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INVITATION TO COMMENT

CACI 22-01

Title
Civil Jury Instructions: Revisions to Judicial Council of California Civil Jury Instructions

Proposed Rules, Forms, Standards, or Statutes
Add and revise jury instructions and verdict forms

Proposed by
Advisory Committee on Civil Jury Instructions
Justice Martin J. Tangeman, Chair

Action Requested
Review and submit comments by March 7, 2022

Proposed Effective Date
May 12, 2022

Contact
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Executive Summary and Origin

The Advisory Committee on Civil Jury Instructions seeks public comment on proposed additions and revisions to the Judicial Council of California Civil Jury Instructions (CACI). Under California Rules of Court, rule 10.58, the advisory committee is responsible for regularly reviewing case law and statutes affecting jury instructions and making recommendations to the Judicial Council for updating, revising, and adding topics to the council's civil jury instructions. On approval by the Judicial Council, all changes will be published in the May 2022 supplement to the 2022 edition of the official LexisNexis Matthew Bender CACI publication.

Attachments and Links

1. Table of Contents, Civil Jury Instructions (CACI 22-01), pages 2–3
2. Proposed new and revised instructions and verdict forms, pages 4–91

CIVIL JURY INSTRUCTIONS (CACI 22-01)
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VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts

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We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***]'s claimed harm occur before [***insert date from applicable statute of limitations***]?**
   ____ 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. **Before [***insert date from applicable statute of limitations***], did [***name of plaintiff***] discover, or know of facts that would have caused a reasonable person to suspect, that [he/she/***nonbinary pronoun***/it] had suffered harm that was caused by someone's wrongful conduct?**
   ____ Yes ____ No

   [*or***]**

2. **Would a reasonable and diligent investigation have disclosed before [***insert date from applicable statute of limitations***] that [***specify factual basis for cause of action~~, e.g., "a medical device" or "inadequate medical treatment"~~***] contributed to [***name of plaintiff***]'s harm?**
   ____ 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 December 2007; Revised December 2010, May 2022

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. 454, *Affirmative Defense—Statute of Limitations,* and CACI No.

455, *Statute of Limitations—Delayed Discovery*. If the only issue is whether the plaintiff's harm occurred before or after the limitation date, omit question 2. If the plaintiff claims that the delayed-discovery rule applies to save the action, use the first option for question 2. If the plaintiff claims that a reasonable investigation would not have disclosed the pertinent information before the limitation date, use the second option for question 2. If both delayed-discovery and non-discovery despite reasonable investigation are at issue, use both options and renumber them as question 2 and question 3.

The date to be inserted throughout is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

In question 1, "claimed harm" refers to all of the elements of the cause of action, which must have occurred before the cause of action accrues and the limitation period begins. (*Glue-Fold, Inc. v. Slautterback Corp.* (2000) 82 Cal.App.4th 1018, 1029 [98 Cal.Rptr.2d 661].) In some cases, it may be necessary to modify this term to refer to specific facts that give rise to the cause of action.

The first option for question 2 may be modified to refer to specific facts that the plaintiff may have known.

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by an unsafe condition while employed by [***name of ~~plaintiff's employer~~contractor***] and working on [~~name of defendant~~]~~'s property~~*specify nature of work that defendant hired the contractor to perform*]. 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***] retained control over ~~safety conditions at the worksite~~ [***name of contractor***]'s manner of performance of [***specify nature of work***];**

~~3~~2. **That [***name of defendant***] ~~negligently~~ actually exercised [his/her/***nonbinary pronoun***/its] retained control over ~~safety conditions by~~ that work by [***specify alleged ~~negligent acts or omissions~~ negligence of defendant***];**

~~4~~3. **That [***name of plaintiff***] was harmed; and**

~~5~~4. **That [***name of defendant***]'s negligent exercise of [his/her/***nonbinary pronoun***/its] retained control ~~over safety conditions was a substantial factor in causing~~ affirmatively contributed to [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017, May 2022

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the ~~safety conditions at the worksite~~ manner of performance of some part of the work entrusted to the contractor. (*Sandoval v. Qualcomm Inc.* (2021) 12 Cal.5th 256, 274.) Both retaining control and actually exercising control over some aspect of the work is required because hirers who fully and effectively delegate work to a contractor owe no tort duty to that contractor's workers. (See *id.*) 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 unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. 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.

The hirer's exercise of retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081]; see also *Sandoval, supra,* 12 Cal.5th at p. 277.) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Hooker, supra,* 27 Cal.4th ~~*Id.* at~~ p. 212, fn. 3; see also *Sandoval, supra,* 12 Cal.5th at p. 277.) "Affirmative contribution" means that there must be causation between the hirer's exercising retained control and the plaintiff's injury. Modification may be required if the defendant's failure to act is alleged pursuant to *Hooker*.~~But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. Element 5, the standard "substantial factor" element, expresses the "affirmative contribution." requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594–595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)~~

Sources and Authority

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Contract workers must prove that the hirer *both* retained control *and* actually exercised that retained control in such a way as to affirmatively contribute to the injury." (*Sandoval, supra,* 12 Cal.5th at p. 276, original italics.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- " 'Affirmative contribution' means that the hirer's exercise of retained control contributes to the injury in a way that isn't merely derivative of the contractor's contribution to the injury. Where the contractor's conduct is the immediate cause of injury, the affirmative contribution requirement can be satisfied only if the hirer in some respect induced—not just failed to prevent—the contractor's injury-causing conduct." (*Sandoval, supra,* 12 Cal.5th at p. 277.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at

a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

"[A]ffirmative contribution is a different sort of inquiry than substantial factor causation. For instance, a fact finder might reasonably conclude that a hirer's negligent hiring of the contractor was a substantial factor in bringing about a contract worker's injury, and yet negligent hiring is not affirmative contribution because the hirer's liability is essentially derivative of the contractor's conduct. Conversely, affirmative contribution does not itself require that the hirer's contribution to the injury be substantial." (*Sandoval, supra,* 12 Cal.5th at p. 278), internal citations omitted.)

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- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- ~~"Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594–595 [207 Cal.Rptr.3d 712].)~~

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an

injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "Although plaintiffs concede that [contractor] had exclusive control over how the window washing would be done, they urge that [owner] nonetheless is liable because it affirmatively contributed to decedent's injuries 'not [by] active conduct *but … in the form of an omission to act*.' Although it is undeniable that [owner]'s failure to equip its building with roof anchors contributed to decedent's death, *McKown* [*v. Wal-Mart Stores, Inc.* (2002) 27 Cal.4th 219] does not support plaintiffs' suggestion that a passive omission of this type is actionable. … Subsequent Supreme Court decisions … have repeatedly rejected the suggestion that the passive provision of an unsafe workplace is actionable. … Accordingly, the failure to provide safety equipment does not constitute an 'affirmative contribution' to an injury within the meaning of *McKown*." (*Delgadillo v. Television Center, Inc.* (2018) 20 Cal.App.5th 1078, 1093 [229 Cal.Rptr.3d 594], original italics.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'… [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

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

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

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

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

1306. Sexual Battery—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] committed a sexual battery. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **[(a) That [***name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

   [OR]

   [(b) That [*name of defendant***] intended to cause a harmful [or offensive] contact with [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

   [OR]

   [(c) That [*name of defendant***] caused an imminent fear of a harmful [or offensive] contact with [[***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast]/ [or] [***name of plaintiff***] by use of [***name of defendant***]'s [sexual organ/anus/groin/buttocks/ [or] breast]], and a sexually offensive contact with [***name of plaintiff***] resulted, either directly or indirectly;]**

   [OR]

   [(d) That [*name of defendant***] caused contact between a sexual organ, from which a condom has been removed, and [***name of plaintiff***]'s [sexual organ/anus/groin/buttocks/ [or] breast];]**

   [OR]

   [(e) That [*name of defendant***] caused contact between [a/an] [sexual organ/anus/groin/buttocks/ [or] breast] and [***name of plaintiff***]'s sexual organ from which [***name of defendant***] removed a condom;]**

AND

2. **That [***name of plaintiff***] did not [consent to the touching/verbally consent to the condom being removed]; and**

3. **That [***name of plaintiff***] was harmed [or offended] by [***name of defendant***]'s conduct.**

["Offensive contact" means contact that offends a reasonable sense of personal dignity.]

New October 2008; Revised May 2022

Directions for Use

Omit any of the options for element 1 that are not supported by the evidence. If more than one are at issue, include the word "OR" between them.

Use the second bracketed alternative in element 2 only if option (d) or option (e) is at issue. (Compare Civ. Code, § 1708.5(a), (b), (c) with Civ. Code, § 1708.5(d), (e).) Modification of the instruction will be necessary if the plaintiff's claim involves any of options (a)–(c) and option (d) or option (e) because the consent requirement is not the same.

Give the bracketed words "or offensive" in element 1 and "or offended" in element 3 and include the optional last sentence if the offensive nature of the conduct is at issue. In most cases, it will be clear whether the alleged conduct was offensive. The offensive nature of the conduct will most likely not be at issue if the conduct was clearly harmful.

For a definition of "intent," see CACI No. 1320, *Intent*.

Sources and Authority

- Sexual Battery. Civil Code section 1708.5.
- Consent as Defense. Civil Code section 3515.
- "A cause of action for sexual battery under Civil Code section 1708.5 requires the batterer intend to cause a 'harmful or offensive' contact and the batteree suffer a 'sexually offensive contact.' Moreover, the section is interpreted to require that the batteree did not consent to the contact." (*Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1225 [44 Cal.Rptr.2d 197], internal citation omitted.)
- "The element of lack of consent to the particular contact is an essential element of battery." (*Rains v. Superior Court* (1984) 150 Cal.App.3d 933, 938 [198 Cal.Rptr. 249].)
- "As a general rule, one who consents to a touching cannot recover in an action for battery. ... However, it is well-recognized a person may place conditions on the consent. If the actor exceeds the terms or conditions of the consent, the consent does not protect the actor from liability for the excessive act." (*Ashcraft v. King* (1991) 228 Cal.App.3d 604, 609–610 [278 Cal.Rptr. 900].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 452–488

3 Levy et al., California Torts, Ch. 41, *Assault and Battery*, § 41.01[3] (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.27, 58.55 (Matthew

Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery,* § 21.27 (Matthew Bender)

California Civil Practice: Torts §§ 12:7–12:9, 12:36-12:39 (Thomson Reuters)

1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of victim***];**

2. **That when the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, [***name of plaintiff***] was [virtually] present at the scene [through [***specify technological means***]];**

3. **That [***name of plaintiff***] was then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of victim***];**

4. **That [***name of plaintiff***] suffered serious emotional distress; and**

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

[*Name of plaintiff***] need not have been then aware that [***name of defendant***] had caused the [***e.g., traffic accident***].**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013, June 2014, December 2014, December 2015, May 2022

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "bystander" case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*,

and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Include the optional language in element 2 only if the plaintiff claims virtual presence at the scene through technological means, and specify the technology used to assist the jury in understanding the concept of "virtual" presence. (See *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144, 1159 [272 Cal.Rptr.3d 906].)

There is some uncertainty as to how the "event" should be defined in element 2 and then just exactly what the plaintiff must perceive in element 3. When the event is something dramatic and visible, such as a traffic accident or a fire, it would seem that the plaintiff need not know anything about why the event occurred. (See *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].) And the California Supreme Court has stated that the bystander plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324], original italics.)

But what constitutes perception of the event is less clear when the victim is clearly in observable distress, but the cause of that distress may not be observable. It has been held that the manufacture of a defective product is the event, which is not observable, despite the fact that the result was observable distress resulting in death. (See *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 843−844 [151 Cal.Rptr.3d 320].) In another observable-distress case, medical negligence that led to distress resulting in death was found to be perceivable because the relatives who were present observed the decedent's acute respiratory distress and were aware that defendant's *inadequate* response caused her death. (See *Keys v. Alta Bates Summit Medical Center* (2015) 235 Cal.App.4th 484, 489−490 [185 Cal.Rptr.3d 313], emphasis added.) It might be argued that observable distress is the event and that the bystanders need not perceive anything about the cause of the distress. However, these cases indicate that is not the standard. But if it is not necessary to comprehend that negligence is causing the distress, it is not clear what it is that the bystander must perceive in element 3. Because of this uncertainty, the Advisory Committee has elected not to try to express element 3 any more specifically.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra,* 27 Cal.3d at p. 928.) In *Wong v. Jing,* an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747]; but see *Keys, supra,* 235 Cal.App.4th at p. 491 [finding last sentence of this instruction to be a correct description of the distress required].)

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 738 [69 Cal.Rptr. 72, 441 P.2d 912].)

- "As an introductory note, we observe that plaintiffs … framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort … .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman, supra,* 212 Cal.App.4th at p. 836.)

- "Where plaintiffs allege they were virtually present at the scene of an injury-producing event sufficient for them to have a contemporaneous sensory awareness of the event causing injury to their loved one, they satisfy the second *Thing* requirement to state a cause of action for NIED. Just as the Supreme Court has ruled a 'plaintiff may recover based on an event perceived by other senses so long as the event is contemporaneously understood as causing injury to a close relative', so too can the [plaintiffs] pursue an NIED claim where, as alleged, they contemporaneously saw and heard [their child's] abuse, but with their senses technologically extended beyond the walls of their home." (*Ko ~~v. Maxim Healthcare Services, Inc.~~ (2020) , supra,* 58 Cal.App.5th ~~1144,~~ at p. 1159 ~~[272 Cal.Rptr.3d 906]~~, internal citation omitted.)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird, supra,* 28 Cal.4th at p. 920.)

- "*Bird* does not categorically bar plaintiffs who witness acts of medical negligence from pursuing NIED claims. 'This is not to say that a layperson can never perceive medical negligence or that one who does perceive it cannot assert a valid claim for NIED.' Particularly, a NIED claim may arise when … caregivers fail 'to respond significantly to symptoms obviously requiring immediate medical attention.' " (*Keys, supra,* 235 Cal.App.4th at p. 489.)

- "The injury-producing event here was defendant's lack of acuity and response to [decedent]'s inability

to breathe, a condition the plaintiffs observed and were aware was causing her injury." (*Keys, supra,* 235 Cal.App.4th at p. 490.)

- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman, supra,* 212 Cal.App.4th at p. 841, fn. 4.)

- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman, supra,* 212 Cal.App.4th at pp. 843−844.)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)

- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)

- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks, supra,* 2 Cal.App.4th at p. 1271.)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra,* 189 Cal.App.4th at p. 1378.)

- "We have no reason to question the jury's conclusion that [plaintiffs] suffered serious emotional distress as a result of watching [decedent] 's struggle to breathe that led to her death. The jury was properly instructed, as explained in *Thing,* that '[s]erious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.' The instructions clarify that 'Emotional distress includes suffering, anguish, fright, … nervousness, grief, anxiety, worry, shock … .' Viewed through

this lens there is no question that [plaintiffs'] testimony provides sufficient proof of serious emotional distress." (*Keys, supra,* 235 Cal.App.4th at p. 491, internal citation omitted.)

- "[W]here a participant in a sport has expressly assumed the risk of injury from a defendant's conduct, the defendant no longer owes a duty of care to bystanders with respect to the risk expressly assumed by the participant. The defendant can therefore assert the participant's express assumption of the risk against the bystanders' NIED claims." (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 731 [183 Cal.Rptr.3d 234].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1144–1158

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153*, Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements (Civ. Code, § 1708.85)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her/***nonbinary pronoun***] right to privacy by distributing private sexually explicit materials. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally distributed by [***specify means, e.g., posting online***] [a] [photograph(s)/film(s)/videotape(s)/recording(s)/[***specify other reproduction***]] of [***name of plaintiff***];**

2. **That [***name of plaintiff***] did not consent to the distribution of the [***specify, e.g., photographs***];**

3. **That [***name of defendant***] knew, or reasonably should have known, that [***name of plaintiff***] had a reasonable expectation that the [***e.g., photographs***] would remain private;**

4. **That the [***e.g., photographs***] [exposed an intimate body part of [***name of plaintiff***]/ [or] showed [***name of plaintiff***] engaging in an act of [intercourse/oral copulation/sodomy/ [or] [***specify other act of sexual penetration***]];**

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.**

[An "intimate body part" is any part of the genitals[, and, in the case of a female, also includes any portion of the breast below the top of the areola,] that is uncovered or visible through less than fully opaque clothing.]

New December 2015; Revised May 2022

Directions for Use

This instruction is for use for an invasion-of-privacy cause of action for the dissemination of sexually explicit materials. (See Civ. Code, § 1708.85(a).) It may not be necessary to include the last definitional paragraph as the court may rule as a matter of law that an image of an intimate body part has been distributed. (See Civ. Code, § 1708.85(b).)

~~The plaintiff's harm (element 5) is~~ Plaintiff may recover general or special damages as defined in subdivision (d) of Civil Code section 48a. (Civ. Code, § 1708.85(a).) "General damages" are damages for loss of reputation, shame, mortification and hurt feelings. (Civ. Code, § 48a(d)(1).) "Special damages" are essentially economic loss. (Civ. Code, § 48a(d)(2.)

Sources and Authority

- Right of Action Against Distributor of Private Sexually Explicit Material. Civil Code section 1708.85

- General and Special Damages. Civil Code section 48a(d)(1), (2)

Secondary Sources

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.07 (Matthew Bender)

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.25B (Matthew Bender)

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

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[*Name of plaintiff*] claims that [*name of defendant*] breached the obligation of good faith and fair dealing because [*name of defendant*] failed to accept a reasonable settlement demand for a claim against [*name of plaintiff*]. To establish ~~this~~ [*name of plaintiff*]'s claim against [*name of defendant*], [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under a policy of liability insurance issued by [*name of defendant*];**

2. **That [*name of ~~plaintiff in underlying case~~ claimant*] made a claim against [*name of plaintiff*] that was covered by [*name of defendant*]'s insurance policy;**

3. **That ~~[*name of defendant*] failed to accept~~ [*name of claimant*] made a reasonable ~~settlement~~ demand to settle [his/her/*nonbinary pronoun*] claim against [*name of plaintiff*] for an amount within policy limits;**

4. **That [*name of defendant*] failed to accept this settlement demand;**

~~4~~5. **That [*name of defendant*]'s failure to accept the settlement demand was the result of unreasonable conduct by [*name of defendant*]; and**

~~5~~

6. **That a ~~monetary~~ judgment was entered against [*name of plaintiff*] for a sum of money greater than the policy limits.**

[or]

6. **That [*name of defendant*]'s failure to accept the settlement demand was a substantial factor in causing [*name of plaintiff*]'s harm.**

"Policy limits" means the highest amount of insurance coverage available under the policy for the claim against [*name of plaintiff*].

A settlement demand for an amount within policy limits is reasonable if [*name of defendant*] knew or should have known at the time ~~the~~ it failed to accept the demand ~~was rejected~~ that a potential judgment against [*name of plaintiff*] was likely to exceed the amount of the demand based on [*name of ~~plaintiff in underlying case~~ claimant*]'s injuries or losses and [*name of plaintiff*]'s probable liability. However, the demand may be unreasonable for reasons other than the amount demanded.

An insurance company's unreasonable conduct may be shown by its action or by ~~the~~ its failure to act. An insurance company's conduct is unreasonable when, for example, it does not give at least as

much consideration to the interests of the insured as it gives to its own interests.

New September 2003; Revised December 2007, June 2012, December 2012, June 2016, November 2021, May 2022

Directions for Use

This instruction is for use in an "excess judgment" case; that is one in which judgment was against the insured for an amount over the policy limits, after the insurer rejected a settlement demand within policy limits. Use the first option for element 6 if the plaintiff is seeking only the amount of the excess judgment. Use the second option for element 6 if the plaintiff is seeking damages separate from or in addition to the excess judgment. (See *Howard v. American National Fire Ins. Co.* (2010) 187 Cal.App.4th 498, 527 [115 Cal.Rptr.3d 42].)

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case. For example, if the plaintiff is the insured's assignee, modify the instruction as needed to reflect the underlying facts and relationship between the parties.

For instructions regarding general breach of contract issues, refer to the Contracts series (CACI No. 300 et seq.).

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

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

Sources and Authority

- "[T]he implied obligation of good faith and fair dealing requires the insurer to settle in an appropriate case although the express terms of the policy do not impose such a duty. [¶] The insurer, in deciding whether a claim should be compromised, must take into account the interest of the insured and give it at least as much consideration as it does to its own interest. When there is great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration in good faith of the insured's interest requires the insurer to settle the claim." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659 [328 P.2d 198], citation omitted.)

- "Liability is imposed not for a bad faith breach of the contract but for failure to meet the duty to accept reasonable settlements, a duty included within the implied covenant of good faith and fair dealing." (*Crisci v. Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 430 [58 Cal.Rptr. 13, 426 P.2d 173].)

- "In determining whether an insurer has given consideration to the interests of the insured, the test is whether a prudent insurer without policy limits would have accepted the settlement offer." (*Crisci*, *supra,* 66 Cal.2d at p. 429.)

- "[I]n deciding whether or not to compromise the claim, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. ... [T]he only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto. Assn. Inter-Insurance Bureau* (1975) 15 Cal.3d 9, 16 [123 Cal.Rptr. 288, 538 P.2d 744], internal citation omitted.)

- "[A]n insurer is required to act in good faith in dealing with its insured. Thus, in deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests may require the insurer to settle the claim within the policy limits. An unreasonable refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." (*Hamilton v. Maryland Cas. Co.* (2002) 27 Cal.4th 718, 724–725 [117 Cal.Rptr.2d 318, 41 P.3d 128].)

- "The size of the judgment recovered in the personal injury action when it exceeds the policy limits, although not conclusive, furnishes an inference that the value of the claim is the equivalent of the amount of the judgment and that acceptance of an offer within those limits was the most reasonable method of dealing with the claim." (*Crisci*, *supra,* 66 Cal.2d at p. 431.)

- "The covenant of good faith and fair dealing implied in every insurance policy obligates the insurer, among other things, to accept a reasonable offer to settle a lawsuit by a third party against the insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits. The insurer must evaluate the reasonableness of an offer to settle a lawsuit against the insured by considering the probable liability of the insured and the amount of that liability, without regard to any coverage defenses. An insurer that fails to accept a reasonable settlement offer within policy limits will be held liable in tort for the entire judgment against the insured, even if that amount exceeds the policy limits. An insurer's duty to accept a reasonable settlement offer in these circumstances is implied in law to protect the insured from exposure to liability in excess of coverage as a result of the insurer's gamble—on which only the insured might lose." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 836 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "An insured's claim for bad faith based on an alleged wrongful refusal to settle first requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. The offer satisfies this first element if (1) its terms are clear enough to have created an enforceable contract resolving all claims had it been accepted by the insurer, (2) all of the third party claimants have joined in the demand, (3) it provides for a complete release of all insureds, and (4) the time provided for acceptance did not deprive the insurer of an adequate opportunity to investigate and evaluate its insured's exposure." (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], internal citations omitted.)

- "An insurer's duty to accept a reasonable settlement offer is not absolute. ' "[I]n deciding whether or not to settle a claim, the insurer must take into account the interests of the insured, and when there is a great risk of recovery beyond the policy limits, a good faith consideration of the insured's interests *may* require the insurer to settle the claim within the policy limits. An *unreasonable* refusal to settle may subject the insurer to liability for the entire amount of the judgment rendered against the insured, including any portion in excess of the policy limits." ' [¶] Therefore, failing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' " *(Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688 [276 Cal.Rptr.3d 13], internal citations omitted, original italics.)

- "A claim for bad faith based on the wrongful refusal to settle thus requires proof the insurer unreasonably failed to accept an offer. [¶] Simply failing to settle does not meet this standard." (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citation omitted.)

- "To be liable for bad faith, an insurer must not only cause the insured's damages, it must act or fail to act without proper cause, for example by placing its own interests above those of its insured." (*Pinto, supra,* 61 Cal.App.5th at p. 692.)

- "A bad faith claim requires 'something beyond breach of the contractual duty itself, and that something more is ' "refusing, *without proper cause,* to compensate its insured for a loss covered by the policy … ." [Citation.] Of course, the converse of "without proper cause" is that declining to perform a contractual duty under the policy *with proper cause* is not a breach of the implied covenant.' " (*Graciano, supra,* 231 Cal.App.4th at p. 433, original italics.)

- "Determination of the reasonableness of a settlement offer for purposes of a reimbursement action is based on the information available to [the insurer] at the time of the proposed settlement." (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793 [244 Cal.Rptr. 655, 750 P.2d 297].)

- "The third party is entitled to set a reasonable time limit within which the insurer must accept the settlement proposal … ." (*Graciano, supra,* 231 Cal.App.4th at p. 434.)

- "Whether [the insurer] 'refused' the 'offer,' and whether it could reasonably have acted otherwise in light of the 11-day deadline imposed by the offer's terms, were questions for the jury." (*Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [136 Cal.Rptr. 331].)

- "A cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits. ... Until judgment is actually entered, the mere possibility or probability of an excess judgment does not render the refusal to settle actionable." (*Safeco Ins. Co. of Am. v. Superior Court* (1999) 71 Cal.App.4th 782, 788 [84 Cal.Rptr.2d 43], internal citations omitted.)

- "An insurer's wrongful failure to settle may be actionable even without rendition of an excess judgment. An insured may recover for bad faith failure to settle, despite the lack of an excess judgment, where the insurer's misconduct goes beyond a simple failure to settle within policy limits or the insured suffers consequential damages apart from an excess judgment." (*Howard, supra, ~~v. American National Fire Ins. Co.~~ (2010)* 187 Cal.App.4th ~~498,~~ at p. 527 ~~[115 Cal.Rptr.3d 42]~~, internal citations omitted.)

- " 'An insurer who denies coverage *does so at its own risk and although its position may not have been entirely groundless,* if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.' Accordingly, contrary to the defendant's suggestion, an insurer's 'good faith,' though erroneous, belief in noncoverage affords no defense to liability flowing from the insurer's refusal to accept a reasonable settlement offer." (*Johansen, supra,* 15 Cal.3d at pp. 15−16, original italics, footnotes and internal citation omitted.)

- "[W]here the *kind* of claim asserted is not covered by the insurance contract (and not simply the *amount* of the claim), an insurer has no obligation to pay money in settlement of a noncovered claim, because 'The insurer does not … insure the entire range of an insured's well-being, outside the scope of and unrelated to the insurance policy, with respect to paying third party claims.' " (*Dewitt v. Monterey Ins. Co.* (2012) 204 Cal.App.4th 233, 244 [138 Cal.Rptr.3d 705], original italics.)

- "A good faith belief in noncoverage is not relevant to a determination of the reasonableness of a settlement offer." (*Samson v. Transamerica Insurance Co.* (1981) 30 Cal.3d 220, 243 [178 Cal.Rptr. 343, 636 P.2d 32], internal citation omitted.)

- "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. Where the underlying action has proceeded to trial and a judgment in excess of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment, excluding any punitive damages awarded." (*Hamilton, supra,* 27 Cal.4th at p. 725, internal citations omitted.)

- "[I]nsurers do have a 'selfish' interest (that is, one that is peculiar to themselves) in imposing a blanket rule which effectively precludes disclosure of policy limits, and that interest can adversely affect the possibility that an excess claim against a policyholder might be settled within policy limits. Thus, a palpable conflict of interest exists in at least one context where there is no formal settlement offer. We therefore conclude that a formal settlement offer is not an absolute prerequisite to a bad faith action in the wake of an excess verdict when the claimant makes a request for policy limits and the insurer refuses to contact the policyholder about the request." (*Boicourt v. Amex Assurance Co.* (2000) 78 Cal.App.4th 1390, 1398−1399 [93 Cal.Rptr.3d 763].)

- "For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no 'opportunity to settle' that an insurer may be taxed with ignoring." (*Reid v. Mercury Ins. Co.* (2013) 220 Cal.App.4th 262, 272 [162 Cal.Rptr.3d 894].)

- "[F]ailing to accept a reasonable settlement offer does not necessarily constitute bad faith. '[T]he crucial issue is … the basis for the insurer's decision to reject an offer of settlement.' '[M]ere errors by an insurer in discharging its obligations to its insured " 'does not necessarily make the insurer

liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*.' " ' " (*Pinto, supra,* 61 Cal.App.5th at p. 688, internal citations omitted, original italics.)

- "In short, so long as insurers are not subject to a strict liability standard, there is still room for an honest, innocent mistake." (*Walbrook Ins. Co. Ltd. v. Liberty Mut. Ins. Co.* (1992) 5 Cal.App.4th 1445, 1460 [7 Cal.Rptr.2d 513, 521].)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 366–368

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-A, *Implied Covenant Liability—Introduction*, ¶¶ 12:202–12:224 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-B, *Bad Faith Refusal To Settle*, ¶¶ 12:226–12:548 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-C, *Bad Faith Liability Despite Settlement Of Third Party Claims*, ¶¶ 12:575–12:581.12 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, *Refusal To Defend Cases*, ¶¶ 12:582–12:686 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Settle, §§ 26.1–26.35

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

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

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

VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits

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We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] insured under a policy of liability insurance issued by [***name of defendant***]?**
   ____ Yes ____ No

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

2. **Did [***name of claimant***] make a claim against [***name of plaintiff***] that was covered by [***name of defendant***]'s insurance policy?**
   ____ 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 claimant***] make a reasonable settlement demand to settle [his/her/***nonbinary pronoun***] claim against [***name of plaintiff***] for an amount within policy limits?**
   ____ Yes ____ No

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

4. **Did [***name of defendant***] fail to accept this settlement demand?**
   ____ Yes ____ No

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

5. **Was [***name of defendant***]'s failure to accept the settlement demand the result of unreasonable conduct by [***name of defendant***]?**
   ____ Yes ____ No

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

6. Was a judgment entered against [*name of plaintiff*] for a sum of money greater than the policy limits?
____ Yes ____ No

[or]

Was [*name of defendant*]'s failure to accept the settlement demand a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

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

New May 2022

Directions for Use

This verdict form is based on CACI No. 2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits—Essential Factual Elements.*

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

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

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

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.

2522A. Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her/***nonbinary pronoun***] to harassment based on [***describe protected status, e.g., race, gender, or age***] at [***name of employer***] 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 employer***];**

[2. That [*name of defendant***] was an employee of [***name of employer***];]**

~~2~~**3. That [***name of plaintiff***] was subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***];**

~~3~~**4. That the harassing conduct was severe or pervasive;**

~~4~~**5. 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~~**6. That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive;**

~~6~~**7. That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

~~7~~**8. That [***name of plaintiff***] was harmed; and**

~~8~~**9. That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was the target of the harassing conduct and the defendant is ~~an individual such as the alleged harasser or plaintiff's coworker~~ an "employee of an entity subject to this subdivision." (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee, and include an additional question on the verdict form. See CACI No. VF-2507A, *Work Environment Harassment—Conduct*

Directed at Plaintiff—Individual Defendant.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) 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 employer defendant, see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant*. For a case in which the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant*. Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

Modify element ~~2~~3 if the 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).)

If there are both employer and individual supervisor defendants (see CACI No. 2521A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity 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].)

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).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "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).

- "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.)

- "Under FEHA, an employee who harasses another employee may be held personally liable." (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524 [169 Cal.Rptr.3d 794].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1331 [58 Cal.Rptr.2d 308].)

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, 3.36–3.45

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 §§ 2:56–2:56.50 (Thomson Reuters)

2522B. Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

[*Name of plaintiff***] claims that coworkers at [***name of employer***] 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 employer***];**

[2. That [*name of defendant*] was an employee of [*name of employer*];]

2~~3~~. **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~~4~~. **That the harassing conduct was severe or pervasive;**

4~~5~~. **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~~6~~. **That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [***e.g., women***];**

6~~7~~. **That [***name of defendant***] [participated in/assisted/ [or] encouraged] the harassing conduct;**

7~~8~~. **That [***name of plaintiff***] was harmed; and**

8~~9~~. **That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018, July 2019, November 2021, May 2022

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 individual such as the alleged harasser or plaintiff's coworker~~ an "employee of an entity subject to this subdivision." (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee, and include an additional

question on the verdict form. See CACI No. VF-2507B, *Work Environment Harassment—Conduct Directed at Others—Individual Defendant*.

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (See Gov. Code, § 12940(j)(1).) 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 employer defendant, see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* For a case in which the plaintiff is the target of the harassment, see CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the hostile environment is due to sexual favoritism, see CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity 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).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "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 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.)

- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra,* 50 Cal.App.4th at p. 1331.)

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, 3.36–3.45

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, 2:56.50 (Thomson Reuters)

2522C. Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual 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 employer***] 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 these 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 employer***];**

[2. That [*name of defendant***] was an employee of [***name of employer***];]**

~~2~~**3. That there was sexual favoritism in the work environment;**

~~3~~**4. That the sexual favoritism was severe or pervasive;**

~~4~~**5. 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~~**6. That [***name of plaintiff***] considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive because of the sexual favoritism;**

~~6~~**7. That [***name of defendant***] [participated in/assisted/ [or] encouraged] the sexual favoritism;**

~~7~~**8. That [***name of plaintiff***] was harmed; and**

~~8~~**9. That the conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018, July 2019, May 2020, November 2021, May 2022

Directions for Use

This instruction is for use in a hostile work environment case involving sexual favoritism when the defendant is ~~an individual such as the alleged harasser or plaintiff's coworker~~ an "employee of an entity subject to this subdivision." (Gov. Code, § 12940(j)(3).) Include optional element 2 if there is a dispute about the defendant's status as an employee, and include an additional question on the verdict form. See

CACI No. VF-2507C, *Work Environment Harassment—Sexual Favoritism—Individual Defendant.*

The relevant provision protects an employee, an applicant, an unpaid intern or volunteer, or a person providing services under a contract. (Gov. Code, § 12940(j)(1).) If the facts of the case support it, the instruction should be modified as appropriate to the applicant's circumstances.

For an employer defendant, see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity 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. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

If there are both employer and individual supervisor defendants (see CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity 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).
- Employee Personal Liability for Harassment. Government Code section 12940(j)(3).
- "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 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].)
- "[W]e conclude a nonharassing supervisor, who fails to take action to prevent sexual harassment, is not personally liable for sexual harassment under the Fair Employment and Housing Act (FEHA)." (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322 [58 Cal.Rptr.2d 308].)

- "A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer." (*Fiol*, *supra*, 50 Cal.App.4th at p. 1331.)

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, 3.36–3.45

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[5] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 2:56, 2:56.50 (Thomson Reuters)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her/***nonbinary pronoun***] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove 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 [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**

4. That [*name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**

5. That [*name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements;**

6. That [*name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

[7. That [*name of defendant***] could have made a reasonable accommodation when the interactive process should have taken place;]**

~~7~~8. That [*name of plaintiff***] was harmed; and**

~~8~~9. That [*name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009, May 2022

Directions for Use

In elements 3 and 4, select a term to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

~~There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process~~. Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare ~~*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with~~ *Nadaf-Rahrov v. The ~~Nieman~~ Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] ~~with~~; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict]; *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] [adopting the *Scotch* court's reasoning].) See also verdict form CACI No. VF-2513, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.
- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility

for the failure rests with the party who failed to participate in good faith." (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)

- "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 v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242 [206 Cal.Rptr.3d 841].)

- "FEHA requires an informal process with the employee to attempt to identify reasonable accommodations, not necessarily ritualized discussions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 [184 Cal.Rptr.3d 9].)

- "The point of the interactive process is to find reasonable accommodation for a disabled employee, or an employee regarded as disabled by the employer, in order to *avoid* the employee's termination. Therefore, 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 pp. 243−244, original italics.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)

- "Typically, the employee must initiate the process 'unless the disability and resulting limitations are obvious.' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971−972 [181 Cal.Rptr.3d 553].)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p. 62, fn. 23.)

- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. … To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)

- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree … with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)

- "We synthesize *Wysinger, Nadaf-Rahrov,* and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. …' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

- "Well-reasoned precedent supports [defendant's] argument that, in order to succeed on a cause of action for failure to engage in an interactive process, 'an employee must identify a reasonable

accommodation that would have been available at the time the interactive process should have occurred.' " (*Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 96 [273 Cal.Rptr.3d 312].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1048

Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA),* ¶¶ 9:2280–9:2285, 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*, § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

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

VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] [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 employer***]?**
   ____ 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***] an employee of [***name of employer***]?**
Yes No

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

~~2~~3. **Was [***name of plaintiff***] subjected to harassing conduct because [he/she/***nonbinary pronoun***] was [***protected status, e.g., a woman***]?**
____ Yes ____ No

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

~~3~~4. **Was the harassment severe or pervasive?**
____ Yes ____ No

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

~~4~~5. **Would a reasonable [***e.g., woman***] in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ Yes ____ No

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

~~5~~6. **Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive?**
____ Yes ____ No

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

~~6~~7. **Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?**
____ Yes ____ No

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

~~7~~8. **Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?**
____ Yes ____ No

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

~~8~~9. **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.

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

This verdict form is based on CACI No. 2522A, *Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2522A.

Modify question ~~2~~3 if the 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).)

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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.

VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [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 employer*]?
____ 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*] an employee of [*name of employer*]?
Yes No

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

~~2~~3. Did [*name of plaintiff*] personally witness harassing conduct that took place in [his/her/*nonbinary pronoun*] immediate work environment?
____ Yes ____ No

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

~~3~~4. Was the harassment severe or pervasive?
____ Yes ____ No

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

~~4~~5. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
____ Yes ____ No

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

~~5~~6. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating, offensive, oppressive, or abusive toward [*e.g., women*]?
____ Yes ____ No

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

~~6~~7. Did [*name of defendant*] [participate in/assist/ [or] encourage] the harassing conduct?
____ Yes ____ No

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

~~7~~8. Was the harassing conduct a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

~~8~~9. 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.

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, June 2013, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

This verdict form is based on CACI No. 2522B, *Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2521C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant*.

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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.

VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant (Gov. Code, §§ 12923, 12940(j))

We answer the questions submitted to us as follows:

1. Was [*name of plaintiff*] [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 employer*]?
____ 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*] an employee of [*name of employer*]?
Yes No

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

~~2~~3. Was there sexual favoritism in the work environment?
____ Yes ____ No

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

~~3~~4. Was the sexual favoritism severe or pervasive?
____ Yes ____ No

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

~~4~~5. Would a reasonable [*describe member of protected group, e.g., woman*] in [*name of plaintiff*]'s circumstances have considered the work environment to be hostile, intimidating, offensive, oppressive, or abusive?
____ Yes ____ No

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

~~5~~6. Did [*name of plaintiff*] consider the work environment to be hostile, intimidating,

offensive, oppressive, or abusive because of the sexual favoritism?
____ Yes ____ No

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

~~6~~7. Did [*name of defendant*] [participate in/assist/ [or] encourage] the sexual favoritism?
____ Yes ____ No

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

~~7~~8. Was the sexual favoritism a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

~~8~~9. 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.

Derived from former CACI No. VF-2507 December 2007; Revised December 2010, December 2014, December 2016, May 2020, May 2021, November 2021, May 2022

Directions for Use

This verdict form is based on CACI No. 2522C, *Work Environment Harassment—Sexual Favoritism—Essential Factual Elements—Individual Defendant*.

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.

Relationships other than employer/employee can be substituted in question 1, as in element 1 in CACI No. 2521C. Depending on the facts of the case, other factual scenarios for employer liability can be substituted in questions ~~6 and~~ 7, as in element ~~6~~7 of the instruction.

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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

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.

VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

We answer the questions submitted to us as follows:

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

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

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

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

3. **Did [***name of plaintiff***] have [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***] request that [***name of defendant***] make reasonable accommodation for [his/her/***nonbinary pronoun***] [***e.g., physical condition***] so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***] willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she/***nonbinary pronoun***] would be able to perform the essential job requirements?**
   ____ 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 participate in a timely, good-faith interactive process with [*name of plaintiff*] to determine whether reasonable accommodation could be made?

____ 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. Could [*name of defendant*] have made a reasonable accommodation when the interactive process should have taken place?

Yes No

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

~~7~~8. Was [*name of defendant*]'s failure to participate in a good-faith interactive process a substantial factor in causing harm to [*name of plaintiff*]?

____ Yes ____ No

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

~~8~~9. 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 April 2009; Revised December 2009, December 2010, December 2016, May 2022

Directions for Use

This verdict form is based on CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process.*

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.

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."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited **[***insert major life activity***]**" in question 3. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

Bracketed question 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict]; *Shirvanyan v. Los Angeles*

Community College Dist. (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] [adopting the *Scotch* court's reasoning].)

Do not include the transitional language following question ~~7~~8 and question ~~8~~9 if the only damages claimed are also claimed under Government Code section 12940(m) on reasonable accommodation. Use CACI No. VF-2509, *Disability Discrimination—Reasonable Accommodation,* or CACI No. VF-2510, *Disability Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship,* to claim these damages.

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~9 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

~~There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1 [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] with *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving that a reasonable accommodation was available before the employer can be held liable under the statute].)~~

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.

2754. Reporting Time Pay—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] scheduled or otherwise required [him/her/*nonbinary pronoun*] to [report to work/report to work for a second shift] but when [*name of plaintiff*] reported to work, [*name of defendant*] [failed to put [*name of plaintiff*] to work/furnished a shortened [workday/shift]]. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of plaintiff*] was an employee of [*name of defendant*];**

3. **That [*name of defendant*] required [*name of plaintiff*] to report to work for one or more [workdays/second shifts];**

4. **That [*name of plaintiff*] reported for work; and**

5. **That [*name of defendant*] [failed to put [*name of plaintiff*] to work/furnished less than [half of the usual day's work/two hours of work on a second shift]].**

If you find that [*name of plaintiff*] has proved all of the above elements, you must determine the amount of wages [*name of defendant*] must pay to [*name of plaintiff*]. For each workday when an employee reports to work, as required, but is either not put to work or furnished with less than half the usual day's ~~work~~hours, the employer must pay wages for half the usual or scheduled day's ~~work~~ hours at the employee's regular rate of pay (and in no event for less than two hours or more than four hours).

[*Name of plaintiff*]'s regular rate of pay in this case is [*specify amount*].

[For each occasion when an employee is required to report for a second shift in the same workday but is furnished less than two hours of work, the employer must pay wages for two hours at the employee's regular rate of pay.]

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

New November 2021; Revised May 2022

Directions for Use

This instruction is intended to instruct the jury on factual determinations required for the judge to then calculate damages for the defendant's failure to pay reporting time under section 5 of the Industrial Welfare Commission's wage orders. (Cal. Code Regs., tit. 8, § 11010, subd. 5, § 11020, subd. 5, § 11030, subd. 5, § 11040, subd. 5, § 11050, subd. 5, § 11060, subd. 5, § 11070, subd. 5, § 11080, subd. 5, § 11090, subd. 5, § 11100, subd. 5, § 11110, subd. 5, § 11120, subd. 5, § 11130, subd. 5, § 11140, subd. 5, § 11150, subd. 5, and § 11160, subd. 5.)

Select the appropriate bracketed language in the introductory paragraph and elements 3 and 5, and indicate whether the plaintiff was not provided work at all or was provided a shortened shift, or both, in the introductory paragraph and element 5. If the case involves both first and second shifts, the instruction will need to be modified.

Element 1 may be omitted if there is no dispute regarding the defendant's status as an employer.

Modify the instruction as appropriate if the plaintiff claims that the defendant required telephonic reporting before a potential shift. (See *Ward v. Tilly's, Inc.* (2019) 31 Cal.App.5th 1167, 1171 [243 Cal.Rptr.3d 461].)

Include the bracketed next to last paragraph only if the plaintiff claims that the defendant required the plaintiff to report for work a second time in a single workday.

Sources and Authority

- "Employee" and "Employer" Defined. Title 8 California Code of Regulations sections 11010–11160.
- "Person" Defined. Lab. Code section 18.
- Reporting Time Pay. Title 8 California Code of Regulations sections11010–11160 (subd. 5 of each section).
- "We conclude that the on-call scheduling alleged in this case triggers Wage Order 7's reporting time pay requirements. As we explain, on-call shifts burden employees, who cannot take other jobs, go to school, or make social plans during on-call shifts—but who nonetheless receive no compensation from [the defendant] unless they ultimately are called in to work. This is precisely the kind of abuse that reporting time pay was designed to discourage." (*Ward, supra,* 31 Cal.App.5th at p. 1171.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 432

1 Wilcox, California Employment Law, Ch. 1, *Overview of Wage and Hour Laws*, § 1.05; Ch. 3, *Determining Compensable Hours and Proper Payment Amounts*, § 3.13 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

2760. Missed Rest Breaks—Essential Factual Elements (Lab. Code, § 226.7)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] wages because [***name of defendant***] did not provide [***name of plaintiff***] with one or more paid rest breaks during one or more workdays.**

An employer must provide paid 10-minute rest breaks and must schedule them, if practicable, in the middle of each work period. An employer must provide rest breaks once every four hours (rounding up by the half hour). This means that over the course of a workday, an employer must provide a 10-minute rest break to an employee who works longer than 3.5 hours [and] [must provide a second 10-minute rest break if the workday lasts 7 to 8 hours].

The employer must relieve the employee of all job duties during a rest break but has no obligation to keep records of employee rest breaks or to ensure that an employee takes a rest break.

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

1. **That [***name of defendant***] employed [***name of plaintiff***] for one or more workdays lasting [longer than 3.5 hours/longer than 6 hours but no more than 10 hours];**

2. **That [***name of plaintiff***] did not take one or more 10-minute rest breaks; [and]**

[3. That [*name of defendant***] did not provide [***name of plaintiff***] with one or more 10-minute rest breaks; and]**

4. **The amount of wages owed.**

An employer "provides" a rest break only if the employee is relieved of all work duties and the employer relinquishes control over how the employee spends the employee's time. An employer who does not provide one or more rest breaks during a single workday must pay one additional hour of wages for the workday at the employee's regular rate of pay.

["Workday" means any consecutive 24-hour period beginning at the same time each calendar day.]

["Regular rate of pay" for [*name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of plaintiff***] has proved one or more rest breaks were not provided.]**

[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for missed rest breaks separately from claims for missed meal breaks. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]

New May 2022

Directions for Use

This instruction is intended for use by non-exempt employees subject to Section 12(C) of Industrial Welfare Commission wage orders 1-2001 through 11-2001, 13-2001 through 15-2001, and 17-2001. Other Wage Orders contain exceptions to the common rule. Different meal and rest period rules apply to emergency ambulance employees; do not give this instruction in a case involving those employees. (See Lab. Code, § 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.)

The instruction should include the shift length if there is uniformity in that allegation, and specify which breaks the plaintiff claims to have missed, if possible. Depending on the length of the shift, multiple rest breaks could be at issue. In element 1, select the appropriate length of shift or modify the element to encompass longer shifts that require third, fourth, or fifth rest breaks.

Element 3 is bracketed because there is a lack of authority addressing whether a plaintiff has the burden of proving that, in addition to not taking a rest break, the defendant did not afford the plaintiff an opportunity to take a rest break, or whether the defendant has the burden of proving that an untaken rest break was provided.

It is possible that the regular rate of pay will be different over different periods of time. The court must determine the method for calculating plaintiff's regular rate of pay. If different regular rates of pay are at issue, define the plaintiff's regular rate of pay for all relevant date ranges.

The definitions of "regular rate of pay" and "workday" may be deleted if they are included in other instructions.

Give the optional final paragraph only if both missed rest breaks and meal breaks are at issue in the case.

Sources and Authority

- Right of Action for Missed Meal and Rest and Recovery Periods. Labor Code section 226.7.
- Rest Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 12.
- "Wages" Defined, Labor Code section 200.
- "Workday" Defined. Labor Code section 500.
- "Though under the basic calculation the right to 10 minutes' rest would accrue for any shift lasting more than two hours, the third sentence of Wage Order No. 5's rest period subdivision modifies this entitlement slightly. Under the third sentence, "a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours." Thus, employees working shifts lasting over two hours but under three and one-half hours, who otherwise would have been entitled to 10 minutes' rest, need not be permitted a rest period. The combined effect of the two pertinent sentences, giving full effect to each, is this: Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for

shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

- "An employer is required to authorize and permit the amount of rest break time called for under the wage order for its industry. If it does not—if, for example, it adopts a uniform policy authorizing and permitting only one rest break for employees working a seven-hour shift when two are required—it has violated the wage order and is liable. No issue of waiver ever arises for a rest break that was required by law but never authorized; if a break is not authorized, an employee has no opportunity to decline to take it." (*Brinker Rest. Corp., supra,* 53 Cal. 4th at p. 1033.)

- "What we conclude is that state law prohibits on-duty and on-call rest periods. During required rest periods, employers must relieve their employees of all duties and relinquish any control over how employees spend their break time." (*Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 260 [211 Cal.Rptr.3d 634, 385 P.3d 823].)

- "[O]ne cannot square the practice of compelling employees to remain at the ready, tethered by time and policy to particular locations or communications devices, with the requirement to relieve employees of all work duties and employer control during 10-minute rest periods." (*Augustus, supra,* 2 Cal.5th at p. 269.)

- "Although section 12(A) of Wage Order 1–2001 does not describe the considerations relevant to such a justification, we conclude that a departure from the preferred schedule is permissible only when the departure (1) will not unduly affect employee welfare and (2) is tailored to alleviate a material burden that would be imposed on the employer by implementing the preferred schedule." (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1040 [201 Cal.Rptr.3d 337].)

- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166].)

- "[W]e hold that the Court of Appeal erred in construing section 226.7 as a penalty and applying a one-year statute of limitations. The statute's plain language, the administrative and legislative history, and the compensatory purpose of the remedy compel the conclusion that the 'additional hour of pay' is a premium wage intended to compensate employees, not a penalty." (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1114 [56 Cal.Rptr.3d 880, 155 P.3d 284], internal citation omitted.)

Secondary Sources

2765. Nonpayment of Wages Under Rounding System—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] wages because [***name of defendant***]'s practice of adjusting employees' recorded time to the nearest [***specify preset increment of time***] failed to compensate [***name of plaintiff***] for all time worked at [***name of plaintiff***]'s regular rate of pay. This practice is often referred to as "rounding."**

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

1. **That, over time, [***name of defendant***]'s method of rounding led to a reduction in [***name of plaintiff***]'s wages; and**

2. **The amount of wages owed to [***name of plaintiff***] for time lost by rounding.**

New May 2022

Directions for Use

The court determines whether the method of rounding used is neutral. (See *AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1028 [234 Cal.Rptr.3d 804].) Once the court has determined that a defendant's rounding method was not neutral, the jury will need to resolve any factual disputes to determine whether the plaintiff has lost wages, presumably through competent expert testimony, as a result of the defendant's rounding method.

Rounding of time entries "to the nearest 5 minutes, or to the nearest one-tenth or quarter of an hour" is permissible "provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked." (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 901 [148 Cal.Rptr.3d 690].)

Sources and Authority

- Use of Time Clocks. 29 C.F.R. § 785.48(b)

- "Nothing in our analysis precludes a trial court from looking at multiple datapoints to determine whether the rounding system at issue is neutral as applied. Such analysis could uncover bias in the system that unfairly singles out certain employees. For example, as the trial court discussed, a system that in practice overcompensates lower paid employees at the expense of higher paid employees could unfairly benefit the employer." (*AHMC Healthcare, Inc., supra,* 24 Cal.App.5th at p. 1028.)

- "Although California employers have long engaged in employee time-rounding, there is no California statute specifically authorizing or prohibiting this practice." (*See's Candy Shops, Inc., supra,* 210 Cal.App.4th at p. 901.)

- "Whether a rounding policy will 'result in undercompensation over time is a factual' issue. Summary adjudication on a rounding claim may be appropriate where the employer can show the rounding policy does not systematically underpay the employee, even if the employee loses some compensation over time." (*David v. Queen of Valley Medical Center* (2020) 51 Cal.App.5th 653, 664 [264 Cal.Rptr.3d 279], internal citation omitted.)

- "Relying on the DOL rounding standard, we have concluded that the rule in California is that an employer is entitled to use the nearest-tenth rounding policy if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.' " (*See's Candy Shops, Inc., supra,* 210 Cal.App.4th at p. 907.)

Secondary Sources

Draft—Not Approved by Judicial Council

2768. Missed Meal Breaks—Essential Factual Elements (Lab. Code, §§ 226.7, 512)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/***nonbinary pronoun***] wages because [***name of defendant***] did not provide one or more meal breaks as required by law.**

An employer must provide a 30-minute unpaid meal break for each period of work lasting longer than 5 hours. To establish this claim, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] employed [***name of plaintiff***] for one or more work periods lasting longer than 5 hours;**

2. **That [***name of plaintiff***] did not take one or more meal breaks;**

[3. That [*name of defendant***] failed to provide [***name of plaintiff***] with one or more meal breaks as required by law; and]**

[3. That [*name of defendant***] does not have [accurate] records showing that plaintiff took each meal break; and]**

4. **The amount of wages owed.**

[An employer fails to "provide" a meal break as required by law if it does not relieve the employee of all duty, does not relinquish control over the employee's activities, does not allow the employee to leave the premises, does not permit the employee a reasonable opportunity to take an uninterrupted 30-minute break, or impedes or discourages the employee from doing so. The employer does not have an obligation to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.]

[If [*name of plaintiff***] has proved these four facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves all of the following:**

1. **That [***name of defendant***] provided [***name of plaintiff***] a reasonable opportunity to take uninterrupted meal breaks;**

2. **That [***name of defendant***] did not impede [***name of plaintiff***] from taking meal breaks;**

3. **That [***name of defendant***] did not discourage [***name of plaintiff***] from taking meal breaks;**

4. **That [***name of defendant***] relieved [***name of plaintiff***] of all duties during meal breaks; and**

5. **That [***name of defendant***] relinquished control over [***name of plaintiff***]'s activities during meal breaks[, including allowing [him/her/***nonbinary pronoun***] to leave the premises].**

An employer does not have an obligation to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.]

For each workday in which [*name of defendant***] did not provide [***name of plaintiff***] with one or more 30-minute meal breaks, [***name of defendant***] must pay one additional hour of wages for the workday at [***name of plaintiff***]'s regular rate of pay.**

["Regular rate of pay" for [*name of plaintiff***] from [***insert beginning date***] to [***insert ending date***] was [***insert applicable formula***]. [***Repeat as necessary for date ranges with different regular rates of pay***.] Multiply the regular rate of pay by the number of workdays that [***name of plaintiff***] has proved one or more meal breaks were not provided.]**

"Workday" means any consecutive 24-hour period beginning at the same time each calendar day.

[Meal breaks, which are unpaid, and rest breaks, which are paid, have different requirements. You should consider claims for missed meal breaks separately from claims for missed rest breaks. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]

New May 2022

Directions for Use

This instruction assumes a non-exempt employee is entitled to a meal break and that there has been no mutual agreement to waive a break. Include the optional language concerning a second meal break if appropriate to the facts of the case. Modifications to account for additional meal breaks required for an employee working a longer shift will be required. This instruction can also be modified to cover delayed meal breaks.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) Different meal and rest period rules apply to emergency ambulance employees; do not give this instruction in a case involving those employees. (See Lab. Code, § 880–890, added by initiative, Gen. Elec. (Nov. 6, 2018), commonly known as Prop. 11.)

Use the first option for element 3 if the plaintiff claims that the employer failed to provide meal breaks and the employer has records showing the required meal breaks were provided. Give the bracketed paragraph defining "provide" only if the first option for element 3 is given.

Use the second option for element 3 if the plaintiff claims that the employer does not have any records or if the employer has records showing noncompliant meal breaks taken by the employee, and give the second bracketed paragraph, which shifts the burden of proof to the employer to prove that meal breaks were provided. (See *Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661] ["time records showing noncompliant meal periods raise a rebuttable presumption of meal

period violations"].) Include the bracketed language in element 5 of the defendant-employer's burden only if permission to leave the premises is at issue in the case.

It is unresolved which party has the burden of proof when inaccurate records are involved. The committee has bracketed the word "accurate" in the second option for element 3 because it is not clear if it is plaintiff's burden to prove the employer's records are inaccurate as part of proving that the employer failed to provide meal breaks (option 1) or if it is defendant's burden to prove that meal breaks were provided if the plaintiff claims the employer has not maintained accurate records (option 2).

The court must determine the method for calculating plaintiff's regular rate of pay, and must instruct the jury accordingly. It is possible that the regular rate of pay will be different over different periods of time. If so, supply the different date ranges and rates of pay.

The Labor Code and the wage orders exempt certain employees from receiving premium pay for missed meal period violations (for example, executives). The assertion of an exemption from wage and hour laws is an affirmative defense, which presents a mixed question of law and fact. (See *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) Other exceptions to the meal period requirement exist, for example: where the Industrial Welfare Commission authorized adoption of a working condition order permitting a meal period to commence after six hours of work (see Lab. Code, § 512(b)(1)); certain commercial drivers; workers in the wholesale baking, motion picture, and broadcasting industries; and workers covered by collective bargaining agreements that meet specified requirements (Lab. Code, § 512(b)).

The definitions of "regular rate of pay" and "workday" may be deleted if they are included in other instructions.

Give the optional final paragraph only if both missed meal breaks and rest breaks are at issue in the case.

Sources and Authority

- Right of Action For Missed Meal Period. Labor Code section 226.7.
- Meal Periods. Labor Code section 512.
- Employer Duty to Keep Payroll Records. Labor Code sections 226, 1174(d).
- Meal Periods. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 11.
- Records. Cal. Code Regs., tit. 8, § 11010 et seq., subd. 7.
- "Wages" Defined. Labor Code § 200.
- "Workday" Defined. Labor Code § 500.
- "An employer's duty with respect to meal breaks under both section 512, subdivision (a) and Wage Order No. 5 is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their

activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so. What will suffice may vary from industry to industry, and we cannot in the context of this class certification proceeding delineate the full range of approaches that in each instance might be sufficient to satisfy the law." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

- "Accordingly, we conclude that Wage Order No. 5 imposes no meal timing requirements beyond those in section 512. Under the wage order, as under the statute, an employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at p. 1049.

- "[W]e hold that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 61 [275 Cal.Rptr.3d 422, 481 P.3d 661].)

- "Because time records are required to be accurate, it makes sense to apply a rebuttable presumption of liability when records show noncompliant meal periods. If the records are accurate, then the records reflect an employer's true liability; applying the presumption would not adversely affect an employer that has complied with meal period requirements and has maintained accurate records. If the records are incomplete or inaccurate—for example, the records do not clearly indicate whether the employee chose to work during meal periods despite bona fide relief from duty—then the employer can offer evidence to rebut the presumption. It is appropriate to place the burden on the employer to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods. 'To place the burden elsewhere would offer an employer an incentive to avoid its recording duty and a potential windfall from the failure to record meal periods.' " (*Donohue, supra,* 11 Cal.5th at p. 76, internal citations omitted.)

- "[Defendant] misunderstands how the rebuttable presumption operates at the summary judgment stage. Applying the presumption does not mean that time records showing missed, short, or delayed meal periods result in 'automatic liability' for employers. If time records show missed, short, or delayed meal periods with no indication of proper compensation, then a rebuttable presumption arises. Employers can rebut the presumption by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work. 'Representative testimony, surveys, and statistical analysis,' along with other types of evidence, 'are available as tools to render manageable determinations of the extent of liability.' Altogether, this evidence presented at summary judgment may reveal that there are no triable issues of material fact. The rebuttable presumption does not require employers to police meal periods. Instead, it requires employers to give employees a mechanism for recording their meal periods and to ensure that employees use the mechanism properly. (*Donohue, supra,* 11 Cal.5th at 77.)

- "Employers covered by Industrial Welfare Commission (IWC) wage order No. 5-2001 have an obligation both to relieve their employees for at least one meal period for shifts over five hours and to record having done so. If an employer's records show no meal period for a given shift over five hours, a rebuttable presumption arises that the employee was not relieved of duty and no meal

period was provided. This is consistent with the policy underlying the meal period recording requirement, which was inserted in the IWC's various wage orders to permit enforcement. An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Brinker Restaurant Corp., supra,* 53 Cal.4th at pp. 1052–1053, conc. opn. of Werdegar, J., internal citations omitted.)

- "[W]e hold that the term 'regular rate of compensation' in section 226.7(c) has the same meaning as 'regular rate of pay' in section 510(a) and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of section 226.7(c) comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the 'state's labor laws are to be liberally construed in favor of worker protection.' " (*Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 [280 Cal.Rptr.3d 783, 489 P.3d 1166].)

- "[W]e construe the Legislature's use of the disjunctive as permitting an additional hour of pay for each work day that either type of break period is violated. We agree with the district court in *Marlo* [*v. United Parcel Service, Inc.*] that allowing an employee to recover one additional hour of pay for each type of violation per work day is not contrary to the 'one additional hour' and 'per work day' wording in subdivision (b). We further agree with *Marlo* that construing section 226.7, subdivision (b), as permitting one premium payment for each type of break violation is in accordance with and furthers the public policy behind the meal and rest break mandates." (*United Parcel Service Wage & Hour Cases* (2011) 196 Cal.App.4th 57, 69 [125 Cal.Rptr.3d 384].)

Secondary Sources

2769. Affirmative Defense—Missed Meal Breaks—Waiver by Mutual Consent

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[*Name of defendant***] claims that [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***] right to a [first] meal break on one or more workdays. This is called "waiver." To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] worked for a period of no more than 6 hours; and**

2. **That [***name of plaintiff***] and [***name of defendant***] freely, knowingly, and mutually consented to waiving the meal break of the workday.**

[OR]

[*Name of defendant***] claims that [***name of plaintiff***] gave up [his/her/***nonbinary pronoun***] right to a second meal break on one or more workdays. This is called "waiver." To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] worked for a period of no more than 12 hours;**

2. **That [***name of plaintiff***] did not waive [his/her/***nonbinary pronoun***] first meal break of the workday; and**

3. **That [***name of plaintiff***] and [***name of defendant***] freely, knowingly, and mutually consented to waiving the second meal break.**

New May 2022

Directions for Use

This instruction sets forth the affirmative defense of waiver of a meal break by mutual consent. An employee can waive their first or second meal break but not both. (Lab. Code, § 512(a).) Give only the paragraph of the instruction that applies to the meal break waived.

For an instruction on waiver of off-duty meal breaks, see CACI No. 2770, *Affirmative Defense—Missed Meal Breaks—Written Waiver of Off-Duty Meal Breaks.*

Sources and Authority

- Meal Periods. Labor Code section 512.
- Meal Periods. Cal. Code Regs., tit. 8, §§ 11010–11150, ¶ 11(C) & § 11160, ¶ 10(D).
- "An employer's assertion that it did relieve the employee of duty, but the employee waived the opportunity to have a work-free break, is not an element that a plaintiff must disprove as part of the plaintiff's case-in-chief. Rather, as the Court of Appeal properly recognized, the assertion is

an affirmative defense, and thus the burden is on the employer, as the party asserting waiver, to plead and prove it." (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1052–1053 [139 Cal.Rptr.3d 315, 273 P.3d 513], conc. opn. of Werdegar, J., internal citations omitted.)

Secondary Sources

2770. Affirmative Defense—Missed Meal Breaks—Written Waiver of Off-Duty Meal Breaks

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[*Name of defendant***] claims that [***name of plaintiff***] agreed in writing to give up [his/her/***nonbinary pronoun***] right to be relieved of all job duties during meal breaks. To succeed on this defense, [***name of defendant***] must prove the following:**

1. **That [***name of plaintiff***] worked for a period of more than 5 hours;**

2. **That the nature of [***name of plaintiff***]'s work prevents [him/her/***nonbinary pronoun***] from being relieved of all duty during meal breaks;**

3. **That [***name of plaintiff***] and [***name of defendant***] freely, knowingly, and mutually consented in writing to meal breaks during which [he/she/***nonbinary pronoun***] would not be relieved of all duties; [and]**

[4. **That [***name of plaintiff***] has not revoked in writing [his/her/***nonbinary pronoun***] written consent; and]**

5. **That [***name of defendant***] paid [***name of plaintiff***] at [his/her/***nonbinary pronoun***] regular rate of pay for the meal breaks.**

New May 2022

Directions for Use

This instruction sets forth an employer's affirmative defense of a written waiver of off-duty meal breaks. Give this instruction only if the defendant claims that the plaintiff freely entered into a written agreement for on-duty meal breaks.

Omit optional element 4 if the plaintiff's revocation of written consent is not at issue.

Sources and Authority

- Meal Periods. Labor Code section 512
- Meal Periods. Cal. Code Reg., tit. 8, §§ 11010–11150, ¶ 11(C) & § 11160, ¶ 10(D).
- "Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an 'on duty' meal period and counted as time worked. An 'on duty meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing revoke the agreement at any time." Cal. Code Regs., tit. 8, § 11040, 11(C).
- "An on-duty meal period is one in which an employee is not 'relieved of all duty' for the entire

30-minute period." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1035 [139 Cal.Rptr.3d 315, 273 P.3d 513].)

- "[E]mployees who sign on-duty meal agreements that include a right-to-revoke clause are entitled to be paid their regular wages for every on-duty meal period, but they are not entitled to one-hour of premium pay. However, if all the requirements for a compliant on-duty meal period are not met, e.g., there is no signed agreement with a right-to-revoke clause, the employer owes employees their regular wage for working during the meal break, plus one hour of premium pay for every workday the meal break policy was noncompliant, also at the employees' regular rate of compensation." (*Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 459 [253 Cal.Rptr.3d 248], footnote omitted.)

- "[A]bsent a waiver, the statute's plain terms required [the defendant] to provide 'a meal period'—whether off-duty or on-duty—of at least 30 minutes any time an employee worked at least five hours." (*L'Chaim House, Inc. v. Department of Industrial Relations* (2019) 38 Cal.App.5th 141, 149 [250 Cal.Rptr.3d 413, 418, 38 Cal.App.5th 141].)

Secondary Sources

3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she/***nonbinary pronoun***] was harmed by [***name of physician***]'s [***insert tort theory, e.g., "negligence"***].**

[*Name of plaintiff***] also claims that [***name of hospital***] is responsible for the harm because [***name of physician***] was acting as [his/her/***nonbinary pronoun***/its] [agent/employee/[***insert other relationship***, e.g., "partner"]] when the incident occurred.**

If you find that [*name of physician***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of hospital***] is responsible for the harm. [***Name of hospital***] is responsible if [***name of plaintiff***] proves ~~[***Name of plaintiff***] claims that [***name of hospital***] is responsible for [***name of physician***]'s conduct because [***name of physician***] was [***name of hospital***]'s apparent [employee/agent]. To establish this claim, [***name of plaintiff***] must prove~~ both of the following:**

1. **That [***name of hospital***] held itself out to the public as a provider of care; and**

2. **That [***name of plaintiff***] looked to [***name of hospital***] for services, rather than selecting [***name of physician***] for services.**

~~[~~A hospital holds itself out to the public as a provider of care unless the hospital gives notice to a patient that a physician is not an [employee/agent] of the hospital. However, the notice may not be adequate if a patient in need of medical care cannot be expected to understand or act on the information provided. ~~In deciding whether [*name of plaintiff***] has proved element 1, y~~Y~~ou must take into consideration [***name of plaintiff***]'s condition at the time and decide whether any notice provided was adequate to give a reasonable person in [***name of plaintiff***]'s condition notice of the disclaimer.~~]~~**

New November 2021; Revised May 2022

Directions for Use

Use this instruction only if a patient claims that a hospital defendant is responsible for a physician's negligence or other wrongful conduct as an ostensible agent~~. Give this instruction with CACI No. 3701, *Tort Liability Asserted Against Principal—Essential Factual Elements*, if the plaintiff is relying on the doctrine of ostensible agency to establish the principal-agent relationship in CACI No. 3701~~.

~~Include the bracketed paragraph only if the hospital claims it notified the plaintiff that the physician was not its employee or agent.~~

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.

- "Ostensible Authority" Defined. Civil Code section 2317.

- When Principal is Bound by Ostensible Agent. Civil Code section 2334.

- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' Generally, the first element is satisfied 'when the hospital "holds itself out" to the public as a provider of care,' 'unless it gave the patient contrary notice.' Nonetheless, a hospital's 'contrary notice' may be insufficient 'to avoid liability in an emergency room context, where an injured patient in need of immediate medical care cannot be expected to understand or act upon that information.' Reliance upon an apparent agency is demonstrated 'when the plaintiff "looks to" the hospital for services, rather than to an individual physician.' Ultimately, 'there is really only one relevant factual issue: whether the patient had reason to know that the physician was not an agent of the hospital. As noted above, hospitals are generally deemed to have held themselves out as the provider of services unless they gave the patient contrary notice, and the patient is generally presumed to have looked to the hospital for care unless he or she was treated by his or her personal physician. Thus, unless the patient had some reason to know of the true relationship between the hospital and the physician—i.e., because the hospital gave the patient actual notice or because the patient was treated by his or her personal physician—ostensible agency is readily inferred.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363], internal citations omitted.)

- "It is well established in California that a hospital may be liable for the negligence of physicians on the staff, unless the hospital has clearly notified the patient that the treating physicians are not hospital employees and there is no reason to believe the patient was unable to understand or act on the information. This rule is founded on the theory of ostensible agency." (*Wicks v. Antelope Valley Healthcare Dist.* (2020) 49 Cal.App.5th 866, 882 [263 Cal.Rptr.3d 397].)

- "[T]he adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Effectively, all a patient needs to show is that he or she sought treatment at the hospital, which is precisely what plaintiff alleged in this case. Unless the evidence conclusively indicates that the patient should have known that the treating physician was not the hospital's agent, such as when the patient is treated by his or her personal physician, the issue of ostensible agency must be left to the trier of fact." (*Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448, 1458 [122 Cal.Rptr.2d 233].)

- "Neither *Mejia*, *Whitlow*, nor *Markow* is factually on point with this case. Yet all three opinions inform our decision in this case. They rest on the same principle of California law, that although a hospital may not control, direct or supervise physicians on its staff, a hospital may be liable for their

negligence on an ostensible agency theory, unless (1) the hospital gave the patient actual notice that the treating physicians are not hospital employees, and (2) there is no reason to believe the patient was unable to understand or act on the information, or (3) the patient was treated by his or her personal physician and knew or should have known the true relationship between the hospital and physician." (*Wicks, supra,* 49 Cal.App.5th at p. 884.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 1–4

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.45 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13 et seq. (Matthew Bender)

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she/***nonbinary pronoun***] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

New September 2003; Revised April 2008, December 2009, December 2011, May 2022

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

For actions or proceedings filed on or after January 1, 2022 and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022), the survival action statute allows for recovery of a decedent's noneconomic damages for pain, suffering, or disfigurement. (Code Civ. Proc., § 377.34(b).) (See also CACI No. 3919, *Survival Damages*.) Insert only the bracketed terms that apply in a survival action, and modify the instruction to make clear that the damages are for the decedent's pre-death pain, suffering, or disfigurement.

Sources and Authority

- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).

- "One of the most difficult tasks imposed on a fact finder is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. The inquiry is inherently subjective and not easily amenable to concrete measurement." (*Pearl v. City of Los Angeles* (2019) 36

Cal.App.5th 475, 491 [248 Cal.Rptr.3d 508], internal citations omitted.)

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].)

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be

required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson, supra,* 25 Cal.App.5th at p. 1096, original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

California Civil Practice: Torts § 5:10 (Thomson Reuters)

~~3903Q~~ 3919. Survival Damages ~~(Economic Damage)~~ (Code Civ. Proc, § 377.34)

If you decide that [*name of plaintiff*] has proved [his/her/*nonbinary pronoun*] claim against [*name of defendant*] for the death of [*name of decedent*], you must also decide the amount of damages that [*name of decedent*] sustained before death and that [he/she/*nonbinary pronoun*] would have been entitled to recover because of [*name of defendant*]'s conduct[, including any [penalties/ [or] punitive damages] as explained in the other instructions that I will give you].

[*Name of plaintiff*] may recover the following damages:

[1. The reasonable cost of reasonably necessary medical care that [*name of decedent*] received;]

[2. The amount of [income/earnings/salary/wages] that [he/she/*nonbinary pronoun*] lost before death;]

[3. The reasonable cost of health care services that [*name of decedent*] would have provided to [*name of family member*] before [*name of decedent*]'s death;]

[4. [*Specify other recoverable economic damage.*]]

[5. The [physical pain/mental suffering/disfigurement] [*name of decedent*] suffered before [his/her/*nonbinary pronoun*] death.]

You may not award damages for any loss for [*name of decedent*]'s shortened life span attributable to [his/her/*nonbinary pronoun*] death.

New May 2019; Revised November 2019, May 2020; Renumbered from CACI No. 3903Q May 2022

Directions for Use

Give this instruction if a deceased person's estate claims survival damages for harm that the decedent incurred in the decedent's lifetime. This instruction addresses survival damages in a claim against a defendant who is alleged to have caused the decedent's death. However, survival damages are available for any claim incurred while alive, not just a claim based on the decedent's death. (See *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 294 [87 Cal.Rptr.2d 441, 981 P.2d 68].) In a case that does not involve conduct that caused the decedent's death, modify the instruction to include the damages recoverable under the particular claim rather than the damages attributable to the death.

Survival damages can include punitive damages and penalties. (See Code Civ. Proc., § 377.34.) Include the bracketed language in the last sentence of the opening paragraph if either or both are sought. If punitive damages are claimed, give the appropriate instruction from CACI Nos. 3940–3949.

If items 1 and 2 are given, do not also give CACI No. 3903A, *Medical Expenses—Past and Future (Economic Damages)*, and CACI No. 3903C, *Past and Future Lost Earnings (Economic Damages)*, as the future damages parts of those instructions are not applicable. Other 3903 group instructions may be

omitted if their items of damages are included under item 3 and must not be given if they include future damages.

Though ~~D~~damages for pain, suffering, or disfigurement are generally not recoverable in a survival action (except at times in an elder abuse case), Code of Civil Procedure section 337.34(b) permits the recovery of these noneconomic damages by the decedent's personal representative or successor in interest. (Code Civ. Proc., § 377.34; see *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1265 [45 Cal.Rptr.3d 222]; see also instructions in the 3100 Series, Elder Abuse and Dependent Adult Civil Protection Act.) For actions or proceedings filed on or after January 1, 2022 and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022) and depending on the case, it may be preferable either to include item 5 (an item of noneconomic damages) or to give CACI No. 3905, *Items of Noneconomic Damage*, and a version of CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, that includes only pain, suffering, or disfigurement. Note that many Sources and Authority below do not recognize the availability of noneconomic damages as a result of this temporary change in law. (Stats. 2021, ch. 448 (SB 447).)

Sources and Authority

- Survival Damages. Code of Civil Procedure section 377.34.
- Term-Limited Exception for Survival Damages. Code of Civil Procedure section 377.34(b).

- "In California, 'a cause of action for or against a person is not lost by reason of the person's death' and no 'pending action . . . abate[s] by the death of a party . . .' In a survival action by the deceased plaintiff's estate, the damages recoverable expressly exclude 'damages for pain, suffering, or disfigurement.' They do, however, include all 'loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages.' Thus, under California's survival law, an estate can recover not only the deceased plaintiff's lost wages, medical expenses, and any other pecuniary losses incurred before death, but also punitive or exemplary damages." (*County of L.A., supra,* 21 Cal.4th at pp. 303–304, internal citations omitted.)

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. (See … CACI No. 3903E ["Loss of Ability to Provide Household Services (Economic Damage)"].)" (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809], internal citations omitted.)

- "The second category requires more discussion. That consists of the reasonable value of 24-hour nursing care that Decedent *would have provided* to his wife *after* his death and before she passed away in 2014, nearly four years later. As appellants explain this claim, 'to the extent his children

were forced to provide gratuitous home health care and other household services to [wife] up to the time of her death, [Decedent's] estate is also entitled to recover those costs as damages since he had been providing those services for his wife before he died.' … The parties disagree as to whether such damages are recoverable. Appellants contend that they are properly recovered as ' "lost years" damages,' representing economic losses the decedent incurred during the period by which his life expectancy was shortened; [defendant], in contrast, contends that they are not recoverable because they were not 'sustained or incurred before death,' as required by section 377.34. We conclude that [defendant] has the better argument." (*Williams, supra,* 27 Cal.App.5th at p. 238, original italics.)

- "By expressly authorizing recovery of only penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived, the Legislature necessarily implied that *other* categories of damages that the decedent would have been entitled to recover had the decedent lived would not be recoverable in a survival action." (*Williams, supra,* 27 Cal.App.5th at p. 239, original italics.)

- "In survival actions, … damages are narrowly limited to 'the loss or damage that the decedent sustained or incurred before death', which by definition *excludes* future damages. For a trial court to award ' "lost years" damages' in a survival action—that is, damages for 'loss of future economic benefits that [a decedent] would have earned during the period by which his life expectancy was shortened'—would collapse this fundamental distinction and render the plain language of 377.34 meaningless." (*Williams, supra,* 27 Cal.App.5th at p. 240, original italics, internal citations omitted.)

- "The same conclusion [that they are not recoverable in a survival action] would seem to follow as to the trial court's award of damages for the value of Decedent's lost pension benefits and Social Security benefits." (*Williams, supra,* 27 Cal.App.5th at p. 240, fn. 21.)

- "[T]here is at least one exception to the rule that damages for the decedent's predeath pain and suffering are not recoverable in a survivor action. Such damages are expressly recoverable in a survivor action under the Elder Abuse Act if certain conditions are met." (*Quiroz, supra,* 140 Cal.App.4th at p. 1265.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 27

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, § 55.21 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 181, *Death and Survival Actions*, § 181.45 (Matthew Bender)

6 California Points and Authorities, Ch. 66, *Death and Survival Actions*, § 66.63 et seq. (Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner***] claims that [***name of respondent***] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. 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 ~~all~~ both of the following:**

1. **That [***name of respondent***] [has a mental disorder/is impaired by chronic alcoholism];** ~~**[**~~**and**~~**]**~~

2. **That [***name of respondent***] is gravely disabled as a result of the [mental disorder/chronic alcoholism]**~~**[; and/.]**~~

~~**[3. That [***name of respondent***] is unwilling or unable voluntarily to accept meaningful treatment.]**~~

New June 2005; Revised June 2016, May 2022

Directions for Use

~~There is a split of authority as to whether element 3 is required. (Compare *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)~~ Give CACI No. 4002, *"Gravely Disabled" Explained*, with this instruction.

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

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

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 et seq. (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 because of [a mental health 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 because of [a mental disorder/impairment by chronic alcoholism].]**

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

In determining whether [*name of respondent***] is presently 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 condition.]**

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

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

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

Directions for Use

This instruction provides the definition of "gravely disabled" from Welfare and Institutions Code section 5008(h)(1)(A), 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].)

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second 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 ~~last~~ 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. (*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).

- "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 ed. 2008) Actions, § 97

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)