require the court to order a reduction in the baseline term if it finds that there has been substantial progress in completing the IRP. The committee does not see that requirement as consistent with section 875(e) which provides that the court must make a finding and can either maintain or reduce the baseline term. Given that statutory language, the committee declines to reduce the court's discretion. Similarly, the committee declines to make an order to a less restrictive placement mandatory when the statute affords the court discretion to determine when such an order is appropriate. However, the committee has added language to rule 5.807 to clarify that when the court is evaluating the youth's progress in meeting the IRP it is to consider that progress in light of the programming that has been made available to the youth.
			Proposed Rule 5.808. Discharge from secure youth treatment facility disposition Lastly, the Committee should include guidance regarding the court's assessment of whether a youth poses a "substantial risk of imminent harm to others in the community," including whether	As explained above, in response to the comment by the Orange County District Attorney, the committee believes that the court can assess whether a youth poses a substantial risk of imminent harm to others in the community without further direction in the rule, and also has concluded that as the burden of proof is not

	Commenter	Position	Comment	Committee Response
			or not a hearing is required, the burden of proof required, or the criteria used to assess "substantial risk" and "imminent harm." At a minimum, this Committee should add and adopt language reflected in Rule 5.770(c) (Conduct of transfer of jurisdiction hearing under section 707), that the court must state a basis for its decision to be recorded in the minutes.	specified that it would be the preponderance of the evidence as provided in Evidence Code section 115 as the statute does not specify an alternate burden and that to specify that here would be superfluous. The committee has included the suggestion that the court be required to recite the basis for its finding on the record.
			We have no comments on Rule 5.5663, Rule 5.760, and Rule 5.790, the repeal of 5.805, or changes to the proposed forms.	The committee is grateful for the careful review and support for the bulk of the proposal.
			We thank the Committee for its incredibly hard and thoughtful work on these proposed changes and the many positive, fair proposals contained in these new rules. Please do not hesitate to contact us further.	
5.	Christina Scott Mission Viejo, CA	N	*Commenter indicated disapproval of the proposal and then provided specific comments detailing personal experiences that were not germane or relevant to the proposal*	No response required
6.	Superior Court of Riverside County By Susan Ryan, Chief Deputy of Legal Services	A	Does the proposal appropriately address the stated purpose? Yes, the proposed changes to rules of court and the new forms as well as the revisions to several other forms and revoking the JV-732 will address the closing of DJJ.	The committee appreciates the review and concurrence in the substance of the proposal.
			Should the new commitment form JV-733 be mandatory or optional?	The committee agrees that an optional form is preferable here as it ensures that all courts have an

	Commenter	Position	Comment	Committee Response
			This form should be optional. Many counties, including Riverside have adopted local internal probation department forms to include the findings and orders needed for a SYTF commitment. Keeping the JV-733 optional will allow the processes that have been working to continue. The findings and orders on the local probation department forms can be updated as needed to match the JV-733.	option available, but any court that has already implemented a process or wants to do so in the future can issue its own findings and orders so long as it complies with the statutory requirements.
			Are new rules of court required to set forth the SYTF commitment process, or would it be preferable to rely on the statutory directives in Welfare and Institutions Code section 875? New rules would be appreciated as it makes it easier for the court to create procedures and policies. This will also create more uniformity for the various courts.	The committee heard from all commenters that the rules were of value and has kept them in the proposal with minor revisions.
			Would the proposal provide cost savings? If so, please quantify. No.	The committee concurs that the proposal will not provide cost savings.
			What would the implementation requirements be for courts-for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?	The committee will note these impacts in its report to the council.

	Commenter	Position	Comment	Committee Response
			2-4 hours of training for courtroom staff on the new requirements and findings that must be included in the minutes. Court staff, judges and agencies would need to be notified of the rules/forms revisions and new rules and forms. Filing and minute codes would need to be created and/or modified in the case management system.	
			Would 1.5 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Generally, these processes are already in place, however a little more time may be needed for training and communication with the agencies. 1.5 months may be a bit too short-3 months would be sufficient.	The committee appreciates that additional time would be ideal but because DJJ will be closed on July 1 it has concluded that a July 1, 2023 effective date is necessary.
			How will would this proposal work in courts of different sizes? This would likely work the same for courts of any size.	The committee agrees that the proposal can be implemented in courts of any size.
7.	Superior Court of San Diego County By Mike Roddy, Executive Officer	AM	• Does the proposal appropriately address the stated purpose? **Yes. The changes are necessary as a result of the closure of DJJ.**	The committee appreciates the review and concurrence in the substance of the proposal.
			• Should the proposed commitment form JV-733 be mandatory or optional? **The San Diego Superior Court would prefer an optional form. In this court, a minute order is used to make the required findings and orders.**	The committee agrees that an optional form is preferable here as it ensures that all courts have an option available, but any court, like San Diego Superior Court, that has already implemented a process or wants to implement one in the future

	Commenter	Position	Comment	Committee Response
				can do so, as long as it complies with the statutory requirements.
			• Are new rules of court required to set forth the SYTF commitment process, or would it be preferable to rely on the statutory directives in Welfare and Institutions Code section 875? **The new rules may not be required, but they are helpful.**	The committee heard from all commenters that the rules were of value and has kept them in the proposal with minor revisions.
			• Would the proposal provide cost savings? **No.**	The committee concurs that the proposal will not provide cost savings.
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Train judges and staff; create minute order codes. (This has already been done in San Diego.)**	The committee will note these impacts in its report to the council.
			• Would 1.5 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	The committee is pleased to hear that the proposal can be implemented by July 1, 2023.
			• How well would this proposal work in courts of different sizes? **It should work in courts of different sizes.**	The committee agrees that the proposal can be implemented in courts of any size.
			CRC 5.804(a)(3): consider amending "evaluate the criteria in section 875(a)(1)-(3)" to "evaluat*ing* the criteria in section 875(a)(3)" to match verb tense	The committee revised this provision to break it into two sentences for clarity.

	Commenter	Position	Comment	Committee Response
			and since 875(a)(1)-(2) are already covered by CRC 5.804(a)(1)-(2).	
			JV-733, very bottom of page two of the form: "The maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court is:" This language is no longer accurate, as the maximum term now cannot exceed the middle term. See Welf. & Inst. Code 875(c)(2).	The committee has corrected this provision on the JV-733 to reflect that it may not exceed the middle term for an adult convicted of the offense or offenses.
8.	Robert Tamayo, Deputy Probation Officer III, Monterey County Probation Department	NI	JV060 I noticed there is no information for the parents or the youth regarding their rights after they turn 18 and are still on juvenile probation, especially since some crimes can cause the youth to be on probation until 25. Some questions to consider: Are parents allowed to attend probation meetings and access the court regardless of consent from the youth? Can the youth decline to have parent s access to probation information or info on their case? Can the parent request information from probation on their performance, etc? Do parents have a right to know what is going on in their child's case if they are over 18? Etc.	The committee agrees that it may be helpful to parents to remind them that different rules apply to minor children and those who are legal adults, and has added a question on page 6 of the JV-060-INFO alerting parents to the rights to control access to information that arise once a person under juvenile court jurisdiction reaches majority.

Item number: 08

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Juvenile Law: Sex Offender Registration Termination

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt forms JV 915, JV-917, JV-918; approve forms JV-915-INFO and JV-916

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

*Staff contact (*name, phone and e-mail*): Tracy Kenny, 916-263-2838 tracy.kenny@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): Novermber 2, 2021
Project description from annual agenda: 4. Implementation of SB 384 (Stats. 2017, ch. 541), Sex offenders: registration: criminal offender record information systems
Develop juvenile forms to implement SB 384, which, in relevant part, establishes three tiers of sex offender registration based on specified criteria and a petition process to request termination from the registry upon completion of a mandated minimum registration period under specified conditions. Forms were adopted in 2021 for criminal court use, but juvenile courts have requested that forms be made available for the relatively smaller number of juveniles who have been required to register as sex offenders.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This item was on the committee's 2022 agenda but was not able to be completed, since the underlying statute is now in effect and courts are receiving these requests, the committee would like to put these forms in place in 2023.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☒ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on:

Title
Juvenile Law: Sex Offender Registration Termination

Rules, Forms, Standards, or Statutes Affected
Adopt forms JV-915, JV-917, JV-918; approve forms JV-915-INFO and JV-916

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 23, 2023

Contact
Tracy Kenny, 916-263-2838,
tracy.kenny@jud.ca.gov
Stephanie Lacambra, 415-865-7481
stephanie.lacambra-t@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends the adoption of three mandatory forms and the approval of two optional forms to be used to petition the juvenile court for termination of sex offender registration for persons required to register as sex offenders as a result of a juvenile adjudication and commitment to the Division of Juvenile Justice. All five forms are adapted from existing forms that were approved by the council for use in criminal courts that became effective July 1, 2021.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2023:

1. Adopt *Petition to Terminate Juvenile Sex Offender Registration* (form JV-915), *Response by District Attorney to Petition to Terminate Juvenile Sex Offender Registration* (form JV-917), and *Order on Petition to Terminate Juvenile Sex Offender Registration* (form JV-918) to

assist the courts in processing petitions to terminate sex offender registration as a result of a juvenile adjudication.

2. Approve *Information on Filing a Petition to Terminate Juvenile Sex Offender Registration* (form JV-950-INFO) and *Proof of Service—Juvenile Sex Offender Registration Termination* (form JV-916) as optional forms to assist petitioners in seeking to terminate sex offender registration for juvenile adjudications.

The proposed forms are attached at pages 6-15.

Relevant Previous Council Action

At its meeting on March 12, 2021, the Judicial Council adopted and approved five analogous criminal forms to support the termination of sex offender registration for those required to register as a result of criminal convictions, which became effective on July 1, 2021.

Analysis/Rationale

Background

Senate Bill 384 (Stats. 2022, ch. 811), effective January 1, 2021, has converted sex offender registration from a lifetime requirement to a tier-based registration system with a minimum registration time period. Sex offender registration for youth adjudicated in juvenile court is required only for those who are committed to the Division of Juvenile Justice, and the minimum time period is either 5 or 10 years, depending on the registrable offense. The California Department of Justice will designate tiers for all current registrants and will notify the registering law enforcement agency of the designation. As of July 1, 2021, registrants have been able to petition the court in the county of registration to terminate the registration requirement if the registrant has been registered for the minimum required time and meets other criteria. The district attorney (DA) may request a hearing if the DA believes that the person does not meet the requirements or that community safety would be enhanced by the person's continued registration. Penal Code section 290.5, effective July 1, 2021, outlines the procedure and requirements for the petition process. On March 12, 2021, the Judicial Council adopted three mandatory criminal forms and approved two optional forms to be used for this purpose, but those forms cannot be used in juvenile cases because of the differences in the statutory requirements and terminology.[1] The forms recommended here parallel those criminal case forms.

Petition to Terminate Juvenile Sex Offender Registration (form JV-915)

Form JV-915 allows petitioner or counsel to (1) indicate that petitioner has met the requirements for termination under Penal Code section 290.5(a), including proof of current registration; that petitioner has no pending charges that could extend the time to complete the registration requirements of petitioner's tier or change petitioner's status; and that petitioner is not in custody

[1] Judicial Council of Cal., Advisory Com. Rep., *Criminal Forms: Sex Offender Registration Termination* (Feb. 11, 2021), *https://jcc.legistar.com/View.ashx?M=F&ID=9183000&GUID=C952EF51-7DC9-4D06-8519-CF6CCC9811D1*.

and not on parole, probation, postconviction supervised release, or any other form of supervised release; (2) identify petitioner's tier designation and indicate whether petitioner has registered for the minimum number of years for that tier designation, as required under Penal Code section 290.008; (3) provide information on any previously filed and denied petitions so the served parties and the court are aware of any time restrictions on filing a subsequent petition under Penal Code section 290.5(a)(4); and (4) identify the law enforcement agencies that the petition was served on and the method of service, to indicate compliance with the service requirements of Penal Code section 290.5(a)(2).

***Information on Filing a Petition to Terminate Juvenile Sex Offender Registration* (form JV-915-INFO)**

Form JV-915-INFO is an information sheet that provides background on eligibility for relief, tier designation, tolling of the registration period, and the petition process.

***Proof of Service—Juvenile Sex Offender Registration Termination* (form JV-916)**

Form JV-916 is designed to assist a petitioner in documenting all required service on law enforcement and the district attorney, as required under Penal Code section 290.5(a)(2).

***Response by District Attorney to Petition to Terminate Juvenile Sex Offender Registration* (form JV-917)**

This form allows the district attorney to provide a response to a petition, which may be to indicate no objection to the petition, object because of community safety, object because the petitioner is ineligible, or request a summary denial and state the reason. It is being proposed as a mandatory form that would be filed in all cases.

***Order on Petition to Terminate Juvenile Sex Offender Registration* (form JV-918)**

Form JV-918 allows the court to take one or more of the following actions: (1) grant the request to terminate sex offender registration under Penal Code section 290 et seq.; (2) summarily deny the request based on petitioner's ineligibility; (3) deny the request after hearing based on a finding that community safety would be significantly enhanced by petitioner's continued registration or because petitioner did not meet the requirements of Penal Code section 290(e); (4) indicate that its findings after hearing are either stated on the record or in writing in the order; and (5) state the time period after which the petitioner may file another petition.

Policy implications

The proposed forms will implement SB 384, which establishes three tiers of sex offender registration based on specified criteria and a petition process to request termination from the registry upon completion of a mandated minimum registration period under specified conditions. Judicial Council forms were adopted in 2021 for criminal court use, but juvenile courts have requested that forms be made available for the relatively smaller number of juveniles who have been required to register as sex offenders. Providing a structured process with mandatory forms that mirror the forms adopted for criminal court use in 2021 would promote statewide consistency and provide a road map that courts can follow for clear compliance with SB 384.

Comments

This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the Winter 2023 rules and forms comment cycle. Two organizations and two superior courts submitted comments on this proposal. All commenters agreed with the proposal, but commenters disagreed about whether the proposed forms should be made optional or mandatory. A chart with the full text of the comments received and the committees' responses is attached at pages 16-19.

Comments on whether to make the proposed forms mandatory

The commenters disagreed on whether the proposed forms should be made optional or mandatory. Riverside Superior Court has drafted its own local forms, but indicated that it could transition to the proposed forms, San Diego Superior Court indicated a preference for optional forms, and the Orange County Bar Association suggested the proposed forms be made mandatory for state-wide consistency. The committee concluded that consistency was important in this case, and sought to align these forms with the parallel criminal court forms, which are mandatory.

Comment on requiring that JV-915 form be signed under penalty of perjury

The Superior Court of San Diego County noted that form CR-415 must be signed under penalty of perjury in criminal court and asked the committee to consider whether the analogous JV-915 form should likewise be signed under the penalty of perjury. The committee considered this option, but since form JV-915 may be signed by the attorney or the petitioner, it determined that it was preferable not to include a requirement that the forms be signed under penalty of perjury. The committee also noted that a response from law enforcement must be filed indicating whether the petitioner is eligible for termination of registration so the court will not be relying on the declarations of the petitioner alone in evaluating the petition.

Comment on modifying JV-915-INFO form

The Superior Court of San Diego County brought to our attention that JV-915-INFO, item 7 needed to be corrected because information from a juvenile case is confidential and thus cannot be accessed online or at a public kiosk. The form has been revised accordingly to reflect that information on the case can be obtained in person at the courthouse, and that the response form is required to be filed on the petitioner or their attorney.

Alternatives considered

The committee considered recommending all the forms—not just the information form and the proof of service form—as optional in case any courts wish to retain local forms that they created as an alternative to the mandatory forms but determined that mandatory forms would be preferable for statewide consistency based on the comments received. The committee also considered taking no action to assist those required to register for juvenile adjudications but determined that, although the volume of these cases is not high, the procedure is challenging and the courts and registrants would benefit from the adoption of standardized forms.

Fiscal and Operational Impacts

The volume of petitions for termination of juvenile sex offender registration under Penal Code section 290.5 is anticipated to be relatively small because of the narrow group of offenders who are required to register as juvenile offenders. Moreover, with the closure of the Division of Juvenile Justice, after June 30, 2023, no youth adjudicated in juvenile court will be required to register. Despite this smaller pool of petitioners, juvenile courts have requested access to forms to assist them with the juvenile requests for termination. The proposed forms are intended to mitigate workload burdens by streamlining some of this process. Expected costs include training, case management system updates, and the production of new forms.

Attachments and Links

1. Forms JV-915, JV-915-INFO, JV-916, JV-917, and JV-918, at pages 6–15
2. Chart of comments, at pages 16-19
3. Link A: Senate Bill 384 (Stats. 2022, ch. 811)
4. Link B: Pen. Code, § 290.5, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=290.5.&lawCode=PEN*
5. Link C: Pen. Code, § 290.008, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=290.008.&lawCode=PEN*

JV-915 Petition to Terminate Juvenile Sex Offender Registration

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council
JV-915.v7.032323.cz

- Before using this form, read *Information on Filing a Petition to Terminate Juvenile Sex Offender Registration* (form JV-915-INFO).
- Petitioner must continue to register as a sex offender until a court terminates the registration requirement.
- A copy of the filed petition and proof of current registration (available at the registering law enforcement agency) must be served on the proper law enforcement agencies and district attorney offices. Proof of service must be filed with the court (you may use *Proof of Service—Juvenile Sex Offender Registration Termination* (form JV-916), available at *www.courts.ca.gov/forms*). The petition may be denied if service is not complete.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Petitioner's Information

a. Name: _____
First *Middle* *Last*

Date of birth: _____ *(mm/dd/yyyy)*

b. Attorney representing petitioner *(if any)*

Attorney Name: _____

Firm: _____

State Bar No.: _____

c. Contact information *(IMPORTANT: You may be contacted about this matter at the address, phone, or email listed below. Contact the court immediately if your contact information changes):*

☐ Check if attorney's contact information

_____
Street

_____ _____ _____ Phone: _____
City *State* *Zip*

Email *(if available):* _____ ☐ Petitioner or attorney agrees to email communication.

d. ☐ If there is a hearing, petitioner requests an interpreter in *(language)*: _____

2 Registration Status and Information

a. Petitioner is **currently registered** as a sex offender in California in the County of: _____

b. Court in which petitioner was convicted of an offense requiring sex offender registration in California (e.g., specific California superior court, federal district court, military court, other state court) and the case number for the conviction, if known, are: _____

_____

c. This petition is being filed after the expiration of petitioner's mandated minimum registration period.

d. Proof of current registration is attached (available at the registering law enforcement agency).

Petitioner Name:	Case Number:

3 Termination Request

Petitioner requests termination of the requirement to register as a sex offender in California.

4 Pending Charges

☐ There are no known pending charges against petitioner that could extend the time to complete the registration requirements of petitioner's tier or change petitioner's tier status.

5 Custody Status

☐ Petitioner is not in custody *(in jail or prison)*.

6 Supervision Status

☐ Petitioner is not on parole, probation, postconviction supervised release, or any other form of supervised release.

7 Tier Designation and Eligibility

Petitioner was designated by the Department of Justice in the following tier and has registered for the following number of years:

a. ☐ Tier 1 (Juvenile)—petitioner has registered for at least 5 years.

b. ☐ Tier 2 (Juvenile)—petitioner has registered for at least 10 years

8 Previous Petition

a. Petitioner *(check one)* ☐ has ☐ has not previously filed a Penal Code section 290.5 petition in California for termination of a sex offender registration requirement that was denied by the court.

b. The previous petition was denied in *(case number)*: _____, in the Superior Court of California, County of: _____, on *(date)*: _____

c. The court set: ____ years and ____ months as the time period after which petitioner may again request termination.

9 Registration Period

☐ Petitioner believes that they have met the requirements to register for the time period required by their tier designation as determined by the Department of Justice.

Date: _____

_____
Printed name of petitioner or attorney

_____
Signature of petitioner or attorney

JV-915-INFO Information on Filing a Petition to Terminate Juvenile Sex Offender Registration

DRAFT Not approved by the Judicial Council JV-915-INFO.v5.022723.cz

1 General Information

- You must continue to register as a sex offender until a court grants your request to terminate the registration requirement.
- You may be required to register as a sex offender in another jurisdiction even if your requirement to register in California is terminated.
- Do not file evidence that shows proof of rehabilitation unless requested by the court after the petition is filed.
- Form JV-915 and proof of current registration may only be filed following the expiration of your mandated minimum registration period.
- This information sheet is for terminating registration based on adjudications in juvenile court. It does not address registration based on criminal convictions.
- Proof of current registration is available at the registering law enforcement agency.
- It is very important that you provide a reliable mailing address on form JV-915 so that the district attorney and court can reach you. Contact the court immediately if your mailing address changes.

2 Am I eligible for relief under Penal Code section 290.5?

You *may be* eligible to petition for relief under Penal Code section 290.5 if:

- You are required to register as a sex offender under Penal Code section 290 et seq.; *and*
- You have registered for the minimum time period for your assigned tier.

3 Which tier am I? How is my tier determined?

- Your tier is based on the offense for which you were adjudicated and committed to the Division of Juvenile Justice. The Department of Justice will determine tier placement for all current registrants and will notify the law enforcement agency where you register. Registrants may request a tier notification letter from the registering law enforcement agency.
- Upon being adjudicated for a registrable offense, your minimum required registration period begins on the date you were released from the Division of Juvenile Justice.
- Any misdemeanor conviction for failure to register extends the minimum time period by one year, without regard to the actual time served in custody for the conviction. Any felony conviction for failure to register extends the minimum time period by three years, without regard to the actual time served in custody for the conviction.
- If the minimum registration period has not been tolled or extended, you are eligible for relief after you have registered for the following time periods:

If you are...	You must have registered for at least...
Tier 1 (Juvenile)	5 years
Tier 2 (Juvenile)	10 years

4 Are there any other requirements besides registering for my tier's minimum time period?

If you are assessed as Tier 1 or Tier 2, you are eligible to petition for relief only upon reaching the end of the minimum registration period, and only if *all of* the following are true:

- You are not the subject of pending criminal charges that could extend the time to complete the registration requirements of the tier or change the tier status;
- You are not in custody;
- You are not on parole, probation, postconviction supervised release, or any other form of supervised release;
- You have not been convicted of a new offense requiring sex offender registration since your release from custody following your adjudication for the offense originally giving rise to your duty to register; and
- You have not been convicted of a new offense described in Penal Code section 667.5(c) since your release from custody upon adjudication for the offense originally giving rise to your duty to register.

5 At the end of my minimum period of registration, where and how do I file my petition and proof of current registration with the court?

You may file form JV-915 and proof of current registration as a sex offender, which you can get from the registering law enforcement agency, in the juvenile court in the county where you register. If you register with more than one law enforcement agency (for example, campus registration or additional residence address), you must file the petition and proof of current registration in the county of your primary residence.

- Make a copy of the completed form JV-915 and proof of current registration for each law enforcement agency and district attorney's office you (or someone on your behalf) must serve.
- Contact the court clerk or check the court's website to see if any local rules exist regarding filing or service of the petition and proof of current registration and ask how you can receive proof of filing.
- File form JV-915 and proof of current registration by:
  - Taking them to the court clerk in person;
  - Mailing them to the court; or
  - Depending on the court's local rules and practices, filing them electronically.

6 Who else gets a copy of the petition and proof of current registration, and how?

After form JV-915 and proof of current registration are filed with the court, you or someone on your behalf must deliver a copy of the petition and the proof of current registration to:

- The law enforcement agency with which you currently register; and
- The district attorney in the county in which you currently register.

If you were adjudicated of a registrable offense in a county other than where you currently reside or register, the petition and proof of current registration must also be delivered to the law enforcement agency and the district attorney of the county of conviction of the registrable offense.

Example: If you were adjudicated for a registrable offense in Los Angeles County but register in Orange County, you or someone on your behalf must serve the law enforcement agency and the district attorney's office in both counties.

Contact every agency that must be served to check if there is a specific person or mailing address that should receive the petition and proof of current registration. If the agencies do not get a copy, they will not be able to provide the information the court needs to consider your request, and the court may deny the request or delay its decision until it receives this information.

There are three main ways to serve the petition and proof of current registration (use *Proof of Service—Juvenile Sex Offender Registration Termination* (form JV-916) to guide you on the information you need to report back to the court about how and when the petition was served):

- **Personal service:** You may serve the petition and proof of current registration or ask someone else to do it. Go in person to hand-deliver the petition and proof of current registration to a representative of the law enforcement agency and district attorney's office during business hours. This is the most reliable form of service.
- **Service by mail:** Place copies of the petition and proof of current registration in a stamped, sealed envelope addressed to the law enforcement agency and district attorney's office. Put first-class postage on the envelope and mail it by depositing the envelope with the U.S. Postal Service or at an office or business mail drop where the mail is picked up every day and deposited with the U.S. Postal Service.

  Alternatively, you may mail the documents by certified mail with a return receipt requested.
- **Electronic service:** Contact the law enforcement agency and district attorney's office to check if they accept electronic service and, if so, how to confirm receipt of service. The court may require proof of consent and proof of electronic service. You can use *Consent to Electronic Service and Notice of Electronic Service Address* (form EFS-005-CV) and *Proof of Electronic Service* (form EFS-050), available at www.courts.ca.gov/*forms.*

Your petition may be denied if all law enforcement agencies and district attorney offices required to be served are not served. When service is complete, you or the person who served the documents on your behalf must fill out *Proof of Service—Juvenile Sex Offender Registration Termination* (form JV-916) and file it with the court.

7 Time frame for court's decision

The court will not make a decision until it hears from the law enforcement agency and the district attorney. This may take four months or longer.

- The law enforcement agency has 60 days from receipt of the petition to report on your eligibility to the court and district attorney. The law enforcement agency may request more time if it discovers a conviction not previously considered by the Department of Justice.
- The district attorney may request a hearing within 60 days after receiving the eligibility report from law enforcement.

Once you file your petition and proof of current registration and the court gives you a case number, you can see whether the court has received and filed any responses from the law enforcement agency and the district attorney's office by going in person to the juvenile court to request access to your paper file. The district attorney will also serve a copy of its response on you or your attorney.

The court may grant your request, deny your request, or set the request for a hearing if one is requested by the district attorney.The court will notify you or your attorney if a hearing is set.

8 Hearing

The district attorney in the county where the petition is filed may request a hearing if the district attorney does not believe you have registered for the minimum time period required or if they believe that you should continue registering for community safety. If the court must decide at the hearing whether you should continue to register for community safety, the court will make its decision by reviewing the facts of your case, your conduct before and after the conviction, and your current risk of sexual or violent re-offense, among other factors.

If the district attorney does not request a hearing, the court must grant the petition for termination if (1) you provided proof of current registration, (2) the registering law enforcement agency reported that you met the requirements for termination, (3) there are no pending charges against you that could extend the time to complete the registration requirements of the tier or change your tier status, and (4) you are not in custody or on parole, probation, or supervised release.

9 Subsequent petition

If the court denies your request, it will let you know how much time must pass before you can make the request again. That period must be at least one year from date of denial, but may not exceed five years, based on facts presented at the hearing.

JV-916 Proof of Service—Juvenile Sex Offender Registration Termination

Clerk stamps date here when form is filed.

DRAFT
Not approved by
the Judicial Council
JV-916.v4.032323.cz

Instructions

- This form is for providing proof that a copy of a filed *Petition to Terminate Juvenile Sex Offender Registration* (form JV-915) and proof of current registration were served (delivered) to the required law enforcement agencies and district attorney offices. Read *Information on Filing a Petition to Terminate Juvenile Sex Offender Registration* (form JV-915-INFO) for more information.
- The person who serves (delivers) a document or form in this case and who fills out this form must be at least 18 years old.
- This form is for proof of service by mail or personal delivery. For proof of electronic service, read and follow rule 2.251 of the California Rules of Court, and use *Proof of Electronic Service* (form POS-050/EFS-050).
- File a completed form with the court. Keep a copy of this form for your records.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number:

Case Number:

1 At the time I served *Petition to Terminate Juvenile Sex Offender Registration* (form JV-915) and proof of current registration, I was at least 18 years old.

2 My name is: _____

My mailing address is:

_____ _____ _____ _____
Street *City* *State* *Zip*

3 I served copies of *Petition to Terminate Juvenile Sex Offender Registration* (form-915) and proof of current registration filed *(check one)*:

☐ for myself ☐ on behalf of *(name of petitioner)*: _____

4 I mailed or personally delivered a filed-stamped copy of *Petition to Terminate Juvenile Sex Offender Registration* (form JV-915) and proof of current registration to the agencies listed below:

a. **Registering law enforcement agency**

Name of agency: _____

Address: _____ _____ _____ _____
Street *City* *State* *Zip*

Date of service: _____

Method of service *(check one)*:

☐ Mailed the documents to the agency at the address above in a sealed envelope from *(city, state)*: _____ by depositing the envelope with the U.S. Postal Service

☐ Delivered in person to *(name)*: _____ at *(time)*: _____ at the address above.

Petitioner Name:	Case Number:

4 b. **District attorney (county of registration):**

County of: _____

Address: _____ _____ ____ _____
Street *City* *State* *Zip*

Date of service: _____

Method of service *(check one)*:

☐ Mailed the documents to the district attorney's office at the address above in a sealed envelope from *(city, state)*: _____ by depositing the envelope with the U.S. Postal Service.

☐ Delivered in person to *(name)*: _____ at *(time)*: _____ at the address above.

c. ☐ **Law enforcement agency (county of conviction, if different from county of registration)**

Name of agency: _____

Address: _____ _____ ____ _____
Street *City* *State* *Zip*

Date of service: _____

Method of service *(check one)*:

☐ Mailed the documents to the agency at the address above in a sealed envelope from *(city, state)*: _____ by depositing the envelope with the U.S. Postal Service.

☐ Delivered in person to *(name)*: _____ at *(time)*: _____ at the address above.

d. ☐ **District attorney (county of adjudication, if different from county of registration)**

County of: _____

Address: _____ _____ ____ _____
Street *City* *State* *Zip*

Date of service: _____

Method of service *(check one)*:

☐ Mailed the documents to the district attorney's office at the address above in a sealed envelope from *(city, state)*: _____ by depositing the envelope with the U.S. Postal Service.

☐ Delivered in person to *(name)*: _____ at *(time)*: _____ at the address above.

☐ *Check here if you served copies of the petition and proof of current registration to additional law enforcement agencies and district attorney offices. Attach a separate page listing the names, addresses, dates of service, and methods of service of each additional copy you served. Write "JV-916, Item 4" on the top of the page.*

5 I declare under penalty of perjury under the law of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____
Type or print server's name *Server signs here after serving*

JV-917

Response by District Attorney to Petition to Terminate Juvenile Sex Offender Registration

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council
JV-917.v6.032323.cz

1 Petitioner's Information

This is a response to a petition filed by:

a. Name: _____
First *Middle* *Last*

Date of birth: _____ *(mm/dd/yyyy)*

CSAR Petition No.: _____

b. Tier *(check one)*:

☐ Tier 1 (Juvenile)

☐ Tier 2 (Juvenile)

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

For Court use only:

Date:
Time:
Department:

2 Response

a. ☐ The district attorney has no objection to this petition.

b. ☐ The district attorney objects to granting the petition and requests a hearing because *(check all that apply)*:

(1) ☐ Community safety would be significantly enhanced by the petitioner's continued registration.

(2) ☐ Petitioner has not met the requirements of Penal Code section 290(e).

c. ☐ The district attorney requests that the petition be summarily denied because *(check all that apply and state reasons for requesting a summary denial)*:

(1) ☐ Petitioner has not fulfilled the filing and service requirements of Penal Code section 290.5 because:

_____

(2) ☐ Pending charges against petitioner could extend the time to complete the registration requirements of the tier or change petitioner's tier status: _____

(3) ☐ Petitioner is in custody or on parole, probation, or supervised release: _____

(4) ☐ Petitioner has not met the mandatory minimum registration period for that tier.

(5) ☐ Other: _____

d. This response has been served on the petitioner or counsel at the address stated on the petition.

_____
_____
_____
_____

Printed name, office address, and phone number of district attorney/district attorney's representative

Date: _____

▶ _____

Signature of district attorney/district attorney's representative

JV-918 Order on Petition to Terminate Juvenile Sex Offender Registration

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council
JV-918.v5.032323.cz

Fill in court name and street address:

Superior Court of California, County of

Case Number:

1 Petitioner's Name: _____
First *Middle* *Last*

Birthdate: _____ CSAR Petition No.: _____
(mm/dd/yyyy)

Name of attorney representing petitioner (*if any*): _____

Mailing address: _____
Street

_____ _____ _____
City *State* *Zip*

Email: _____

2 ☐ The court **GRANTS** the petition to terminate the sex offender registration requirement under Penal Code section 290 et seq.

3 ☐ The court **SUMMARILY DENIES** the petition to terminate the sex offender registration requirement because *(check all that apply and state reasons for summary denial):*

a. ☐ Petitioner has not fulfilled the filing and service requirements of Penal Code section 290.5 because:

_____

_____

b. ☐ Pending charges against petitioner could extend the time to complete the registration requirements of the tier or change petitioner's tier status: _____

_____

c. ☐ Petitioner is in custody or on parole, probation, or supervised release: _____

_____

d. ☐ Petitioner has not met the mandatory minimum registration period for petitioner's tier.

e. ☐ Other: _____

4 ☐ After hearing, the court **DENIES** the petition to terminate the juvenile sex offender registration requirement because the court finds that *(check all that apply)*:

a. ☐ Petitioner has not met the requirements of Penal Code section 290(e).

b. ☐ Community safety would be significantly enhanced by the petitioner's continued registration. The court's findings are *(select one):* ☐ stated orally on the record ☐ stated below:

_____

_____

_____

_____

_____

_____

_____

This is a Court Order.

Petitioner Name:	Case Number:

4 c. ☐ Petitioner may not file another petition for termination for ____ years *(must be between one to five years)* from the date of denial, for the following reasons: _____

_____

Date: _____

_____
Signature of Judicial Officer

To the court: Notify the Department of Justice, California Sex Offender Registry, when a petition for termination from the registry is granted, denied, or summarily denied. If the petition is denied after hearing, the court must also state the time period after which the person can file a new petition for termination. The court may notify the department through electronic reporting or by mail (California Sex Offender Registry, P.O. Box 903387, Sacramento, CA 94203-3780).

This is a Court Order.

W23-08

Juvenile Law: Sex Offender Registration Termination (Adopt forms JV-915, JV-917, JV-918; approve forms JV-915-INFO and JV-916)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association By Michael A. Gregg, President	A	The proposal appropriately addresses the stated purpose.	The committee appreciates the agreement with the proposal.
			Adoption of mandatory forms should not result in significant disruption of existing court processes where local forms have been adopted.	The committee concurs and is recommending that the petition, response, and order forms all be adopted as mandatory forms.
2.	Pacific Juvenile Defender Center By Brooke Harris, Executive Director and Laurel Arroyo, President	A	We write with comments related to the proposed adoption of forms JV-915, JV-917, JV918, and the approval of forms JV-915-INFO and JV-916.	The committee appreciates the review of the proposal.
			The Pacific Juvenile Defender Center (PJDC) was founded in 1999 as an affiliate of the National Juvenile Defender Center (now the Gault Center) with an overall mission to promote justice for all youth by ensuring excellence in juvenile defense and advocating for systemic reforms to the delinquency system. Today, PJDC has a membership of over 1,600 defenders and advocates across California. To further its mission, PJDC engages its members through training and technical assistance, communications and outreach, research, and policy and legal reform.	No response required.
			We support the adoption and approval of all proposed forms, and appreciate the hard work of the Family and Juvenile Law Advisory Committee to create and amend these forms, as we believe they will provide essential guidance to the Court.	The committee appreciates the support for the proposal and has moved the proposal forward with minimal revisions.

	Commenter	Position	Comment	Committee Response
3.	Superior Court of Riverside County By Susan Ryan, Chief Deputy Legal Services	A	Does the proposal appropriately address the stated purpose? Yes, the proposal does seem to address additional aspects of AB 153 that were not addressed by last year's proposal, namely Judicial Council forms for juvenile court.	The committee appreciates the support for this proposal to provide forms for juvenile sex offenders to terminate registration.
			Would making forms JV-915, JV-917, and JV-918 mandatory result in significant disruption of existing court processes because of the adoption of local forms? While Riverside Superior Court did adopt local forms for use in juvenile courts, switching over to use the new mandatory Judicial Council forms would not result in a significant disruption of existing processes.	The committee was pleased to hear that the transition to using statewide mandatory forms would not be disruptive as it has concluded that the benefits of consistency of practice weigh in favor of a mandatory petition, response, and order.
			Would the proposal provide cost savings? If so, please quantify. No cost savings.	The committee concurs that the proposal will not likely be cost saving.
			What would the implementation requirements be for courts-for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? 2-4 hours of training. Procedures that were created last year will need to be revised. New codes in the case management system would need to be created for the new forms. Judges, court staff and agencies would need to be informed of the new forms and	The committee notes these impacts and will report them to the council.

	Commenter	Position	Comment	Committee Response
			existing local forms that were created would need to be revoked.	
			Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?? Yes	The committee is pleased to hear that the new forms can be implemented by September 1, 2023.
			How will would this proposal work in courts of different sizes? This would likely work the same for courts of any size.	The committee concurs that these forms will work in courts of all sizes.
4.	Superior Court of San Diego County By Mike Roddy, Executive Officer	AM	• Does the proposal appropriately address the stated purpose? **Yes.**	The committee appreciates the support for this proposal to provide forms for juvenile sex offenders to terminate registration.
			• Would making forms JV-915, JV-917, and JV-918 mandatory result in a significant disruption of existing court processes because of the adoption of local forms? **The San Diego Superior Court would prefer that the forms be made optional.**	The committee considered this preference but ultimately concluded that the benefits of statewide consistency weighed in favor of mandatory forms for this purpose.
			• Would the proposal provide cost savings? **No.**	The committee concurs that the proposal will not likely be cost saving.
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Revise current process; train judges and staff.**	The committee notes these impacts and will report them to the council.

	Commenter	Position	Comment	Committee Response
			• Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	The committee is pleased to hear that the new forms can be implemented by September 1, 2023.
			• How well would this proposal work in courts of different sizes? **It should work in courts of different sizes.**	The committee concurs that these forms will work in courts of all sizes.
			The CR-415 is signed under penalty of perjury. Consider whether the JV-915 should be as well.	The committee did consider this option, but as the form can be signed by the attorney or the petitioner, it determined that it was preferable not to include a requirement that the forms be signed under penalty of perjury. The committee also notes that a response from law enforcement must be filed indicating whether the petitioner is eligible for termination of registration so the court will not be relying on the declarations of the petitioner alone in evaluating the petition.
			JV-915-INFO, item 7: Information from a juvenile case cannot be accessed online or at a public kiosk.	The committee has revised this item to reflect that the response will be filed on the petitioner or their attorney and that the petitioner will be notified if a hearing is set.

Item number: 09

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Recommend JC approval (has circulated for comment)

Title of proposal: Juvenile Law: Transfer of Jurisdiction to Criminal Court

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 5.770; revise form JV 710

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

*Staff contact (*name, phone and e-mail*): Tracy Kenny, 916 263-2838 tracy.kenny@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 1, 2022
Project description from annual agenda:
1. Legislative Changes from the 2022 Legislative Session
As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration and will take action only where necessary to allow courts to implement the legislation efficiently.
y. AB 2361 (Bonta) Juveniles: transfer to court of criminal jurisdiction (Ch. 330, Stats. of 2022)
Requires the juvenile court to find by clear and convincing evidence that the minor is not amenable to rehabilitation while under the jurisdiction of the juvenile court in order to transfer the minor to a court of criminal jurisdiction.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The Judicial Council just approved changes to the impacted rule and form to take effect on January 1 which are now out of date because of this newly enacted legislation. Making them accurate sooner than later will ensure that courts are using the right evidentiary standards when considering these motions for transfer of jurisdiction.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☒ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)

☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 23-
For business meeting on May 11–12, 2023

Title
Juvenile Law: Transfer of Jurisdiction to Criminal Court

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 5.770; revise form JV-710

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Stephanie E. Hulsey, Cochair
Hon. Amy M. Pellman, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 6, 2023

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov
Stephanie Lacambra, 415-865-7481
stephanie.lacambra-t@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee proposes amending one rule of court and revising one form to implement recent legislative changes requiring that the court find by clear and convincing evidence that a youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court. Assembly Bill 2361 amended Welfare and Institutions Code section 707 to include that standard of proof and to require the court, in an order entered upon the minutes, to state the basis for making that finding.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2023:

1. Amend California Rules of Court, rule 5.770 to reflect the higher evidentiary standard and the requirement for the court to state its reasons for finding that a youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court; and

2. Revise *Order to Transfer Juvenile to Criminal Court Jurisdiction* (form JV-710) to reflect the higher standard of proof and the finding required by the court to order a transfer.

The proposed amended rule and revised form are attached at pages 4–6.

Relevant Previous Council Action

The Judicial Council adopted California Rules of Court, rule 5.770 effective January 1, 1991, as rule 1482, which was renumbered effective January 1, 2007. This rule has been amended numerous times—most recently effective January 1, 2023, to implement recent legislative changes limiting the use of transfer motions to youth ages 16 or 17, in most cases, and providing direct appeal rights to youth for whom the court has made a transfer order.

Order to Transfer Juvenile to Criminal Court Jurisdiction (form JV-710) was adopted by the council effective January 1, 2006, with the title *Juvenile Fitness Hearing* and was made optional effective January 1, 2012. It was significantly revised effective May 22, 2017, to implement the changes enacted by Proposition 57 and then again effective January 1, 2023, to implement the age restrictions on the use of transfer orders in Senate Bill 1391 (Lara; Stats. 2018, ch. 1012).

Analysis/Rationale

Background

The Family and Juvenile Law Advisory Committee proposes amending rule 5.770 of the California Rules of Court and revising *Order to Transfer Juvenile to Criminal Court Jurisdiction* (form JV-710) to reflect the changes to Welfare and Institutions Code section 707 enacted by AB 2361.

Amendments to rule 5.770

Rule 5.770(a) would be amended to update the standard of proof for the prosecution to a clear and convincing evidence standard. Rule 5.770(b) would be amended to add paragraph (3), which states the new required court finding regarding whether the youth is amenable to rehabilitation while under the jurisdiction of the juvenile court. The requirements for the court to state its reasoning on the record would be relocated to rule 5.770(c), which currently requires the court to specify the basis for its order. The advisory committee comment to rule 5.770 would also be amended accordingly, to add AB 2361 to the comment on the intent of subdivision (b) and to relocate the comment on stating the basis of the order to be a comment on subdivision (c).

Revisions to *Order to Transfer Juvenile to Criminal Court Jurisdiction* (form JV-710)

The current optional order form to effectuate a transfer of jurisdiction from juvenile to criminal court would be revised at item 4.b to state that the prosecution has shown by clear and convincing evidence that the youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court (based on findings that are stated on the record) and should be transferred to the jurisdiction of the criminal court.

Policy implications

New legislation AB 2361 (Bonta, Mia; Stats. 2022, ch. 330), which governs the transfer of juveniles to a court of criminal jurisdiction, now requires the juvenile court to find by clear and convincing evidence that the minor is not amenable to rehabilitation while under the jurisdiction of the juvenile court in order to transfer the minor to a court of criminal jurisdiction.

Comments

This proposal was circulated for public comment from December 9, 2022, to January 20, 2023, as part of the winter 2023 rules and forms comment cycle. Two organizations and two superior courts submitted comments on this proposal. All commenters agreed with the proposal as drafted. A chart with the full text of the comments received and the committee's responses is attached at pages 7–10.

Alternatives considered

The committee considered not changing the rule or form, but that would have left the documents both legally inaccurate and misleading.

Fiscal and Operational Impacts

The costs to translate and reproduce the new forms would be minor. Also, the two courts that commented identified minor costs to train staff and update minute order codes. The heightened standard of proof may result in the filing of fewer motions to transfer youth to courts of criminal jurisdiction by the prosecuting attorney.

Attachments and Links

1. Cal. Rules of Court, rule 5.770, at pages 4–5
2. Form JV-710, at page 6
3. Chart of comments, at pages 7–10
4. Link A: Assem. Bill 2361, *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2361*

Rule 5.770 of the California Rules of Court would be amended, effective September 1, 2023, to read:

Rule 5.770. Conduct of transfer of jurisdiction hearing under section 707

(a) Burden of proof (§ 707)

In a transfer of jurisdiction hearing under section 707, the burden of proving that there should be a transfer of jurisdiction to criminal court jurisdiction is on the petitioner, by ~~a preponderance of the evidence~~ clear and convincing evidence.

(b) Criteria to consider (§ 707)

Following receipt of the probation officer's report and any other relevant evidence, the court may order that the youth be transferred to the jurisdiction of the criminal court if the court finds by clear and convincing evidence each of the following:

(1) The youth was 16 years or older at the time of any alleged felony offense, or the youth was 14 or 15 years of age at the time of an alleged felony offense listed in section 707(b) and was not apprehended prior to the end of juvenile court jurisdiction;

(2) The youth should be transferred to the jurisdiction of the criminal court based on an evaluation of all the criteria in section 707(a)(3)(A)–(E) as provided in that section~~.~~ ; and ~~The court must state on the record the basis for its decision, including how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision.~~

(3) The youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court.

(c) Basis for order of transfer

If the court orders a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered on the minutes. The court must state on the record the basis for its decision, including how it weighed the evidence and identifying the specific factors on which the court relied to reach its decision. This statement must include the reasons supporting the court's finding that the minor is not amenable to rehabilitation while under the jurisdiction of the juvenile court.

(d)–(h) * * *

Advisory Committee Comment

Subdivision (b). This subdivision reflects changes to section 707 as a result of the passage of Senate Bill 382 (Lara; Stats. 2015, ch. 234); ~~and~~ Proposition 57, the Public Safety and Rehabilitation Act of 2016; and Assembly Bill 2361 (Bonta, Mia; Stats. 2022, ch. 330). SB 382 was intended to clarify the factors for the juvenile court to consider when determining whether a case should be transferred to criminal court by emphasizing the unique developmental characteristics of children and their prior interactions with the juvenile justice system. Proposition 57 provided that its intent was to promote rehabilitation for juveniles and prevent them from reoffending, and to ensure that a judge makes the determination that a youth should be tried in a criminal court. Consistent with this intent, the committee urges juvenile courts—when evaluating the statutory criteria to determine if transfer is appropriate—to look at the totality of the circumstances, taking into account the specific statutory language guiding the court in its consideration of the criteria.

~~Under subdivision (b)(2), the court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009.~~

Subdivision (c). The court must state on the record the basis for its decision. The statement of decision must fully explain the court's reasoning to allow for meaningful appellate review. See, e.g., *C.S. v. Superior Court* (2018) 29 Cal.App.5th 1009.

Although this rule and section 707 require the juvenile court to recite the basis for its decision only when the transfer motion is granted, the advisory committee believes that juvenile courts should, as a best practice, state the basis for their decisions on these motions in all cases so that the parties have an adequate record from which to seek subsequent review.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council** **JV-710.v4.030323.cz**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Case Name:	
ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION (Welfare and Institutions Code, § 707)	CASE NUMBER:

1. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present:
   ☐ Youth ☐ Youth's attorney *(name):*
   ☐ Deputy District Attorney *(name):* ☐ Other:

2. ☐ The court has read and considered ☐ the petition and report of the probation officer ☐ other relevant evidence.

3. **THE COURT FINDS** *(check one)*
   Welfare and Institutions Code section 707
   a. ☐ The youth was 16 years old or older at the time of the alleged felony offense; or
   b. ☐ The individual was 14 or 15 years of age at the time of the alleged offense, the alleged offense is an offense listed in Welfare and Institutions Code section 707(b), and the individual was not apprehended before the end of juvenile court jurisdiction.

4. **AFTER CONSIDERING EACH OF THE TRANSFER OF JURISDICTION CRITERIA, THE COURT ALSO FINDS AND ORDERS**
   The court has considered each of the criteria in Welfare and Institutions Code section 707(a)(3), has documented its findings on each of the criteria on the record, and based on those findings makes the following orders:
   a. ☐ The transfer motion is denied. The youth is retained under the jurisdiction of the juvenile court.
   The next hearing is on *(date):* at *(time):*
   for *(specify):*

   b. ☐ The transfer motion is granted. The prosecutor has shown by clear and convincing evidence that the youth is not amenable to rehabilitation while under the jurisdiction of the juvenile court and should be transferred to the jursidiction of the criminal court.
   (1) ☐ The matter is referred to the district attorney for prosecution under the general law.
   (2) ☐ The youth is ordered to appear in criminal court on *(date):* at *(time):*
   in Department:
   (3) ☐ The petition filed on *(date):* is dismissed without prejudice on the appearance date in (2).
   (4) ☐ The youth is to be detained in ☐ juvenile hall ☐ county jail (Welfare and Institutions Code section 207.1).
   (5) ☐ Bail is set in the amount of: $
   (6) ☐ The youth is released ☐ on own recognizance ☐ to the custody of:

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-710 [Rev. September 1, 2023]

Welfare and Institutions Code, §§ 207.1, 707, 781(d);
Cal. Rules of Court, rules 5.504, 5.770
www.courts.ca.gov

W23-09

Juvenile Law: Transfer of Jurisdiction to Criminal Court (Amend Cal. Rules of Court, rule 5.770; revise form JV 710)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	Orange County Bar Association By Michael A. Gregg, President	A	Accurately reflects changes to WIC 707 changing standard from preponderance to clear and convincing and adding requirement that court find minor is not amenable to rehabilitation before transfer to adult court.	The committee appreciates the commenters agreement with the approach taken.
			Based on caselaw, also appropriately adds due process requirement that the court must state on the record not only its basis for the decision but its evaluative process by detailing how it weighed the evidence and by identifying the specific facts which persuaded it to reach a decision to transfer the minor.	The committee notes that this change to incorporate caselaw into the rule and form was adopted effective January 1, 2022, but has been updated to reflect the recent legislative change.
			The proposal appropriately addresses the stated purpose.	The committee concurs that the proposal accurately implements the recent legislative change.
2.	Pacific Juvenile Defender Center By Brooke Harris, Executive Director and Laurel Arroyo, President	A	We write with comments related to the proposed amendment to rule 5.770 of the California Rules of Court, and the proposed revision to the *Order to Transfer Juvenile to Criminal Court Jurisdiction (Welfare and Institutions Code, § 707)* (form JV-710).	The committee appreciates the review of this proposal by key stakeholders in the juvenile court.
			The Pacific Juvenile Defender Center (PJDC) was founded in 1999 as an affiliate of the National Juvenile Defender Center (now the Gault Center) with an overall mission to promote justice for all youth by ensuring excellence in juvenile defense and advocating for systemic reforms to the delinquency system. Today, PJDC has a	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commenter	Position	Comment	Committee Response
			membership of over 1,600 defenders and advocates across California. To further its mission, PJDC engages its members through training and technical assistance, communications and outreach, research, and policy and legal reform.	
			We strongly support the proposed changed to rule 5.770, and believe that the draft language accurately reflects the change in the standard of proof created by the passage of Assembly Bill 2361 (Bonta; Stats. 2022, ch 330). We commend the Family and Juvenile Law Advisory Committee for this language, and urge the Judicial Council to adopt the proposed rule as currently written. We have no comments on the proposed changed to form JV-710.	The committee appreciates the support of the commenter and is putting forward the proposal as it circulates for comment as suggested by the commenter.
3.	Superior Court of Riverside County By Susan Ryan, Chief Deputy Legal Services	A	Does the proposal appropriately address the stated purpose? The amendment to Rule 5.770 and the revision to the JV-710 form makes it easier for the court to state that the prosecution has shown by clear and convincing evidence that the youth is not amenable to rehabilitation while under the juvenile court's jurisdiction.	The committee concurs that the proposal will effectively implement the heightened standard of proof.
			Would the proposal provide cost savings? If so, please quantify? No.	The committee notes that the proposal will not achieve cost savings but is required to make the rule and form legally accurate.
			What would the implementation requirements be for courts-for example, training staff (please identify position and expected hours of training), revising processes and procedures (please	The committee takes note of these impacts which are driven by the legislative changes.

	Commenter	Position	Comment	Committee Response
			describe), changing docket codes in case management systems, or modifying case management systems? Minimal training would be needed for courtroom staff to understand the purpose and changes to the JV-710 form and updated associated minute orders. New minute order code will need to be created in the case management system that would have the "clear and convincing" language.	
			Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes	The committee is pleased that the proposal can be implemented within the calendar year so that the rules and forms are made accurate.
			How well would this proposal work in courts of different sizes? The proposal would likely work the same for any size court.	The committee agrees that courts of all sizes can implement this proposal.
4.	Superior Court of San Diego County By Mike Roddy, Executive Officer	A	• Does the proposal appropriately address the stated purpose? **Yes. The changes are necessary as a result of a change in the law.**	The committee concurs that the proposal accurately implements the recent legislative change.
			• Would the proposal provide cost savings? **No.**	The committee notes that the proposal will not achieve cost savings but is required to make the rule and form legally accurate.
			• What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? **Train judges and staff;**	The committee takes note of these impacts which are driven by the legislative changes.

	Commenter	Position	Comment	Committee Response
			create minute order codes. (This has already been done in San Diego.)	
			• Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? **Yes.**	The committee is pleased that the proposal can be implemented within the calendar year so that the rules and forms are made accurate.
			• How well would this proposal work in courts of different sizes? **It should work in courts of different sizes.**	The committee agrees that courts of all sizes can implement this proposal.

Deferred until April 13

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Circulate for comment (January 1 cycle)

Title of proposal: Probate Conservatorship: Less Restrictive Alternatives

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 7.1103, 10.468, 10.478; revise form GC-312

Committee or other entity submitting the proposal:
Probate and Mental Health Advisory Committee

*Staff contact (*name, phone and e-mail*): Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 1, 2022
Project description from annual agenda: Recommend revisions to Judicial Council forms and amendments to rules of court to implement the requirements of Assembly Bill 1663 in probate conservatorships and other protective proceedings. Assembly Bill 1663 (Stats. 2022, ch. 894) modified the probate conservatorship process to clarify the standards for appointment of a conservator, increase court oversight of a conservator after appointment, add to the information that the conservator and the court must provide to a conservatee, and enact a framework for supported decisionmaking. The bill's provisions require revision of multiple conservatorship forms to bring them into conformity with its requirements. Amendments to rules of court, including those relating to education and training of appointed counsel, judicial officers, and court staff, are also required.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☐ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR23-23

Title
Probate Conservatorship: Less Restrictive Alternatives

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 7.1103, 10.468, and 10.478; revise form GC-312

Proposed by
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

Action Requested
Review and submit comments by May 12, 2023

Proposed Effective Date
January 1, 2024

Contact
Corby Sturges, 415-865-4507,
Corby.Sturges@jud.ca.gov

Executive Summary and Origin

The Probate and Mental Health Advisory Committee proposes amending three rules of court and revising one form in response to changes to conservatorship law enacted by recent legislation. The rule amendments would implement legislation that requires education on alternatives to conservatorship for judicial officers assigned to probate, probate staff attorneys, probate examiners, court investigators, and counsel appointed in probate conservatorship proceedings. Revisions to the form would implement legislation that requires the supplemental information provided by the petitioner or proposed conservator to specify clearly and discuss in detail the less restrictive alternatives to a conservatorship that were considered or tried before the filing of the petition. Additional revisions to the form would identify the person completing the form, clarify the structure of information to be provided about the reasons for conservatorship, and solicit information about the proposed conservatee's knowledge and opinion of the conservatorship.

The Proposal

Assembly Bill 1663 (Stats. 2022, ch. 894) amended multiple provisions in the Probate Code related to conservatorship proceedings. The bill focused on two principal themes: less restrictive alternatives to conservatorship and the rights retained by a person under conservatorship, or conservatee. This proposal would address the first of these themes by amending the rules that

prescribe educational requirements for judicial officers, court staff, and appointed counsel in conservatorship proceedings revising the mandatory supplemental information form.

Rules requiring education on less restrictive alternatives

Section 1456 requires the Judicial Council to develop a rule of court to address the qualifications and education of judicial officers regularly assigned to hear probate matters, court-employed probate staff attorneys, probate examiners, court investigators, and counsel appointed under section 1470 or 1471 in guardianship and conservatorship proceedings.[1] Effective January 1, 2008, the council adopted the required rules, since renumbered as rules 7.1103, 10.468, and 10.478, to effectuate this mandate. Rule 7.1103 provides education requirements for counsel appointed under section 1470 or 1471 in conservatorship proceedings. Rule 10.468 provides education requirements for judges and subordinate judicial officers regularly assigned to probate matters. And rule 10.478 provides education requirements for court-employed probate staff attorneys, probate examiners, and court investigators.

AB 1663 amended section 1456(a)(4) to require that, where the mandatory subject matter of annual education specified in the rules of court must include, at a minimum, "the less restrictive alternatives to conservatorship set forth in [s]ection 1800.3." The committee therefore proposes amendments to add those less restrictive alternatives to the applicable provisions of rules 7.1103, 10.468, and 10.478.[2]

Less restrictive alternatives in the supplemental information form

Section 1821(a) requires the petitioner or the proposed conservator to file, in addition to the petition, supplemental information explaining why appointment of a conservator is necessary. The supplemental information must be filed on a form separate from the petition form and must be confidential, made available only to parties, persons given notice of the petition who have requested the supplemental information or who have appeared in the proceedings, their attorneys, and the court. As required by the statute, the Judicial Council adopted a mandatory form, *Confidential Supplemental Information* (form GC-312), to implement these requirements.

Section 1821 specifies five categories of information to be provided in the supplemental information form. AB 1663 amended the provisions addressing each of those categories. Of the four provisions that were amended substantively, three require revisions to form GC-312.[3] First, section 1821(a)(1)(B) requires the information on the form to include, in addition to the location of the proposed conservatee's residence, the nature of that residence. The committee proposes

[1] All subsequent statutory references are to the Probate Code unless otherwise specified.

[2] In addition to the substantive amendments, the committee also proposes amending the cross-references to title 7 in rules 10.468 and 10.478 to reflect the anticipated division of title 7, effective September 1, 2023, into two separate divisions, the first for the probate rules and the second for the mental health rules.

[3] The proposed revisions are not highlighted on the attached form because they are extensive and the form has been reorganized, as described below.

revising renumbered item 5 on form GC-312 to add a description of the nature of the proposed conservatee's residence.

Second, section 1821(a)(1)(D) requires supplemental information about the health and social services provided to the proposed conservatee to cover the year immediately preceding the filing of the petition when the petitioner or proposed conservator has that information. The committee proposes inserting the term immediately into renumbered item 7 on form GC-312 to reflect this amendment.

Third, and most significant, section 1821(a)(1)(C) requires the supplemental information form to include more detailed and specific information about the alternatives to conservatorship that the petitioner or proposed conservator considered; reasons those alternatives were not suitable; alternatives tried, if any; and reasons the alternatives do not meet the proposed conservatee's needs. The statute requires that the alternatives considered include at least a supported decisionmaking agreement, as defined in Welfare and Institutions Code section 21001; the designation of a health care surrogate as described in section 4711; an advance health care directive under section 4670 et seq.; and a power of attorney under section 4000 et seq. (§ 1821(a)(1)(C).) The committee therefore proposes revising renumbered item 6 on form GC-312 to solicit additional, specific information about the consideration or attempt, if any, of the statutorily specified alternatives and any other alternatives, along with the reasons that each alternative is unsuitable or does not meet the proposed conservatee's needs.

In addition to the statutorily mandated revisions, the committee proposes adding item 2 to specify whether the person completing the form is the petitioner or the proposed conservator; revising items 3 and 4 to provide clearer structure to the information, required by section 1821(a)(1)(A) and (E), about the reasons that a conservatorship; and adding item 8 to request information, if known, about the proposed conservatee's knowledge and preferences regarding the conservatorship. Not only will these proposed revisions bring the form into conformity with current law, but they are also intended to present more relevant information to the court and organize that information in a format that will help the court process it more efficiently.

In summary, the committee proposes that the Judicial Council, effective January 1, 2024:

- Amend California Rules of Court, rules 7.1103, 10.468, and 10.478, to add the less restrictive alternatives to conservatorship stated in section 1800.3 to the subject matter of the education required under these rules; and
- Revise *Confidential Supplemental Information* (form GC-312) to incorporate the changes required by AB 1663's amendments to section 1821(a) and to provide more clarity and structure to the information provided on that form.

The text of the proposed rules and the proposed form are attached at pages 5–12.

Alternatives Considered

The committee did not consider taking no action. Sections 1456 and 1821 expressly require implementation through, respectively, rules and a form. The existing rules and form no longer conform to the law and must be updated to satisfy the council's statutory mandates.

The committee considered taking action to implement other statutory amendments enacted by AB 1663 that did not immediately require revisions to existing rules or forms. Unfortunately, the committee lacks the resources to undertake these additional projects at this time. The committee will consider additional action regarding probate conservatorships in a future comment cycle.

Fiscal and Operational Impacts

The fiscal and operational impacts of the proposal, including updating curricula for judicial branch education, are almost entirely attributable to statute. Petitioners, their attorneys if they have them, and proposed conservators are now required to specify in more depth the reasons that a conservatorship is needed. In that respect, the proposed form will assist them to do so more completely by reminding them of the issues that they must address. An increased rate of complete supplemental information forms would, at least in theory, lead to fewer continued hearings and other delays in conservatorship proceedings.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 7.1103, 10.468, and 10.478, at pages 5–8
2. Form GC-312, at pages 9–12
3. Link A: Assem. Bill 1663 (Stats. 2022, ch. 894), *https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB1663*

Rules 7.1103, 10.468, and 10.478 of the California Rules of Court would be amended, effective January 1, 2024, to read:

Rule 7.1103. Qualifications and annual education required for counsel appointed to represent a conservatee, proposed conservatee, or person alleged to lack legal capacity (Prob. Code, §§ 1456, 1470(a), 1471)

Except as provided in rule 7.1104(b), an attorney appointed to represent the interests of a conservatee, proposed conservatee, or person alleged to lack legal capacity must have met the qualifications in (a) or (b) and, in every calendar year after first availability for appointment, must meet the annual education requirements in (c).

(a)–(c) * * *

(d) Subject matter and delivery of education

Education in the following subjects—delivered in person or by any State Bar–approved method of distance learning—may be used to satisfy this rule's education requirements:

(1)–(2) * * *

(3) Special considerations for representing an older adult or a person with a disability, including:

(A)–(C) * * *

(D) ~~Less restrictive~~ The less restrictive alternatives to conservatorship, including supported decisionmaking, stated in Probate Code section 1800.3.

Rule 10.468. Content-based and hours-based education for superior court judges and subordinate judicial officers regularly assigned to hear probate proceedings

(a) Definitions

As used in this rule, the following terms have the meanings stated below:

(1) "Probate proceedings" are decedents' estates, guardianships and conservatorships under division 4 of the Probate Code, trust proceedings under division 9 of the Probate Code, and other matters governed by provisions of that code and the rules in division 1 of title 7 of the California Rules of Court.

Rules 7.1103, 10.468, and 10.478 of the California Rules of Court would be amended, effective January 1, 2024, to read:

(2) * * *

(b) Content-based requirements

(1) Judicial officers beginning a regular assignment to hear probate proceedings after the effective date of this rule~~,~~ —unless they are returning to this assignment after less than two years in another assignment~~,~~ —must complete six hours of education on probate guardianships and conservatorships, including court-supervised fiduciary accounting and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3, within one year of starting the assignment.

(2)–(4) * * *

(c) Hours-based continuing education

(1) In a court with five or more authorized judges, judicial officers regularly assigned to hear probate proceedings must complete 12 hours of continuing education every three-year education cycle on probate guardianships and conservatorships, including court-supervised fiduciary accounting and the less restrictive alternatives to conservatorship set forth in Probate Code section 1800.3.

(2) In a court with four or fewer authorized judges, judicial officers regularly assigned to hear probate proceedings must complete nine hours of continuing education every three-year education cycle, on probate guardianships and conservatorships, including court-supervised fiduciary accounting and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3.

(3)–(7) * * *

(d)–(e) * * *

Rule 10.478. Content-based and hours-based education for court investigators, probate attorneys, and probate examiners

(a) Definitions

As used in this rule, the following terms have the meanings specified below, unless the context or subject matter otherwise require:

Rules 7.1103, 10.468, and 10.478 of the California Rules of Court would be amended, effective January 1, 2024, to read:

(1)–(2) * * *

(3) A "probate examiner" is a person employed by a court to review filings in probate proceedings in order to assist the court and the parties to get the filed matters properly ready for consideration by the court in accordance with the requirements of the Probate Code, the rules in division 1 of title 7 of the California Rules of Court, and the court's local rules;

(4) "Probate proceedings" are decedents' estates, guardianships and conservatorships under division 4 of the Probate Code, trust proceedings under division 9 of the Probate Code, and other matters governed by provisions of that code and the rules in division 1 of title 7 of the California Rules of Court;

(b) Content-based requirements for court investigators

(1) Court investigators must complete 12 hours of education within one year of their start date after January 1, 2008. The education must include the following general topics:

(A)–(D) * * *

(E) Accessing and evaluating community resources for children and mentally impaired elderly or developmentally disabled adults; ~~and~~

(F) Interviewing children and persons with mental function or communication deficits~~.~~; and

(G) The less restrictive alternatives to conservatorship stated in Probate Code section 1800.3.

(2)–(4) * * *

(c) Content-based education for probate attorneys

(1) Probate attorneys must complete 12 hours of education within six months of their start date after January 1, 2008, in probate-related topics, including guardianships, conservatorships, ~~and~~ court-supervised fiduciary accounting, and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3.

(2)–(4) * * *

Rules 7.1103, 10.468, and 10.478 of the California Rules of Court would be amended, effective January 1, 2024, to read:

(d) Content-based education for probate examiners

(1) Probate examiners must complete 20 hours of education within one year of their start date after January 1, 2008, in probate-related topics, of which 12 hours must be in guardianships and conservatorships, including court-appointed fiduciary accounting and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3.

(2)–(4) * * *

(e) * * *

(f) Hours-based education for probate attorneys

(1) Probate attorneys must complete 12 hours of continuing education each two-year education cycle in probate-related subjects, of which six hours per year must be in guardianships and conservatorships, including court-supervised fiduciary accounting and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3. The education cycle is determined in the same manner as in rule 10.474(c)(3).

(2)–(4) * * *

(g) Hours-based education for probate examiners

(1) Probate examiners must complete 12 hours of continuing education each two-year education cycle in probate-related subjects, of which six hours per year must be in guardianships and conservatorships, including court-appointed fiduciary accounting and the less restrictive alternatives to conservatorship stated in Probate Code section 1800.3. The education cycle is determined in the same manner as in rule 10.474(c)(3).

(2)–(4) * * *

(h)–(i) * * *

CONFIDENTIAL (DO NOT ATTACH TO PETITION)

GC-312

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
EMAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CONSERVATORSHIP OF *(name):*		
PROPOSED CONSERVATEE		
CONFIDENTIAL SUPPLEMENTAL INFORMATION ☐ **Limited Conservatorship of** ☐ **Person** ☐ **Estate**		CASE NUMBER:
		HEARING DATE:
		DEPT.: TIME:

1. a. **Proposed conservatee *(name):***
   b. Date of birth: c. Age:
   d. Social security number:
2. I, the person completing this form, am the *(check each that applies)* ☐ petitioner ☐ proposed conservator in this proceeding.
3. ☐ **ABILITY TO PROVIDE PROPERLY FOR PERSONAL NEEDS*** The following facts and circumstances supplement and support the petition's assertions that the proposed conservatee is unable to provide properly for personal needs for physical health, food, clothing, or shelter *(specify in detail, expanding on the reasons in the petition; give specific examples from the proposed conservatee's daily life showing significant, ongoing behavior patterns):*
   a. Physical health *(give examples showing the proposed conservatee's inability to move and exercise, maintain personal hygiene, make and attend routine medical appointments, take medication as prescribed, etc.):*

      ☐ Continued in Attachment 3a.
   b. Food *(give examples showing the proposed conservatee's inability to eat or drink, prepare food, shop for food, etc.):*

      ☐ Continued in Attachment 3b.
   c. Clothing *(give examples showing the proposed conservatee's inability to get dressed, do laundry, shop for clothing, etc.):*

      ☐ Continued in Attachment 3c.
   d. Shelter *(give examples showing the proposed conservatee's inability to pay rent or mortgage, pay utility bills, keep house, etc.):*

      ☐ Continued in Attachment 3d.

***** If any part of item 3 does not apply to the proposed conservatorship, skip it, check box 3 in item 10, and explain why it does not apply.

CONSERVATORSHIP OF *(name)*: PROPOSED CONSERVATEE	CASE NUMBER:

4. ☐ **ABILITY TO MANAGE OWN FINANCIAL RESOURCES*** The following facts and circumstances supplement the petition's assertions that the proposed conservatee is substantially unable to manage that person's own financial resources or to resist fraud or undue influence *(specify in detail, expanding on the reasons in the petition; give specific examples from the proposed conservatee's daily life showing significant, ongoing behavior patterns):*

   a. Financial resources *(give examples of the proposed conservatee's substantial inability to manage money or property):*

      ☐ Continued in Attachment 4a.

   b. Fraud or undue influence *(give examples of the proposed conservatee's substantial inability to resist fraud or undue influence):*

      ☐ Continued in Attachment 4b.

* If any part of item 4 does not apply to the proposed conservatorship, skip it, check box 4 in item 10, and explain why it does not apply.

5. **RESIDENCE*** *("Residence" means the place that a person would usually describe as "home"; for example, owned real property or a long-term rental where the proposed conservatee has lived for some time, lives currently, and would continue to live, if possible.)*

   a. The proposed conservatee's **residence** is *(for example, owned or rented, single-family home or apartment in multiunit building):*

   b. The proposed conservatee's **residence** is located at *(street address, city, state):*

   c. The proposed conservatee is **currently located** at ☐ the residence in item 4b ☐ other *(street address, city, state):*

   d. **Ability to live in residence** The proposed conservatee is
      (1) ☐ **living** in the residence, and
         (a) ☐ is able to continue living there unless circumstances change.
         (b) ☐ will need to be moved after a conservator is appointed *(give specific reasons in item 5e).*
         (c) ☐ other *(specify and give reasons in item 5e)*.
      (2) ☐ **not living** in the residence, and
         (a) ☐ will be able to return home by *(date):* *(explain in item 5e).*
         (b) ☐ will not return to live there *(give specific reasons in item 5e).*
         (c) ☐ other *(specify and give reasons in item 5e)*.

   e. Specific reasons supporting the determination in item 5d about the proposed conservatee's ability to live in the residence:

      ☐ Continued in Attachment 5e.

* If any part of item 5 does not apply to the proposed conservatorship, skip it, check box 5 in item 10, and explain why it does not apply.

CONSERVATORSHIP OF *(name)*: PROPOSED CONSERVATEE	CASE NUMBER:

6. **ALTERNATIVES TO CONSERVATORSHIP*** I have considered the following alternatives to conservatorship and determined that they are unsuitable or do not meet the proposed conservatee's needs *(check the box next to each alternative you considered; state whether you tried it and, if so, for how long; and explain why it is unsuitable or does not meet the conservatee's needs):*

a. ☐ A supported decisionmaking agreement, as defined in Welfare and Institutions Code section 21001

☐ Continued in Attachment 6a.

b. ☐ Designation of a health care surrogate under Probate Code section 4711

☐ Continued in Attachment 6b.

c. ☐ An advance health care directive Probate Code section 4600 et seq.

☐ Continued in Attachment 6c.

d. ☐ A power of attorney (general or limited, durable or nondurable) under Probate Code section 4000 et seq.

☐ Continued in Attachment 6d.

e. ☐ A trust, as defined in Probate Code section 82

☐ Continued in Attachment 6e.

f. ☐ Other alternatives considered *(describe each and explain why it is unsuitable or does not meet the conservatee's needs):*

☐ Continued in Attachment 6f.

* If any part of item 6 does not apply to the proposed conservatorship, skip it, check box 6 in item 10, and explain why it does not apply.

CONSERVATORSHIP OF *(name)*: PROPOSED CONSERVATEE	CASE NUMBER:

7. **HEALTH OR SOCIAL SERVICES PROVIDED*** *(complete each that applies):*

a. ☐ In the year immediately before the petition was filed, the proposed conservatee received the following **health services,** for example, doctor's visits, medical testing, hospitalizations, surgeries, administration of medication, wound care, or therapy. *(Describe the services and the circumstances in which they were provided):*

☐ Continued in Attachment 7a.

b. ☐ In the year immediately before the petition was filed, the proposed conservatee received the following **social services,** for example, companionship, assistance with personal hygiene, housekeeping, shopping, cooking, or assistance managing finances. *(Describe the services and the circumstances in which they were provided):*

☐ Continued in Attachment 7b.

c. ☐ I do not know, and cannot reasonably find out, what, if any, ☐ health services ☐ social services were provided to the proposed conservatee in the year before the petition was filed.

***** If any part of item 7 does not apply to the proposed conservatorship, skip it, check box 7 in item 10, and explain why it does not apply.

8. **KNOWLEDGE AND PREFERENCES** The proposed conservatee *(check all that apply):*

a. ☐ knows about ☐ does not know about the proposed conservatorship. ☐ I don't know.
b. ☐ agrees with ☐ does not agree with the proposed conservatorship. ☐ I don't know. ☐ Not applicable.

9. **SOURCE OF INFORMATION** The facts, circumstances, and conclusions stated on this form are based on *(check all that apply):*

a. for item 3, ☐ my own personal knowledge ☐ an affidavit (declaration) by another person, attached as Attachment 3.
b. for item 4, ☐ my own personal knowledge ☐ an affidavit (declaration) by another person, attached as Attachment 4.
c. for item 5, ☐ my own personal knowledge ☐ an affidavit (declaration) by another person, attached as Attachment 5.
d. for item 6, ☐ my own personal knowledge ☐ an affidavit (declaration) by another person, attached as Attachment 6.
e. for item 7, ☐ my own personal knowledge ☐ an affidavit (declaration) by another person, attached as Attachment 7.

10. **ITEMS THAT DO NOT APPLY** The following items, or parts of those items, on this form do not apply to the proposed conservatorship *(for each item checked, explain why that item, or part of that item, does not apply to the proposed conservatorship):*

☐ 3 ☐ 4 ☐ 5 ☐ 6 ☐ 7

☐ Continued on Attachment 10.

11. Number of pages attached: _____

DECLARATION

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

Item number:12

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 5, 2023

Rules Committee action requested [Choose from drop down menu below]**:**
Submit to JC (without circulating for comment)

Title of proposal: Rules and Forms: Technical Revisions to Wage Garnishment Forms

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Revise forms WG-002, WG-003, WG-030

Committee or other entity submitting the proposal:
Judicial Council staff

*Staff contact (*name, phone and e-mail*): James Barolo, 415-865-8928, james.barolo@jud.ca.gov*

Identify project(s) on the committee's annual agenda that is the basis for this item:
Annual agenda approved by Rules Committee on (*date*): November 1, 2022
Project description from annual agenda: Develop rule and form changes as necessary to make corrections and adjustments meeting the criteria of rule 10.22(d)(2): "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy…." These include revisions to forms that contain dollar figures based on statutory criteria that the Judicial Council is mandated to adjust on a regular basis.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The Legislature enacted changes to the amount of a judgement debtor's earnings that may be garnished under an earnings withholding order. These statutory changes take effect September 1, 2023. Staff proposes that the minor form revisions needed to implement the statutory change take effect the same day.

Additional Information for Rules Committee: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Additional Information for JC Staff (provide with reports to be submitted to JC)**:**

- **Form Translations** (check all that apply)
  This proposal:
  ☐ includes forms that have been translated.
  ☐ includes forms or content that are required by statute to be translated. Provide the code section that mandates translation: Click or tap here to enter text.
  ☐ includes forms that staff will request be translated.

- **Form Descriptions** (for any proposal with new or revised forms)
  ☐ The forms in this proposal will require new or revised form descriptions on the JC forms webpage. (If this is checked, the form descriptions should be approved by a supervisor before submitting this RAR.).

- **Self-Help Website** (check if applicable)
  ☒ This proposal may require changes or additions to self-help web content.

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: May 11–12, 2023

Title
Rules and Forms: Technical Revisions to Wage Garnishment Forms

Rules, Forms, Standards, or Statutes Affected
Revise forms WG-002, WG-003, WG-030

Recommended by
Judicial Council staff
James Barolo, Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 23, 2023

Contact
James Barolo, 415-865-8928
james.barolo@jud.ca.gov

Executive Summary

Judicial Council staff recommend the revision of three Judicial Council forms to reflect statutory amendments to the amount of a judgment debtor's earnings that may be garnished under an earnings withholding order.

Recommendation

Judicial Council staff recommend that the Judicial Council, effective September 1, 2023, revise the following forms to reflect recent changes to Code of Civil Procedure section 706.050 as enacted in Senate Bill 1477 (Stats 2022, ch. 849):

- *Earnings Withholding Order* (form WG-002);
- *Employee Instructions* (form WG-003); and
- *Earnings Withholding Order for Elder or Dependent Adult Financial Abuse* (form WG-030).

The revised forms are attached at pages 3–8. SB 1477 is available as Link A under Attachments and Links.

Relevant Previous Council Action

The council last revised forms WG-002 and WG-030 effective July 1, 2016, to reflect statutory amendments to the method of computing the amount of a judgment debtor's earnings that may be garnished under an earnings withholding order. The council last revised form WG-003 effective January 1, 2012, to reflect statutory changes to wage garnishment exemptions.

Analysis/Rationale

To determine the appropriate amount of earnings to garnish under an earnings withholding order, a series of calculations must be performed. (Code Civ. Proc., § 706.050.) Such calculations use the applicable minimum wage, the debtor's earnings, and statutory multipliers. The council's wage garnishment forms provide the statutory multipliers and contain step-by-step instructions for the calculations. Senate Bill 1477 amended the statutory multipliers used in the calculations, effective September 1, 2023. Accordingly, this proposal revises the council's forms to update the multipliers and sets the effective date for the revised forms as September 1, 2023.

Policy implications

The proposed form revisions simply implement statutory amendments on existing council forms to ensure the forms remain consistent with law. Therefore, the policy implications borne out of this proposal are the result of statutory changes and not form revisions.

Comments

These proposals were not circulated for public comment because they are minor noncontroversial revisions to implement changes in law, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The alternative to updating the wage garnishment forms using the new statutory multipliers would be *not* to update them. Staff did not consider this option because taking no action would have left mandatory forms inconsistent with the law as of September 1, 2023.

Fiscal and Operational Impacts

If a court provides free copies of these forms to parties, it will incur costs to print or duplicate the forms. Courts may also incur self-help training costs regarding the new statutory multipliers. However, the revisions are required to make the forms consistent with current law.

Attachments and Links

1. Forms WG-002, WG-003, and WG-030, at pages 3–8
2. Link A: SB 1477, *https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1477*

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: EMAIL ADDRESS: ATTORNEY FOR (*name*):	LEVYING OFFICER (*Name and address*): DRAFT 3/15/2023 NOT APPROVED BY THE JUDICIAL COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY: ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	
EARNINGS WITHHOLDING ORDER (Wage Garnishment) / LEVYING OFFICER FILE NO.:	COURT CASE NO.:

EMPLOYEE: *KEEP YOUR COPY OF THIS LEGAL PAPER.* **EMPLEADO:** *GUARDE ESTE PAPEL OFICIAL.*

EMPLOYER: Enter the following date to assist your recordkeeping.
Date this order was received by employer *(specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed)*:

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer	Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee (*see instructions on reverse of this form).* Pay the withheld sums to the **levying officer** *(name and address above*).

   If the employee works for you now, you must **give the employee a copy of this order and the *Employee Instructions* (form WG-003)** within 10 days after receiving this order.

   Complete both copies of the form *Employer's Return* (form WG-005) and **mail them to the levying officer** within 15 days after receiving this order, whether or not the employee works for you.

2. The total amount due is: $

   Count 10 calendar days from the date when you received this order. If your employee's pay period ends before the 10th day, **do not** withhold earnings payable for that pay period. **Do** withhold from earnings that are payable for any pay period ending on or after that 10th day.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

3. The judgment was entered in the court on (*date):*

   The judgment creditor *(if different from the plaintiff)* is *(name):*

4. The *INSTRUCTIONS TO EMPLOYER* on the reverse tell you how much of the employee's earnings to withhold each payday and answer other questions you may have.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

(Employer's Instructions on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
WG-002 [Rev. September 1, 2023]

EARNINGS WITHHOLDING ORDER (Wage Garnishment)

Code of Civil Procedure, §§ 706.022, 706.108, 706.125
www.courts.ca.gov

INSTRUCTIONS TO EMPLOYER ON EARNINGS WITHHOLDING ORDERS

The instructions in paragraph 1 on the reverse of this form describe your early duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period.*

The withholding period is the period covered by the *Earnings Withholding Order* (this order). The withholding period begins 10 calendar days after you receive the order and continues until the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice), is withheld.

It may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) an order of higher priority (explained on the reverse of the *Employer's Return* (form WG-005) is received.

You are entitled to rely on and must obey all written notices signed by the levying officer.

The *Employer's Return* (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review that form *(Employer's Return)* for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180-day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two-year period during which no amounts are withheld under the order. **Return the Earnings Withholding Order to the levying officer with a statement of the reason it is being returned.**

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.

Be sure to mark each *check with the case number, the levying officer's file number, if different, and the employee's name so the money will be applied to the correct account.*

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, 706.050, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

COMPUTATION INSTRUCTIONS

California law provides how much earnings to withhold, if any, for different amounts of disposable earnings and different pay periods, and takes into consideration different minimum wage amounts. The method of calculation is at Code of Civil Procedure section 706.050 and is described in the column to the right. You may also look on the California Courts Self-Help website for assistance in determining the maximum withholding amounts for different amounts of disposable income, for different pay periods, and with different minimum wage amounts. The information is at ***www.courts.ca.gov/self-help-employerwagecivil.htm***.

THESE COMPUTATION INSTRUCTIONS APPLY UNDER NORMAL CIRCUMSTANCES. THEY DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.

State law limits the amount of earnings that can be withheld. The limitations are based on the employee's disposable earnings, which are different from gross pay or take-home pay.

(A) To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), first compute the employee's *disposable earnings.*

Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings because they are not paid by the employer.

Disposable earnings are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

(B) After the employee's disposable earnings are known, to determine what amount should be withheld, you may look to the statute, follow the directions below in (C), or seek assistance on the California Courts Self-Help website at ***www.courts.ca.gov/self-help-employerwagecivil.htm***. Note that you also need to know the amount of the minimum wage in the location where the employee works.

(C) Calculate the maximum amount that may be withheld from the employee's disposable earnings, which is the *lesser* of the following two amounts:

- 20 percent of disposable earnings for that week; **or**
- 40 percent of the amount by which the employee's disposable earnings that week exceed the applicable minimum wage. If there is a local minimum wage in effect in the location where the employee works that exceeds the state minimum wage at the time the earnings are payable, the local minimum wage is the applicable minimum wage.

To calculate the correct amount, follow the steps below:

Step 1: Determine the applicable minimum wage per pay period.

- For a daily or weekly pay period, multiply the applicable hourly minimum wage by 48.
- For a biweekly pay period, multiply the applicable hourly minimum wage by 96.
- For a semimonthly pay period, multiply the applicable hourly minimum wage by 104.
- For a monthly pay period, multiply the applicable hourly minimum wage by 208.

Step 2: Subtract the amount from Step 1 from the employee's disposable earnings during that pay period.

Step 3: If the amount from Step 2 is less than zero, do not withhold any money from the employee's earnings.

Step 4: If the amount from Step 2 is greater than zero, multiply that amount by 0.40.

Step 5: If the amount from Step 4 is lower than 20 percent of the employee's disposable earnings, withhold this amount. If it is greater than 20 percent of the employee's disposable earnings, withhold 20 percent of the disposable earnings.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order,* an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF *EARNINGS WITHHOLDING ORDERS* FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single indebtedness (no matter how many debts are represented in that judgment), the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN *EARNINGS WITHHOLDING ORDER* BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE *EARNINGS WITHHOLDING ORDER* TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the law that applies to this case.

   IF YOU VIOLATE ANY OF THESE LAWS YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

For your protection and privacy, please press the Clear This Form button after you have printed the form.

4

Print this form | Save this form | Clear this form

DRAFT 3/2/2023
NOT APPROVED BY THE
JUDICIAL COUNCIL

EMPLOYEE INSTRUCTIONS

-NOTICE-

IMPORTANT LEGAL NOTICE TO EMPLOYEE
ABOUT EARNINGS WITHHOLDING ORDERS
(Wage Garnishment)

The **Earnings Withholding Order** requires your employer to pay part of your earnings to the sheriff or other levying officer. The levying officer will pay the money to a creditor who has a court judgment against you. The information below may help you protect the money you earn.

-NOTICIA-

NOTICIA LEGAL IMPORTANTE RESPECTO
A LAS ÓRDENES DE RETENCIÓN DE SUELDO

La **Orden de Retención de Sueldo** requiere que su empleador pague una parte de su sueldo a un oficial de embargo. El oficial le pagará el dinero retenido a su acreedor que ha conseguido una decisión judicial en contra de usted. Pida usted que un amigo o su abogado le lea este papel oficial. Esta información le puede ayudar a proteger su sueldo.

CAN YOU BE FIRED BECAUSE OF THIS?

NO. You cannot be fired unless your earnings have been withheld before for a different court judgment. If this is the first judgment for which your wages will be withheld and your employer fires you because of this, the California Labor Commissioner, listed in the phone book of larger cities, can help you get your job back.

HOW MUCH OF YOUR PAY WILL BE WITHHELD?

The reverse of the Earnings Withholding Order (abbreviated in this notice as EWO) that applies to you contains Employer Instructions. These explain how much of your earnings can be withheld. Generally, the amount is about 20% of your take home pay until the amount due has been withheld. The levying officer will notify the employee of an additional assessment charged for paying out money collected under this order and that amount will also be withheld.

If you have trouble figuring this out, ask your employer for help.

IS THERE ANYTHING YOU CAN DO?

YES . There are several possibilities.

1. See an attorney. If you do not know an attorney, check with the lawyer referral service or the legal aid office in your county (both are listed in the yellow pages under "Attorneys").
   An attorney may be able to help you make an agreement with your creditor, or may be able to help you stop your earnings from being withheld. You may wish to consider bankruptcy or asking the bankruptcy court to help you pay your creditors. These possibilities may stop your wages from being withheld.
   An attorney can help you decide what is best for you. Take your **EWO** to the attorney to help you get the best advice and the fastest help.

2. Try to work out an agreement yourself with your creditor. Call the creditor or the creditor's attorney, listed on the **EWO**. If you make an agreement, the withholding of your wages will stop or be changed to a smaller amount you agree on. *(See item 4 on the reverse for another way to make an offer to your creditor.)*

3. You can ask for an EXEMPTION. An exemption will protect more, or maybe even all of your earnings. You can get an exemption if you need your earnings to support yourself or your family, **but you cannot get an exemption if:**
   a. You use some of your earnings for luxuries and they aren't really necessary for support; ***OR***
   b. You owe money to an attorney because of a court order in a family case; ***OR***
   c. You owe the debt for past due child support of spousal support (alimony); ***OR***
   d. You owe the debt to a former employee for wages.

HOW DO YOU ASK FOR AN EXEMPTION?

(See the other side of this form for instructions about claiming an exemption.)

Form Adopted for Mandatory Use
Judicial Council of California
WG-003 [Rev. September 1, 2023]

Code of Civil Procedure, § 706.122
www.courts.ca.gov

HOW DO YOU ASK FOR AN EXEMPTION?

1. Call or write the levying officer for three (3) copies each of the forms called "Claim of Exemption" and "Financial Statement." These forms are free. The name and address of the levying officer are in the big box on the right at the top of the **EWO**.
2. Fill out both forms. On the forms are some sentences or words which have boxes ☐ in front of them. The box means the words which follow may not apply to your case. If the words do apply, put a check in the box.

   Remember, it is ***your*** job to prove with the Financial Statement form that your earnings are needed for support. Write down the details about your needs.
3. For example, if your child has special medical expenses, tell which child, what illnesses, who the doctor is, how often the doctor must be visited, the cost per visit, and the costs of medicines. These details should be listed in item 6. If you need more space, put "See attachment 6" and attach a typed 8½ by 11 sheet of paper on which you have explained your expenses in detail.
4. You can use the Claim of Exemption form to make an offer to the judgment creditor to have a specified amount withheld each pay period. Complete item 3 on the form to indicate the amount you agree to have withheld **each pay day during the withholding period.** (Be sure it's less than the amount to be withheld otherwise.) If your creditor accepts your offer, he will not oppose your claim of exemption. (See (1) below.)
5. Sign the Claim of Exemption and Financial Statement forms. Be sure the Claim of Exemption form shows the address where you receive mail.
6. Mail or deliver two (2) copies of each of the two forms to the levying officer. Keep one copy for yourself in case a court hearing is necessary.

Do not use the Claim of Exemption and Financial Statement forms to seek a modification of child support or alimony payments. These payments can be modified only by the family law court that ordered them.

FILE YOUR CLAIM OF EXEMPTION AS SOON AS POSSIBLE FOR THE MOST PROTECTION.

ONE OF TWO THINGS WILL HAPPEN NEXT

(1) The judgment creditor will not oppose (object to) your claim of exemption. If this happens, after 10 days the levying officer will tell your employer to stop withholding or withhold less from your earnings. The part (or all) of your earnings needed for support will be paid to you or paid as you direct. And you will get back earnings the levying officer or your employer were holding when you asked for the exemption.

—OR—

(2) The creditor will oppose (object to) your claim of exemption. If this happens, you will receive a Notice of Opposition and Notice of Hearing on Claim of Exemption, in which the creditor states why your exemption should not be allowed. A box in the middle of the Notice of Hearing tells you the time and place of the court hearing which will be in about ten days. Be sure to go to the hearing if you can.

If the judgment creditor has checked the box in item 3 on the Notice of Hearing on Claim of Exemption, the creditor will not be in court. If you are willing to have the court make its decision based on your Financial Statement and the creditor's Notice of Opposition, you need not go to the hearing.

The Notice of Opposition to Claim of Exemption will tell you why the creditor thinks your claim should not be allowed. If you go to the hearing, take any bills, paycheck stubs, canceled checks, or other evidence (including witnesses) that will help you prove your Claim of Exemption and Financial Statement are correct and your earnings are needed to support yourself or your family.

Perhaps you can even prove the Notice of Opposition is wrong. For example, perhaps the Notice of Opposition states that the judgment was for wages for a past employee. You may be able to provide evidence that the person was not an employee or that the debt was not for wages.

If the judge at the hearing agrees with you, your employer will be ordered to stop withholding your earnings or withhold less money. The judge can even order that the **EWO** end before the hearing (so you would get some earnings back).

If the judge does not agree with you, the withholding will continue unless you **appeal to** a higher court. The rules for appeals are complex so you should see an attorney if you want to appeal.

If you have one court hearing, you should not file another Claim of Exemption about the same **EWO** unless your finances have gotten worse in an important way.

If your **EWO** is to be changed or ended, the levying officer must sign the notice to your employer of the change. He may give you permission to deliver it to the employer, or it can be mailed.

WHAT HAPPENS TO YOUR EARNINGS IF YOU FILE A CLAIM OF EXEMPTION?

Your employer must continue to hold back part of your earnings for the **EWO** until he receives a notice signed by the levying officer to change the order or end it early.

The levying officer will keep your withheld earnings until your Claim of Exemption is denied or takes effect. At that time your earnings will be paid according to the law that applies to your case.

REGARDING CHILD SUPPORT

If you are obligated to make child support payments, the local child support agency may help you to have an Order Assigning Salary or Wages entered. This order has the top priority claim on your earnings. When it is in effect, little or no money may be available to be withheld for an **EWO**. And, if the local child support agency is involved in collecting this support from you, it may agree to accept less money if this special order is entered.

WHAT IF YOU STILL HAVE QUESTIONS?

If you cannot see an attorney, or don't want to see an attorney, you might be able to answer some of your questions by reading the law in a law library. Ask the law librarian to help you find sections 706.050 and 706.105 of the California Code of Civil Procedure. Other sections of the code, beginning with section 706.010 may also answer some of your questions.

Also, the office of the Wage and Hour Division of the U.S. Department of Labor may be able to answer some of your questions. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

Print this form Save this form

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : EMAIL ADDRESS: ATTORNEY FOR (*Name*):	LEVYING OFFICER (*name and address*): DRAFT 3/15/2023 NOT APPROVED BY THE JUDICIAL COUNCIL
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: **DEFENDANT/RESPONDENT:**	CASE NUMBER:
EARNINGS WITHHOLDING ORDER FOR ELDER OR DEPENDENT ADULT FINANCIAL ABUSE (Wage Garnishment)	LEVYING OFFICER FILE NUMBER:

EMPLOYEE: *KEEP YOUR COPY OF THIS LEGAL PAPER.* ***EMPLEADO:*** *GUARDE ESTE PAPEL OFICIAL.*

EMPLOYER: Enter the following date to assist your record keeping.
Date this order was received by employer (*specify the date of personal delivery by levying officer or registered process server or the date mail receipt was signed*):

TO THE EMPLOYER REGARDING YOUR EMPLOYEE:

Name and address of employer

Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. A judgment creditor has obtained this order to collect a court judgment against your employee. You are directed to withhold part of the earnings of the employee *(see instructions on reverse of this form).*

   Pay the withheld sums to the **levying officer** *(name and address above).* If the employee works for you now, you must **give the employee a copy of this order and the *Employee Instructions (form WG-003)*** within 10 days after receiving this order.

   Complete both copies of the *Employer's Return* (form WG-005) and mail them to the levying officer within 15 days after receiving this order, whether or not the employee works for you.

2. a. The total amount due is: $
   b. The amount arising from an elder or dependent financial abuse claim is: $

   Count 10 calendar days from the date when you received this order. If your employee's pay period ends before the tenth day, **do not** withhold earnings payable for that pay period. **Do** withhold from earnings that are payable for any pay period ending on or after that 10th day.

   Continue withholding for all pay periods until you withhold the amount due. The levying officer will notify you of an assessment you should withhold in addition to the amount due. Do not withhold more than the total of these amounts. Never withhold any earnings payable before the beginning of the earnings withholding period.

3. The judgment was entered in the court on *(date):*

   The judgment creditor (if different from the plaintiff) is *(name):*

4. The INSTRUCTIONS TO EMPLOYER on the reverse tell you how much of the employee's earnings to withhold each payday. Follow those instructions unless you receive a court order or order from the levying officer giving you other instructions.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

☐ LEVYING OFFICER ☐ REGISTERED PROCESS SERVER

(Employer's Instructions on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
WG-030 [Rev. September 1, 2023]

EARNINGS WITHHOLDING ORDER FOR ELDER OR DEPENDENT ADULT FINANCIAL ABUSE (Wage Garnishment)

Code of Civil Procedure,
§§ 706.023, 706.108, 706.052
www.courts.ca.gov

INSTRUCTIONS TO EMPLOYER ON EARNINGS WITHHOLDING ORDERS

The instructions in paragraph 1 on the reverse of this form describe your early duties to provide information to your employee and the levying officer.

Your other duties are TO WITHHOLD THE CORRECT AMOUNT OF EARNINGS (if any) and PAY IT TO THE LEVYING OFFICER during the *withholding period*.

The withholding period is the period covered by the *Earnings Withholding Order* (this order). The withholding period begins 10 calendar days after you receive the order and continues until the total amount due, plus additional amounts for costs and interest (which will be listed in a levying officer's notice), is withheld.

It may end sooner if (1) you receive a written notice signed by the levying officer specifying an earlier termination date, or (2) an order of higher priority (explained on the reverse of the *Employer's Return (form WG-005))* is received.

You are entitled to rely on and must obey all written notices signed by the levying officer.

The *Employer's Return* (form WG-005) describes several situations that could affect the withholding period for this order. If you receive more than one *Earnings Withholding Order* during a withholding period, review that form *(Employer's Return)* for instructions.

If the employee stops working for you, the *Earnings Withholding Order* ends after no amounts are withheld for a continuous 180-day period. If withholding ends because the earnings are subject to an order of higher priority, the *Earnings Withholding Order* ends after a continuous two-year period during which no amounts are withheld under the order. **Return the Earnings Withholding Order to the levying officer with a statement of the reason it is being returned.**

WHAT TO DO WITH THE MONEY

The amounts withheld during the withholding period must be paid to the levying officer by the 15th of the next month after each payday. If you wish to pay more frequently than monthly, each payment must be made within 10 days after the close of the pay period.

Be sure to mark each *check with the case number, the levying officer's file number, if different, and the employee's name so the money will be applied to the correct account.*

WHAT IF YOU STILL HAVE QUESTIONS?

The garnishment law is contained in the Code of Civil Procedure beginning with section 706.010. Sections 706.022, 706.025, 706.050, and 706.104 explain the employer's duties.

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based. Inquiries about the federal law will be answered by mail, telephone, or personal interview at any office of the Wage and Hour Division of the U.S. Department of Labor. Offices are listed in the telephone directory under the U.S. Department of Labor in the U.S. Government listing.

COMPUTATION INSTRUCTIONS

California law provides how much earnings to withhold, if any, for different amounts of disposable earnings and different pay periods, and takes into consideration different minimum wage amounts. The method of calculation is at Code of Civil Procedure section 706.050, and is described in the column to the right. You may also look on the California Courts Self-Help website for assistance in determining the maximum withholding amounts for different amounts of disposable income, for different pay periods, with different minimum wage amounts. The information is at ***www.courts.ca.gov/self-help-employerwagecivil.htm***.

THESE COMPUTATION INSTRUCTIONS APPLY UNDER NORMAL CIRCUMSTANCES. THEY DO NOT APPLY TO ORDERS FOR THE SUPPORT OF A SPOUSE, FORMER SPOUSE, OR CHILD.

State law limits the amount of earnings that can be withheld. The limitations are based on the employee's disposable earnings, which are different from gross pay or take-home pay.

(A) To determine the CORRECT AMOUNT OF EARNINGS TO BE WITHHELD (if any), first compute the employee's *disposable earnings.*

Earnings include any money (whether called wages, salary, commissions, bonuses, or anything else) that is paid by an employer to an employee for personal services. Vacation or sick pay is subject to withholding as it is received by the employee. Tips are generally not included as earnings because they are not paid by the employer.

Disposable earnings are the earnings left after subtracting the part of the earnings a state or federal law requires an employer to withhold. Generally these required deductions are (1) federal income tax, (2) federal social security, (3) state income tax, (4) state disability insurance, and (5) payments to public employee retirement systems. Disposable earnings will change when the required deductions change.

(B) After the employee's disposable earnings are known, to determine what amount should be withheld, you may look to the statute, follow the directions below in (C), or seek assistance on the California Courts Self-Help website at ***www.courts.ca.gov/self-help-employerwagecivil.htm***. Note that you will also need to know the amount of the minimum wage in the location where the employee works.

(C) Calculate the maximum amount that may be withheld from the employee's disposable earnings, which is the *lesser* of the following two amounts:

- 20 percent of disposable earnings for that week; **or**
- 40 percent of the amount by which the employee's disposable earnings that week exceed the applicable minimum wage. If there is a local minimum wage in effect in the location where the employee works that exceeds the state minimum wage at the time the earnings are payable, the local minimum wage is the applicable minimum wage

To calculate the correct amount, follow the steps below:

Step 1: Determine the applicable minimum wage per pay period.

- For a daily or weekly pay period, multiply the applicable hourly minimum wage by 48.
- For a biweekly pay period, multiply the applicable hourly minimum wage by 96.
- For a semimonthly pay period, multiply the applicable hourly minimum wage by 104.
- For a monthly pay period, multiply the applicable hourly minimum wage by 208.

Step 2: Subtract the amount from Step 1 from the employee's disposable earnings during that pay period.

Step 3: If the amount from Step 2 is less than zero, do not withhold any money from the employee's earnings.

Step 4: If the amount from Step 2 is greater than zero, multiply that amount by 0.40.

Step 5: If the amount from Step 4 is lower than 20 percent of the employee's disposable earnings, withhold this amount. If it is greater than 20 percent of the employee's disposable earnings, withhold 20 percent of the disposable earnings.

Occasionally, the employee's earnings will also be subject to a *Wage and Earnings Assignment Order,* an order available from family law courts for child, spousal, or family support. The amount required to be withheld for that order should be deducted from the amount to be withheld for this order.

IMPORTANT WARNINGS

1. IT IS AGAINST THE LAW TO FIRE THE EMPLOYEE BECAUSE OF *EARNINGS WITHHOLDING ORDERS* FOR THE PAYMENT OF ONLY ONE INDEBTEDNESS. No matter how many orders you receive, so long as they all relate to a single indebtedness (no matter how many debts are represented in that judgment), the employee may not be fired.
2. IT IS ILLEGAL TO AVOID AN *EARNINGS WITHHOLDING ORDER* BY POSTPONING OR ADVANCING THE PAYMENT OF EARNINGS. The employee's pay period must not be changed to prevent the order from taking effect.
3. IT IS ILLEGAL NOT TO PAY AMOUNTS WITHHELD FOR THE *EARNINGS WITHHOLDING ORDER* TO THE LEVYING OFFICER. Your duty is to pay the money to the levying officer who will pay the money in accordance with the law that applies to this case.

IF YOU VIOLATE ANY OF THESE LAWS YOU MAY BE HELD LIABLE TO PAY CIVIL DAMAGES AND YOU MAY BE SUBJECT TO CRIMINAL PROSECUTION!

EARNINGS WITHHOLDING ORDER FOR ELDER OR DEPENDENT ADULT FINANCIAL ABUSE (Wage Garnishment)

For your protection and privacy, please press the Clear This Form button after you have printed the form.

Print this form | Save this form | Clear this form

Item number: 13

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee action requested [Choose from drop down menu below]**:**
Submit to JC (without circulating for comment)

Rules Committee Meeting Date: April 5, 2023

Title of proposal: Rules and Forms: Miscellaneous Technical Changes

Proposed rules, forms, or standards *(include amend/revise/adopt/approve):*
Revise forms, AP-150 Info, CR-133, and FW-002.

Committee or other entity submitting the proposal:
Judicial Council Staff

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by Rules Committee date: N/A
Project description from annual agenda: N/A

If requesting July 1 or out of cycle, explain:
This proposal was not circulated for public comment because it is noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Additional Information: (To facilitate Rules Committee's review of your proposal, please include any relevant information not contained in the attached summary.)

Information for JC Staff regarding form translations:

- *List any amended forms in this proposal that have already been translated:*
- *List any new forms that require translation by statute or that you will request to be translated:*

Judicial Council *of* California

455 Golden Gate Avenue · San Francisco, California 94102-3688

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

Item No.:
For business meeting on: May 12, 2023

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
revise forms APP-150-INFO, CR-133, and FW-002

Recommended by
Judicial Council staff
Anne M. Ronan, Supervising Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
September 1, 2023

Date of Report
March 23, 2023

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov *by.*

Executive Summary

Various members of the judicial branch, members of the public, and Judicial Council staff have identified errors in the California Rules of Court and Judicial Council forms resulting from input errors, and minor changes needed to conform to changes in law or previous council actions. Judicial Council staff recommend making the necessary corrections to ensure the rules and forms conform to law and to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council, effective September 1, 2023:

1. Revise *Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases* (form APP-150-INFO), to correct the form number referenced in item 1 for *Petition for Writ of Habeas Corpus*, which has been renumbered as form HC-001.

2. Revise *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) to correct the form number in item 2b, for *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense*, which has been renumbered as form CR-105.

3. Revise *Request to Waive Additional Court Fees (Superior Court)* (form FW-002) to correct the reference in the lower left footer on the form to Government Code section 68633, and Cal. Rules of Court, rules 3.51 and 3.56.

The revised forms are attached at pages 3–17.

Relevant Previous Council Action

The Judicial Council has acted on these rules and forms previously. This proposal addresses minor corrections of items that were either inadvertently omitted in the prior action or unrelated to any prior action.

Analysis/Rationale

The changes to these rules and forms are technical in nature and necessary to correct inadvertent omissions or incorrect references. They are needed to ensure that the rules and forms are correct and conform to the law.

Policy implications

There are no policy implications to this proposal.

Comments

This proposal was not circulated for public comment because the changes are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

None.

Fiscal and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Because the proposed changes are technical corrections, case management systems are unlikely to need updating to implement them

Attachments and Links

1. Forms, at pages 3–17.

APP-150-INFO Information on Writ Proceedings in Misdemeanor, Infraction, and Limited Civil Cases

GENERAL INFORMATION

1 What does this information sheet cover?

This information sheet tells you about **writ proceedings**—proceedings in which a person is asking for a writ of mandate, prohibition, or review—in misdemeanor, infraction, and limited civil cases, and in certain small claims cases. Please read this information sheet before you fill out *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151). This information sheet does not cover everything you may need to know about writ proceedings. It is only meant to give you a general idea of the writ process. To learn more, you should read rules 8.930–8.936 of the California Rules of Court, which set out the procedures for writ proceedings in the appellate division. You can get these rules at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

This information sheet does NOT provide information about appeals or proceedings for writs of supersedeas or habeas corpus, or for writs in certain small claims cases.

- For information about appeals, please see the box on the right side of this page.
- For information about writs of habeas corpus, please see rules 4.550–4.552 of the California Rules of Court and *Petition for Writ of Habeas Corpus* (form HC-001).
- For information about writs of supersedeas, please see rule 8.824 of the California Rules of Court. This information sheet applies to writs relating to *postjudgment enforcement actions* of the small claims division. For information about writs relating to other actions by the small claims division, see rules 8.930–8.936 of the California Rules of Court and *Petition for Writ (Small Claims)* (form SC-300).
- For information about writs relating to actions of the superior court on small claims appeals, see rules 8.485–8.493 of the California Rules of Court.

You can get these rules and forms at any courthouse or county law library or online at *www.courts.ca.gov/rules* for the rules or *www.courts.ca.gov/forms* for the forms.

2 What is a writ?

A writ is an order from a higher court telling a lower court to do something the law says the lower court must do or not to do something the law says the lower court does not have the power to do. In writ proceedings in the appellate division, the lower court is the superior court that took the action or issued the order being challenged.

For information about appeal procedures, see:

- *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO);
- *Information on Appeal Procedures for Infractions* (form CR-141-INFO); and
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO).

You can get these forms at any courthouse or county law library or online at *www.courts.ca.gov/forms*.

In this information sheet, we call the lower court the "trial court."

3 Are there different kinds of writs?

Yes. There are three main kinds of writs:

- Writs of mandate (sometimes called "mandamus"), which are orders telling the trial court to do something.
- Writs of prohibition, which are orders telling the trial court not to do something.
- Writs of review (sometimes called "certiorari"), which are orders telling the trial court that the appellate division will review certain kinds of actions already taken by the trial court.

There are laws (statutes) that you should read concerning each type of writ: see California Code of Civil Procedure sections 1084–1097 about writs of mandate, sections 1102–1105 about writs of prohibition, and sections 1067–1077 about writs of review. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml.*

4 Is a writ proceeding the same as an appeal?

No. In an **appeal,** the appellate division *must* consider the parties' arguments and decide whether the trial court made the legal error claimed by the appealing party and whether the trial court's decision should be overturned based on that error (this is called a "decision on the merits"). In a **writ proceeding,** the appellate division is *not* required to make a decision on the merits; even if the trial court made a legal error, the appellate division can decide not to consider that error now, but to wait and consider the error as part of any appeal from the final judgment. Most requests for writs are denied without a decision on the merits (this is called a "summary denial"). Because of this, appeals are the ordinary way that decisions made by a trial court are reviewed and writ proceedings are often called proceedings for "extraordinary" relief.

Appeals and writ proceedings are also used to review different kinds of decisions by the trial court. Appeals can be used only to review a trial court's final judgment and a few kinds of orders. Most rulings made by a trial court before it issues its final judgment cannot be appealed right away; they can only be appealed after the trial court case is over, as part of an appeal of the final judgment. Unlike appeals, writ proceedings can be used to ask for review of certain kinds of important rulings made by a trial court before it issues its final judgment.

5 Is a writ proceeding a new trial?

No. **A writ proceeding is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses. Instead, if it does not summarily deny the request for a writ, the appellate division reviews a record of what happened in the trial court and the trial court's ruling to see if the trial court made the legal error claimed by the person asking for the writ. When it conducts its review, the appellate division presumes that the trial court's ruling is correct; the person who requests the writ must show the appellate division that the trial court made the legal error the person is claiming.

6 Can a writ be used to address *any* errors made by a trial court?

No.

Writs can only address certain legal errors. Writs can only address the following types of legal errors made by a trial court:

- The trial court has a legal duty to act but:
  - Refuses to act;
  - Has not done what the law says it must do; or
  - Has acted in a way the law says it does not have the power to act.
- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

There must be no other adequate remedy. The trial court's error must also be something that can be fixed only with a writ. The person asking for the writ must show the appellate division that there is no adequate way to address the trial court's error other than with the writ (this is called having "no adequate remedy at law"). As mentioned above, appeals are the ordinary way that trial court decisions are reviewed. If the trial court's ruling can be appealed, the appellate division will generally consider an appeal to be good enough (an "adequate remedy") unless the person asking for the writ can show the appellate division that the person will be harmed in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm).

Statutory writs: There are laws (statutes) that provide that certain kinds of rulings can or must be challenged using a writ proceeding. These are called "statutory writs." Here is a list of some of the most common rulings that a statute says can or must be challenged using a writ:

- A ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))
- Denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))
- A ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))

- Denial of a stay in an unlawful detainer matter (see California Code of Civil Procedure section 1176)
- An order disqualifying the prosecuting attorney (see California Penal Code section 1424)

You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* You will need to check whether there is a statute providing that the specific ruling you want to challenge can or must be reviewed using a writ proceeding. (Note that just because there is a statute requiring or allowing you to ask for a writ to challenge a ruling does not mean that the court must grant your request; the appellate division can still deny a request for a statutory writ.)

Common law writs: Even if there is not a statute specifically providing for a writ proceeding to challenge a particular ruling, most trial court rulings other than the final judgment can potentially be challenged using a writ proceeding if the trial court made the type of legal error described above and the petitioner has no other adequate remedy at law. These writs are called "common law" writs.

7 Can the appellate division consider a request for a writ in *any* case?

No. Different courts have the power (called "jurisdiction") to consider requests for writs in different types of cases. The appellate division can only consider requests for writs in limited civil, misdemeanor, and infraction cases, and certain small claims cases. A limited civil case is a civil case in which the amount claimed is $25,000 or less (see California Code of Civil Procedure sections 85 and 88). Misdemeanor cases are cases in which a person has been charged with or convicted of a crime for which the punishment can include jail time of up to one year but not time in state prison (see California Penal Code sections 17 and 19.2). (If the person was also charged with or convicted of a felony in the same case, it is considered a felony case, not a misdemeanor case.) Infraction cases are cases in which a person has been charged with or convicted of a crime for which the punishment can be a fine, traffic school, or some form of community service but cannot include any time in jail or prison (see California Penal Code sections 17 and 19.8). Examples of infractions include traffic tickets or citations for violations of some city or county ordinances. (If a person was also charged with or convicted of a misdemeanor in the same case, it is considered a misdemeanor case, not an infraction case.) You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* The appellate division can consider requests for writs in small claims actions relating to postjudgment enforcement orders.

The appellate division does NOT have jurisdiction to consider requests for writs in either unlimited civil cases (civil cases in which the amount claimed is more than $25,000) or felony cases (cases in which a person has been charged with or convicted of a crime for which the punishment can include time in state prison). Requests for writs in these cases can be made in the Court of Appeal. The appellate division also does NOT have jurisdiction to consider requests for writs of habeas corpus; requests for these writs can be made in the superior court.

Requests for writs relating to actions of the small claims division *other* than postjudgment enforcement orders are considered by a single judge in the appellate division. (See form SC-300-INFO.) Requests for writs relating to superior court actions in small claims cases on appeal may be made to the Court of Appeal.

8 Who are the parties in a writ proceeding?

If you are asking for the writ, you are called the PETITIONER. You should read "Information for the Petitioner," beginning on page 4.

The court the petitioner is asking to be ordered to do or not to do something is called the RESPONDENT. In appellate division writ proceedings, the trial court is the respondent.

Any other party in the trial court case who would be affected by a ruling regarding the request for a writ is a REAL PARTY IN INTEREST. If you are a real party in interest, you should read "Information for a Real Party in Interest," beginning on page 10.

9 Do I need a lawyer to represent me in a writ proceeding?

You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated

and you will have to follow the same rules that lawyers have to follow. If you have any questions about the writ procedures, you should talk to a lawyer. In limited civil cases and infraction cases, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding a lawyer on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm.*

INFORMATION FOR THE PETITIONER

This part of the information sheet is written for the petitioner—the party asking for the writ. It explains some of the rules and procedures relating to asking for a writ. The information may also be helpful to a real party in interest. There is more information for a real party in interest starting on page 10 of this information sheet.

(10) Who can ask for a writ?

Only a party in the trial court proceeding—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—can ask for a writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d)). Parties are also usually the only ones that ask for writs challenging other kinds of trial court rulings. However, in most cases, a person who was not a party does have the legal right to ask for a writ if that person has a "beneficial interest" in the trial court's ruling. A "beneficial interest" means that the person has a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling.

(11) How do I ask for a writ?

To ask for a writ you must serve and file a petition for a writ (see below for an explanation of how to "serve and file" a petition). A petition is a formal request that the appellate division issue a writ. A petition for a writ explains to the appellate division what happened in the trial court, what legal error you (the petitioner) believe the trial court made, why you have no other adequate remedy at law, and what order you are requesting the appellate division to make.

(12) How do I prepare a writ petition?

If you are represented by a lawyer, your lawyer will prepare your petition for a writ. If you are not represented by a lawyer, you must use *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151) to prepare your petition. You can get form APP-151 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* This form asks you to fill in the information that needs to be in a writ petition.

a. Description of your interest in the trial court's ruling

Your petition needs to tell the appellate division why you have a right to ask for a writ in the case. As discussed above, usually only a person who was a party in the trial court case—the plaintiff or defendant in a civil case or the defendant or prosecuting agency in a misdemeanor or infraction case—asks for a writ challenging a ruling in that case. If you were a party in the trial court case, say that in your petition. If you were not a party, you will need to describe what "beneficial interest" you have in the trial court's ruling. A "beneficial interest" means that you have a specific right or interest affected by the ruling that goes beyond the general rights or interests the public may have in the ruling. To show the appellate division that you have a beneficial interest in the ruling you want to challenge, you must describe how the ruling will affect you in a direct and negative way.

b. Description of the legal error you believe the trial court made

Your petition will need to tell the appellate division what legal error you believe the trial court made. Not every mistake a trial court might make can be addressed by a writ. You must show that the trial court made one of the following types of legal errors:

- The trial court has a legal duty to act but:
  - Refuses to act;
  - Has not done what the law says it must do; or

  - Has acted in a way the law says it does not have the power to act.

- The trial court has performed or says it is going to perform a judicial function (like deciding a person's rights under law in a particular case) in a way that the court does not have the legal power to do.

To show the appellate division that the trial court made one of these legal errors, you will need to:

- Show that the trial court has the legal duty or the power to act or not act in a particular way. You will need to tell the appellate division what legal authority—what constitutional provision, statute, rule, or published court decision—establishes the trial court's legal duty or power to act or not act in that way.
- Show the appellate division that the trial court has not acted in the way that this legal authority says the court is required to act. You will need to tell the appellate division exactly where in the record of what happened in the trial court it shows that the trial court did not act in the way it was required to.

c. Description of why you need the writ

One of the most important parts of your petition is explaining to the appellate division why you need the writ you have requested. Remember, the appellate division does not have to grant your petition just because the trial court made an error. You must convince the appellate division that it is important for it to issue the writ.

Your petition needs to show that a writ is the only way to fix the trial court's error. To convince the court you need the writ, you will need to show the appellate division that you have no way to fix the trial court's error other than through a writ (this is called having "no adequate remedy at law").

This will be hard if the trial court's ruling can be appealed. If the ruling you are challenging can be appealed, either immediately or as part of an appeal of the final judgment in your case, the appellate division will generally consider this appeal to be a good enough way to fix the trial court's ruling (an "adequate remedy"). To be able to explain to the appellate division why you do not have an adequate remedy at law, you will need to find out if the ruling you want to challenge can be appealed, either immediately or as part of an appeal of the final judgment.

Here are some trial court rulings that can be appealed. There are laws (statutes) that say that certain kinds of trial court rulings ("orders") can be appealed immediately. In limited civil cases, California Code of Civil Procedure section 904.2 lists orders that can be appealed immediately, including orders:

- Changing or refusing to change the place of trial (venue)
- Granting a motion to quash service of summons
- Granting a motion to stay or dismiss the action on the ground of inconvenient forum
- Granting a new trial
- Denying a motion for judgment notwithstanding the verdict
- Granting or dissolving an injunction or refusing to grant or dissolve an injunction
- Appointing a receiver
- Made after final judgment in the case

In misdemeanor and infraction cases, orders made after the final judgment that affect the substantial rights of the defendant can be appealed immediately (California Penal Code section 1466).

In misdemeanor cases, orders granting or denying a motion to suppress evidence can also be appealed immediately (California Penal Code section 1538.5(j)).

You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces /codes.xhtml.* You should also check to see if there are published court decisions that indicate whether you can or must use an appeal or a writ petition to challenge the type of ruling you want to challenge in your case.

If the ruling can be appealed, you will need to show that an appeal will not fix the trial court's error. If the trial court ruling you want to challenge can be appealed, you will need to show the appellate division why that appeal is not good enough to fix the trial court's error. To do that, you will need to show the appellate division how you will be harmed by the trial court's error in a way that cannot be fixed by the appeal if the appellate division does not issue the writ (this is called "irreparable" injury or harm). For example, because of

the time it takes for an appeal, the harm you want to prevent may happen before an appeal can be finished.

d. Description of the order you want the appellate division to make

Your petition needs to describe what you are asking the appellate division to order the trial court to do or not do. Writ petitions usually ask that the trial court be ordered to cancel ("vacate") its ruling, issue a new ruling, or not take any steps to enforce its ruling.

If you want the appellate division to order the trial court not to do anything more until the appellate division decides whether to grant the writ you are requesting, you must ask for a "stay." If you want a stay, you should first ask the trial court for a stay. You should tell the appellate division whether you asked the trial court for a stay. If you did not ask the trial court for a stay, you should tell the appellate division why you did not do this.

If you ask the appellate division for a stay, make sure you also fill out the "Stay requested" box on the first page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151).

e. Verifying the petition

Petitions for writs must be "verified." This means that either the petitioner or the petitioner's attorney must declare under penalty of perjury that the facts stated in the petition are true and correct, must sign the petition, and must indicate the date that the petition was signed. On the last page of the *Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case)* (form APP-151), there is a place for you to verify your petition.

(13) Is there anything else that I need to serve and file with my petition?

Yes. Along with the petition, you must serve and file a record of what happened in the trial court (see below for an explanation of how to serve and file the petition). Since the appellate division judges were not there in the trial court, a record of what happened must be sent to the appellate division for its review. The materials that make up this record are called "supporting documents."

What needs to be in the supporting documents. The supporting documents must include:

- A record of what was said in the trial court about the ruling that you are challenging (this is called the "oral proceedings") and
- Copies of certain important documents from the trial court.

Read below for more information about these two parts of the supporting documents.

Record of the oral proceedings. There are several ways a record of what was said in the trial court may be provided to the appellate division:

- **A transcript**—A transcript is a written record (often called the "verbatim" record) of the oral proceedings in the trial court. If a court reporter was in the trial court and made a record of the oral proceedings, you can have the court reporter prepare a transcript of those oral proceedings, called a "reporter's transcript," for the appellate division. If a reporter was not there, but the oral proceedings were officially recorded on approved electronic recording equipment, you can have a transcript prepared for the appellate division from the official electronic recording of these proceedings. You (the petitioner) must pay for preparing a transcript, unless the court orders otherwise.
- **A copy of an electronic recording**—If the oral proceedings were officially recorded on approved electronic recording equipment, the court has a local rule for the appellate division permitting this recording to be used as the record of the oral proceedings, and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of a transcript. You (the petitioner) must pay for preparing a copy of the official electronic recording, unless the court orders otherwise.
- **A summary**—If a transcript or official electronic recording of what was said in the trial court is not available, your petition must include a declaration (a statement signed by the petitioner under penalty of perjury) either:
  - Explaining why the transcript or official electronic recording is not available and providing a fair summary of the proceedings, including the petitioner's arguments and any statement by the court supporting its ruling; or

- Stating that the transcript or electronic recording has been ordered, the date it was ordered, and the date it is expected to be filed.

Copies of documents from the trial court. Copies of the following documents from the trial court must also be included in the supporting documents:

- The trial court ruling being challenged in the petition
- All documents and exhibits submitted to the trial court supporting and opposing the petitioner's position
- Any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and of the ruling being challenged

What if I cannot get copies of the documents from the trial court because of an emergency? Rule 8.931 of the California Rules of Court provides that in extraordinary circumstances the petition may be filed without copies of the documents from the trial court. If the petition is filed without these documents, you must explain in your petition the urgency and the circumstances making the documents available.

Format of the supporting documents. Supporting documents must be put in the format required by rule 8.931 of the California Rules of Court. Among other things, there must be a tab for each document and an index listing the documents that are included. You should carefully read rule 8.931. You can get a copy of rule 8.931 at any courthouse or county law library or online at *www.courts.ca.gov/rules.*

(14) Is there a deadline to ask for a writ?

Yes. For statutory writs, the statute usually sets the deadline for serving and filing the petition. Here is a list of the deadlines for filing petitions for some of the most common statutory writs (you can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml*).

Statutory Writ	Filing Deadline
Writ challenging a ruling on a motion to disqualify a judge (see California Code of Civil Procedure section 170.3(d))	10 days after notice to the parties of the decision
Writ challenging the denial of a motion for summary judgment (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order
Writ challenging a ruling on a motion for summary adjudication of issues (see California Code of Civil Procedure section 437c(m)(l))	20 days after service of written notice of entry of the order

For common law writs or statutory writs where the statute does not set a deadline, you should file the petition as soon as possible and not later than 30 days after the court makes the ruling that you are challenging in the petition. While there is no absolute deadline for filing these petitions, writ petitions are usually used when it is urgent that the trial court's error be fixed. Remember, the court is not required to grant your petition even if the trial court made an error. If you delay in filing your petition, it may make the appellate division think that it is not really urgent that the trial court's error be fixed and the appellate division may deny your petition. If there are extraordinary circumstances that delayed the filing of your petition, you should explain these circumstances to the appellate division in your petition.

(15) How do I "serve" my petition?

Rule 8.931(d) requires that the petition and one set of supporting documents be served on any named real party in interest and that just the petition be served on the respondent trial court. "Serving" a petition on a party means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the petition to the real party in interest and the respondent court in the way required by law. If the petition is mailed or

personally delivered, it must be by someone who is not a party to the case—so not you.

- Make a record that the petition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the petition, who was served with the petition, how the petition was served (by mail, in person, or electronically), and the date the petition was served.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

16 How do I file my petition?

To file a petition for a writ in the appellate division, you must bring or mail the original petition, including the supporting documents, and the proof of service to the clerk for the appellate division of the superior court that made the ruling you are challenging. If the superior court has more than one courthouse location, you should call the clerk at the courthouse where the ruling you are challenging was made to ask where to file your petition.

You should make a copy of all the documents you are planning to file for your own records before you file them with the court. It is a good idea to bring or mail an extra copy of the petition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

17 Do I have to pay to file a petition?

There is no fee to file a petition for a writ in a misdemeanor or infraction case, but there is a fee to file a petition for a writ in a limited civil case. You should ask the clerk for the appellate division where you are filing the petition what this fee is. If you cannot afford to pay this filing fee, you can ask the court to waive this fee. To do this, you must fill out a *Request to Waive Court Fees* (form FW-001). You can get form FW-001 at any courthouse or county law library or online at *www.courts.ca.gov/forms.* You can file this application either before you file your petition or with your petition. The court will review this application and decide whether to waive the filing fee.

18 What happens after I file my petition?

Within 10 days after you serve and file your petition, the respondent or any real party in interest can serve and file preliminary opposition to the petition. Within 10 days after an opposition is filed, you may serve and file a reply to that opposition.

The appellate division does not have to wait for an opposition or reply before it can act on a petition for a writ, however. Without waiting, the appellate division can:

a. Issue a stay

b. Summarily deny the petition

c. Issue an alternative writ or order to show cause

d. Notify the parties that it is considering issuing a preemptory writ in the first instance

e. Issue a peremptory writ in the first instance if such relief was expressly requested in the petition.

Read below for more information about these options.

a. Stay of trial court proceedings

A stay is an order from the appellate division telling the trial court not to do anything more until the appellate division decides whether to grant your petition. A stay puts the trial court proceedings on temporary hold.

b. Summary denial

A "summary denial" means that the appellate division denies the petition without deciding whether the trial court made the legal error claimed by the petitioner or whether the writ requested by the petitioner should be issued based on that error. Remember, even if the trial court made a legal error, the appellate division can decide not to consider that error now but to wait and consider the error as part of any appeal from the final judgment. No reasons need to be given for a summary denial. Most petitions for writs are denied in this way.

c. Alternative writ or order to show cause

An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested). The appellate division will issue an alternative writ or an order to show cause only if the petitioner has shown that the petitioner has no adequate remedy at law and the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed.

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition.

If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or a real party in interest can file a response to the appellate division's order (called a "return") that explains why the trial court should not be ordered to do what the petitioner requested. The return must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the alternative writ or order to show cause was issued. The petitioner will then have an opportunity to serve and file a reply within 15 days after the return is filed. The appellate division may set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

d. Peremptory writ in the first instance

A "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some modified form of what the petitioner requested) that is issued without the appellate division first issuing an alternative writ or order to show cause. It is very rare for the appellate division to issue a peremptory writ in the first instance, and it will not do so unless the respondent and real parties in interest have received notice that the court might do so, either through the petitioner expressly asking for such relief in the petition, or by the court first notifying the parties and giving the respondent court and any real party in interest a chance to file an opposition.

The respondent court or a real party in interest can file a response to the appellate division's notice (called an "opposition") that explains why the trial court should not be ordered to do what the petitioner has requested. The opposition must be served and filed within the time specified by the appellate division or, if no time is specified, within 30 days from the date the notice was issued. The petitioner will then have a chance to serve and file a reply within 15 days after the opposition is filed. The appellate division may then set the matter for oral argument. When all the papers have been served and filed (or the time to serve and file them has passed) and oral argument is completed, the appellate division will decide the case.

(19) What should I do if the court denies my petition?

If the court denies your petition, it may be helpful to talk to a lawyer. In a limited civil or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov /selfhelp-lowcosthelp.htm.*

INFORMATION FOR A REAL PARTY IN INTEREST

This part of the information sheet is written for a real party in interest—a party from the trial court case other than the petitioner who will be affected by a ruling on a petition for a writ. It explains some of the rules and procedures relating to responding to a petition for a writ. The information may also be helpful to the petitioner.

(20) I have received a copy of a petition for a writ in a case in which I am a party. Do I need to do anything?

You do not *have* to do anything. The California Rules of Court give you the right to file a preliminary opposition to a petition for a writ within 10 days after the petition is served and filed, but you are not required to do this. The appellate division can take certain actions without waiting for any opposition, including:

- Summarily denying the petition;
- Issuing an alternative writ or order to show cause;
- Notifying the parties that it is considering issuing a peremptory writ in the first instance; or
- Issuing a peremptory writ in the first instance if such relief was expressly requested in the petition.

Read the response to question (18) for more information about these options.

Most petitions for writs are summarily denied, often within a few days after they are filed. If you have not already received something from the appellate division saying what action it is taking on the petition, it is a good idea to call the appellate division to see if the petition has been denied before you decide whether and how to respond.

This would be a good time to talk to a lawyer. You do not *have* to have a lawyer; you are allowed to represent yourself in a writ proceeding in the appellate division. But writ proceedings can be very complicated and you will have to follow the same rules that lawyers have to follow. If you have any questions about writ proceedings or about whether and how you should respond to a writ petition, you should talk to a lawyer. In a limited civil case or infraction case, you must hire a lawyer at your own expense if you want one (the court cannot provide one). You can get information about finding an attorney on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-lowcosthelp.htm.*

If the petition has not already been summarily denied, you may, but are not required to, serve and file a preliminary opposition to the petition within 10 days after the petition was served and filed. In general, it is a good idea to consider filing a preliminary opposition if the petition misstates the facts or if you think the petition shows that the trial court made a legal error that may need to be fixed. However, the appellate division will seldom grant a writ without first issuing an alternative writ, an order to show cause, or a notice that it is considering issuing a peremptory writ. In all these circumstances, you will get notice from the court and have a chance to file a response. Note that the appellate division may issue a peremptory writ without notice if the petitioner expressly asked the court, in the petition, to issue a peremptory writ in the first instance. If the petitioner did that, you may want to consider whether to file a preliminary opposition, to explain why you believe the small claims court made no legal error and why the petitioner is not entitled to a writ.

If you decide to file a preliminary opposition, you must serve that preliminary opposition on all the other parties to the writ proceeding. "Serving and filing" an opposition means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the preliminary opposition to the other parties in the way required by law. If the preliminary opposition is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the preliminary opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the preliminary opposition, who was served with the preliminary opposition, how the preliminary opposition was served (by mail, in person, or electronically), and the date the preliminary opposition was served.
- File the original preliminary opposition and the proof of service with the appellate division. You should make a copy of the preliminary opposition for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the preliminary opposition to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California

Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

(21) I have received a copy of an alternative writ or an order to show cause issued by the appellate division. Do I need to do anything?

Yes. Unless the trial court has already done what the alternative writ told it to do, you should serve and file a response called a "return."

As explained above, the appellate division will issue an alternative writ or an order to show cause if the appellate division has decided that the petitioner may have shown that the trial court made a legal error that needs to be fixed. An "alternative writ" is an order telling the trial court either to do what the petitioner has requested in the petition (or some modified form of what the petitioner requested) or to show the appellate division why the trial court should not be ordered to do what the petitioner requested. An "order to show cause" is similar; it is an order telling the trial court to show the appellate division why the trial court should not be ordered to do what the petitioner requested in the petition (or some modified form of what the petitioner requested).

If the appellate division issues an alternative writ and the trial court does what the petitioner requested (or a modified form of what the petitioner requested as ordered by the appellate division), then no further action by the appellate division is needed and the appellate division may dismiss the petition. If the trial court does not comply with an alternative writ, however, or if the appellate division issues an order to show cause, then the respondent court or the real party in interest may serve and file a response to the appellate division's order, called a "return."

A return is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your return. If you are not represented by a lawyer, you will need to prepare your own return. A return is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml*. A return can also include additional supporting documents not already filed by the petitioner.

If you do not file a return when the appellate division issues an alternative writ or order to show cause, it does not mean that the appellate division is required to issue the writ requested by the petitioner. However, the appellate division will treat the facts stated by the petitioner in the petition as true, which makes it more likely the appellate division will issue the requested writ.

Unless the appellate division sets a different filing deadline in its alternative writ or order to show cause, you must serve and file your return within 30 days after the appellate division issues the alternative writ or order to show cause. The return must be served on all the other parties to the writ proceeding. "Serving and filing" the return means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the return to the other parties in the way required by law. If the return is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the return has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the return, who was served with the return, how the return was served (by mail, in person, or electronically), and the date the return was served.
- File the original return and the proof of service with the appellate division. You should make a copy of the return you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the return to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California

Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

(22) I have received a copy of a notice from the appellate division indicating it is considering issuing a peremptory writ in the first instance. Do I need to do anything?

Yes. You should serve and file a response called an "opposition."

As explained in the answer to question (18), a "peremptory writ in the first instance" is an order telling the trial court to do what the petitioner has requested (or some form of what the petitioner requested as ordered by the appellate division) that is issued without the appellate division first issuing an alternative writ or order to show cause. The appellate division will not issue a peremptory writ in the first instance without first giving the parties notice and a chance to file an opposition. However, when the appellate division issues such a notice, it means that the appellate division is strongly considering granting the writ requested by the petitioner.

An opposition is your argument to the appellate division about why the trial court should not be ordered to do what the petitioner has requested. If you are represented by a lawyer in the writ proceeding, your lawyer will prepare your opposition. If you are not represented by a lawyer, you will need to prepare your own opposition. Like a return discussed above, an opposition is usually a legal response called an "answer." An answer is used to admit or deny the facts alleged in the petition, to add to or correct the facts, and to explain any legal defenses to the legal arguments made by the petitioner. You should read California Code of Civil Procedure sections 430.10–430.80 for more information about answers. You can get copies of these statutes at any county law library or online at *leginfo.legislature.ca.gov/faces/codes.xhtml.*

Unless the appellate division sets a different deadline in its notice that it is considering issuing a peremptory writ, you must serve and file your opposition within 30 days after the appellate division issues the notice. The opposition must be served on all the other parties to the writ proceeding. "Serving and filing" the opposition means that you must:

- Have somebody over 18 years old mail, deliver, or electronically send ("serve") the opposition to the other parties in the way required by law. If the opposition is mailed or personally delivered, it must be by someone who is not a party to the case—so not you.
- Make a record that the opposition has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) or *Proof of Electronic Service (Appellate Division)* (form APP-109E) can be used to make this record. The proof of service must show who served the opposition, who was served with the opposition, how the opposition was served (by mail, in person, or electronically), and the date the opposition was served.
- File the original opposition and the proof of service with the appellate division. You should make a copy of the opposition you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the opposition to the clerk when you file your original, and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court documents and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courts.ca.gov/selfhelp-serving.htm.*

(23) What happens after I serve and file my return or opposition?

After you file a return or opposition, the petitioner has 15 days to serve and file a reply. The appellate division may also set the matter for oral argument. When all the papers have been filed (or the time to file them has passed) and oral argument is completed, the appellate division will decide the case.

CR-133 Request for Court-Appointed Lawyer in Misdemeanor Appeal

Clerk stamps date here when form is filed.

DRAFT

03/22/2023

Not approved by the Judicial Council

Instructions

- This form is only for requesting that the court appoint a lawyer to represent a defendant in a **misdemeanor** appeal.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courts.ca.gov/forms*.
- The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:
  - (1) You were convicted and your punishment includes going to jail or paying a fine of more than $500 (including penalty and other assessments); or
  - (2) You are likely to suffer other negative consequences from the conviction (for example, immigration problems or inability to get or keep a license or permit); or
  - (3) You have not been convicted but you are likely to suffer significant harm if you lose the appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where the notice of appeal was filed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Name of Defendant (the party who is filing this request):

Name: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

b. Defendant's lawyer *(skip this if the defendant is filling out this form)*:

Name: _____ State Bar number: _____

Street address: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Mailing address *(if different)*: _____ (*Street*) _____ (*City*) _____ (*State*) _____ (*Zip*)

Phone: _____ Email: _____

Fax: _____

Trial Court Case Name: _____ Trial Court Case Number:

Information About Your Case

2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case? *(Check a or b.)*

a. ☐ Yes

b. ☐ No *(Complete and attach* Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense *(form CR-105) showing that you/your client cannot afford to hire a lawyer. You can get form CR-105 at any courthouse or county law library or online at* www.courts.ca.gov/forms.*)*

3 If you have been convicted, describe the punishment the trial court gave you/your client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine):* $ _____

c. ☐ Restitution *(fill in the amount of the restitution):* $ _____

d. ☐ Probation *(fill in the amount of time on probation):* _____

e. ☐ Other punishment *(describe any other punishment that the trial court gave you/your client in this case):*

_____

_____

_____

f. ☐ *Describe any other negative consequences that you are/your client is likely to suffer because of this conviction:*

_____

_____

_____

4 *If you have not been convicted, describe the order being challenged on appeal:*

_____

_____

_____

Notice to Defendant: If you were represented by appointed counsel in the trial court and the trial court finds that you are able to pay all or part of the cost of that counsel, at the conclusion of the proceedings, the court may also determine after a hearing whether you are able to pay all or a portion of the cost of any attorney appointed to represent you in this appeal. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such orders will have the same force and effect as a judgment in a civil action and will be subject to enforcement.

Date: _____

_____ ▶ _____

Type or print name *Signature of defendant or attorney*

FW-002 Request to Waive Additional Court Fees (Superior Court)

CONFIDENTIAL

Clerk stamps date here when form is filed.

DRAFT
03/23/2023
Not approved by the Judicial Council

This form asks the court to waive *additional* court fees that are not covered in a current order. If you have not already received an order that waived or reduced your court fees, you must complete and file a *Request to Waive Court Fees (Superior Court),* form FW-001, along with this form.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

1 **Your Information** *(person asking the court to waive the fees):*

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

Phone number: _____

2 Your lawyer, if you have one *(name, firm or affiliation, address, phone number, and State Bar number):*

_____

_____

_____

a. The lawyer has agreed to advance all or a portion of your fees or costs *(check one)*: ☐ Yes ☐ No

b. *(If yes, your lawyer must sign here):*
Lawyer's signature: _____
If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

3 Date your *last* court fee waiver order, if any, was granted: _____

4 Has your financial situation improved since your last *Request to Waive Court Fees?* ☐ No ☐ Yes
(If yes, you must fill out a new Request to Waive Court Fees*, form FW-001, and attach it to this form.)*

5 What other fees do you want your court fee waiver order to cover? *(Check all that apply):*

a. ☐ Jury fees and expenses
b. ☐ Court-appointed interpreter fees for a witness
c. ☐ Fees for a peace officer to testify in court
d. ☐ Fees for court-appointed experts
e. ☐ Other *(specify):* _____

6 Why do you need these other services? *(Explain):*

_____

_____

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Print your name here

▶ _____
Sign here