Item number: 01

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 4, 2024

Rules Committee action requested [Choose from drop down menu below]**:**
Submit to JC (without circulating for comment)

Title of proposal: Judicial Branch Education: Judicial Schedules

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rule 10.603

Committee or other entity submitting the proposal:
The Center for Judicial Education and Research (CJER) Advisory Committee

*Staff contact (*name, phone and e-mail*): Karene Alvarado, 415-865-7761, karene.alvarado@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*): N/A
Project description from annual agenda: The CJER Advisory Committee's annual agenda is approved by the Executive and Planning Committee. The Executive and Planning Committee is expected to meet and approve this project as part of the CJER Advisory Committee's 2024 annual agenda by March 14, 2024.

Draft Project Summary: Recommend a technical amendment to California Rules of Court, rule 10.603(c)(2)(B), by replacing references to repealed Standards of Judicial Administration with citations to applicable court rule(s).

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

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.)
N/A

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.: [XX-XXX]
For business meeting on May 16, 2024

Title
Judicial Branch Education: Judicial Schedules

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 10.603

Recommended by
Center for Judicial Education and Research Advisory Committee
Hon. Darrell S. Mavis, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2024

Date of Report
March 8, 2024

Contact
Karene Alvarado, 415-865-7761
karene.alvarado@jud.ca.gov

Executive Summary

The Center for Judicial Education and Research Advisory Committee recommends the Judicial Council make a technical amendment to rule 10.603 of the California Rules of Court to replace outdated references with citations to the current judicial education requirements.

Recommendation

The Center for Judicial Education and Research Advisory Committee recommends that the Judicial Council, effective September 1, 2024, amend rule 10.603 of the California Rules of Court to correct outdated references to repealed standards of judicial administration and replace them with the citations to the relevant rules of court on judicial education requirements that replaced the standards (Cal. Rules of Court, rules 10.451, 10.452, and 10.462–10.469).

The proposed amended rule is attached at page 3.

Relevant Previous Council Action

The Judicial Council adopted a comprehensive set of rules on judicial branch education effective January 1, 2008. At the same time, the council repealed standards 10.10 through 10.15 of the California Standards of Judicial Administration that contained judicial education

recommendations. However, rule 10.603(c)(2)(B), addressing the presiding judge's duty to plan for judicial education in creating judicial schedules, was not amended at that time and currently references repealed standards 10.11 through 10.13.

Analysis/Rationale

This proposal is recommended to correct references that are currently inaccurate.

Policy implications

There are no policy implications of the recommendation in this proposal.

Comments

The proposed amendment was discussed at an open meeting of the Center for Judicial Education and Research Advisory Committee. There were no significant points of discussion or divergence of opinion within the advisory committee. Based on its technical and noncontroversial nature, this proposal is within the Judicial Council's purview to adopt without circulation for comment. (See Cal. Rules of Court, rule 10.22(d)(2).)

Alternatives considered

The Center for Judicial Education and Research Advisory Committee rejected the alternative of taking no action, as the current references in rule 10.603(c)(2)(B) direct presiding judges to repealed standards. The advisory committee concluded that the only logical course of action would be to recommend a technical amendment to rule 10.603 to include citations to the current judicial education requirements within the rules of court that replaced the repealed standards.

Fiscal and Operational Impacts

This proposal will result in no fiscal or operational costs to the courts or the Judicial Council.

Attachments and Links

1. Cal. Rules of Court, rule 10.603, at page 3
2. Link A: Cal. Rules of Court, rule 10.603, www.courts.ca.gov/cms/rules/index.cfm?title=ten&linkid=rule10_603

Rule 10.603 of the California Rules of Court is amended, effective September 1, 2024, to read:

Rule 10.603. Authority and duties of presiding judge

(a)–(b) ***

(c) Duties

(1) ***

(2) *Judicial schedules*

(A) ***

(B) The plan should take into account ~~the principles contained in standards 10.11–10.13~~ rules 10.451, 10.452, and 10.462–10.469 (on judicial education) and standard 10.5 (on community activities) of the Standards of Judicial Administration.

(C)–(I) ***

(3)–(11) ***

(d) ***

Item number: 02

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/4/24

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

Title of proposal: Civil Jury Instructions: Instructions With Minor or Nonsubstantive Revisions (Release 45)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Judicial Council of California Civil Jury Instructions: Revise CACI Nos. 441, 1002, 1204, 2561, 2603, 3060, 3071, 3708, and 4603.

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions

*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*): 10/26/23
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.)

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
Telephone 415-865-4200 · Fax 415-865-4205

M E M O R A N D U M

Date
March 20, 2024

To
Members of the Rules Committee

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

Subject
Civil Jury Instructions: Instructions With Minor or Nonsubstantive Revisions (Release 45)

Action Requested
Review and Approve Publication of Instructions

Deadline
April 4, 2024

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 nine 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 nine 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. 441, 1002, 1204, 2561, 2603, 3060, 3071, 3708, and 4603.

These instructions will be published in the midyear supplement to the 2024 edition of *CACI* and posted online on the California Courts website.

The revised instructions are attached at pages 5–39.

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]
(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.

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[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.

Analysis/Rationale

Overview of revisions

Seven of the nine instructions in this release have proposed revisions under category (a) above (additions of cases to the Sources and Authority). One instruction (CACI No. 3071) has a revision (an updated statutory subdivision) in the Directions for Use that falls under category (c) above. One instruction (CACI No. 2603) has a revision to the descriptions for a statute and regulation in the Sources and Authority.

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 5–39

CIVIL JURY INSTRUCTIONS
(Release 45: Nonsubstantive Changes)
TABLE OF CONTENTS

441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

A peace officer may use deadly force only when necessary in defense of human life. [*Name of plaintiff***] claims that [***name of defendant***] was negligent in using deadly force to [arrest/detain/ [,/or] prevent escape of/ [,/or] overcome resistance to] [him/her/***nonbinary pronoun/name of decedent***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was a peace officer;**

2. **That [***name of defendant***] used deadly force on [***name of plaintiff/decedent***];**

3. **That [***name of defendant***]'s use of deadly force was not necessary to defend human life;**

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

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

[*Name of defendant***]'s use of deadly force was necessary to defend human life only if a reasonable officer in the same situation would have believed, based on the totality of the circumstances known to or perceived by [***name of defendant***] at the time, that deadly force was necessary [either]:**

[to defend against an imminent threat of death or serious bodily injury to [*name of defendant***] [and/or] [another person]][; or/.]]**

[to apprehend a fleeing person for a felony, when all of the following conditions are present:

i. **The felony threatened or resulted in death or serious bodily injury to another;**

ii. **[***Name of defendant***] reasonably believed that the person fleeing would cause death or serious bodily injury to another unless immediately apprehended; and**

iii. **[***Name of defendant***] made reasonable efforts to identify [himself/herself/***nonbinary pronoun***] as a peace officer and to warn that deadly force may be used, unless the officer had objectively reasonable grounds to believe the person is aware of those facts.]**

[A peace officer must not use deadly force against persons based only on the danger those persons pose to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.]

[A person being [arrested/detained] has a duty not to use force to resist a peace officer unless the peace officer is using unreasonable force.]

["Deadly force" is force that creates a substantial risk of causing death or serious bodily injury. It is not limited to the discharge of a firearm.]

A threat of death or serious bodily injury is "imminent" if, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or to another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

"Totality of the circumstances" means all facts known to or perceived by the peace officer at the time, including the conduct of [*name of defendant***] and [***name of plaintiff/decedent***] leading up to the use of deadly force. In determining whether [***name of defendant***]'s use of deadly force was necessary in defense of human life, you must consider [***name of defendant***]'s tactical conduct and decisions before using deadly force on [***name of plaintiff/decedent***] and whether [***name of defendant***] used other available resources and techniques as [an] alternative[s] to deadly force, if it was reasonably safe and feasible to an objectively reasonable officer.**

[A peace officer who makes or attempts to make an arrest does not have to retreat or stop because the person being arrested is resisting or threatening to resist. Tactical repositioning or other deescalation tactics are not retreat. A peace officer does not lose the right to self-defense by using objectively reasonable force to [arrest/detain/ [,/or] prevent escape/ [,/or] overcome resistance].]

New November 2020

Directions for Use

Use this instruction for a negligence claim arising from a peace officer's use of deadly force. Penal Code section 835a preserves the "reasonable force" standard for nondeadly force, but creates a separate, higher standard that authorizes a peace officer to use deadly force only when "necessary in defense of human life." If the plaintiff claims that the defendant used both deadly and nondeadly force, or if the jury must decide whether the force used was deadly or nondeadly, this instruction may be used along with the corresponding essential elements for negligence involving nondeadly force. See CACI No. 440, *Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*.

Element 1 may be stipulated to or decided by the judge as a matter of law. In such a case, the judge must instruct the jury that the defendant was a peace officer. If there are contested issues of fact regarding element 1, include the specific factual findings necessary for the jury to determine whether the defendant was a peace officer.

Select either or both bracketed options concerning the justifications for using deadly force under Penal Code section § 835a(c) depending on the facts of the case. If only one justification is supported by the facts, omit the either/or language. Include the bracketed sentence following the justifications if the plaintiff claims that the only threat the plaintiff posed was self-harm. A peace officer may not use deadly force against a person based on a danger that person poses to themselves if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the

peace officer or to another person. (Pen. Code, § 835a(c)(2).)

"Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. (Pen. Code, § 835a(e)(1).) The definition may be omitted from the instruction if a firearm was used. Note that this definition does not require that the encounter result in the death of the person against whom the force was used. If there is no dispute about the use of deadly force, the court should instruct the jury that deadly force was used.

Include the final bracketed paragraph only if the defendant claims that the person being arrested resisted arrest or threatened resistance.

In a wrongful death or survival action, use the name of the decedent victim where applicable and further modify the instruction as appropriate.

Sources and Authority

- Legislative Findings Regarding Use of Force by Law Enforcement. Penal Code section 835a(a).
- When Use of Deadly Force Is Justified. Penal Code section 835a(c).
- When Peace Officer Need Not Retreat. Penal Code section 835a(d).
- Definitions. Penal Code section 835a(e).
- "Peace Officer" Defined. Penal Code section 830 et seq.
- "There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence." (*Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, 586 [86 Cal.Rptr. 465, 468 P.2d 825].)
- "The evidence relevant to negligence and intentional tort overlaps here and presents a case similar to *Grudt v. City of Los Angeles, supra,* 2 Cal.3d 575. … [¶] This court held it was reversible error to exclude the negligence issue from the jury even though plaintiff also had pled intentional tort. The court pointed to the rule that a party may proceed on inconsistent causes of action unless a nonsuit is appropriate." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 635 [156 Cal.Rptr. 727, 596 P.2d 1143].)
- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)
- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer *unless* excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, original italics, internal citation omitted.)
- "[T]he reasonableness of a peace officer's conduct must be determined in light of the totality of

> circumstances. [Citations.] … [P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct." (*Villalobos v. City of Santa Maria* (2022) 85 Cal.App.5th 383, 389 [301 Cal.Rptr.3d 308], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 427, 993

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.24 seq. (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.22 (Matthew Bender)

California Civil Practice: Torts § 12:22 (Thomson Reuters)

1002. Extent of Control Over Premises Area

[*Name of plaintiff*] claims that [*name of defendant*] controlled the property involved in [*name of plaintiff*]'s harm, even though [*name of defendant*] did not own or lease it. A person controls property that the person does not own or lease when the person uses the property as if it were the person's own. A person is responsible for maintaining, in reasonably safe condition, all areas that person controls.

New September 2003; Revised May 2020

Directions for Use

Use this instruction only for property that is not actually owned or leased by the defendant.

Sources and Authority

- "[A] defendant's duty to maintain land in a reasonably safe condition extends to land over which the defendant exercises control, regardless of who owns the land. 'As long as the defendant exercised control over the land, the location of the property line would not affect the defendant's potential liability.' " (*University of Southern California v. Superior Court* (2018) 30 Cal.App.5th 429, 445 [241 Cal.Rptr.3d 616], internal citation omitted.)

- "Even if a hazard located on publicly owned property is created by a third party, an abutting owner or occupier of private property will be held liable for injuries caused by that hazard if the owner or occupier has ' "dramati[cally] assert[ed]" ' any of the ' "right[s] normally associated with ownership or … possession" ' by undertaking affirmative acts that are consistent with being the owner or occupier of the property and that go beyond the 'minimal, neighborly maintenance of property owned by another.' " (*Lopez v. City of Los Angeles* (2020) 55 Cal.App.5th 244, 258 [269 Cal.Rptr.3d 377].)

- "In *Alcaraz … ,* our Supreme Court held that a landowner who exercises control over an adjoining strip of land has a duty to protect or warn others entering the adjacent land of a known hazard there. This duty arises even if the person does not own or exercise control over the hazard and even if the person does not own the abutting property on which the hazard is located. … [¶] The *Alcaraz* court concluded that such evidence was 'sufficient to raise a triable issue of fact as to whether defendants exercised control over the strip of land containing the meter box and thus owed a duty of care to protect or warn plaintiff of the allegedly dangerous condition of the property.' " (*Contreras v. Anderson* (1997) 59 Cal.App.4th 188, 197–198 [69 Cal.Rptr.2d 69], footnote and internal citations omitted.)

- ~~" ' "*The crucial element is control.*" [Citation.]' '[W]e have placed major importance on the existence of possession and control as a basis for tortious liability for conditions on the land.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 414 [82 Cal.Rptr.3d 735], original italics, internal citations omitted.)~~ " '[A] defendant cannot be held liable for the defective or dangerous condition of property which it [does] not own, possess, or control.' Thus, ' "[a] tenant ordinarily is not liable for injuries to

his invitees occurring outside the leased premises on common passageways over which he has no control. [Citations.] Responsibility in such cases rests on the owner, who has the right of control and the duty to maintain that part of the premises in a safe condition. It is clear, however, that if the tenant exercises control over a common passageway outside the leased premises, he may become liable to his business invitees if he fails to warn them of a dangerous condition existing thereon." ' The ' "crucial element is control." ' " (*Moses v. Roger-McKeever* (2023) 91 Cal.App.5th 172, 179 [308 Cal.Rptr.3d 149], internal citation omited.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1225, 1226

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.02–15.03 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.03–381.04 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, § 334.52 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.15 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:2 (Thomson Reuters)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

---

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

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

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

If [*name of plaintiff***] has proved these three facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves that the benefits of the [***product***]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:**

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

[(f) [*Other relevant factor(s)***].]**

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018, May 2019, May 2020

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If the plaintiff asserts both tests, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that the plaintiff was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury

resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

If evidence of industry custom and practice has been admitted for a limited purpose, at the timely request of a party opposing this evidence, the jury must be given a limiting instruction on how this evidence may and may not be considered under the risk-benefit test. (See *Kim v. Toyota Motor Corp.* (2018) 6 Cal.5th 21, 30, 38 [237 Cal.Rptr.3d 205, 424 P.3d 290].)

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.3d 158].)

- "The risk-benefit test requires the plaintiff to first 'demonstrate[] that the product's design proximately caused his injury.' If the plaintiff makes this initial showing, the defendant must then 'establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design.' " (*Kim, supra,* 6 Cal.5th at p. 30, internal citation omitted.)

- "Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the

design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations … , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." ' " (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "Under *Barker,* in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.' " (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations." (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)

- "In some defective design cases, 'the feasibility of a reasonable alternative design is obvious and understandable to laypersons and therefore expert testimony is unnecessary to support a finding that

the product should have been designed differently and more safely. For example, when a manufacturer sells a soft stuffed toy with hard plastic buttons that are easily removable and likely to choke and suffocate a small child who foreseeably attempts to swallow them, the plaintiff should be able to reach the trier of fact … without hiring an expert to demonstrate the feasibility of an alternative safer design.' " (*Camacho v. JLG Industries Inc.* (2023) 93 Cal.App.5th 809, 816 [311 Cal.Rptr.3d 372], internal citation omitted.)

- "We stress that while industry custom and practice evidence is not categorically inadmissible, neither is it categorically admissible; its admissibility will depend on application of the ordinary rules of evidence in the circumstances of the case. … First, the party seeking admission of such evidence must establish its relevance to at least one of the elements of the risk-benefit test, either causation or the *Barker* factors. The evidence is relevant to the *Barker* inquiry if it sheds light on whether, objectively speaking, the product was designed as safely as it should have been, given 'the complexity of, and trade-offs implicit in, the design process.' Whether the evidence serves this purpose depends on whether, under the circumstances of the case, it is reasonable to conclude that other manufacturers' choices do, as the Court of Appeal put it, 'reflect legitimate, independent research and practical experience regarding the appropriate balance of product safety, cost, and functionality.' If the proponent of the evidence establishes a sufficient basis for drawing such a conclusion, the evidence is admissible, even though one side or the other may argue it is entitled to little weight because industry participants have weighed the relevant considerations incorrectly. The evidence may not, however, be introduced simply for the purpose of showing the manufacturer was acting no worse than its competitors." (*Kim, supra,* 6 Cal.5th at p. 37, internal citations omitted.)

- "[I]f the party opposing admission of this evidence makes a timely request, the trial court must issue a jury instruction that explains how this evidence may and may not be considered under the risk-benefit test." (*Kim, supra,* 6 Cal.5th at p. 38.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67

Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1615–1631

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

California Products Liability Actions, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship (Gov. Code, §§ 12940(*l*)(1), 12926(u))

[*Name of defendant***] claims that accommodating [***name of plaintiff***]'s [religious belief/religious observance] would create an undue hardship to the operation of [his/her/***nonbinary pronoun***/its] business.**

To succeed on this defense, [*name of defendant***] must prove that [he/she/***nonbinary pronoun***/it] considered reasonable alternative options for accommodating the [religious belief/religious observance], including (1) excusing [***name of plaintiff***] from duties that conflict with [his/her/***nonbinary pronoun***] [religious belief/religious observance][,] [or] (2) permitting those duties to be performed at another time or by another person[, or (3) [***specify other reasonable accommodation***]].**

If you decide that [*name of defendant***] considered but did not adopt [a] reasonable accommodation[s], you must then decide if the accommodation[s] would have created an undue hardship because it would be significantly difficult or expensive, in light of the following factors:**

a. The nature and cost of the accommodation[s];

b. [*Name of defendant***]'s ability to pay for the accommodation[s];**

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant***]'s employees and the relationship of the employees' duties to one another;**

f. The number, type, and location of [*name of defendant***]'s facilities; and**

g. The administrative and financial relationship of the facilities to one another.

New September 2003; Revoked December 2012; Restored and Revised June 2013; Revised November 2019, May 2020, May 2021

Directions for Use

For religious beliefs and observances, the statute requires the employer (or other covered entity) to demonstrate that the employer explored certain means of accommodating the plaintiff, including two specific possibilities: (1) excusing the plaintiff from duties that conflict with the plaintiff's religious belief or observance or (2) permitting those duties to be performed at another time or by another person. (Gov. Code, § 12940(*l*)(1).) If there is evidence of another reasonable alternative accommodation, include it as a third means of accommodating the plaintiff.

Sources and Authority

- Religious Accommodation Required Under Fair Employment and Housing Act. Government Code section 12940(*l*)(1).

- "Undue Hardship" Defined. Government Code section 12926(u).

- "If the employee proves a prima facie case and the employer fails to initiate an accommodation for the religious practices, the burden is then on the employer to prove it will incur an undue hardship if it accommodates that belief. '[T]he extent of undue hardship on the employer's business is at issue only where the employer claims that it is unable to offer any reasonable accommodation without such hardship.' ..." (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 371 [58 Cal.Rptr.2d 747], internal citations omitted.)

- "It would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far. [¶] ... [¶] Alternatively, the Court of Appeals suggested that [the employer] could have replaced [plaintiff] on his Saturday shift with other employees through the payment of premium wages ... . To require [the employer] to bear more than a de minimus cost ... is an undue hardship. Like abandonment of the seniority system, to require [the employer] to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion." (*TWA v. Hardison* (1977) 432 U.S. 63, 81, 84 [97 S.Ct. 2264, 53 L.Ed.2d 113], footnote omitted.)

- "We hold that showing 'more than a *de minimis* cost,' as that phrase is used in common parlance, does not suffice to establish 'undue hardship' under Title VII. [*TWA v.*] *Hardison* cannot be reduced to that one phrase. In describing an employer's 'undue hardship' defense, *Hardison* referred repeatedly to 'substantial' burdens, and that formulation better explains the decision. We therefore … understand *Hardison* to mean that 'undue hardship' is shown when a burden is substantial in the overall context of an employer's business. This fact-specific inquiry comports with both *Hardison* and the meaning of 'undue hardship' in ordinary speech." (*Groff v. DeJoy* (2023) 600 U.S. 447 [143 S.Ct. 2279, 2294, 216 L.Ed.2d 1041], original italics, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1025, 1026

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment and Housing Act*, ¶¶ 7:151, 7:215, 7:305, 7:610, 7:631, 7:640−7:641 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.52[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*,

§§ 115.35[2][a]–[c], 115.54, 115.91 (Matthew Bender)

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

1 Lindemann and Grossman, Employment Discrimination Law (3d ed.) Religion, pp. 227–234 (2000 supp.) at pp. 100–105

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

- Employment in a Comparable Position. Government Code section 12945.2(b)(6).
- Employment in a Comparable Position. Cal. Code Regs., tit. 2, § 11087~~(g)~~(i).
- "[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 (Matthew Bender)

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

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff*] claims that [*name of defendant*] denied [him/her/*nonbinary pronoun*] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her/*nonbinary pronoun*] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[*insert other actionable characteristic*]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [*name of plaintiff*];**

2. **[That a substantial motivating reason for** [*name of defendant*]**'s conduct was [its perception of] [*name of plaintiff*]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*insert other actionable characteristic*]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*insert other actionable characteristic*]] of a person whom [*name of plaintiff*] was associated with was a substantial motivating reason for [*name of defendant*]'s conduct;]

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

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

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Unruh Civil Rights Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Civil Rights Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Civil Rights Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Civil Rights Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. Of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*Marina Point, Ltd. V. Wolfson* (1982) 30 Cal.3d 721, 736 [180 Cal.Rptr. 496, 640 P.2d 115].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra,* 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.
- Remedies Under Unruh Civil Rights Act. Civil Code section 52.
- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)

- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706].)

- "A plaintiff can recover under the Unruh Civil Rights Act on two alternate theories: (1) a violation of the ADA [citation]; or (2) denial of access to a business establishment based on intentional discrimination." (*Martin v. Thi E-Commerce, LLC* (2023) 95 Cal.App.5th 521, 527 [313 Cal.Rptr.3d 488].)

- "To state a claim under the Unruh Civil Rights Act, a plaintiff must allege the defendant is a business establishment that intentionally discriminates against and/or denies plaintiff full and equal treatment of a service, advantage, or accommodation based on plaintiff's protected status." (*Liapes v. Facebook, Inc.* (2023) 95 Cal.App.5th 910, 922 [313 Cal.Rptr.3d 330].)

- "A person who aids and abets the commission of an offense, such as an intentional tort, may be liable if the person ' "knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act" ' or ' "gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." ' A person can be liable for aiding and abetting violations of civil rights laws." (*Liapes, supra,* 95 Cal.App.5th at p. 926, internal citations omitted.)

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- ~~Whether a defendant is a "business establishment" is decided as an issue of law~~"[W]e proceed to decide whether [defendant] is a business establishment. The resolution of this issue is one of law." (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "When a plaintiff has visited a business's website with intent to use its services and alleges that the business's terms and conditions exclude him or her from full and equal access to its services, the plaintiff need not enter into an agreement with the business to establish standing under the Unruh Civil Rights Act. In general, a person suffers discrimination under the Act when the person presents himself or herself to a business with an intent to use its services but encounters an exclusionary policy or practice that prevents him or her from using those services. We conclude that this rule applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store. Although mere awareness of a business's discriminatory policy or practice is not enough for standing under the Act, entering into

an agreement with the business is not required." (*White v. Square, Inc.* (2019) 7 Cal.5th 1019, 1023 [250 Cal.Rptr.3d 770, 446 P.3d 276].)

- "We hold that including websites connected to a physical place of public accommodation is not only consistent with the plain language of Title III, but it is also consistent with Congress's mandate that the ADA keep pace with changing technology to effectuate the intent of the statute." (*Thurston v. Midvale Corp.* (2019) 39 Cal.App.5th 634, 644 [252 Cal.Rptr.3d 292].)

- "As to intentional discrimination, the California Supreme Court has held that the discriminatory effect of a facially neutral policy or action is not alone a basis for inferring intentional discrimination under the Unruh Civil Rights Act. It follows that we cannot infer intentional discrimination from [plaintiff's] alleged facts that he made [defendant] aware of the discriminatory effect of [defendant's] facially neutral website, and that [defendant] did not ameliorate these effects." (*Martinez v. Cot'n Wash, Inc.* (2022) 81 Cal.App.5th 1026, 1032 [297 Cal.Rptr.3d 712], internal citation omitted.)

- "Beyond the pleading stage, if a plaintiff wants to prevail on an Unruh Civil Rights Act claim, he or she must present sufficient evidence to overcome the online defendant's argument that he or she 'did not actually possess a *bona fide intent* to sign up for or use its services.' " (*Thurston v. Omni Hotels Management Corp.* (2021) 69 Cal.App.5th 299, 307 [284 Cal.Rptr.3d 341], internal citation omitted, original italics.)

- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)

- "[T]he protection against discrimination afforded by the Unruh Act applies to 'all persons,' and is not reserved for restricted categories of prohibited discrimination." (*Marina Point, Ltd., supra,* 30 Cal.3d at p. 736.)

- "Nevertheless, the enumerated categories, bearing the 'common element' of being 'personal' characteristics of an individual, necessarily confine the Act's reach to forms of discrimination based on characteristics similar to the statutory classifications—such as 'a person's geographical origin, physical attributes, and personal beliefs.' The 'personal characteristics' protected by the Act are not defined by 'immutability, since some are, while others are not [immutable], but that they represent traits, conditions, decisions, or choices fundamental to a person's identity, beliefs and self-definition.' " (*Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1145 [228 Cal.Rptr.3d 336].)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "The Act applies not merely in situations where businesses exclude individuals altogether, but also 'where unequal treatment is the result of a business practice.' 'Unequal treatment includes offering price discounts on an arbitrary basis to certain classes of individuals.' " (*Candelore, supra,* 19 Cal.App.5th at pp. 1145–1146, internal citations omitted.)

- "Race discrimination claims under … the Unruh Civil Rights Act follow the analytical framework established under federal employment law. Although coaches are different from 'ordinary employers,' the *McDonnell Douglas* framework strikes the appropriate balance in evaluating race discrimination claims brought by college athletes:… ." (*Mackey v. Board of Trustees of California State University* (2019) 31 Cal.App.5th 640, 661 [242 Cal.Rptr.3d 757], internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who … operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its

facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra,* 242 Cal.App.4th at p. 1395.)

- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' … [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra,* 242 Cal.App.4th at p. 1399.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. … '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.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529−530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)

- "[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training." (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 994–1015

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10–116.16 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* § 35.20 et seq. (Matthew Bender)

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

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

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

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

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

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

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

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

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

New June 2015; Revised May 2020

Directions for Use

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

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

The statute requires that the employer's retaliatory act be "due to" the employee's refusal to release the

medical information. (Civ. Code, § 56.20(b).) One court has instructed the jury that the refusal to release must be a "motivating reason" for the retaliation. (See *Kao, supra,* 229 Cal.App.4th at p. 453.) With regard to the causation standard under the Fair Employment and Housing Act, the California Supreme Court has held that the protected activity must have been a *substantial* motivating reason. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

Sources and Authority

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

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

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

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

Secondary Sources

2 Witkin, California Evidence (5th ed. 2012) Witnesses, § 540

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

3708. Peculiar-Risk Doctrine

[*Name of plaintiff***] claims that even if [***name of independent contractor***] was not an employee, [***name of defendant***] is responsible for [***name of independent contractor***]'s conduct because the work involved a special risk of harm.**

A special risk of harm is a recognizable danger that arises out of the nature of the work or the place where it is done and requires specific safety measures appropriate to the danger. A special risk of harm may also arise out of a planned but unsafe method of doing the work. A special risk of harm does not include a risk that is unusual, abnormal, or not related to the normal or expected risks associated with the work.

To establish this claim, [*name of plaintiff***] must prove each of the following:**

1. **That the work was likely to involve a special risk of harm to others;**

2. **That [***name of defendant***] knew or should have known that the work was likely to involve this risk;**

3. **That [***name of independent contractor***] failed to use reasonable care to take specific safety measures appropriate to the danger to avoid this risk; and**

4. **That [***name of independent contractor***]'s failure was a cause of harm to [***name of plaintiff***].**

[In deciding whether [*name of defendant***] should have known the risk, you should consider [his/her/***nonbinary pronoun***/its] knowledge and experience in the field of work to be done.]**

New September 2003

Sources and Authority

- "The doctrine of peculiar risk is an exception to the common law rule that a hirer was not liable for the torts of an independent contractor. Under this doctrine, 'a person who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligent performance of the work causes injuries to others. By imposing such liability without fault on the person who hires the independent contractor, the doctrine seeks to ensure that injuries caused by inherently dangerous work will be compensated, that the person for whose benefit the contracted work is done bears responsibility for any risks of injury to others, and that adequate safeguards are taken to prevent such injuries.' This doctrine of peculiar risk thus represents a limitation on the common law rule and a corresponding expansion of hirer vicarious liability." (*Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, 646−647 [182 Cal.Rptr.3d 803], internal citation omitted.)

- ~~In determining the applicability of the doctrine of peculiar risk, a~~ "A critical inquiry in determining the applicability of the doctrine of peculiar risk "~~is~~ is whether the work for which the contractor was hired involves a risk that is 'peculiar to the work to be done,' arising either from the nature or the location of the work and ' "against which a reasonable person would recognize the necessity of taking special precautions." ' " (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 695 [21 Cal.Rptr.2d 72, 854 P.2d 721], internal citations omitted.)

- "The courts created this exception in the late 19th century to ensure that innocent third parties injured by inherently dangerous work performed by an independent contractor for the benefit of the hiring person could sue not only the contractor, but also the hiring person, so that in the event of the contractor's insolvency, the injured person would still have a source of recovery." (*Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 258 [74 Cal.Rptr.2d 878, 955 P.2d 504].)

- "The analysis of the applicability of the peculiar risk doctrine to a particular fact situation can be broken down into two elements: (1) whether the work is likely to create a peculiar risk of harm unless special precautions are taken; and (2) whether the employer should have recognized that the work was likely to create such a risk." (*Jimenez v. Pacific Western Construction Co.* (1986) 185 Cal.App.3d 102, 110 [229 Cal.Rptr. 575].)

- "Whether the particular work which the independent contractor has been hired to perform is likely to create a peculiar risk of harm to others unless special precautions are taken is ordinarily a question of fact." (*Castro v. State of California* (1981) 114 Cal.App.3d 503, 511 [170 Cal.Rptr. 734], internal citations omitted; but see *Jimenez, supra,* 185 Cal.App.3d at pp. 109–111 [proper in this case for trial court to find peculiar risk as a matter of law].)

- "[T]he hiring person's liability is cast in the form of the hiring person's breach of a duty to see to it that special precautions are taken to prevent injuries to others; in that sense, the liability is 'direct.' Yet, peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability … is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work. … 'The conclusion that peculiar risk is a form of vicarious liability is unaffected by the characterization of the doctrine as "direct" liability in situations when the person hiring an independent contractor 'fails to provide in the contract that the contractor shall take [special] precautions.' " (*Toland, supra,* 18 Cal.4th at p. 265.)

- "A peculiar risk may arise out of a contemplated and unsafe method of work adopted by the independent contractor." (*Mackey v. Campbell Construction Co*. (1980) 101 Cal.App.3d 774, 785-786 [162 Cal.Rptr. 64].)

- "The term 'peculiar risk' means neither a risk that is abnormal to the type of work done, nor a risk that is abnormally great; it simply means 'a special, recognizable danger arising out of the work itself.' For that reason, as this court has pointed out, the term 'special risk' is probably a more accurate description than 'peculiar risk,' which is the terminology used in the Restatement." (*Privette, supra*, 5 Cal.4th at p. 695, internal citations omitted.)

- "Even when work performed by an independent contractor poses a special or peculiar risk of harm, ...

the person who hired the contractor will not be liable for injury to others if the injury results from the contractor's 'collateral' or 'casual' negligence." (*Privette, supra,* 5 Cal.4th at p. 696.)

- " 'Casual' or 'collateral' negligence has sometimes been described as negligence in the operative detail of the work, as distinguished from the general plan or method to be followed. Although this distinction can frequently be made, since negligence in the operative details will often not be within the contemplation of the employer when the contract is made, the distinction is not essentially one between operative detail and general method. 'It is rather one of negligence which is unusual or abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence which creates only the normal or contemplated risk.' " (*Aceves v. Regal Pale Brewing Co.* (1979) 24 Cal.3d 502, 510 [156 Cal.Rptr. 41, 595 P.2d 619], overruled on other grounds in *Privette, supra*, 5 Cal.4th at p. 702, fn. 4.)

- "[T]he question is whether appellant's alleged injuries resulted from negligence which was unusual or abnormal, creating a new risk not inherent in the work itself or in the ordinary or prescribed way of doing it, and not reasonably foreseeable by respondent; or whether the injuries were caused by normal negligence which precipitated a contemplated special risk of harm which was itself 'peculiar to the work to be done, and arising out of its character, or out of the place where it is to be done, against which a reasonable man would recognize the necessity of taking special precautions.' This question, like the broader issue of whether there was a peculiar risk inherent in the work being performed, is a question of fact to be resolved by the trier of fact." (*Caudel v. East Bay Municipal Utility Dist.* (1985) 165 Cal.App.3d 1, 9 [211 Cal.Rptr. 222].)

- "[T]he dispositive issue for purposes of applying the peculiar risk doctrine to the present case is whether there was a direct relationship between the accident and the 'particular work performed' by [contractor]. In other words, if the 'character' of the work contributed to the accident, the peculiar risk doctrine applies. If the accident resulted from 'ordinary' use of the vehicle, the peculiar risk doctrine does not apply, notwithstanding the vehicle's size and weight." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 309 [111 Cal.Rptr.3d 787], internal citation omitted.)

- "Nevertheless, we determined that the doctrine of peculiar risk does not apply when an independent contractor 'seeks to hold the general contractor vicariously liable for injuries arising from risks inherent in the nature *or the location* of the hired work over which the independent contractor has, through the chain of delegation, been granted control.' " (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 52 [282 Cal.Rptr.3d 658, 493 P.3d 212], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1394–1396

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][b] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][b] (Matthew Bender)

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

248.22, 248.32[3] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.41 et seq. (Matthew Bender)

California Civil Practice: Torts § 3:22 (Thomson Reuters)

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.]

[A disclosure is protected even though the [agency/employer] already knew about the information disclosed.]

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, November 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.

Labor Code section 1102.5(b) applies even when an employee discloses information to an employer or agency that already knew about the violation. (*People ex rel. Garcia-Brower v. Kolla's Inc.* (2023) 14 Cal.5th 719, 721 [308 Cal.Rptr.3d 388, 529 P.3d 49].)

"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 v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703, 718 [289 Cal.Rptr.3d 572, 503 P.3d 659]; 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.)

- "Section 1102.6 prescribes a two-part burden-shifting framework for deciding employee retaliation claims. It states: 'In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing

evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.' " (*Zirpel v. Alki David Productions, Inc.* (2023) 93 Cal.App.5th 563, 573 [310 Cal.Rptr.3d 730], 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.)

- "[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.)

- "The question here is whether a report of unlawful activities made to an employer or agency that already knew about the violation is a protected 'disclosure' within the meaning of section 1102.5(b). We hold it is." (*People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 721.)

- "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 v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259], disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)

- "[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, disapproved on other grounds in *People ex rel. Garcia-Brower, supra,* 14 Cal.5th at p. 734.)

- "[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.)

- "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 v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268], 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, §§ 302–307A, 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)

21 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*, §§ 100.33, 100.42, 100.45, 100.48, 100.60–100.61A (Matthew Bender)

Item number: 03

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/4/24

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 45)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Judicial Council of California Civil Jury Instructions (CACI): Revise CACI Nos. 372, VF-300, VF-400, 1009A, 2500, 2501, 2502, 2513, 2521A, 2521B, 2521C, 2540, 2541, 2547, 2743, 3066, 4001, 4002, 4004, 4005, 4006, 4007, 4008, VF-4000, 4328, 5009, 5012, and all other verdict forms; and revoke CACI No. 4001.

Committee or other entity submitting the proposal:
Advisory Committee on Civil Jury Instructions

*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*): 10/26/23
Project description from annual agenda: 1. Maintenance—Case Law; 2. Maintenance—Legislation; 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

455 Golden Gate Avenue · San Francisco, California 94102-3688

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 24-073
For business meeting on May 17, 2024

Title
Jury Instructions: Civil Jury Instructions (Release 45)

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 17, 2024

Date of Report
March 21, 2024

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

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of 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. Upon Judicial Council approval, the instructions will be published in the official midyear supplement to the 2024 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 17, 2024, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court:

1. Revisions to 27 instructions and verdict forms: CACI Nos. 372, VF-300, VF-400, 1009A, 2500, 2501, 2502, 2513, 2521A, 2521B, 2521C, 2540, 2541, 2547, 2743, 3066, 4000, 4002, 4004, 4005, 4006, 4007, 4008, VF-4000, 4328, 5009, and 5012; and
2. Revocation of CACI No. 4001.

A table of contents and the revised civil jury instructions and verdict forms are attached at pages 6–108.

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 *CACI* 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 45 of *CACI*. The council approved release 44 at its November 2023 meeting.

Analysis/Rationale

A total of 28 instructions and verdict forms are presented in this release.[2] In addition, at its meeting on April 4, 2024, the Judicial Council's Rules Committee approved changes to 9 other instructions under a delegation of authority from the council to the Rules Committee.[3]

The recommended revisions to the instructions are 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.

Revised instructions

CACI No. 2501, *Affirmative Defense—Bona fide Occupational Qualification*. A comment received for last year's release 44 urged the committee to develop an instruction addressing an employer's bona fide occupational qualification (BFOQ) defense for employees who are pregnant, recovering from childbirth, or having related medical conditions under Government

[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] The committee also proposes two global changes to be made to all verdict forms, discussed below. These proposed changes are demonstrated in CACI No. VF-300 and CACI No. VF-400, which are attached at pages 103–108. CACI No. VF-4000 has a substantive change as well as demonstrating the global change shown in VF-300.

[3] 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.

Code section 12945(a). In the current release, the committee proposed adding "not to offer an accommodation" to the existing BFOQ instruction as a bracketed option; the committee's proposal inadvertently did not include adding a citation to the source of the proposed change (section 12945) in the Directions for Use or the Sources and Authority, which caused some confusion. The committee thus recommends adding (1) a citation in the Sources and Authority to section 12945 and (2) a sentence to the Directions for Use about the need for modification if the BFOQ defense relates to allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. But based on input from commenters, the committee no longer proposes changes to the text of the instruction. Because the existing elements of CACI No. 2501 are not formulated to cover a failure to accommodate claim without modification, the committee will consider in a future release additional changes to the instruction or a new BFOQ instruction for use in the context of an employer's failure to accommodate.

Fair Employment and Housing Act (FEHA). Several CACI instructions in the FEHA series include as an essential element to be proved that the defendant is an employer (or other covered entity). Others are drafted for use in cases in which the defendant's status as an employer (or other covered entity) is assumed. The Supreme Court in *Raines v. U.S. Healthworks Medical Group* recently held that a business entity acting as an agent of an employer may be held directly liable as an "employer" for alleged violations of FEHA.[4] The committee recommends citing the new case in the Sources and Authority of several instructions and noting in the Directions for Use the potential need for modification if the defendant's status as an employer is disputed. One commenter did not view the recommended changes as necessary, especially those relating to work environment harassment. Two commenters supported the additions. A fourth commenter proposed language limiting the court's holding, which the committee has excerpted in the Sources and Authority.

Lanterman-Petris-Short Act (LPS). Senate Bill 43 (Stats. 2023, ch. 637) updated LPS conservatorship law. Before SB 43, people were eligible for LPS conservatorship if a serious mental illness or chronic alcoholism left them unable to secure food, clothing, or shelter. SB 43 expanded eligibility for LPS conservatorship to include people who are unable to provide for their personal safety or necessary medical care, in addition to food, clothing, or shelter. In addition, severe substance use disorder and a co-occurring mental health disorder with severe substance use disorder were added to the conditions which may support conservatorship based on the inability to secure basic personal needs. These changes were largely implemented by expanding the definition of "gravely disabled." The committee recommends revisions to several instructions in the LPS series to conform them to this recent legislation.

CACI No. 4328, *Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking*. Recent legislation expanded the affirmative defense to eviction available to tenants when an eviction is based on

[4] (2023) 15 Cal.5th 268 [312 Cal.Rptr.3d 301, 534 P.3d 40].

acts of violence or abuse.[5] Senate Bill 1017 made the defense available when the abuse or violence is committed against a tenant, as well as against a tenant's immediate family member, or a tenant's household member. (Code Civ. Proc., § 1161.3(b).) The eviction protections under section 1161.3 also include a broader range of violent acts. In addition to domestic violence, sexual assault, stalking, human trafficking, and elder and dependent adult abuse, SB 1017 added three categories of crimes of violence. (§ 1161.3(a)(1).) Another change concerns what constitutes documentation of the abuse or violence for notifying the landlord of the abuse or violence. (§ 1161.3(a)(2)(D).)

The committee recommends retitling the instruction as *Affirmative Defense—Victim of Abuse or Violence* and refining the instruction based on the amendments to section 1161.3. Three commenters observed that the proposal retained language from a previous version of section 1161.3 about a plaintiff giving "at least three days' notice" before terminating a tenancy based on an act of abuse or violence. Current law requires the expiration of a three-day notice requiring the tenant not to voluntarily permit or consent to the presence of the perpetrator of abuse or violence on the premises. (§ 1161.3(b)(2)(B)(ii).) The committee has refined the instruction to correct the phrasing in elements 2 and 3 of the second half of the instruction. These three commenters also advocated for the instruction to address new partial eviction procedures under section 1174.27 if the perpetrator of abuse or violence is also a tenant in residence of the same dwelling unit as the tenant, the tenant's immediate family member, or the tenant's household member. The committee will consider the suggestion in the next cycle.

Global Changes to Verdict Forms. Each verdict form in *CACI* has a final sentence to instruct the presiding juror what to do after a verdict has been reached. The sentence currently states, "After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom." A trial judge (now retired) suggested that the committee consider deleting the final clause about presenting the verdict in the courtroom. In that trial judge's experience, the existing language caused jurors to believe that they would have to present orally in open court and that belief had the effect of discouraging jurors from agreeing to serve as the presiding juror. Because verdict forms not referring to courtroom presentation would be equally effective in advising the jury what to do once a verdict has been reached, the committee recommends deleting the final clause from the final sentence of all verdict forms. An example of this deletion as recommended is shown in CACI Nos. VF-300, VF-400, and VF-4000.

The committee also recommends deleting the word "being" from the introductory clause of a stock sentence in the Directions for Use of a number of verdict forms. The current phrasing is, "If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest … ." An example of this deletion (and the one discussed above) is shown in CACI No. VF-400.

[5] Sen. Bill 1017 (Stats. 2022, ch. 558); Assem. Bill 1756 (Stats. 2023, ch. 478).

Policy implications

The committee endeavors to express the law in plain English. Except for language choices, there are generally no policy implications.

Comments

The proposed additions and revisions in *CACI* circulated for comment from January 30 through March 5, 2024. Comments were received from eight commenters: a lawyer, two bar associations (California Lawyers Association and Orange County Bar Association), and five professional organizations (Association of Southern California Defense Counsel, Civil Justice Association of California, Family Violence Appellate Project, Public Law Center, and Western Center on Law & Poverty). Most commenters submitted comments on multiple instructions and verdict forms. No particular instruction garnered unusual attention or opposition.[6]

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 109–158.

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 from members of the legal community that did not result in recommendations for this release. Some suggestions were deferred for further consideration; others were declined for lack of support.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal.

Attachments and Links

1. CACI Nos. 372, 1009A, 2500, 2501, 2502, 2513, 2521A, 2521B, 2521C, 2540, 2541, 2547, 2743, 3066, 4000, 4001, 4002, 4004, 4005, 4006, 4007, 4008, VF-4000, 4328, 5009, 5012, VF-300, VF-400, at pages 6–108
2. Chart of comments, at pages 109–158

[6] Two commenters identified a recent Court of Appeal case, *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507], that flagged potential issues related to CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. That case was not yet final when the invitation to comment (CACI 24-01) circulated. The committee will consider the commenters' suggestions and the *Acosta* decision at its next meeting.

TABLE OF CONTENTS
CIVIL JURY INSTRUCTIONS
Release 45; May 2024

*These verdict forms changes will be applied globally across all the verdict forms in the Judicial Council of California Civil Jury Instructions.

372. Common Count: Open Book Account

A book account is a written record of the credits and debts between parties [to a contract/in a fiduciary relationship]. [The contract may be oral, in writing, or implied by the parties' words and conduct.] A book account is "open" if entries can be added to it from time to time.

[*Name of plaintiff***] claims that there was an open book account in which financial transactions between the parties were recorded and that [***name of defendant***] owes [him/her/***nonbinary pronoun***/it] money on the account. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] had financial transactions with each other;**

2. **That [***name of plaintiff***], in the regular course of business, kept [a written/an electronic] account of the debits and credits involved in the transactions;**

3. **That [***name of defendant***] owes [***name of plaintiff***] money on the account; and**

4. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

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*New December 2005; Revised November 2019, May 2024**

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

Include the second sentence in the opening paragraph if the account is based on a contract rather than a fiduciary relationship. It is the contract that may be oral or implied; the book account must be in writing. (See Code Civ. Proc., § 337a [book account must be kept in a reasonably permanent form]; *Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65–66 [317 P.2d 155] [book account is a detailed statement kept in a *book*].)

Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 337a(a), (b) [defining and excluding "consumer debt" from the definition of "book account"]; see also Code Civ. Proc., § 425.30 [exempting "consumer debt" from "common counts"].)

Sources and Authority

- "Book Account" and "Consumer Debt" for Book Accounts Defined. Code of Civil Procedure section 337a(a), (b).

- " 'A book account may be deemed to furnish the foundation for a suit in assumpsit ... only when it contains a statement of the debits and credits of the transactions involved completely enough to

supply evidence from which it can be reasonably determined what amount is due to the claimant.' ... 'The term "account," ... clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.' " (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)

- "A book account is defined ... as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum does not constitute a book account." (*Joslin, supra,* 155 Cal.App.2d at pp. 65–66, internal citations omitted.)

- "A book account may furnish the basis for an action on a common count ' "... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)

- "A *book account* is a detailed statement of debit/credit transactions kept by a creditor in the regular course of business, and in a reasonably permanent manner. In one sense, *an open-book account* is an account with one or more items unsettled. However, even if an account is technically settled, the parties may still have an open-book account, if they anticipate possible future transactions between them." (*Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, fn. 5 [53 Cal.Rptr.3d 887, 150 P.3d 764], original italics, internal citation omitted.)

- "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra,* 174 Cal.App.3d at p. 708.)

- "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit* may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)

- "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim. Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "[S]ince the basic premise for pleading a common count ... is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and ... 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, §§ 561, 565

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, § 43.2820 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

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[*Name of plaintiff*] claims that [he/she/*nonbinary pronoun*] was harmed by an unsafe concealed condition while employed by [*name of plaintiff's employer*] and working on [*name of defendant*]'s property. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] [owned/leased/occupied/controlled] the property;**
2. **That [*name of defendant*] knew, or reasonably should have known, of a preexisting unsafe concealed condition on the property;**
3. **That [*name of plaintiff's employer*] neither knew nor could be reasonably expected to know of the unsafe concealed condition;**
4. **That the condition was not part of the work that [*name of plaintiff's employer*] was hired to perform;**
5. **That [*name of defendant*] failed to warn [*name of plaintiff's employer*] of the condition;**
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.**

An unsafe condition is concealed if either it is not visible or its dangerous nature is not apparent to a reasonable person.

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*Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2011, May 2024**

Directions for Use

This instruction is for use if a concealed dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property.

Elements 3 and 4 express the independent contractor's limited duty to inspect the premises for potential safety hazards. (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 53–54 [282 Cal.Rptr.3d 658, 493 P.3d 212].)

For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on the hirer's retained control over the contractor's performance of work, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner~~'s~~ providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

Sources and Authority

- "[T]he hirer as landowner may be independently liable to the contractor's employee, even if it does not retain control over the work, if: (1) it knows or reasonably should know of a concealed, preexisting hazardous condition on its premises; (2) the contractor does not know and could not reasonably ascertain the condition; and (3) the landowner fails to warn the contractor." (*Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 675 [36 Cal.Rptr.3d 495, 123 P.3d 931].)

- "[T]here is no reason to distinguish conceptually between premises liability based on a hazardous substance that is concealed because it is invisible to the contractor and known only to the landowner and premises liability based on a hazardous substance that is visible but is known to be hazardous only to the landowner. If the hazard is not reasonably apparent, and is known only to the landowner, it is a concealed hazard, whether or not the substance creating the hazard is visible." (*Kinsman, supra*, 37 Cal.4th at p. 678.)

- "A landowner's duty generally includes a duty to inspect for concealed hazards. But the responsibility for job safety delegated to independent contractors may and generally does include explicitly or implicitly a limited duty to inspect the premises as well. Therefore, … the landowner would not be liable when the contractor has failed to engage in inspections of the premises implicitly or explicitly delegated to it. Thus, for example, an employee of a roofing contractor sent to repair a defective roof would generally not be able to sue the hirer if injured when he fell through the same roof due to a structural defect, inasmuch as inspection for such defects could reasonably be implied to be within the scope of the contractor's employment. On the other hand, if the same employee fell from a ladder because the wall on which the ladder was propped collapsed, assuming that this defect was not related to the roof under repair, the employee may be able to sustain a suit against the hirer. Put in other terms, the contractor was not being paid to inspect the premises generally, and therefore the duty of general inspection could not be said to have been delegated to it. Under those circumstances, the landowner's failure to reasonably inspect the premises, when a hidden hazard leads directly to the employee's injury, may well result in liability." (*Kinsman, supra,* 37 Cal.4th at pp. 677–678, internal citations omitted.)

- "We emphasize that our holding applies only to hazards on the premises of which the independent contractor is aware or should reasonably detect. Although we recognized in *Kinsman* that the delegation of responsibility for workplace safety to independent contractors may include a limited duty to inspect the premises, it would not be reasonable to expect [an independent contractor] to identify every conceivable dangerous condition on the roof given that he is not a licensed roofer and was not hired to repair the roof." (*Gonzalez, supra,* 12 Cal.5th at p. 54, internal citations omitted.)

- "[T]he initial formulation of the *Kinsman* test asks whether the independent contractor could reasonably have discovered the latent hazardous condition; the gloss on the test for obvious hazards asks whether knowledge of the hazard is inadequate to prevent injury. Both of these tests are defeated where, as here, there is undisputed evidence that the hazard could reasonably have been discovered (by inspecting the ladder) and, once discovered, avoided (by getting another ladder)." (*Johnson v.*

Raytheon Co. (2019) 33 Cal.App.5th 617, 632 [245 Cal.Rptr.3d 282].)

- "The court also told the jury that [defendant] was liable if its negligent use or maintenance of the property was a substantial factor in harming [plaintiff] (see CACI Nos. 1000, 1001, 1003 & 1011). These instructions were erroneous because they did not say that these principles would only apply to [defendant] if the hazard was concealed." (*Alaniz v. Sun Pacific Shippers, L.P.* (2020) 48 Cal.App.5th 332, 338–339 [261 Cal.Rptr.3d 702].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1259 et seq.

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶¶ 6:4, 6:9.12 (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, §§ 15.04[4], 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.~~23~~20 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability,* §§ 421.11–421.12 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability,* § 178.20 et seq. (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.**

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*New September 2003; Revised April 2009, June 2011, June 2012, June 2013, May 2020, May 2024**

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~~If the defendant's status as employer is in dispute, the court may need to instruct the

jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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~~,~~." ~~"Protective Hairstyles," and "Reproductive Health Decisionmaking."~~ Government Code section 12926(w)~~, (x), (y)~~.
- "Protective Hairstyles." Government Code section 12926(x).
- "Reproductive Health Decisionmaking." Government Code section 12926(y).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of

employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "[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)

2501. Affirmative Defense—Bona fide Occupational Qualification

[*Name of defendant*] claims that [his/her/*nonbinary pronoun*/its] decision [to ~~[~~discharge/[*other adverse employment action*]] [*name of plaintiff*] was lawful because [he/she/*nonbinary pronoun*/it] was entitled to consider [*protected status—for example, race, gender, or age*] as a job requirement. To succeed, [*name of defendant*] must prove all of the following:

1. **That the job requirement was reasonably necessary for the operation of [*name of defendant*]'s business;**

2. **That [*name of defendant*] had a reasonable basis for believing that substantially all [*members of protected group*] are unable to safely and efficiently perform that job;**

3. **That it was impossible or highly impractical to consider whether each [applicant/employee] was able to safely and efficiently perform the job; and**

4. **That it was impossible or highly impractical for [*name of defendant*] to rearrange job responsibilities to avoid using [*protected status*] as a job requirement.**

*New September 2003; Revised May 2024**

Directions for Use

An employer may assert the bona fide occupational qualification (BFOQ) defense where the employer has a practice that on its face excludes an entire group of individuals because of their protected status. Modifications will be necessary if the BFOQ defense is raised in a case involving allegations of failure to accommodate an employee who is pregnant, recovering from childbirth, or having related medical conditions. (Gov. Code, § 12945(a).)

Sources and Authority

- Bona fide Occupational Qualification. Government Code section 12940(a)(1).
- Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions. Government Code section 12945(a).
- Bona fide Occupational Qualification. Cal. Code Regs., tit. 2, § ~~7286.7(a)~~ 11010(a).
- Bona fide Occupational Qualification Under Federal Law. 42 U.S.C. § 2000e-2(e)(1).
- The BFOQ defense is a narrow exception to the general prohibition on discrimination. (*Bohemian Club v. Fair Employment & Housing Com.* (1986) 187 Cal.App.3d 1, 19 [231 Cal.Rptr. 769]; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.* (1991) 499 U.S. 187, 201 [111 S.Ct. 1196, 113 L.Ed.2d 158].)

- " '[I]n order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.' " (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19, quoting *Weeks v. Southern Bell Telephone & Telegraph Co.* (5th Cir. 1969) 408 F.2d 228, 235.)

- "First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business.' Secondly, the employer must show that the categorical exclusion based on [the] protected class characteristic is justified, i.e., that 'all or substantially all' of the persons with the subject class characteristic fail to satisfy the occupational qualification." (*Johnson Controls, Inc. v. Fair Employment & Housing Com.* (1990) 218 Cal.App.3d 517, 540 [267 Cal.Rptr. 158], quoting *Weeks*, *supra*, 408 F.2d at p. 235.)

- "Even if an employer can demonstrate that certain jobs require members of one sex, the employer must also 'bear the burden of proving that because of the nature of the operation of the business they could not rearrange job responsibilities ...' in order to reduce the BFOQ necessity." (*Johnson Controls, Inc.*, *supra*, 218 Cal.App.3d at p. 541; see *Hardin v. Stynchcomb* (11th Cir. 1982) 691 F.2d 1364, 1370–1371.)

- "Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is 'impossible or highly impractical' to deal with the older employees on an individualized basis." (*Western Airlines, Inc. v. Criswell* (1985) 472 U.S. 400, 414–415 [105 S.Ct. 2743, 86 L.Ed.2d 321], internal citation and footnote omitted.)

- "The Fair Employment and Housing Commission has interpreted the BFOQ defense in a manner incorporating all of the federal requirements necessary for its establishment. ... [¶] The standards of the Commission are ... in harmony with federal law regarding the availability of a BFOQ defense." (*Bohemian Club*, *supra*, 187 Cal.App.3d at p. 19.)

- "By modifying 'qualification' with 'occupational,' Congress narrowed the term to qualifications that affect an employee's ability to do the job." (*International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW*, *supra*, 499 U.S. at p. 201.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1032, ~~1033~~ 1034

Chin et al., California Practice Guide: Employment Litigation, Ch.9-C, *California Fair Employment and Housing Act (FEHA)*, ¶¶ 9:2380, 9:2382, 9:2400, 9:2430 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual Harassment, §§ 2.91–2.94

2 Wilcox, California Employment Law, Ch. 41, *Civil Actions Under Equal Employment Opportunity Laws*, §§ 41.94[3], 41.108 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.54[4], 115.101 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:84 (Thomson Reuters)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that 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/[***other covered relationship to defendant***]];**

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group-for example, persons over the age of 40***];**

4. **That [***name of plaintiff***] is [***protected status***];**

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

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

*New September 2003; Revised June 2011, May 2024**

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity. (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1405 [194 Cal.Rptr.3d 689].)

~~If element 1 is given~~If the defendant's status as employer is in dispute, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section

12940(a).

- Disparate Impact May Prove Age Discrimination. Government Code section 12941.1.

- Justification for Disparate Impact. Cal. Code Regs., tit. 2, §§ 11010(b), 11017(a), (e).

- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- "It is well settled that valid statistical evidence is required to prove disparate impact discrimination, that is, that a facially neutral policy has caused a protected group to suffer adverse effects. ' "Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group. … [S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." ' " (*Jumaane, supra,* 241 Cal.App.4th at p. 1405.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:530, 7:531, 7:535 (The Rutter Group)
1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation, § 2:23 (Thomson Reuters)

2513. Business Judgment for "At-Will" Employment

In California, employment is presumed to be "at will." ~~That~~ This means that an employer may [discharge/[*other adverse action*]] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory/retaliatory] reason.

New December 2013; Revised May 2024

Directions for Use

Give this instruction to advise the jury that the employer's adverse action is not illegal just because it is ill-advised. It has been held to be error not to give this instruction. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 20−24 [151 Cal.Rptr.3d 41].)

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- "[A] plaintiff in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise. … ' "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. … 'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is … whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason … does not have to be a reason that the judge or jurors would act on or approve.' " ' " (*Veronese, supra,* 212 Cal.App.4th at p. 21, internal citation omitted.)
- "[I]f nondiscriminatory, [defendant]'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*." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)
- "[U]nder the law [defendant] was entitled to exercise her business judgment, without second guessing. But [the court] refused to tell the jury that. That was error." (*Veronese, supra,* 212 Cal.App.4th at p. 24.)
- "An employment decision based on political concerns, even if otherwise unfair, is not actionable under section 12940 so long as the employee's race or other protected status is not a substantial factor in the decision." (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 355 [223 Cal.Rptr.3d 173].)
- "What constitutes satisfactory performance is of course a question ordinarily vested in the

employer's sole discretion. An employer is free to set standards that might appear unreasonable to outside observers, and to discipline employees who fail to meet those standards, so long as the standards are applied evenhandedly. But that does not mean that an employer conclusively establishes the governing standard of competence in an employment discrimination action merely by asserting that the plaintiff's performance was less than satisfactory. Evidence of the employer's policies and practices, including its treatment of other employees, may support a contention, and an eventual finding, that the plaintiff's job performance did in fact satisfy the employer's own norms." (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 742−743 [167 Cal.Rptr.3d 485].)

- "The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor." (*Cheal, supra,* 223 Cal.App.4th at p. 755.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 244 et seq.

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1017–1021

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

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, 7:530, 7:531, 7:535 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.01 et seq. (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.23 (Matthew Bender)

2521A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was subjected to harassment based on [his/her/***nonbinary pronoun***] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***];**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, November 2023, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element 2 if plaintiff was not actually a member of the protected class, but alleges harassment 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).)

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined*. If there are both employer and individual supervisor defendants (see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dept. of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].) Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).

- Harassment Because of Sex. Government Code section 12940(j)(4)(C).

- Person Providing Services Under Contract. Government Code section 12940(j)(5).

- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).

- Perception and Association. Government Code section 12926(o).

- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "To establish a prima facie case of a hostile work environment, [the plaintiff] must show that (1) [plaintiff] is a member of a protected class; (2) [plaintiff] was subjected to unwelcome harassment; (3) the harassment was based on [plaintiff's] protected status; (4) the harassment unreasonably interfered with [plaintiff's] work performance by creating an intimidating, hostile, or offensive work environment; and (5) defendants are liable for the harassment." (*Ortiz v. Dameron Hospital Assn.* (2019) 37 Cal.App.5th 568, 581 [250 Cal.Rptr.3d 1].)

- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)

- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dept. of Health Servs., supra,* 31 Cal.4th at p. 1042.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so

intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that *all* acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is *not* a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.3d 464].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

- "Under FEHA, an employer is strictly liable for harassment by a supervisor. However, an employer is only strictly liable under FEHA for harassment by a supervisor 'if the supervisor is acting in the capacity of supervisor when the harassment occurs.' 'The employer is *not* strictly liable for a supervisor's acts of harassment resulting from a completely private relationship unconnected with the employment and not occurring at the workplace or during normal working hours.' " (*Atalla v. Rite Aid Corp.* (2023) 89 Cal.App.5th 294, 309 [306 Cal.Rptr.3d 1], internal citations omitted, original italics.)

- "Here, [defendant] was jointly liable with its employees on a respondeat superior or vicarious liability theory on every cause of action in which it was named as a defendant." (*Bihun, supra,* 13 Cal.App.4th at p. 1000.)

- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)

- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an

abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "The stray remarks doctrine … 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." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted.)

- "[I]n reviewing the trial court's grant of [defendant]'s summary judgment motion, the Court of Appeal properly considered evidence of alleged discriminatory comments made by decision makers and coworkers along with all other evidence in the record." (*Reid, supra,* 50 Cal.4th at p. 545.)

- "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment, however liberalized it be." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 286 [100 Cal.Rptr.3d 296].)

- "In contending that the 'subjectively offensive' element was not proven, a defendant 'will assert that a plaintiff consented to the conduct through active participation in it, or was not injured because the plaintiff did not subjectively find it abusive.' [¶] [Evidence Code] Section 1106 limits the evidence the defendant may use to support this assertion. It provides that '[i]n any civil action alleging conduct

which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff … .' This general rule is, however, subject to the exception that it 'does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.' The term 'sexual conduct' within the meaning of section 1106 has been broadly construed to include 'all active or passive behavior (whether statements or actions), that either directly or through reasonable inference establishes a plaintiff's willingness to engage in sexual activity,' including 'racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits.' " (*Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874 [235 Cal.Rptr.3d 161], internal citations omitted.)

- "[A]llegations of a racially hostile work-place must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff." (*McGinest v. GTE Serv. Corp.* (9th Cir. 2004) 360 F.3d 1103, 1115.)

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1525 [169 Cal.Rptr.3d 794], original italics.)

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

- "The plaintiff must show that the harassing conduct took place because of the plaintiff's sex, but need not show that the conduct was motivated by sexual desire. For example, a female plaintiff can prevail by showing that the harassment was because of the defendant's bias against women; she need not show that it was because of the defendant's sexual interest in women. In every case, however, the plaintiff must show a discriminatory intent or motivation based on gender." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 114 [129 Cal.Rptr.3d 384], internal citations omitted.)

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1239–1240 [166 Cal.Rptr.3d 676].)

- "A recent legislative amendment modifies section 12940, subdivision (j)(4)(C) (a provision of FEHA specifying types of conduct that constitute harassment because of sex) to read: 'For purposes of this subdivision, "harassment" because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions. *Sexually harassing conduct need not be motivated by sexual desire*.' " (*Lewis, supra,* 224 Cal.App.4th at p. 1527, fn. 8, original italics.)

- "California courts have held so-called 'me too' evidence, that is, evidence of gender bias against employees other than the plaintiff, may be admissible evidence in discrimination and harassment cases." (*Meeks, supra,* 24 Cal.App.5th at p. 871.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-A, *Sources Of Law Prohibiting Harassment*, ¶¶ 10:18–10:19, 10:22, 10:31 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***] and that this harassment created a work environment for [***name of plaintiff***] that was hostile, intimidating, offensive, oppressive, or abusive.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That [***name of plaintiff***], although not personally subjected to harassing conduct, personally witnessed harassing conduct that took place in [his/her/***nonbinary pronoun***] immediate work environment;**

3. **That the harassing conduct was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor engaged in the conduct;]

   [*or***]**

   [That [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the conduct and failed to take immediate and appropriate corrective action;]**

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

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

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*Derived from former CACI No. 2521 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the alleged harassment did not occur in the workplace, the instruction should be modified as appropriate. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1051 [58 Cal.Rptr.2d 122] ["[A]s long as the harassment occurs in a work-related context, the employer is liable"].)

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the hostile environment is due to widespread sexual favoritism, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J.; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that

conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment**.**' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment**.**' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284-285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs., supra,* 31 Cal.4th at p. 1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of

the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2521C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was subjected to harassment based on sexual favoritism at [***name of defendant***] and that this harassment created a work environment that was hostile, intimidating, offensive, oppressive, or abusive. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences.**

To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [an employee of/an applicant for a position with/a person providing services under a contract with/an unpaid intern with/a volunteer with] [***name of defendant***];**

2. **That there was sexual favoritism in the work environment;**

3. **That the sexual favoritism was severe or pervasive;**

4. **That a reasonable [***describe member of protected group, e.g., woman***] in [***name of plaintiff***]'s circumstances would have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

5. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

6. **[***Select applicable basis of defendant's liability:***]**

   [That a supervisor [engaged in the conduct/created the sexual favoritism];]

   [*or***]**

   [That [*name of defendant***] [or [his/her/***nonbinary pronoun***/its] supervisors or agents] knew or should have known of the sexual favoritism and failed to take immediate and appropriate corrective action;]**

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

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

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*Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2024**

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is an employer or other entity covered by the FEHA. If the defendant is a labor organization, employment agency, apprenticeship training program or any training program leading to employment (rather than an employer), the instruction should be modified as appropriate. (See Gov. Code, § 12940(j)(1).) Further modification may be necessary if the defendant is a business-entity agent of an employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See *ibid.*) If the facts of the case support it, the instruction should be modified as appropriate for the applicant's circumstances.

For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or sexual orientation, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

In element 6, select the applicable basis of employer liability: (a) strict liability for a supervisor's harassing conduct, or (b) the employer's ratification of the conduct. For a definition of "supervisor," see CACI No. 2525, *Harassment—"Supervisor" Defined.* If there are both employer and individual supervisor defendants (see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*) and both are found liable, they are both jointly and severally liable for any damages. Comparative fault and Proposition 51 do not apply to the employer's strict liability for supervisor harassment. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042 [6 Cal.Rptr.3d 441, 79 P.3d 556]; see *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 [16 Cal.Rptr.2d 787], disapproved on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [25 Cal.Rptr.2d 109, 863 P.2d 179]; see also *Rashtian v. BRAC-BH, Inc.* (1992) 9 Cal.App.4th 1847, 1851 [12 Cal.Rptr.2d 411] [Proposition 51 cannot be applied to those who are without fault and only have vicarious liability by virtue of some statutory fiat].)

See also the Sources and Authority to CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.*

Sources and Authority

- Declaration of Legislative Intent With Regard to Application of the Laws About Harassment. Government Code section 12923.
- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).

- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "[T]he adjudicator's inquiry should center, dominantly, on whether the discriminatory conduct has unreasonably interfered with the plaintiff's work performance. To show such interference, 'the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.' " (*Harris v. Forklift Sys.* (1993) 510 U.S. 17, 25 [114 S.Ct. 367, 126 L.Ed.2d 295], conc. opn. of Ginsburg, J; see Gov. Code, § 12923(a) endorsing this language as reflective of California law.)
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him',

the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

- "The FEHA imposes two standards of employer liability for sexual harassment, depending on whether the person engaging in the harassment is the victim's supervisor or a nonsupervisory coemployee. The employer is liable for harassment by a nonsupervisory employee only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. This is a negligence standard. Because the FEHA imposes this negligence standard only for harassment 'by an employee other than an agent or supervisor', by implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs., supra,* 31 Cal.4th at pp. 1040–1041, original italics.)

- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra,* 31 Cal.4th at p. 1041, original italics.)

- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)

- "In order to be actionable, it must be shown that respondents knew, or should have known, of the alleged harassment and failed to take appropriate action." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 294 [156 Cal.Rptr.3d 851].)

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 363, 370

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40, 10:110–10:260 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.68, 2.75, Sexual and Other Harassment, §§ 3.1, 3.14, 3.17, 3.21, 3.36, 3.45

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.80[1][a], 41.81[1][b] (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[10][g][i] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:56 (Thomson Reuters)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*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].]**

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*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, May 2024**

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, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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~~ consider giving special instructions defining ~~"physical disability," "mental disability," and~~ "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

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 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).
- "The California Fair Employment and Housing Act, which defines 'employer' to 'include[]' 'any person acting as an agent of an employer,' permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer. We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have fewer than five employees. We base our conclusion on our interpretation of the FEHA's definition of employer; we express no

view of the scope of a business entity agent's possible liability under the FEHA's aider and abettor provision." (*Raines, supra,* 15 Cal.5th at p. 291, internal citations omitted.)

- "[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, §§ ~~1049~~ 1045–1051

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*, §§ 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

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***]].]**

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*New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013, May 2019, May 2023, May 2024**

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, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940~~(a)–(d)~~(b)–(h), (j), (k).)

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~~ consider giving special instructions defining ~~"physical disability," "mental disability," and~~ "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

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 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).
- "Under FEHA, an employer is required 'to make reasonable accommodation for the known physical or mental disability of an applicant or employee.' Relatedly, the employer is required 'to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability … .' " (*Lin v. Kaiser Foundation Hospitals* (2023) 88 Cal.App.5th 712, 728 [304 Cal.Rptr.3d 820], internal citations omitted.)
- "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, 1048

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~~ 115.20, 115.35, 115.92 (Matthew Bender)

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

2547. Disability-Based Associational Discrimination—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her/***nonbinary pronoun***] based on [his/her/***nonbinary pronoun***] association with a person with a disability. 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***] was [***specify basis of association or relationship, e.g., the brother of [name of associate]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of associate***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of associate] was covered under [plaintiff]'s employer-provided health care plan***];]**

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of associate***] because [***specify, e.g., [name of associate] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of associate***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

   [or]

   [[*Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

6. **[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;]

7. **That [*name of plaintiff*]'s association with [*name of associate*] was a substantial motivating reason for [*name of defendant*]'s [decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*]/conduct];**

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

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

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*New December 2014; Revised May 2017, May 2020, November 2023, May 2024**

Directions for Use

Give this instruction if plaintiff claims that the plaintiff was subjected to an adverse employment action because of the plaintiff's association with a person with a disability or perceived to have a disability. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA, which can include business entities acting as agents of employers. (Gov. Code, § 12926(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(b)–(h), (j), (k).)

Select a term to use throughout to describe the source of the person's disability. 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."

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (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].) Element 4 sets forth options for the three versions, which are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a person with a disability. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if

the court decides to impose this requirement.

Read the first option for element 6 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 the existence of an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 6 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 7 if either the second or third option is included for element 4.

Element 7 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]; *Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the question of whether the associate has a disability is disputed, ~~additional~~ consider giving special instructions defining "medical condition," "mental disability," and "physical disability." ~~may be required.~~ (See Gov. Code, § 12926(i), (j), (m) [defining "medical condition," "mental disability," and "physical disability"]; see also Cal. Code Regs., tit. 2, § 11065.)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Person Who Has or Is Perceived to Have a Disability Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)

- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action. *Rope* held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042, internal citation omitted.)

- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p. 658, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

- "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.)

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

Secondary Sources

~~8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1045–1051~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213–9:2215 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2], [4] (Matthew Bender)

~~11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.10, 115.23, 115.34 (Matthew Bender)~~

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff*] claims that [*name of defendant*] retaliated against [him/her/*nonbinary pronoun*] for [pursuing/assisting another in the enforcement of] [his/her/*nonbinary pronoun*] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] [*specify acts taken by plaintiff to invoke, enforce, or assist in the enforcement of the right to equal pay*];**

2. **That [*name of defendant*] [discharged/[*other adverse employment action*]] [*name of plaintiff*];**

3. **That [*name of plaintiff*]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [*name of defendant*]'s [discharging/[*other adverse employment action*]] [*name of plaintiff*];**

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

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

New May 2018; Revised May 2020, May 2024

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The ~~a~~Act prohibits adverse employment actions against an employee who has invoked the protections of or taken steps to enforce ~~the equal pay requirements of the act~~ it. ~~Also, the employer cannot prohibit an employee from disclosing that employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise that employee's rights.~~ (Lab. Code, § 1197.5(k)(1) [protecting the right of employees to invoke the protections of the Act, assist in enforcement of the Act, disclose their wages, discuss the wages of others, inquire about another employee's wages, or encourage other employees to exercise their rights under the Act].) Modify the instruction as necessary to describe the employee's protected activity in the first sentence. An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First, there must be a causal connection between the employee's ~~pursuit of equal pay~~ protected activity and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the

employee's ~~pursuit of equal pay~~ protected activity and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

If an employer takes adverse action within 90 days of an employee's exercise of rights protected by the Equal Pay Act, there is a rebuttable presumption in favor of the employee's claim. (Lab. Code, § 1197.5(k)(1).) Consider modifying this instruction and/or giving additional instructions regarding the rebuttable presumption.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).
- Rebuttable Presumption in Favor of Employee's Claim. Labor Code section 1197.5(k)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.20 (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)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

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

1. [**That by threats, intimidation or coercion, [*name of defendant*] caused [*name of plaintiff*] to reasonably believe that if [he/she/*nonbinary pronoun*] exercised [his/her/*nonbinary pronoun*] right [*insert right, e.g., "to vote"*], [*name of defendant*] would commit violence against [[him/her/*nonbinary pronoun*]/ [or] [his/her/*nonbinary pronoun*] property] and that [*name of defendant*] had the apparent ability to carry out the threats;]**

   [*or*]

   [That [*name of defendant*] acted violently against [[*name of plaintiff*]/ [and] [*name of plaintiff*]'s property] [to prevent [him/her/*nonbinary pronoun*] from exercising [his/her/*nonbinary pronoun*] right [*e.g., to vote*]/to retaliate against [*name of plaintiff*] for having exercised [his/her/*nonbinary pronoun*] right [*e.g., to vote*]];]

[2. **That [*name of defendant*] intended to deprive [*name of plaintiff*] of [his/her/*nonbinary pronoun*] enjoyment of the interests protected by the right [*e.g., to vote*];]**

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

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

*New September 2003; Renumbered from CACI No. 3025 and Revised December 2012, November 2018, May 2024**

Directions for Use

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

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(k).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) ~~For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law.~~ No case has been found, however, that applies the speech limitation to foreclose ~~such~~ a claim based on coercion without violence or a threat of violence, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203

Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

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

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages,* and CACI No. 3068, *Ralph Act—Damages and Penalty,* to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

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

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

- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

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

- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- ~~Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search~~

~~and seizure].)~~

- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)

- "The Legislature's purpose suggests to us that the coercive nature of a tax—however exorbitant or unfair that tax may be—was not what the Legislature had in mind when it forbade interference with legal rights by 'threat, intimidation, or coercion.' Plaintiffs have cited no case where economic or monetary pressures alone have been found to constitute coercion under the Bane Act." (*County Inmate Telephone Service Cases* (2020) 48 Cal.App.5th 354, 371 [262 Cal.Rptr.3d 1].)

- ~~Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1:~~ "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things." (Assembly Bill 2719 (Stats. 2000, ch. 98) [abrogating the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282]].)

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender, supra,* 217 Cal.App.4th at p. 981, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff.

That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)

- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)

- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' … . The first is a purely legal determination. Is the … right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that … right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra,* 17 Cal.App.5th at p. 803.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989 et seq.

Cheng et al., Cal. Fair Housing and Public Accommodations § 14:5 (The Rutter Group)

California Civil Practice: Civil Rights Litigation §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12[2] (Matthew Bender)

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

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.20 et seq.

(Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism] and therefore [should be placed in a conservatorship/the conservatorship should be renewed]. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled ~~due to a mental disorder or chronic alcoholism~~. To succeed on this claim, [***name of petitioner***] must prove beyond a reasonable doubt both of the following:**

1. **That [***name of respondent***] [has a [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder]/is impaired by chronic alcoholism]; and**

2. **That [***name of respondent***] is gravely disabled as a result of the [mental health disorder/severe substance use disorder/co-occurring mental health disorder and severe substance use disorder/chronic alcoholism].**

New June 2005; Revised June 2016, May 2022, May 2024

Directions for Use

Give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction.

Select the appropriate option in the first sentence depending on whether the case involves an initial petition to establish a conservatorship or a successive petition for reappointment. (Welf. & Inst. Code, §§ 5350, 5361(b).)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008 until January 1, 2026 (or an earlier date), do not include "severe substance use disorder" or "a co-occurring mental health disorder and severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].)

A different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. (Welf. & Inst. Code, § 5008(h)(1)(B).)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).

- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)

- "LPS Act commitment proceedings are subject to the due process clause because significant liberty interests are at stake. But an LPS Act proceeding is civil. '[T]he stated purposes of the LPS Act foreclose any argument that an LPS commitment is equivalent to criminal punishment in its design or purpose.' Thus, not all safeguards required in criminal proceedings are required in LPS Act proceedings." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1167 [231 Cal.Rptr.3d 79], internal citations omitted.)

- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly and only for those truly necessary cases where a 'gravely disabled' person is incapable of providing for his basic needs either alone or with help from others." (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- "The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- "[T]he trial court erred in accepting counsel's waiver of [conservatee]'s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- " 'The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.' An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment." (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382−383 [199 Cal.Rptr.3d 689].)

- "We … hold that capacity or willingness to accept treatment is a relevant factor to be considered on the issue of grave disability but is not a separate element that must be proven to establish a conservatorship." (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 703 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons."

(*Conservatorship of Davis, supra,* 124 Cal.App.3d at p. 328, disapproved on other grounds in *Conservatorship of K.P., supra,* 11 Cal.5th at p. 717.)

- "The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- "Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act's reach, according to the argument presented in this appeal." (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)

- "The party seeking imposition of the conservatorship must prove the proposed conservatee's grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury." (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)

- "Although there is no private right of action for a violation of section 5152, 'aggrieved individuals can enforce the [LPS] Act's provisions through other common law and statutory causes of action, such as negligence, medical malpractice, false imprisonment, assault, battery, declaratory relief, United States Code section 1983 for constitutional violations, and Civil Code section 52.1. [Citations.]' " (*Swanson v. County of Riverside* (2019) 36 Cal.App.5th 361, 368 [248 Cal.Rptr.3d 476].)

Secondary Sources

15 Witkin, Summary of California Law (11th ed. 2017) Wills and Probate, § ~~1007~~ 994

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, § ~~97~~ 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.~~30~~ 42 et seq. (Matthew Bender)

4001. "Mental Disorder" Explained

Revoked May 2024. Reserved for Future Use.

~~**The term "mental disorder" is limited to those disorders described in the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association. This book is sometimes referred to as "the DSM [***current edition, e.g., "IV"***]."**~~

~~*New June 2005*~~

~~Directions for Use~~

~~This instruction is not intended for cases proceeding on a theory of impairment by chronic alcoholism only.~~

~~Sources and Authority~~

~~"The term 'mental disorder' is limited to those disorders listed by the American Psychiatric Association in its Diagnostic and Statistical Manual of Mental Disorders (Cal. Admin. Code, tit. 9, § 813)." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 282, fn. 5 [139 Cal.Rptr. 357].) "Although this [administrative] regulation has since been repealed, the practice has been to continue using the same definition." (California Conservatorship Practice (Cont.Ed.Bar) § 23.11.)~~

~~Secondary Sources~~

~~3 Witkin, California Procedure (5th ed. 2008) Actions, § 97~~

~~2 California Conservatorship Practice (Cont.Ed.Bar) § 23.11~~

~~32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)~~

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for the person's basic needs for food, clothing, ~~or~~ shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include persons with intellectual disabilities by reason of the disability alone.]

[[*Insert one or more of the following*:**] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She/***Nonbinary pronoun***] must be unable to provide for the basic needs of food, clothing, ~~or~~ shelter, personal safety, or necessary medical care because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and a severe substance use disorder/impairment by chronic alcoholism].]**

["Personal safety" means the ability of a person to survive safely in the community without involuntary detention or treatment.]

["Necessary medical care" means care that a licensed health care practitioner, while operating within the scope of their practice, determines to be necessary to prevent serious deterioration of an existing physical medical condition, which, if left untreated, is likely to result in serious bodily injury. "Serious bodily injury" means an injury involving extreme physical pain, substantial risk of death, or protracted loss or impairment of function of a bodily member, organ, or of mental faculty, or requiring medical intervention, including but not limited to hospitalization, surgery, or physical rehabilitation.]

[If you find [*name of respondent***] will not take [his/her/***nonbinary pronoun***] prescribed medication without supervision and that a mental health disorder makes [him/her/***nonbinary pronoun***] unable to provide for [his/her/***nonbinary pronoun***] basic needs for food, clothing, ~~or~~ shelter, personal safety, or necessary medical care without such medication, then you may conclude [***name of respondent***] is gravely disabled.**

In determining whether [*name of respondent***] is gravely disabled, you may consider evidence that [he/she/***nonbinary pronoun***] did not take prescribed medication in the past. You may also consider evidence of [his/her/***nonbinary pronoun***] lack of insight into [his/her/***nonbinary pronoun***] mental health condition.]**

In considering whether [*name of respondent***] is gravely disabled, you may not consider the likelihood of future deterioration or relapse of a condition.**

In determining whether [*name of respondent***] is gravely disabled, you may consider whether [he/she/***nonbinary pronoun***] is unable or unwilling to voluntarily accept meaningful treatment.**

New June 2005; Revised January 2018, May 2019, May 2020, May 2022, May 2024

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A) and (h)(2), which will be the applicable standard in most cases. The instruction applies to both adults and minors. (*Conservatorship of M.B.* (2018) 27 Cal.App.5th 98, 107 [237 Cal.Rptr.3d 775].)

If a county's relevant governing body has adopted a resolution postponing the changes made to Welfare and Institutions Code section 5008, omit from the definition of "gravely disabled" the terms "personal safety" and "necessary medical care," as well as "severe substance use disorder" and "a co-occurring mental health disorder and a severe substance use disorder." (Welf. & Inst. Code, § 5008(h)(4) [authorizing a county's deferral of changes made in Senate Bill 43 (Stats. 2023, ch. 637)].) These four terms should not be given in those counties until January 1, 2026, or an earlier date specified in the county's resolution.

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is ~~a second~~ another standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The Welfare and Institutions Code defines "severe substance use disorder." (Welf. & Inst. Code, § 5008(o).) Give additional information about this term if appropriate. For example, severe substance use disorder requires a diagnosis, so it may be preferable to identify the individual's diagnosed severe substance use disorder.

The next to last paragraph regarding the likelihood of future deterioration may not apply if the respondent has no insight into the respondent's mental ~~disorder~~ health condition. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

If there is evidence concerning the availability of third parties that are willing to provide assistance to the proposed conservatee, see CACI No. 4007, *Third Party Assistance*.

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "Severe Substance Use Disorder" Defined. Welfare and Institutions Code section 5008(o).
- "Personal Safety" Defined. Welfare and Institutions Code section 5008(p).
- "Necessary Medical Care" Defined. Welfare and Institutions Code section 5008(q).
- "Serious Bodily Injury" Defined. Welfare and Institutions Code section 15610.67.
- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative

determination to meet the constitutional requirements of precision. The term 'gravely disabled' is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)

- "The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra,* 187 Cal.App.3d at p. 909.)

- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)

- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 463, fn. 4.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence

demonstrates that he was not. Accordingly, the order granting the petition must be overturned." (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

- "[T]he definition of ' "[g]ravely disabled minor" ' from section 5585.25 is not part of the LPS Act, but is found in the Children's Civil Commitment and Mental Health Treatment Act of 1988. (§ 5585.) This definition applies 'only to the initial 72 hours of mental health evaluation and treatment provided to a minor. … Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the … [LPS Act].' (§ 5585.20.) Accordingly, we must apply the definition found in the LPS Act, and determine whether there was substantial evidence Minor suffered from a mental disorder as a result of which she 'would be unable to provide for [her] basic personal needs' if she had to so provide." (*Conservatorship of M.B., supra,* 27 Cal.App.5th at p. 107.)

- "Theoretically, someone who is willing and able to accept voluntary treatment may not be gravely disabled if that treatment will allow the person to meet the needs for food, clothing, and shelter. Under the statutory scheme, however, this is an evidentiary conclusion to be drawn by the trier of fact. If credible evidence shows that a proposed conservatee is willing and able to accept treatment that would allow them to meet basic survival needs, the fact finder may conclude a reasonable doubt has been raised on the issue of grave disability, and the effort to impose a conservatorship may fail. It may be necessary in some cases for the fact finder to determine whether the treatment a proposed conservatee is prepared to accept will sufficiently empower them to meet basic survival needs. In some cases of severe dementia or mental illness, there may simply be no treatment that would enable the person to 'survive safely in freedom.' " (*Conservatorship of K.P.* (2021) 11 Cal.5th 695, 711 [280 Cal.Rptr.3d 298, 489 P.3d 296].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th sed. ~~2008~~ 2019) Actions, §~~97~~ 103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) §§ 23.3, 23.5

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.33, 361A.42 (Matthew Bender)

4004. Issues Not to Be Considered—Type of Treatment, Care, or Supervision

In determining whether [*name of respondent*] is gravely disabled, you must not consider or discuss the type of treatment, care, or supervision that may be ordered if a conservatorship is [established/renewed].

New June 2005; Revised May 2024

Sources and Authority

- "Petitioner's proposed jury instruction reads as follows: 'You are instructed that the matter of what kind or type of treatment, care or supervision shall be rendered is not a part of your deliberation, and shall not be considered in determining whether or not [proposed conservatee] is or is not gravely disabled. The problem of treatment, care and supervision of a gravely disabled person and whether or not he shall be detained in a sanitarium, private hospital, or state institution, is not within the province of the jury, but is a matter to be considered by the conservator in the event that the jury finds that [proposed conservatee] is gravely disabled.' [¶] [T]he instruction should be given." (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 553 & fn. 7 [200 Cal.Rptr. 262].)

- "[I]nformation about the consequences of conservatorship for [proposed conservatee] was irrelevant to the only question before [the] jury: whether, as a result of a mental disorder, he is unable to provide for his basic personal needs for food, clothing, or shelter." (*Conservatorship of P.D.* (2018) 21 Cal.App.5th 1163, 1168 [231 Cal.Rptr.3d 79].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, § ~~97~~103 et seq.

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4005. Obligation to Prove—Reasonable Doubt

[*Name of respondent*] is presumed not to be gravely disabled. [*Name of petitioner*] has the burden of proving beyond a reasonable doubt that [*name of respondent*] is gravely disabled. The fact that a petition has been filed claiming [*name of respondent*] is gravely disabled is not evidence that this claim is true.

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that [*name of respondent*] is gravely disabled as a result of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether [*name of respondent*] is gravely disabled, you must impartially compare and consider all the evidence that was received throughout the entire trial.

Unless the evidence proves that [*name of respondent*] is gravely disabled because of [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism] beyond a reasonable doubt, you must find that [he/she/*nonbinary pronoun*] is not gravely disabled.

Although a conservatorship is a civil proceeding, the burden of proof is the same as in criminal trials.

New June 2005; Revised June 2016, May 2024

Directions for Use

The presumption in the first sentence of the instruction is perhaps open to question. Two older cases have held that there is such a presumption. (See *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1340 [249 Cal.Rptr. 415]; *Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1099 [242 Cal.Rptr. 289].) However, these holdings may have been based on the assumption that the California Supreme Court had incorporated all protections for criminal defendants into LPS proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [proof beyond reasonable doubt and unanimous jury verdict required].) Subsequent cases have made it clear that an LPS respondent is not entitled to all of the same protections as a criminal defendant. (See *Conservatorship of Ben C.* (2007) 40 Cal.4th 529, 538 [53 Cal.Rptr.3d 856, 150 P.3d 738] [exclusionary rule and *Wende* review do not apply in LPS].)

Sources and Authority

- "A proposed conservatee has a constitutional right to a finding based on proof beyond a reasonable doubt. Without deciding whether the court has a sua sponte duty to so instruct, we are satisfied that, on request, a court is required to instruct in language emphasizing a proposed conservatee is

presumed to not be gravely disabled until the state carries its burden of proof." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1099, internal citation omitted.)

- "[I]f requested, a court is required to instruct that a proposed conservatee is presumed not to be gravely disabled until the state carries its burden of proof." (*Conservatorship of Law, supra,* 202 Cal.App.3d at p. 1340.)

- ~~But see *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]:~~ "Even if we view the presumption in a more general sense as a warning against the consideration of extraneous factors, we cannot conclude that the federal and state Constitutions require a presumption-of-innocence-like instruction outside the context of a criminal case. Particularly, we conclude that, based on the civil and nonpunitive nature of involuntary commitment proceedings, a mentally ill or disordered person would not be deprived of a fair trial without such an instruction." ~~But see~~ (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1409 [122 Cal.Rptr.2d 384]~~:~~.)

- "Neither mental disorder nor grave disability is a crime." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 330 [177 Cal.Rptr. 369].)

- "More recently this court has recognized, however, that the analogy between criminal proceedings and proceedings under the LPS Act is imperfect at best and that not all of the safeguards required in the former are appropriate to the latter." (~~See~~ *Conservatorship of Ben C., supra,* 40 Cal.4th at p. 538.)

- "In [*Conservatorship of*] *Roulet*, the California Supreme Court held that due process requires proof beyond a reasonable doubt and jury unanimity in conservatorship proceedings. However, subsequent appellate court decisions have not extended the application of criminal law concepts in this area." (*Conservatorship of Maldonado* (1985) 173 Cal.App.3d 144, 147 [218 Cal.Rptr. 796].)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Actions, §§ ~~97, 104~~ 103, 116

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.81

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.~~33~~ 42[8][c] (Matthew Bender)

4006. Sufficiency of Indirect Circumstantial Evidence

You may not decide that [*name of respondent*] is gravely disabled based substantially on indirect evidence unless this evidence:

1. **Is consistent with the conclusion that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism]; and**

2. **Cannot be explained by any other reasonable conclusion.**

If the indirect evidence suggests two reasonable interpretations, one of which suggests the existence of a grave disability and the other its nonexistence, then you must accept the interpretation that suggests [*name of respondent*] is not gravely disabled.

If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable one.

If you base your verdict on indirect evidence, [*name of petitioner*] must prove beyond a reasonable doubt each fact essential to your conclusion that [*name of respondent*] is gravely disabled.

New June 2005; Revised May 2024

Directions for Use

Read this instruction immediately after CACI No. 202, *Direct and Indirect Evidence*.

Sources and Authority

- "[W]here proof to establish a conservatorship for a person alleged to be gravely disabled is based upon substantially circumstantial evidence, the proposed conservatee is entitled, on request in an appropriate case, to have the jurors instructed as to the principles relevant when applying circumstantial evidence to the beyond a reasonable doubt burden of proof." (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1088 [242 Cal.Rptr. 289].)

- "A proposed conservatee is entitled to procedural due process protections similar to a criminal defendant since fundamental liberty rights are at stake. The trial court had a sua sponte duty to correctly instruct on the general principles of law necessary for the jury's understanding of the case." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1092, fn. 5, internal citations omitted.)

- "The court has no duty to give the [circumstantial evidence jury instructions applicable to criminal cases] in a case where the circumstantial evidence necessary to prove a certain mental state is not

subject to any inference except that pointing to the existence of that mental state." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098; *Conservatorship of Law* (1988) 202 Cal.App.3d 1336, 1342 [249 Cal.Rptr. 415].)

- "Where a noncriminal case is to be evaluated by a reasonable doubt standard, it follows that a party on a proper state of the evidence is entitled on request to have jurors informed of the manner in which that standard must be established when the evidence consists substantially of circumstantial evidence." (*Conservatorship of Walker, supra,* 196 Cal.App.3d at p. 1098.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Actions, §§ ~~100, 104~~ 106

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.90

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.33 (Matthew Bender)

4007. Third Party Assistance

A person is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the person's basic needs ~~for food, clothing, or shelter~~ for food, clothing, shelter, personal safety, or necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide [*name of respondent*] with food, clothing, ~~or shelter~~shelter, personal safety, or necessary medical care. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family or Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [197 Cal.Rptr. 539, 673 P.2d 209].)
- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)
- "In *Conservatorship of Early* ... the Supreme Court held that it was error for the trial court to refuse to admit evidence of and to fail to instruct on the 'availability of assistance of others to meet the basic needs of a person afflicted with a mental disorder.' " (*Conservatorship of Baber* (1984) 153 Cal.App.3d 542, 552–553 [200 Cal.Rptr. 262], citation omitted.)
- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by

case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, §§ ~~98, 100~~ 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.42 (Matthew Bender)

4008. Third Party Assistance to Minor

A minor is not "gravely disabled" if [he/she/*nonbinary pronoun*] can survive safely with the help of third party assistance. Third party assistance is the aid of family, friends, or others who are responsible, willing, and able to help provide for the minor's health, safety, and development, including ~~food, shelter, and clothing~~ food, clothing, shelter, personal safety, and necessary medical care.

You must not consider offers by family, friends, or others unless they [have testified to/stated specifically in writing] their willingness and ability to help provide for [*name of respondent*]'s health, safety, and development. Well-intended offers of assistance are not sufficient unless they will ensure the person can survive safely.

[Assistance provided by a correctional facility does not constitute third party assistance.]

New June 2005; Revised May 2024

Sources and Authority

- Help of Family and Friends. Welfare and Institutions Code section 5350(e).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "[A] person is not 'gravely disabled' within the meaning of section 5008, subdivision (h)(1) if he or she is capable of surviving safely in freedom with the help of willing and responsible family members, friends or third parties." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 321 [177 Cal.Rptr. 369].)
- "Although a minor may not be legally responsible to provide for his basic personal needs, or may suffer disabilities other than a mental disorder which preclude him from so providing, the [statutory] definition is nevertheless applicable. A minor is 'gravely disabled' within the meaning of section 5008, subdivision (h)(1), when the trier of fact, on expert and other testimony, finds that disregarding other disabilities, if any, the minor, because of the further disability of a mental disorder, would be unable to provide for his basic personal needs. Immaturity, either physical or mental when not brought about by a mental disorder, is not a disability which would render a minor 'gravely disabled' within the meaning of section 5008." (*In re Michael E.* (1975) 15 Cal.3d 183, 192, fn. 12 [123 Cal.Rptr. 103, 538 P.2d 231].)
- "As we view the broad purpose of the LPS Act, imposition of a conservatorship should be made only in situations where it is truly necessary. To accomplish this purpose evidence of the availability of third party assistance must be considered." (*Conservatorship of Early* (1983) 35 Cal.3d 244, 253 [673 P.2d 209, 197 Cal.Rptr. 539].)
- "The California Supreme Court in *Conservatorship of Early* ... concluded although a person might be

gravely disabled if left to his or her own devices, he or she may be able to function successfully in freedom with the support and assistance of family and friends. The court recognized almost everyone depends to a greater or lesser extent upon others in order to survive in our complex society." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 299 [256 Cal.Rptr. 415].)

- "Corrections custody does not qualify as third party assistance under the LPS Act as interpreted by case law." (*Conservatorship of Jones, supra,* 208 Cal.App.3d at p. 303.)

- "Under section 5350, subdivision (e)(1), a person is not gravely disabled only if he or she can *survive safely* with the assistance of a third party. There is substantial evidence that the assistance offered by [respondent's mother], while well-intended, would not meet this requirement." (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 699 [1 Cal.Rptr.2d 46], original italics, footnote omitted.)

- "The parties have raised the issue of whether section 5350, subdivision (e)(2), precluded the trial court from considering [petitioner's mother's] testimony on the issue of third party assistance. This section provides that third parties shall not be considered willing or able to provide assistance unless they so indicate in writing. This section has no application in this case. The purpose of section 5350, subdivision (e), 'is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others to publicly state, and requiring the court to publicly find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter.' This was not the case here; [petitioner's mother] took the stand at trial and testified as to her willingness to provide assistance to her daughter. No purpose of section 5350, subdivision (e), would be served by requiring her to also execute a writing to this effect." (*Conservatorship of Johnson, supra,* 235 Cal.App.3d at p. 699, fn. 5.)

Secondary Sources

3 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Actions, §§ ~~90, 97, 100~~ 103, 105

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.4

~~28 California Forms of Pleading and Practice, Ch. 329, *Juvenile Courts: Delinquency Proceedings*, § 329.73 (Matthew Bender)~~

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, §§ 361A.42, 361A.45 (Matthew Bender)

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

____ **12 jurors find that [*name of respondent*] is presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

____ **9 or more jurors find that [*name of respondent*] is not presently gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism].**

[If you have concluded that [*name of respondent*] is gravely disabled due to [a mental health disorder/a severe substance use disorder/a co-occurring mental health disorder and severe substance use disorder/impairment by chronic alcoholism], then answer the following:

Do all 12 jurors find that [*name of respondent*] is disqualified from voting because [he/she/*nonbinary pronoun*] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process?
____ Yes ____ No]

Signed: _____
Presiding Juror

Dated: _____

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

New June 2005; Revised December 2010, May 2017, May 2024

Directions for Use

The question regarding voter disqualification is bracketed. The judge must decide whether this question is appropriate in a given case. (See CACI No. 4013, *Disqualification From Voting.*)

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

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/***nonbinary pronoun***] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]];**

2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] [was/were] documented in a [court order/law enforcement report/statement of a qualified third party acting in a professional capacity/[***specify other evidence or documentation***]];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]] is not ~~also~~ a tenant of the same living unit as [[***name of defendant***]/ [or] a member of [***name of defendant***]'s immediate family/ [or] a member of [***name of defendant***]'s household]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime from Civil Code section 1946.7***]].**

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

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

   ~~[or]~~

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

[tenants/ [or] guests/ [or] invitees/ [,/or] licensees];

~~**and**~~

2. ~~**[***Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation**~~ **That [***name of plaintiff***] gave [***name of defendant***] a three-day notice requiring [him/her/***nonbinary pronoun***] not to voluntarily permit or consent to the presence on the property of the person who committed the abuse or violence; and**

3. **That, after the three-day notice expired, [***name of defendant***] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence.**

New December 2011; Revised June 2013, June 2014, January 2019, May 2020, May 2024

Directions for Use

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

~~All protected statuses are~~ "Abuse and violence" is defined by statute to include several acts. (~~See~~ Code Civ. Proc., § 1161.3(a); see Code Civ. Proc., § 1219 [sexual assault]; Civ. Code, §§ 1708.7 [stalking], 1946.7(a)(6) [a crime that caused bodily injury or death], (a)(7) [a crime that included the exhibition, drawing, brandishing, or use of a firearm or other deadly weapon or instrument], (a)(8) [a crime that included the use of force against the victim or a threat of force against the victim]; Fam. Code, § 6211 [domestic violence]; Pen. Code, §§ 236.1 [human trafficking], Section 646.9 [stalking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider giving an additional special instruction defining the ~~protected status~~ specific abuse or violence alleged to make the meaning clear to the jury.

~~The acts~~ Evidence of ~~domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult~~ abuse or violence must be documented in a court order, law enforcement report, ~~or tenant and~~ qualified third-party statement, or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)~~(1)~~(2)(A)–(D).) Consider giving an additional special instruction defining the type of documentation if it is necessary to make the meaning clear to the jury. A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, ~~or~~ a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3~~(d)(3)~~(a)(6).) If the parties dispute whether a third party is qualified, consider giving an additional special instruction on the definition of "qualified third party."

~~Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to~~

~~quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.~~

The tenant has a complete defense to the unlawful detainer cause of action if the tenant ~~must~~ proves that the perpetrator is not a tenant of the same "dwelling unit" as the tenant, the tenant's immediate family member, or household member unless the statutory exception is established. (~~see~~ Code Civ. Proc., § -1161.3~~(a)(2)~~(d)(1); see Code Civ. Proc., § 1161.3(b)(2)(B).) ~~, which~~ "Dwelling unit" is expressed in element 3 as "living unit." ~~Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.~~ If the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit, then the statute provides for a partial eviction process under Code of Civil Procedure section 1174.27.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of ~~Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking~~Abuse or Violence. Code of Civil Procedure section 1161.3.
- Unlawful Detainer Remedies for Abuse or Violence Against Tenant. Code of Civil Procedure section 1174.27.

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 714, 752

Gaab & Reese, California Practice Guide: Civil Procedure Before Trial—Claims & Defenses, Ch. 11(I)-C, *Particular Defenses*, ¶¶ 11:230–231 (The Rutter Group)

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

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

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

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

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64[15] (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28[8] (Matthew Bender)

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

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

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21[12]

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense and experience in deciding whether testimony is true and accurate. However, during your deliberations, do not make any statements or provide any information to other jurors based on any special training or unique personal experiences that you may have had related to matters involved in this case. What you may know or have learned through your training or experience is not a part of the evidence received in this case.

[Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may [ask to have testimony read back to you] [or] [ask to see any exhibits admitted into evidence that have not already been provided to you].] [Also, jurors/Jurors] may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June

2011, June 2013, May 2019, May 2024

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*. If a general verdict is to be used, give CACI No. 5022, *Introduction to General Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

~~Delete the reference to reading back testimony if the proceedings are not being recorded.~~ Do not read the bracketed portion of the fifth paragraph that refers to reading back testimony if a court reporter is not being used to record the trial proceedings. Consider deleting the reference to providing exhibits if the court sends all admitted exhibits into the jury room.

Sources and Authority

- Conduct of Jury Deliberations. Code of Civil Procedure section 613.
- Further Instructions After Deliberation Begins. Code of Civil Procedure section 614.
- Verdict Requires Three Fourths. Code of Civil Procedure section 618, article I, section 16, of the California Constitution.
- Juror Misconduct as Grounds for New Trial. Code of Civil Procedure section 657.
- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' " (*Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064 [18 Cal.Rptr.2d 106], original italics.)
- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis, supra,* 14 Cal.App.4th at p.

1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

- "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of a matter at issue is misconduct." (*In re Malone* (1996) 12 Cal.4th 935, 963 [50 Cal.Rptr.2d 281, 911 P.2d 468].)

- "[The juror]'s comments to the jury, in the nature of an expert opinion concerning the placement of crossing gate 'sensors,' their operation, and the consequent reason why gates had not been or could not be installed at the J-crossing, constituted misconduct … . Speaking with the authority of a professional transportation consultant, [the juror] interjected the subject of 'sensors,' on which there had been no evidence at trial." (*McDonald v. S. Pac. Transp. Co.* (1999) 71 Cal.App.4th 256, 263–264 [83 Cal.Rptr.2d 734].)

- "Jurors cannot, without violation of their oath, receive or communicate to fellow jurors information from sources outside the evidence in the case. '[It] is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct *unless shown by the prevailing party to have been harmless will invalidate the verdict*.' " (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 952–953 [161 Cal.Rptr. 377], original italics, internal citations omitted.)

- " 'All the jurors, including those with relevant personal backgrounds, were entitled to consider this evidence and express opinions regarding it. "[I]t is an impossible standard to require … [the jury] to be a laboratory, completely sterilized and freed from any external factors." [Citation.] "It is 'virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.' " [Citation.] A juror may not express

> opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in *evaluating and interpreting* that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one's background from one's *analysis* of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations. "Jurors are not automatons. They are imbued with human frailties as well as virtues." [Citation.]' " (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 77 [133 Cal.Rptr.3d 548, 264 P.3d 336], original italics.)

Secondary Sources

7 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~2019) Trial, §~~§ 318, 321, 380~~ 275 et seq.

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *General Considerations*, ¶ 15:15 et seq. (The Rutter Group)

~~4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)~~

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.~~32[3]~~30 (Matthew Bender)

~~28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)~~

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.~~33~~30

California Judges Benchbook: Civil Proceedings—Trial §§ 13.8, 13.32, 13.50, 13.53, 13.59, 14.6, 14.21 (Cal CJER 2019)

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next.

At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign ~~it~~ at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant]~~ that you are ready to present your verdict in the courtroom~~.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014, May 2019, May 2024

Directions for Use

This instruction should be given if a special verdict form is used. The second and third paragraphs will have to be modified in a case under the Lanterman-Petris-Short Act. (See CACI No. 4012, *Concluding Instruction* (for LPS Act).)

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)
- "A special verdict is 'fatally defective' if it does not allow the jury to resolve every controverted

issue." (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)

- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)

- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings … ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' " (*J.P., supra,* 232 Cal.App.4th at p. 338, internal citations omitted.)

- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)

- "[T]hat the jury instruction … defined [the element] did not obviate the necessity of including that required element in the special verdict. 'A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.' " (*Trejo, supra,* 13 Cal.App.5th at p. 138.)

- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th

986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (~~5th~~ 6th ed. ~~2008~~ 2019) Trial, §§ ~~342~~ 346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11[3] ~~et seq.~~ (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial § 14.14 (Cal CJER 2019)

VF-300. Breach of Contract

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

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

____ Yes ____ No]

[or]

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

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

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

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

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New April 2004; Revised December 2010, June 2011, June 2013, June 2015, May 2020, May 2024

Directions for Use

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

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

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

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

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

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

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

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

VF-400. Negligence—Single Defendant

We answer the questions submitted to us as follows:

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

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

2. Was [*name of defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
____ 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. What are [*name of plaintiff***]'s damages?**

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, May 2024

Directions for Use

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

This verdict form is based on CACI No. 400, *Negligence—Essential Factual Elements*.

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

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

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.

Instruction(s)	Commenter	Comment	Committee Response
372. Common Count: Open Book Account (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	Public Law Center by Jonathan Bremen, Impact Litigation Staff Attorney, Lydia Tse, Staff Attorney, Consumer Law, Emily Phillips, Staff Attorney, Housing and Homelessness Prevention Santa Ana	Public Law Center (PLC) is a 501(c)(3) not-for-profit organization that provides free civil legal services to low-income individuals and families across Orange County. The civil legal services that we provide include consumer, family, immigration, housing, veterans, community organizations, and health law. PLC appreciates the opportunity to comment on Invitation CACI 24-01 regarding: (1) proposed jury instruction 4328 (Affirmative Defense—Tenant Was Victim of Abuse or Violence [Code Civ. Proc., § 1161.3]); and (2) proposed jury instruction 372 (Common Count: Open Book Account).	No response required. See below for the committee's responses to PLC's substantive comments.
		PLC supports the adoption of proposed instruction 372. Common counts make debt collection cases, which can cause extreme hardship for consumers, subject to lesser evidentiary standards than all other lawsuits. They allow evasion of modern consumer protection standards and give debt collectors special treatment in court. Code of Civil Procedure section 425.30 addresses common counts in general, not just book accounts. Thus, PLC recommends adding the section 425.30 language — prohibiting use of common courts to recover consumer debt — to the other common count jury instructions including:	The committee acknowledges PLC's support for the revisions to CACI No. 372. With respect to the four other Common Count instructions mentioned, PLC's comment goes beyond the scope of the invitation to comment.

Instruction(s)	Commenter	Comment	Committee Response
		370. Common Count: Money Had and Received 371. Common Count: Goods and Services Rendered 373. Common Count: Account Stated 374. Common Count: Mistaken Receipt The language used in the other common count jury instructions should reference Code of Civil Procedure section 425.30 as follows: Do not give this instruction for a claim involving "consumer debt" incurred on or after July 1, 2024. (See Code Civ. Proc., § 425.30 [exempting consumer debt from common counts].)	The committee will consider PLC's suggestion for CACI Nos. 370, 371, 373, and 374 during the next release cycle.
1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions (Revise)	Association of Southern California Defense Counsel by Edward L. Xanders Attorney Sacramento	We write on behalf of the Association of Southern California Defense Counsel (ASCDC) to comment on the proposed additions regarding CACI 1009A. We want to ensure that the Advisory Committee on Jury Instructions is aware of the concerns that the Second Appellate District, Division Three, recently voiced about CACI 1009A and its user notes, set forth in *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] (*Acosta*). For convenience, a copy of *Acosta* is attached [*Attachment omitted]; the Court's request for revisions is in footnote 7. As explained below, the proposed additions regarding CACI 1009A do not resolve the concerns flagged in Acosta. In particular, there is no change to the instruction's text to include a description of the independent contractor's duty to inspect for safety issues, nor do the proposed additions to the Directions for Use and Sources and Authority resolve that concern or discuss recent key cases addressing that duty.	ASCDC's comments are beyond the scope of the invitation to comment. At the time the committee posted its invitation for comment (CACI 24-01), *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] was not yet a final decision. The Supreme Court denied review during the invitation to comment period on January 31, 2024. The committee will consider ASCDC's comments and the *Acosta* decision during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions. ASCDC has approximately 1,100 attorney members in Southern and Central California, who are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is actively involved in assisting courts, the organized bar, and committees on issues of interest to its members, the judiciary, the bar as a whole, and the public. It is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing standards of civil litigation practice. ASCDC members are frequently involved in cases applying the Privette doctrine and its exceptions, and ASCDC frequently appears as an amicus in such cases. ASCDC is concerned that the proposed revisions in the recent Invitation to Comment, CACI 24-01, do not adequately address the concerns that the Court of Appeal justices (the Honorable Lee Smalley Edmon, the Honorable Luis A. Lavin, and the Honorable Anne H. Edgerton) raised in Acosta. We again thank the Advisory Committee for the substantial time and hard work it puts into the CACI instructions. We hope these suggestions are helpful.	No further response required.
		The *Acosta* decision. In *Acosta*, an electrical technician injured by a broken roof hatch sued the building's owner and management company for negligence and premises liability. He argued that the case fell within the *Kinsman* exception to the *Privette* doctrine, under which a property owner may be liable for an injury to an independent contractor's employee if the injury resulted from a *concealed* hazard that the owner knew, or reasonable should have known, about. (See *Kinsman v. Unocal Corp*. (2005) 37 Cal.4th 659; *Privette v. Superior Court* (1993) 5 Cal.4th 689.)	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		After a jury awarded a substantial verdict against the defendants, the Second Appellate District, Division Three, reversed the judgment and directed entry of judgment for the defendants. Relying on *Kinsman*, and several cases that discuss and apply that exception—*Gonzalez v. Mathis* (2021) 12 Cal.5th 29 (*Gonzalez*), *Johnson v. The Raytheon Co., Inc.* (2019) 33 Cal.App.5th 617 (*Johnson*) and *Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863 (*Blaylock*)—the Court of Appeal recognized that *Kinsman* imposes a duty on the independent contractor to conduct a reasonable safety inspection of the worksite before work begins and that the contractor's employees therefore cannot recover under the *Kinsman* exception if a reasonable inspection by the contractor would have uncovered the hazard.	
		The *Acosta* court's concerns about CACI 1009A. The Court of Appeal recognized, in reaching its decision, that CACI 1009A, and its instructions for use, fail to adequately address the independent contractor's duty to reasonably inspect the premises, an important component of the *Kinsman* exception. The Court first noted: Although not relevant to our analysis, we note that the trial court instructed the jury on negligence (CACI No. 400–411), landowners' nondelegable duties (CACI No. 3713), and landowner liability to employees of independent contractors for unsafe concealed conditions under *Privette/Kinsman* (CACI No. 1009A). In other words, the jury was instructed that (1) defendants were negligent if they failed to use reasonable care to prevent harm to [plaintiff], (2) [the property owner] had a nondelegable duty to keep [the premises] in a safe condition, *and* (3) defendants could be liable to [plaintiff] only if they knew or reasonably should have known of an unsafe concealed condition at [the premises], and [plaintiff's independent-contractor employer] neither knew nor	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		reasonably could be expected to know of that unsafe concealed condition. (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The Court then explained (in the same footnote) that these instructions and the relevant use notes were incomplete and misleading on two fronts, and urged the Judicial Council and this Advisory Committee to resolve the problem: 1) "The jury was not told how the separate concepts of negligence, nondelegable duty, and peculiar risk relate to one another for purposes of determining defendants' liability, and ***the CACI use notes do not appear to give trial courts any guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases***." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7, italics added.) 2) "CACI No. 1009A ***does not include a description of the independent contractor's duty to inspect for safety issues***, as described in *Kinsman, Gonzalez, Johnson*, and *Blaylock*. ***We urge the Judicial Council and its Advisory Committee on Civil Jury Instructions to consider CACI No. 1009A and its use notes*** in light of recent decisions, including *Gonzalez, Johnson*, and *Blaylock.* (*Ibid.*, italics added.) And, since the Second Appellate District, Division Three, granted a request to publish *Acosta*, the same comments apply equally to *Acosta* itself.	
		The current proposed additions regarding CACI 1009A. The proposed additions in the latest Invitation to Comment, CACI 24-01, do not propose *any* changes to CACI 1009A's text. The only proposed changes involve additions to the Directions for Use and Sources and Authority. The *only* proposed change to the Directions for Use entails adding language that elements 3 and 4 of the instruction	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		"express the independent contractor's limited duty to inspect the premises for potential safety hazards." Thus, this "change" leaves CACI 1009A's text exactly as before and does not address the *Acosta* court's concern that "CACI No. 1009A does not include a description of the independent contractor's duty to inspect for safety issues…." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The proposed addition to the Directions for Use would have no impact because juries will only see the actual instruction. And as the *Acosta* court recognized, the language in current elements 3 and 4 is vague and incomplete because it does not actually explain that the independent contractor's employees (including the plaintiff) have a duty to reasonably inspect the premises and are charged with what such an inspection would reveal. As *Acosta* recognized, the statement that the contractor "neither knew or could be reasonably expected to know of the unsafe concealed condition" is unclear and meaningless without a reference to the contractor having a duty to inspect for safety issues. Nor does the only currently proposed change to the Directions for Use address the *Acosta* court's concern that "the CACI use notes do not appear to give trial courts any guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) In addition, the proposed changes to the CACI 1009A Directions for Use and Sources and Authority do not resolve the Second Appellate District, Division Three's urging that the Judicial Council and its Advisory Committee on Civil Jury Instructions consider the CACI 1009A "use notes in light of recent decisions, including *Gonzalez*, *Johnson*, and *Blaylock*." (*Acosta, supra,* 96 Cal.App.5th at p. 665, fn. 7.) The additions	

Instruction(s)	Commenter	Comment	Committee Response
		to the Directions for Use merely contain one reference to *Gonzalez*. And the references to Sources and Authority only add one snippet from *Gonzalez* and one from *Johnson*, omitting any references to *Blaylock* and *Acosta*.	
		Recommended additions in light of the Acosta court's concerns. ASCDC appreciates the enormous task the Advisory Committee faces in grappling with so many jury instructions. That daunting task is why comments by appellate courts for the need for change, such as the Second Appellate District, Division Three's comments in *Acosta*, are of crucial importance. They reflect the view of the justices in the trenches who have dealt with the need for clarity in the law and in the CACI jury instructions.	No further response required.
		Recommended change to CACI 1009A text. In light of the *Acosta* court's concern that the existing language of CACI 1009A does not explain that the independent contractor has a duty to inspect, ASCDC recommends that the instruction's text be modified to explain that the contractor has a duty to reasonably inspect the worksite and the means of access for safety issues. This could be done, for example, by adding the following language to the end of element 3: "through a reasonable\inspection of the worksite, and its means of access, for safety hazards."	No further response required.
		Recommended changes to CACI 1009A Directions for Use and Sources and Authority. As the *Acosta* court explained, the trial court in *Acosta* ended up providing the jury with the general CACI instructions on negligence (CACI Nos. 400-411), the CACI instruction on a landowners' nondelegable duties (CACI No. 3713), *and* the CACI instruction regarding the *Kinsman* exception to the	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		Privette doctrine, that is, landowner liability to employees of independent contractors for unsafe concealed conditions (CACI No. 1009A). As the *Acosta* court recognized, this resulted in the jury receiving contradictory and inconsistent instructions. (See 96 Cal.App.5th at p. 665, fn. 7.) On the one hand, the jury was told through CACI Nos. 400-411 and CACI No. 3713 that the defendants were negligent if they failed to use reasonable care to prevent harm to plaintiff and that a landowner has a nondelegable duty to keep the premises safe, which are both erroneous statements in a *Privette* doctrine context, unless the plaintiff can prove that an exception to the doctrine applies, such as the *Kinsman* exception. And, on the other hand, the jury was correctly instructed under CACI No. 1009A, in accordance with the *Kinsman* exception, that the defendants could *only* be liable if they knew or reasonably should have known of an unsafe concealed condition at the premises *and* the plaintiff or his employer neither knew nor reasonably could be expected to know of that unsafe concealed condition. The *Acosta* court recognized that such confusion could be rectified by modifying the CACI use notes to provide "guidance about whether negligence and/or nondelegable duty instructions should be given in peculiar risk cases." (96 Cal.App.5th at p. 665, fn. 7.) We therefore recommend, given the *Acosta* court's concern, that the Directions for Use for CACI 1009A be modified to explain that CACI 400-411 and CACI 3713 ***should not be given*** in cases involving CACI 1009A, and that the defendant landowner's or hirer's liability in such cases should be determined based solely on applying CACI 1009A's elements. ***The same modification should be made to the Directions for Use regarding any other exception to the Privette doctrine, such as CACI 1009B and 1009D.***	

Instruction(s)	Commenter	Comment	Committee Response
		In addition, the Directions for Use notes and/or the Sources and Authority for CACI 1009A should be expanded to clarify that (a) the independent contractor's duty to inspect for safety issues includes not only the worksite itself but also the means of accessing the worksite; and (b) that the independent contractor's employee cannot recover under the *Kinsman* exception for an alleged concealed hazard that a reasonable inspection by the contractor would uncover. They also should include references to the two relevant 2023 decisions—*Blaylock* and *Acosta*. *Gonzalez*, *Johnson*, *Blaylock*, and *Acosta* make clear that while an independent contractor's duty of inspection under *Kinsman* may be "limited" in the sense that it does not encompass portions of the premises beyond the subject worksite or means of access, or safety hazards beyond the contractor's particular expertise, the inspection duty otherwise broadly encompasses any safety hazards that the contractor's employees did not know about but could have reasonably uncovered in a reasonable pre-work inspection for safety issues. The following case law snippets address these various points, so we present them for the Committee's consideration as additions to the two current proposals that regard *Gonzalez* and *Johnson* only. ● The independent contractor's duty to inspect for safety issues includes the "means to access the worksite" because that constitutes "an inherent risk in the job for which [the contractor] was hired." (*Gonzalez, supra,* 12 Cal.5th at p. 55.) ● "[A] hirer presumptively delegates to an independent contractor all responsibility for workplace safety, such that the hirer is not responsible for any injury resulting from a known unsafe condition at the worksite—regardless of whether the	

Instruction(s)	Commenter	Comment	Committee Response
		contractor was specifically tasked with repairing the unsafe condition and regardless of whether the danger was created by the work for which the contractor was retained." (*Gonzalez*, *supra*, 12 Cal.5th at p. 52.) ● "[T]he fact that neither [plaintiff] nor his coworkers noticed any safety concerns in the crawl space, and none had recognized the panel [plaintiff] fell through as a 'trap door,' is not sufficient to suggest the trap door was concealed from the perspective of [the contractor]. [The contractor] had a duty to inspect the work premises for potential safety hazards; [plaintiff] offers no evidence that any such inspection occurred." (*Blaylock v. DMP 250 Newport Center, LLC* (2023) 92 Cal.App.5th 863, 872 [310 Cal.Rptr.3d 1].) ● "[T]he broken condition of the hatch, and the fact that the ladder did not reach all the way to the roof, were not concealed and would have been apparent had [plaintiff] or [the independent contractor] inspected the hatch and ladder. Thus, [the contractor] is deemed as a matter of law to have been aware of the condition of the hatch and ladder." (*Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635, 663 [314 Cal.Rptr.3d 507].) ● "[A]lthough [plaintiff's] employer, [the independent contractor], was not hired to inspect or repair the roof hatch, the electrical work for which it was hired required roof access. Because [the contractor], through [plaintiff], chose to access the roof through the roof hatch by means of the fixed ladder, the roof hatch and ladder necessarily were part of the worksite and were within [the contractor's] duty to inspect." (*Acosta*, *supra*, 96 Cal.App.5th at p. 662.) ● "We do not agree that the duty to inspect is as limited as [plaintiff] suggests. He is correct that an independent contractor does not have a duty to inspect all of the landowner's property or to identify hazards wholly outside his area of expertise. (See *Gonzalez, supra*, 12 Cal.5th at pp. 54-55, 282 Cal.Rptr.3d 658,	

Instruction(s)	Commenter	Comment	Committee Response
		493 P.3d 212.)... But a landowner who hires an independent contractor 'presumptively delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees' ([*SeaBright Ins. Co. v. US Airways, Inc.* (2011) 52 Cal.4th 590, 600], 129 Cal.Rptr.3d 601, 258 P.3d 737), and thus the independent contractor has a duty to determine whether its employees can safely perform the work they have been hired to do (*Gonzalez,* at p. 55, 282 Cal.Rptr.3d 658, 493 P.3d 212). That includes a duty to inspect not only the worksite itself, but the 'means to access the worksite.' (*Ibid.*)" (*Acosta, supra,* 96 Cal.App.5th at pp. 661-662.) ● "Whether the independent contractor *actually* inspected, or whether an employee of the independent contractor *actually* communicated an unsafe condition to the contractor, is irrelevant—what matters is whether the hazard would have been revealed by a reasonable inspection…. [H]ere, the information that would have been revealed if [plaintiff] or any other [contractor] employee conducted a reasonable inspection of the workplace is attributed to [the contractor] as a matter of law, regardless of [plaintiff's] actual knowledge or ability to transmit that knowledge to [the contractor]." (*Acosta, supra,* 96 Cal.App.5th at pp. 663-664, original italics.)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	Thank you for the opportunity to comment on proposed revisions to California Civil Jury Instructions – CACI 24-01. 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. We have concerns about the proposed changes to CACI Sections 1009A, 2500, 2502, 2521A, 2521B, 2521C, and 2540, and 5009. We respectfully request that you address these concerns as recommended below.	See below for the committee's responses to CJAC's substantive comments on CACI No. 1009A. The committee's responses to CJAC's other comments are organized by instruction.
		I. Premises Liability **CACI 1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions** ***Directions for Use*** In this section, we propose the citation in the revision be updated as follows to conform with recent case law and to clarify what Elements 3 and 4 require of the independent contractor: "Elements 3 and 4 express the independent contractor's ~~limited~~ duty to inspect the premises for potential safety hazards. (*Acosta v. MAS Realty, LLC* (2023) 96 Cal. App. 5th 635, 659 ("Further, a contractor has a duty to inspect the work site to identify safety hazards before beginning work."), citing *Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 53–54 [282 Cal.Rptr.3d 658, 493 P.3d 212].). Elements 3 and 4 of the instruction require that the independent's contractor's employer 'neither knew nor could be reasonably expected to know' of the alleged	This comment is beyond the scope of the invitation to comment. At the time the committee posted its invitation for comment (CACI 24-01), *Acosta v. MAS Realty, LLC* (2023) 96 Cal.App.5th 635 [314 Cal.Rptr.3d 507] was not yet a final decision. The Supreme Court denied review during the invitation to comment period on January 31, 2024. The committee will consider CJAC's comment and the *Acosta*

Instruction(s)	Commenter	Comment	Committee Response
		concealed condition, and that the condition 'was not part of the work' that the independent contractor was hired to perform.	decision during the next release cycle.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
2500. Disparate Treatment—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 Sacramento	**II. Fair Employment and Housing** **CACI 2500, 2502, 2521A, 2521B, 2521C, and 2540.** ***Directions for Use*** The Directions for Use in the aforementioned sections propose an overly broad definition of "other business-entities acting as agents of employers," which is not consistent with the holding in *Raines v. U.S. Healthworks Medical Group*. While the Sources and Authority sections for these instructions properly include the following limiting language from the *Raines* decision, the Directions for Use omit it: "[…] permits a business entity acting as an agent of an employer to be held directly liable as an employer for employment discrimination in violation of the FEHA in appropriate circumstances *when the business-entity agent has at least five employees and carries out FEHA-regulated activities on behalf of an employer*" (emphasis added). This is an important limitation and distinction. We propose the same language be included in the Directions for Use for CACI	The committee decided that the Directions for Use fairly omit the limiting language advanced by the commenter. The committee was informed by the Supreme Court's language at the end of the *Raines* decision, which states: "We do not decide the significance, if any, of employer control over the act(s) of the agent that gave rise to the FEHA violation, and we also do not decide whether our conclusion extends to business-entity agents that have

Instruction(s)	Commenter	Comment	Committee Response
		Sections 2500, 2502, and 2540 to avoid confusion and an overly broad application of the holding in *Raines*, as follows: 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, and other business-entities acting as agents of employers if they are carrying out FEHA-regulated activities on behalf of the employer. (See Gov. Code, § 12940(a)–(d); *Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].) Further, the Directions for Use for CACI Sections 2521A, 2521B, and 2521C should be modified to read: Further modification may be necessary if the defendant is a business-entity agent of an employer carrying out FEHA-related activities on behalf of the employer. (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].	fewer than five employees." (*Raines v. U.S. Healthworks Medical Group* (2023) 15 Cal.5th 268, 291 [312 Cal.Rptr.3d 301, 534 P.3d 40].)
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required
2501. Affirmative Defense—Bona fide Occupational Qualification	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
(Revise)	Bruce Greenlee Attorney (ret.) Richmond	1. You don't cite any authority supporting the new language on failure to accommodate that is proposed to be added to the introductory paragraph.	The committee recommends adding a citation to the Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions under Government Code section 12945(a).
		2. How would one assemble this instruction using the new language? What would the protected status be? If the protected status is disability, the instruction would say that the decision not to offer an accommodation was lawful because the job required a disabled employee. That makes no sense. Ditto if some other protected status is used. The decision not to offer an accommodation was lawful because the job requires a woman? Also no sense. Importing a component of disability law into a situation unrelated to disability does not work.	The committee recommends adding a Direction for Use note about the potential need for modification if the case involves a BFOQ for pregnancy, childbirth and related conditions.
		3. But the same issues are there even apart from the new language. True, the statute provides for an exception for "based on a bona fide occupational qualification." (I guess this is the exception to allow a Chinese restaurant to hire only Chinese cooks, or lingerie models to all be women.). But the conflict between the adverse employment action and the protected class is there in all cases. First, it's hard to imagine any other adverse employment action other than refusal to hire. I hired a Japanese cook, but then had	The committee believes that the refinements noted above resolve the concerns raised by the commenter. No further response required.

Instruction(s)	Commenter	Comment	Committee Response
		to fire him/her because I learned s/he was not Chinese? Pretty far-fetched. Then the instruction needs to state that the problem is that the plaintiff is NOT a member of the required category; not that the plaintiff is a member of some other protected category. Element 2 is wrong. It's not that substantially all Mexicans can't cook Chinese food; it's that only Chinese can do it.	No further response required.
		4. Revise introductory paragraph as follows: [Name of defendant] claims that [pronoun] decision [not to hire/other adverse employment action] [name of plaintiff] was lawful because a requirement of the job of [specify, e.g., lingerie model] is that the employee be [exclusive status, e.g., a woman].	No further response required.
		5. Make current element 2 element 1 and revise as follows: That [name of defendant] had a reasonable basis for believing that only [members of exclusive group, e.g., women] are able to perform the job of [specify, e.g., lingerie model];	No further response required.
		6. Then make current element 1 element 2 and revise as follows: That job requirement that the employee must be [[exclusive status, e.g., a woman]] was [essential/reasonably necessary] for the operation of [name of defendant]'s business;	No further response required.
		7. Given the problems with the instruction and the debatable proposition that there are jobs that can only be done by one kind of person, the best course of action might be to revoke this instruction.	The committee does not agree that the BFOQ instruction needs to be revoked.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran President	"[O]ther adverse employment action" covers what would be at issue for this instruction, and there are no changes in the sources of authority as grounds for the addition. Further, the addition of "not to offer an accommodation to" is confusing as there are various potential adverse employment actions at issue and it is not limited or specific to accommodation claims. It is also confusing because, as specified in the instruction, there are categories of consideration at issue such as race, age, etc. and it is not specific to disability.	The committee recommends adding a citation to the Bona fide Occupational Qualification for Pregnancy, Childbirth and Related Conditions under Government Code section 12945(a) and a Directions for Use note about the potential need for modification if the case involves a BFOQ for pregnancy, childbirth and related conditions.
2502. Disparate Impact—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 Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	California Lawyers Association by Reuben A. Ginsburg	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
2513. Business Judgment (Revise)	Chair, Jury Instructions Committee Sacramento		
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
Work Environment Harassment instructions (2521A, 2521B, and 2521C) (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 Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Bruce Greenlee Attorney (ret.) Richmond	1. I would not add this or any language to the DforU. The statement that "further modification may be necessary" is not terribly helpful without some mention of how and where. (The "why" is addressed.) It's particularly dubious here because the instructions do not attempt to define who qualifies as an employer. Hence, any modification would have to start with adding an element stating that "defendant is an employer because" and including agent as one of the options. (See, e.g., element 1 of CACI No. 2540.) I don't think this is necessary because employer status is seldom an issue in FEHA harassment cases. There currently is no instruction defining "employer," to which *Raines* would be applicable. (cf. CACI No. 2525, defining "Supervisor.") That's probably fine because I doubt that	The committee believes that users should be aware of the Supreme Court's decision in *Raines*. The committee believes it is preferable to alert users to the potential need for modification if their FEHA work environment harassment claims involve a business entity acting as an agent of an employer. The committee does not

Instruction(s)	Commenter	Comment	Committee Response
		deciding whether or not the defendant qualifies as a FEHA employer is a jury issue.	agree that the issue is so rare that it should not be mentioned in the work environment harassment instructions.
		2. While it's harmless, I don't think *Raines* really needs to be in the [Sources and Authority] for these instructions. They have very robust Sources and Authority now.	The committee believes it is important to include relevant Supreme Court authority in the Sources and Authority.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
Disability Discrimination instructions (2540, 2541, and 2547) (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 Sacramento	See CJAC's comment for CACI No. 2500.	See committee's response to CACI No. 2500.
	Bruce Greenlee Attorney (ret.) Richmond	1. Last paragraph of the DforU in 2540 and the corresponding paragraphs in 2541 and 2547: "Consider giving special instructions". Why wouldn't one give the special instructions if whether the employee's disability matches the statutory requirements is an issue? Current language "may be required" is better.	The committee concluded that "may be required" is not sufficiently clear. It is the committee's view that a special instruction will need to be drafted if

Instruction(s)	Commenter	Comment	Committee Response
			the existence of a qualifying disability is disputed.
		2. I don't really see any need to change the order of "physical disability," "mental disability," and "medical condition." Bottom line is I don't see any need for any revisions to this paragraph except for maybe adding the Cal Code Regs cite.	The committee decided to sequence the statutory terms in the order they are listed in the statute and in the Sources and Authority. The committee acknowledges the commenter's support for adding citations to the regulations.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
2743. Equal Pay Act—Retaliation—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 (ret.) Richmond	1. New last sentence of DforU: Use of "and/or" is generally discouraged, though I have found instances in which I thought it to be the best option. But this is not one of them. One wouldn't both modify this instruction and also give additional instructions; one would do one or the other. So "and" should not appear.	The committee finds that doing both is a possible option. The committee has chosen to retain the use of and/or in the Directions for Use of this instruction.

Instruction(s)	Commenter	Comment	Committee Response
		2. Also, I would think that only one additional instruction would be needed to express this relatively simple presumption.	The committee is not convinced that instructing on the rebuttable presumption would have to be done in one additional instruction.
		3. Revise sentence: "Consider adding language to this instruction or giving an additional instruction regarding the rebuttable presumption."	For the reasons stated above, the committee declines to make the suggested change.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
3066. Bane Act—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 Christina Zabat-Fran, President	Agree.	No response required.
4000. Conservatorship—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 Christina Zabat-Fran,	These changes are based upon SB43 effective January 1, 2024 which expanded the definition of "gravely disabled" to add two	The committee believes the instruction properly

Instruction(s)	Commenter	Comment	Committee Response
	President	new criteria for that statutory term of art: (1) a condition in which a person as a result of severe substance use disorder or co-occurring mental health disorder and a severe substance use disorder is unable to provide for their basic personal needs for food, clothing, or shelter, or (2) as a result thereof cannot meet their basic personal needs for "personal safety or necessary medical care" including when impaired by chronic alcoholism. SB43 also added other new definitions and allowed counties to defer implementation of those changes until January 1, 2026.	states the essential factual elements of an LPS conservatorship. The Directions for Use advise to give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction. CACI 4002 explains "gravely disabled" as expanded by SB 43.
		This summary of the essential factual elements for a Lanterman-Petris-Short Act [*LPS] conservatorship fails to include the new provisions of SB43 nor even references to other factual requirements. It is suggested that this instruction be amended to add language at the opening paragraph after "[…alcoholism] and" stating "is unable to provide for their basic personal needs for food, clothing, shelter, personal safety, or necessary medical care such that Respondent…." And the same language be added to numbered paragraph 2.	See the committee's response above.
		Additionally this instruction should be amended to add a new paragraph 3 referencing the language of Wel & Inst Code §5008(h)(1)(B) pertaining to the alternative factual element for "gravely disabled". That subsection refers to any condition in which a person has been found mentally incompetent under Section 1370 of the Penal Code and the four (4) additional requirements stated therein. There is no mention nor explanation of these alternative factual elements anywhere in this instruction language nor in the Directions for Use.	As stated in the Directions for Use of CACI No. 4002, the committee does not believe that the instruction would be used for a conservatorship under Penal Code section 1370. The committee recommends adding this

Instruction(s)	Commenter	Comment	Committee Response
			same warning to the Directions for Use of CACI No. 4000.
4001. "Mental Disorder" Explained (Revoke)	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
4002. "Gravely Disabled" Explained (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Bruce Greenlee Attorney (ret.) Richmond	1. New paragraph defining "Necessary Medical Care: This sentence: "necessary to prevent serious deterioration of an existing physical medical condition which, if left untreated, is likely to result in serious bodily injury." Per the rules of grammar and the dreaded "which/that" conundrum, "which" is always preceded by a comma. Move the comma to follow "condition." (Mistake is the Legislature's (W&I 5008(q)), but move it anyway.)	The committee recommends refining the sentence's punctuation to add a comma before which.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	It is recommended that the definitional terms for "gravely disabled" also contain a reference to the language of Wel & Inst Code §5008(h)(1)(B) referencing persons who have been found mentally incompetent under Section 1370 of the Penal Code with the listed four (4) factual requirements. The explanation is incomplete without this statutory alternative. It is also recommended that the Directions for Use include a reference to Wel & Inst Code §15610.67 definition of "serious bodily injury" since statutory references to other definitions are already included therein.	The committee agrees in part and recommends adding to the Sources and Authority a citation for "Serious Bodily Injury" Defined. The committee does not believe that the instruction should be expanded to include options under Penal Code section 1370. As the Directions for Use state, "A different instruction will be required if this standard is alleged."
4004. Issues Not to Be Considered (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	This instruction only references one (1) factual issue not to be considered in determining the need for a conservatorship by the jury. However, CACI 4002 itself states that the jury may not consider the likelihood of future deterioration or relapse of a condition and the Directions for Use thereunder indicate other factors not to be considered, including whether the person previously was gravely disabled and whether the person is willing or not willing to accept various forms of treatment. These non-elements should be all included herein and not spread out among other CACI instructions, or the title of this	The committee agrees in part and recommends expanding the title as suggested.

Instruction(s)	Commenter	Comment	Committee Response
		instruction to reflect its limited use as "Issues Not to Be Considered: Type of Treatment, Care, or Supervision."	
4005. Obligation to Prove—Reasonable Doubt (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran, President	It is recommended that paragraphs 2 & 4 of this instruction be modified to correctly define the term "gravely disabled" since that is the ultimate responsibility of the jury. These two paragraphs currently do not match the statutory definition of gravely disabled as found at Wel & Inst Code §5800(h)(1)(2)(3). They especially ignore the definitions at Wel & Inst Code §5800(h)(1)(A) & (B).	Gravely disabled is explained in CACI No. 4002. The committee does not believe it is necessary to repeat the content of that instruction in CACI No. 4005, which is about the burden of proof.
4006. Sufficiency of Indirect Circumstantial Evidence (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran, President	Agree.	No response required.
4007. Third Party Assistance (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
	Bruce Greenlee Attorney (ret.) Richmond	1. New language in first paragraph expanding on "basic needs:" Where does this language come from? The only statute cited in the [Sources and Authority], W&I 5350(e), does not contain this list of requirements. If "basic needs" are defined in a different statute, that statute needs to be in the [Sources and Authority].	The committee recommends adding a citation for the definition of gravely disabled, which includes a person's basic personal needs, to the Sources and Authority.
		2. And would it really be an "or?" Seems problematic if the family only has to do one of the listed items. "Ok, we'll see that s/he gets fed, but s/he can't live here." But on the other hand, if you change it to "and," then you are requiring the family to agree to provide everything in the list, which absent statutory authority, also seem problematic.	The committee does not recommend a change to the phrasing. The issue is whether there is testimony from family, friends, or others that they are willing and able to help provide for the person's basic personal needs. The issue is not whether one person is willing to help provide all of them.
		3. New language in second paragraph: Replace "their" with "[his/her/nonbinary pronoun]". The reference is to a specific person, the respondent, so gender or lack thereof will be clear.	The committee recommends against adding the pronoun as proposed; the sentence would read: "…to help provide [*respondent*] with food, clothing, [etc.]"

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	Wel & Inst. Code §5350(e)(1)&(4) specifically provide that the "family and friends assistance" provisions, which negate a finding of gravely disabled do not apply to persons found gravely disabled under the Wel & Inst. Code §5008(h)(1)(B) pertaining to the Penal Code §1370 findings of mental incompetency for felony charges. This instruction should be modified either to provide such language or to provide in Directions For Use that it should not be given in those circumstances.	The Directions for Use of an earlier instruction in the LPS series states that a different instruction will be required if the standard for mental incompetence under Penal Code section 1370 is alleged. The committee does not favor repeating that information in the context of this instruction.
4008. Third Party Assistance to Minor (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Bruce Greenlee Attorney (ret.) Richmond	1. See 1 and 2 for CACI 4007, above.	The committee recommends adding a citation for the definition of gravely disabled, which includes a person's basic personal needs, to the Sources and Authority.
		2. Interesting that for 4007, the prior language was "or;" for 4008 it was "and."	No further response required.

Instruction(s)	Commenter	Comment	Committee Response
	Orange County Bar Association by Christina Zabat-Fran, President	Wel & Inst. Code §5350(e)(1)&(4) specifically provide that the "family and Friend assistance" provisions, which negate a finding of gravely disabled, do not apply to persons found gravely disabled under the Wel & Inst. Code §5008(h)(1)(B) pertaining to the Penal Code §1370 under findings of mental incompetency for felony charges. This instruction should be modified either to provide such language or to provide in the Directions for Use that it should not be given in those circumstances.	See the committee's response to OCBA's same comment for CACI No. 4007, above.
VF-4000. Conservatorship —Verdict Form (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
4328. Affirmative Defense— Tenant Was Victim of Abuse or Violence (Revise)	California Lawyers Association, Litigation Section, Jury Instructions Committee by Reuben A. Ginsburg, Chair Sacramento	a. We agree with the revisions to the title and the first series of elements in the instruction.	No response required.
		b. We would modify element 2 in the second series of elements in the instruction to more closely parallel the language in element 3: "2. That [*name of plaintiff*] gave [*name of defendant*] at least three days' notice requiring [him/her/*nonbinary pronoun*] not to voluntarily permit or consent to the presence <u>on the property</u> of the person who committed the abuse or violence ~~back to the property~~; and"	The committee recommends the refinement to element 2 suggested by the California Lawyers Association (CLA).

Instruction(s)	Commenter	Comment	Committee Response
		c. The citation in the third paragraph of the Directions for Use to Code of Civil Procedure section 1161.3(a)(1)(A), (B), (C), (D) should be to section 1161.3(a)(2)(A), (B), (C), (D).	The committee recommends updating the citation as suggested by CLA.
		d. The revised instruction refers to a "qualified third party," and the Directions for Use notes the statutory definition of "qualified third party." Because there may be a factual dispute as to whether a third party was qualified, we suggest adding to the Directions for Use: "If the parties dispute whether a third party is 'qualified,' consider giving a special instruction on the definition of 'qualified third party.' "	The committee recommends adding a sentence similar to what CLA has suggested about a factual dispute relating to whether a third party is qualified.
		e. The last paragraph of the Directions for Use states that the tenant has a "complete defense" if the tenant proves that the perpetrator is not a tenant of the same dwelling unit. We would modify this language to state that the defense is complete unless the landlord proves the exception stated in Code of Civil Procedure section 1161.3(b)(2)(B): "The tenant has a complete defense to the unlawful detainer cause of action if the tenant proves that the perpetrator is not a tenant of the same 'dwelling unit' as the tenant, the tenant's immediate family member, or household member~~.~~ (~~S~~see Code Civ. Proc., § 1161.3(d)(1)), unless the landlord proves the exception (*id*., § 1161.3(b)(2)(B))."	The committee recommends adding language to the last paragraph of the Directions for Use similar to what CLA has suggested about the exception.
	Family Violence Appellate Project by Gloria Carolina Chong Housing Attorney	The Family Violence Appellate Project ("FVAP") submits the following comments regarding the Judicial Council's ("Council") proposed changes to the California Civil Jury Instructions ("CACI") number 4328, "Affirmative Defense—	See below for the committee's responses to FVAP's substantive comments.

Instruction(s)	Commenter	Comment	Committee Response
	Oakland	Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)". FVAP is the only nonprofit organization in California dedicated to representing domestic violence survivors in civil appeals for free. FVAP's goal is to empower abuse survivors through the court system and ensure that they and their children can live in safe and healthy environments, free from abuse. This includes a commitment to increasing survivors' access to secure and safe housing. Our connection to the domestic violence community and position as a co-sponsor of SB 1017 – a bill that revised Code of Civil Procedure section 1161.3 and added Code of Civil Procedure section 1174.27 - makes FVAP uniquely situated to assess the impact of the Council's proposed CACI revisions on survivors. We greatly appreciate the Council's work to update these important instructions. We submit the following comments to ensure these instructions serve their crucial function of accurately conveying information that court users – particularly jury participants and pro per litigants – can understand.	
		CACI No. 4328: Draft Jury Instructions A. Comments Regarding: Exceptions to the Affirmative Defense The second half of CACI instructions No. 4328 detail when a landlord may still evict a tenant who successfully asserts the Code of Civil Procedure section 1161.3 eviction defense. However, the proposed revisions do not accurately reflect the exception to the affirmative defense as detailed in Code Civ. Proc. § 1161.3.	The committee agrees and recommends refining elements 2 and 3 in the second half of the instruction to track the language of Code of Civil Procedure section 1161.3(b)(2)(B)(ii) about a three-day notice, as suggested by FVAP.

Instruction(s)	Commenter	Comment	Committee Response
		Particularly, the proposed revisions state that the plaintiff must have given defendant "at least three days' notice" requiring that defendant not allow the person who committed abuse or violence back to the property. However, Code Civ. Proc. § 1161.3 (b)(2)(B)(ii) uses clear language indicating that a plaintiff must give the defendant "a three-day notice" banning the perpetrator of abuse from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "three days' notice" to mean that a plaintiff giving verbal notice would suffice for the purposes of this exception. Incorrectly interpreting the exception to this defense has huge implications and could lead to a survivor of abuse or violence being wrongfully evicted. The possibility of a survivor being wrongfully evicted is in direct contradiction to the legislature's intent of "provid[ing]… survivors of abuse and violence protection against being evicted on account of the very abuse or violence which they endured." (Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1017 (2021-2022 Reg. Sess.) as amended Mar. 31, 2022, p.7.) Thus, the draft jury instructions should be amended to include the unambiguous language that Code Civ. Proc. § 1161.3 (b)(2)(B)(ii) uses to avoid misinterpretation of the exception to this affirmative defense. **1. Recommended Language:** Based on the reasons outlined in section A, we recommend the following text to explain the affirmative defense exception: … "2. That [name of plaintiff] gave [name of defendant] a three-day notice requiring [him/her/nonbinary pronoun] not to voluntarily permit or consent to the presence of the person who committed the abuse or violence back to the property; and 3. That, after the three-day notice expired, [name of defendant]	

Instruction(s)	Commenter	Comment	Committee Response
		voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence."	
		B. Comments Regarding: Reference to Code Civ. Proc. § 1174.27 and Partial Evictions Currently, the proposed CACI instructions fail to contemplate the partial eviction procedure as referenced in Code Civ. Proc. § 1161.3 and as detailed in Code Civ. Proc. § 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the Directions for Use briefly mention partial eviction procedures, the instructions themselves should reference partial evictions for jurors to understand what occurs when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, we suggest brief language be added to reference the partial eviction procedures detailed in Code Civ. Proc. § 1174.27. **1. Recommended Language:** We recommend the Council add the following language to the end of the jury instructions for the reasons outlined in Section B. Please note that our recommended language below includes reference to our proposed Verdict Form No. 4303 that we suggest the Council include later in this comment. "If the person who committed the act[s] of abuse or violence is a tenant of the same living unit as [[name of defendant who asserted the defense]/ [or] a member of [name of defendant who asserted the defense]'s immediate family]/ [or] a member of [name of defendant who asserted the defense]'s household], the jury shall proceed in accordance with Code Civ. Proc. § 1174.27. If Code Civ. Proc. § 1174.27 applies, the jury shall	This suggestion is beyond the scope of the invitation to comment. The committee will consider the suggestion for additional information about a partial eviction process under Code of Civil Procedure section 1174.27 during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		reference Verdict Form No. 4303 for partial eviction procedures."	
		CACI No. 4328: Directions for Use **A. Comments Regarding: Use of Additional Definitions** We suggest the Council add language that more clearly defines the documentation requirements detailed in this defense. Particularly, the Council should consider adding definitions of the terms "court order" and "law enforcement report", as each term encompasses various documents that a tenant may present when asserting this defense. Code of Civil Procedure section 1161.3(a)(2) clearly defines these terms to avoid ambiguity when interpreting the documentation requirements. Additionally, we suggest language that details who qualifies as a "health practitioner" under the Code of Civil Procedure. Currently, the Directions for Use explains who may serve as a qualified third party for the purposes of providing documentation of abuse. However, this section fails to include the detailed definition of "health practitioner" used in Code Civ. Proc. § 1161.3(a)(3). Again, the Code of Civil Procedure provides these detailed definitions to avoid ambiguity in the interpretation of this affirmative defense, and as such, the definitions should be included in the Directions for Use. **1. Recommended language:** Based on the reasons outlined above, we recommend the following text to clearly define terms used in the proposed instructions. "The acts of abuse or violence must be documented in a court order, law enforcement report, qualified third-party statement,	The committee does not agree that adding statutory definitions for "court order," "law enforcement report," and "health practitioner"—which are just three of many defined terms in the statute—would be of significant assistance to CACI users. The Directions for Use cite the relevant subdivisions of the statute that contain the additional definitions suggested. The committee, however does recommend adding a sentence to the Directions for Use about the potential need to instruct the jury about the type of documentation at issue. The committee also recommends adding a sentence similar to what CLA suggested about a factual dispute relating to whether a third party is qualified.

Instruction(s)	Commenter	Comment	Committee Response
		or any other form of documentation or evidence that reasonably verifies that the abuse or violence occurred (element 2). (Code Civ. Proc., § 1161.3(a)(2)(A), (B), (C), (D).) A "court order" is a temporary restraining order, emergency protective order, or protective order lawfully issued within the last 180 days that protects the tenant, the tenant's immediate family member, or the tenant's household member from abuse or violence. (Code Civ. Proc., § 1161.3(a)(2)(A).) A "law enforcement report" is a copy of a written report, written within the last 180 days, by a peace officer acting in their official capacity that states the tenant, the tenant's immediate family member, or the tenant's household member filed a report alleging that they are a victim of abuse or violence. (Code Civ. Proc., § 1161.3(a)(2)(B).) Further, a "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, or a human trafficking caseworker, or a victim of violent crime advocate. (Code Civ. Proc., § 1161.3(a)(6).) A "health practitioner" can be any of the following: "a physician and surgeon, osteopathic physician and surgeon, psychiatrist, psychologist, registered nurse, licensed clinical social worker, licensed marriage and family therapist, or licensed professional clinical counselor." (Code Civ. Proc., § 1161.3 (a)(3).)"	
		Addition of Verdict Form No. 4303. Currently, the proposed CACI instructions do not reference the partial eviction procedures outlined in Code Civ. Proc. § 1174.27. As the fact finders of the court, the jury must also decide whether to order a partial eviction if the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit. As such, we suggest the addition of a Verdict Form to detail the steps necessary in making this partial eviction determination.	FVAP's comment is beyond the scope of the invitation to comment. The committee nevertheless thanks FVAP for drafting a proposed verdict form for the novel partial eviction process under Code of Civil Procedure section 1174.27. The

Instruction(s)	Commenter	Comment	Committee Response
		Deviating from standard unlawful detainer procedures, a partial eviction is a judgment entered against one or more defendant(s) and for plaintiff and the other defendant(s). The defendant(s) who have judgment entered for them retain possession of the dwelling unit. Without a verdict form for this novel partial eviction procedure, the jury may be more likely to inadvertently issue judgements that are contrary to law or difficult to implement. To ensure that a jury has proper instructions usable for partial evictions, we make the below recommendations for the proposed new Verdict Form. **1. Recommended language:** --Begin Form-- **Title: Verdict Form No. 4303 Partial Eviction Procedure—Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., §§ 1161.3 and 1174.27)** We answer the questions submitted as follows: 1. Does plaintiff's complaint include a cause of action based on an act of abuse or violence against a tenant, a tenant's immediate family member, or a tenant's household member? _____ 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 a defendant assert the Code of Civil Procedure section 1161.3 affirmative eviction defense? _____ yes _____no If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 3. Did [name of defendant who raised the defense] give plaintiff a court order, law enforcement report, statement of a qualified third party or other evidence or documentation that	committee will consider the proposed new verdict form during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		evidences that they (or their immediate family member, or their household member) experienced abuse or violence? _____ yes _____no If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 4. Name the defendant that perpetrated the abuse or violence. Perpetrator of abuse or violence: _____ 5. Is the perpetrator of abuse or violence a tenant in residence in the same dwelling unit as the defendant who asserted the defense? _____ yes _____no If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 6. Is the perpetrator of abuse or violence guilty of unlawful detainer based on an act of abuse or violence against another defendant, or that defendant's immediate family member or household member? _____ yes _____no If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form. 7. Is [name of defendant who raised the defense] guilty of an unlawful detainer on any other grounds? _____ yes _____no Signed: _____ Presiding Juror Dated: _____ After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.	

Instruction(s)	Commenter	Comment	Committee Response
		Directions for Use This verdict form is based on CACI No. 4328, Affirmative Defense–Tenant was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3). See also the Directions for Use for that instruction to determine if a partial eviction is proper. Question 3 incorporates the documentation requirements set forth in CACI No. 4328, see those instructions to determine whether the proper documentation was provided. If a partial eviction is ordered using the above verdict form, the following will apply per Code Civ. Proc. § section 1172.47: • A partial eviction will be issued ordering the removal of the perpetrator of abuse or violence and ordering the perpetrator to be immediately removed and barred from the dwelling unit. (Code Civ. Proc., § 1172.47 (f)(1)(A).) • The tenancy will not be terminated. (Code Civ. Proc., § 1172.47 (f)(1)(A).) • The landlord is ordered to change the locks and provide the remaining occupants with the new key. (Code Civ. Proc., § 1172.47 (f)(1)(B).) • The defendant raising the affirmative defense and any other occupant not found guilty of an unlawful detainer shall not be guilty of an unlawful detainer and may not be named in any judgment in favor of the landlord. (Code Civ. Proc., § 1172.47 (e)(1).) • Only the defendant who is found to be the perpetrator of abuse or violence, and thus guilty of unlawful detainer, will be held liable to the landlord for any amount associated with the unlawful detainer such as holdover damages, court costs, lease termination fees and attorney's fees. (Code Civ. Proc., § 1172.47 (f)(2).) • The court may permanently bar the perpetrator of abuse or violence from entering any portion of the residential premises. (Code Civ. Proc., § 1172.47 (f)(3)(A).)	

Instruction(s)	Commenter	Comment	Committee Response
		• The court may order as an express condition of the tenancy that the remaining occupants shall not give permission to or invite the perpetrator of abuse or violence to live in the dwelling unit. (Code Civ. Proc., § 1172.47 (f)(3)(B).) • The court must consider custody or visitation orders or arrangements and any other factor that may necessitate the temporary reentry of the perpetrator of abuse or violence. (Code Civ. Proc., § 1172.47 (f)(4).) -- End Form --	
	Bruce Greenlee Attorney (ret.) Richmond	1. Opening paragraph; [*specify crime*]: I think that the first time that you use this device in the instruction it should be expanded to say where to find one of these crimes since it has to be one of three specific crimes, not just any old crime. Revise: [*specify crime from Code of Civil Procedure section 1946.7(a)(6)-(8*)]	The committee agrees that adding information to the bracketed "specify crime" would improve clarity. The committee recommends adding a reference to Civil Code section 1946.7 to the bracket.
		2. Element 3: Why delete "also?" It emphasizes the crucial point that the exception applies only if the perpetrator and the victim are living together in the same rental unit.	The committee does not share the commenter's understanding of the affirmative defense.
		3. Is "perpetrator" a word not readily familiar to your average juror? Using it instead of "person who committed" would shorten things a bit.	The committee does not see improved clarity in the suggested change.
		4. DforU third paragraph: Change "victim of violent crime advocate" to "advocate for victims of violent crime." "Advocate" is the key word and it needs to lead rather than "victim."	"A victim of violent crime advocate" is the statutory terminology of Civil Code section 1946.7. (Civ. Code, § 1946.7(h)(5); see Code

Instruction(s)	Commenter	Comment	Committee Response
			Civ. Proc., § 1161.3(a)(2).) The committee prefers to use the precise statutory language in this sentence.
		5. "DforU last paragraph: Dwelling unit" is still not defined. So the question of whether a building with multiple apartments is a single dwelling unit under this statute remains unresolved. I would not delete this pondering.	As the Directions for Use indicate, a process for partial eviction of only the perpetrator of the violence or abuse now exists because of recent legislation (Sen. Bill 1017 (Stats. 2002; ch. 558); see Code Civil Proc., § 1174.27.) The note's pondering no longer has applicability.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	Public Law Center by Jonathan Bremen et al. Santa Ana	**Proposed Instruction 4328 Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)** In general, PLC supports the adoption of proposed CACI 4328, as it reflects the key changes to Code of Civil Procedure section 1161.3. Notably, the "[or] a member of [name of defendant]'s immediate family" language throughout the instructions clarifies that under current law, the crime victim/survivor does not need to be a tenant or a member of	The committee acknowledges PLC's general support for the changes to CACI No. 4328. See below for the committee's responses to PLC's substantive comments.

Instruction(s)	Commenter	Comment	Committee Response
		the tenant's household. In addition, the proposed revisions in the "Directions for Use" generally appear helpful to a jury. Nonetheless, PLC recommends several minor modifications to the instructions to better align with the changes in law and to protect the rights of our clients.	
		A. Paragraph 3 PLC urges the Judicial Council to remove this paragraph from the section listing what the defendant must prove. Code of Civil Procedure section 1161.3 does not require the tenant to prove that the perpetrator of violence is not a tenant to raise this as an affirmative defense. Rather, if the defendant raises this as an affirmative defense and the landlord responds with evidence that the perpetrator of violence is a tenant in the same household, the court must proceed under Code of Civil Procedure section 1174.27. Thus, PLC suggests removing Paragraph 3 and inserting the language from Paragraph 3 in Section 2, which begins with, "Even if Defendant proves all of the above, Plaintiff may still evict Defendant if . . . ."	The committee agrees that Code of Civil Procedure section 1174.27 applies if the perpetrator is a tenant of the same residential dwelling unit. The committee also agrees that the court must proceed using that process. The committee has addressed this circumstance in the Directions for Use. The committee does not believe it is appropriate to remove element 3 from the instruction, which addresses when the perpetrator is not a tenant of the residential dwelling unit under Code of Civil Procedure section 1161.3.
		B. Paragraph 4	The committee does not agree that it is necessary to restate in element 4

Instruction(s)	Commenter	Comment	Committee Response
		Paragraph 4 could be more clearly written to reflect that the violence or abuse can be against a tenant, tenant's immediate family member, or a member of tenant's household. Accordingly, PLC recommends the following revision to Paragraph 4: **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult/ [or] [***specify crime***]** against a tenant, a tenant's immediate family member, or a tenant's household member.	against whom the acts of violence were committed; element 1 states that requirement. Elements 2–4 build on element 1.
		C. Section 2 Section 2, which specifies what the Plaintiff must prove to move forward with an eviction, does not accurately reflect the exception to the affirmative defense as detailed in Code of Civil Procedure section 1161.3. Particularly, the proposed instruction state, "after at least three days' notice, [*name of defendant*] voluntarily permitted or consented to the presence on the property of the person who committed the abuse or violence." However, Code of Civil Procedure section 1161.3, subdivision (b)(2)(B)(ii) indicates that a plaintiff must give the defendant "*a three-day notice*" banning the abuser from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "*three days' notice*" to mean that a plaintiff's verbal notice is sufficient for this exception. To avoid misinterpretation of the exception to this affirmative defense, the proposed instruction should be amended to include the unambiguous language from Code of Civil Procedure section 1161.3, subdivision (b)(2)(B)(ii).	The committee agrees and recommends revising elements 2 and 3 of the second part of the instruction as suggested by FVAP above.

Instruction(s)	Commenter	Comment	Committee Response
		The proposed instruction fails to contemplate the partial eviction procedure as referenced in Code of Civil Procedure section 1161.3 and detailed in section 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the "Directions for Use" briefly mention partial eviction procedures, the instructions themselves should reference partial evictions, so jurors understand how to proceed when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, PLC suggests adding a brief reference to the partial eviction procedures set forth in Code of Civil Procedure section 1174.27.	The committee has addressed the partial eviction procedure for when the perpetrator is a tenant of the same residential dwelling unit in the Directions for Use. The committee will consider developing a new instruction and/or whether to propose further revisions in the next release.
		D. Directions For Use PLC recommends several amendments to the third paragraph of the "Directions for Use" section. First, PLC suggests defining or including examples of a "court order." Code of Civil Procedure section 1161.3, subdivision (a)(2)(A) lists a temporary restraining order, emergency protective order, or other protective order. Including such examples would provide clarity to jurors, especially those without legal knowledge. Second, PLC suggests clarifying or defining "law enforcement report." The proposed instruction states, "[t]he acts of abuse or violence must be documented in a court order, law enforcement report, qualified third party statement . . . ." However, according to Code of Civil Procedure section 1161.3, not all the details of the abuse or violence need to be documented in a police report. Rather, it is sufficient that the police report states that the tenant, the tenant's immediate family member, or the tenant's household member has filed a report alleging that they are a victim of abuse or violence. (Code Civ. Proc., § 1161.3,	The Directions for Use alert users to special circumstances involving the instruction; they are not read to a jury. The committee therefore believes the explanation for element 2 in the Directions for Use alerts users to the types of evidence that may document abuse or violence and that adding additional definitions or examples about court orders or law enforcement reports is not necessary. The committee, however,

Instruction(s)	Commenter	Comment	Committee Response
		subd. (a)(2)(B).) Thus, PLC recommends changing the beginning of the sentence so that it reads, "Evidence of abuse or violence must be documented . . . ." Alternatively, PLC recommends defining "law enforcement report."	recommends refining the paragraph, as suggested, to read "Evidence of…", rather than "The acts of…".
	Western Center on Law & Poverty by Katherine J. G. McKeon Attorney, Housing Team Los Angeles	The following comments are submitted by the Western Center on Law & Poverty regarding the Judicial Council's ("Council") proposed changes to the California Civil Jury Instructions ("CACI") number 4328, "Affirmative Defense—Tenant Was Victim of Abuse or Violence (Code Civ. Proc., § 1161.3)". As a designated support center, Western Center provides technical assistance and litigation support to legal service providers across the state of California on a wide variety of housing matters, including unlawful detainer procedures and practices. Western Center also sponsors and supports legislature in the State legislature, advocating for strong, clear, and enforceable eviction protections for low-income and vulnerable communities.	See below for the committee's responses to Western Center on Law & Poverty's substantive comments.
		I. Comments Regarding: Draft Jury Instructions The second half of CACI instructions No. 4328 do not accurately reflect the exception to the affirmative defense as detailed in Code Civ. Proc., § 1161.3. Particularly, the proposed revisions state that the plaintiff must have given defendant "at least three days' notice" requiring that defendant not allow the person who committed abuse or violence back to the property. However, Code Civ. Proc., § 1161.3 (b)(2)(B)(ii) uses clear language indicating that a plaintiff must give the defendant "a three-day notice" banning the perpetrator of abuse	The committee agrees and recommends revising elements 2 and 3 of the second half of the instruction as suggested by FVAP above.

Instruction(s)	Commenter	Comment	Committee Response
		from the property. Currently, the proposed revisions may lead to ambiguity when interpreting the three-day notice requirement, as a juror may interpret "three days' notice" to mean that a plaintiff may give verbal notice, thus satisfying this exception to the statute and allowing an unlawful detainer to proceed. Thus, the draft jury instructions should be amended to include the unambiguous language that Code Civ. Proc., § 1161.3 (b)(2)(B)(ii) uses to avoid misinterpretation of the exception to this affirmative defense. Currently, the proposed CACI instructions fail to contemplate the partial eviction procedure as referenced in Code Civ. Proc., § 1161.3 and as detailed in Code Civ. Proc., § 1174.27. Jurors must understand how these two code sections interact when deciding whether to order a partial eviction. Although the Directions for Use briefly mention partial eviction procedures, the instructions themselves should reference partial evictions for jurors to understand what occurs when a defendant asserts that another defendant living in the dwelling unit was the perpetrator of abuse or violence. Thus, we suggest brief language be added to reference the partial eviction procedures detailed in Code Civ. Proc., § 1174.27.	The committee has addressed the partial eviction procedure for when the perpetrator is a tenant of the same residential dwelling unit in the Directions for Use. The committee will consider developing a new instruction and/or whether to propose further revisions in the next release.
		II. Comments Regarding: Directions for Use We suggest the Council add language that more clearly defines the documentation requirements detailed in this defense. Particularly, the Council should consider adding definitions of the terms "court order" and "law enforcement report", as each term encompasses various documents that a tenant may present when asserting this defense. Additionally, we suggest language that details who qualifies as a "health practitioner" under the Code of Civil Procedure. Code of Civil Procedure sections	The Directions for Use alert users to special circumstances involving the instruction. The committee does not believes that adding additional definitions or examples about court orders, law enforcement reports, or who qualifies

Instruction(s)	Commenter	Comment	Committee Response
		1161.3 (a)(2) and (a)(3) clearly define these terms to avoid ambiguity when interpreting the documentation requirements.	as a health practitioner is necessary. The committee, however does recommend adding a sentence to the Directions for Use about the potential need to instruct the jury about the type of documentation at issue. The committee also recommends adding, as suggested by CLA (above), a sentence similar to what CLA suggested about a factual dispute relating to whether a third party is qualified.
		III. Addition of Verdict Form for Partial Evictions Currently, the proposed CACI instructions do not reference the partial eviction procedures outlined in Code Civ. Proc., § 1174.27. As the fact finders of the court, the jury must also decide whether to order a partial eviction if the person who committed the abuse or violence is a tenant in residence of the same residential dwelling unit. As such, we suggest the addition of a Verdict Form to detail the steps necessary in making this partial eviction determination. Deviating from standard unlawful detainer procedures, a partial eviction is a judgment entered against one or more defendant(s) and for plaintiff and the other defendant(s). The defendant(s) who have judgment entered for them retain possession of the	This comment is beyond the scope of the invitation to comment. The committee will consider drafting a new verdict form for the novel partial eviction procedure during the next release cycle.

Instruction(s)	Commenter	Comment	Committee Response
		dwelling unit. Without a verdict form for this novel partial eviction procedure, the jury may be more likely to inadvertently issue judgements that are contrary to law or difficult to implement. To ensure that a jury has proper instructions usable for partial evictions, we recommend the addition of a new Verdict Form. IV. Conclusion In conclusion, we express our appreciation for the Judicial Council's work on updating these important instructions to reflect new protections for tenants under state law, and for the Council's consideration of these comments. Thank you for your consideration.	No further response required.
5009. Predeliberation Instructions (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Civil Justice Association of California by Lucy Chinkezian Counsel Sacramento	**Concluding Instructions** **CACI 5009. Predeliberation Instructions** ***Directions for Use*** As drafted, this instruction can cause confusion. The revision refers the reader back to certain "bracketed" language that should not be read if a court reporter is not being used to record the trial proceedings. However, there are *multiple* bracketed clauses in the paragraph to which the revision refers, and not all of them should be stricken if there is no court reporter. Therefore, it may not be obvious what to read in the scenario where there is no court reporter, but where not all exhibits were sent back.	The committee agrees that clarity could be improved by refining the two sentences in the Directions for Use.

Instruction(s)	Commenter	Comment	Committee Response
		We recommend breaking up these concepts into separate instructions that can be more clearly stricken when appropriate, as follows: Do not read the bracketed portion of the fifth paragraph that refers to reading back testimony if a court reporter is not being used to record the trial proceedings. Consider ~~deleting the bracketed reference to providing exhibits if the court sends all admitted exhibits into the jury room~~ deleting the entire bracketed portion of the fifth paragraph if the proceedings are not being recorded and the court sends all admitted exhibits into the jury room.	The committee recommends revising the Directions for Use in a manner similar to what has been suggested.
		We further recommend changing the instruction itself to include the word "also" within the brackets, as the word is unnecessary in the event the bracketed language is not read. The revision would look as follows: [Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may [ask to have testimony read back to you] [or] [ask to see any exhibits admitted into evidence that have not already been provided to you].] Also,] jurors may need further explanation about the laws that apply to the case.	The committee recommends bracketing [Also, jurors/Jurors] in the fifth paragraph of the instruction in the event that both optional introductory sentences are not given.
		For the forgoing reasons, CJAC respectfully asks that the jury instructions be amended to address the concerns that we have raised. [*Commenter's contact information omitted.]	No further response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
	California Lawyers Association	Agree.	No response required.

Instruction(s)	Commenter	Comment	Committee Response
5012. Introduction to Special Verdict Form (Revise)	by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento		
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
Verdict Forms Globally (Revise)	Bruce Greenlee Attorney (ret.) Richmond	1. It could be clearer in the Invitation to Comment just exactly what global change is proposed. Assume it's the deletion of "that you are ready to present your verdict in the courtroom." And I assume that some change in the law or procedure now gives the job of reading the verdict to the judge rather than the foreperson. If that comes from a statute or a Rule of Court, the statute or rule needs to be in the [Sources and Authority].	The committee will clearly describe the global change in its Advisory Committee Report to the Judicial Council. The commenter correctly notes that the committee has proposed deleting the final clause of the final sentence of all verdict forms: "that you are ready to present your verdict in the courtroom." This change is being made on the suggestion of a trial court judge. It is intended to avoid discouraging jurors from agreeing to serve as a presiding juror on the mistaken belief that they will have to present orally their verdict in open court.

Instruction(s)	Commenter	Comment	Committee Response
VF-300. Breach of Contract (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
VF-400. Negligence—Single Defendant (Revise)	California Lawyers Association by Reuben A. Ginsburg Chair, Jury Instructions Committee Sacramento	Agree.	No response required.
	Orange County Bar Association by Christina Zabat-Fran President	Agree.	No response required.
All CACI instructions	Family Violence Appellate Project by Gloria Carolina Chong Housing Attorney Oakland	We also recommend making some further changes to all instructions to increase their readability and accessibility for jurors and litigants with limited English proficiency and limited literacy skills. We recommend the following: ▪ Avoid long sentences with many clauses separated by commas. Although this type of sentence structure is common in legal writing, it often leads to confusion and misunderstanding for people without a legal background. These sentences should be broken down into separate, shorter sentences. ▪ Use a variety of text formatting options throughout the forms. Individuals with limited English proficiency or limited literacy	FVAP's broader comments about the Judicial Council of California's Civil Jury Instructions (CACI) are beyond the scope of the invitation to comment. Ease of understanding by jurors, without sacrificing accuracy, is the primary goal of CACI. To that end, the committee will consider

Instruction(s)	Commenter	Comment	Committee Response
		skills would be able to understand and appropriately utilize the forms if the key words/phrases and instructions stood out from the rest of the text using italics, bold font, underlining, larger font size, ALL CAPS, and creative combinations thereof. We also encourage the Council to generally revise the CACI instructions to make them more accessible in form and content to pro per litigants and jurors. The language should be accessible for a party with a 7th or 8th grade reading level to understand. Visually, the Civil Jury Instructions should be structured to support reading comprehension for those with limited literacy skills. It is our hope that this is the beginning of a longer dialogue about ways the California courts can be more accessible to tenants, particularly survivors of domestic violence and tenants representing themselves. In conclusion, we express our appreciation for the Judicial Council's work on updating these important instructions to reflect new protections for tenants under state law, and for the Council's consideration of these comments. [*Commenter's contact information omitted.]	FVAP's comments directed to increasing readability and accessibility in future releases.

Item number: 04

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/4/2024

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

Title of proposal: Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e)

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Adopt rule 4.553

Committee or other entity submitting the proposal:
Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e) Criminal Law Advisory Committee

*Staff contact (*name, phone and e-mail*): Sarah Fleischer-Ihn, 415-865-7702, 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*): 10/26/23
Project description from annual agenda: Develop standards for appointment of private counsel in superior court for Racial Justice Act claims, as required under Penal Code section 1473.1 (SB 133 (Stats. 2023, ch. 34)).

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This proposal would implement a change in the law that is already in effect.

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.: 24-091
For business meeting on May 17, 2024

Title
Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e)

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 4.553

Recommended by
Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2024

Date of Report
March 5, 2024

Contact
Sarah Fleischer-Ihn, 415-865-7702
sarah.fleischer-ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends the adoption of rule 4.553 of the California Rules of Court to implement legislation requiring the Judicial Council to develop qualifications for the appointment of counsel in superior court habeas corpus proceedings under Penal Code section 1473(e). Section 1473(e) provides for relief under the California Racial Justice Act of 2020, which prohibits the state from seeking or obtaining a conviction or sentence based on race, ethnicity, or national origin and allows petitioners to make claims for relief based on violations of the act.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective September 1, 2024, adopt California Rules of Court, rule 4.553, on qualifications for appointed counsel for claims under Penal Code section 1473(e).

The proposed rule is attached at pages 6–7.

Relevant Previous Council Action

Because this rule addresses a new statutory requirement, there is no relevant previous council action.

With regard to implementation of other aspects of the California Racial Justice Act of 2020 (Racial Justice Act), the Appellate Advisory Committee and the Criminal Law Advisory Committee are recommending amendments to rules 4.551, 8.385, and 8.386 of the California Rules of Court and revisions to *Petition for Writ of Habeas Corpus* (form HC-001), *Motion to Vacate Conviction or Sentence* (form CR-187), and *Order on Motion to Vacate Conviction or Sentence* (form CR-188). These recommendations are also anticipated for consideration by the Judicial Council at its May 17, 2024, meeting.

Analysis/Rationale

The committee recommends adoption of a new rule of court to fulfill the requirements of Penal Code section 1473.1.[1] Section 1473.1 was enacted on June 30, 2023,[2] and requires the Judicial Council to develop standards for appointment of private counsel in superior court for claims filed under section 1473(e) by individuals who are not sentenced to death.[3] Section 1473(e) addresses petitions for writ of habeas corpus with a claim for relief under section 745,[4] which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin. The statute requires that the standards include a minimum of 10 hours of training on the Racial Justice Act.

The recommended rule is modeled in part after two other rules in the California Rules of Court addressing counsel qualifications in criminal and related matters: rule 4.117, Qualifications for appointed trial counsel in capital cases, and rule 8.652, Qualifications of counsel in death penalty–related habeas corpus proceedings. Like these rules, the recommended rule includes a purpose section defining the rule's scope, attorney qualifications, alternative qualifications, and guidance around public defender appointments.

The committee proposes rule 4.553 do the following:

- Describe the purpose and scope of the rule (subd. (a));
- Include the following qualifications for appointed counsel (subd. (b)):
    - Active membership in the State Bar of California (par. (1));
    - Experience as one of the following (par. (2)):

[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Sen. Bill 133 (Stats. 2023, ch. 34).

[3] Effective January 1, 2024, subdivision (f) of section 1473 was re-lettered as (e). (See Sen. Bill 97; Stats. 2023, ch. 381.)

[4] The California Racial Justice Act of 2020 (Assem. Bill 2542; Stats. 2020, ch. 317) enacted Penal Code section 745.

        - Counsel of record for a petitioner in at least two habeas corpus proceedings filed in the Supreme Court, a Court of Appeal, or a superior court (subpar. (A));
        - Counsel of record in at least two criminal appeals filed in the Supreme Court, a Court of Appeal, or a federal appellate court (subpar. (B)); or
        - Have the experience required to have represented the individual in the underlying class of criminal case (subpar. (C));
    - Familiarity with the practices and procedures of California criminal courts (par. (3));
    - Demonstrated proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy (par. (4)); and
    - Have completed a minimum requirement of 10 hours of training on the Racial Justice Act, including training on implicit bias and on habeas corpus procedure, approved for Minimum Continuing Legal Education credit by the State Bar of California (par. (5));
- Allow the court to appoint an attorney who does not meet all the qualifications if the attorney has completed the 10 hours of training on the California Racial Justice Act of 2020, including training on implicit bias and on habeas corpus procedure, and demonstrates the ability to provide competent representation (subd. (c)); and
- Provide guidance to public defender offices on assignment of qualified attorneys (subd. (d)).

Policy implications

In addition to implementing legislative requirements, this recommendation helps implement Goal I, "Access, Fairness, Diversity, and Inclusion," of the judicial branch's strategic plan by assisting courts with appointing qualified counsel to represent petitioners in habeas corpus proceedings with claims under section 745.

Comments

The proposal circulated for comment from December 8, 2023, to January 19, 2024. Six comments were received. The commenters were two divisions in the Superior Court of Orange County, the Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, the First District Appellate Project (joined by the Office of the State Public Defender), the San Francisco Public Defender, and the Orange County Bar Association. Three commenters agreed with the proposal and three agreed if modified.

The committee appreciates the time taken to respond to this proposal. Below is a summary of substantive issues that were raised in the comments. All comments received, and the committee's responses, are provided in the attached chart of comments at pages 8–16.

Alternative requirements

The First District Appellate Project, joined by the Office of the State Public Defender, and the San Francisco Public Defender were concerned that the alternative requirements subdivision did

not provide sufficient assurance that an attorney would have the skills to litigate a habeas corpus petition with a claim under section 745. The First District Appellate Project recommended dropping the section altogether, stating that the proposed qualifications were already modest and provided courts with sufficient leeway by allowing counsel to have different kinds of relevant experience. Additionally, they expressed concern that the alternative requirements section would authorize the appointment of counsel who did not meet basic criteria. The San Francisco Public Defender separately recommended modeling the appointment procedure after rule 8.300 of the California Rules of Court on appointment of appellate counsel.[5]

In developing the rule, the committee carefully considered a framework establishing sufficient qualifications as well as a measure of flexibility for courts. The committee discussed the comments but concluded that it was important to offer courts a way to use their discretion and judgment to appoint qualified counsel who did not meet all of the qualifications listed in subdivision (b). Further, in developing the alternative requirements section, the committee decided to set a minimum threshold requiring an appointed attorney to meet the statutory requirement under section 1473.1 of a minimum of 10 hours of training in the Racial Justice Act, and then allow courts the discretion to determine counsel's ability to provide competent representation on a case-by-case basis. Subdivision (c)'s requirement that the court find counsel who "demonstrate[] the ability to provide competent representation to the petitioner" ensures that counsel who is not competent is not appointed.

One hour of training on habeas corpus procedure

Section 1473.1 requires appointed counsel to have a minimum of 10 hours of training on the Racial Justice Act. The rule includes training in implicit bias and habeas corpus procedure as part of the 10-hour requirement.[6] The First District Appellate Project, joined by the Office of the State Public Defender, suggests requiring the training to specifically include at least one hour of training on habeas corpus procedure since most criminal trial practitioners have little to no familiarity with state habeas corpus practice.

The committee agreed with the importance of including training in habeas corpus procedure as part of the training requirements for appointed counsel but thought the proposed language without a specific time requirement was sufficient.

Active membership in State Bar of California

A member of the JRS commented that the requirement that appointed counsel be an active member of the State Bar of California was unnecessary because it could limit pro hac vice appointments of otherwise qualified counsel who are licensed out of state. The committee opted to retain the requirement for active membership in the State Bar of California as it is a stated

[5] Under rule 8.300, each Court of Appeal adopts procedures for appointing appellate counsel for indigent defendants. Qualified attorneys are placed on a list to receive appointments in appropriate cases, and the court may contract with an administrator to handle appellate court appointments.

[6] Proposed new rule 4.553(b)(5).

requirement in other rules of court on appointment of counsel in criminal and related matters (see Cal. Rules of Court, rules 4.117(d)(1) and 8.652(c)(1)). Additionally, a court may appoint qualified out-of-state counsel under the procedures in the alternative requirements subdivision.

Demonstrating proficiency

A member of the JRS commented that the provision requiring an attorney to demonstrate proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy[7] could be burdensome for courts to assess, overbroad, and more applicable to capital appointments than appointments under section 1473(e). Although a few members of the committee agreed that this provision could be burdensome for courts to assess, the majority thought that the requirement was manageable and gave courts the discretion to determine how best to assess an attorney's proficiency.

Alternatives considered

Section 1473.1 requires the Judicial Council to promulgate standards for appointment of counsel in superior court for claims filed under section 1473(e), so the committee did not consider the alternative of not proposing such standards.

Section 1473.1 contains an exception for death penalty cases, but it does not appear to prohibit developing qualifications related to the Racial Justice Act in these types of cases. However, given that qualifications for counsel in death penalty–related habeas corpus proceedings are quite extensive and already difficult to meet, the committee decided not to develop qualifications related to the Racial Justice Act for counsel in death penalty–related habeas corpus proceedings.

Fiscal and Operational Impacts

The fiscal and operational impacts of this proposal are attributable to legislation.

Attachments and Links

1. Cal. Rules of Court, rule 4.553, at pages 6–7
2. Chart of comments, at pages 8–16
3. Link A: Penal Code section 1473.1, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.1.&lawCode=PEN

[7] See proposed new rule 4.553(b)(4).

Rule 4.553 of the California Rules of Court would be adopted, effective September 1, 2024, to read:

Rule 4.553. Qualifications for appointed counsel for claims under section 1473(e) in noncapital case

(a) Purpose

This rule defines the minimum qualifications for appointment of counsel for a petition for writ of habeas corpus claim filed under section 1473(e) in a noncapital case in the superior court. These minimum qualifications are designed to promote competent representation in habeas corpus proceedings related to the California Racial Justice Act of 2020 and to avoid unnecessary delay and expense by assisting the courts in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether a person received effective assistance of counsel. An attorney is not entitled to appointment simply because the attorney meets the minimum requirements.

(b) Qualifications

To be eligible as appointed counsel, an attorney must:

(1) Be an active member of the State Bar of California.

(2) Have experience as one of the following:

(A) Counsel of record for a petitioner in at least two habeas corpus proceedings filed in the Supreme Court, a Court of Appeal, a superior court, or a federal court.

(B) Counsel of record in at least two criminal appeals filed in the Supreme Court, a Court of Appeal, or a federal appellate court.

(C) Have the experience required to have represented the individual in the underlying class of criminal case.

(3) Be familiar with the practices and procedures of California criminal courts.

(4) Demonstrate proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy.

(5) Have completed a minimum requirement of 10 hours of training on the California Racial Justice Act of 2020, including training on implicit bias and on habeas corpus procedure, approved for Minimum Continuing Legal Education credit by the State Bar of California.

Rule 4.553 of the California Rules of Court would be adopted, effective September 1, 2024, to read:

(c) Alternative requirements

The court may appoint an attorney who does not meet all the qualifications stated in (b)(1)–(4) if the attorney meets the qualifications of (b)(5) and demonstrates the ability to provide competent representation to the petitioner. If the court appoints counsel under this subdivision, it should state on the record the basis for finding counsel qualified.

(d) Public defender appointments

When the court appoints the public defender under section 987.2, the public defender should assign an attorney from that office or agency who meets the qualifications described in (b) or assign an attorney who the public defender determines would qualify under (c).

W24-02
Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
1.	First District Appellate Project by J. Bradley O'Connell, Assistant Director Lauren E. Dodge, Staff Attorney, Deborah E. Rodriguez, Staff Attorney *Joinder of Office of State Public Defender in these comments.*		The First District Appellate Project (FDAP) submits these comments on the proposed rule on qualifications of counsel for Racial Justice Act (RJA) habeas corpus petitions pursuant to Invitation to Comment W24-02 FDAP is the contract-administrator for indigent defense appeals in the First District pursuant to Rule 8.300(e). FDAP has been actively engaged with implementation of the RJA since its original passage in 2020 and through its subsequent amendments. FDAP recognizes the importance of the RJA and the rules promulgated for its application to vindication of criminal defendants' fundamental rights to assurance that their pretrial proceedings, trials, sentencings, and appeals are not tainted by racial bias. FDAP staff and panel attorneys have litigated RJA issues in pending appeals. Additionally, FDAP has sponsored and otherwise participated in training programs on the RJA for both trial and appellate practitioners. FDAP appreciates this opportunity to comment on the proposed rules setting qualification standards for appointment of counsel for habeas corpus petitions raising RJA claims (Pen. Code § 1473.1). • Rule 4.553(b)(5). Training. The proposed rule should be amended to clarify that *at least one hour of the mandatory 10 hours of RJA training must be specifically devoted to habeas corpus procedure*.	The committee appreciates the comments. As reflected in the proposed rule, the committee agrees that it is important to include habeas corpus procedure as part of the training requirements for appointed counsel. The committees believe the proposed language without a specific time requirement is sufficient.

	Commenter	Position	Comment	Committee Response
			One of the oddities of California appointed counsel practice is that *most criminal trial practitioners have no familiarity with the unique features of state habeas corpus practice.* Instead, in California, most habeas petitions filed on behalf of indigent clients are investigated and prepared by appointed *appellate* counsel, rather than appointed trial defense counsel. It's true that some important aspects of habeas representation, such as factual investigation and conducting evidentiary hearings, call upon trial skills. However, many other crucial aspects of habeas corpus practice, especially at the preliminary and pre-hearing pleading and briefing stages, are unique to habeas corpus. Those habeas pleading rules and other procedures do *not* closely parallel ordinary criminal pre-trial and trial practice. Unfortunately, in the past, superior courts have rarely appointed counsel on habeas corpus petitions. Consequently, *most defense trial attorneys have had no experience or training in habeas corpus practice*. That is true of both public defender offices and conflict panels for appointed counsel. In fact, anecdotally, we have already heard some concern from public defender offices regarding the prospect of handling RJA habeas petitions, because habeas practice in general is unfamiliar terrain for most defense trial attorneys. For these reasons, we believe it is vital that Rule 4.553 explicitly provide that *at least one hour* of	

	Commenter	Position	Comment	Committee Response
			the mandatory 10 hours of RJA training *must be specifically directed to habeas corpus practice*. In other words, habeas corpus should not simply be covered passingly during trainings on various kinds of RJA claims. At least one hour should be devoted specifically to habeas corpus procedures in view of the general lack of familiarity with habeas practice among most trial practitioners. • Rule 4.553(c). Alternative requirements. Proposed subdivision (c) broadly provides that a "court may appoint an attorney who does not meet all of the requirements stated in (b)(1)-(4)" if the attorney has completed the requisite 10 hours of RJA training (per (b)(5)) "and demonstrates the ability to provide competent representation to the petitioner." *We recommend that the Judicial Council drop subdivision (c) altogether* on the ground that it is too vaguely worded ("ability to provide competent representation") and does not provide sufficient assurance that the attorney has the requisite experience and skills to litigate an RJA habeas petition. The requirements of (b)(1)-(4) are modest and already afford courts with sufficient leeway to appoint an attorney who may not otherwise satisfy the more specific criteria of the rule, such as having previously handled two or more appeals or habeas corpus petitions. Proposed subdivision (b)(2)(C) provides courts with that flexibility by authorizing appointment of an	The committee believes this subdivision is important to ensure that courts have the flexibility to use their discretion and judgment to appoint counsel who are qualified but do not satisfy all of the requirements of the rule. Additionally, courts must make specific findings on the record about appointments under this subdivision.

	Commenter	Position	Comment	Committee Response
			attorney with "the experience required to have represented the individual in the underlying class of criminal case." Through that provision, the proposed rule assures that experienced trial attorneys, as well as appellate and habeas practitioners, will qualify for appointments on RJA habeas petitions. Subdivision (c), however, goes further and would authorize the appointment of an attorney without experience in *any* of the forms of criminal practice listed in (b)(2) (appellate, habeas, or trial). Still more troubling, (c) would allow appointment of an attorney who does not satisfy the even more basic criteria of (b)(1) (California Bar membership), (b)(3) (familiarity with California criminal practice and procedures) and (b)(4) (general legal practice skills). We can hypothesize a situation in which the circumstances of a case might support the appointment of an out-of-state attorney with expertise uniquely suited to the challenges of that case (thus allowing an exemption from (b)(1) in such circumstances). However, it is difficult to conceive of any case in which it would be appropriate to appoint an attorney who does *not* "demonstrate proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy," as (b)(4) would otherwise require. We understand the desirability of allowing courts some discretion to appoint an attorney who may not necessarily "check all the boxes"	In developing the alternative requirements section, the committee decided to set a minimum threshold requiring an appointed attorney to meet the statutory requirement under section 1473.1 of a minimum of 10 hours of training in the Racial Justice Act, and then allow courts the discretion to determine counsel's ability to provide competent representation on a case-by-case basis. Subdivision (c)'s requirement that the court find counsel "demonstrate[] the ability to provide competent representation to the petitioner" ensures that counsel who is not competent is not appointed.

	Commenter	Position	Comment	Committee Response
			but who plainly has the necessary experience and demonstrated legal skills to represent the petitioner zealously and effectively in an RJA habeas proceeding. But we believe that proposed subdivision (c) goes too far by allowing appointment of an attorney who lacks trial, appellate, *or* habeas experience (as otherwise required by (b)(2)), who is not familiar with California criminal procedure ((b)(3)), or, most disturbingly, who has not "demonstrate[d] proficiency" in such crucial skills as issue identification, analysis, writing and advocacy ((b)(4)). We commend the substantial work the advisory committee has devoted to crafting this proposed rule on qualifications for appointed counsel on RJA habeas petitions. We greatly appreciate the opportunity to comment on the proposed rule based on the First District Appellate Project's familiarity with the purposes of the RJA and with California habeas corpus practice. Joinder of Office of State Public Defender in these comments. T**he Office of the State Public Defender (OSPD) fully joins in FDAP's comments on proposed Rule 4.553 (W24-02)**. OSPD has authorized FDAP to inform the Judicial Council of OSPD's concurrence and joinder in FDAP's comment letter on this proposal.	

W24-02
Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
2.	Office of the State Public Defender by Erik Levin, Supervising Deputy State Public Defender	AM	*The Office of the State Public Defender Office fully joins in the First District Appellate Project's comment letter.	The committee appreciates the comments.
3.	Orange County Bar Association by Christina Zabat-Fran, President	A	The proposal appropriately addresses the stated purpose.	The committee appreciates the comments.
4.	San Francisco Public Defender by Danielle Harris, Managing Attorney	AM	The proposal allows just 10 hours of training to suffice for RJA habeas appointment even if counsel has no habeas or appellate experience and is not qualified to represent the person at the trial level on the same case. This does not reasonably assure competent counsel and thus risks running afoul of Sixth Amendment guarantees. A better solution where the other listed criteria are not met would be akin to the way appellate counsel is appointed. Rule 8.300 states that counsel must be appointed based on criteria approved by the Judicial Council and the task of administering a panel of attorneys for appointment has been delegated to the Court of Appeal's Appellate Project directors. The project directors evaluate the qualifications of attorneys who request appointment to cases there and a similar process should be instituted here when only the 10-hour requirement is met.	The committee appreciates the comments. The committee believes subdivision (c) is important to ensure that courts have the discretion to appoint qualified counsel who do not satisfy all of the requirements of the rule. Additionally, courts must make specific findings on the record about appointments under this subdivision. Courts may work with their justice system partners to implement the appointment process as appropriate.
5.	Superior Court of Orange County by Iyana Doherty, Courtroom Operations Supervisor	A	*Does the proposal appropriately address the stated purpose?* Yes	The committee appreciates the comments.

	Commenter	Position	Comment	Committee Response
			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?* We currently have two attorneys on our Writ of Habeas Corpus Conflict Panel. The court will have to confirm if the attorneys have the training requirements required and if not, provide them with time to complete the training. Contracts would have to be amended to include training requirements. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Unsure. Attorneys would need to make sure they have taken the training provided by the State Bar and I don't know if 3 months is enough time for them to get done. *How well would this proposal work in courts of different sizes?* Yes, this proposal would not differ for courts of different sizes.	
6.	Superior Court of Orange County, Juvenile Division		*Does the proposal appropriately address the stated purpose?*	The committee appreciates the comments.

	Commenter	Position	Comment	Committee Response
	by Katie Tobias, Operations Analyst		Yes, the proposal appropriately addresses the stated purpose. *Would the proposal provide cost savings? If so, please quantify.* The proposal does not appear to 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?* Provide an information update to Case Processing Staff, Courtroom Staff, and Judicial Officers. The following will need to occur for implementation: update procedures, make modifications in the case management systems, and train staff. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes, three months will be sufficient time for implementation. *How well would this proposal work in courts of different sizes?* Our court is a large court, and this could work for Orange County.	
7.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court	A	**JRS Position: Agree** with proposed changes.	The committee appreciates the comments.

W24-02
Criminal Procedure: Appointment of Counsel for Claims Filed Under Penal Code Section 1473(e)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
	Executives Advisory Committee (CEAC) by TCPJAC/CEAC Joint Rules Subcommittee (JRS)		The JRS notes that the proposal is required to conform to a change of law. The JRS submits the following comments: Proposed Rule 4.553(b) does promulgate necessary standards. Minor suggestions relate to qualifications: (1) as being unnecessary/assumed and would limit rare instance of not permitting pro hac vice appointment (maybe petitioner is out of state); and (4) seems unnecessary in light of section (c). Section (b)(4) might be burdensome to have trial courts figure out how an attorney would demonstrate proficiency in investigation, issue identification, etc. This appears to come from capital case appointments and appears overbroad.	The committee opts to retain the qualifications in rule 4.553(b)(1) requiring active membership in the State Bar of California as it is a stated requirement in other rules of court on appointment of counsel in criminal and related matters (see Cal. Rules of Court, rule 4.117(d)(1), and rule 8.652(c)(1)). Additionally, the court may appoint out-of-state counsel under the procedures in the alternative requirements subdivision. The committee opts to retain the qualifications in rule 4.553(b)(4) requiring the court to appoint counsel who demonstrates proficiency in investigation, issue identification, legal research, analysis, writing, and advocacy. Though a few members of the committee agreed that this could be burdensome for courts to assess, the majority thought that the requirement was manageable and allows courts the discretion to determine how best to assess an attorney's proficiency.

Item number: 05

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: 4/4/2024

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

Title of proposal: Criminal Procedure: Racial Justice Act

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386; revise forms HC-001, CR-187, and CR-188

Committee or other entity submitting the proposal:
AAC, CLAC

*Staff contact (*name, phone and e-mail*): Sarah Fleischer-Ihn, 415-865-7702, sarah.fleischer-ihn@jud.ca.gov*
Kendall Hannon, 415-865-7653, kendall.hannon@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*): 10/26/23
Project description from annual agenda: AAC: This is a joint project with the Criminal Law Advisory Committee to develop a proposal to amend various habeas corpus rules and revise certain forms used in post-conviction proceedings to implement the Racial Justice Act (AB 2542 from 2020) and AB 256 from 2022 (which made the Racial Justice Act apply retroactively).

CLAC: Amend California Rules of Court, rule 4.451, Habeas Corpus proceedings, and revise Petition for Writ of Habeas Corpus (form HC-001) to incorporate habeas corpus proceedings under Penal Code section 745 and 1473(f). Revise Motion to Vacate Conviction or Sentence (form CR-187), and Order on Motion to Vacate Conviction or Sentence (form CR-188) to incorporate requests for relief under Penal Code section 745 and 1473.7(a)(3).

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
This proposal would implement a change in the law that is already in effect.

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 17, 2024

Title
Criminal Procedure: Racial Justice Act

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386; revise forms CR-187, CR-188, and HC-001

Recommended by
Appellate Advisory Committee
Hon. Louis Mauro, Chair

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2024

Date of Report
March 14, 2024

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Executive Summary

The Appellate Advisory Committee and the Criminal Law Advisory Committee recommend amending rules 4.551, 8.385, and 8.386 of the California Rules of Court and revising *Motion to Vacate Conviction or Sentence* (form CR-187), *Order on Motion to Vacate Conviction or Sentence* (form CR-188), and *Petition for Writ of Habeas Corpus* (form HC-001) to implement the Racial Justice Act, which prohibits the state from seeking or obtaining a conviction or sentence based on race, ethnicity, or national origin.

Recommendation

The Appellate Advisory Committee and the Criminal Law Advisory Committee recommend that the Judicial Council, effective September 1, 2024:

1. Amend California Rules of Court, rule 4.551, to add provisions on appointment of counsel, judicial disqualification, and evidentiary hearings, and state reasons for denying a petition for

requests for relief under Penal Code sections 745 and 1473(e), and authorize an additional 60 days for the court to rule on an amended habeas corpus petition;

2. Amend California Rules of Court, rule 8.385 to add a provision on appointment of counsel;

3. Amend California Rules of Court, rule 8.386 to add a provision detailing when a court must hold an evidentiary hearing when a petition requests relief under Penal Code section 745;

4. Revise *Motion to Vacate Conviction or Sentence* (form CR-187) to allow a moving party to request relief under Penal Code sections 745 and 1473.7(a)(3);

5. Revise *Order on Motion to Vacate Conviction or Sentence* (form CR-188) to allow a court to grant or deny relief requested under Penal Code sections 745 and 1473.7(a)(3);

6. Revise *Petition for Writ of Habeas Corpus* (form HC-001) to allow a petitioner to request relief under Penal Code sections 745 and 1473(e); and

7. Make clarifying and technical changes to forms CR-187, CR-188, and HC-001.

The proposed amended rules and revised forms are attached at pages 15–37.

Relevant Previous Council Action

Because these forms address a recent statutory procedure, there is no relevant previous council action on the Racial Justice Act.

Rule 4.551, Habeas corpus proceedings, establishes procedures for noncapital habeas corpus proceedings in the trial court. The rule was adopted by the Judicial Council effective January 1, 1982, as rule 260 and renumbered as rule 4.551 effective January 1, 2001. It was last revised for technical amendments effective January 22, 2019.

Rule 8.385, Proceedings after the petition is filed, establishes procedures for noncapital habeas corpus proceedings after a petition is filed in the Supreme Court or Court of Appeal. The rule was adopted by the Judicial Council effective January 1, 2009. It was last amended effective January 1, 2016.

Rule 8.386, Proceedings if the return is ordered to be filed in the reviewing court, established procedures for noncapital habeas corpus proceedings if the Supreme Court orders that the return to a petition be filed in the Supreme Court, or the Court of Appeal orders that the return be filed in the Court of Appeal. The rule was adopted effective January 1, 2009. It was last amended effective January 1, 2016.

Motion to Vacate Conviction or Sentence (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188) address relief under Penal Code[1] sections 1016.5 and

[1] All further statutory references are to the Penal Code unless otherwise specified.

1473.7. The forms were adopted by the Judicial Council effective January 1, 2018, and most recently revised effective September 21, 2022, to reflect amendments to section 1473.7(a)(1) and incorporate case law clarifying custody requirements, appointment of counsel, and timeliness in filing a motion.

Petition for Writ of Habeas Corpus (form HC-001) is used to petition a superior court, a Court of Appeal, or the Supreme Court for a writ of habeas corpus.[2] A self-represented person must use form HC-001 to petition any of these courts for a writ of habeas corpus, with exceptions for good cause. (Cal. Rules of Court, rules 4.551(a)(1), 8.380(a).) Form HC-001 was most recently revised effective January 1, 2019, to update filing instructions, replace or add authority that is more recent or more on point for the propositions they support, add language relevant to successive petitions and repetitive claims to include the court in which the petition is filed, and add citations as authority for the procedural bars of successiveness and repetitiveness.

Analysis/Rationale

California Racial Justice Act of 2020

The California Racial Justice Act of 2020 (Assem. Bill 2542; Stats. 2020, ch. 317) enacted section 745, which prohibits the state from seeking or obtaining a conviction or sentence on the basis of race, ethnicity, or national origin and allows defendants to make claims for relief based on violations of this act. A violation is established if the defendant proves, by a preponderance of the evidence, that specified people involved in the case[3] exhibited bias or animus toward the defendant based on the defendant's race, ethnicity, or national origin; whether, during trial, in court and during the proceedings, specified people involved in the case used discriminatory language or otherwise exhibited bias or animus toward the defendant because of the defendant's race, ethnicity, or national origin; whether the defendant was charged or convicted of a more serious offense than similarly situated defendants of other races, nationalities, or national origins; or whether a longer or more severe sentence was imposed on the defendant than on other similarly situated individuals.[4] This statute initially applied only prospectively to cases in which a judgment was entered on or after January 1, 2021. The act allowed defendants to file motions in the trial court for claims under section 745 or, if judgment had been entered, a petition for writ of habeas corpus or a motion to vacate a conviction or sentence under section 1473.7 (§ 745(b)). The act also added provisions to sections 1473 and 1473.7 specifically addressing claims raised under section 745 (§§ 1473(e) and 1473.7(a)(3)).

Two years later, Assembly Bill 256 (Stats. 2022, ch. 739) authorized retroactive relief, in phases, under section 745. Beginning on January 1, 2023, cases in which a petitioner was sentenced to death or facing actual or potential immigration consequences related to the conviction or

[2] Note that rule 4.571 contains different requirements in death penalty–related habeas corpus proceedings.

[3] Specified people include the judge, an attorney in the case, a law enforcement officer involved in the case, an expert witness, or a juror.

[4] § 745(a).

sentence could seek retroactive relief. On January 1, 2024, the eligibility expanded to petitioners who are currently incarcerated "in the state prison or in a county jail pursuant to subdivision (h) of Section 1170,[5] or committed to the Division of Juvenile Justice for a juvenile disposition." On January 1, 2025, the eligibility extends to felony convictions or juvenile dispositions resulting in a commitment to the Division of Juvenile Justice where judgment became final on or after January 1, 2015. Finally, on January 1, 2026, the eligibility extends to all felony convictions or juvenile dispositions resulting in a commitment to the Division of Juvenile Justice, regardless of when the judgment or disposition became final.

Last year, Assembly Bill 1118 (Stats. 2023, ch. 464) further amended section 745(b) to authorize petitioners with a claim based on the trial record to raise the claim on direct appeal and to move to stay an appeal and request remand to the superior court to file a motion for relief under section 745(a). AB 1118 also eliminated the clause "if judgment has been imposed" before the clause authorizing the filing of a petition for writ of habeas corpus or a motion to vacate a conviction or sentence under section 1473.7.

The Judicial Council has rules of court that govern noncapital habeas corpus proceedings in both the superior courts (Cal. Rules of Court, rules 4.550–4.552) and appellate courts (Cal. Rules of Court, rules 8.380–8.388). The Judicial Council also has approved forms for a petition for writ of habeas corpus (form HC-001) and a motion and order to vacate a conviction or sentence under section 1473.7(a)(1) and (2) (forms CR-187 and CR-188). However, these rules and forms do not currently incorporate claims under section 745. To reflect each committee's respective subject matter expertise, the Criminal Law Advisory Committee led the development of the recommended amendments to rule 4.551 and revisions to forms CR-187 and CR-188 because they primarily impact the trial courts. The Appellate Advisory Committee led the development of the recommended amendments to rules 8.385 and 8.386 on petitions for writ of habeas corpus in the appellate courts. Both committees jointly developed the recommended revisions to form HC-001.

Rule 4.551, habeas corpus proceedings

Rule 4.551 establishes procedures for habeas corpus petitions filed in the trial court in noncapital cases. The committees identified differences between the general procedures for petitions for writ of habeas corpus established by this rule and the procedures established in section 1473(e) for petitions with claims under section 745(a):

- Generally, there is no requirement for a petition for writ of habeas corpus to include a request for appointed counsel; counsel is appointed if the court issues an order to show cause and the petitioner is unrepresented and desires but cannot afford counsel. (Cal. Rules of Court, rule 4.551(c)(2).) However, a petition for writ of habeas corpus with a claim under section 745(a) "shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel and either the

[5] Under section 1170(h), imprisonment for certain felonies is served in the county jail, with specified exceptions.

petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed..” (§ 1473(e).)

- Currently, the rule of court does not address amending an undecided habeas corpus petition with a new claim. Section 1473(e) now authorizes a petitioner to amend a pending petition with a claim that the petitioner’s conviction or sentence violated section 745(a).

- Currently, the rule of court does not address disqualification of a judge. Section 745(b) requires disqualification if a claim under section 745(a) is based in whole or in part on conduct or statements by the judge.

- Generally, an evidentiary hearing is only required after the issuance of an order to show cause if the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the relief depends on the resolution of an issue of fact. (Cal. Rules of Court, rule 4.551(f).) However, if the court issues an order to show cause on a claim raised under section 745(a), the court must hold an evidentiary hearing, unless the state declines to show cause. Further, the defendant may appear remotely, and the court may conduct the hearing with remote technology unless counsel indicates the defendant’s presence in court is needed. (§ 1473(e).)

- Generally, any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for denial. (Cal. Rules of Court, rule 4.551(g).) But if the court determines that the petitioner has not established a prima facie showing of entitlement to relief for a claim under section 745(a), the court must include the factual and legal basis for its conclusion on the record or in a detailed written order. (*Ibid.*)

To reflect these distinctions, the committees recommend amending rule 4.551 to:

- Add new subdivision (a)(3) to state that a petition raising a claim under section 745(a) must include whether the petitioner requests appointment of counsel and whether the petitioner can afford counsel. Existing subdivision (a)(3) would be renumbered as (a)(5).

- Add new subdivision (a)(4) to state that if a petitioner has an undecided habeas corpus petition pending in superior court, the petitioner may amend the existing petition with a claim that the petitioner’s conviction or sentence violated section 745(a). Existing subdivision (a)(4) would be renumbered as (a)(8).

- Add new subdivision (a)(7) to state that if a petition raises a claim under section 745(a) that is based on conduct or statements by a judge, the judge must disqualify themselves from proceedings under section 745.

- Add new subdivision (d), Appointment of counsel, to incorporate existing language that upon issuing an order to show cause, a court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel, and add new paragraph (2) mirroring

the language of section 1473(e) to state that when a petition raises a claim under section 745(a) and requests appointment of counsel, the court must appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of section 745(a) or the State Public Defender requests that counsel be appointed, and that newly appointed counsel may amend a petition filed before their appointment.

- Renumber subdivision (f), Evidentiary hearing; when required, as subdivision (g) and add paragraph (2) as an exception applying when an order to show cause is issued for a claim raised under section 745(a) to state that the court must hold an evidentiary hearing unless the state declines to show cause, and allow for the use of remote technology as appropriate.

- Renumber subdivision (g), Reasons for denial of petition, as subdivision (h) and add paragraph (2) as an exception applying to denials under section 745(a) to require the court to include the factual and legal basis for its conclusion on the record or in a detailed written order.

In response to comments, the committees also recommend amending rule 4.551 to expand the time frame for a court to rule on an amended habeas corpus petition and add advisory committee comments on section 1473(e).

Rules 8.385 and 8.386, habeas proceedings on appeal

Rule 8.385 establishes procedures for petitions for a writ of habeas corpus filed in the Supreme Court or Court of Appeal. Currently, rule 8.385(f) provides that when a return is ordered to be filed in the Supreme Court or the Court of Appeal, rule 8.386 applies and the "court in which the return is ordered filed must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel."

To reflect the Racial Justice Act's appointment of counsel provision, the committees recommend that the appointment of counsel language from rule 8.385(f) be removed and that a new subdivision (g), Appointment of counsel, be added. Subdivision (g)(1) would contain the appointment of counsel language currently contained in subdivision (f), which applies when the reviewing court issues an order to show cause. Subdivision (g)(2) would apply where the petition raises a claim under section 745(a). As with the recommended amendments to rule 4.551, new subdivision (g)(2) would mirror the language of section 1473(e) requiring the reviewing court to appoint counsel where the petitioner requests counsel, cannot afford counsel, and either the petition alleges facts that would establish a violation of section 745(a) or the State Public Defender requests counsel be appointed.

Rule 8.386 establishes the procedures that apply when a return to a petition for writ of habeas corpus is ordered to be filed in the Supreme Court or the Court of Appeal. Subdivision (f) identifies when the reviewing court must hold an evidentiary hearing. The committees recommend that a new subdivision (f)(2) be added to reflect that if the reviewing court issues an

order to show cause on a claim raised under section 745(a), an evidentiary hearing must be held unless the state declines to show cause. Current subdivision (f)(2) would be renumbered as (f)(3).

Motion to Vacate Conviction or Sentence (form CR-187) and *Order on Motion to Vacate Conviction or Sentence* (form CR-188)

Under section 1473.7(a)(3), a person who is out of custody may file a motion to vacate a conviction or sentence based on a claim under section 745(a). To implement requests for relief under section 745(a), the committees recommend revising form CR-187 to allow a moving party to (1) indicate the category of retroactivity the case falls under;[6] (2) indicate which violation under section 745(a) applies; (3) explain when the violation was discovered;[7] (4) indicate whether the claim is based on judicial conduct;[8] (5) request discovery;[9] and (6) request counsel and indicate if the moving party cannot afford counsel.[10]

The committees recommend revising form CR-188 to allow a court to make findings and grant or deny relief requested under section 745(a), such as granting or denying a request to waive personal appearance, finding whether the motion was filed following the time frames in section 745(j), finding whether the moving party filed with or without undue delay, deciding whether to grant or deny a motion for disclosure, and deciding whether to vacate the conviction or sentence. The committees also recommend technical changes throughout the form for consistency and clarity.

Petition for Writ of Habeas Corpus (form HC-001)

Under section 1473(e), a person may file a petition for writ of habeas corpus based on a claim under section 745(a). To implement requests for relief under section 745(a), the committees recommend revising form HC-001 to allow a petitioner to (1) indicate the category of retroactivity the case falls under;[11] (2) indicate which violation of section 745(a) applies; (3) request counsel and indicate if the petitioner cannot afford counsel;[12] (4) state whether the claim is based on judicial conduct;[13] (5) request permission to amend a pending petition for writ of habeas corpus;[14] (6) request discovery;[15] and (7) explain whether the claim is being raised for

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[6] See § 745(j).

[7] See § 1473.7(c).

[8] See § 745(b).

[9] See § 745(d).

[10] See *People v. Fryhaat* (2019) 35 Cal.App.5th 969, 983 (right to appointed counsel where an indigent party has set forth factual allegations stating a prima facie case for relief under section 1473.7).

[11] See § 745(j).

[12] See § 1473(e).

[13] See § 745(b).

[14] See § 1473(e).

[15] See § 745(d).

the first time or not.[16] The committees also recommend technical revisions to form HC-001 for consistency and clarity.

Policy implications

The amendments to the rules and revisions to the forms recommended by the committees will implement legislative changes. Accordingly, the key policy implications are ensuring that council rules and forms correctly reflect the law. These revisions are therefore consistent with the *Strategic Plan for California's Judicial Branch*, specifically the goals of Modernization of Management and Administration (Goal III) and Quality of Justice and Service to the Public (Goal IV). This recommendation also implements Goal I, Access, Fairness, Diversity, and Inclusion, by making forms easier to complete and understand for self-represented litigants.

Comments

The proposal circulated for comment from December 8, 2023, to January 19, 2024. Twelve comments were received from two divisions of the Superior Court of Orange County, the Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, the First District Appellate Project, the Office of the State Public Defender, the San Francisco Public Defender, the Orange County Bar Association, the Ella Baker Center for Human Rights, two appellate court staff attorneys, one attorney, and a member of the public. Five commenters agreed with the proposal and seven agreed if modified.

The committees appreciate the time taken to respond to this proposal. Below is a summary of substantive issues that were raised in the comments. All comments received, and the committees' responses, are provided in the attached chart of comments at pages 38–69.

Time frame to rule on a petition

Existing rules require a court to rule on a petition for writ of habeas corpus within 60 days (see Cal. Rules of Court, rule 4.551(a)(3)), but do not address the time frame to rule on an amended habeas corpus petition. The proposal asked for specific comments on whether amending an existing petition for writ of habeas corpus to include a claim under section 745, as proposed in rule 4.551, should impact the existing 60-day time frame, such as including an additional 30 days to make a ruling. Two commenters stated that additional time was needed for such rulings.

In discussing the comments, the committees agreed that courts would need an additional 60 days to rule on an amended petition adding a claim under section 745(a). Because the same rationale to allow additional time for a court ruling applies to any amended petition, the committees recommend adding a new provision to allow 60 days for a court to make a ruling when an unadjudicated petition is amended to add a claim under section 745(a) or is amended with leave of court.[17]

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[16] See § 1473(e).

[17] Amending an unadjudicated writ of habeas corpus petition requires leave of the court. (See *In re Clark* (1993) 5 Cal.4th 750.)

Appointment of counsel

As noted above, section 1473(e) provides that, when a petition for writ of habeas corpus includes a claim under section 745(a), "the court shall appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed." In developing this proposal, committee members held differing interpretations of when counsel should be appointed in a Racial Justice Act habeas proceeding: either upon issuance of an order to show cause, similar to appointment of counsel for other noncapital habeas proceedings,[18] or before the issuance of an order to show cause, based on "facts that would establish a violation of [section 745(a)].[19]" To accommodate both interpretations, the proposal included new subdivision (d), Appointment of counsel, in rule 4.551. Current language about appointment of counsel in existing subdivision (c), Order to show cause, was moved to the new subdivision, and a new paragraph (2) addressing petitions for writ of habeas corpus with a claim under section 745(a) was added, mirroring the language of section 1473(e).

The Office of the State Public Defender, joined by the First District Appellate Project, requests the committees adopt the interpretation that appointment of counsel occurs before an order to show cause is issued, under a different and lower threshold than is required for appointment of counsel in other types of noncapital habeas corpus proceedings.

There was significant discussion among members of the Criminal Law Advisory Committee about this issue. Although several members voted to adopt the interpretation that appointment of counsel occurs before the issuance of an order to show cause, a majority believed that the issue must be resolved by the courts and that, in the meantime, the proposed language accommodates both interpretations The committees recommend that, to accommodate both interpretations, the new subdivision on appointment of counsel mirror the language of section 1473(e) as it did in the proposal circulated to comment. The committee will continue to monitor the issue.

The First District Appellate Project submitted comments expressing concern that the proposed new subdivision in rule 4.551(d) and 8.385(g), which addresses the two instances when a court *must* appoint counsel, could be misconstrued as limiting the power of those courts to appoint counsel in other circumstances. The committees believe that the proposed rules, as drafted, are sufficiently clear in that they only address when appointment of counsel is mandatory. The rules do not address, and are in no way intended to limit, any discretion or authority courts may have to appoint counsel in other situations.

Adding provisions addressing habeas corpus practice generally

The First District Appellate Project, joined by the Office of the State Public Defender, submitted a comment expressing concern that the rule amendments specific to claims under section 745,

[18] Cal. Rules of Court, rule 4.551(c)(1), (2).

[19] § 1473(e).

such as amending petitions or judicial disqualification, could be misinterpreted as not applying to habeas corpus practice generally.

The committees discussed whether to extend these provisions to apply to all habeas proceedings but noted that determining what would be lawful and appropriate would be an entirely separate project, considering the complexities of habeas corpus practice and procedure. Therefore, the committees recommend adding an advisory committee comment to clarify that the revisions reflect the language in section 1473(e) and are not intended to limit a court's discretion and authority in habeas corpus proceedings that do not include claims under section 745.

Definition of a prima facie showing

When developing the proposal, the committees identified an unresolved legal issue: whether the definition of a "prima facie showing" in section 745(h)(2)[20] applies to petitions for writ of habeas corpus under section 1473(e).[21] As a result, the committees did not incorporate the definition from section 745(h)(2) into rule 4.551 and intend to monitor the issue.

The committees received three comments stating that under the rules of statutory construction, the definition of a "prima facie showing" should be the same in sections 745 and 1473. Additionally, two commenters requested that if the committees do not adopt this position, an advisory committee comment should be added to the rule noting that the issue is unresolved. The commenters noted that the rule, as currently drafted and without a clarifying advisory committee comment, would require the application of the definition of a prima facie showing in rule 4.551(c)(1) to claims raised under section 745.

Based on the comments received, the committees recommend adding an advisory committee comment stating that the issue of whether the prima facie showing for a petition for writ of habeas corpus under section 1473(e) is the same as in section 745(h)(2) or defined in subdivision (c)(1) of this rule (see *In re Marquez* (2007) 153 Cal.App.4th 1, 11) is unresolved.

Evidentiary hearings in Supreme Court or Court of Appeal

The Sixth District Court of Appeal submitted a comment expressing concern that proposed subdivision (f)(2) in rule 8.386 could be interpreted as requiring an appellate court to hold an evidentiary hearing on a petition raising a claim under section 745 even where (1) the superior court held an evidentiary hearing and denied relief and (2) no further factual development of the record was required. The comment contended this would be inconsistent with established

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[20] Section 745(h)(2) provides: "'Prima facie showing' means that the defendant produces facts that, if true, establish that there is a substantial likelihood that a violation of [section 745(a)] occurred. For purposes of this section, a 'substantial likelihood' requires more than a mere possibility, but less than a standard of more likely than not." One appellate court has interpreted this standard as "less stringent" than the standard for a prima facie showing for a habeas corpus petition. (*Finley v. Superior Court* (2023) 95 Cal.App.5th 12, 22.)

[21] When considering whether the petitioner in a noncapital habeas corpus proceeding has made a prima facie showing of entitlement to relief, the court takes the petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if the factual allegations were proved. If so, the court must issue an order to show cause. (Cal. Rules of Court, rule 4.551(c)(1).)

practice in these cases, where the appellate court would independently review what transpired in the superior court evidentiary hearing, without holding a new hearing. The comment recommended that an advisory committee comment be adopted recognizing that this established procedure is not impacted by the proposed rule.

The committees do not recommend adding an advisory committee comment on this point. The committees note that proposed subdivision (f)(2) only applies to petitions that raise a claim under section 745(a). Existing practice on other petitions would be unaffected. As for petitions that raise a claim under section 745(a), the proposed rule simply incorporates the statutory language.

Addressing AB 1118 in title 8 of rules of court

Under AB 1118, when a criminal defendant claims a violation of section 745(a) that is based on the trial record, the defendant may either raise that claim on direct appeal or may move to have the appeal stayed and request remand to file a motion for relief in the superior court. The committees asked for specific comment on whether the habeas rules in title 8 of the rules of court should be amended to address this statute.

A comment received from the Orange County Bar Association stated that in cases where an indigent defendant's appeal has been stayed to permit a motion for relief to be filed in the superior court, clarification is needed as to whether the defendant's appellate attorney or trial attorney was responsible for bringing the motion. The committees recommend that no further clarification be added to the rules on this point. The statute does not specify which attorney representing the defendant will be responsible for bringing the motion before the superior court, and the committees envision that this determination would need to be made on a case-by-case basis after discussion between the defendant and the attorneys involved.

"Judgment is not final" check box

A claim under section 745(a) may be filed at any time in "all cases in which judgment is not final." While a prejudgment request for relief will be filed as a motion in the trial court, a judgment that is "not final" can also be a case where judgment was imposed but an appeal is pending. In that circumstance, it could be appropriate for a person to seek relief through postconviction procedures. For these reasons, the committee decided to include the check box in the postconviction forms as well and asked for specific comment on whether to delete or modify the language.

Three commenters requested the check box remain but be modified to be simpler and easier to understand. One commenter recommended replacing "Judgment is not final" in form HC-001 with "You are in criminal custody and an appeal is pending," and another commenter requested citations to authority for a more complete definition of what constitutes a "final judgment."

The committees agreed that "Judgment is not final" was a difficult concept to understand and discussed replacing it with "An appeal is pending." However, there was some discussion about other possible situations where a judgment is not final, but an appeal is not pending. To be as accurate as possible while being more explanatory, the committees recommend adding "(for

example, because an appeal is pending)" to the "Judgment is not final" check boxes on forms CR-187 and HC-001.

Death penalty–related habeas corpus proceedings

The committees circulated a version of form HC-001 that included a check box indicating that the petitioner was eligible to file for relief due to a judgment of death.[22] Before circulation, a group of defense counsel requested form HC-001 include (1) an advisement that persons sentenced to death should not use the form and should consult with an attorney about rights under the Racial Justice Act, and (2) a general advisement regarding the importance of filing a timely petition that includes all issues or claims the petitioner is aware of at the time of filing. The committees were sympathetic to the concerns the advisements sought to address but were cautious about providing legal advice and therefore did not add the advisements.

In response to a request for specific comments on whether there should be separate rules and forms for death penalty–related habeas corpus proceedings with Racial Justice Act claims, two commenters responded affirmatively but did not provide extensive comments. The committees will continue to monitor issues related to Racial Justice Act claims in such proceedings.

The committees recommend deleting the check box on form HC-001 indicating that the petitioner is eligible to file for relief due to a judgment of death. Under the rules of court, form HC-001 must be used by self-represented petitioners filing for relief in noncapital habeas corpus proceedings (Cal. Rules of Court, rules 4.551(a)(1), 8.830(a)) but it is not intended for use by self-represented petitioners with a judgment of death. Death penalty–related habeas proceedings are governed by different statutes and rules of court, and petitioners are generally represented by counsel in these matters.

Check box for requesting relief on or after January 1, 2026

The committees circulated versions of forms CR-187 and HC-001 that included a check box stating that the person is seeking relief on or after January 1, 2026, for a felony conviction, though the forms are anticipated to go into effect on September 1, 2024. The proposal contained a request for specific comment about whether this could be confusing for self-represented litigants, and if it should be deleted and reintroduced with an effective date of January 1, 2026.

Two commenters thought it would be helpful to delete and reintroduce the check box, with one of the commenters suggesting that the current language should also be modified to be clearer. One commenter thought the language was sufficiently clear and did not have to be reintroduced.

The committees recommend keeping the check boxes for persons eligible to seek relief on or after January 1, 2026. The committees were concerned that further revisions adding the check boxes back in could potentially not be ready for use by January 1, 2026, and also thought the

[22] § 745(j)(2).

item served an educational function by informing people of when they are eligible to file for relief.

Request for counsel

The committees requested specific comments on whether to revise the request for counsel on form HC-001 to separate the request from a declaration of indigency and whether to require the petitioner to include a financial statement. A commenter noted that it is difficult for persons in custody to obtain records from their certified trust accounts and that it was sufficient at this stage to declare indigency under penalty of perjury.

The committees agree with the comments and recommend revising the request for counsel on form HC-001 to separate the request from a statement of indigency, but do not recommend requiring a financial statement.

Check boxes to indicate grounds for relief and to request discovery

Three commenters requested revision of form HC-001 to include check boxes for a petitioner to indicate the grounds for a violation of section 745(a) and to request discovery, similar to proposed items on form CR-187. In response, the committees recommend adding check boxes to form HC-001 indicating the grounds for a violation of section 745(a) and a request for discovery. The committees did not originally add the Racial Justice Act–specific check boxes because form HC-001 is for broad use and does not include any other issue-specific check boxes. However, the committees agree that including the grounds for a violation of section 745(a) and the request for disclosure of evidence would be useful for self-represented petitioners. Additionally, if the appellate courts hold that appointment of counsel in a Racial Justice Act proceeding happens before issuance of an order to show cause, the forms would be appropriately set up for courts to consider those requests.

Alternatives considered

The committees developed this proposal in anticipation of a significant increase in the number of requests for postconviction relief due to the retroactive applicability of relief under section 745 and did not consider the alternative of no action. Initially, the committees considered developing separate forms for relief under section 745. Upon further discussion, however, the committees decided to propose revisions to existing forms so they could cover claims under section 745. In the habeas context, there is significant overlap between the information needed for a claim under section 745 and other claims, and having one form would allow a petitioner to raise multiple claims on a single petition for writ of habeas corpus rather than submit separate petitions when seeking to raise both section 745 and other claims for relief. The committees also thought having fewer forms would be easier for self-represented petitioners to use.

Fiscal and Operational Impacts

The fiscal and operational impacts of this proposal are largely attributable to legislation. The proposal aims to mitigate workload burdens by making the retroactive application of relief under section 745 more efficient, consistent, and easier to navigate for self-represented litigants and the

courts. Expected costs include training, case management system updates, and the production of new forms.

Attachments and Links

1. Cal. Rules of Court, rules 4.551, 8.385, and 8.386, at pages 15–19
2. Forms CR-187, CR-188, and HC-001, at pages 20–37
3. Chart of comments, at pages 38–69
4. Link A: Penal Code section 745, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=745.&lawCode=PEN*
5. Link B: Penal Code section 1473, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.&lawCode=PEN*
6. Link C: Penal Code section 1473.7, *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1473.7.&lawCode=PEN*

Rules 4.551, 8.385, and 8.386 of the California Rules of Court are amended, effective September 1, 2024, to read:

Rule 4.551. Habeas corpus proceedings

(a) Petition; form and court ruling

(1) Except as provided in (2), the petition must be on the *Petition for Writ of Habeas Corpus* (form HC-001).

(2) For good cause, a court may also accept for filing a petition that does not comply with (a)(1). A petition submitted by an attorney need not be on the Judicial Council form. However, a petition that is not on the Judicial Council form must comply with Penal Code section 1474 and must contain the pertinent information specified in the *Petition for Writ of Habeas Corpus* (form HC-001), including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue.

(3) If a petition raises a claim under Penal Code section 745(a), the petition must include whether the petitioner requests appointment of counsel and whether the petitioner can afford counsel.

(4) If a petitioner has an unadjudicated habeas corpus petition pending in the superior court, the petitioner may amend the existing petition with a claim the petitioner's conviction or sentence was in violation of Penal Code section 745(a).

~~(3)~~(5)

(A) On filing, the clerk of the court must immediately deliver the petition to the presiding judge or ~~his or her~~ their designee. The court must rule on a petition for writ of habeas corpus within 60 days after the petition is filed.

(B) When an unadjudicated habeas corpus petition is amended to include a claim under section 745, or otherwise amended with leave of court, the time to rule on a petition for writ of habeas corpus is extended to 60 days from the date the amended petition was filed.

~~(B)~~(6)If the court fails to rule on the petition (or amended petition) within 60 days of its filing, the petitioner may file a notice and request for ruling.

~~(i)~~(A)The petitioner's notice and request for ruling must include a declaration stating the date on which any ~~the~~ petition or amended petition was filed, ~~and~~ the date of the notice and request for ruling, and ~~indicating~~ the fact that the petitioner has not received a ruling on the petition. A copy of the original (and the amended) petition must be attached to the notice and request for ruling.

~~(ii)~~(B)If the presiding judge or ~~his or her~~ their designee determines that the notice is complete and the court has failed to rule, the presiding judge or ~~his or her~~ their designee must assign the petition to a judge and calendar the matter for a decision without appearances within 30 days of the filing of the notice and

request for ruling. If the judge assigned by the presiding judge rules on the petition before the date the petition is calendared for decision, the matter may be taken off calendar.

(7) If a petition raises a claim under Penal Code section 745(a) that is based on conduct or statements by a judge, the judge must disqualify themselves from proceedings under section 745.

~~(4)~~(8) For the purposes of (a)~~(3)~~(5), the court rules on the petition by:

(A) Issuing an order to show cause under (c);

(B) Denying the petition for writ of habeas corpus; or

(C) Requesting an informal response to the petition for writ of habeas corpus under (b).

~~(5)~~(9) The court must issue an order to show cause or deny the petition within 45 days after receipt of an informal response requested under (b).

(b) Informal response

* * *

(c) Order to show cause

(1) The court must issue an order to show cause if the petitioner has made a prima facie showing that ~~he or she~~ the petitioner is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if ~~his or her~~ the petitioner's factual allegations were proved. If so, the court must issue an order to show cause.

~~(2) On issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.~~

~~(3)~~(2) An order to show cause is a determination that the petitioner has made a showing that ~~he or she~~ they may be entitled to relief. It does not grant the relief sought in the petition.

(d) Appointment of counsel

(1) On issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.

(2) When a petition raises a claim under Penal Code section 745(a) and requests appointment of counsel, the court must appoint counsel if the petitioner cannot afford

counsel and either the petition alleges facts that would establish a violation of section 745(a) or the State Public Defender requests that counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment.

~~(d)~~(e) Return

* * *

~~(e)~~(f) Denial

* * *

~~(f)~~(g) Evidentiary hearing; when required

(1) Except as provided in (2), within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing. An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.

(2) If the court issues an order to show cause on a claim raised under Penal Code section 745(a), the court must hold an evidentiary hearing, unless the state declines to show cause. The defendant may appear remotely, and the court may conduct the hearing with remote technology, unless counsel indicates the defendant's presence in court is needed.

~~(g)~~(h) Reasons for denial of petition

(1) Except as provided in (2), any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient.

(2) If the court determines that the petitioner has not established a prima facie showing of entitlement to relief for a claim raised under Penal Code section 745(a), the court must state the factual and legal basis for its conclusion on the record or issue a written order detailing the factual and legal basis for its conclusion.

~~(h)~~(i) Extending or shortening time

* * *

Advisory Committee Comment

The court must appoint counsel on the issuance of an order to show cause. (*In re Clark* (1993) 5 Cal.4th 750, 780 and *People v. Shipman* (1965) 62 Cal.2d 226, 231–232.) The Court of Appeal has held that under Penal Code section 987.2, counties bear the expense of appointed counsel in a habeas corpus proceeding challenging the underlying conviction. (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862.) Penal Code section 987.2 authorizes appointment of the public defender, or private counsel if there is no public defender available, for indigents in criminal proceedings.

The issue of whether the prima facie showing for a petition for writ of habeas corpus under section 1473(e) is the same as in section 745(h)(2) or defined in subdivision (c)(1) of this rule (see *In re Marquez* (2007) 153 Cal.App.4th 1, 11) is unresolved.

Subdivision (a)(4) and (7). The committee's revisions reflect the language in section 1473(e) and are not intended to limit a court's discretion and authority in habeas corpus proceedings that do not include claims under section 745.

Rule 8.385. Proceedings after the petition is filed

(a)–(e) * * *

(f) Return to the reviewing court

If the return is ordered to be filed in the Supreme Court or the Court of Appeal, rule 8.386 applies. ~~and the court in which the return is ordered filed must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.~~

(g) Appointment of counsel

(1) If the return is ordered to be filed in the Supreme Court or the Court of Appeal, the court in which the return is ordered filed must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.

(2) When a petition raises a claim under Penal Code section 745(a) and requests appointment of counsel, the court must appoint counsel if the petitioner cannot afford counsel and either the petition alleges facts that would establish a violation of section 745(a) or the State Public Defender requests that counsel be appointed. Newly appointed counsel may amend a petition filed before their appointment.

Advisory Committee Comment

* * *

Rule 8.386. Proceedings if the return is ordered to be filed in the reviewing court

(a)–(e) * * *

(f) Evidentiary hearing ordered by the reviewing court

(1) An evidentiary hearing is required if, after considering the verified petition, the return, any traverse, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.

(2) If the court issues an order to show cause on a claim raised under Penal Code section 745(a), the court must hold an evidentiary hearing unless the state declines to show cause. The defendant may appear remotely, and the court may conduct the hearing with remote technology, unless counsel indicates the defendant's presence in court is needed.

~~(2)~~(3) The court may appoint a referee to conduct the hearing and make recommended findings of fact.

(g) * * *

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 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 03/06/2024
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	CASE NUMBER:
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT: DATE OF BIRTH:	***FOR COURT USE ONLY*** DATE: TIME: DEPARTMENT:

MOTION TO VACATE CONVICTION OR SENTENCE

☐ Pen. Code, § 1016.5 ☐ Pen. Code, § 1473.7(a)(1) ☐ Pen. Code, § 1473.7(a)(2) ☐ Pen. Code, § 1473.7(a)(3)

Instructions—Read carefully if you are filing this motion for yourself

- The term "Moving Party" as used in this form refers to the person asking for relief.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- You must file a separate motion for each separate case number.
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filing your motion.

1. This motion concerns a conviction or sentence in case number . On *(date):* , the Moving Party was convicted of a violation of the following offenses *(list all offenses included in the conviction):*

CODE	SECTION	TYPE OF OFFENSE *(felony, misdemeanor, or infraction)*

If you need more space to list offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

2. ☐ **MOTION UNDER PENAL CODE SECTION 1016.5**

a. **GROUNDS FOR RELIEF: The Moving Party requests relief based on the following:**

(1) Before acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise the Moving Party that the conviction might have immigration consequences, as required under Penal Code section 1016.5(a).

(2) The conviction that was based on the plea of guilty or nolo contendere may result in immigration consequences for the Moving Party, including possible deportation, exclusion from admission to the United States, or denial of naturalization.

(3) The Moving Party likely would not have pleaded guilty or nolo contendere if the court had advised the Moving Party of the immigration consequences of the plea. (*People v. Arriaga* (2014) 58 Cal.4th 950.)

b. **Supporting Facts**

Tell your story. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences, (2) the possible immigration consequences, and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. (*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.*)

3. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(1), Legal Invalidity With Actual or Potential Immigration Consequences**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence. (Note: A determination of legal invalidity may, *but is not required to*, include a finding of ineffective assistance of counsel.) If you are claiming that your conviction or sentence is invalid due to ineffective assistance of counsel, before the hearing is held on this motion, you (or the prosecutor) must give timely notice to the attorney who you are claiming was ineffective in representing you.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. b. **Supporting Facts**

Tell your story. What facts show prejudicial error? Include information that shows that the conviction or sentence you are challenging is currently causing or has the possibility of causing your removal from the United States, or the denial of your application for an immigration benefit, lawful status, or naturalization.

CAUTION: You must *state facts, not conclusions.* For example, if claiming ineffective assistance of counsel, you must state facts detailing what the attorney did or failed to do and how that affected your conviction or sentence.

Note: The court presumes your conviction or sentence is not legally valid if
(1) you pleaded guilty or nolo contendere based on a law that provided that the arrest and conviction would be deemed never to have occurred if specific requirements were completed;
(2) you completed those specific requirements; and
(3) despite completing those requirements, your guilty or nolo contendere plea has been, or possibly could be, used as a basis for adverse immigration consequences.

(*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

c. **Reasonable Diligence (*check all that apply)***

(1) (a) ☐ On *(date):* , the Moving Party received a notice to appear in immigration court or other notice from immigration authorities that asserts the conviction or sentence as a basis for removal or the denial of an application for an immigration benefit, lawful status, or naturalization.

(b) ☐ The Moving Party has not received a notice to appear in immigration court or other notice from immigration authorities as described above.

(2) (a) ☐ On *(date):* , the Moving Party received notice that a final removal order was issued against the Moving Party, based on the conviction or sentence that the Moving Party seeks to vacate.

(b) ☐ The Moving Party has not received a final notice of removal as described above.

(If you are requesting appointment of counsel, you may skip the following item, 3c(3).)

(3) This motion may be denied because of a delay in filing it. If you received *both* notices mentioned above, explain why you did not bring and could not bring this motion earlier. If you received both notices before this law went into effect on January 1, 2017, when did you become aware of the law? Did something happen to give you a reason to look for conviction relief?

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

4. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(2), Newly Discovered Evidence of Actual Innocence**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison or on bail, probation, mandatory supervision, post release community supervision (PRCS), or parole).

a. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following:**

(1) Newly discovered evidence of actual innocence exists that requires vacating the conviction or sentence as a matter of law or in the interests of justice.

(2) The Moving Party discovered the new evidence of actual innocence on *(date):*

b. **Supporting Facts**

Tell your story. Describe the newly discovered evidence and how it proves your actual innocence. Explain why you could not discover this evidence at the time of your trial. Explain why you did not bring and could not bring this motion earlier. *(If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) for any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting the claim.)*

5. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7(a)(3), Conviction or Sentence Based on Race, Ethnicity, or National Origin in Violation of Penal Code section 745(a) (Racial Justice Act)**

The Moving Party is not currently in criminal custody in the case referred to in item 1 (criminal custody includes in jail or prison or on bail, probation, mandatory supervision, postrelease community supervision (PRCS), or parole).

a. **Filing Date**

If you have a claim for violation of Penal Code section 745(a), indicate which of the following apply to the case in which you are making this claim *(check all that apply):*

(1) ☐ Judgment is not final (for example, because an appeal is pending).

(2) ☐ The Moving Party is facing actual or potential immigration consequences related to the conviction or sentence.

(3) ☐ This motion is filed **on or after** January 1, 2025, and judgment became final for a felony conviction on or after January 1, 2015; **or**

(4) ☐ This motion is filed **on or after** January 1, 2026, and judgment is for a felony conviction.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

5. b. **GROUNDS FOR RELIEF: Moving Party requests relief based on the following** *(choose all that apply)*:

(1) ☐ The judge, an attorney, a law enforcement officer, an expert, or a juror in the case exhibited bias or animus toward the Moving Party because of the Moving Party's race, ethnicity, or national origin.

(2) ☐ During in-court trial proceedings, the judge, an attorney, a law enforcement officer, an expert, or a juror used racially discriminatory language about the Moving Party's race, ethnicity, or national origin. (Racially discriminatory language does not include relaying language used by someone else that is relevant to the case, or giving a racially neutral and unbiased physical description of the suspect.)

(3) ☐ The Moving Party was charged with or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, **and** the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the Moving Party's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4) ☐ The Moving Party received a longer or more severe sentence compared to similarly situated individuals convicted of the same offense **and**:

(a) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants who share the Moving Party's race, ethnicity, or national origin than on others in that county; *and/or*

(b) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in that county.

c. **Discovery of Violation**

The Moving Party learned of the grounds described in item 5b above on or about *(date):* _____

d. **Supporting Facts**

CAUTION: You must state facts, not conclusions. A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time (*when*) or place (*where*).

e. ☐ Judicial Conflict. The motion is based on a statement or conduct by a judge *(check if applicable).*
The judge's name is:

f. ☐ **Motion for Disclosure.** The Moving Party is requesting disclosure of evidence relevant to a potential violation of Penal Code section 745(a) *(check if applicable).*

(1) The type of records or information sought is described as follows:

(2) The reason the records or information are needed is as follows:

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

6. ☐ **REQUEST FOR COUNSEL (*People v. Fryhaat* (2019) 35 Cal.App.5th 969, 981)**

   a. The Moving Party requests appointment of counsel upon a finding by the court that there is a prima facie case for relief, and

   b. The Moving Party is indigent and has completed and attached *Defendant's Financial Statement* (form CR-105) showing that the Moving Party cannot afford to hire a lawyer. Form CR-105 is available online at www.courts.ca.gov/forms.

7. ☐ The Moving Party requests that the court hold the hearing on this motion without the Moving Party's personal presence because the Moving Party is *(check one)*

   a. ☐ in federal custody awaiting deportation.

   b. ☐ otherwise in custody at *(facility):*

   c. ☐ outside of the United States and lacks permission to enter.

   d. ☐ other *(specify):*

8. The Moving Party requests that the court vacate the conviction or sentence in the above-captioned matter.

9. If the Moving Party entered a plea of guilty or nolo contendere, the Moving Party requests that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

Date:

(NAME OF MOVING PARTY OR ATTORNEY FOR MOVING PARTY)

(SIGNATURE OF MOVING PARTY OR ATTORNEY)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		DRAFT Not approved by the Judicial Council 03/06/2024
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:		
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	DATE OF BIRTH:	CASE NUMBER:

ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE

☐ Pen. Code, § 1016.5 ☐ Pen. Code, § 1473.7(a)(1)

☐ Pen. Code, § 1473.7(a)(2) ☐ Pen. Code, § 1473.7(a)(3)

FOR COURT USE ONLY

DATE:

TIME:

DEPARTMENT:

1. **FOR APPOINTMENT OF COUNSEL**
   a. ☐ The court **grants** the request for appointment of counsel.
   b. ☐ The court **denies** the request for appointment of counsel because the Moving Party has not shown *(choose all that apply)*
      ☐ a prima facie case ☐ indigency.

2. **FOR PENAL CODE SECTION 1016.5 RELIEF**
   a. ☐ The court **grants** the Moving Party's request to vacate the judgment and to permit the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.
   b. ☐ The court **denies** the Moving Party's request to vacate the judgment and to permit the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

3. **FOR PENAL CODE SECTION 1473.7(a)(1) RELIEF**
   a. **Request to Waive Personal Appearance** *(if applicable)*
      (1) ☐ The court finds good cause to **grant** the request that the court hold the hearing without the personal presence of the Moving Party.
      (2) ☐ The court **denies** the request that the court hold the hearing without the personal presence of the Moving Party.
   b. **Timeliness**
      (1) ☐ The court **deems the motion timely** because the Moving Party did not receive, or acted with reasonable diligence after receiving, notice from immigration authorities.
      (2) ☐ The court exercises its discretion to **deem the motion timely.**
      (3) ☐ The court **deems the motion untimely and dismisses the motion** after a hearing (*People v. Alatorre* (2021) 70 Cal.App.5th 747).
   c. **Vacatur of Conviction or Sentence**
      (1) ☐ The court **grants** the Moving Party's request to vacate the conviction or sentence on the basis that the conviction or sentence is legally invalid due to a prejudicial error damaging the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.

         ☐ The court permits the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.
      (2) ☐ The court **denies** the Moving Party's request to vacate the conviction or sentence on the basis that the conviction or sentence is legally invalid due to a prejudicial error damaging the Moving Party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a conviction or sentence.

DEFENDANT:	CASE NUMBER:

4. **FOR PENAL CODE SECTION 1473.7(a)(2) RELIEF**

a. **Request to Waive Personal Appearance** *(if applicable)*

(1) ☐ The court finds good cause to **grant** the request that the court hold the hearing without the personal presence of the Moving Party.

(2) ☐ The court **denies** the request that the court hold the hearing without the personal presence of the Moving Party.

b. **Undue Delay**

(1) ☐ The court finds that the Moving Party **filed without undue delay** from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence.

(2) ☐ The court finds that the Moving Party **failed to file the motion without undue delay** from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence of actual innocence, and **dismisses** the motion after a hearing.

c. **Vacatur of Conviction or Sentence**

(1) ☐ The court **grants** the Moving Party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence.

☐ The court permits the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

(2) ☐ The court **denies** the Moving Party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence.

(3) The court's basis for the ruling:

5. **FOR PENAL CODE SECTION 1473.7(a)(3) RELIEF**

a. **Request to Waive Personal Appearance** *(if applicable)*

(1) ☐ The court finds good cause to **grant** the request that the court hold the hearing without the personal presence of the Moving Party.

(2) ☐ The court **denies** the request that the court hold the hearing without the personal presence of the Moving Party.

b. **Time Frames**

(1) ☐ The court finds that the motion **was filed in accordance with the time frames** in Penal Code section 745(j).

(2) ☐ The court finds that the motion **was filed prematurely under the time frames** in Penal Code section 745(j) and dismisses the motion after a hearing.

c. **Undue Delay**

(1) ☐ The court finds that the Moving Party filed **without undue delay** from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence that provides a basis for relief under Penal Code section 745(a).

(2) ☐ The court finds that the Moving Party **failed to file the motion without undue delay** from the date the Moving Party discovered, or could have discovered through the exercise of due diligence, the evidence that provides a basis for relief under Penal Code section 745(a), and **dismisses the motion** after a hearing.

d. **Motion for Disclosure**

(1) ☐ The court grants the Moving Party's request for the following records or information relevant to a potential Penal Code section 745(a) violation:

(2) ☐ The court denies the Moving Party's request for disclosure of records or information.

DEFENDANT:	CASE NUMBER:

5. e. **Vacatur of Conviction or Sentence**

(1) The court finds the following violations of section 745(a) occurred *(check all that apply)*:

(a) ☐ The judge, an attorney, a law enforcement officer, an expert, or a juror in the case exhibited bias or animus toward the Moving Party because of the Moving Party's race, ethnicity, or national origin.

(b) ☐ During in-court trial proceedings, the judge, an attorney, a law enforcement officer, an expert, or a juror used racially discriminatory language about the Moving Party's race, ethnicity, or national origin. (Racially discriminatory language does not include relaying language used by someone else that is relevant to the case, or giving a racially neutral and unbiased physical description of the suspect.)

(c) ☐ The Moving Party was charged with or convicted of a more serious offense than defendants of other races, ethnicities, or national origin who have engaged in similar conduct and are similarly situated, **and** the prosecution more frequently sought or obtained convictions for more serious offenses against people who share the Moving Party's race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(d) ☐ The Moving Party received a longer or more severe sentence compared to similarly situated individuals convicted of the same offense **and**:

(i) ☐ longer or more severe sentences were more frequently imposed for the same offense on people who share the Moving Party's race, ethnicity, or national origin than on others in the county; *and/or*:

(ii) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in that county.

(2) ☐ The court **grants** the Moving Party's request to vacate the conviction and sentence based on a violation of Penal Code section 745(a) and finds the conviction and sentence legally invalid.

(a) ☐ Refer to the court minute order from *(date):* _____

OR *(check all that apply)*:

(b) ☐ The court orders the following new proceedings consistent with Penal Code section 745(a):

(c) ☐ The court finds a violation of Penal Code section 745(a)(3) and modifies the judgment to the following lesser included or lesser related offense:

(d) ☐ The court permits the Moving Party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

(e) ☐ The court grants the following remedies:

DEFENDANT:	CASE NUMBER:

5. e. (3) ☐ The court **grants** the Moving Party's request to vacate the sentence based on a violation of Penal Code section 745(a) and finds the sentence was legally invalid.

(a) ☐ Refer to the court minute order from *(date):* _____

OR *(check all that apply)*:

(b) ☐ The court imposes the following new sentence:

(c) ☐ The court grants the following remedies:

(4) ☐ The court **denies** the Moving Party's request to vacate the conviction or sentence based on a violation of Penal Code section 745(a).

(5) The court's basis for the ruling:

Date:

_____
(JUDICIAL OFFICER)

Name: _____

Address: _____

_____

_____

_____

_____

CDCR or ID Number: _____

DRAFT
Not approved by
the Judicial Council
03/06/2024

_____

_____

_____

_____

(Court)

_____
Petitioner

v.

_____
Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction or sentence and are filing this petition in the superior court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the superior court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original of the petition and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rules 4.551 (as amended January 1, 2024) and 8.380 (as amended January 1, 2020) of the California Rules of Court. Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

☐ A conviction ☐ Parole ☐ A violation of the Racial Justice Act under Penal Code section 745(a)

☐ A sentence ☐ Credits

☐ Jail or prison conditions ☐ Prison discipline

☐ Other *(specify):* _____

1. Your name: _____

2. a. Where are you incarcerated? _____

b. If you are not incarcerated, are you on supervised release, such as probation, parole, mandatory supervision, or postrelease community supervision?

☐ Yes *(specify):* _____

☐ No

3. Why are you in custody or on supervised release? ☐ Criminal conviction ☐ Civil commitment

Answer items a through i to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

_____

_____

_____

_____

b. Penal or other code sections: _____

c. Name and location of sentencing or committing court:

_____

_____

_____

d. Case number: _____

e. Date convicted or committed: _____

f. Date sentenced/Date of judgment: _____

g. Length of sentence: _____

h. When do you expect to be released? _____

i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

_____

_____

_____

4. What was the LAST plea you entered? *(Check one):*

☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. CLAIMS FOR RELIEF

Claim 1: State briefly your claim for relief. For example, "The trial court imposed an illegal enhancement," or "an expert witness violated the Racial Justice Act." *(If you have additional claims for relief, use a separate page for each claim. State claim 2 on page 4. For additional claims, make copies of page 4 and number the additional claims in order.)*

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where).*

b. Supporting documents:
Attach declarations, relevant records, transcripts, or other documents supporting your claim. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474.)

c. Supporting cases, rules, or other authority *(optional)*:
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

Claim 2 or **Claim** _____ *(if applicable):*

a. Supporting facts:

b. Supporting documents:

c. Supporting cases, rules, or other authority:

7. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:

a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

b. Result: c. Date of decision:

d. Case number or citation of opinion, if known:

e. All issues raised: (1)

(2)

(3)

f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

8. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:

a. Result: b. Date of decision:

c. Case number or citation of opinion, if known:

d. All issues raised: (1)

(2)

(3)

9. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal (see *In re Dixon* (1953) 41 Cal.2d 756, 759):

10. Administrative review:

a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Dexter* (1979) 25 Cal.3d 921, 925.) Explain what administrative review you sought or explain why you did not seek such review:

b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No

Attach documents that show you have exhausted your administrative remedies. (See People v. Duvall *(1995) 9 Cal.4th 464, 474.)*

11. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, sentence, commitment, or issue in any court, including this court? (See *In re Clark* (1993) 5 Cal.4th 750, 767–769 and *In re Miller* (1941) 17 Cal.2d 734, 735.)

☐ Yes If yes, continue with number 12. ☐ No If no, skip to number 14.

12. a. (1) Nature of proceeding (for example, "habeas corpus petition"): _____

(2) Name of court: _____

(3) Result *(attach order or explain why unavailable):* _____

(4) Date of decision: _____

(5) Case number or citation of opinion, if known: _____

(6) All issues raised: (a) _____

(b) _____

(c) _____

b. (1) Nature of proceeding: _____

(2) Name of court: _____

(3) Result *(attach order or explain why unavailable):* _____

(4) Date of decision: _____

(5) Case number or citation of opinion, if known: _____

(6) All issues raised: (a) _____

(b) _____

(c) _____

13. If any of the courts listed in number 12 held a hearing, state name of court, date of hearing, nature of hearing, and result:

_____

_____

_____

14. Explain any delay in discovering or presenting the claims for relief and in raising the claims in this petition. (See *In re Robbins* (1998) 18 Cal.4th 770, 780; Pen. Code, § 1473(e).)

_____

_____

_____

15. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

_____

_____

_____

16. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

_____

_____

_____

17. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

_____

18. Answer the following questions if you are raising a claim of violation of the Racial Justice Act under Penal Code section 745(a):

a. Indicate which of the following apply to the case in which you are making a claim for violation of Penal Code section 745(a) *(check all that apply)*:

(1) ☐ Judgment is not final (for example, because an appeal is pending),

(2) ☐ You are currently serving a sentence in the state prison or county jail under Penal Code 1170(h) for the felony conviction in which you are raising a Racial Justice Act claim,

(3) ☐ This petition is filed **on or after** January 1, 2025, and judgment became final for a felony conviction on or after January 1, 2015, or

(4) ☐ This petition is filed **on or after** January 1, 2026, and judgment is for a felony conviction.

b. I request relief based on the following (*choose all that apply*):

(1) ☐ The judge, an attorney, a law enforcement officer, an expert, or a juror in the case exhibited bias or animus toward me because of my race, ethnicity, or national origin.

(2) ☐ During in-court trial proceedings, the judge, an attorney, a law enforcement officer, an expert, or a juror used racially discriminatory language about my race, ethnicity, or national origin. (Racially discriminatory language does not include relaying language used by someone else that is relevant to the case, or giving a racially neutral and unbiased physical description of the suspect.)

(3) ☐ I was charged with or convicted of a more serious offense than defendants of other races, ethnicities, or national origins who have engaged in similar conduct and are similarly situated, ***and*** the prosecution more frequently sought or obtained convictions for more serious offenses against people who share my race, ethnicity, or national origin in the county where the convictions were sought or obtained.

(4) ☐ I received a longer or more severe sentence compared to similarly situated individuals convicted of the same offense **and**:

(a) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants who share my race, ethnicity, or national origin than on others in that county; *and/or*

(b) ☐ longer or more severe sentences were more frequently imposed for the same offense on defendants in cases with victims of one race, ethnicity, or national origin than in cases with victims of other races, ethnicities, or national origins in that county.

c. Is your claim based on a statement or conduct by a judge? ☐ Yes ☐ No

If yes, please state the judge's name:

d. Do you want appointed counsel? ☐ Yes ☐ No

If yes, can you afford to hire counsel? ☐ Yes ☐ No

e. Do you request permission to amend a pending petition for writ of habeas corpus with this claim? ☐ Yes ☐ No

(1) If yes, in what court is your petition pending? _____

(2) If yes, what is the case number of your pending petition? _____

f. Do you request disclosure of evidence relevant to a potential violation of Penal Code section 745(a)? ☐ Yes ☐ No

(1) ☐ The type of records or information sought is described as follows:

_____

_____

_____

(2) ☐ The reason the records or information are needed is as follows:

_____

_____

_____

g. Are you raising this claim for the first time? ☐ Yes ☐ No

If no, are you raising it again because of new evidence that could not have been previously known to you?

(1) ☐ Yes *(explain):*

(2) ☐ No *(explain):*

If you need additional space to answer any question on this petition, add an extra page and indicate that your answer is "continued on additional page."

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: _____

▶ _____
(SIGNATURE OF PETITIONER)

W24-01

Criminal Procedure: Racial Justice Act (amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386)

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

	Commenter	Position	Comment	Committee Response
1.	Iyana Doherty, Courtroom Operations Supervisor *Superior Court of California-Orange County*	A	*Does the proposal appropriately address the stated purpose?* Yes *Are the rules and forms written in a way that would be understandable to self-represented litigants?* Yes with a few modifications. The word "final" can be misinterpreted and recommend section 18, line 5(b) be updated to include a line field to include judge's name *Does the proposal appropriately consider changes made to section 745 by AB 1118 (Stats. 2023, ch. 464)* Yes *How should amending an existing petition for writ of habeas corpus to include a claim under section 745 impact the existing 60-day timeframe for a court to rule on a petition for writ of habeas corpus (see Cal. Rules of Court, rule 4.551(a)(3))?* Some petitions may raise multiple claims and would require extensive research that could possibly go past the 60-day timeframe. *Is it appropriate to include references on forms HC-001 and CR-187 to claims for relief under section 745 in cases in which judgments are not final? Should this language be deleted or modified?*	The committees appreciate the comments. The committees agree, in part, and will modify the "judgment is not final" checkboxes to add "for example, because an appeal is pending." The final version of the form will have a fillable section for the judge's name. The committees agree and recommend extending the timeframe to an additional 60 days from the date an amended petition is filed.

	Commenter	Position	Comment	Committee Response
			Yes, it is appropriate to include however, the language needs to be clearer as self-represented litigants may misinterpret the meaning of "judgments are not final."	The committee agrees, in part, and will modify the "judgment is not final" checkboxes to add "for example, because an appeal is pending."
			Should the committees consider rule amendments relating to the Racial Justice Act and death penalty-related habeas corpus proceedings? Yes	The committees intend to monitor issues around claims for relief under section 745 in the context of death penalty-related habeas proceedings. The committees will delete the checkbox for petitioners seeking relief due to a judgment of death since form HC-001 is intended to be used in noncapital cases (see Cal. Rules of Court, rule 4.551(a), 8.830(a)).
			Should form HC-001 be limited to non-capital cases? No	
			Is it confusing for self-represented litigants to include items 18(a)(5) on form HC-001 and item 5(a)(4) on form CR-187, which both indicate that on or after January 1, 2026, relief may be sought for any felony conviction? Yes.	The committees recommend keeping the checkboxes in to ensure that this option is available on January 1, 2026, and to serve an educational function informing people of when they are eligible to file for relief.
			Should these items be deleted and reintroduced in a future form proposal, effective January 1, 2026? Yes, the items should be deleted. Also, recommend deleting and reintroducing in a future form proposal item 18(a)(4) on form HC-001 and item 5(a)(3) on form CR-187.	Item 18(a)(4) on form HC-001 and item 5(a)(3) on form CR-187 are requests for relief filed on or after January 1, 2025 for judgments that became final for a felony conviction on or after January 1, 2015. Because it is anticipated that these forms will be effective September 1, 2024, the committees prefer to keep these items rather than delete and reintroduce them as it would be difficult to update the forms in such a short span of time.

	Commenter	Position	Comment	Committee Response
			Should item 18(c) on form HC–001 requesting appointment of counsel be revised to (1) separate the request for counsel from a declaration of indigency, and (2) require the petitioner to include a financial statement to indicate that the petitioner cannot afford counsel, similar to item 6 on form CR-187? (1) There is no need to separate. (2) Yes, additional verbiage needed to have petitioner include financial statement. *Under AB 1118, when a defendant has a claim alleging a violation of Penal Code section 745 that is based on the trial record, the defendant may either raise that claim on direct appeal or may move to stay his appeal and request remand to file a motion in the superior court. Should the criminal appeal rules in Title 8 of the Rules of Court be amended to address this provision?* Yes, it is noted item 7 on the form HC-001 addresses the appeal but it is not mentioned on form CR-187. *Would the proposal provide cost savings? If so, please quantify.* Yes, in relation to appointment of counsel. If declared on form, it could reduce the amount of hearings needed to appoint/address counsel. *What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of*	Based on other comments received, the committees will modify this item to separate the request for counsel from the showing of indigency. Due to the difficulties of obtaining certified trust accounts for petitioners in prison, the committees will not require the petitioner to include a financial statement. The committees believe section 745(b) is sufficiently clear and does not require any amendments to Title 8 of the Rules of Court to implement its provisions.

	Commenter	Position	Comment	Committee Response
			training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Minimal impact to case processing staff. Procedure updates communication will need to be provided to staff. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes	
2.	Danielle Harris Managing Attorney, The Freedom Project *San Francisco Public Defender*	A	On 4.551(a)(4)'s issue re amending a pending, undecided habeas petition: We suggest adding a provision that says where an RJA habeas filed and there is already a pending, undecided habeas petition pending, the two petitions may be consolidated and the original one thus deemed "amended."	The committees believe the proposed language is sufficient and declines the recommendation.
3.	Galit Lipa, State Public Defender Christina A. Spaulding, Chief Deputy State Public Defender Erik Levin, Supervising Deputy State Public Defender *Office of the State Public Defender* *Joinder of the First District Appellate Project (FDAP) in these comments.*	AM	The Office of the State Public Defender (OSPD) submits these comments in response to Invitation to Comment W24-01. Our comments focus on the appointment of counsel and the proposed revisions to form HC-001. Since the RJA was enacted in 2020, OSPD has provided numerous trainings on the RJA, has filed amicus briefs in several cases concerning the proper interpretation of the statute, including *People v. Lashon* (2023) 93 Cal.App.5th 136, review granted Nov. 15, 2023, S282159, *Finley v. Superior Court* (2023) 95 Cal.App.5th 12,	The committees appreciate the comments.

	Commenter	Position	Comment	Committee Response
			Young v. Superior Court (2022) 79 Cal.App.5th 138, *Harris v. Superior Court* (B313302) review den. July 1, 2021, S269619, and *Flores v. Superior Court* (G060445) review den. Nov. 10, 2021, S270692, and is actively litigating RJA issues in a number of our own cases. OSPD is concerned with ensuring that the Racial Justice Act (RJA) is implemented broadly, as the Legislature intended, to eradicate racial disparities in the criminal legal system. (Stats. 2020, ch. 317, § 2, subd. (i).) To implement the RJA, the Legislature added a provision to Penal Code section 1473[1]—now subdivision (e)[2]—for the appointment of counsel for people who file a petition for habeas corpus alleging violations of the RJA: > The petition shall state if the petitioner requests appointment of counsel and the court shall appoint counsel if the petitioner cannot afford counsel *and either the petition alleges facts that would establish a violation of subdivision (a) of Section 745 or the State Public Defender requests counsel be appointed.* (§ 1473, subd. (e), italics added; see also Proposed Rule 4.551(d)(2).) Because the Legislature gave the State Public Defender authority to request appointment of counsel for	

	Commenter	Position	Comment	Committee Response
			RJA petitioners, OSPD has a particular interest in how this provision is applied. [1] All citations are to the Penal Code unless otherwise indicated. [2] This is the numbering as of January 1, 2024. (Sen. Bill 97 (Stats 2023, ch. 381).) Respecting the appointment of counsel, the advisory committees note that there are two possible interpretations of section 1473, subdivision (e): first, "that unless the State Public Defender requests appointment, the court appoints counsel only if it issues an order to show cause, similar to the appointment of counsel for other noncapital petitions for the writ of habeas corpus." (Invitation to Comment, W24-01, p. 5.) Alternatively, section 1473, subdivision (e) sets a standard for the appointment of counsel that "is distinct from the prima facie showing that would be required for an order to show cause" and requires counsel to be appointed before the court decides whether to issue an order to show cause. *(Ibid*.) The advisory committees decided not to resolve this dispute but to "accommodate[]" both positions. (*Ibid*.) OSPD submits that the second interpretation is correct, as a matter of statutory construction and California Supreme Court precedent. We urge the committees to reject the notion that, unless the State Public Defender requests the appointment of counsel, RJA petitioners are	The committees believe this issue must be resolved by the courts and that in the meantime, both interpretations can be accommodated under the proposed language.

	Commenter	Position	Comment	Committee Response
			entitled to counsel only after an order to show cause is issued. The showing required for the appointment of counsel under section 1473, subdivision (e) is similar to that in former section 1170.95. A petitioner must make a facially sufficient allegation that a violation of the RJA occurred in their case. If they do so, "[n]ewly appointed counsel may amend a petition filed before their appointment." (§ 1473, subd. (e).) Then, "[t]he court . . . shall determine if the petitioner has made a prima facie showing of entitlement to relief" and, if so, "issue an order to show cause . . . and hold an evidentiary hearing." (*Ibid*.) The structure of the statute thus reinforces that the Legislature intended for petitioners, upon filing a complying petition, to have the assistance of counsel to develop and present their claims to the court before the court rules on the merits of the petition. (Cf. *People v. Lewis* (2021) 11 Cal.5th 952, 966 [addressing structure of former section 1170.95]; see also Invitation to Comment, W24-01, p.5 [noting that provision allowing newly appointed counsel to amend the habeas petition underscores that appointment of counsel does not require a prima facie case].) As in the context of former section 1170.95, the threshold for appointment of counsel should not become a barrier to relief. The Supreme Court stressed in *People v. Lewis*, *supra*, 11 Cal.5th at	

	Commenter	Position	Comment	Committee Response
			p. 966, that it was contrary to the remedial intent of the statute, and short-sighted, to create a two-step process whereby many petitions were rejected, without counsel ever being appointed, only to have that determination reversed on appeal: "[E]ven assuming the practice leads to short-term efficiencies, those savings are a false economy that shifts work from trial counsel to appellate counsel and from the trial courts to the appellate courts." [citation] Leaving it to an appellate court to review a summary denial, on an underdeveloped record, arguably places a greater strain on judicial resources than appointing counsel from the outset. (*Id*. at pp. 969-970, quoting *People v. Tarkington* 49 Cal.App.5th 892, 925 (dis. opn. of Lavin, J.), review granted, then dismissed and remanded S263219 (Nov. 20, 2021), in light of *People v. Lewis*.) As the high court recognized, both petitioners and the courts benefit if counsel is appointed at the earliest opportunity, to help develop and present the claim to the trial court in the first instance. (*Lewis*, supra, at p. 970.) Lewis's holding was subsequently codified by Senate Bill 775. (Stats. 2021, ch. 551, § 1, subd. (b).) These considerations are even more significant in the context of the RJA. For example,	

	Commenter	Position	Comment	Committee Response
			establishing violations of section 745 subdivisions (a)(3) and (4) may require complex statistical evidence that a pro se petitioner, particularly one who is incarcerated, is ill-equipped to develop. The statute contemplates that, to develop such claims, petitioners may request information pursuant to section 745, subdivision (d), and it may be necessary to retain an expert to analyze the data. The assistance of counsel is vital even at the preliminary stages of developing these claims. To avoid having petitions dismissed prematurely, the standard forms should be designed to make it as easy as possible for pro se petitioners to meet the requirements for the appointment of counsel. OSPD agrees with the decision to have a single habeas form (Invitation to Comment, W24-01, p.11.) but suggests that a separate section be devoted to RJA claims, to make it easier for courts to determine whether the petition is facially sufficient and thus facilitate the appointment of counsel. The proposed form already has a separate section (number 18) devoted to alleged violations of the RJA, including a box for petitioners to check if they are requesting counsel. OSPD suggests that another subsection be added here, similar to the check boxes used in form CR-187, "5.b. GROUNDS FOR RELIEF," followed by a space for the petitioner	The committees agree, in part, and will add checkboxes to item 18 for the petitioner to indicate the grounds for relief under section 745(a). Item 6 on HC-001 should be used for the petitioner to set out supporting facts.

	Commenter	Position	Comment	Committee Response
			to set out supporting facts. This would allow petitioners to more readily identify which section(s) of the RJA they are alleging were violated and to provide the necessary supporting information. If courts appoint counsel for any indigent petitioner who requests it and files a facially sufficient petition, OSPD does not anticipate that it will be necessary for the State Public Defender to intercede to request appointment of counsel. The minor proposed modification to the proposed HC-001 form would make it easier for petitioners to meet the standard for appointment of counsel and for courts to determine if they have done so. Joinder of the First District Appellate Project (FDAP) in these comments. As stated in its separately submitted comment letter in response to Invitation W24-01, FDAP fully joins in OSPD's comments on these proposed rules. OSPD's Joinder in FDAP's separate comment letters. FDAP is submitting a separate comment letter addressing distinct aspects of the proposed rules included in W24-01 as well as a letter addressing rule changes included in W24-02. OSPD fully joins in FDAP's separate comment letters on W24-01 and W24-02.	
4.	Heather MacKay *Attorney* *Law Office of Heather MacKay*	AM	1. On HC-001:	The committees appreciate the comments.

	Commenter	Position	Comment	Committee Response
			Item 18(a)(1) - Suggest revising this language from "the judgment is not final" to "you are in criminal custody and an appeal is pending." Only people in criminal custody (which includes both incarceration and supervised release such as parole or post-release community supervision) may file a petition for writ of habeas corpus. (PC 1473(a).) A person whose judgment is not final but who is not in criminal custody would instead have to file a motion under PC 1473.7(a). Also, pro se defendants may not know when their judgment is or is not final, so saying that an appeal is pending may help them better understand the non-finality requirement. Item 18 (a)(4) and (a)(5) should include language that "you are in criminal custody" because a person must still be in criminal custody to file a habeas corpus petition. People who meet the criteria currently included in (a)(4) and (a)(5) but who are not in custody must file a motion under PC 1473.7(a).	The committees agree, in part, and will modify the "judgment is not final" checkbox in both HC-001 and CR-187 to add "for example, because an appeal is pending. The committees prefer to keep item 18(a) of HC-001 to address when a petitioner can file for relief since custodial status is addressed in item 2.
5.	Marina Meyere Managing Attorney *California Court of Appeal, Sixth Appellate District*	AM	A. Proposed Rule 8.386(f)(2) – Evidentiary hearing ordered by the reviewing court. The proposed rule mirrors the language of proposed rule 4.551(g)(2) applicable to the superior courts, but we believe it fails to account for a significant distinction in habeas corpus procedure at the appellate court level. As currently formulated, the proposed rule would appear to require an appellate court to	The committees appreciate the comments. The committees decline to make the recommended change. The proposed rule mirrors the statutory language contained in Penal Code section 1473(e).

	Commenter	Position	Comment	Committee Response
			conduct an evidentiary hearing whenever it issues an order to show cause returnable in the reviewing court. However, the proposed rule fails to account for the situation where the superior court has already conducted an evidentiary hearing on the claim and has denied habeas corpus relief. In this situation, the petitioner must file a new original habeas corpus petition in the appellate court. (In re Clark (1993) 5 Cal.4th 750, 767, fn. 7; see also Robinson v. Lewis (2020) 9 Cal.5th 883, 895-896.) When the superior court denies habeas corpus relief after conducting an evidentiary hearing, the established habeas corpus procedure in this limited context is for the appellate court to conduct independent review of what transpired at the superior court evidentiary hearing. (*In re Hochber*g (1970) 2 Cal.3d 870, 874, fn. 2, 876; see *also In re Resendiz* (2001) 25 Cal.4th 230, 249.) The appellate court may issue an order to show cause returnable before itself in this situation, but there may not be any need for further development of the factual record. The proposed rule could be interpreted as requiring a second evidentiary hearing regardless. We believe the proposed rule should be clarified or an advisory committee comment should be added recognizing that this established procedure is not impacted by the proposed rule. B. Request for Specific Comment – *Should the committees consider rule amendments relating*	

	Commenter	Position	Comment	Committee Response
			to the Racial Justice Act and death penalty-related habeas corpus proceedings? Should form HC-001 be limited to non-capital cases? This court continues to get submissions from self-represented litigants sentenced to death even after the enactment of Proposition 66. The habeas corpus form HC-001 makes it easier to discern the nature of the claims and whether the matter properly belongs in this court. Recognizing the impact of Proposition 66 and the added requirements specific to death-penalty related habeas corpus petitions, the committees may want to develop a specific habeas corpus form for such claims. Regardless, we believe form HC-001 or a new form to be developed by the committees should be required for all self-represented litigants seeking habeas corpus relief.	The committees intend to monitor issues around claims for relief under section 745 in the context of death penalty-related habeas proceedings. The committees will delete the checkbox for petitioners seeking relief due to a judgment of death since form HC-001 is intended to be used in noncapital cases (see Cal. Rules of Court, rule 4.551(a), 8.830(a)).
6.	The Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee	A	The proposal generally addresses the statutory requirements. *Feedback on specific comment: Is it confusing for self-represented litigants to include items 18(a)(5) on form HC-001 and item 5(a)(4) on form CR-187, which both indicate that on or after January 1, 2026, relief may be sought for any felony conviction? Should these items be deleted and reintroduced in a future form proposal, effective January 1, 2026?*	The committees appreciate the comments.

	Commenter	Position	Comment	Committee Response
			The subcommittee recommends keeping the items on the forms rather than pursuing amendments later. It reads pretty clearly that those options on the forms wouldn't be applicable until later on.	The committees agree with the recommendation.
7.	J. Bradley O'Connell, Assistant Director Lauren Dodge, Staff Attorney Deborah Rodriguez, Staff Attorney *First District Appellate Project* *Joinder of Office of State Public Defender (OSPD) in these comments.*	AM	The First District Appellate Project (FDAP) submits these comments on the proposed Racial Justice Act (RJA) Rules pursuant to Invitation to Comment W24-01. FDAP is the contract-administrator for indigent defense appeals in the First District pursuant to Rule 8.300(e). FDAP has been actively engaged with implementation of the RJA since its enactment in 2020 and through its subsequent amendments. FDAP recognizes the importance of the RJA and the rules promulgated for its application to vindication of criminal defendants' fundamental rights to assurance that their pretrial proceedings, trials, sentencings, and appeals are not tainted by racial bias. FDAP staff and panel attorneys have litigated RJA issues in pending appeals. Additionally, FDAP has sponsored and otherwise participated in RJA training programs for both trial and appellate practitioners. FDAP appreciates this opportunity to comment on the proposed rules for superior court and appellate habeas petitions raising RJA claims. • Rule 4.551. General. Current rule 4.551 is not exhaustive and does not cover all aspects of	The committees appreciate the comments.

	Commenter	Position	Comment	Committee Response
			superior court habeas corpus practice. Several of the new RJA-specific provisions are common sense clarifications and are consistent with existing habeas corpus practices (even though some of those common habeas practices are not currently codified in the Rules of Court). However, as reflected in our individual comments below, several of these proposed clarifications and additions refer specifically to petitions raising RJA claims. Under traditional statutory (and rule) construction tenets, the proposed additions could create the misleading impression that they apply *only* to habeas petitions raising RJA claims, rather than to habeas corpus practice generally. "[W]hen the drafters of a statute" – or a rule – "have employed a term in one place and omitted it in another, it should not be inferred where it has been excluded." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.) • <u>Rule 4.551(a)(4). Amendment of pending petition to add RJA claim.</u> Although not explicitly addressed in existing Rule 4.551, habeas courts currently allow amendments of pending habeas petitions either to add new claims or to supplement or modify the allegations of the original claims. For example, in the course of discovery and other investigation of the originally pleaded claims, counsel may discover facts supporting additional claims (e.g., newly-discovered evidence, suppression of evidence, etc.). However, by referring to amendment of habeas	The committees will add an advisory committee comment that the revisions reflect the language in section 1473(e) and are not intended to limit a court's discretion and authority in habeas corpus proceedings that do not include claims under section 745.

	Commenter	Position	Comment	Committee Response
			petitions only in the context of adding RJA claims to already-pending petitions, the proposed provision may create the misleading impression that this is the *only* context in which amendment of a habeas petition is permissible. • Rule 4.551(a)(9). Disqualification of judge. This provision presents a similar risk of misconstruction. By requiring judicial disqualification only where the habeas petition raises an RJA claim based on a judge's conduct or statements, the provision implies that a habeas petition raising some other form of judicial misconduct does not trigger similar disqualification requirements. Similar judicial disqualification standards should apply to all habeas petitions which raise claims of judicial bias or judicial misconduct, whether those claims arise under the RJA, constitutional provisions, or other statutory provisions. We do not suggest that all petitions raising claims of judicial *error* should trigger potential disqualification of a judge. However, RJA and non-RJA claims raising claims of judicial bias, partiality, or misconduct should be governed by similar disqualification standards and procedures. • Rule 4.551(c)(1). Prima facie standard for RJA habeas claims. As stated in the Invitation to Comment (p. 12): "The issue of whether the definition of a prima facie showing in section 745(h)(2) applies to petitions for writ of habeas corpus under section 1473(f) remains undecided	See response above.

	Commenter	Position	Comment	Committee Response
			by the courts. As a result, *both committees declined to incorporate the definition in section 745(h)(2) into rule 4.551*. The committees intend to track and monitor the issue." (Emphasis added.) We submit that under long-established rules of statutory construction, the term "prima facie" as used in Penal Code sections 745 and 1437(f) must be construed to have the same meaning. Both those provisions employing "prima facie" standards were added to the statutory scheme by the Racial Justice Act of 2020. "[W]hen a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (*Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123; *People v. McKay* (2002) 27 Cal.4th 601, 621.) When a legislature "uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that [the legislature] intended that text to have the same meaning in both statutes." (*Smith v. City of Jackson* (2005) 544 U.S. 228, 233.) In view of these statutory construction principles, it appears evident that the Legislature intended that the term "prima facie case" have the identical meaning for both the remedial procedures authorized by the RJA – a motion or a habeas corpus petition. Consequently, we do not believe that any additional judicial	

	Commenter	Position	Comment	Committee Response
			clarification is necessary to confirm that the section 745 "prima facie" standard applies equally to the similarly-phrased "prima facie" standard for RJA habeas petitions under section 1437(f). Case law has already established that the prima facie showing required to establish an RJA violation is lower than the prima facie burden ordinarily required for a habeas corpus petition. (*Finley v. Superior Court* (2023) 95 Cal.App.5th 12.) While the *Finley* court considered a motion made pursuant to section 745, its reasoning is equally applicable to section 1473(f), which was added to the statutory scheme by the same RJA legislation. As *Finley* reasoned, imposing a "heavy burden" at the prima facie stage in an RJA case would be contrary to the Act's structure and purpose. By enacting the RJA, the Legislature intended "to depart from the discriminatory purpose paradigm in federal equal protection law," a standard that was "'nearly impossible to establish.'" (*Finley,* at p. 22.) However, if the advisory committees decline to take a position on the applicability of this relaxed prima facie case standard to RJA habeas petitions (as suggested on p. 12), *we request that the committees include an advisory note to Rule 4.551 acknowledging that the issue is undecided*. The inclusion of such an advisory note could flag the possibility that the prima facie showing for an RJA violation under	The committees will add an advisory committee comment that the issue of whether the prima facie showing for a petition for writ of habeas corpus under section 1473(e) is defined under section 745(h)(2) or in subdivision (c)(1) is unresolved.

	Commenter	Position	Comment	Committee Response
			section 1437(f) may be lesser than the showing required for other habeas claims. Indeed, in the absence of such a note explicitly identifying the question as unresolved, Rule 4.551, as currently drafted, would *require* application of the general habeas definition of "prima facie" to RJA violations brought under section 1473(f). (See Rule 4.551(c)(1) ["the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved."]) An advisory note to this effect would put the courts and practitioners on notice that this lower prima facie burden (a "substantial likelihood" that an RJA violation occurred) may apply to an RJA violation raised through a habeas petition pursuant to section 1437(f), as well as to one raised via a motion under section 745. • Rule 4.551(d). Appointment of counsel. Current Rule 4.551(c)(2) provides that a court "must" appoint counsel upon issuing an order to show cause on a habeas petition. That rule implements the California Supreme Court's holdings that appointment of counsel is mandatory under due process principles whenever a court finds that a habeas corpus or other post-conviction petition states a prima facie case for relief. (*In re Clark* (1993) 5 Cal.4th 750, 780.) (See Advisory Committee Comment to current Rule.) Proposed Rule 4.551(d)(1) restates current rule 4.551(c)(2) as to habeas petitions generally. Proposed rule	

	Commenter	Position	Comment	Committee Response
			4.551(d)(2) addresses the distinct circumstances under which the superior court must appoint counsel on a habeas petition raising an RJA claim. (As noted at the end of this letter, FDAP joins in the separate comment letter being filed by the Office of the State Public Defender regarding appointment of counsel on RJA habeas petitions, and we will not elaborate on that subject in this letter.) We note, however, that while appointment of counsel is mandatory under the circumstances addressed in proposed Rule 4.551(d), *habeas courts also possess inherent discretion to appoint counsel under other circumstances.* Habeas courts commonly appoint counsel for pro. per. petitioners where the court believes that the claims may have potential merit but the pro. per. pleadings are insufficiently developed for the court to determine whether they state a prima facie case. Frequently, the assistance of counsel may be necessary to conduct an investigation in order to develop a sufficient factual showing to state a prima facie case. To avoid any incorrect impression that appointment of counsel is permissible only under the mandatory-appointment circumstances stated in proposed Rule 4.551(d)(1)-(d)(2), we suggest that the Judicial Council add a provision recognizing courts' inherent authority to order discretionary appointments for good cause and in the interest of justice under other circumstances. Alternatively, the Judicial	The committees agree that rule 4.551(d) only lists the circumstances when a court reviewing a habeas petition must appoint counsel. The rule does not address, and is not intended to limit, any discretion or authority courts may have to appoint counsel in other situations. The committees, however, believe that the rule as drafted is sufficiently clear on this point and therefore decline to make the suggested change.

	Commenter	Position	Comment	Committee Response
			Council could add an Advisory Comment to that effect. We do not believe that it is necessary for the rule to identify all potential circumstances that may warrant a discretionary appointment of counsel prior to issuance of an Order to Show Cause (OSC). Instead, consistent with current practices, it would be preferable for the rule (or an Advisory Comment) simply to recognize courts' discretion to make such discretionary appointments in the interests of justice prior to a finding that a pro. per. petition alleges facts that would establish a section 745(a) violation (as to an RJA claim) or that it states a prima facie case requiring issuance of an OSC (as to non-RJA habeas claims). • Rule 4.551(d). Amendment of petition after counsel's appointment. Rule 4.551(d)(2) (the provision specific to RJA petitions) provides that "[n]ewly appointed counsel may amend a petition filed before their appointment." However, there is no corresponding provision in Rule 4.551(d)(1), which may imply that there is no similar allowance for newly appointed counsel to amend a non-RJA petition. The circumstances supporting a post-appointment amendment of a habeas petition – the inability of pro. per. petitioners to articulate and amplify their pleadings effectively and to investigate and provide factual support for their allegations – apply equally to non-RJA petitions. Accordingly, we suggest that the Judicial	

	Commenter	Position	Comment	Committee Response
			Council modify this provision in a way that clarifies that this allowance for post-appointment amendments applies equally to RJA and non-RJA petitions. For instance, the Judicial Council could move this provision to a new subdivision (d)(3), thus clarifying that it applies to appointments under both (d)(1) and (d)(2). • Rule 8.385(g). Appointment of counsel on appellate habeas petitions. Like proposed Rule 4.551(d), Rule 8.385(g) implements the due process principle requiring appointment of counsel upon a finding that a post-conviction petition states a prima facie case. And subdivision (g)(2) gives effect to the statutory provision also requiring appointment on an RJA habeas petition upon the recommendation of the State Public Defender. As with rule 4.551(d), it would be desirable to supplement the rule to avoid any implication that these are the *only* circumstances under which appellate courts may appoint habeas counsel. Appellate courts, in the exercise of discretion, often find good cause to appoint habeas counsel for pro. per. petitioners at an early stage of the proceeding prior to issuance of an order to show cause or of a determination that the petition states a prima facie case. Indeed, the undersigned appellate attorneys are familiar with numerous instances of such pre-OSC habeas appointments in the First District alone.	The committees will add an advisory committee comment that the revisions reflect the language in section 1473(e) and are not intended to limit a court's discretion and authority in habeas corpus proceedings that do not include claims under section 745. The committees agree that rule 8.385(g) only lists the circumstances when a court reviewing a habeas petition must appoint counsel. The rule does not address, and is not intended to limit, any discretion or authority courts may have to appoint counsel in other situations. The committees, however, believe that the rule as drafted is sufficiently clear on this point and therefore decline to make the suggested change.

	Commenter	Position	Comment	Committee Response
			Joinder of Office of State Public Defender (OSPD) in these comments. As stated in its separately submitted comment letter in response to Invitation W24-01, **the OSPD fully joins in FDAP's comments on these proposed rules**. FDAP's Joinder in OSPD's separate comment letter. OSPD is submitting a separate comment letter addressing distinct aspects of the proposed rules included in W24-01. **FDAP fully joins in OSPD's separate comment letter on W24-01.**	
8.	Susan Rocha Pro Per Litigant *Los Angeles County resident*	A	*Old outdated laws and codes need to be reviewed and changed and/or corrected.	The committees appreciate the comment.
9.	Katie Tobias Operations Analyst *Orange County Superior Court, Lamoreaux Justice Center*	A	* *Does the proposal appropriately address the stated purpose?* Yes, the proposal appropriately addresses the stated purpose. *Are the rules and forms written in a way that would be understandable to self-represented litigants?* Yes, the rules and forms are written in a way that would be understandable to self-represented litigants. *Does the proposal appropriately consider changes made to section 745 by AB 1118 (Stats. 2023, ch. 464)?* Yes, the proposal appropriately considers changes made to section 745 by AB 1118.	The committees appreciate the comment.

W24-01
Criminal Procedure: Racial Justice Act (amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386)
All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	Committee Response
			How should amending an existing petition for writ of habeas corpus to include a claim under section 745 impact the existing 60-day timeframe for a court to rule on a petition for writ of habeas corpus (see Cal. Rules of Court, rule 4.551(a)(3))? Additional time should be given for the court to rule on the petition for writ of habeas corpus if it is being amended to include a claim under section 745. As well as extending time in case of a judge recusal as to 745(a). *Would the proposal provide cost savings? If so, please quantify.* The proposal does not appear to 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?* Provide an information update to Case Processing staff, Courtroom staff, and Judicial Officers. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes, as it pertains to Juvenile.	The committee agrees and recommends extending the timeframe to an additional 60 days from the date the amended petition is filed. The committee declines, at this time, to extend the time for a ruling due to judicial disqualification.

	Commenter	Position	Comment	Committee Response
			How well would this proposal work in courts of different sizes? Our court is a large court, and this could work for Orange County	
10.	Mike Thompson Attorney *California Court of Appeal, Third Appellate District*	AM	<u>Revisions to Rule 4.551:</u> 1. Although section 1473, subd. (f) does not explicitly cross-reference section 745's definition of a "prima facie" showing, it does so implicitly by incorporating section 745 by reference. Further, effective Jan. 1, 2024, section 745 will allow a defendant to raise a claim by motion under section 745 or by petition for writ of habeas corpus. It cannot be the law that the standard for relief depends on which method is used to raise the claim. Thus, it must be true that the prima facie showing for purposes of a habeas corpus petition is the same showing required under section 745. For these reasons, I would urge the Committee to incorporate the prima facie definition into the rule. <u>Revisions to Form HC-001:</u> 1. I would retain the check box for "judgment is not final" in Item 18 as it causes no harm and may facilitate implementation of the phased-in retroactivity of claims under section 745(j). 2. Regarding the comment (at p. 8 of the Invitation to Comment) that AB 1118 could be construed as allowing pre-judgment petitions for writ of habeas corpus for section 745(a) relief, such a construction would be contrary to the	The committees appreciate the comment. The committees will add an advisory committee comment that the issue of whether the prima facie showing for a petition for writ of habeas corpus under section 1473(e) is defined under section 745(h)(2) or in subdivision (c)(1) is unresolved. The committee will retain the checkboxes. No response needed.

	Commenter	Position	Comment	Committee Response
			well-established rule that habeas relief ordinarily cannot serve as a substitute for appeal. (*In re Terry* (1971) 4 Cal.3d 911, 927.) Such a drastic change in the law should not be presumed by implication. 3. Footnote 8 of the Invitation to Comment provides: "[S]ection 1473(f) states that a petition for writ of habeas corpus is appropriate after 'judgment has been entered.' " This is not technically correct. Section 1473, subd. (f) provides: "Notwithstanding any other law, a writ of habeas corpus may also be prosecuted after judgment has been entered based on evidence that a criminal conviction or sentence was sought, obtained, or imposed in violation of subdivision (a) of Section 745, *if that section applies based on the date of judgment as provided in subdivision (k) of Section 745*." (§ 1473, subd. (f), italics added.) Presumably, this language was intended to be a reference to section 745, *subdivision (j)*, consistent with the changes in AB 256. However, it appears that SB 467 erroneously included a reference to subdivision (k). As a result, if construed literally, section 1473, subd. (f) states that a habeas petition based on a violation of section 745 may only be prosecuted after judgment if the judgment was entered before January 1, 2021, and the petition is based on a violation of section 745, subs. (a)(1) or (2). As a result of this apparent drafting error, there is an ambiguity in the law that will need to be resolved by the Legislature or the courts.	The committee appreciates the correction.

	Commenter	Position	Comment	Committee Response
			4. I would include in new Item 18, Form HC-001, a checklist identical to that proposed as new Item 5.b in Form CR-187. Such a checklist would help avoid confusion as to the basis (or bases) for the claim. <u>Revisions to Form CR-187:</u> 1. Item 5.d should be amended to include the cautionary language that a movant "must state facts, not conclusions," as currently included in Item 3.b in Form CR-187 and Item 6.a in Form HC-001.	The committees agree and will add checkboxes to item 18 for the petitioner to indicate the grounds for relief under section 745(a). The committees agree and will add similar language to item 5d of CR-187.
11.	Christina Zabat-Fran, President *Orange County Bar Association*	AM	The Council requested comments on whether the criminal appeal rules in Title 8 should be amended to address the provision allowing a defendant to request a stay of appeal to file a motion in the trial court. For indigent defendants, clarity is needed in the procedures regarding which lawyer is responsible for bringing the motion during the stay. Is it the appellate lawyer? Or the trial lawyer?	The committees appreciate the comment. The committees decline to make the suggested change. Penal Code section 745(b) does not specify which attorney representing the petitioner on appeal has responsibility for bringing the motion before the superior court. The committees envision that determining which attorney will file the motion will require discussion between the defendant and defendant's attorneys and will necessarily depend on the circumstances of a given case. The committees also believe section 745(b) is sufficiently clear and does not require any amendments to Title 8 of the Rules of Court to implement it.
12.	Morgan Zamora Prison Advocacy Coordinator	AM	The numbered comments that follow correspond to the bullet point Requests for Specific	The committees appreciate the comment.

W24-01

Criminal Procedure: Racial Justice Act (amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386)

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

	Commenter	Position	Comment	Committee Response
	Macio Lindsay Inside Policy Fellow *Ella Baker Center for Human Rights*		Comments listed on Page 13 of the Invitation to Comment, W24-01. 2. There is an expectation that self-represented litigants will understand the named rules and forms. However, self-represented litigants may not understand what constitutes a "final judgment" and will consider any available post-conviction avenue for relief, such as PC § 745, to mean their judgment is not yet final. Litigants will benefit from forms HC-001 and CR-187, including either a full definition of the legal term "final judgment" or a citation to case law, a statute, or a rule regarding a more complete definition of what constitutes a "final judgment." For example, items 6(b), 9, 10(a), 11, and 14 on form HC-001 cite relevant case law that litigants can reference to better understand what certain language in the form means contextually. 4. An amendment to an existing writ of habeas corpus petition that includes a claim under PC § 745 should trigger a 30-day extension of time for the court to rule on the amended petition. In consideration of this proposition, section 745 amendments to the existing writ of habeas corpus petitions will occur at various times within the 60-day timeframe for the court to rule on the petition. A 30-day extension of time beyond the original 60-day deadline should provide courts with more sufficient time to review the section 745 claim. Accordingly, Cal. Rules of Court, rule 4.551(a) should be	The committees agree in part, and will modify the "judgment is not final" checkboxes to add "for example, because an appeal is pending."

	Commenter	Position	Comment	Committee Response
			amended to include the following language: "When an existing writ of habeas corpus petition is amended to include a claim under section 745, the time to rule on the petition for writ of habeas corpus shall be extended for 30 days, beyond the expiration of the original 60-day time period."	The committees agree, in part, and recommend extending the timeframe to an additional 60 days from the date the amended petition is filed.
			5. Regarding claims for relief under section 745, the language referencing judgments that are not final are appropriate on forms HC-001 and CR-187, although many self-represented litigants will not understand what constitutes a "final judgment." A full definition of the legal term or citation to relevant case law, statute, or rule will be a helpful reference to self-represented litigants as to what constitutes a final judgment. For example, items 6(b), 9, 10(a), 11, and 14 on form HC-001 cite relevant case law that litigants can reference to better understand what certain language in the form means contextually.	The committees agree in part, and will modify the "judgment is not final" checkboxes to add "for example, because an appeal is pending."
			7. It will be confusing to self-represented litigants to include item 18(a)(5) on form HC-001 and item 5(a)(4) on form CR-187, which indicate that on or after January 1, 2026, relief may be sought for any felony convictions. It is likely that litigants may interpret this language to mean that relief may not be sought for those currently serving a sentence for a felony conviction until 2026 which is incorrect. Both items referenced above should be either deleted from the form or amended to include a more	The committees recommend keeping the checkboxes in to ensure that this option is available on January 1, 2026, and also to serve an educational function informing people of when they are eligible to file for relief.

	Commenter	Position	Comment	Committee Response
			clear explanation of the timeline for the tiered implementation of the Racial Justice Act and at which points certain individuals become eligible to seek relief. 8. As currently proposed, item 18(c) on form HC-001 will be confusing to self-represented litigants. To provide clarity, this item should be revised to include the following two questions and each question should be followed by "yes" or "no" check boxes: the first question, "Do you want appointed counsel?" and the second question, "Can you afford private counsel?" Separating the two questions will more clearly state section 1473 appointment of counsel criteria. Additionally, a requirement for self-represented litigants to include a financial statement is unnecessary and will be a timely and burdensome task, particularly, if a certified trust account statement must also be provided. The process for self-represented litigants incarcerated in California state prison to obtain these documents is as follows: first, the self-represented litigant must submit a request to the institution litigation coordinator to process and forward to the institution trust account department; second, accounting prepares and transmits the certified trust account statement to the litigant's correctional counselor (CCI); third, the self-represented litigant must sign a receipt and seal the certified trust account statement and	The committees agree and will modify this item to separate the request for counsel from the showing of indigency. The committees appreciate this information and will not require a financial statement.

	Commenter	Position	Comment	Committee Response
			section 745 habeas corpus petition with postage attached, and present these documents to the CCI; and fourth, the CCI delivers the legal mail to the institution's mailroom, where it is then logged and the legal documents mailed to the court. In anticipation of the significant number of post-judgment petitions for relief, securing a financial statement with a certified trust account statement will be a timely and burdensome task for litigants and institutional staff. Creating circumstances where thousands of self-represented litigants will have to go through this process will unnecessarily expend institutional resources and create backlogs in processing that further prolong access to justice. A check box asking the self-represented litigant if they can afford counsel, along with the verified signature under penalty of perjury included on form HC-001 is adequate to meet section 1473 appointment of counsel criteria. 9. Clarity is important and any rule that is not explicitly in alignment with section 745 should be amended to alleviate ambiguity. In addition to the above Specific Comments, Mr. Lindsey and myself would like to suggest the following additional comments which may provide further clarity and equity for the currently incarcerated populations that will make use of this form: ● Items 5(b) through (f)(2) and item 6 on form CR-187 provide relevant information that	

W24-01

Criminal Procedure: Racial Justice Act (amend Cal. Rules of Court, rules 4.551, 8.385, and 8.386)

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

	Commenter	Position	Comment	Committee Response
			should also be included in item 18 on form HC-001. The following three reasons support this proposition: first, to provide self-represented litigants a check box option of the available grounds for the section 745 violations under which they are seeking relief; second, to alert the court of the specific section 745 violation the litigant is asserting, and third, to alert the court if the litigant is requesting discovery. The amendment of item 18 on form HC-001 to incorporate items 5(b) through (f)(2) and item 6 on form CR-187 will be helpful to both self-represented litigants and the court by increasing consistency in the documentation of these claims.	The committees agree, in part, and will add checkboxes to item 18 for the petitioner to indicate the grounds for relief under section 745(a) and a request for disclosure.
			● Amendments to rule 4.551 are needed to reflect gender neutral pronouns as to increase inclusivity and representation of transgender, non-binary, and gender non-conforming individuals. References to “his” and “her” should be changed to “their” in subsections (a)(6)(B) and (c)(1)(2) of rule 4.551 as well as in any other location where these exclusionary descriptors are used.	The committees agree with the suggestion and will revise the rule to reflect gender neutral pronouns.

Item 06
Deferred to a later meeting

Item 06(A)
Deferred to a later meeting

Item number: 07

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 4, 2024

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

Title of proposal: Mental Health Law: CARE Act Rule Amendments and Form Revisions

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Amend Cal. Rules of Court, rules 7.2210, 7.2221, 7.2225, and 7.2230; revise forms CARE-050-INFO, CARE-060-INFO, CARE-100, CARE-101, CARE-105, CARE-106, and CARE-113

Committee or other entity submitting the proposal:
Probate and Mental Health Advisory Committee. The Family and Juvenile Law Advisory Committee joins the elements of the proposal that addresses communications between the CARE Act court and the juvenile court, if applicable.

*Staff contact (*name, phone and e-mail*): Theresa Chiong, 415-865-4080, theresa.chiong@jud.ca.gov; 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*): October 26, 2023
Project description from annual agenda: CARE Act Rule Amendments and Form Revisions: The committee will develop a recommendation for amendments to the rules and revisions to the forms implementing the Community Assistance, Recovery, and Empowerment (CARE) Act (Welf. & Inst. Code, §§ 5970–5987) to conform to the law as amended by Senate Bill 35 (Stats. 2023, ch. 283) and to facilitate the act's implementation. Amendments are expected to address, among other issues, sharing private health information with the courts and specified agencies or providers and—to be developed in collaboration with the Family and Juvenile Law Advisory Committee—communication between a CARE Act court and a juvenile court when a person over the age of 18 who is subject to continuing juvenile court jurisdiction is also the subject of a CARE Act petition. The project is intended to assist litigants and courts in navigating the CARE Act process.

Family and Juvenile Law: 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. SB 35 makes numerous changes to the Community Assistance, Recovery, and Empowerment (CARE) Act, including expanding the topics to be addressed by statewide rules of court to include communications between the CARE Act court and the juvenile court, if applicable.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The CARE Act was amended by Senate Bill 35 (Stats. 2023, ch.) which took effect immediately as an urgency statute. Conforming rule amendments and form revisions are needed before January 1, 2025, to facilitate the implementation of the CARE Act by the second cohort of 50 California courts and counties by December 1, 2024.

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 17, 2024

Title
Mental Health Law: CARE Act Rule Amendments and Form Revisions

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 7.2210, 7.2221, 7.2225, and 7.2230; revise forms CARE-050-INFO, CARE-060-INFO, CARE-100, CARE-101, CARE-105, CARE-106, and CARE-113

Recommended by
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

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, 2024

Date of Report
March 21, 2024

Contact
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Executive Summary

The Probate and Mental Health Advisory Committee recommends amending four rules of court and revising seven forms to implement Senate Bill 35 (Stats. 2023, ch. 283), which amended both substantive and procedural aspects of the Community Assistance, Recovery, and Empowerment (CARE) Act. In addition, the statute updated the mandate that the Judicial Council adopt rules implementing the policies and provisions of the act to add a requirement that the rules include "communications between the CARE Act court and the juvenile court, if applicable," and to remove the requirement that the rules include "the clerk's review of the petition." The Family and Juvenile Law Advisory Committee joins in recommending the

amendment of rule 7.2210(d)–(f), and the revision of forms CARE-050-INFO and CARE-100 to the extent those proposed changes address communications between the CARE Act court and the juvenile court.

Recommendation

The Probate and Mental Health Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective September 1, 2024:

1. Amend Cal. Rules of Court, rule 7.2210 to add subdivisions (c), (d), (e), and (f), which outline the procedures for filing a motion under Welfare and Institutions Code section 5976.5(e) to seal records in CARE Act proceedings, provide for communications between the CARE Act court and the juvenile court, provide for notification of respondent's attorney in certain parallel or related legal proceedings, and clarify that the rule does not authorize additional communication, absent an express waiver by respondent.

2. Amend Cal. Rules of Court, rule 7.2221 to remove language regarding the clerk's review of the petition to conform to the repeal of that requirement from Welfare and Institutions Code section 5977.4(c) by SB 35.

3. Amend Cal. Rules of Court, rule 7.2225 to reflect the amendments to Welfare and Institutions Code section 5978, which clarify who must serve as the petitioner in CARE Act proceedings initiated upon referral from other court proceedings.

4. Amend Cal. Rules of Court, rule 7.2230 to remove unnecessary language regarding the local rule process.

5. Revise the following forms to conform to statutory amendments and make technical changes:

    - *Information for Petitioners—About the CARE Act* (form CARE-050-INFO);
    - *Information for Respondents—About the CARE Act* (form CARE-060-INFO);
    - *Petition to Commence CARE Act Proceedings* (form CARE-100);
    - *Mental Health Declaration—CARE Act Proceedings* (form CARE-101);
    - *Order for CARE Act Report* (form CARE-105);
    - *Notice of Order for CARE Act Report* (form CARE-106); and
    - *Notice of Respondent's Rights—CARE Act Proceedings* (form CARE-113).

The proposed amended rules and revised forms are attached at pages 14–41.

Relevant Previous Council Action

At its May 12, 2023, meeting, the Judicial Council approved the adoption of eleven rules of court, California Rules of Court 7.2201 through 7.2230, as a new chapter in Probate and Mental Health Rules, and a new category of forms (CARE forms), with thirteen new forms to implement requirements and provisions of the CARE Act. Those rules of court and forms became effective on September 1, 2023.

Analysis/Rationale

The CARE Act took effect on January 1, 2023.[1] The act requires implementation by counties in two phases. The first cohort of 7 counties and their superior courts began implementation of the CARE Act on October 1, 2023.[2] Los Angeles County began implementation of the CARE Act on December 1, 2023, ahead of their required implementation date. The second cohort, comprising the remaining 50 counties in California, must begin implementation by December 1, 2024.[3]

The CARE Act is intended to provide "a path to care and wellness" for Californians living with schizophrenia spectrum and other psychotic disorders that lead to "risks to their health and safety and increased homelessness, incarceration, hospitalization, conservatorship, and premature death."[4] To achieve this end, the act authorizes specified adults to petition a superior court for a determination that the person for whom the petition is filed (the respondent) is eligible to participate in the CARE Act process and, if so, for an order beginning the CARE Act process for the respondent.[5]

On September 30, 2023, SB 35 was signed and took effect immediately as an urgency statute. SB 35 was enacted to fill gaps, clarify ambiguities, and correct inaccurate cross-references in the CARE Act. The bill's amendments included:

- Authorizing subordinate judicial officers to preside over the proceedings;[6]
- Clarifying that the respondent has a right to an interpreter in court;[7]
- Prohibiting filing fees for court filings;[8]
- Clarifying the persons who may file a petition and the rights of original petitioners;[9]
- Allowing the respondent to petition the court for an order sealing case records; and
- Creating a presumption in favor of sealing if such a petition is filed.[10]

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[1] The CARE Act was enacted as section 7 of Senate Bill 1338 (Stats. 2022, ch. 319, § 7) and is codified at Welfare and Institutions Code sections 5970–5987. All further unspecified statutory references are to the Welfare and Institutions Code.

[2] § 5970.5(a). The counties in the first cohort are Glenn, Orange, Riverside, San Diego, San Francisco, Stanislaus, and Tuolumne.

[3] § 5970.5(b).

[4] Sen. Bill 1338, § 1(a).

[5] §§ 5972, 5974, 5975, and 5977.

[6] § 5975.2.

[7] § 5976(j).

[8] § 5975.3.

[9] §§ 5974 and 5977(b)(6).

[10] § 5976.5.

SB 35 also adds a mandate that the rules adopted to implement the policies and provisions of the CARE Act include "communications between the CARE Act court and the juvenile court, if applicable." (§ 5977.4(c).)

Substantive and procedural changes in SB 35 require the rule amendments and form revisions in the proposal to conform to existing law.

Rules of court

The committee[11] recommends the amendment of four rules of court, rules 7.2210, 7.2221, 7.2225, and 7.2230. The Family and Juvenile Law Advisory Committee joins in recommending the amendment of rule 7.2210(d)–(f).

Rule 7.2210

The committees recommend amending rule 7.2210 to add subdivisions (c), (d), (e), and (f) to conform to SB 35's amendments to the CARE Act.

Subdivision (c) delineates new procedures pertaining to the respondent's filing a motion under section 5976.5(e) to seal records in CARE Act proceedings. The rule includes procedures relating to notice requirements, the time frame within which an opposition to such a request must be filed, and for identifying and maintaining sealed records. Such a rule is required because the rules addressing sealing records generally, rules 2.550–2.551, do not, by their terms, apply to records that are required to be kept confidential by law, as CARE Act records are,[12] and rule 3.1103 exempts causes of action arising under the Welfare and Institutions Code from the "law and motion" rules.

Subdivision (d) of the rule implements the mandate, added by SB 35 to section 5977.4(c), to include in the rules of court provisions regarding "communications between the CARE Act court and the juvenile court, if applicable." The rule requires the CARE Act court, upon learning a respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, to inform the juvenile court, in any suitable manner, that a CARE Act petition has been filed on behalf of that respondent.[13] The rule also clarifies that the CARE Act court is not precluded by statute from exercising concurrent jurisdiction with the juvenile court over a respondent who is within juvenile court dependency, delinquency, or transition jurisdiction.

Subdivision (e) includes provisions regarding notification of respondent's attorney in certain proceedings in which respondent is a party of the CARE Act proceedings. The rule would

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[11] The term "committee" is used in this report to refer to the Probate and Mental Health Advisory Committee alone. When the term "committees" is used, it is to refer collectively to the Probate and Mental Health Advisory Committee and the Family and Juvenile Law Advisory Committee.

[12] § 5977.4(a). Those rules also do not apply because they address situations in which the party filing the documents is the one making the motion to seal them, while in CARE Act cases that is not typically the situation.

[13] A detailed explanation of the committees' rationale for the rules pertaining specifically to communications involving respondents who are also within juvenile court jurisdiction is provided under "Alternatives Considered," below.

require the CARE Act court, upon learning that a respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, to order the county agency to notify the respondent's attorney in the juvenile proceeding that a CARE Act petition has been filed on behalf of the respondent and provide that attorney with the contact information, if known, of the respondent's CARE Act attorney.

Subdivision (e) also requires the CARE Act court, upon learning that a respondent has been referred from a proceeding described in section 5978, to order the agency to notify the respondent's attorney in that case. Section 5978 allows a court in which a person faces proceedings for assisted outpatient treatment, conservatorship under the Lanterman-Petris-Short Act, or competency to stand trial under section 1370.01 of the Penal Code to refer the person for commencement of CARE Act proceedings on their behalf. While the attorney in the aforementioned proceedings would probably be aware of their client's referral to the CARE Act court, subdivision (e) ensures the attorney in the related proceeding is notified if the referral is acted upon by the filing of a petition to commence CARE Act proceedings. This information is essential to the attorney in the related proceeding as the outcomes in the CARE proceedings may have a direct effect upon proceedings referred from.[14]

Subdivision (f) specifies that the requirements in subdivisions (d) and (e) do not authorize communication of confidential information other than required in those subdivisions between the courts or between the county agency and parties, absent an express waiver by the respondent. This subdivision reinforces the high degree of confidentiality in CARE Act proceedings, even as subdivisions (d) and (e) allow for limited communication.

Rule 7.2210 also includes two advisory committee comments. The first comment clarifies that the phrase "within a juvenile court's dependency, delinquency, or transition jurisdiction," as used in subdivisions (d) and (e), refers only to a respondent whom a juvenile court had found to be described by Welfare and Institutions Code section 300, 450, 601, or 602 and who is, at the time the CARE Act petition is filed, within a juvenile court's jurisdiction based on one of those descriptions. The comment emphasizes that the phrase does not refer to any other party to a juvenile court proceeding. The second comment explains that subdivision (d)(2) describes existing law and does not create new law. Specifically, the comment states that neither the juvenile court law[15] nor the CARE Act precludes concurrent jurisdiction or confers exclusive jurisdiction on either court over matters relating to persons who meet the statutory jurisdictional criteria of both.

[14] For example, for a defendant referred from proceedings under Penal Code section 1370.01 who is incarcerated in county jail, if a hearing to determine eligibility does not occur within 14 court days of the petition being filed, the respondent must be released on their own recognizance. In addition, if a defendant referred pursuant to this section is accepted into CARE, the criminal charges must be dismissed. See Penal Code § 1370.01(b)(1)(D)(iv).

[15] §§ 200–987.

Rule 7.2221
The committee recommends amending rule 7.2221 by deleting subdivision (b), to reflect the removal of the statutory mandate directing the Judicial Council to adopt rules that include the clerk's review of the petition per the passage of SB 35.

Rule 7.2225
The committee recommends amending rule 7.2225 to reflect the revised language in section 5978(a) and (b) clarifying the identity of the person required to serve as the petitioner in CARE Act proceedings initiated upon referral from other court proceedings. The act now expressly lists who is to be the petitioner in such cases.

Rule 7.2230
The committee recommends amending rule 7.2230 to remove an unnecessary clause in subdivision (a). Rule 7.2230 was adopted to implement the mandate requiring a rule regarding "the process by which counsel will be appointed." (§ 5977.4(c).) The council previously concluded that it would be impracticable to establish a single, uniform statewide appointment process because the size and experience of local bars, the existence of qualified legal services projects that have agreed to accept appointments, the structure of local public defender services, and other circumstances vary widely among courts and counties. After further discussion, the committee determined the clause regarding "establish[ment] by local rule" was unnecessary, as any local court process would already be subject to California Rules of Court, rule 10.613. In addition, some courts had interpreted the clause to require them to adopt a local rule in the narrow sense of that term rather than the intended broader sense used in rule 10.613.

CARE Act forms
The committee recommends the revision of seven forms:

- *Information for Petitioners—About the CARE Act* (form CARE-050-INFO);
- *Information for Respondents—About the CARE Act* (form CARE-060-INFO);
- *Petition to Commence CARE Act Proceedings* (form CARE-100);
- *Mental Health Declaration—CARE Act Proceedings* (form CARE-101);
- *Order for CARE Act Report* (form CARE-105);
- *Notice of Order for CARE Act Report* (form CARE-106); and
- *Notice of Respondent's Rights—CARE Act Proceedings* (form CARE-113).

The Family and Juvenile Law Advisory Committee joins in the revision of forms CARE-050-INFO and CARE-100.

***Information for Petitioners—About the CARE Act* (form CARE-050-INFO)**
The form is an information sheet that describes the CARE Act process and instructs petitioners how to properly fill out the petition form. It is primarily directed at self-represented petitioners. The form provides basic information about the CARE Act process, eligibility requirements for the petitioner and respondent, and step-by-step instructions on how to complete *Petition to Commence CARE Act Proceedings* (form CARE-100).

The committees recommend revising form CARE-050-INFO to:

- Include the provision that there be no filing fees for CARE Act filings, reflecting the addition of section 5975.3;

- Replace "severe mental illness" with "serious mental disorder," reflecting revised language in section 5972(b), which mirrors the language the statute refers to in section 5600.3(b)(2);

- Reflect the changes to who may file a petition, as amended in sections 5974(j) and (k) and 5978;

- Mirror item 7 in *Petition to Commence CARE Act Proceedings* (form CARE-100) providing instruction on information to include if the petition is being filed in response to a referral from another court proceeding, if the respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, or if the respondent has a conservator;

- Reflect the revision to section 5977(b)(6)(B) regarding the rights of the original petitioner described under section 5974(a) and (b), making their rights consistent with other petitioners, giving them the "right to be present and make a statement" at the initial hearing on the merits of the petition; and

- Update the language of the form to increase readability through the provision of plain language where possible without losing legal accuracy.

Information for Respondents—About the CARE Act **(form CARE-060-INFO)**
Form CARE-060-INFO is an information sheet for respondents that provides details about the CARE Act and CARE proceedings. The form explains the possible identities and rights of each party, the role of a supporter, the CARE Act eligibility criteria, and what happens in the initial stages of the court proceedings. This information is intended to help the respondent understand the CARE process and how the respondent may respond.

The committee recommends revising form CARE-060-INFO to:

- Update item 1 to include the respondent's right to have an interpreter in all proceedings if necessary for the respondent to fully participate, reflecting the addition of section 5976(j);

- Revise item 9 to reflect the amendment of section 5977(b)(6)(B) revising the rights of the original petitioner described under section 5974(a) and (b), making their rights consistent with other petitioners, giving them the "right to be present and make a statement" at the initial hearing on the merits of the petition;

- Add item 11 to include information about the respondent's right to appeal under section 5976(i); and

- Include additional technical, nonsubstantive conforming revisions aimed at improving readability.

Petition to Commence CARE Act Proceedings **(form CARE-100)**
Form CARE-100 is the mandatory petition form to initiate CARE Act proceedings. The form enables the petitioner to provide information regarding the petitioner's and respondent's eligibility and necessary information to begin the CARE Act process.

The committees recommend revising form CARE-100 to:

- Incorporate the clarifications described above as to who may file a petition, and to replace "severe mental illness" with "serious mental disorder" to reflect the change in section 5972(b).

- Require the provision of information, if known and if applicable, about a judicial proceeding from which the respondent has been referred, and whether the respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction or has a court-appointed conservator.

  This revision corresponds to rule 7.2210(d), which requires the CARE Act court to inform the juvenile court that a CARE Act petition has been filed on behalf of a respondent within the juvenile court's dependency, delinquency, or transition jurisdiction. It also corresponds to rule 7.2210(e), which requires the CARE Act court to order the county agency to notify the respondent's attorney in a proceeding identified in section 5978 or a respondent within a juvenile court's dependency, delinquency, or transition jurisdiction that a CARE Act petition has been filed on behalf of the respondent. Finally, the revision responds to the mandate in section 5977.4(c), directing the Judicial Council to adopt rules to implement provisions regarding communications between the CARE Act and juvenile court, if applicable. The revision to form CARE-100 to require such information increases the likelihood that the court and counsel would have that information.

- Include additional technical, nonsubstantive conforming revisions.

Mental Health Declaration—CARE Act Proceedings **(form CARE-101)**
Form CARE-101 is a mandatory form to be submitted by the petitioner. The form must be completed by a licensed behavioral health professional and fulfills the health affidavit requirement in section 5975(d)(1). The committee recommends revising the form to replace "severe mental illness" with "serious mental disorder," reflecting the same revised language in section 5972(b), which mirrors the term the statute refers to in section 5600.3(b)(2).

***Order for CARE Act Report* (form CARE-105)**
Form CARE-105 is a mandatory form for the court to use to order a county agency to investigate and file a written report that includes all of the statutory requirements under section 5977(a)(3)(B). The committee recommends revising the form to state that the report must include the information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report, as required by the addition of section 5977(a)(3)(B)(iv).

***Notice of Order for CARE Act Report* (form CARE-106)**
Form CARE-106 is a mandatory form for use by county agencies to provide notice of *Order for CARE Act Report* (form CARE-105). Similar to form CARE-105, the committee recommends revising form CARE-106 to state that report must include the information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report, as required by the addition of section 5977(a)(3)(B)(iv).

***Notice of Respondent's Rights—CARE Act Proceedings* (form CARE-113)**
Form CARE-113 is a form for mandatory use that informs the respondent of their rights in the CARE Act process. A copy of the form must be provided to the respondent along with any notice of hearing served on the respondent. The committee recommends revising the form to include the respondent's right to have an interpreter in all proceedings if necessary for the respondent to fully participate, as authorized by the addition of section 5976(j). Additionally, the committee recommends minor technical, nonsubstantive conforming changes primarily aimed at improving readability.

Policy implications
To the extent this recommendation has policy implications, they all can be attributed to the legislation. These recommended rules and forms will implement and facilitate those legislative policies.

Comments
The proposal was circulated for comment in the winter invitation-to-comment cycle, in December 2023 to January 2024. Eight comments were received: four from superior courts, one from a local bar association, one from the Joint Rules Subcommittee of the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, one from the trusts and estates section of the California Lawyers Association, and one from a law enforcement association. One commenter agreed with the proposal, three agreed with the proposal if modified, and four did not indicate whether they agreed or disagreed with the proposal.

The committees thank all commenters and appreciate the time taken to respond to this proposal.

Concurrent jurisdiction
The committees received multiple comments requesting the rules provide clarification on responsibilities and duties when dual jurisdiction exists, particularly including guidance as to

which court's orders will take precedence in the event of a conflict between the juvenile court and CARE Act court.

Although the council interprets the statute as not precluding concurrent jurisdiction, without additional legislative direction regarding the limits of permissible information sharing and the relative priority of orders, the committees declined to expand the proposal. The committees determined the issues raised by the commenters are more appropriately addressed to the Legislature for clarification and resolution.

Time for implementation

The committees received responses from two commenters indicating three months would not provide sufficient time for implementation, with one of the two specifying 6 to 12 months would be more suitable. On the other hand, one county bar association recommended implementing the amendments sooner and expressed concerns that currently participating counties would be noncompliant until the proposal's effective date, as SB 35 was enacted as emergency legislation and took effect immediately.

The committees do not recommend changes to the proposal in response to these comments. Eight counties and their superior courts have begun implementation of the CARE Act with integration of SB 35 changes. The changes to the law have already taken effect, and the committees determined that implementation could not be delayed the beyond the time necessary. The eight participating counties are capable of and have been complying with the statute even without the uniformity and guidance provided by the rules and forms. September 1, 2024, is the earliest date on which the proposal can take effect after time for sufficient review and preparation by the courts and counties.

Appointment of counsel

The committee received a comment from one bar association recommending statewide procedures be implemented for the appointment of counsel with concerns toward smaller counties being unable to coordinate effectively among the various eligible attorney-authorizing agencies. The committee does not recommend establishing a uniform statewide process for appointment of counsel at this time. The committee determined that uniformity in the appointment process would lead to a lack of parity among counties in practice, and that, in any event, establishment of a statewide appointment process would be premature given the dependence of each legal service project's eligibility for appointment on the uncertain availability of funding and the project's agreement to accept these appointments. The committee determined that each court and county has experience appointing counsel in other types of proceedings and can leverage its experience and existing processes and systems to appoint counsel much more efficiently than it would be able to under a uniform statewide appointment process.

Clarification of terms and language

The committees received a comment requesting clarification regarding proposed rule 7.2210(d) and whether the CARE Act court must provide proof of notice that the juvenile court has been

notified that a CARE Act petition has been filed on behalf of the respondent. In response to this comment, for clarification purposes, the committees have replaced the term "notify" with "inform" to emphasize that a formal notice process is not required.

The committee received a comment requesting the revision of *Petition to Commence CARE Act Proceedings* (form CARE-100) to expand the current category of "peace officer" to specifically include "probation officer" for clarity. The committee does not recommend modifying the form, as the term "peace officer" reflects the language used in subdivision (f) of section 5974. Specifying probation officers but not other peace officers would imply a distinction that the statute does not make. Additionally, because peace officers include a wide array of individuals, listing the potential individuals would lengthen an already complicated form. The committee determined that clarification would be more appropriate in educational resources.

Communication with counsel in related proceedings

The committee received comments from two superior courts raising concerns about the petitioner's inability to supply the information needed to inform the respondent's attorney in related proceedings of the commencement of CARE Act proceedings. One court suggested developing a court form to use to provide the county with that information. In response to these comments, the committee is developing an optional form for that purpose. The form will be circulated for comment at a later date.

All comments received, and the committee's responses, are provided in the attached chart of comments at pages 42–68.

Alternatives considered

The committees did not consider taking no action because SB 35 added a requirement that the Judicial Council adopt rules to implement the policies and provisions in the CARE Act, including communications between the CARE Act court and juvenile court, if applicable. (§ 5977.4(c).) The legislation also made substantive and procedural changes to the CARE Act that require conforming changes to the rules and forms.

The committees considered the creation of a notice form for the purpose of notifying the juvenile court that CARE proceedings have been initiated. However, the committees determined the manner in which a CARE Act court informs the juvenile court that a CARE petition has been filed on behalf of a respondent who is within the juvenile court's jurisdiction should be left to the court's discretion, as long as confidentiality requirements are met.

The committees initially considered proposing rules that provide for broader communications between CARE Act courts and juvenile courts. However, some members questioned the council's authority to provide by rule for any communication unless statute expressly authorized an exception to the confidentiality requirements. Members also noted that direct communication between courts about pending matters is rare. Weighing the mandate in SB 35 that the Judicial Council adopt rules "including communications between the CARE Act court and juvenile court, if applicable," against the statutory requirements of confidentiality in both types of proceedings

and the absence of specific guidance or authority in the CARE Act, the committees chose to proceed cautiously when addressing communication about those proceedings.

The committees declined to recommend a rule authorizing court-to-court communications about CARE Act respondents who are parents with children within a juvenile court's jurisdiction. The members were concerned that even implicitly authorizing such communications would raise due process issues by potentially placing parental rights in jeopardy without sufficient notice and an opportunity to be heard. As a result, the committees' proposal addresses only communications about respondents who are themselves within a juvenile court's dependency, delinquency, or transition jurisdiction.

The committees considered developing a rule requiring the respondent's CARE Act attorney, upon learning that the respondent has been referred from a proceeding identified in section 5978, or that the respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, to notify the respondent's attorney in the related case that a CARE Act petition has been filed on the respondent's behalf. However, the committees decided a rule requiring the CARE Act court to order the county agency to notify the respondent's attorney in the related case would be more appropriate because the agency is also responsible for providing notice to other persons.

The committee considered expanding *Information for Respondents—About the CARE Act* (form CARE-060-INFO) to include a section informing respondents of the possible consequences of failing to participate in the CARE process or complete their CARE plan as well as the addition of brief information regarding the consequences of noncompliance. However, the committee decided against such expansion as form CARE-060-INFO was developed and subsequently revised specifically to concentrate on the initial hearings (i.e., initial appearance and hearing on the merits), and because it will be served on the respondent along with *Order for CARE Act Report* (form CARE-105), which indicates court-appointed counsel's contact information. Appointment of counsel occurs once the court finds that the petitioner has made a prima facie showing that the respondent is or may be a person described by section 5972. The committee determined that appointed counsel will be able to assist respondent in navigating through the court process, including providing explanation throughout the process of the possible consequences if respondent chooses not to participate.

Fiscal and Operational Impacts

The proposed rules and forms should not have a significant fiscal or operational impact on the courts. They are intended to provide updated guidance and information to the court and parties.

The trial courts will incur ongoing costs to print, copy, and provide the mandated forms. There may also be changes required in the case management systems. These costs, however, are expected to be minimal.

The courts will also experience some operational impacts to develop procedures and training for the CARE Act court to notify the juvenile court in CARE Act proceedings in which the

respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction. The additional work for court staff is expected to be minimal.

Attachments and Links

1. Cal. Rules of Court, rules 7.2210, 7.2221, 7.2225, and 7.2230, at pages 14–17
2. Forms CARE-050-INFO, CARE-060-INFO, CARE-100, CARE-101, CARE-105, CARE-106, and CARE-113, at pages 18–41
3. Chart of comments, at pages 42–68
   Link A: Senate Bill 35 (showing amendments),
   https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=202320240SB35&showamends=true
4. Link B: Senate Bill 1338,
   https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1338

Rules 7.2210, 7.2221, 7.2225, and 7.2230 of the California Rules of Court are amended, effective September 1, 2024, to read:

Rule 7.2210. General provisions

(a) * * *

(b) Access to records (§ 5977.4(a))

All documents filed and all evaluations, reports, and other documents submitted to the court in CARE Act proceedings are confidential, notwithstanding disclosure of their contents during a CARE Act hearing. No person other than the respondent, the respondent's counsel, the county behavioral health director or the director's designee, counsel for the director or the director's designee, and, with the respondent's express consent given in writing or orally in court, the respondent's supporter may inspect or copy the case records without a court order.

(c) Sealing of records (§ 5976.5(e))

(1) A motion to seal records under section 5976.5(e) must specify the records to which it applies.

(2) The respondent must serve the motion to seal on the other parties not later than the close of the next court day after the motion is filed.

(3) Any opposition to the motion must be filed within 10 court days of the date of service in (2).

(4) The extensions of time in Code of Civil Procedure sections 1010.6 and 1013 apply to motions under section 5976.5(e).

(5) The court may grant the motion without a hearing or, if timely opposition is filed, set a hearing on the motion, and provide at least five court days' notice to all parties.

(6) *Order*

(A) If the court grants the motion and the sealed record is in paper format, the clerk must place on the envelope or container of the record a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)." If the sealed record is in electronic form, the clerk must file the court's order, maintain the record ordered sealed in a secure manner, and clearly identify the record as sealed by court order on a specified date.

(B) The order must state whether any person other than the court is authorized to inspect the sealed record.

(7) Rules 2.550 and 2.551 do not apply to motions to seal records under section 5976.5(e).

(d) Respondent within juvenile court jurisdiction (§ 5977.4(c))

(1) *Informing the juvenile court*

Upon learning that a respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, the CARE Act court must inform the juvenile court that a CARE Act petition has been filed on behalf of that respondent. The court may communicate this information in any suitable manner.

(2) *Concurrent jurisdiction with juvenile court*

The CARE Act court is not precluded by statute from exercising jurisdiction over a respondent who is within a juvenile court's dependency, delinquency, or transition jurisdiction. The CARE Act court and the juvenile court may, therefore, exercise concurrent jurisdiction over such a respondent.

(e) Notification of respondent's attorney in related proceedings (§ 5977.4(c))

If the CARE Act court learns that the respondent has been referred from a proceeding identified in section 5978 or that the respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction, the court must order the county agency to:

(1) Notify the respondent's attorney, if any, in the related case that a CARE Act petition has been filed on behalf of the respondent; and

(2) Provide the attorney with the contact information of the respondent's CARE Act attorney, if known.

(f) No communication of further information (§ 5976.5)

Subdivisions (d) and (e) of this rule do not authorize the communication of information other than that identified in those subdivisions absent an express waiver by the respondent.

Advisory Committee Comment

Subdivisions (d) and (e). As used in these subdivisions, the phrase "within a juvenile court's dependency, delinquency, or transition jurisdiction" refers to a respondent whom a juvenile court has found to be described by Welfare and Institutions Code section 300, 450, 601, or 602 and who is currently within the juvenile court's jurisdiction based on one of those descriptions. The term does not refer to any other party to a juvenile court proceeding.

Subdivision (d)(2). The subdivision is intended to describe the effect of existing law. Neither the juvenile court law (Welf. & Inst. Code, §§ 200–987) nor the CARE Act precludes concurrent jurisdiction or, conversely, confers exclusive jurisdiction on either court over matters relating to the mental health treatment of persons who meet the statutory jurisdictional criteria of both.

Rule 7.2221. Papers to be filed (§ 5975)

~~**(a) Petition packet (§ 5975)**~~

A petition to commence CARE Act proceedings must be made on *Petition to Commence CARE Act Proceedings* (form CARE-100). The petition must include either:

(1) A completed *Mental Health Declaration—CARE Act Proceedings* (form CARE-101); or

(2) The evidence described in section 5975(d)(2).

~~**(b) Acceptance of papers for filing**~~

~~On receipt of a petition, the clerk must file the petition packet, assign a case number, and place the packet in a confidential file.~~

Rule 7.2225. ~~Petitioner~~ Persons who may file petition (§§ 5974, 5978)

~~**(a) Persons who may file petition**~~

~~A petition to commence proceedings under the CARE Act may be filed by any of the persons identified in section 5974 or, in the circumstances specified therein, section 5978.~~ Any person identified in section 5974 may file a petition to begin CARE Act proceedings. If a petition is based on a referral authorized by section 5978, only the person designated in that section may file the petition.

~~**(b) Petitioner on referral under Penal Code section 1370.01**~~

~~On referral by a court under Penal Code section 1370.01, an agency designated by the county will be the petitioner.~~

Rule 7.2230. Counsel for respondent (§§ 5976(c), 5977(a)(3)(A), (a)(5)(C) & (b)(1))

(a) Appointment

If the court finds that the petitioner has made a prima facie showing that the respondent is or may be a person described by section 5972, the court must~~, in accordance with procedures established by local rule~~:

(1) Appoint a qualified legal services project as counsel to represent the respondent; or

(2) If no qualified legal services project has agreed to accept CARE Act appointments from the court, appoint a public defender or an attorney acting in that capacity to represent the respondent.

(b)–(c) * * *

CARE-050-INFO Information for Petitioners—About the CARE Act

This information sheet describes the CARE Act and how to fill out *Petition to Commence CARE Act Proceedings* (form CARE-100). A court self-help center may also be able to help you. Go to *https://selfhelp.courts.ca.gov/self-help/find-self-help* to find your court's self-help center. **Note:** There is no cost to file a CARE Act petition.

1 What is the CARE Act?

CARE stands for Community Assistance, Recovery, and Empowerment. The CARE Act allows specific people, called *petitioners*, to ask for court-ordered treatment, services, support, and a housing plan for people, called *respondents*. A respondent must be at least 18 years old, have a schizophrenia spectrum or other psychotic disorder, and meet several other requirements.

The CARE process uses evaluations and court hearings to figure out whether the respondent is eligible for services. A county behavioral health agency may contact the respondent as part of the process. If the respondent is eligible, a CARE agreement or plan for services may be created. If the court approves, it will order the CARE agreement or plan.

2 What is a CARE agreement or CARE plan?

A CARE agreement and a CARE plan are written documents that describe services to support the recovery and stability of the respondent. They must be approved by court order. Services may include clinical behavioral health care; counseling; specialized psychotherapy, programs, and treatments; stabilization medications; a housing plan; and other supports and services provided directly and indirectly by local government. The agreement or plan cannot give anyone the right to use force to medicate the respondent.

A CARE agreement is a voluntary agreement for services and treatment between the respondent and the county behavioral health agency after a court has found that the respondent is eligible for the CARE program. For the agreement to be valid, the court must approve it. The court can change the agreement before approving it.

A CARE plan is a set of community-based services and supports for the respondent that is ordered by the court if the respondent and the county cannot reach a CARE agreement.

3 Have you thought about ways to help other than CARE Act proceedings?

There may be other ways to help a person with a serious mental illness. If the person has private health insurance, contact their health plan/insurer. If you do not know if the person has private health insurance or if they do not have private insurance, contact your county's behavioral health agency or check its website. County behavioral health agencies offer many services. These include services like counseling, therapy, and medication and can also include programs like full-service partnerships, rehabilitative mental health services, peer support services, intensive case management, crisis services, residential care, substance use disorder treatment, assertive community treatment, and supportive housing. Counties are required to provide services to Medi-Cal beneficiaries who qualify for specialty mental health and substance use disorder services. They are also allowed to provide their services to people who do not receive Medi-Cal, depending on local funding and eligibility standards. These services do not require a court order.

A *full-service partnership* is a program for a person with a serious mental illness who would benefit from intensive services. A full-service partnership can help a person who is homeless, involved with the justice system, or uses crisis psychiatric care frequently. *Assertive community treatment* is a form of mental health care provided in a community setting to help a person become independent and live as part of the community as they recover.

Find out if the person has made an advance health care directive or psychiatric advance directive. These written documents name someone else to make health care decisions for a person when that person cannot. If the person has a directive, you can contact the person named in it to ask for their help. Think about looking into local social services and community-based programs too.

4 How do I complete *Petition to Commence CARE Act Proceedings* (form CARE-100)?

Item 1: Who Can Be the Petitioner?

The petitioner is the person who asks the court to start CARE Act proceedings for a person who needs help because of a serious mental disorder.

To be a petitioner, you ***must*** be 18 years of age or older ***and*** be one of the following:

- A person who lives with the respondent.
- The respondent's spouse or registered domestic partner, parent, sibling, child, or grandparent.
- A person who has authority to act as the respondent's parent.
- The director of a county behavioral health agency of the county where the respondent lives or is present, or the director's designee.
- A licensed behavioral health professional who is or has been supervising the treatment of or treating the respondent for a mental disorder within the last 30 days, or the professional's designee.
- The director of a public or charitable agency who is or has, within the last 30 days, been providing behavioral health services to the respondent or in whose institution the respondent resides, or the director's designee.
- The director of a hospital in which the respondent is or was recently hospitalized, or the director's designee.
- A California tribal court judge in whose court the respondent has appeared within the previous 30 days, or the judge's designee.
- The director of adult protective services of the county where the respondent lives or is present, or the director's designee.
- The director of a California Indian health services program or tribal behavioral health department that is or has, within the previous 30 days, been providing behavioral health services to the respondent, or the director's designee.
- A first responder who has encountered the respondent multiple times to arrest or involuntarily detain the respondent, engage the respondent in voluntary treatment, or make other efforts to get the respondent professional help.
- The public guardian or public conservator of the county where the respondent lives or is present, or the public officer's designee.
- A conservator or proposed conservator referred from a proceeding under the Lanterman-Petris-Short (LPS) Act.
- The respondent.

In item 1, enter your name and check the box next to the petitioner type or types that apply to you.

Item 2: Relationship to the Respondent

Enter the respondent's name in item 2a. Describe your relationship with the respondent in item 2b. If you are a petitioner from a hospital, a public or charitable agency, a licensed behavioral health professional who has been treating or supervising the respondent, or a first responder, state how many times you have interacted with the respondent, give the date of the most recent interaction, and describe the nature and outcome of each interaction in item 2c.

Item 3: Respondent's Address or Last Known Location

If you know where the respondent lives, enter the address in item 3. If you do not know the respondent's address, or if they do not have one, state that the address is unknown and give the respondent's last known location and any other information, such as a phone number or email address, that might help to locate the respondent.

Item 4: The Right Court and County

In item 4, show why the county where you are filing the petition is the right place to file. You can file a petition only in the county where the respondent lives, where the respondent is currently present, or where the respondent is facing a legal case. Check all options that apply. If the person does not live in the county, it helps to state where they live, if you know.

Item 5: Respondent Eligibility

You must state facts and provide information that support your claim that the respondent is eligible for the CARE Act process. **All** of the following requirements, which are listed in item 5a–5g on form CARE-100, must be met for a respondent to be eligible. Please note that the situations discussed below are only *examples* of circumstances that **may** qualify. The court decides whether each respondent is eligible based only on facts about that respondent.

Requirements	Explanations	Examples
The respondent must be 18 years old or older (item 5a) and must:		
Have a diagnosis of a schizophrenia spectrum disorder or another psychotic disorder in the same class, as defined in the current *Diagnostic and Statistical Manual of Mental Disorders* (**item 5b**).	Only a person with a schizophrenia spectrum or other psychotic disorder is eligible for the CARE Act process. A person who does not have that diagnosis is not eligible even if they have a different serious mental disorder, such as bipolar disorder or major depression. **Note:** The psychotic disorder must not be based on a medical condition, including a physical health condition such as a traumatic brain injury, autism, dementia, or a neurological condition. A person with a current diagnosis of substance use disorder must also have a psychotic disorder and meet all the other criteria in item 5 to be eligible.	Schizophrenia, schizophreniform disorder, schizoaffective disorder, delusional disorder, schizotypal personality disorder, and other psychotic disorders.
Be currently experiencing a serious mental disorder that (**item 5c**): • Is severe in degree and persistent in duration (**item 5c(1)**) • May cause behavior that interferes substantially with the person's activities of daily living (**item 5c(2)**), **and** • May lead to an inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period (**item 5c(3)**).	Indicate any behaviors, such as delusions, hallucinations, or unusual and ongoing mood changes, that substantially interfere with the respondent's ability to perform essential and routine tasks needed for work or self-care. Describe why you believe the respondent is unable to live independently, function in the community, and take care of their condition and social relationships without additional help.	If caused by a chronic, prolonged, or recurrent mental disorder: • Difficulty with self-care (e.g., bathing, grooming, obtaining and eating food, dressing appropriately for the weather, securing health care, or following medical advice). • Difficulty maintaining a residence, using transportation, or managing money day to day. • Difficulty concentrating or completing tasks as scheduled. • Difficulty functioning socially, creating and maintaining relationships. • Recent history of inability to care for themselves (bathe, groom, get food and eat, use the restroom) daily without additional help.

Requirements	Explanations	Examples
Not be clinically stabilized in ongoing voluntary treatment (**item 5d**).	Describe why you believe the respondent is not being adequately supported in a voluntary treatment program such that their condition and symptoms are stable.	• Repeated and ongoing refusal to accept voluntary treatment without reason. • Temporary acceptance of voluntary treatment that is interrupted by failure or refusal to continue the treatment without reason. • Voluntary treatment is accepted, but that treatment is not effective to stabilize the respondent.
At least *one* of the following must be true (item 5e):		
The respondent is unlikely to survive safely in the community without supervision ***and*** the respondent's condition is substantially deteriorating (**item 5e(1)**). **OR**	Indicate recent instances where the respondent has needed supervision to survive in the community due to lack of reality orientation, confusion, or impaired insight. Describe how the respondent's ability to think clearly, communicate, or participate in regular activities has worsened quickly.	• Recent or frequent hospitalizations due to symptoms such as delusions, hallucinations, disorganization, impaired insight, impaired judgment. • Recent or frequent arrests due to a mental disorder.
The respondent needs services and supports to prevent a relapse or deterioration that would likely result in grave disability or serious harm to the respondent or others (**item 5e(2)**).	Describe how the respondent would be unable to survive safely, would be gravely disabled, or would cause serious harm to others or themselves unless they received services and supports. • *Grave disability* includes a person's inability, due to a mental disorder, to provide for their basic personal needs for food, clothing, or shelter. • *Serious harm* includes injury causing extreme pain, high risk of death, or loss of physical or mental functions.	• A person who has immediate access to safe housing but chooses, because of a mental disorder, to live in conditions that could lead to a danger to their health. • A person who recently attempted suicide because of their mental disorder and continues to express a desire to harm themselves. • Self-injuring behavior, such as walking into traffic or harming oneself unknowingly through behavior that puts them at risk for serious injury or death.

Requirements	Explanations	Examples
The respondent's participation in a CARE plan or CARE agreement must:		
Be the least restrictive alternative necessary to ensure the respondent's recovery and stability (**item 5f**), ***and***	Explain how participation in a CARE plan or CARE agreement: • Would effectively meet the respondent's treatment needs while placing as few limits as possible on the respondent's rights and personal freedoms. • Is necessary because other less restrictive alternatives would not ensure the respondent's recovery and stability; for example, because other less restrictive alternatives have not been successful.	Less restrictive alternatives might include: • **Voluntary full-service partnerships**, which are collaborative relationships between the county and the individual, and when appropriate the individual's family, through which the county plans for and provides the full spectrum of community services. • **Supported decisionmaking**, which is an individualized process of supporting and accommodating an adult with a disability to enable them to make life decisions without impeding their self-determination. • **Assertive community treatment**, which is a person-centered, recovery-based treatment option that employs low client-to-staff ratios.
Be likely to benefit the respondent (**item 5g**).	Explain how participating in a CARE plan could help the respondent stabilize and improve their current state and situation.	• The respondent's prior improvement when participating in similar treatment programs. • Medical opinion that the patient would benefit from treatment.

Note: Include in the petition as much information as you have about each item listed above. You may also attach any documents you have that support one or more of those items.

Item 6: Required Documentation

You must attach supporting documentation to the petition. That documentation must include one of two things:

a. A completed declaration by a licensed behavioral health professional on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101); **OR**

b. Evidence that the respondent was detained for a minimum of two intensive treatments, the most recent one within the last 60 days.

For example, this evidence could include copies of certification for intensive treatment, a declaration from a witness to the intensive treatment, or other documents showing that the respondent was detained twice for up to 14 days of intensive treatment. Evidence should include the dates of the last treatment period.

Note: For purposes of the CARE Act, "intensive treatment" only includes involuntary treatment authorized by Welfare and Institutions Code section 5250. It does ***not*** refer to treatment authorized by any other statute, including but not limited to 72-hour holds under Welfare and Institutions Code section 5150 or treatments under Welfare and Institutions Code sections 5260 and 5270.15.

Item 7: Other Proceedings

If the respondent has another court case, information about that case could be helpful to your CARE Act petition. Complete item 7 if you know any of the requested information.

- If you are filing a petition in response to a referral from another court proceeding, fill out item 7a. Give the name of the referring court and the case number, department, and type of case, if you know. If you have a copy of the referral order, label it "Attachment 7a" and attach it to the petition.
- If the respondent is within a juvenile court's jurisdiction as a dependent, ward, or nonminor dependent, fill out item 7b. Give the court name, the case number, and contact information for the respondent's juvenile court attorney.
- If the respondent has a conservator, fill out item 7c. Give the court name, the case number, and contact information for the respondent's conservatorship attorney.

Note: If you don't know the information requested in part of item 7, leave that part blank. The petition will be processed even if you do not complete item 7.

Item 8: Tribal Enrollment or Services From an American Indian Health Care Provider

If you know that the respondent is a member of a federally recognized Indian tribe or is receiving services from California Indian health care provider, tribal court, or tribal organization, include that information in item 8.

Note: The petition will be processed even if you do not complete item 8.

Item 9: Helpful Information

In item 9, check any of the boxes that apply to the respondent and provide any requested information that you know.

Note: The petition will be processed even if you do not complete item 9.

Item 10: Attachments

In item 10, list the total number of pages attached to the petition.

Signature: You must write the date, print your name, and *sign the petition under penalty of perjury.* That means that if you have stated anything that you know is not true on the form, you may be criminally liable. If you have an attorney helping you, they will sign as well.

5 Is service of process required?

No. To begin CARE Act proceedings, you do not need to provide anyone with a copy of the petition except the court.

6 What will happen after I file the petition?

After you file a petition, the court will review it and any supporting documents filed with it. The court will decide if the documents show that the respondent meets or might meet the CARE eligibility requirements. Then the court will either:

a. **Dismiss the petition** if it finds (1) that the petition does not show that the respondent meets or may meet the CARE Act eligibility requirements ***or*** (2) that the respondent is voluntarily working with the county agency, their engagement is effective, and the respondent has enrolled or is likely to enroll in voluntary treatment through the county or another provider. **OR**

b. **Order a report** if it finds that the petition does show that the respondent meets or may meet the CARE Act eligibility requirements. The court will order a county agency to engage the respondent and file a written report with the court within 14 business days. The county will notify you and the respondent that the court ordered the report.

   Note: The procedures are different if the county behavioral health agency is the petitioner.

7 The initial appearance

If the court finds that the county agency's report supports the petition's showing that the respondent meets or may meet the CARE Act eligibility requirements and the county's engagement with the respondent was not effective, the court will set an *initial appearance.* The court will also order the county to give notice of the initial appearance to you, as well as to the respondent, the respondent's appointed counsel, and the county behavioral health agency.

You, the petitioner, must be present at the initial appearance, or the court may dismiss the petition. You will receive a notice in the mail of the date, time, and place of the initial appearance.

Note: At the initial appearance, the director of the county behavioral health agency, or the director's designee, will replace you as the petitioner.

8 Do petitioners have any rights?

You have the right to go to the hearing on the merits and make a statement. If you live with the respondent, are the respondent's spouse or domestic partner, parent, sibling, child, or grandparent, or are someone who has authority to act as the respondent's parent, then the court may choose to give you ongoing rights to receive notice. And if the respondent agrees, the court may also allow you to participate in the rest of the CARE Act proceedings.

If you are a petitioner not listed above, the court cannot give you other ongoing rights.

If the petition is dismissed and later the respondent's situation changes, you may file a new petition with the court.

9 What is a vexatious litigant?

A *vexatious litigant* is a person whom a court has found to have used the court process to harm or annoy other people by repeatedly suing them or filing other papers against them without a good reason.

A CARE Act court may find that a person is a vexatious litigant if that person files more than one CARE Act petition that is not true or is intended to disturb, harm, or annoy the respondent. Once declared a vexatious litigant, a person may be placed on a vexatious litigants list kept by the Judicial Council. The court may enter an order that prevents a vexatious litigant from filing any new litigation, including other types of cases (not just CARE Act petitions), without first getting permission from the trial court presiding judge. If such an order is issued, the court may fine a person who does not follow the order or send them to jail for contempt of court.

10 What if I don't speak English?

When you file your papers, ask the clerk if a court interpreter is available. You can also use *Request for Interpreter (Civil)* (form INT-300) or a local court form or website to request an interpreter. For more information about court interpreters, go to *https://selfhelp.courts.ca.gov/request-interpreter*.

11 What if I have a disability?

If you have a disability and need an accommodation while you are at court, you can use *Disability Accommodation Request* (form MC-410) to make your request. You can also ask the ADA Coordinator in your court for help. For more information, see *How to Request a Disability Accommodation for Court* (form MC-410-INFO) or go to *https://selfhelp.courts.ca.gov/jcc-form/MC-410.*

CARE-060-INFO Information for Respondents—About the CARE Act

This information sheet provides information about the CARE Act and CARE Act proceedings.

1 Why am I being given these documents?

Someone has filed a petition with a court to start a CARE Act case for you. In the case, you are called the *respondent.* The CARE Act applies only to specific people. The petition asks a court to decide if you are one of them. The court has found that you might be. It is asking for more information to help it decide if you are.

Important information for you:

- You have been appointed an attorney, free of charge.
- Your court-appointed attorney will try to contact you about this case using the last known address or location on file for you.
- You may also contact your attorney at any time. Your attorney's contact information is listed in item 5 of *Order for Care Act Report* (form CARE-105) and item 4 of *Notice of Initial Appearance—CARE Act Proceedings* (form CARE-110). You should have received one of those forms when you got this form.
- You should make sure that your attorney knows how to get in touch with you. Give them your contact information and let them know if it changes.
- You may also choose an attorney to represent you instead of the appointed attorney. If you choose your own attorney, you are responsible for their fees.
- You have the right to an interpreter, free of charge, at every CARE Act court hearing.

2 What is the CARE Act?

CARE stands for Community Assistance, Recovery, and Empowerment. The CARE process is a way to get court-ordered treatment, services, support, and a housing plan for adults with schizophrenia spectrum disorders or other similar psychotic disorders.

The CARE process uses outreach, meetings, and court hearings. The court will decide if you meet the eligibility requirements. One or more county agencies will be part of the process. If you are eligible, they will work with you to identify services and supports you might need.

If you are eligible for CARE, the court will ask you to work with the county behavioral health agency to make a CARE agreement for services and supports. If you do not reach an agreement with the county agency, the court will order a clinical evaluation of your mental health. After reviewing the evaluation, the court will decide if you are still eligible. If you are, the court will order you and the county agency to develop a CARE plan.

3 What is CARE eligibility?

To be eligible for the CARE process, you need to be at least 18 years old and have a schizophrenia spectrum disorder or another psychotic disorder. That disorder, or another mental disorder if you have one, must be serious. That means it has lasted for a long time, it can make you do things that interfere with your life, and it can make it impossible for you to live on your own for very long without treatment, support, and rehabilitation.

You also cannot be stabilized in a voluntary treatment program. In addition, *either* it must be unlikely that you will survive safely in the community without somebody watching over you and your condition is getting a lot worse, *or* you must need services and supports to keep your symptoms from coming back or getting bad enough that you would probably become severely disabled or would seriously hurt yourself or somebody else. Finally, it must be likely that going through the CARE process will help you and that nothing less restrictive than the CARE process will make sure that you recover and stabilize.

4 What is a CARE agreement or CARE plan?

A CARE agreement and CARE plan are written documents that contain services designed to support you. They must be approved by court order. They may include clinical behavioral health care; counseling; specialized psychotherapy, programs, and treatment; stabilization medications; a housing plan; and other supports and services, provided directly or indirectly by local government. These documents cannot give anyone the right to use force to medicate you.

4

A CARE agreement is a voluntary agreement between you and the county behavioral health agency. If you are eligible for the CARE program, the court will order you and the county agency to try to reach a CARE agreement. The court can modify the agreement before approving it.

If you cannot reach a CARE agreement, the court may ask you to work with the county to create a CARE plan. A CARE plan is an individualized range of community-based supports and services. It can include the same services and supports as a CARE agreement. You and the county agency will propose one or more CARE plans to the court. The court will order the final CARE plan.

5 Who is the petitioner?

The petitioner is the person who is asking the court to start CARE Act proceedings for you.

6 Who is the respondent?

The respondent is you, the person the court is being asked to start CARE Act proceedings for.

7 What happens after the petition has been filed?

The court reviews the petition and decides if you might be eligible for the CARE process. If it thinks you might be, the court may order a county agency to try to contact you, talk with you, and file a written report. The county agency must file the report with the court within 14 business days, unless the court gives it more time. The county will send notice to you and the petitioner if the court orders a report.

What happens if the county agency contacts me?

The county agency will ask you about your mental and physical health. It will also ask how your mental health affects your your life and what services and treatment you think would be helpful. It will ask if you are willing to work with the county to get connected to those services and treatment options.

What will the report include?

The county agency will file a report even if it is not able to contact you. The report will include:

- The agency's opinion about whether you meet, or are likely to meet, the CARE eligibility requirements. These include your mental health diagnosis and current condition, whether you need additional services, and whether there are other services that would help you but be less restrictive than a CARE agreement or plan.
- The county's efforts to get you to participate voluntarily in services and whether the county thinks you can participate voluntarily in services.

What happens after the court receives the report?

After the court receives the report, it will either:

- **Dismiss the proceedings:** If the court finds, based on the petition and the county's report, that you are not eligible for the CARE process or that you are working willingly and effectively with the county agency and have enrolled or are likely to enroll in behavioral health treatment, the court will dismiss the case; or
- **Set an initial appearance (court hearing):** If the court finds that the county's report shows that you may be eligible for the CARE process and the county's contacts with you were not able to connect you with voluntary services and treatment, the court will set an initial appearance.

Note: The court has appointed an attorney for you. The attorney will contact you at the beginning of the CARE Act process. If the court sets an initial appearance, the county will give you notice of the date, time, and place of the hearing along with additional information.

8 What happens at the initial appearance and the hearing on the merits?

At the initial appearance:

- You may replace your court-appointed attorney with an attorney that you choose.

  Note: If you choose your own attorney, you are responsible for their fees, if any.

- You have the right to appear in person. You can choose to give up your right to attend personally, and your attorney can appear on your behalf.

- If you do not tell the court, through your attorney, that you are choosing not to attend and you do not appear, the court may have a hearing without you. To do that, the court needs to find that reasonable attempts to encourage you to appear have failed and that having a hearing without you would be in your best interests.

- The petitioner must be present at the initial appearance, or the court may dismiss the petition.

- A representative from the county behavioral health agency will be present.

- If the original petitioner is not the director of a county behavioral health agency, the court will replace the original petitioner with the director of the county behavioral health agency or their designee, who will then take over as the petitioner.

- If you are enrolled in a federally recognized Indian tribe or receiving services from an Indian health care provider, a tribal court, or a tribal organization, the law allows a representative from the program, the tribe, or the tribal court to be present if you consent. The county must give notice of the initial appearance to the tribal representative.

- The court will set a hearing on the merits of the petition.

- The hearing on the merits of the petition may happen at the same time as the initial appearance but only if you (the respondent), the petitioner, and the court all agree.

At the hearing on the merits:

The court will decide if you meet the CARE Act requirements. The court will consider the petition, the report from the county agency, and all evidence properly presented to it, including evidence that you provide.

- **If the court finds that you *do not* meet the CARE Act requirements:** The court will dismiss the petition. The original petitioner may be able to file a new petition if something changes unless the court finds that the original petition was not filed in good faith.

- **If the court finds that the petitioner has shown that you *do* meet the CARE Act requirements:** The court will order the county behavioral health agency to work with you, your attorney, and your supporter, if you have one, to connect you with behavioral health treatment. You all will also need to decide if you and the behavioral health agency can reach a CARE agreement. The court will set a case management hearing.

  Note: If you are enrolled in a federally recognized Indian tribe and you want a tribal representative to attend the case management hearing, you should let the tribe know the date, time, and place of the hearing.

9 What rights do petitioners have?

The original petitioner has the right to go to the hearing on the merits and make a statement. If the original petitioner lives with you; is your spouse, parent, sibling, child, or grandparent; or is someone who has authority to act as your parent, the court may give them ongoing rights to receive notice. In addition, if you agree, the court may allow that person to participate in your CARE Act process.

If the original petitioner is not someone listed above, the court will not give them additional rights.

10 What rights do respondents have?

You have the right to be informed of what is happening in your case. You have the right to participate in your case. You have the right to an attorney at all stages of the process. You have the right to an interpreter if you need one. You have the right to keep confidential all CARE evaluations, reports, documents, and filings. You also have other rights that are described in *Notice of Respondent's Rights* (form CARE-113). You will get a copy of that form when you get notice of any court hearing in the CARE Act process.

11 What if I disagree with a court order?

You have the right to ask a higher court to review a court order in the CARE process. This is called an *appeal.* Talk with your attorney if you think you want to appeal a court order. To get more information, read *Information on Appeal Procedures for Unlimited Civil Cases* (form APP-001-INFO).

12 What is a "supporter"?

You have the right to choose a person to support you throughout the CARE Act process. The CARE Act calls that person a *supporter.* The supporter helps you understand, communicate, make decisions, and express your preferences. You can choose to have your supporter with you at meetings, appointments, or court hearings.

Your supporter must:

- Respect your values and beliefs and support your preferences as well as they can.
- Communicate with you to help you understand and make informed decisions.

Your supporter must not:

- Act independently from you.
- Make decisions for you or on your behalf unless necessary to keep someone from immediately getting hurt.
- Sign documents for you.

You have a right to have a supporter throughout the CARE Act process.

13 What if I don't speak English?

You have the right to an interpreter at all CARE Act court hearings. Let your attorney know that you will need an interpreter for court hearings. When you go to court, tell the judge you need an interpreter if you or your attorney haven't already asked for one. You can also use *Request for Interpreter (Civil)* (form INT-300) or a local court form or website to request an interpreter. For more information about court interpreters, go to *https://selfhelp.courts.ca.gov/request-interpreter*.

14 What if I have a disability?

If you have a disability and need an accommodation while you are at court, you can use *Disability Accommodation Request* (form MC-410) to make your request.

You can also ask the ADA Coordinator in your court for help. For more information, see *How to Request a Disability Accommodation for Court* (form MC-410-INFO) or go to *https://selfhelp.courts.ca.gov/jcc-form/MC-410.*

CONFIDENTIAL

CARE-100

ATTORNEY OR PETITIONER 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:		
CARE ACT PROCEEDINGS FOR *(name):* RESPONDENT		
PETITION TO COMMENCE CARE ACT PROCEEDINGS		CASE NUMBER:

For information on completing this form, see *Information for Petitioners—About the CARE Act* (form CARE-050-INFO).

1. Petitioner *(name):*
   is 18 years of age or older and *(check all that apply):*

   a. ☐ A person who lives with respondent.

   b. ☐ A spouse or registered domestic partner, parent, sibling, child, or grandparent of respondent.

   c. ☐ A person who stands in the place of a parent to respondent.

   d. ☐ The director* of the county behavioral health agency of the county named above.

   e. ☐ A licensed behavioral health professional* who is or has been, within the past 30 days, treating or supervising the treatment of respondent.

   f. ☐ The director* of a hospital in which respondent is hospitalized.

   g. ☐ The director* of a public or charitable organization, agency, or home
      (1) ☐ who is or has been, within the past 30 days, providing behavioral health services to respondent; or
      (2) ☐ in whose institution respondent resides.

   h. ☐ Respondent.

   i. ☐ A first responder—including a peace officer, firefighter, paramedic, emergency medical technician, mobile crisis response worker, or homeless outreach worker—who has had repeated interactions with respondent.

   j. ☐ The public guardian* or public conservator* of the county named above.

   k. ☐ A conservator or proposed conservator referred from a proceeding under Welfare and Institutions Code section 5350.

   l. ☐ The director* of adult protective services of the county named above.

   m. ☐ The director* of a California Indian health services program or tribal behavioral health department that has, within the past 30 days, provided or is currently providing behavioral health services to respondent.

   n. ☐ A California tribal court judge* before whom respondent has appeared within the past 30 days.

   * This person may designate someone else to file the petition on their behalf. If the petitioner is a designee, check this category and put the designee's name in item 1, above.

2. a. Petitioner asks the court to find that respondent *(name):*
   is eligible to participate in the CARE Act process and to commence CARE Act proceedings for respondent.

   b. Petitioner's relationship to respondent *(specify and describe relationship):*

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

2. c. ☐ Petitioner's interactions with respondent *(if petitioner is specified in 1e, 1f, 1g, or 1i, specify the number of interactions with respondent and the date of the most recent interaction, and describe the nature and outcome of each interaction):*

☐ If you need additional space, please include on a separate piece of paper and label as Attachment 2c.

3. Respondent lives or was last found at *(give respondent's residential address, if known and one exists; otherwise, state that the address is unknown and provide the last known location and any additional contact information, such as a phone number, including whether the number can receive texts, or an email address):*

☐ If you need additional space, please include on a separate piece of paper and label as Attachment 3.

4. Respondent *(check all that apply):*
   a. ☐ Is a resident of the county named above.
   b. ☐ Is currently located in the county named above.
   c. ☐ Is a defendant or respondent in a criminal or civil proceeding pending in the superior court of the county named above.
   d. ☐ Is a resident of *(specify county if known and different from the county named above):*

5. Respondent meets each of the following requirements and is eligible to participate in the CARE Act process and receive services and support under a CARE agreement or CARE plan *(provide information below to support each requirement):*
   a. Respondent is 18 years of age or older. Date of birth *(if known):*
   Age in years *(if exact age not known, give approximate age):*
   b. Respondent has a diagnosis of a schizophrenia spectrum disorder or another psychotic disorder in the same class, as defined in the current *Diagnostic and Statistical Manual of Mental Disorders*. Diagnosis and additional information are provided
      ☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.
      ☐ on separate documents, attached and labeled as Attachment 5b.
      ☐ below.

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

5. c. Respondent is currently experiencing a serious mental disorder, as defined in Welfare and Institutions Code section 5600.3(b)(2), in that the disorder:
   (1) Is severe in degree and persistent in duration;
   (2) May cause behavior that interferes substantially with respondent's primary activities of daily living; ***and***
   (3) May result in respondent's inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period.

   Supporting information regarding the severity, duration, and risks of respondent's disorder is provided
   ☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.
   ☐ on separate documents, attached and labeled as Attachment 5c.
   ☐ below.

   d. Respondent is not currently stabilized in ongoing voluntary treatment. Respondent's current stability and treatment are described
   ☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.
   ☐ on separate documents, attached and labeled as Attachment 5d.
   ☐ below.

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

5. e. At least one of these is true *(complete (1) or (2) or both):*

(1) ☐ Respondent is unlikely to survive safely in the community without supervision ***and*** respondent's condition is substantially deteriorating. Reasons that respondent is unlikely to survive safely in the community, the type of supervision respondent would need to survive safely, and the extent to which respondent's physical or mental condition has recently grown worse are described

☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.

☐ on separate documents, attached and labeled Attachment 5e(1).

☐ below.

(2) ☐ Respondent needs services and supports to prevent a relapse or deterioration that would be likely to lead to grave disability or serious harm to respondent or others. The services and supports needed by respondent and the reasons respondent would become gravely disabled or present a risk of harm to self or others are described

☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.

☐ on separate documents, attached and labeled Attachment 5e(2).

☐ below.

f. Participation in a CARE plan or CARE agreement would be the least restrictive alternative necessary to ensure respondent's recovery and stability. A description of available alternative treatment plans and an explanation why no alternative treatment plan that would be less restrictive of respondent's liberty could ensure respondent's recovery and stability are provided

☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.

☐ on separate documents, attached and labeled Attachment 5f.

☐ below.

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

5. g. Respondent is likely to benefit from participation in a CARE plan or CARE agreement. Reasons in support of this assertion are provided
   - ☐ on *Mental Health Declaration—CARE Act Proceedings* (form CARE-101), attached as Attachment 6a.
   - ☐ on separate documents, attached and labeled Attachment 5g.
   - ☐ below.

6. **Required Documentation**

   The evidence described below is attached in support of this petition. *(Attach the documents listed in a or b, or both, and check the box next to the description of each document or set of documents attached).*

   a. ☐ A completed *Mental Health Declaration—CARE Act Proceeding* (form CARE-101), the declaration of a licensed behavioral health professional stating that, no more than 60 days before this petition was filed, the professional or a person designated by them

      (1) ☐ examined respondent and determined that respondent met the diagnostic criteria for eligibility to participate in the CARE Act proceedings; or

      (2) ☐ made multiple attempts to examine respondent but was not successful in obtaining respondent's cooperation and has reasons, explained with specificity, to believe that respondent meets the diagnostic criteria for eligibility to participate in CARE Act proceedings.

      Attach *Mental Health Declaration—CARE Act Proceedings* (form CARE-101) and label it Attachment 6a.

   b. ☐ Evidence that respondent was detained for at least two periods of intensive treatment, the most recent period within the past 60 days. *Examples of evidence:* a copy of the certification of intensive treatment, a declaration from a witness to the intensive treatment, or other documentation indicating involuntary detention and certification for up to 14 days of intensive treatment. *(Attach all supporting documents and label each, in order, Attachment 6b1, 6b2, 6b3, etc.)*

      Note: For purposes of the CARE Act, "intensive treatment" refers to involuntary treatment authorized by Welfare and Institutions Code section 5250. It does ***not*** refer to treatment authorized by any other statutes, including but not limited to Welfare and Institutions Code sections 5150, 5260, and 5270.15.

7. **Other Court Proceedings** *(you may leave a field blank if you don't know the information requested or it does not apply)*

   a. ☐ This petition is in response to respondent's referral from another court proceeding.

   (1) Court, department, and judicial officer:

   (2) Case number:

   (3) Type of proceeding from which respondent was referred:

      (A) ☐ Mental competence proceeding arising from a misdemeanor prosecution (Penal Code, § 1370.01)

      (B) ☐ Assisted outpatient treatment (Welf. & Inst. Code, §§ 5346–5348)

      (C) ☐ Lanterman-Petris-Short Act conservatorship (Welf. & Inst. Code, §§ 5350–5372)

   (4) ☐ The referral order is attached and labeled as Attachment 7a *(optional)*.

   (5) Respondent's attorney in referring proceeding *(name):*
   (mailing address):
   (telephone number): *(email address):*

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

7. b. ☐ Respondent is within a juvenile court's dependency, delinquency, or transition jurisdiction.
   (1) Court: (2) Case number:
   (3) Respondent's attorney in juvenile court proceeding *(name):*
   (mailing address):
   (telephone number): *(email address):*

   c. ☐ Respondent has a court-appointed conservator.
   (1) Court: (2) Case number:
   (3) Respondent's attorney in conservatorship proceeding *(name):*
   (mailing address):
   (telephone number): *(email address):*

Other information *(you may leave a field blank if you don't know the information requested or it does not apply)*

8. Tribal affiliation
   a. ☐ Respondent is an enrolled member of a federally recognized Indian tribe.
   Tribe's name and mailing address:

   b. ☐ Respondent is receiving services from a California Indian health services program, a California tribal behavioral health department, or a California tribal court.
   Name and mailing address of program, department, or court:

9. Check any of the following statements that is true and give the requested information if you know it:
   a. ☐ Respondent needs interpreter services or an accommodation for a disability *(if you know, describe respondent's needs):*

   b. ☐ Respondent is served by a Regional Center *(if you know, give the center name and the services provided to respondent):*

   c. ☐ Respondent is a current or former member of the state or federal armed services or reserves *(branch name if you know it):*

10. Number of pages attached: _____

Date:

_____ ▶ _____
(TYPE OR PRINT NAME OF ATTORNEY) (SIGNATURE OF ATTORNEY)

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 OF PETITIONER) (SIGNATURE OF PETITIONER)

CONFIDENTIAL

CARE-101

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:		
CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT		
MENTAL HEALTH DECLARATION—CARE ACT PROCEEDINGS		CASE NUMBER:

TO LICENSED BEHAVIORAL HEALTH PROFESSIONAL
This form will be used to help the court determine whether respondent meets the diagnostic criteria for CARE Act proceedings.

GENERAL INFORMATION

1. Declarant's name:

2. Office address, telephone number, and email address:

3. **License status** *(complete either a or b):*

   a. ☐ I am a licensed behavioral health professional and conducting the examination described on this form is within the scope of my license. I have a valid California license as a *(check one)*:

      (1) ☐ physician.
      (2) ☐ psychologist.
      (3) ☐ clinical social worker.
      (4) ☐ marriage and family therapist.
      (5) ☐ professional clinical counselor.

   b. ☐ I have been granted a waiver of licensure by the State Department of Health Care Services under Welfare and Institutions Code section 5751.2 because *(check one)*:

      (1) ☐ I am employed as a ☐ psychologist ☐ clinical social worker continuing my employment in the same class as of January 1, 1979, in the same program or facility.

      (2) ☐ I am registered with the licensing board of the State Department of Health Care Services for the purpose of acquiring the experience required for licensure and employed or under contract to provide mental health services as a *(check one)*:

         (a) ☐ clinical social worker.
         (b) ☐ marriage and family therapist.
         (c) ☐ professional clinical counselor.

      (3) ☐ I am employed or under contract to provide mental health services as a psychologist who is gaining experience required for licensure.

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

3. b. (4) ☐ I have been recruited for employment from outside this state, and my experience is sufficient to gain admission to a California licensing examination. I am employed or under contract to provide mental health services as a *(check one):*
   (a) ☐ psychologist.
   (b) ☐ clinical social worker.
   (c) ☐ marriage and family therapist.
   (d) ☐ professional clinical counselor.

4. Respondent *(name):*
   ☐ is ☐ is not a patient under my continuing care and treatment.

EXAMINATION OR ATTEMPTS MADE AT EXAMINATION OF RESPONDENT

5. Complete one of the following: *(both a and b must be within 60 days of the filling of the CARE Act petition)*
   a. ☐ I examined the respondent on *(date):* *(proceed to item 7).*
   b. ☐ On the following dates: I attempted to examine respondent but was unsuccessful due to respondent's lack of cooperation in submitting to an examination.

6. *(Answer only if item 5b is checked.)* Explain in detail when, how many attempts, and the types of attempts that were made to examine respondent. Also explain respondent's response to those attempts and the outcome of each attempt.

7. Based on the following information, I have reason to believe respondent meets the diagnostic criteria for CARE Act proceedings *(each of the following requirements **must** be met for respondent to qualify for CARE Act proceedings):*
   a. Respondent has a diagnosis of a schizophrenia spectrum disorder or another psychotic disorder in the same class *(indicate the specific disorder):*

   Note: Under Welfare and Institutions Code section 5972, a qualifying psychotic disorder must be primarily psychiatric in nature and not due to a medical condition such as a traumatic brain injury, autism, dementia, or a neurological condition. A person who has a current diagnosis of substance use disorder without also meeting the other statutory criteria, including a diagnosis of schizophrenia spectrum or other psychotic disorder, does not qualify.

   b. Respondent is experiencing a serious mental disorder that *(**all** of the following must be completed):*
      (1) Is severe in degree and persistent in duration *(explain in detail):*

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

7. b. (2) May cause behavior that interferes substantially with the primary activities of daily living *(explain in detail):*

(3) May result in an inability to maintain stable adjustment and independent functioning without treatment, support, and rehabilitation for a long or indefinite period *(explain in detail):*

c. Respondent is not clinically stabilized in ongoing voluntary treatment *(explain in detail):*

d. At least one of these is true *(complete one or both of the following):*

(1) ☐ Respondent is unlikely to survive safely in the community without supervision **and** respondent's condition is substantially deteriorating *(explain in detail):*

(2) ☐ Respondent needs services and supports to prevent a relapse or deterioration that would likely result in grave disability or serious harm to respondent or others *(explain in detail):*

CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT	CASE NUMBER:

7. e. Participation in a CARE plan or CARE agreement would be the least restrictive alternative necessary to ensure respondent's recovery and stability *(explain in detail):*

f. Respondent is likely to benefit from participation in a CARE plan or CARE agreement *(explain in detail):*

8. ☐ Additional information regarding my examination of respondent is ☐ as follows ☐ on Attachment 8.

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 DECLARANT'S NAME)

(SIGNATURE OF DECLARANT)

CONFIDENTIAL

CARE-105

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:		
CARE ACT PROCEEDINGS FOR *(name):* RESPONDENT		
ORDER FOR CARE ACT REPORT		CASE NUMBER:

1. The court has read and reviewed *Petition to Commence CARE Act Proceedings* (form CARE-100) filed by petitioner
   (name):
   (address):
   on *(date):* asking the court to begin CARE Act proceedings for respondent
   (name):
   (address, if known): .
2. The court has found that the petition has made a prima facie showing that the respondent is or may be eligible to participate in the CARE Act process. A copy of the petition and all attachments are included with this order.

The court orders as follows:

3. The following county agency *(name):*
   or its designee must contact and engage the respondent and, no later than *(date):* ,
   file with the court a written report that includes the following information:
   a. Respondent's county of residence;
   b. A determination whether respondent meets or is likely to meet the CARE Act eligibility requirements;
   c. The outcome of the county's efforts to engage respondent during the period before the report deadline above;
   d. Conclusions and recommendations about respondent's ability to voluntarily engage in services;
   e. The information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report; and
   f. Other:
4. Before engaging the respondent and preparing the report, the county agency named in item 3 or its designee must use *Notice of Order for CARE Act Report* (form CARE-106) to serve notice of this order on petitioner, respondent, and respondent's counsel as provided in California Rules of Court, rule 7.2235(a).
5. The court has, by separate order, appointed the following attorney to represent the respondent at all stages of these CARE Act proceedings.
   a. Name:
   b. Firm name:
   c. Street address:
   d. Mailing address *(if different):*
   e. Email address:
   f. Telephone number: g. Fax number:

Date:

JUDICIAL OFFICER

CONFIDENTIAL

CARE-106

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:		
CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT		
NOTICE OF ORDER FOR CARE ACT REPORT		CASE NUMBER:

1. Petitioner *(name):*

2. Respondent *(name):*

3. The court has ordered *(name of county agency):* or its designee to engage the respondent and, no later than *(date):* , file with the court a written report that includes all of the following information:
   a. The respondent's county of residence;
   b. A determination whether the respondent meets, or is likely to meet, the criteria necessary to participate in the CARE Act process;
   c. The outcome of efforts made to voluntarily engage the respondent;
   d. Conclusions and recommendations about the respondent's ability to voluntarily engage in services; and
   e. The information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report.

4. Attached to this notice, as required by California Rules of Court, rule 7.2235(a), are
   a. a copy of *Order for CARE Act Report* (form CARE-105) issued by the court in this proceeding on *(date):* ,
   b. a copy of the petition filed on form CARE-100 on *(date):* to begin these proceedings, and
   c. *Information for Respondents—About the CARE Act* (form CARE-060-INFO).

Date:

(TYPE OR PRINT NAME OF COUNTY AGENCY REPRESENTATIVE)

(SIGNATURE OF COUNTY AGENCY REPRESENTATIVE)

CONFIDENTIAL

CARE-113

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:		
CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT		
NOTICE OF RESPONDENT'S RIGHTS—CARE ACT PROCEEDINGS		CASE NUMBER:

Someone filed a petition to begin CARE Act proceedings for you. You have been appointed an attorney, free of charge. That attorney will contact you about this case. You may also choose an attorney to represent you instead of the appointed attorney. If you choose your own attorney, you will be responsible for their fees. A person who, like you, is the subject of a CARE Act petition is called the respondent.

THE CARE ACT RESPONDENT'S RIGHTS

Every respondent has all of the following rights.

During the CARE Act proceedings, you have a right to:

- Be informed of the proceedings;
- Receive notice of each hearing;
- Be present and personally participate at each hearing;
- Be represented by an attorney at all stages of the proceedings, regardless of ability to pay;
- Receive a copy of the petition;
- Receive a copy of the court-ordered evaluation and court-ordered report;
- Have a supporter be present with you and assist you;
- Have an interpreter assist you, if necessary;
- Present evidence;
- Call witnesses;
- Cross-examine witnesses;
- Appeal decisions; and
- Keep confidential all evaluations, reports, documents, and filings submitted to the court for CARE Act proceedings.

CARE Act hearings are closed to the public unless the court orders otherwise (see below). However, you have a right to:

- Demand that the hearing be public and be held in a place the public can attend;
- Request any family member or friend, including a supporter, attend the hearing without giving up your right to keep the hearing closed to the rest of the public; and
- Be informed by the judge of these rights before each hearing begins.

Note: The court may allow a hearing to be public if the judicial officer finds that the public interest in an open hearing clearly outweighs your interest in privacy.

You have a right to a supporter throughout the CARE Act process.
A supporter can help you understand, communicate, make decisions, and express your preferences. You can have a supporter with you at hearings and meetings throughout the CARE Act process. For more information, see *Information for Respondents—About the CARE Act* (form CARE-060-INFO).

What if I don't speak English?
When your appointed attorney contacts you, let them know that you will need an interpreter at court hearings. Let the court know as early in the case as possible that you need an interpreter. If there is no interpreter when you get to court, ask the clerk for one. You can also use *Request for Interpreter—Civil* (form INT-300) or a local court form or website to request an interpreter. For more information about court interpreters, go to *https://selfhelp.courts.ca.gov/request-interpreter*.

What if I have a disability?
If you have a disability and need an accommodation while you are at court, you can use *Disability Accommodation Request* (form MC-410) to make your request. You can also ask the ADA Coordinator in your court for help. For more information, see *How to Request a Disability Accommodation for Court* (form MC-410-INFO).

Mental Health Law: CARE Act Rule Amendments and Form Revisions (Amend Cal. Rules of Court, rules 7.2210, 7.2221, 7.2225, and 7.2230; revise forms CARE-050-INFO, CARE-060-INFO, CARE-100, CARE-101, CARE-105, CARE-106, and CARE-113)

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

	Commenter	Position	Comment	Committee Response
1.	Chief Probation Officers of California by Karen A. Pank, Executive Director	NI	**Clarification on Respective Duties for Juvenile Court and CARE court** The amendment to rule 7.2210 subdivisions (d) and (e) under section 5977.4(c), would expressly note the ability for concurrent jurisdiction of the juvenile court and CARE Act court. There are many considerations that would need to be accounted for in instances of concurrent jurisdiction and while this proposed change adds clarity that concurrent jurisdiction may exist, there remains many practical impacts regarding respective duties and obligations when there are dual and/or multiple jurisdictions between Juvenile Court and CARE Act court. We would note that without clarity and coordination in this space, it may result in confusion on the part of the youth with respect to reporting, monitoring, and other considerations. There is also needed clarity regarding the roles and duties of the jurisdictions as it relates to court mandates and the delivery of services.	The committee appreciates this comment but does not recommend modifying the proposal in response. The committee recognizes the intersection between the juvenile court law and CARE Act process presents complex challenges and understands the request for additional clarity Although the council interprets the statute as not precluding concurrent jurisdiction, without additional legislative direction regarding the limits of permissible information sharing and the relative priority of orders, the committee declines to expand the proposal. The issues raised by the commenters are more appropriately addressed to the Legislature for clarification and resolution.
			Sealing of Records Rule 7.2210 subdivision (c) refers to the procedures "pertaining to the respondent's ability to file a motion under section 5976.5(e) to seal records in CARE Act proceedings." It's important that the record sealing provisions align with, and are not contradictory to, sealing of records for juvenile court jurisdiction matters and would benefit from additional clarity to ensure that sealing provisions are specific to CARE court matters.	The committee does not recommend modifying the proposal in response to this comment. Rule 7.2210 subdivision (c) is located within Division 2 of Title 7 of the Probate and Mental Health Rules, specifically under the preliminary provisions of the CARE Act Rules. Rule 7.2210 provisions apply only to procedures in the CARE Act court to seal records of CARE Act proceedings. Because they do not apply to sealing juvenile court records, the procedures for sealing those records remain unchanged. The committee holds the view that the

	Commenter	Position	Comment	Committee Response
				language is sufficiently clear in its current form.
			Probation Listed as a CARE Court Petitioner Lastly, we request revising the Petition to Commence CARE Act Proceedings (form CARE-100). As it currently reads, a "peace officer" is listed as a petitioner which includes probation, but we request revising the form to specifically list probation officer for clarity.	The committee does not recommend modifying the proposal in response to this comment. The term "peace officer" in *Petition to Commence CARE Act Proceedings* (form CARE-100) reflects the language used to categorize a first responder in subdivision (f) of Section 5974 of the Welfare and Institutions Code. Specifying probation officers but not other peace officers would imply a distinction that the statute does not make. On the other hand, because peace officers include a wide array of individuals, listing the potential individuals would lengthen an already complicated form. The committee holds the view that clarification would be more appropriate in educational resources.
2.	Orange County Bar Association by Christina Zabat-Fran, President	AM	The Orange County Bar Association is strongly supportive of the CARE Act legislation and the amendments under SB35. We do believe this proposal appropriately addresses the stated purpose of implementing SB35 as detailed subject to our comments following. We cannot comment on whether initial experiences implementing the CARE Act suggest further changes to this proposal, except as outlined below, because our Court's implementation is too recent - we suggest such request be directed specifically to the 7 County Courts themselves that are now implementing the Act.	The committee appreciates this comment. No response is required.

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			1. SB35 was enacted as emergency legislation effective immediately on October 2, 2023. This proposal provides for the Rule amendments & Form revisions to only be effective on September 1, 2024. No reasons are provided for the delay in implementing SB35 until September 1, 2024. We recommend that these amendments be sooner implemented unless good cause exists for the delay since the 7 currently participating counties will be non-compliant for another 8 months, which will adversely affect future programs. [We understand the standard cycle for such proposal means an effective date of either January 1 or September 1. https://www.courts.ca.gov/documents/howprorule.pdf. We encourage use of any available means to expedite the effective date].	The committee does not recommend modifying the proposal in response to this comment. The now 8 participating counties are capable of maintaining compliance with the statute while awaiting the effective date of the rules and forms. For example, courts can already order the county agency to provide "information, including protected health information, necessary to support the determinations, conclusions, and recommendations in the report" in the "other" box on CARE-105. In balancing requests for an expedited effective date against requests for additional time for implementation the committee determined the recommended effective date of September 1, 2024, allows for adequate time of the formal proposal to undergo sufficient review and the incorporation of recommended changes.
			2. Welfare & Institutions Code §5977.4(c) requires that the "Judicial Council shall adopt rules to implement the policies and provisions in this section and (stated provisions of the Act) to promote statewide consistency, including but not limited to, … the process by which counsel will be appointed." However, at footnote 14 the Council has "concluded that it would be impracticable to establish a single, uniform statewide appointment process because… circumstances vary widely among courts and counties." The Act mandates that counsel be appointed at no charge and without reference to any ability to pay by the CARE Court	No response required.

	Commenter	Position	Comment	Committee Response
			in accordance with WIC §5971(d), 5976(c), 5977(a), 5977.4, 5981.5, *et al* and that the Council fully implement these procedures. It is recommended that statewide procedures for appointment of counsel be implemented prior to the effective date for all 58 counties to participate in the Act (or, at the very least, that the subject be reviewed again in late 2024 or early 2025 as additional counties come on-board to ensure all such Counties have available means of appointing counsel). Without the statewide procedures it is doubted that certain smaller counties, and their judges and petitioning agencies, could coordinate effectively among the various eligible attorney-authorizing agencies.	The committee does not recommend modifying the proposal in response to this comment. The statute and rules provide statewide procedures for the appointment of counsel. Welfare and Institutions Code Section 5977(a) in conjunction with rule 7.2230 define who may be appointed as respondent's counsel in CARE Act proceedings and when appointment should occur in the process. The committee chose not to impose a uniform statewide process for appointment of counsel based on its determination that uniformity regarding the appointment process would lead to a lack of parity in practice. The committee previously determined that imposing a single statewide process would inevitably ignore relevant differences among the counties in the availability of qualified legal services projects, public defender systems, bench-bar relationships, and many other respects. Each court and county has experience appointing counsel in other types of proceedings and can leverage its experience and existing processes and systems to appoint counsel much more efficiently than it would be able to under a uniform statewide appointment process.

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				The statute and rules allow flexibility for counties to implement locally tailored procedures that would more adequately suit the needs of their specific court based on the resources available.
3.	Superior Court of Los Angeles County by Bryan Borys, Director of Research and Data Management	AM	In response to the Judicial Council of California's "Invitation to Comment W24-03, Mental Health Law: CARE Act Rule Amendments and Form Revisions," the Superior Court of California, County of Los Angeles (Court), agrees with the proposal (if modified) and its ability to appropriately address its stated purpose. Through the experience gained during the Court's initial implementation of the CARE Act, the following recommendations may better facilitate its statewide expansion:	The committee appreciates this comment. No response required.
			• Establish JBSIS reporting requirements.	The subject of the comment is beyond the scope of this proposal.
			• Permit form CARE-101 to be filed with, or after the filing of the petition, as there may be occasions when supplemental information is provided prior to the prima facie finding on CARE-101. Current language on CARE-100 implies that CARE-101 may only be used as an attachment to the petition.	The committee does not recommend modifying the proposal in response to this comment. Section 5975 requires the petition to "contain" either an affidavit from a licensed behavioral health professional (§5975(d)(1)) or evidence that the respondent was detained for a minimum of two intensive treatments, the most recent one within the last 60 days of filing the petition (§5975(d)(2)). In other words, if the petitioner is including CARE-101 to satisfy section 5975(d)(1) requirements, it is intended to be included with the filing of petition (form CARE-100).

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				At the same time, it is certainly possible that a petitioner may wish to supplement an already filed petition. There is nothing that prohibits form CARE-101 supplementally, and the instructions on the form only say that "[t]his form will be used to help the court determine whether respondent meets the diagnostic criteria for CARE Act proceedings."
			• Address the concern that petitioners may identify other court cases, but not provide attorney information for notice purposes; therefore, access to Juvenile, AOT and LPS records may be required to determine party information for county agencies to provide notice(s) to attorney(s) in other case(s).	The committee does not recommend any change to the proposal in response to this comment. The committee has balanced the usefulness of additional information with the petitioner's need for simplicity in what is already a complicated process. Sections 5972 and 5975 specify the information required to be included in the petition. Any additional information requested, including the name and contact information of the respondent's attorney in a related case, is optional in acknowledgment that many petitioners may be unable to provide it. To ensure that respondent's counsel in a related case is informed of the CARE Act proceedings, the committee's amendments to rule 7.2230 establish a process for the court to order the county agency to provide that information to counsel. The committee also plans to develop an optional form for courts and agencies to use in this process and circulate it for public comment soon.

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			Although the Court does not see any cost savings from the proposal, it anticipates that additional costs may be incurred through: • Additional notice requirements. • Searches to identify related case information. • Additional resources required to process sealing orders. • Additional resources required to record information regarding ongoing rights of original petitioners when granted.	The committee appreciates this comment. No response required.
			Additionally, the Court foresees the following implementation requirements which include, but are not limited to: • Update of (or creation of) a notice form for the purposes of notifying the juvenile court that CARE Act proceedings have been initiated for individuals with a pending dependency, juvenile justice, or transitional petition. • Providing juvenile staff with information and training on how to process and track CARE Court petition notifications from CARE Court in the case management system (CMS). Creating event code(s) in the Juvenile CMS to track incoming notifications from CARE Court regarding newly filed CARE Court petitions. • Establishing procedures and CMS configurations for the sealing of CARE Court records.	No response required.

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			Lastly, the Court does not agree that three months from Judicial Council's approval of this proposal until its effective date will provide sufficient time for implementation, as the adoption of, and integration of new local forms into CMS may require additional time.	The committee does not recommend any change to this proposal in response to this comment. This proposal is in response to the passage of SB 35 which was enacted to fill gaps, clarify ambiguities, and correct inaccurate cross-references in the CARE Act. SB 35 was signed on September 30, 2023, and took effect immediately as an urgency statute. Eight counties and their superior courts have begun implementation of the CARE Act with integration of SB 35 changes. The remaining fifty counties must begin implementation by December 1, 2024. The changes to the law have already taken effect. In balancing requests for an expedited effective date against requests for additional time for implementation the committee determined the council cannot delay the effect of its rules and forms beyond the time necessary.
4.	Superior Court of Orange County Juvenile Division by Katie Tobias, Operations Analyst	NI	**Responses to Requests for Specific Comments:** **Does the proposal appropriately address the stated purpose?** Yes, the proposal appropriately addresses the stated purpose.	 No response required.

	Commenter	Position	Comment	Committee Response
			Does initial experience implementing the CARE Act suggest further changes to this proposal or, possibly in a future cycle, to other CARE Act rules and forms that would facilitate the statewide expansion of the CARE Act process? Yes, there may be consideration for possible modifications to this proposal, in future cycles, to CARE Act rules and forms.	No response required.
			Would the proposal provide cost savings? If so, please quantify. No, the proposal will incur ongoing costs of print, copy, and provide the mandatory forms.	No response required.
			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 implementation, as outlined, involves training staff, developing procedures, creating docket codes in the case management system, and establishing processes for data collections and reporting for the Juvenile Court. Additionally, these changes would impact existing practices related to psychotropic medication in both regular and collaborative courtrooms which would change	No response required.

	Commenter	Position	Comment	Committee Response
			our current practices, procedures, and forms to accommodate these changes effectively.	
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? No, a duration of 6-12 months would be more suitable.	The committee does not recommend any change to the proposal in response to this comment. This proposal is in response to the passage of SB 35 which was enacted to fill gaps, clarify ambiguities, and correct inaccurate cross-references in the CARE Act. SB 35 was signed on September 30, 2023, and took effect immediately as an urgency statute. Eight counties and their superior courts have begun implementation of the CARE Act with integration of SB 35 changes. The remaining fifty counties must begin implementation by December 1, 2024. The changes to the law have already taken effect. In balancing requests for an expedited effective date against requests for additional time for implementation the committee determined the council cannot delay the effect of its rules and forms beyond the time necessary.
			How well would this proposal work in courts of different sizes? Our court, being of considerable size, has the potential to implement this effectively in Orange County. While establishing a CARE Court is essential, integration with the current collaborative courts is imperative. Although feasible for Orange	No response required.

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			County, the development of these practices entails a substantial amount of work and coordination.	
5.	Superior Court of Riverside County by Sarah Hodgson, Chief Deputy of Legal Services, General Counsel	NI	Generally, in support of this proposal.	No response required.
			The following comments are related to juvenile court only.	No response required.
			Responses to Requests for Specific Comments: **Does the proposal appropriately address the stated purpose?** The stated purpose of the amendments to CRC 7.2210 and the revisions to CARE-050-INFO and CARE-100, as they pertain to juvenile court, is to address the requirement to include communications between the CARE Act court and the juvenile court when applicable. The amendments do address the purpose of including communications, however there are several questions.	No response required.
			• Regarding amended Rule of Court 7.2210(d), the Rule does not make clear how the notification from the CARE Act court to the juvenile court should be accomplished, or what information should be included. Clarification would be appreciated re: if the rule intends this to simply be a Notice that a petition has been filed, and whether other information should be provided (i.e., CARE Act case number, attorney information for CARE	The committee appreciates this comment but does not recommend modifying the proposal in response. Because both CARE Act proceedings and juvenile court proceedings are confidential, the committee has determined that communication between the courts should be as limited as possible without clear statutory authorization. The current statute authorizes communication only by implication, in directing the council to include "communications between the CARE Act court and the juvenile court, as applicable," in the rules.

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			Act case, whether petition is dismissed subsequently, etc.).	The CARE Act includes an express policy making CARE Act proceedings, information about them, and records of them confidential. The statute includes only one countervailing policy or provision authorizing or requiring disclosure of confidential information by the CARE Act court: in section 5979(a)(3), "the court" is required to consider the fact that a respondent failed to complete the CARE plan in a subsequent hearing under the LPS Act held within 6 months of termination. The statute does not otherwise authorize the CARE Act court to disclose information about the proceedings. The manner in which a CARE Act court informs the juvenile court that a CARE petition has been filed on behalf of a respondent who is within the juvenile court's jurisdiction will be left to the court's discretion, as long as confidentiality requirements are met. To emphasize this, the committees have revised paragraph (d)(1) to note that "[t]he court may, in its discretion, communicate this information in any suitable manner." Given the communication is likely to occur between two divisions of the same court, methods of communication that impose a minimal burden may be available.
			• Additionally, the court would appreciate clarification re: whether the CARE Act court must provide a proof of notice of this information within the CARE Act proceeding. A form notice for court use	The committee agrees clarification is needed and has revised rule 7.2210(d)(1) in response. For clarification, the committee has replaced "notify" with "inform" to emphasize that a formal notice process is not required. While rule 7.2210(d)

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			may be helpful to facilitate this and ensure no unneeded or confidential information is provided.	indicates that upon learning a respondent is within a juvenile court's jurisdiction, the CARE Act court must notify the juvenile court that a CARE Act petition has been filed on behalf of that respondent, the rule does not require proof of such notice. The manner in which a CARE Act court informs the juvenile court that a CARE petition has been filed on behalf of a respondent who is within the juvenile court's jurisdiction will be left to the court's discretion, as long as confidentiality requirements are met. The following language has been added to the rule for clarification purposes, "[t]he court may, in its discretion, communicate this information in any suitable manner."
			• Regarding amended Rule of Court 7.2210(d), the Rule does not make it clear what the juvenile court can or should do with the information provided. For example, should the information be recorded in the case management system in the juvenile case? If so, should that information be marked confidential or sealed since CARE Act proceedings are confidential?	The committee does not recommend any change to the proposal in response to this comment. SB 35 directed the Judicial Council to adopt rules that include "communications between the CARE Act court and the juvenile court, if applicable." Proposed rule 7.2210(d) is in response to that direction and applies only to the actions of the CARE Act court. The juvenile court's management of the information received is beyond the scope of the CARE Act and therefore of this proposal. Of course, any action taken by the juvenile court would need to conform to the laws governing disclosure of information and records of both CARE Act proceedings and juvenile court proceedings
			• Can the information that a CARE Act petition has been filed be shared with	The committee does not recommend any change to the proposal in response to this comment. Rule

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			other parties/attorneys involved in the juvenile case, such as parents, CASA, the child welfare agency, probation, etc.? Per Rule 7.2210(f), must the respondent provide an express waiver to permit others involved in the juvenile case to be told that a CARE Act petition has been filed?	7.2210(f) does not authorize further communication outside of a waiver. At the same time, it does not prohibit further communication if authorized or required by another law.
			• As to the concurrent jurisdiction of the CARE Act and the juvenile court stated in Rule 7.2210(d)(2), there are numerous questions. Guidance will be needed as to which court's orders will take precedence in the event of a conflict, as well as a mechanism for communication between the courts and parties/attorneys to resolve conflicting orders and avoid improper ex parte communication between the judicial officers.	The committee does not recommend any change to the proposal in response to this comment. These issues are beyond the scope of this proposal and a matter for legislative resolution.
			• Regarding Rule of Court 7.2210(e), a form notice would be helpful and appropriate for the county agency to use. This would make the notification to the juvenile court attorney easier, and ensure that no unneeded or confidential information is provided. Additionally, how will the Care Act court know the attorney information from the juvenile case? Juvenile cases are confidential and at least theoretically, the	The committee appreciates this comment and plans to develop an additional form for optional use by the court and county agency in this process and circulate it for public comment in the near future. If the CARE act court has access to the attorney information, it could be provided there.

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			county agency should not have access to this information.	
			• Regarding Rule of Court 7.2210(f), more clarification is needed as to what confidential information is allowed to be communicated absent an express waiver. As currently phrased, it appears the only information that can be shared per Rule of Court 7.2210(d) is the fact that a CARE Act petition was filed.	The committee does not recommend any change to the proposal in response to this comment. Rule 7.2210(f) does not authorize disclosure of information beyond that expressly authorized in subdivision (d) and (e) and absent an express waiver by the respondent. The rule does not prohibit such disclosure, but authorization for such disclosure is outside of the scope of this proposal and a matter for legislative resolution.
			• Perhaps a form notice would be appropriate. This would make the notification to the juvenile court and juvenile court attorney required by subdivisions (d) and (e) easier, and ensure that no unneeded or confidential information is provided.	The committee appreciates this comment and plans to develop an additional form for optional use by the court and county in this process and circulate it for public comment in the near future.
			• The advisory comments to amended Rule 7.2210 are very helpful and assist with the stated purpose.	The committee appreciates this comment. No response required.
			• Regarding revisions to the Judicial Council form *Information for Petitions - About the CARE Act (CARE-050-INFO)* to provide instructions on information to include if the petition is being filed in response to a referral from another court proceeding, if the respondent is within a juvenile court's dependency, delinquency,	No response required.

	Commenter	Position	Comment	Committee Response
			or transition jurisdiction, or if the respondent has a conservator: the instructions included for Item 7 regarding a juvenile case are useful and do address the stated purpose regarding communication between the CARE Act court and the juvenile court. However, it may be common for petitioners not to have this information. What happens when the petitioner does not know about an existing juvenile case, case number, or the attorney information on the juvenile case? The petition will still be filed, however needed information will be missing that that would be needed to assist with the stated purpose of providing information to the juvenile court and/or attorneys. What can the CARE Act court do with this information? Can it be recorded in the case management system in the CARE Act case?	The committee does not recommend any change to the proposal in response to this comment. The committee has to consider balancing the usefulness of additional information with simplicity for the petitioner in what is already a complicated process. The statute indicates in sections 5972 and 5975 the information required to be included in the petition. The additional information requested beyond that required by statute is optional as many petitioners may be unable to provide the name and contact information of the attorney in the related case. Upon learning that a respondent is within a juvenile court's dependency, delinquency or transition jurisdiction, rule 7.2210(d) allows the information provided in item 7 of form CARE-100 to be used by the CARE Act court to inform the juvenile court that a CARE petition has been filed on behalf of the respondent. This information can be recorded in the case management system in the CARE Act case.

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			• Revisions to the Judicial Council form *Petition to Commence CARE Act Proceedings (CARE-100)* that affect juvenile court are, the provision of information, if known and if applicable, about a judicial proceeding from which the respondent has been referred, and whether the respondent is within a juvenile court's dependency, juvenile justice, or transition jurisdiction or has a court-appointed conservator. This revision corresponds to rule 7.2210(d), which requires the CARE Act court to notify the juvenile court that a CARE Act petition has been filed on behalf of a respondent within the juvenile court's dependency, juvenile justice, or transition jurisdiction. It also corresponds to rule 7.2210(e), which requires the CARE Act court to order the county agency to notify the respondent's attorney in a proceeding identified in section 5978 or a respondent within a juvenile court's dependency, juvenile justice, or transition jurisdiction that a CARE Act petition has been filed on behalf of the respondent. Finally, the revision responds to the mandate in section 5977.4(c), directing the Judicial Council to adopt rules to implement provisions regarding communications between the CARE Act and juvenile court, if applicable. The revision to form CARE-	No response required.

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			100 to require such information increases the likelihood that the court and counsel would have that information.	
			Does the initial experience implementing the CARE Act suggest further changes to this proposal or, possibly in a future cycle, to other CARE Act rules and forms that would facilitate the statewide expansion of the CARE Act process? From the juvenile court perspective, there are no responses to this question.	No response required.
			Would the proposal provide cost savings? If so, please quantify? No.	No response required.
			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? Depending what the CARE Act court can do with the information provided in ITEM 7 of the CARE-100 form, and how the notice to the juvenile court is to be accomplished, updates may be needed to the case management system to record this information, and codes may be needed to give and file notice to the juvenile court. Minimal staff	No response required.

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			training would be required regarding how to give notice to the juvenile court. Updates may also be needed to the case management system for the juvenile court case to record the information provided from the CARE Act court such as the case number CARE Act court case and attorney information.	No response required.
			Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	No response required.
			How well would this proposal work in courts of different sizes? The proposal would likely work the same for any size court.	No response required.
			Additional Suggested Revisions re: CARE-060-INFO from Self Help Perspective:	No response required.
			Page 1, Item #1 Currently phrased: "The CARE Act applies only to specific people. The petition asks a court to decide if you are one of them." Suggested edit in red: "The CARE Act applies only to specific people. The petition asks a court to decide if the CARE Act applies to you."	The committee appreciates this comment but does not recommend the suggested change. Revising form CARE-060-INFO to align with the suggested edit, "The CARE Act applies only to specific people. The petition asks a court to decide if the CARE Act applies to you" would require revision of the subsequent paragraph, which would result in language less straightforward than the current language.

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			Page 2, Item #6 Consider deleting item 6 since it is redundant with Item #1, which states "you are called the *respondent*."	The committee appreciates this comment but does not recommend the suggested change. While both Item 1 and Item 6 of form CARE-060-INFO indicates who the respondent is, the committee determined that emphasizing and ensuring the clarity of the respondent's identity is more crucial than eliminating any potential redundancy.
			Page 4, Item #12 Currently phrased: "The supporter helps you understand, communicate, make decisions, and express your preferences. Your supporter can go to any meetings, appointments, or court hearings that you want them to during the process. It's up to you." Suggested edit in red: "The supporter helps you understand, communicate, make decisions, and express your preferences. You can decide to have your supporter go to meetings, appointments or court hearings that you want them to attend during the process." Explanation for suggested edit: The phrase "It's up to you" could be revised to more effectively convey that the respondent can choose what participation level the supporter has.	The committee agrees with the suggested change and has revised the form in a similar manner.
			Page 4, Item #13 Currently phrased: "You have the right to an interpreter at all CARE Act court hearings. When your court-appointed attorney contacts you, make sure to let them know that you do not speak	The committee appreciates this comment. The committee agrees with the suggested change and has modified the form in a similar manner.

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			English and will need an interpreter for court hearings. When you go to court, tell the judge you need an interpreter if you or your attorney haven't already asked for one." Suggested edit in red: Let ~~When~~ your court-appointed attorney ~~contacts you, make sure to let them~~ know that you ~~do not speak English and~~ will need an interpreter for court hearings." Explanation for suggested edit: Deleting extra language makes the sentence easier to understand.	
6.	Superior Court of San Diego County by Mike Roddy, Executive Officer	AM	**Comments on Rules:** Rule 7.2210: Subdivisions (c)(2) and (c)(5) – recommend rephrasing "business" days to "court" days to be consistent with subdivision (c)(3) and with the statutes and Rules of Court that reference notice periods relating to CARE Act proceedings (e.g., §5977(a)(3)(A)(iii), (a)(3)(B); CRC 7.2235(b)(1), (c)(1)).	The committee appreciates this comment. The committee agrees with the suggested change and has modified Rule 7.2210(c)(2) and (c)(5) in response to this comment.
			Responses to Requests for Specific Comments: **Does the proposal appropriately address the stated purpose?** Yes.	No response required.
			Does initial experience implementing the CARE Act suggest further changes to this proposal or, possibly in a future cycle, to other CARE Act rules and forms that would facilitate the	

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			statewide expansion of the CARE Act process? No suggested further changes at this time. The current rules and forms have been working well for our court.	No response required.
			Would the proposal provide cost savings? If so, please quantify. No.	No response required.
			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? Training business office and courtroom staff, updating processes and procedures.	No response required.
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	No response required.
			How well would this proposal work in courts of different sizes? It appears the proposal would work for courts of various sizes.	No response required.

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7.	Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subcommittee	A	**JRS Position:** Agree with proposed changes.	No response required.
			The JRS notes that the proposal is required to conform to a change of law.	No response required.
			The JRS also notes the following impact to court operations:	
			• Requires development of local rules and/or forms. o Court will need to draft procedures, local rules and forms to deal with a number of changes made, such as Re Sealing of records (§ 5976.5(e)) - Court to develop a procedure and local rule for hearings from opposition.	No response required.
			• Impact on local or statewide justice partners. o Proposed section "No communication of further information (§ 5976.5)" limits the communication between CARE Court and juvenile court in cases a juvenile court respondent is also has a CARE filed on their behalf. This may be challenging as both courts will be ordering Case Plans or CARE Plans for the individual. o It would be helpful to allow the members of the juvenile court and CARE Court teams, which include justice partners, social workers,	The committee appreciates this comment but does not recommend any change to the proposal in response. In the absence of legislative authority, the issue is beyond the scope of this proposal and a matter for legislative resolution. The committee appreciates this comment but does not recommend any change to the proposal in response. In the absence of legislative authority, the issue is beyond the scope of this proposal and a

	Commenter	Position	Comment	Committee Response
			and behavioral health clinicians, to share information to align the services ordered in the best interest of the individual in order to avoid duplicate service or contrasting services. Since Juvenile court hearings are also confidential, Care Court information shared with the juvenile court would still be confidential.	matter for legislative resolution.
			o Order for CARE Act Report (CARE-105) - This order has an important addition in section 3. E. that allows County agencies such as county behavioral health departments clear authority to provide more detailed info in the CARE Act report that the county may otherwise not be able to release.	No response required.
			CARE Act is an entirely new court model that needs clarifications. There will likely be need for further clarification or developing further rules of court regarding referrals from criminal court and Probate Court to CARE Court.	No response required.
			Responses to Requests for Specific Comments: **Does the proposal appropriately address the stated purpose?**	

	Commenter	Position	Comment	Committee Response
			Yes**.**	No response required.
			Does initial experience implementing the CARE Act suggest further changes to this proposal or, possibly in a future cycle, to tother CARE Act rules and forms that would facilitate the statewide expansion of the CARE Act process? Yes. CARE Act is new and will likely need some revisions or clarifications. I would anticipate the need for clarification or developing further processes regarding referrals from criminal court and Probate Court to CARE Court.	No response required.
			Would the proposal provide cost savings? If so, please quantify? No, it appears there would be minimal financial impact other than printing additional copies of the new forms for the public and staff.	No response required.
			What would the implementation requirements be for courts- for example, training staff, revising process and procedures, changing docket codes in CMS, or modifying CMS? The Court would need to develop minor additional internal processes for legal processing and court room procedures. There would also be minor changes needed in the case management system.	No response required.
			Would three months from the JC approval of this proposal until its effective date provide sufficient time for implementation?	

	Commenter	Position	Comment	Committee Response
			Yes.	No response required.
			How well would this proposal work in courts of different sizes? I don't see an issue with how this proposal would significantly impact courts of different sizes.	No response required.
8.	Trusts and Estates Section of the California Lawyers Association, Executive Committee by Ryka Farotte, Executive Committee Member	NI	The proposal requests specific comments on possible changes to the proposal or in a future cycle to facilitate the statewide expansion of the CARE Act process. TEXCOM recommends that the CARE-060-INFO form be expanded to include a section informing respondents of the possible consequences of failing to participate in the CARE process or complete their CARE plan as set forth in Welfare and Institutions Code section 5979. TEXCOM believes the inclusion of a discussion on section 5979 is appropriate to ensure respondents are fully informed regarding the CARE Act proceedings. Specifically, respondents should be properly notified of what exactly is "at stake" in the process if they choose not to participate. Without this information, there is potential respondents may be confused regarding this issue if they were to research the process online and see references only to the fact that the	The committee appreciates this comment but does not recommend the proposed changes. Form CARE-060-INFO was developed and subsequently revised to concentrate on the initial hearings (i.e. initial appearance and hearing on the merits) because it will be served on the respondent along with the *Order for CARE Act Report* (form CARE-105), which indicates court appointed counsel's contact information. Appointment of counsel occurs once the court finds that the petitioner has made a prima facie showing that the respondent is or may be a person described by section 5972. Additionally, any potential consideration of failure to complete a CARE plan in a subsequent hearing under the Lanterman-Petris Short Act would not occur until further along in the CARE Act process after a CARE Plan has been ordered. Appointed counsel will be able to assist respondent in navigating through the court process, including providing explanation throughout the process of the possible consequences if respondent chooses not to participate.

	Commenter	Position	Comment	Committee Response
			CARE plan is voluntary and that there are no civil or criminal penalties involved. Thus, for example, respondents could be unaware that the failure to complete a CARE plan can be considered in subsequent hearings under the Lanterman-Petris Short Act. As a result, TEXCOM recommends a notice of the above issue be added to the form to better fulfil its purpose in helping respondents understand the CARE process and better facilitate the statewide expansion of the process.	

Item number: 08

RULES COMMITTEE ACTION REQUEST FORM

Rules Committee Meeting Date: April 4, 2024

Rules Committee action requested [Choose from drop down menu below]**:**
Circulate for comment (out of cycle)

Title of proposal: Mental Health Law: CARE Act and Related Proceedings

*Proposed rules, forms, or standards (*include amend/revise/adopt/approve*):*
Approve form CARE-103

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*): October 26, 2023
Project description from annual agenda: CARE Act Rule Amendments and Form Revisions: The committee will develop a recommendation for amendments to the rules and revisions to the forms implementing the Community Assistance, Recovery, and Empowerment (CARE) Act (Welf. & Inst. Code, §§ 5970–5987) to conform to the law as amended by Senate Bill 35 (Stats. 2023, ch. 283) and to facilitate the act's implementation. Amendments are expected to address, among other issues, sharing private health information with the courts and specified agencies or providers and—to be developed in collaboration with the Family and Juvenile Law Advisory Committee—communication between a CARE Act court and a juvenile court when a person over the age of 18 who is subject to continuing juvenile court jurisdiction is also the subject of a CARE Act petition. The project is intended to assist litigants and courts in navigating the CARE Act process.

Out of Cycle: *If requesting September 1 effective date or out of cycle, explain why:*
The advisory committee circulated proposed CARE Act rule amendments and form revisions in the winter 2024 invitation-to-comment cycle. The Rules Committee is considering today whether to recommend Judicial Council approval of that proposal. In response to comments on the proposed addition of subdivision (e) to rule 7.2210, the committee now proposes approving form CARE-103 for optional use to issue the order required by recommended rule 7.2210(e). Because the form has not yet circulated for public comment, the committee asks to circulate it in the spring 2024 cycle, then to bring it back to the Rules Committee in May so the Judicial Council will be able to consider approval at its July 2024 meeting in time for the form to take effect with rule 7.2210(e) on September 1, 2024.

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:
  ☐ 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

SPR24-37

Title
Mental Health Law: CARE Act and Related Proceedings

Proposed Rules, Forms, Standards, or Statutes
Approve form CARE-103

Proposed by
Probate and Mental Health Advisory Committee
Hon. Jayne Chong-Soon Lee, Chair

Action Requested
Review and submit comments by May 3, 2024

Proposed Effective Date
September 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 approving an optional form for the court's use to order the county agency to provide information to the respondent's attorney—in specified related proceedings—that a petition to commence proceedings under the Community Assistance, Recovery, and Empowerment (CARE) Act has been filed on the respondent's behalf. This form would facilitate the process required by recommended rule 7.2210(e) of the California Rules of Court in response to statutory amendments and input from courts and counties.

Background

The Legislature and Governor enacted the CARE Act in 2022 to provide "a path to care and wellness" for Californians living with schizophrenia spectrum and other psychotic disorders that lead to "risks to their health and safety and increased homelessness, incarceration, hospitalization, conservatorship, and premature death."[1] To achieve this end, the act authorizes specified adults to petition a superior court for a determination that the person for whom the petition is filed (the respondent) is eligible to participate in the CARE Act process and, if so, for

[1] Sen. Bill 1338 (Stats. 2022, ch. 319, § 1(a)). The act is codified at Welfare and Institutions Code sections 5970–5987. All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

an order beginning the CARE Act process for the respondent.[2] The CARE Act took effect January 1, 2023.

At its May 12, 2023, meeting, the Judicial Council approved the adoption of California Rules of Court, rules 7.2201 through 7.2230, as a new chapter in Probate and Mental Health Rules. At the same meeting, the council adopted a new category of forms (CARE forms), with 13 new forms to implement requirements and provisions of the CARE Act. Those rules of court and forms took effect on September 1, 2023.

On September 30, 2023, Governor Newsom signed a CARE Act cleanup bill, Senate Bill 35 (Stats. 2023, ch. 283), which took effect immediately as urgency legislation. As provided in the original CARE Act, seven courts began accepting CARE Act petitions on October 1, 2023; the Los Angeles court joined them on December 1, 2023. In response to SB 35's statutory amendments and input from the first cohort of courts and counties to implement the act, the committee circulated proposed rule amendments and form revisions in the winter 2024 invitation-to-comment cycle.[3] The Judicial Council is scheduled to consider the recommended rules and forms, revised in response to comments received, at its May 2024 meeting. If the council approves the recommendation, the amended rules and revised forms would take effect September 1, 2024.

The Proposal

As part of the proposal circulated in winter 2024, the committee, joined by the Family and Juvenile Law Advisory Committee, proposed adding subdivision (e) to rule 7.2210. The new provision would require the CARE Act court—upon learning that the respondent had been referred from a proceeding specified in section 5978[4] or was at that time within a juvenile court's dependency, delinquency, or transition jurisdiction—to order the county agency to (1) inform the respondent's attorney in the related proceeding that a petition to commence CARE Act proceedings had been filed, and (2) provide that attorney with the name and contact information of the respondent's attorney in the CARE Act proceedings.

Commenters generally agreed with the proposed amendment but expressed concern about the ability of the county agency to obtain the information it would need to contact and inform the attorney in the related proceedings about the CARE Act proceeding. One court suggested that a form order that included known information about the related case and the respondent's attorney in that case would be helpful. The committee agrees and proposes approval of *Order to Provide*

[2] §§ 5972, 5974, 5975, and 5977.

[3] See Judicial Council of Cal., Invitation to Comment W24-03, *Mental Health Law: CARE Act Rule Amendments and Form Revisions, www.courts.ca.gov/documents/w24-03.pdf.*

[4] Section 5978 authorizes a court to refer a person to CARE Act proceedings from proceedings to determine a misdemeanor defendant's competence to stand trial, assisted outpatient treatment proceedings, and mental health conservatorship proceedings under the Lanterman-Petris-Short (LPS) Act.

Information to Respondent's Attorney in Related Proceedings (form CARE-103) for this purpose, effective September 1, 2024.

Because rule 7.2210(e) conditions the CARE Act court's duty to issue the order on its learning of the related proceeding and not on receipt of a motion or request, the committee anticipates that the court would issue the order sua sponte or, perhaps, in response to a party's having filed the form as a proposed order in conjunction with the petition or another filing that disclosed the existence of the related proceeding. The form therefore directs the court or the party filing the form to supply the case number of the related proceeding and the name and contact information of the respondent's attorney in that proceeding, if known, to assist the county agency in carrying out the order.

Alternatives Considered

The committee considered not proposing this form, but determined, based on comments received on the proposed addition of subdivision (e) to rule 7.2210, that an optional form for issuing the required order would be useful to the courts and parties.

Fiscal and Operational Impacts

The committee does not anticipate any fiscal or operational impact from the approval of this form.

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 one month 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. Form CARE-103, at page 4

CONFIDENTIAL

CARE-103

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:		
CARE ACT PROCEEDINGS FOR *(name)*: RESPONDENT		
ORDER TO PROVIDE INFORMATION TO RESPONDENT'S ATTORNEY IN RELATED PROCEEDINGS		CASE NUMBER:

DRAFT
Not approved by the Judicial Council

1. The respondent
   a. ☐ was referred to CARE Act proceedings from:
      (1) ☐ a misdemeanor proceeding, as provided in Penal Code section 1370.01.
      (2) ☐ an assisted outpatient treatment proceeding under Welfare and Institutions Code sections 5345 to 5349.1.
      (3) ☐ a conservatorship proceeding under Welfare and Institutions Code sections 5350 to 5372.
   b. ☐ is currently within a juvenile court's dependency, delinquency, or transition jurisdiction.

2. The court orders *(name):* ,
   as director of *(name of county agency):* ,
   or the director's designee, no later than 10 court days after receipt of this order, to inform the respondent's attorney in the proceeding identified in item 1 that:
   a. a CARE Act petition has been filed on behalf of the respondent; and
   b. the attorney representing the respondent in the CARE Act proceeding is:
      (name):
      (mailing address):

      (telephone number): *(email address):*

Date:

JUDICIAL OFFICER

RELATED CASE INFORMATION

To the party filing the proposed order and the court (if acting sua sponte or if any field below is left blank when filed):
Complete item 3 and enter all known information in items 4, 5, and 6, below, to assist the county agency in complying with the order.

3. The person entering the information below is *(name):*
   (job title): *(employer):*
4. ☐ The proceeding is pending in the Superior Court of *(county, if different from above):*
5. The case number of the related proceeding is *(number):*
6. The contact information for the respondent's attorney in the related proceeding is:
   (name):
   (mailing address):

   (telephone number): *(email address):*

The information above is true and correct to the best of my knowledge.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
CARE-103 [New September 1, 2024]

ORDER TO PROVIDE INFORMATION TO RESPONDENT'S ATTORNEY IN RELATED PROCEEDINGS

Welfare & Institutions Code, §§ 5977.4, 5978;
Cal. Rules of Court, rule 7.2210(e)
www.courts.ca.gov