



LITIGATION SECTION

THE STATE BAR OF CALIFORNIA

California State Bar Litigation Section Comments

Judicial Council Task Force
on Jury Instructions

Civil Jury Instructions, Second Set

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**CIVIL JURY INSTRUCTIONS, Second Set
Litigation Section Comments**

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NEGLIGENCE

370

Ultrahazardous Activities Essential Factual Elements

1 **[Name of plaintiff] claims that [name of defendant] was engaged in an**
2 **ultrahazardous activity when ~~[he/she/it] caused [name of plaintiff]'s harm~~**
3 **that caused [name of plaintiff] to be harmed and that [name of defendant] is**
4 **responsible for that harm.**

5
6 **People who engage in ultrahazardous activities are **can be held** responsible**
7 **for the harm that these activities cause to others, regardless of how**
8 **carefully the activities are carried out. [Insert ultrahazardous activity] is an**
9 **ultrahazardous activity.**

10
11 **To succeed on [his/her] claim, [name of plaintiff] must prove all of the**
12 **following:**

- 13
14 **1. That [name of defendant] was engaged in [insert ultrahazardous activity];**
15 **2. That [name of plaintiff]'s harm was the kind of harm to be anticipated**
16 **as a result of the risk created by the activity;**
17 **3. That [name of plaintiff] was harmed; and**
18 **4. That [name of defendant]'s [insert ultrahazardous activity] was a**
19 **substantial factor in harming [name of plaintiff].**
-

State Bar Committee Comments on Proposed Changes:

Lines 1-3: This proposal removes the possible implication that causation is to be assumed.

Lines 5-6: Instructions 371, 372 and 373 follow the same general format, but use the words "can be held" responsible, whereas this instruction states affirmatively that people "are" responsible. However, in all four instructions the required elements follow these introductory words; in other words, this instruction is like the other three in that the defendant will not be held responsible until the jury finds against the defendant on each of the required elements. We can see no reason for the difference in terminology between "are" and "can be held," and suggest that "can be held" is preferable.

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NEGLIGENCE

372

Strict Liability for Injury Caused by Domestic Animal With Dangerous Propensities

1 **[Name of plaintiff] claims that [name of defendant]'s [insert type of animal]**
2 **harmed [him/her] and that [name of defendant] is responsible for that harm.**

3
4 **People who own, keep, or control animals with unusually dangerous**
5 **natures or tendencies can be held responsible for the harm that their**
6 **animals cause to others, no matter how carefully they guard or restrain**
7 **their animals.**

8
9 **To succeed on [his/her] claim, [name of plaintiff] must prove all of the**
10 **following:**

- 11
12 **1. That [name of defendant] owned, kept, or controlled a [insert type of**
13 **animal];**
 - 14
15 **2. That the [insert type of animal] had an unusually dangerous nature or**
16 **tendency;**
 - 17
18 **3. That before [name of plaintiff] was injured, [name of defendant] knew or**
19 **should have known that the [insert type of animal] had this nature or**
20 **tendency;**
 - 21
22 **4. That [name of plaintiff] was harmed; and**
 - 23
24 **5. That the [insert name of animal]'s unusually dangerous nature or**
25 **tendency was a substantial factor in harming [name of plaintiff].**
-

SOURCES AND AUTHORITY

- ◆ “ ‘The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, to one who ~~is~~ **is** injured without fault, and the question of the owner’s negligence is not in the case.’ ” (*Hillman v. Garcia-Ruby* (1955) 44 Cal.2d 625, 626 [283 P.2d 1033], internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

Changed “in” to “is.”

NEGLIGENCE

373
Dog Bite Statute (Civ. Code, § 3342)
Essential Factual Elements

1 **[Name of plaintiff] claims that [name of defendant]’s dog bit [him/her] and that**
2 **[name of defendant] is responsible for that harm.**

3
4 **People who own dogs can be held responsible for the harm from a dog**
5 **bite, no matter how carefully they guard or restrain their dogs.**

6
7 **To succeed on [his/her] claim, [name of plaintiff] must prove all of the**
8 **following:**

- 9
- 10 **1. That [name of defendant] owned a dog;**
 - 11
 - 12 **2. That the dog bit [name of plaintiff] while [name of plaintiff] was in a**
13 **public place or lawfully on private property;**
 - 14
 - 15 **3. That [name of plaintiff] was harmed; and**
 - 16
 - 17 **4. That [name of defendant]’s dog was a substantial factor in**
18 **causing [name of plaintiff]’s harm.**
 - 19

20 **[[Name of plaintiff] was lawfully on private property of the owner if [he/she]**
21 **was performing any duty required by law or was on the property at the**
22 **invitation, express or implied, of the owner.]**

SOURCES AND AUTHORITY

- ◆ “[A] keeper, in contrast to an owner, is not an insurer of the good behavior of a dog, but must have scienter or knowledge of the vicious propensities of the animal before liability for injuries inflicted by such animal shall attach to him.” (*Buffington v. Nicholson* (1947) 78 Cal.App.2d 37, 42 [177 P.2d 51].)
- ◆ The definition of “lawfully upon the private property of such owner” effectively ~~denies liability to a trespasser~~ prevents trespassers from obtaining recovery under the Dog Bite Statute. (*Fullerton v. Conan* (1948) 87 Cal.App.2d 354, 357⁸ [197 P.2d 59].)

State Bar Committee Comments on Proposed Changes:

Sources and Authority:

(Buffington v. Nicholson (1947) 78 Cal.App.2d 37, 42 [177 P.2d 51].)
Brackets inserted around first word “A” of quotation.

(Fullerton v. Conan (1948) 87 Cal.App.2d 354, 357 [197 P.2d 59].)
This quote rephrased for the purpose of clarification.

MOTOR VEHICLES AND HIGHWAY SAFETY

506

Basic Speed Law (Veh. Code, § 22350)

1 ~~[Name of plaintiff/name of defendant] claims that [name of defendant/name of~~
2 ~~plaintiff] was negligent because [he/she] was driving too fast at the time of~~
3 ~~the accident.~~

4
5 **A person must drive at a reasonable speed. Whether a particular speed is**
6 **reasonable depends on the circumstances, such as traffic, weather,**
7 **visibility, and road conditions. Drivers must not drive so fast that they**
8 **create a danger to people or property.**

9
10 *If [name of plaintiff/name of defendant] has proven that [name of defendant/*
11 *name of plaintiff] was not driving at a reasonable speed at the time of the*
12 *accident, then [name of defendant/name of plaintiff] is negligent.*

State Bar Committee Comments on Proposed Changes:

The suggested changes reflect the committee's concern that the phrasing of the initial paragraph sounded more like a restatement of one party's position than an instruction in the law. The new section added to the end of the instruction is the rule derived from Hardin v. San Jose City Lines, Inc. (1953) 41 Cal.2d 432, 438

PREMISES LIABILITY

602

Extent of Control Over Premises Area

1 **[Name of plaintiff] claims that [name of defendant] controlled the property**
2 **involved in [name of plaintiff]'s harm, even though [name of defendant] did**
3 **not [own/lease] it. A person controls property that he or she does not**
4 **[own/lease] when he or she uses the property as if it were his or her own. A**
5 ~~**person's responsibility to maintain the property in a reasonably safe**~~
6 ~~**condition extends to all areas that the person controls.**~~ **A person is**
7 **responsible for maintaining, in reasonably safe condition, all areas he/she**
8 **controls.**

State Bar Committee Comments on Proposed Changes:

Lines 5-6: Changed for clarity.

PREMISES LIABILITY

603

Unsafe Concealed Conditions

1 **[Name of plaintiff] claims that [he/she] was harmed by a hidden condition on**
2 **[name of defendant]’s property.**

3
4 **[An owner/A lessee/An occupier/One who controls the property] is**
5 **responsible for an injury caused by a hidden condition ~~that created an~~**
6 **~~unreasonable risk of harm if the [owner/lessee/occupier/one who controls~~**
7 **~~the property] knew or should have known about it and failed to take~~**
8 **reasonable precautions to protect against the risk of harm if:**

- 9
10 **1. The condition created an unreasonable risk of harm; and**
11
12 **2. The [owner/lessee/occupier/one who controls the property]**
13 **knew or should have known about it; and**
14
15 **3. The [owner/lessee/occupier/one who controls the property]**
16 **failed to take reasonable precautions to protect against the risk**
17 **of harm.**

18
19 **[An owner/A lessee/An occupier/One who controls the property] must make**
20 **reasonable inspections of the property to discover such conditions.**

State Bar Committee Comments on Proposed Changes:

Lines 4-8: Changed existing text into numbered elements for clarity.

PREMISES LIABILITY

605

**Business Proprietor’s Liability for the
Negligent/Intentional/Criminal Conduct of Others**

1 [An owner of a business that is open to the public/A landlord] must use
2 reasonable care to protect [patrons/guests/tenants] from another person’s
3 harmful conduct on [his/her/its] property if the [owner/landlord] can
4 reasonably anticipate such conduct.
5

6 [An owner of a business that is open to the public/A landlord] does not,
7 however, have a duty to comply with a criminal’s unlawful demands in
8 order to protect others.

State Bar Committee Comments on Proposed Changes:

Lines 1-4: No changes.

Lines 6-8: Added to already existing instruction. Authority for this is Kentucky Fried
Chicken of Cal., Inc. v. Superior Court (1997) 14 Cal.4th 814 at 829

PRODUCTS LIABILITY

**700
Strict Liability
Issues In the Case**

1 **[Name of plaintiff] claims that [he/she] was harmed by a product [distributed/
2 manufactured/sold] by [name of defendant] that:**
3
4 **[contained a manufacturing defect;] [or]**
5
6 **[was defectively designed;] [or]**
7
8 **[did not include sufficient [instructions] [or] [warning of potential safety
9 hazards].]**

SOURCES AND AUTHORITY

- ◆ **Strict** “**Strict** liability has been invoked for three types of defects: manufacturing defects, design defects, and “**warning** **warning** defects,” i.e., inadequate warnings or failures to warn.” (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 994 995 [281 Cal.Rptr. 528].)
- ◆ The doctrine was originally stated as follows: “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.” (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62, 63 62-63 [27 Cal.Rptr. 697].)

State Bar Committee Comments on Proposed Changes:

Punctuation and edits to citations.

PRODUCTS LIABILITY

701

Strict Liability

Manufacturing Defect—Necessary Factual Elements

1 **[Name of plaintiff] claims that the [product] contained a manufacturing**
2 **defect. To succeed, [name of plaintiff] must prove all of the following:**

3
4 **1. That [name of defendant] [manufactured/distributed/sold] the [product];**

5
6 **2. [That the [product] contained a manufacturing defect when it left**
7 **[name of defendant]’s possession;]**

8
9 *[or]*

10
11 **[That, from the time the [product] left [name of defendant]’s**
12 **possession, any changes made to the [product] were reasonably**
13 **foreseeable to [name of defendant];]**

14
15 **3. That the [product] was used [or misused] in a way that was**
16 **reasonably foreseeable to [name of defendant];**

17
18 **4. That [name of plaintiff] was harmed; and**

19
20 **5. That the [product]’s defect was a substantial factor in causing [name**
21 **of plaintiff]’s harm.**

DIRECTIONS FOR USE

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff’s claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- ◆ ~~“[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (Campbell v. Southern Pacific Co. (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)~~
- ◆ ~~“‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (Huynh v. Ingersoll-Rand (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

SOURCES AND AUTHORITY

...

- ◆ [P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer s hands was the sole reason that the product caused injury.” (Campbell v. Southern Pacific Co. (1978)22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)
- ◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the misuse affirmative defense and thus the burden falls on the defendant to prove it.” (Huynh v. Ingersoll-Rand (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

State Bar Committee Comments on Proposed Changes:

The Committee would delete the Directions for Use and move the two bullet items to the Sources and Authority section. The Committee has determined that the Use Note stating that Plaintiff has the burden of proving the “absence of unforeseeable misuse” is not only extremely confusing but incorrect. The authorities cited demonstrate that the burden is on the defendant to prove that plaintiff’s misuse of a product caused the injury. The Use Note imposes an additional element on plaintiff that is not supported by the law.

Members of the Committee strongly questioned the need for the second alternative of element 2, because a manufacturing defect is intrinsic to the product and, unlike a design defect, typically is not dependent upon any changes to the product after the product leaves the manufacturer’s possession. To the extent the second alternative to

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element 2 is included, some Committee members thought the “or” should be in bold, so that if the second alternative is given, the first alternative of element 2 would also be given.

PRODUCTS LIABILITY

702 Strict Liability Manufacturing Defect—Definition

- 1 **A product contains a manufacturing defect if the product differs from the**
2 **manufacturer’s design or specifications or from other ~~apparently identical~~**
3 **typical units of the same product line.**
-

State Bar Committee Comments on Proposed Changes:

The Committee thought “apparently identical” was somewhat confusing, and that “typical” was more easily understood and also accurate.

PRODUCTS LIABILITY

703

Strict Liability

Design Defect—Consumer Expectations Test—Necessary Factual Elements

[Name of plaintiff] claims the [product]’s design was defective because the [product] did not perform as safely as an ordinary consumer would have expected it to perform. To succeed, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. [That, at the time of the harm, the [product] was substantially the same as when it left [name of defendant]’s possession;]

[or]

- 2. [That, from the time the [product] left [name of defendant]’s possession, any changes made to the [product] were reasonably foreseeable to [name of defendant];]

- 3. That the [product] did not perform as safely as an ordinary consumer would have expected;

- 4. That the [product] was used [or misused] in a way that was reasonably foreseeable to [name of defendant];

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

- 6. That the [product]’s design was a substantial factor in causing [name of plaintiff]’s harm.

DIRECTIONS FOR USE

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two

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tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107.)

~~Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citation omitted.)~~
- ~~◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

SOURCES AND AUTHORITY

...

- ◆ “[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.” (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule, supra*, 8 Cal.4th at p. 580.)

◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)

◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

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State Bar Committee Comments on Proposed Changes:

The Committee would delete the Directions for Use relating to product misuse and move the two bullet items to the Sources and Authority section. The Committee has determined that the Use Note stating that Plaintiff has the burden of proving the “absence of unforeseeable misuse” is not only extremely confusing but incorrect. The authorities cited demonstrate that the burden is on the defendant to prove that plaintiff’s misuse of a product caused the injury. The Use Note imposes an additional element on plaintiff that is not supported by the law.

PRODUCTS LIABILITY

704

Strict Liability

Design Defect—Risk-Benefit Test

Necessary Factual Elements—Shifting Burden of Proof

1 **[Name of plaintiff] claims that the [product]’s design was a substantial factor**
2 **in causing harm to [name of plaintiff]. To succeed, [name of plaintiff] must**
3 **prove all of the following:**

- 4
- 5 **1. That [name of defendant] [manufactured/distributed/sold] the [product];**
- 6
- 7 **2. [That, at the time of the harm, the [product] was substantially the same**
- 8 **as when it left [name of defendant]’s possession;]**
- 9

10 *[or]*

11

12 **[That, from the time the [product] left [name of defendant]’s**

13 **possession, any change to the [product] was reasonably foreseeable**

14 **to [name of defendant];]**

15

- 16 **3. That the [product] was used [or misused] in a way that was**
- 17 **reasonably foreseeable to [name of defendant]; and**
- 18
- 19 **4. That the [product]’s design was a substantial factor in causing harm**
- 20 **to [name of plaintiff].**
- 21

22 **If [name of plaintiff] has proved these four facts, then your decision on this**

23 **claim must be for [name of plaintiff] unless [name of defendant] proves that**

24 **the benefits of the design outweigh the risks. In deciding if the benefits**

25 **outweigh the risks, you should consider the following:**

26

- 27 **(a) The gravity of the potential harm resulting from the use of the**
- 28 **[product];**
- 29
- 30 **(b) The likelihood that such harm would occur;**
- 31

- 32 (c) The feasibility of an alternative design;
33
34 (d) The cost of an alternative design;
35
36 (e) The disadvantages of an alternative design; [and]
37
38 (f) [Other relevant factor(s)].
-

DIRECTIONS FOR USE

If both tests for design defect (the consumer expectation test and the risk-benefit test) are asserted by the plaintiff, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106-1107 [206 Cal.Rptr. 431].)

~~Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)~~
- ~~◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

SOURCES AND AUTHORITY

- ◆ This instruction should not be used in connection with the consumer expectation test for design defect: “Risk-benefit weighing is not a formal part of, nor may it serve as a

‘defense’ to, the consumer expectations test.” (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446], internal citation omitted.)

◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978)22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)

◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

...

State Bar Committee Comments on Proposed Changes:

The Committee would delete the Directions for Use and move the two bullet items to the Sources and Authority section. The Committee has determined that the Use Note stating that Plaintiff has the burden of proving the “absence of unforeseeable misuse” is not only extremely confusing but incorrect. The authorities cited demonstrate that the burden is on the defendant to prove that plaintiff’s misuse of a product caused the injury. The Use Note imposes an additional element on plaintiff that is not supported by the law.

PRODUCTS LIABILITY

705

Strict Liability

Failure to Warn—Necessary Factual Elements

[Name of plaintiff] claims that the [product] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To succeed, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. That the [product] had potential [risks/side effects/allergic reactions] that were known or knowable by the use of scientific knowledge available at the time of [manufacture/distribution/sale];
3. That the potential [risks/side effects/allergic reactions] presented a substantial danger to users of the [product];
4. That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];
5. That [name of defendant] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];
6. That the [product] was used [or misused] in a way that was reasonably foreseeable to [name of defendant];
7. That [name of plaintiff] was harmed; and
8. That lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [name of plaintiff]'s harm.

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [Name of defendant] had a continuing duty to warn physicians as long as the product was in use.]

33
34

[For prescription products, the warning must be given to the prescribing physician and must meet the standard set forth above.]

DIRECTIONS FOR USE

A fuller definition of “scientific knowledge” may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was “knowable in light of the generally recognized and prevailing best scientific and medical knowledge available.” *Carlin v. Superior Court* (1996) 13 Cal. 4th 1104, 1112 [56 Cal. Rptr. 2d 162]. The defendant “is held to the knowledge and skill of an expert in the field [and] is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances.” *Id.* at 1113 n.3.

The last bracketed paragraph should be read only in prescription drug products cases: “In the case of prescription drugs and implants, the physician stands in the shoes of the ‘ordinary user’ because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient.” (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467 [81 Cal.Rptr.2d 252].)

~~Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the subcommittee feels that absence of unforeseeable misuse is an element of plaintiff’s claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:~~

- ~~◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)~~
- ~~◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)~~

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SOURCES AND AUTHORITY

...

- ◆ “Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer’s conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product.” (*Anderson v. Owens-Corning Fiberglass Corp.* (1991) 53 Cal.3d 987, 1002–1003 [281 Cal.Rptr. 528].)

“The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances.” (*Carlin v. Superior Court* (1996) 13 Cal. 4th 1104, 1113 n. 3 [56 Cal. Rptr. 2d 162].)

- ◆ “[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution.” (*Anderson, supra*, 53 Cal.3d at p. 1004.)

...

- ◆ “[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.” (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607].)

- ◆ “[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community.” (*Carlin v. Superior Court* (1996) 13 Cal. 4th 10014, 1111 [56 Cal.Rptr.2d 162].)

- ◆ “We are aware of no authority which requires a manufacturer to warn of a risk which is readily known and apparent to the consumer, in this case the physician.” (*Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362 [13 Cal.Rptr.2d 811].)
- ◆ “A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product.” (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1477 [81 Cal.Rptr.2d 252].)
- ◆ “[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer’s hands was the sole reason that the product caused injury.” (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596], internal citations omitted.)
- ◆ “‘Misuse’ is a defense only when that misuse is the actual cause of the plaintiff’s injury, not when some other defect produces the harm. This causation is one of the elements of the ‘misuse’ affirmative defense and thus the burden falls on the defendant to prove it.” (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

...

State Bar Committee Comments on Proposed Changes:

*The Committee gave serious consideration to adding to element 2 the phrase “in light of the generally recognized and prevailing best scientific and medical knowledge” instead of “by the use of scientific knowledge.” There was a question as to whether the Judicial Council’s version changes the standard. Others noted that the cases, including the Supreme Court in *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1107 [56 Cal.Rptr.2d 162], summarize the standard by using language similar to the Judicial Council Instruction. Nonetheless, the Committee thought a Use Note that advised of the fuller standard was appropriate and could be utilized in certain cases.*

The Committee thought the last paragraph relating to prescription products risked oversimplifying the applicable legal standard. The suggested alternative is straightforward and accurate.

*The Committee was divided as to whether to keep the final sentence in the Instruction relating to a continuing duty to warn physicians. *Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467 [81 Cal.Rptr.2d 252] discusses a trial judge’s use of a*

continuing duty instruction but does not decide the propriety of such an instruction. This issue appears unresolved. The Committee nonetheless added a reference to Valentine in the Sources and Authority section.

PRODUCTS LIABILITY

706

Strict Liability

Failure to Warn—Products Containing Allergens (not Prescription Drugs)

[Name of plaintiff] claims that the [product] was defective because it lacked sufficient warnings of potential allergic reactions. To succeed, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] [manufactured/distributed/sold] the [product];
2. That a substantial number of people are allergic to an ingredient in the [product];
3. That the danger of the ingredient is not generally known, or, if known, the ingredient is one that a consumer would not reasonably expect to find in the [product];
4. That the [name of defendant] knew or by the use of scientific knowledge available at the time should have known of the ingredient’s danger and presence;
5. That the [name of defendant] failed to provide sufficient warnings concerning the ingredient’s danger or presence;
6. That [name of plaintiff] was harmed; and
7. That the lack of sufficient warnings was a substantial factor in causing [name of plaintiff]’s harm.

DIRECTIONS FOR USE

A fuller definition of “scientific knowledge” may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was “knowable in light of the generally recognized and prevailing best scientific and medical knowledge available.” Carlin v. Superior

Court (1996) 13 Cal. 4th 1104, 1112 [56 Cal. Rptr. 2d 162], and “knowable by the application of reasonable, developed human skill and foresight.” *Livingston v. Marie Callender’s, Inc.* (1999) 72 Cal.App.4th 830, 839 [85 Cal.Rptr.2d 528].

SOURCES AND AUTHORITY

...

- ◆ Restatement Second of Torts section 402A, comment j states: “In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use. The seller may reasonably assume that those with common allergies, as for example to eggs or strawberries, will be aware of them, and he is not required to warn against them. Where, however, the product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product, the seller is required to give warning against it, if he has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger. Likewise in the case of poisonous drugs, or those unduly dangerous.” *See also Livingston v. Marie Callender’s, Inc.* (1999) 72 Cal.App.4th 830, 838-39 [85 Cal.Rptr.2d 528].

“[A] defendant may be liable to a plaintiff who suffered an allergic reaction to a product on a strict liability failure to warn theory when: the defendant’s product contained an ingredient to which a substantial number of the population are allergic; the ingredient ‘is one whose danger is not generally known, or if known is one which the consumer would reasonably not expect to find in the product’; and where the defendant knew or by the application of reasonable developed human skill and foresight should have know[n]; of the presence of the ingredient and the danger.” (*Livingston, supra*, 72 Cal.App.4th at 839 [85 Cal.Rptr. 528].)

...

- ◆ “The recently adopted Restatement Third of Torts: Products Liability, section 2, comment k, similarly states: ‘Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings [¶] The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic.’ Further, the Restatement Third of Torts: Products Liability, section 2, comment k notes: ‘The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers... . When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required.’ ” (*Livingston, supra*, 72 Cal.App.4th 830, 838–839 [838-39 [85 Cal.Rptr. 528].])
- ◆ “Those issues [noted in the Restatement] are for the trier of fact to determine.” (*Livingston, supra*, 72 Cal.App.4th at p. 840 [85 Cal.Rptr. 528].)

State Bar Committee Comments on Proposed Changes:

The Committee did not see any reason to have a different standard of knowledge in the allergen context from the standard used in other products cases and attempted to have the standard parallel that contained in Instruction 705. The Committee gave serious consideration to adding even more language to describe the standard by which a manufacturer should have known of the danger. As set forth in the Committee’s comments to Instruction 705, the cases refer to “in light of the generally recognized and prevailing best scientific and medical knowledge.” In the allergen context, Livingston refers to “by the application of reasonable, developed human skill and foresight should have known” No consensus was reached on an alternative to the Judicial Council’s Instruction, but the view was that the standard should be the same as set forth in Instruction 705. The Committee agreed that a Use Note similar to that in 705 would be appropriate.

PRODUCTS LIABILITY

**731
Negligence
Basic Standard of Care**

1 **A [designer/manufacture/supplier/installer/repairer] is negligent if**
2 **[he/she/it] fails to use the amount of care in [designing/manufacturing/**
3 **inspecting/installing/repairing] the product that a reasonably careful**
4 **[designer/manufacture/ supplier/installer/repairer] would use in similar**
5 **circumstances to avoid exposing others to a foreseeable risk of harm.**
6
7 **In determining whether [name of defendant] used reasonable care, you**
8 **should balance what [name of defendant] knew or should have known about**
9 **the likelihood and severity of potential harm from the product against the**
10 **burden of taking safety measures to reduce or avoid the harm.**

SOURCES AND AUTHORITY

- ◆ Section 398 was cited with approval in *Pike v. Frank G. Hough Co.* (1970) 2 Cal.3d 464 465, 470 [85 Cal.Rptr. 629].
- ◆ “[W]here an article is either inherently dangerous or reasonably certain to place life and limb in peril when negligently made, a manufacturer owes a duty of care to those who are the ultimate users. This duty requires reasonable care to be exercised in assembling component parts and inspecting and testing them before the product leaves the plant.” (*Reynolds v. Natural Gas Equipment, Inc.* (1960) 184 Cal.App.2d 724, 736 [7 Cal.Rptr. 879], internal citations omitted.)

State Bar Committee Comments on Proposed Changes:

One member of the Committee thought the phrase “which would have been effective” should be added to modify “safety measures”. While the cases do use the modifier, it was not evident to the Committee that the suggested change was necessary, as the Judicial Council’s language implicitly assumes the measures must be effective to reduce or avoid the harm; if there are no effective measures to reduce the harm, there is no balancing that can take place.

PRODUCTS LIABILITY

735
Negligence
Manufacturer or Supplier—Duty to Warn

1 [Name of plaintiff] claims that [name of defendant] was negligent by not using
2 reasonable care to warn [or instruct] about the [product]’s dangerous
3 condition or about facts that make the [product] likely to be dangerous. To
4 succeed on this claim, [name of plaintiff] must prove all of the following:
5

- 6 1. That [name of defendant] [manufactured/distributed/sold] the [product];
- 7
- 8 2. That [name of defendant] knew or reasonably should have known that
9 the [product] was dangerous or was likely to be dangerous when used
10 in a reasonably foreseeable manner;
- 11
- 12 3. That [name of defendant] knew or reasonably should have known that
13 users would not realize the danger;
- 14
- 15 4. That [name of defendant] failed to adequately warn of the danger [or
16 instruct on the safe use of the [product];
- 17
- 18 5. That a reasonable [manufacturer/distributor/seller] under the same or
19 similar circumstances would have warned of the danger [or
20 instructed on the safe use of the [product];
- 21
- 22 6. That [name of plaintiff] was harmed; and
- 23
- 24 7. That [name of defendant]’s failure to warn [or instruct] was a
25 substantial factor in causing [name of plaintiff]’s harm.
26

27 [The warning must be given to the prescribing physician and must include
28 the potential risks or side effects that may follow the foreseeable use of the
29 product. [Name of defendant] had a continuing duty to warn physicians as
30 long as the product was in use.]

State Bar Committee Comments on Proposed Changes:

One member questioned whether element 3 should refer to a particular standard of scientific knowledge comparable to that contained in 705. Another member contended that such a standard of scientific knowledge does not apply in the context of a negligent failure to warn.

PRODUCTS LIABILITY

737
Negligence
Recall/Retrofit

1 **A product manufacturer or supplier that knows of a dangerous defect in a**
 2 **previously sold product is required to use reasonable care to provide**
 3 **under the circumstances. Factors to be considered in determining whether**
 4 **a manufacturer used reasonable care include, but are not limited to,**
 5 **whether the manufacturer: (1) provided an adequate warning of the**
 6 **danger, to recall; (2) recalled the product; and/or (3) corrected the product,**
 7 **or to correct the defect in the product.**

State Bar Committee Comments on Proposed Changes:

The Committee thought the Judicial Council Instruction both overstated and understated the duty owed by manufacturers who learn of a defect in the product. The instruction may overstate the duty by mandating that a duty must necessarily have been breached if a manufacturer does not engage in one of the three types of conduct; it understated the duty by using the disjunctive, implying that only one type of response is necessarily sufficient, when in fact a jury could find that a manufacturer breaches the duty if it does not take two or even three of the described steps.

PRODUCTS LIABILITY

750
Express Warranty

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

6
7 **1. That [name of defendant] [insert one or more of the following]**

8
9 **[made a [statement of fact/promise] that the [product] [insert**
10 **description of alleged express warranty];] [or]**

11
12 **[gave [name of plaintiff] a description of the [product];] [or]**

13
14 **[gave [name of plaintiff] a sample or model of the [product];]**

15
16 **2. That the [product] [insert one or more of the following]**

17
18 **[did not perform as [stated/promised];] [or]**

19
20 **[did not meet the quality of the [description/sample/model];]**

21
22 **3. [That [name of plaintiff] took reasonable steps to notify [name of**
23 **defendant] within a reasonable time that the [product] was not as**
24 **represented, whether or not [name of defendant] received such**
25 **notice;]**

26
27 **4. That [name of plaintiff] was harmed; and**

28
29 **5. That the failure of the [product] to be as represented was a substantial**
30 **factor in causing [name of plaintiff]’s harm.**

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

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

◆ ~~The giving of notice to the seller is not always required. See Instruction 758, *Notification/Reasonable Time*.~~

State Bar Committee Comments on Proposed Changes:

The Committee thought a Use Note was necessary to address the lack of a notice requirement in the context of the purchase of a product when the consumer does not have direct contact with the manufacturer, and that simply a reference to another instruction in the Sources and Authority section was insufficient.

PRODUCTS LIABILITY

Implied Warranty of Merchantability

[Name of plaintiff] [also] claims that [he/she/it] was harmed by the [product] that [he/she/it] bought from [name of defendant] because the [product] did not have the quality that a buyer would expect. To succeed on this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff/name of plaintiff's family member/name of plaintiff's employer] [bought/leased/negotiated] the [sale/lease] of the [product] from [name of defendant];
2. That, at the time of purchase, [name of defendant] was in the business of selling these goods [or by [his/her/its] occupation held [himself/herself/itself] out as having special knowledge or skill regarding these goods];
3. That the [product] [insert one or more of the following]
[was not of the same quality as those generally acceptable in the trade;]
[was not fit for the ordinary purposes for which such goods are used;]
[did not conform to the quality established by the parties' prior dealings or by usage of trade;]
[other ground as set forth in Commercial Code section 2314(2);]
4. [That [name of plaintiff] took reasonable steps to notify [name of defendant] within a reasonable time that the [product] did not have the expected quality;]
5. That [name of plaintiff] was harmed; and
6. That the failure of the [product] to have the expected quality was a substantial factor in causing [name of plaintiff]'s harm.

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- ◆ Although privity appears to be required for actions based upon the implied warranty of merchantability, there are exceptions to this rule, such as one for members of the purchaser's family. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 fn. 8 [120 Cal.Rptr. 681].) Vertical privity is waived for the purchaser's family members, *Hauter v. Zogarts* (1975) 14 Cal.3d 104, and employees, *Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339. A plaintiff satisfies the privity requirement when he leases or negotiates the sale or lease of the product. *United States Roofing v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431 [279 Cal.Rptr. 533].
- ◆ ~~The giving of notice to the seller is not always required. See Instruction 758, Notification/Reasonable Time.~~

State Bar Committee Comments on Proposed Changes:

The Committee thought that the clarification of privity exceptions (for family members and employees, as well as for plaintiffs who had leased or negotiated the sale or lease of the product) was warranted in the Instruction.

Again, the Committee also thought a Use Note was necessary to address the lack of a notice requirement in the context of the purchase of a product when the consumer does not have direct contact with the manufacturer, and that simply a reference to another instruction in the Sources and Authority section was insufficient.

PRODUCTS LIABILITY

752

Implied Warranty of Fitness for a Particular Purpose

1 [Name of plaintiff] claims that [he/she/it] was harmed by the [product] that
2 [he/she/it] bought from [name of defendant] because the [product] was not
3 suitable for [name of plaintiff]'s intended purpose. To succeed on this claim,
4 [name of plaintiff] must prove all of the following:

- 5
- 6 1. That [name of plaintiff/name of plaintiff's family member/name of plaintiff's
7 employer] [bought/leased/negotiated] the [sale/lease] of the [product]
8 from [name of defendant];
- 9
- 10 2. That, at the time of purchase, [name of defendant] knew or had reason
11 to know that [name of plaintiff] intended to use the product for a
12 particular purpose;
- 13
- 14 3. That, at the time of purchase, [name of defendant] knew or had reason
15 to know that [name of plaintiff] was relying on [name of defendant]'s
16 skill and judgment to select or furnish a product that was suitable for
17 the particular purpose;
- 18
- 19 4. That [name of plaintiff] justifiably relied on [name of defendant]'s skill
20 and judgment;
- 21
- 22 5. That the [product] was not suitable for the particular purpose;
- 23
- 24 6. [That [name of plaintiff] took reasonable steps to notify [name of
25 defendant] within a reasonable time that the [product] was not
26 suitable;]
- 27
- 28 7. That [name of plaintiff] was harmed; and
- 29
- 30 8. That the failure of the [product's] failure to be suitable was a
31 substantial factor in causing [name of plaintiff]'s harm.

DIRECTIONS FOR USE

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

SOURCES AND AUTHORITY

- ◆ “Vertical privity is a prerequisite in California for recovery on a theory of breach of the implied warranties of fitness and merchantability.” (*U.S. Roofing, Inc. v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431, 1441 [279 Cal.Rptr. 533], internal citations omitted.) Vertical privity is waived for the purchaser’s family members, *Hauter v. Zogarts* (1975) 14 Cal.3d 104, and employees, *Peterson v. Lamb Rubber Co.* (1960) 54 Cal.2d 339. A plaintiff satisfies the privity requirement when he leases or negotiates the same or lease of the product. *United States Roofing v. Credit Alliance Corp.* (1991) 228 Cal.App.3d 1431 [279 Cal.Rptr. 533].
- ◆ ~~The giving of notice to the seller is not always required. See Instruction 758, Notification/Reasonable Time.~~

State Bar Committee Comments on Proposed Changes:

The Committee thought that the clarification of privity exceptions (for family members and employees, as well as for plaintiffs who had leased or negotiated the sale or lease of the product) was warranted in the instruction.

Again, the Committee also thought a Use Note was necessary to address the lack of a notice requirement in the context of the purchase of a product when the consumer does not have direct contact with the manufacturer, and that simply a reference to another instruction in the Sources and Authority section was insufficient.

PRODUCTS LIABILITY

753

Implied Warranty of Merchantability for Food

1 **[Name of plaintiff] claims that [he/she] was harmed by the [food product] that**
2 **was sold by [name of defendant] because the [food product] was not fit for**
3 **human consumption. To succeed on this claim, [name of plaintiff] must**
4 **prove all of the following:**

- 5
- 6 **1. That [name of plaintiff] [ate/drank] a [food product] sold by [name of**
- 7 **defendant];**
- 8
- 9 **2. That, at the time of purchase, [name of defendant] was in the business**
- 10 **of selling the [food product] [or by [his/her] occupation held [himself/**
- 11 **herself/itself] out as having special knowledge or skill regarding this**
- 12 **[food product];**
- 13
- 14 **3. That the [food product] was harmful when consumed;**
- 15
- 16 **4. That the harmful condition would not reasonably be expected by the**
- 17 **average consumer;**
- 18
- 19 ~~**5. [That [name of plaintiff] took reasonable steps to notify [name of**~~
- 20 ~~**defendant] within a reasonable time of the [product]'s harmful**~~
- 21 ~~**condition;]**~~
- 22
- 23 **5. That [name of plaintiff] was harmed; and**
- 24
- 25 **6. That the [food product] was a substantial factor in causing [name of**
- 26 **plaintiff]'s harm.**

SOURCES AND AUTHORITY

◆ ~~The giving of notice to the seller is not always required. See Instruction 758, *Notification/Reasonable Time*.~~

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State Bar Committee Comments on Proposed Changes:

The Committee recommends deletion of the notice requirement, as none of the cases cited refer to such a requirement. Nor would notice seem required as the case law advises that the implied warranty of merchantability for food “has closer affinities to tort law than to contract law. . .” Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal.App.4th 847, 871 [93 Cal.Rptr.2d].

The Committee also had reservations about removing the distinction between natural and foreign substances as set forth in Mexicali Rose v. Superior Court (1992) 1 Cal.4th 617 [4 Cal.Rptr.2d 145]. Mexicali held that a plaintiff has no claim for breach of implied warranty if the injury-producing substance is natural to the preparation of the food. Id. at 633.

Existence of “Employee” Status Disputed

[Name of plaintiff] claims that [name of agent] was [name of defendant]’s employee and that [name of defendant] is therefore responsible for [name of agent]’s conduct. [Name of defendant] denies that [name of agent] was [his/her/its] employee.

In determining whether [name of agent] was [name of defendant]’s employee, the main question to ask is: Did [name of defendant] have the right to control the way in which [name of agent] performed the work? It does not matter if [name of defendant] exercised the right to control or not. If the right to control existed, then [name of agent] was [name of defendant]’s employee.

If [name of defendant] had the right to specify the end result but not to control the way the work was performed, then [name of agent] was not [name of defendant]’s employee.

If the right of control is not clear, you may consider other factors. The following factors, if true, would suggest that [name of agent] was the employee of [name of defendant]:

- (a) [Name of defendant] supplied the equipment, tools, and place of work;
- (b) [Name of agent] was paid by the hour rather than by the job;
- (c) The work being done by [name of agent] was part of the regular business of [name of defendant];
- (d) [Name of defendant] had an unlimited right to end the relationship with [name of agent];
- (e) The work being done by [name of agent] was the only occupation or business of [name of agent];
- (f) The kind of work performed by [name of agent] is usually done under the direction of a supervisor rather than by a specialist working without supervision;

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44

- (g) The kind of work performed by [name of agent] does not require specialized or professional skill;**
 - (h) The services performed by [name of agent] were to be performed over a long period of time; and**
 - (i) [Name of defendant] and [name of agent] acted as if they had an employer-employee relationship.**
-

State Bar Committee Comments on Proposed Changes:

We believe that the insertion of this sentence will make clear to the jury that the disputed issue covered by this instruction is whether or not the agent is the employee of defendant.

Existence of “Agency” Relationship Disputed

1 **[Name of plaintiff] claims that [name of agent] was [name of defendant]’s agent**
2 **and that [name of defendant] is therefore responsible for [name of agent]’s**
3 **conduct. [Name of defendant] denies that [name of agent] was [his/her/its]**
4 **agent.**
5
6 **If [name of plaintiff] proves that [name of defendant] gave [name of agent]**
7 **authority to act on behalf of [name of defendant], then [name of agent] was**
8 **[name of defendant]’s agent. This authority may be shown by words, but not**
9 **by the words of [name of agent] standing alone, or may be implied by the**
10 **parties’ conduct.**

State Bar Committee Comments on Proposed Changes:

The first suggested change is made to make clear that the disputed issue to which this instruction is directed is the agency relationship.

The second change is inserted to incorporate the legal principal that you cannot prove the agent’s authority solely by the testimony of the agent.

908
Peculiar-Risk Doctrine

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

4
5 **A “special risk” of harm is a recognizable danger that arises out of the**
6 **nature of the work or the place it is done and requires specific safety**
7 **measures appropriate to the danger. A “special risk” of harm may also**
8 **arise out of a planned but unsafe method of doing the work. A “special**
9 **risk” of harm does not include a risk that was is unusual, abnormal, or**
10 **unrelated not related to the normal or expected risks associated with the**
11 **work.**

12
13 **To succeed on this claim, [name of plaintiff] must prove each of the**
14 **following:**

- 15
16 **1. That the work was likely to involve a special risk of harm to others;**
17
18 **2. That [name of defendant] knew or should have known that the work**
19 **was likely to involve this risk;**
20
21 **3. That [name of independent contractor] failed to use reasonable care to**
22 **take specific safety measures appropriate to the danger to avoid this**
23 **risk; and**
24
25 **4. That [name of independent contractor]’s failure was a cause of harm to**
26 **[name of plaintiff].**

27
28 **[In deciding if [name of defendant] should have known the risk, you should**
29 **consider [his/her/its] knowledge and experience in the field of work to be**
30 **done.]**

State Bar Committee Comments on Proposed Changes:

These changes make the language of this paragraph consistent.

910
Ratification

1 [Name of plaintiff] claims that [name of defendant] is responsible for the harm
2 caused by [name of agent]’s conduct because [name of defendant] “adopted
3 as his/her/its own” approved [name of agent]’s conduct after it occurred. If
4 you find that [name of agent] harmed [name of plaintiff], you must decide if
5 [name of defendant] approved adopted that the conduct as his/her/its own.
6 [Name of plaintiff] must prove that all of the following are true:

- 7
- 8 1. That [name of agent] intended to act on behalf of [name of defendant];
- 9
- 10 2. That [name of defendant] learned of [name of agent]’s conduct after it
- 11 occurred; and
- 12
- 13 3. That [name of defendant] adopted approved the [name of agent]’s
- 14 conduct as his/her/its own.
- 15

16 [Name of defendant]’s adoption of [name of agent]’s conduct as his/her/its
17 own Approval can be shown through words, or it can be inferred from a
18 person’s conduct. Approval Adoption of such conduct can be inferred if a
19 person voluntarily keeps the benefits of [his/her] [his/her/its]
20 [representative/employee]’s unauthorized conduct after [he/she] [he/she/it]
21 learns of the unauthorized conduct.]

DIRECTIONS FOR USE

This second sentence of the last paragraph of the instructions is meant to be illustrative of the type of conduct that will create an inference of adoption. The court should tailor that sentence to fit the facts of a particular case.

State Bar Committee Comments on Proposed Changes:

The substitution of the word “approval” for “ratification” does not appear to be appropriate. The concept of ratification would appear to imply some greater degree of adoption of the agent’s conduct than mere approval. The cases cited use the phrase

“adopt as his own” and we think it would be preferable to follow that language rather than using the less precise term.

VICARIOUS RESPONSIBILITY

913
Scope of Employment

1 **[Name of plaintiff] must prove that [name of agent] was acting within the**
2 **scope of [his/her] [employment/authorization] when [name of plaintiff] was**
3 **harmed.**

4
5 **Conduct is within the scope of [employment/authorization] if the conduct:**

6
7 **(a) Is the kind of conduct the [employee/agent] was employed to**
8 **perform; or**

9
10 **(b) Is reasonably foreseeable in light of the employer’s business or the**
11 **employee’s job responsibilities.**

DIRECTIONS FOR USE

For an instruction on the scope of employment in cases involving on-duty peace officers, see Instruction 914, *Scope of Employment—Peace Officer’s Misuse of Authority*.

There is an exception to an employer’s liability for intentional acts of the employee when the employee is motivated by personal malice not engendered by the employment. These instructions do not address that exception; if facts exist whereby the exception would come into consideration, the instructions should be modified accordingly.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1000

Essential Factual Elements (Gov. Code, § 835)

1 **[Name of plaintiff] claims that [he/she] was harmed by a dangerous**
2 **condition of [name of defendant]’s property. To succeed on this claim,**
3 **[name of plaintiff] must prove all of the following:**

- 4
- 5 **1. That [name of defendant] owned [or controlled] the property;**
 - 6
 - 7 **2. That the property was in a dangerous condition at the time of the**
8 **incident;**
 - 9
 - 10 **3. That the dangerous condition created a reasonably foreseeable risk**
11 **of the kind of incident that occurred;**
 - 12
 - 13 **4. [That the negligent or wrongful conduct of [name of defendant]’s**
14 **employee acting within the scope of [his/her] employment created the**
15 **dangerous condition;]**

16
17 *[or]*

18
19 **[That [name of defendant] had notice of the dangerous condition for a**
20 **long enough time to have protected against it.]**

- 21
- 22 **5. That [name of plaintiff] was harmed; and**
 - 23
 - 24 **6. That the dangerous condition was a substantial factor in causing**
25 **[name of plaintiff]’s harm.**
-

State Bar Committee Comments on Proposed Changes:

The single suggested change of omitting the first occurrence of the word "the" in subdivision (4) is offered because the current phrasing seems to presume that there has been negligent conduct.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1001
Control

1 **[Name of plaintiff] claims that [name of defendant] controlled the property at**
2 **the time of the incident. In deciding whether [name of defendant] controlled**
3 **the property, you should consider whether [name of defendant] had the**
4 **power to prevent, fix, or guard against the dangerous condition. You**
5 **should also consider whether [name of defendant] treated the property as if**
6 **it were its property.**

State Bar Committee Comments on Proposed Changes:

The committee proposes no changes to the text of this instruction. However, the word "power" is vague. The "Directions for Use" should be modified to state that this instruction should only be given once the court has determined that the entity had a legal duty to "prevent, fix, or guard against the dangerous condition." This change is necessary because any public entity may have the "power" to "fix" a dangerous condition of public property (i.e. a state maintenance crew driving on a county road has the "power" (in the sense of the ability to do so) to stop and move a boulder obstructing traffic on the county road) without that "power" having anything to do with "control" over the property.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1002

Definition of “Dangerous Condition”

1 A “dangerous condition” is a condition of **public property** that creates a
2 substantial risk of injury to members of the general public who are using
3 the property [or adjacent property] with reasonable care and in a
4 reasonably foreseeable manner. A condition that creates only a minor risk
5 of injury is not a dangerous condition.

State Bar Committee Comments on Proposed Changes:

The addition of "of public property" is meant to clarify that a dangerous condition must be an aspect of the property rather than some other condition. (i.e. a speeding car on a roadway is a "condition" that may create a substantial risk of injury, but it is clearly not a condition of public property that should be the subject of this instruction).

DANGEROUS CONDITION OF PUBLIC PROPERTY

1003

Notice (Gov. Code, § 835.2)

1 **[Name of plaintiff] must prove that [name of defendant] had notice of the**
2 **dangerous condition before the incident occurred. To prove that there was**
3 **notice, [name of plaintiff] must prove:**

4
5 **[That [name of defendant] knew of the condition and knew or should**
6 **have known that it was dangerous. A public entity knows of a**
7 **dangerous condition if an employee knows of the dangerousness of**
8 **the condition and reasonably should have informed the entity about**
9 **it;]**

10
11 *[or]*

12
13 **[That the condition had existed for enough time before the incident**
14 **and was so obvious that the [name of defendant] reasonably should**
15 **have discovered the condition and known that it was dangerous.]**

State Bar Committee Comments on Proposed Changes:

Addition of the words "dangerousness of" are specifically warranted by the text of Government Code section 835.2(a). In the last paragraph, addition of the words "before the incident" clarifies the proper time focus for an analysis of constructive notice.

Also, the first line of the "Directions for Use" should be modified to read "This instruction is intended to be used where plaintiff relies solely on Government Code section 835(b)." Without the word "solely," the phrase "must prove" in the first line of the instruction is inaccurate.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1008

Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

1 **You may not find that [name of defendant]'s property was in a dangerous**
2 **condition solely merely because [name of defendant] did not provide a**
3 **[insert device or marking]. However, you may consider the lack of a [insert**
4 **device or marking], along with other related circumstances shown by the**
5 **evidence, in determining whether [name of defendant]'s property was**
6 **dangerous.**

State Bar Committee Comments on Proposed Changes:

Replacing the word "solely" with "merely" accurately tracks the language of the subject statute. Insertion of the word "related" encourages the jury to maintain a proper focus on the evidence.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1009

**Failure to Provide Traffic Warning Signals, Signs, or Markings
(Gov. Code, § 830.8)**

1 **A public entity is not responsible for harm caused by the lack of a [insert**
2 **relevant warning device] unless it is required to warn of a dangerous traffic**
3 **conditions condition of property that a reasonably careful person would**
4 **not notice or anticipate.**

State Bar Committee Comments on Proposed Changes:

As drafted, the instruction is not an accurate statement of the law. A group of 4 cars racing at 100 mph is a "dangerous traffic condition" but not a dangerous condition of property for which the failure to provide a warning signal or sign would render a public entity responsible. There is simply no legal precedent for the "dangerous traffic conditions" language. Thus, the suggested change re-focuses on the condition of the property.

DANGEROUS CONDITION OF PUBLIC PROPERTY

1010
Weather Conditions Affecting Streets and Highways
(Gov. Code, § 831)

1 **[Name of defendant] claims it cannot be held responsible for [name of**
2 **plaintiff]'s harm to the extent that because the harm was caused by [insert**
3 **weather condition, e.g., fog, wind, rain, flood, ice or snow] affecting the use of a**
4 **public street or highway. To succeed, [name of defendant] must prove both**
5 **of the following:**

- 6
- 7 **1. That [insert weather condition, e.g., fog, wind, rain, flood, ice, or snow]**
8 **affecting the use of a public street or highway was the sole cause of**
9 **[name of plaintiff]'s harm; and**
- 10
- 11 **2. That a reasonably careful person using the public streets and**
12 **highways would have noticed and anticipated the [insert weather**
13 **condition, e.g., fog, wind, rain, flood, ice or snow] and anticipated its**
14 **affect on the use of the street or highway.**
-

State Bar Committee Comments on Proposed Changes:

The suggested changes reflect the committee's concern that the initial draft set up a complete defense and required proof that the affect of weather on a street or highway was the "sole" cause of plaintiff's harm. In fact, Government Code section 831 weather immunity may not dispose of the entire case as other allegations may raise an improper design or other bases for relief not related to the subject weather condition. For this reason, the phrase "to the extent that" was added to clarify that the immunity only addresses the weather aspects of the case. Additionally, the word "sole" was deleted from subdivision (1) because it has no basis in section 831 or any of the interpreting cases. For example, where the defendant alleged comparative fault on the part of the plaintiff driver or a third party, the instruction limiting the application of the weather immunity to cases where the weather condition was the "sole" cause of plaintiff's harm would be an incorrect statement of the law and would tend to confuse the jury. Addition of the phrase "use of" in connection with the street or highway is intended to track the language of section 831 as a more accurate statement of the law. Finally, the word "claims" was eliminated from line 1 because the original phrasing sounded more like a restatement of one party's position than an instruction in the law. Simply put, a public entity is entitled to immunity if it proves the elements set forth in section 831.

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1101
Concealment

1 [Name of plaintiff] claims that [he/she] was harmed because [name of
2 defendant] concealed certain information. To succeed on this claim, [name
3 of plaintiff] must prove all of the following:
4

5 **[1. (a) That [name of defendant] and [name of plaintiff] were in a [insert type
6 of fiduciary relationship, e.g., fiduciary relationship, such as “business
7 partners” or other relationship that would give rise to duty]; and**
8

9 **(b) That [name of defendant] concealed did not disclose an important
10 fact from to [name of plaintiff];]**
11

12 [or]

13
14 **[1. That [name of defendant] disclosed some facts to [name of plaintiff] but
15 concealed did not disclose [other/another] important fact(s), making
16 the disclosure deceptive likely to mislead;]**
17

18 [or]

19
20 **[1. That [name of defendant] intentionally concealed did not disclose an
21 important fact that was known only to [name of defendant] and that
22 [name of plaintiff] could not have discovered;]**
23

24 [or]

25
26 **[1. That [name of defendant] actively concealed an important fact from
27 [name of plaintiff] or prevented [name of plaintiff] from investigating and
28 discovering that fact;]**
29

30 **2. That [name of plaintiff] did not know of the concealed [concealed and/or
31 undisclosed] fact;**
32

33 **3. That [name of defendant] intended to deceive [name of plaintiff] by
34 concealing [concealing and/or not disclosing] the fact;**
35

- 36 **4. That [name of plaintiff] relied on [name of defendant]’s deception and**
37 **that such reliance was reasonable under the circumstances;**
38
39 **5. That [name of plaintiff] was harmed; and**
40
41 **6. That [name of plaintiff]’s reliance on the deception was a substantial**
42 **factor in causing [name of plaintiff]’s harm.**
-

State Bar Committee Comments on Proposed Changes:

Conceal/Did Not Disclose.

The proposed jury instructions as drafted use the term “conceal” throughout. This appears to be drawn from the language of Civil Code section 1710. However, cases have accepted that mere nondisclosure may sufficient in certain circumstances. See, e.g. La Jolla Village Homeowners’ Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1151 [261 Cal. Rptr. 146] (“[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable.”); LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 336-37; Stevensen v. Baum (1998) 65 Cal. App. 4th 159, 165 (“Concealment is a term of art which includes mere nondisclosure when a party has a duty to disclose.”). Thus, the instructions as proposed appear to sacrifice accuracy for the sake of consistency. In the view of the committee, this sacrifice is inappropriate and could impose upon plaintiffs a burden of proving “concealment” under circumstances where the law requires only a showing of “nondisclosure.” Accordingly, the committee recommends that the instruction be revised to read as stated above.

The committee intentionally chose not to change “conceal” in the introductory paragraph or the other instructions because concealment, which implies an element of intent, is still appropriate to discuss the tort generally. The inaccuracy only exists with respect to the individual elements that are modified above.

Likely to Mislead.

Change the second subpart 1 to read:

That [name of defendant] disclosed some facts to [name of plaintiff] but ~~concealed~~ did not disclose [other/another] important fact(s), making the [name of defendant’s] disclosure likely to mislead deceptive.

“Likely to mislead” has been repeatedly used by the Courts and is found in the statute. See Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 294 ;

Roddenberry v. Roddenberry (1996) 44 Cal. App. 4th 634, 666; Civil Code § 1710.
Deceptive is not more easily understood.

“Intentional” Concealment.

Change the third subpart 1 to read:

That [name of defendant] intentionally concealed an important fact that was known only to [name of defendant] and that [name of plaintiff] could not have discovered.

The California appellate courts have applied this category only rarely. However, where they have, the phrase “intentionally concealed” is not supported in the case law. In the context of facts that are known only to the defendant and that cannot be discovered by the plaintiff, the requirement is nondisclosure not intentional concealment. *LiMandri v. Judkins* (1997) 52 Cal. App. 4th 326, 336-337 [60 Cal. Rptr.2d 539]; *Magpali v. Farmers Group, Inc.* (1996) 48 Cal. App. 4th 471, 482 [55 Cal. Rptr. 2d 225]; *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal. 3d 285, 294 [85 Cal. Rptr 444]; *La Jolla Village Homeowners’ Assn. v. Superior Court* (1989) 212 Cal. App. 3d 1131, 1151 [261 Cal. Rptr. 146]. Use of the adverb “intentionally” also appears to confuse this element with the separate requirement of intent, which is properly identified within subpart 3.

Active Concealment.

Change the fourth subpart to read:

1. That [name of defendant] actively concealed an important fact from [name of plaintiff] or prevented [name of plaintiff] from investigating and discovering that fact.

*The opinions that address this element focus entirely on active concealment by the plaintiff, i.e. a proactive effort to prevent plaintiff from learning of the material facts. Courts generally state the issue as a requirement that the defendant “actively concealed” a material fact from the plaintiff or that the defendant “actively concealed discovery” of a material fact from the plaintiff. Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal. App. 4th 603, 612-613 [7 Cal. Rptr. 2d 859]; LiMandri, *supra*, 52 Cal. App. 4th at pp. 336-337; Warner, *supra*, 2 Cal. 3d at p. 294. The language “prevented . . . from investigating” is not found in the cases. It does appear in BAJI and was used in Witkin. Revising the language to eliminate this phrase and focus on defendant’s efforts to prevent discovery, which may encompass preventing an investigation or other activities, is more consistent with the opinions of the California courts.*

FRAUD OR DECEIT

1104

Opinions as Statements of Fact

1 Ordinarily, a person’s opinion is not considered a representation of fact. An
2 opinion is a person’s belief that a fact exists, a statement regarding a
3 future event; or a judgment about quality, value, authenticity, or similar
4 matters. However, [name of defendant]’s opinion is considered a
5 representation of fact if [name of plaintiff] proves that any of the following
6 are true:
7

- 8 1. [Name of defendant] claimed to have special knowledge of the subject
9 matter that [name of plaintiff] did not have; or
- 10
- 11 ~~2. [Name of defendant] made a representation, not as a casual~~
12 ~~expression of belief, but in a way that declared the matter to be true;~~
13 ~~or~~
- 14
- 15 2. [Name of defendant] did not believe what he/she said to [name of
16 plaintiff]; or
- 17
- 18 3. [Name of defendant]’s stated the opinion in a way that suggested the
19 existence of facts on which [name of plaintiff] could rely; or {see
20 alternatives discussed below.}
- 21
- 22 4. [Name of defendant] had a relationship of trust and confidence with
23 [name of plaintiff]; or
- 24
- 25 5. [Name of defendant] had some other special reason to expect that
26 [name of plaintiff] would rely on his or her opinion; or
- 27
- 28 6. [Name of defendant] represented that [his/her/its] product was safe.

State Bar Committee Comments on Proposed Changes:

Future Events.

Change the introduction to read:

Ordinarily, a person's opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists; a statement regarding a future event or a judgment about quality, value, authenticity, or similar matters. However, [name of defendant]'s opinion is considered a representation of fact if [name of plaintiff] proves that any of the following are true:

California courts have consistently adopted the position that a fraud requires a misstatement of past or existing facts. "Generally, an actionable misrepresentation must be made as to past or existing facts." Borba v. Thomas (1977) 70 Cal. App. 3d 144, 152 [138 Cal. Rptr. 565]; Daniels v. Oldenburg (1950) 100 Cal. App. 2d 724, 727; Cohen v. S&S Construction Co. (1983) 151 Cal. App. 3d 941, 946 [201 Cal. Rptr. 173]; Neu-Visions Sports, Inc. v. Soren (2000) 86 Cal. App. 4th 303, 309 [103 Cal. Rptr. 2d 159]. Statements regarding future events are treated as opinions and are actionable only to the extent that they fit within one of the exceptions stated in instruction 1101. See e.g. Neu-Visions Sports, Inc. v. Soren (2000) 86 Cal. App. 4th 303, 309 [103 Cal. Rptr. 2d 159]. This limitation was previously included in BAJI and has been eliminated in the present draft. Elimination of this requirement is a legal error.

Revisions to Subpart 2.

Eliminate subpart 2:

2. [Name of defendant] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;

and replace with:

2. [Name of defendant] did not believe the opinion that he/she stated to [name of plaintiff]; or
{Use one of the following alternatives}

3. [Name of defendant] stated the opinion in a way that suggested the existence of facts on which [name of plaintiff] could rely.;

3. [Name of defendant] stated the opinion in a way that declared as true facts suggested by the statement;

3. [Name of defendant] stated the opinion in a way that suggested the existence of facts.

There is no dichotomy between “casual expression of belief” and “a declaration of the matter as true” as a legal basis for recovery in California’s jurisprudence. The language used comes from *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal. Rptr. 2d 51]. *Bily* used the sentence solely in the context of a decision regarding a professional opinion, whose holding was based specifically on the fact that defendants held themselves out to have specialized accounting knowledge that the plaintiff did not have. *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal. Rptr. 2d 51]. This is already addressed in subsection 1 of the draft instruction. No case has used this language in a fact pattern that did not involve a defendant acting in a professional capacity or with a defendant that did not claim special knowledge regarding the subject matter. See *Neu Visions Sports, supra*, 86 Cal. App. 4th at p. 307; *Anderson v. Deloitte & Touche LLP* (1997) 56 Cal. App. 4th 1468, 1476 [66 Cal. Rptr. 2d 512]; *B.L.M. v. Sabo & Deitcsch* (1997) 55 Cal. App. 4th 823, 834 [64 Cal. Rptr. 2d 335]; *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 489. The case cited by *Bily* in support of the quoted sentence also dealt with a professional opinion. The language is not appropriate statement of the law outside of this context.

Nonetheless, BAJI, the Restatement and California cases support the imposition of liability when a defendant words his statement in the form of an opinion, but in light of all the circumstances, the statement was properly taken to affirm the existence of facts. See e.g. *Cohen v. S.&S. Constr. Co.* (1983) 151 Cal. App. 3d 941, 946 [201 Cal. Rptr. 173]; *Southern Calif. Dist. Council Assemblies of God v. Shepherd of Hills Evangelical Lutheran Church* (1978) 77 Cal. App. 3d 951, 960 [144 Cal. Rptr. 46]; see also Rest.2d Torts § 529. This basis for liability focuses on the degree to which the opinion substituted for or was equivalent to a statement of fact. Further, a party may be found liable for statement of an opinion when he or she false represents to a plaintiff that they have the opinion for purposes of inducing a sale. *Cooper v. Jevne* (1976) 56 Cal. App. 3d 860, 865-866. Similar issues arise in the context of Defamation and Libel. See Draft Instruction 1207 at p. 263. The revisions are intended to capture the meaning of these cases. The language is not drawn directly from any case.

While the committee reached agreement on the language described as item 2 above, the committee could not reach agreement regarding language for option 3. Each of the alternatives presented above received votes from within the committee and the subcommittee that was assigned this set of instructions. The first alternative emphasizes the requirement that the statement in context should be treated as reliably stating facts to a listener. That is, the statement would not be understood as a matter of opinion or prediction over which reasonable people might differ but conveyed the existence of reliable, verifiable information in the possession of the person who stated the opinion. The second option borrows from the language previously proposed by the judicial committee and emphasizes the extent that the representation at issue

substitutes for a statement of facts that can be verified as truthful. The final was favored by others in the committee as being sufficient in itself without further emphasis regarding the reliability or truth of the facts stated.

The main objections to each option fall into two categories. Those favoring the last option argued that the additional language confused this one element with the remaining elements of the tort, in particular actual and reasonable reliance, which must still be proven. If the statement suggests to the listener that facts exist, isn't that sufficient if the implied facts are proven false and the plaintiff relied on the statement? Those favoring the first two alternatives argue that the last option improperly lowers the standard for liability. Arguably, all opinions suggest that the party stating the opinion has some factual basis for his claim or prediction. Restating the requirement as limited to the suggestion of fact alone threatens therefore to eliminate the rule insulating the statement of opinions from claims of fraud. Unable to resolve the issue, the committee recommends further research and debate by the drafters.

Damages Instructions

Unlike BAJI, the proposed instructions do not include a specific damages instructions. Recovery in fraud and deceit are limited by common law and statutory restrictions. In some cases a party may recover only his or her out of pocket expenses. In others, they may obtain the "benefit of the bargain." Thus, use of a general instruction alone will not likely be appropriate. An examination of the other subject matters suggests that the decision not to include a damages instruction where BAJI often does appeared to be a conscious decision on the part of the task for in multiple subject matters in the proposed instructions. The task force may wish to consider whether specific damages instructions in categories in which damages are limited by case law or statute is warranted.

1107
Reliance

1 **[Name of plaintiff] relied on [name of defendant]’s [misrepresentation/
2 concealment] if it caused [name of plaintiff] to [insert brief description of the
3 transaction or change in plaintiff’s legal relationship with the defendant or another
4 party or other conduct that constitutes legal reliance, e.g., “buy the house”], and
5 if [he/she] would not, in all reasonable probability, have [insert brief
6 description of] entered into the transaction or other conduct constituting
7 legal reliance] without such [misrepresentation/concealment].**

8
9 **It is not necessary for a [misrepresentation/concealment] to be the only
10 reason for [name of plaintiff]’s conduct. It is enough if a [misrepresentation/
11 concealment] substantially influenced [name of plaintiff]’s choice, even if it
12 was not the only reason for [his/her] conduct.**

13
14 **If you find that [name of defendant]’s [misrepresentation/concealment] was
15 important, you may infer that [name of plaintiff] relied upon the
16 [misrepresentation/concealment].**

State Bar Committee Comments on Proposed Changes:

Expansion Beyond Transaction.

Change the instruction to read:

***[Name of plaintiff] relied on [name of defendant]’s [misrepresentation/
concealment] if it caused [name of plaintiff] to [insert brief description of the
transaction or change in the plaintiff’s legal relationship with the defendant or
another party or other conduct constituting actual legal reliance, e.g., “buy the
house”], and if [he/she] would not, in all reasonable probability, have [insert brief
description of] entered into the transaction or other conduct constituting actual
legal reliance] without such [misrepresentation/concealment].***

*California defines reliance as follows: “Reliance exists when the misrepresentation or
nondisclosure was an immediate cause of the plaintiff’s conduct which altered his or her
legal relations, and when without such misrepresentation or nondisclosure he or she
would not, in all reasonable probability, have entered into the contract or other
transaction.” (Alliance Mortgage Co. v. Rothwell (1995) 10 Cal.4th 1226, 1239.); see*

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also 5 Witkin, Summary of Cal. Law § 711 at p. 810 & Supplement. The Courts of Appeal have interpreted this element as requiring more than just action. “Viewed in this context, the analysis never reaches the question whether Mariani reasonably could not have known about AWB’s financial condition by the time it entered into the restructuring agreement in February of 1986. While Mariani may have ‘acted’ in a factual sense when he signed the restructuring agreement, he did not ‘rely’ in a legal sense because he did not alter his legal relations with Wells Fargo.” *Mariani v. Price Waterhouse*, (1999) 70 Cal. App. 4th 685, 706. Nonetheless, the full scope of the limitation is not well defined. It is however broader than just engaging in a transaction.

The change is intended to broaden the instruction to take account of the full scope of the conduct that can give rise to a cause of action. While most cases will involve transactions, some will not. Rather than devise language that might suit all cases, the Subcommittee encourages a response that would require the judge to identify the conduct that allegedly satisfies this element based on the particular facts of the case before the Court.

Reliance Based on Materiality.

If you find that [name of defendant]’s [misrepresentation/ concealment] was important, you may infer that [name of plaintiff] relied upon the [misrepresentation/concealment].

Citing multiple authorities, the Supreme Court has stated that at least an inference of reliance arises whenever a showing that a misrepresentation was material. *Engalla v. Permanente*, 15 Cal.4th 951 (Cal. 1997), citing *Vasquez v. Superior Court of San Joaquin County*, 4 Cal. 3d 800 (Cal. 1971), 12 *Williston on Contracts* (3d ed. 1970) 480, and the *Restatement, Rest., Contracts*, § 167, illus. 3. Frequently, courts have asserted inference of reliance as arising with regard to a material fact. In *Vasquez*, the Supreme Court stated:

The rule in this state and elsewhere is that it is not necessary to show reliance upon false representations by direct evidence. “The fact of reliance may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect.” Vasquez, 4 Cal. 3d at 814, citing Hunter v. McKenzie, 197 Cal.176, 185 (Cal. 1925).

Inference of reliance has been sufficient since the Supreme Court’s 1925 decision in Hunter v. McKenzie. The opinion that inferences from attendant circumstances are oft times more satisfactory evidence has persisted. If the “evidence justifies it,” See Mathewson v. Naylor, 18 Cal. App. 2d 741, 744 (Cal. Dist. Ct. App., 1937), Thomas v.

Hawkins, 96 Cal. App.2d 377, 380 (Cal. Dist. Ct. App., 1950), see also, *Gormly v. Dickinson*, 178 Cal. App. 2d 92, 105 (Cal. Dist. Ct. App., 1960), an inference can and should be drawn from the circumstances that have been shown.

The instruction should be revised to reflect this omission.

Statement Of the Burden

The draft contain a number of instructions that do not identify which party bears the burden. See e.g. Instructions 1105-1108. This appears to be an issue that cuts across many areas. The task force should consider whether this needs to be addressed as a global matter.

Damages Instructions

Unlike BAJI, the proposed instructions do not include a specific damages instructions. Recovery in fraud and deceit are limited by common law and statutory restrictions. In some cases a party may recover only his or her out of pocket expenses. In others, they may obtain the “benefit of the bargain.” Thus, use of a general instruction alone will not likely be appropriate. An examination of the other subject matters suggests that the decision not to include a damages instruction where BAJI often does appeared to be a conscious decision on the part of the task for in multiple subject matters in the proposed instructions. The task force may wish to consider whether specific damages instructions in categories in which damages are limited by case law or statute is warranted.

1108
Reasonable Reliance

-
- 1 **You must determine the reasonableness of [name of plaintiff]'s reliance by**
2 **taking into account [name of plaintiff]'s mental capacity, knowledge, and**
3 **experience.**
-

DIRECTIONS FOR USE

The model instruction is appropriate for cases in which evidence of the plaintiff's greater or lesser personal knowledge, education, experience or capacity has been introduced. Trial of class actions may require a different instruction. In that context, the Supreme Court has held that the jury can find that plaintiff class's reliance was justified if plaintiff proves that a reasonable person in the relevant circumstances would have relied on the representation. *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 n. 19.; see also *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal. App. 4th 952, 963. In class cases, the following instruction would be appropriate in lieu of the instruction provided above: "If you find that a reasonable person would have relied upon [name of defendant's] [misrepresentation/concealment], then you may infer that [name of plaintiff's reliance was reasonable under the circumstances."

State Bar Committee Comments on Proposed Changes:

Reasonable Reliance in Class Cases.

*The proposed instruction appears to eliminate the "reasonable man" standard for determining justifiable reliance, in favor of individualized inquiry as to the mental capacity, knowledge, and experience of each plaintiff. While an inquiry into the individual characteristics of the plaintiff is justified by the cases cited in support of the instruction, it is not appropriate for class action cases. At least in the class action context, the limited inquiry is at odds with the Supreme Court's statement in the case of *Vasquez v. Superior Court* (1971) 4 Cal. 3d 800, 814 n.19, that "[i]f the court finds that a reasonable man would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise." As the Court of Appeal most recently held in *Wilner v. Sunset Life Ins Co.* (2000) 78 Cal. App. 4th 952:*

*As noted in *Vasquez*, "it is not necessary to show reliance upon false representations by direct evidence. 'The fact of reliance upon alleged false representations may be inferred from the circumstances attending the*

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transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect.' [Citations.]" (Vasquez v. Superior Court, supra, 4 Cal.3d at p. 814, 94 Cal. Rptr. 796, 484 P.2d 964.) Stated otherwise, "[w]here representations have been made in regard to a material matter and action has been taken, in the absence of evidence showing the contrary, it will be presumed[, or inferred,] that the representations were relied on.' [Citation.]" (Ibid.) Accordingly, should the trial court find upon an evidentiary hearing that Sunset made material misrepresentations to the class members, "at least an inference of reliance would arise as to the entire class." (Ibid., fn. omitted.)

That reliance was justified also may be proven on a class basis. "If the court finds that a reasonable [person] would have relied upon the alleged misrepresentations, an inference of justifiable reliance by each class member would arise. It should be noted in this connection that a misrepresentation may be the basis of fraud if it was a substantial factor in inducing the plaintiff to act and that it need not be the sole cause of damage. [Citation.]" (Vasquez v. Superior Court, supra, 4 Cal.3d at p. 814, fn. 9, 94 Cal. Rptr. 796, 484 P.2d 964.) Id. at 963 (emphasis added).

Statement Of the Burden

The draft contain a number of instructions that do not identify which party bears the burden. See e.g. Instructions 1105-1108. This appears to be an issue that cuts across many areas. The task force should consider whether this needs to be addressed as a global matter.

Damages Instructions

Unlike BAJI, the proposed instructions do not include a specific damages instructions. Recovery in fraud and deceit are limited by common law and statutory restrictions. In some cases a party may recover only his or her out of pocket expenses. In others, they may obtain the "benefit of the bargain." Thus, use of a general instruction alone will not likely be appropriate. An examination of the other subject matters suggests that the decision not to include a damages instruction where BAJI often does appeared to be a conscious decision on the part of the task for in multiple subject matters in the proposed instructions. The task force may wish to consider whether specific damages instructions in categories in which damages are limited by case law or statute is warranted.

DEFAMATION

1200

**Defamation Per Se—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)**

1 **[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff]**
2 **by making [one or more of] the following statement(s): [list all claimed per se**
3 **defamatory statements].**

4
5 **Liability**

6
7 **To succeed on this claim, [name of plaintiff] must prove all of the following**
8 **~~are more likely true than not true:~~**

- 9
10 **1. That [name of defendant] made [one or more of] the statement(s) to [a**
11 **person/persons] other than [name of plaintiff];**
12
13 **2. That [this person/these people] reasonably understood that the**
14 **statement(s) [was/were] about [name of plaintiff];**
15
16 **3. [That [this person/these people] reasonably understood the**
17 **statement(s) to mean that [insert ground(s) for defamation per se, e.g.,**
18 **"[name of plaintiff] had committed a crime"]; and**
19
20 **4. That the statement(s) [was/were] false.**

21
22 **In addition, [name of plaintiff] must prove by clear and convincing evidence**
23 **that [name of defendant] knew the statement(s) [was/were] false or had**
24 **serious doubts about the truth of the statement(s).**

25
26 **Nominal Damages**

27
28 **If [name of plaintiff] has proven all of the above, the law assumes that [name**
29 **of plaintiff]'s reputation has been harmed. Without further evidence of**
30 **damage, [name of plaintiff] is entitled to a nominal sum such as one dollar or**
31 **such greater sum as you believe is proper for the assumed harm to [name**
32 **of plaintiff]'s reputation under the circumstances of this case.**

34 **[Name of plaintiff] is also entitled to recover if [he/she] proves it is more**
35 **likely true than not true that [he/she] sustained any of the following actual**
36 **damages:**

- 37
- 38 a. **Harm to [name of plaintiff]'s property, business, trade, profession, or**
39 **occupation;**
- 40
- 41 b. **Expenses [name of plaintiff] had to pay as a result of the defamatory**
42 **statements;**
- 43
- 44 c. **Harm to [name of plaintiff]'s reputation in addition to that assumed by**
45 **the law; and**
- 46
- 47 d. **Shame, mortification, or hurt feelings.**
- 48

49 **Punitive Damages**

50

51 **[Name of plaintiff] may also recover damages to punish [name of defendant] if**
52 **[name of plaintiff] proves by clear and convincing evidence:**

- 53
- 54 **1. That [name of defendant] acted with intent to cause injury to [name of**
55 **plaintiff]; or**
- 56
- 57 **2. That [name of defendant] acted with a willful and conscious disregard**
58 **for the rights or safety of [name of plaintiff]; or**
- 59
- 60 **3. That [name of defendant]'s conduct was despicable and subjected**
61 **[name of plaintiff] to cruel and unjust hardship in conscious disregard**
62 **of [name of plaintiff]'s rights; [or]**
- 63
- 64 **[4. That [name of defendant] intentionally misrepresented or concealed a**
65 **material fact known to [name of defendant] with the intention of**
66 **depriving [name of plaintiff] of property, a legal right, or otherwise**
67 **causing [name of plaintiff] injury.]**
- 68

69 **["Despicable conduct" is conduct that is so mean, vile, base, or**
70 **contemptible that it would be looked down on and despised by reasonable**
71 **people.]**

State Bar Committee Comments on Proposed Changes:

Unlike the other draft instructions, each of these instructions attempts to combine in a single instruction legal requirements relating to liability, nominal damages, compensatory damages and punitive damages. Commonly used California Civil Jury Instructions separate the elements of the offense from the award of damages. (BAJI No. 7.01 (8th ed. 1994) (Libel/Slander—General or Compensatory Damages); BAJI No. 7.10.1 (1995 rev.) (8th ed. 1994) (Presumed General Damages); BAJI No. 7.11 (8th ed. 1994) (Libel/Slander—Special Damages); BAJI Nos. 7.12, 7.12.1, 7.12.2 (8th ed. 1994) (Libel/Slander—Punitive Damages/Media Defendant). While combining these concepts may be appropriate for this unique area of the law, it is potentially confusing due to length and the lack of any headings or internal divisions. The potential for confusion is exacerbated by the requirement of proof to different degrees (i.e. preponderance versus clear and convincing) for different relief.

The Committee believe that the instructions will be easier to read and more user friendly if internal headings are placed in front of each section identifying whether the instructions that follow deal with “Liability,” “Nominal Damages,” “Actual Damages,” or “Punitive Damages.” This will hopefully reduce the risk of confusion.

Burden of Proof.

The proposed jury instructions correctly, though inconsistently, instruct the juror to apply the preponderance of evidence standard, i.e., “more likely true than not true.” For example, in §§ 1204-1205, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following.” Although the standard is the same in §§ 1200-1203, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following are more likely true than not true” (emphasis added).

The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction. When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

DEFAMATION

1201

**Defamation Per Quod—Essential Factual Elements
(Public Officer/Figure and Limited Public Figure)**

1 **[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff]**
2 **by making [one or more of] the following statement(s): [list all claimed per**
3 **quod defamatory statements].**

4
5 **Liability**

6
7 **To succeed on this claim, [name of plaintiff] must prove all of the following**
8 **are more likely true than not true:**

- 9
10 1. That [name of defendant] made [one or more of] the statement(s) to
11 [a person/persons] other than [name of plaintiff];
12
13 2. That [this person/these people] reasonably understood that the
14 statement(s) [was/were] about [name of plaintiff];
15
16 3. That because of the facts and circumstances surrounding the
17 making of the statement(s), known to the [listener(s)/reader(s)] of
18 the statement(s), [it/they] tended to injure [name of plaintiff] in
19 [his/her] occupation [or to expose [him/her] to hatred, contempt,
20 ridicule, or shame] [or to discourage others from associating or
21 dealing with [him/her]];
22
23 4. That the statement(s) [was/were] false;
24
25 5. That [name of plaintiff] suffered harm to [his/her] property,
26 business, profession, or occupation [including money spent as a
27 result of the statement(s)]; and
28
29 6. That the statement(s) [was/were] a substantial factor in causing
30 [name of plaintiff]'s harm.

31
32 **In addition, [name of plaintiff] must prove by clear and convincing evidence**
33 **that [name of defendant] knew the statement(s) [was/were] false or had**
34 **serious doubts about the truth of the statement(s).**

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35 **Actual Damages**

36
37 **If [name of plaintiff] has proven all of the above, then [name of plaintiff] is**
38 **entitled to recover if [he/she] proves ~~it is more likely true than not true~~ that**
39 **[he/she] sustained the following actual damages:**

- 40
41 **a. Harm to [name of plaintiff]’s property, business, trade, profession, or**
42 **occupation;**
43
44 **b. Expenses [name of plaintiff] had to pay as a result of the defamatory**
45 **statements;**
46
47 **c. Harm to [name of plaintiff]’s reputation; and**
48
49 **d. Shame, mortification, or hurt feelings;**

50
51 **Punitive Damages**

52
53 **[Name of plaintiff] may also recover damages to punish [name of defendant] if**
54 **[name of plaintiff] proves by clear and convincing evidence:**

- 55
56 **1. That [name of defendant] acted with intent to cause injury to [name of**
57 **plaintiff]; or**
58
59 **2. That [name of defendant] acted with a willful and conscious disregard**
60 **for the rights or safety of [name of plaintiff]; or**
61
62 **3. That [name of defendant]’s conduct was despicable and subjected**
63 **[name of plaintiff] to cruel and unjust hardship in conscious disregard**
64 **of [name of plaintiff]’s rights; [or]**
65
66 **[4. That [name of defendant] intentionally misrepresented or concealed a**
67 **material fact known to [name of defendant] with the intention of**
68 **depriving [name of plaintiff] of property, a legal right, or otherwise**
69 **causing [name of plaintiff] injury.]**

70
71 **[“Despicable conduct” is conduct that is so mean, vile, base, or**
72 **contemptible that it would be looked down on and despised by reasonable**
73 **people.]**

State Bar Committee Comments on Proposed Changes:

To prove a claim of defamation per quod, a plaintiff must “[allege] facts showing that the readers or hearers to whom it was published would understand it in [a] defamatory sense” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354, 387] (emphasis in original) quoting (5 Witkin, *Cal. Procedure* (3d ed. 1985) Pleading, § 690, pp. 141-142).) Defamation per quod requires that the “readers . . . recognize [defamation] through some knowledge of specific facts and/or circumstances.” (*Palm Springs Tennis Club v. Rangel*, (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73, 76] (emphasis added).)

The proposed jury instructions do not describe this standard. Instructions 1201, 1203, and 1205, lines 12-14, ask the juror to consider: “That because of the facts and circumstances surrounding the making of the statement(s), [it/they] tended to injure [name of plaintiff] in [his/her] occupation.” As the proposed jury instructions currently stand, the facts to be considered refer to the party who made the statement. The facts which must be proven, however, should be specific to the listener or reader.

Unlike the other draft instructions, each of these instructions attempts to combine in a single instruction legal requirements relating to liability, nominal damages, compensatory damages and punitive damages. Commonly used California Civil Jury Instructions separate the elements of the offense from the award of damages. (BAJI No. 7.01 (8th ed. 1994) (*Libel/Slander—General or Compensatory Damages*); BAJI No. 7.10.1 (1995 rev.) (8th ed. 1994) (*Presumed General Damages*); BAJI No. 7.11 (8th ed. 1994) (*Libel/Slander—Special Damages*); BAJI Nos. 7.12, 7.12.1, 7.12.2 (8th ed. 1994) (*Libel/Slander—Punitive Damages/Media Defendant*). While combining these concepts may be appropriate for this unique area of the law, it is potentially confusing due to length and the lack of any headings or internal divisions. The potential for confusion is exacerbated by the requirement of proof to different degrees (i.e. preponderance versus clear and convincing) for different relief.

The Committee believe that the instructions will be easier to read and more user friendly if internal headings are placed in front of each section identifying whether the instructions that follow deal with “Liability,” “Nominal Damages,” “Actual Damages,” or “Punitive Damages.” This will hopefully reduce the risk of confusion.

Burden of Proof.

The proposed jury instructions correctly, though inconsistently, instruct the juror to apply the preponderance of evidence standard, i.e., “more likely true than not true.” For example, in §§ 1204-1205, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following.” Although the standard is the same in §§ 1200-

1203, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following are more likely true than not true” (emphasis added).

The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction.

When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

**Defamation Per Se—Essential Factual Elements
(Private Figure—Matter of Public Concern)**

1 **[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff] by**
2 **making [one or more of] the following statement(s): [list all claimed per se**
3 **defamatory statement(s)].**

4
5 **Liability**

6
7 **To succeed on this claim, [name of plaintiff] must prove all of the following:**

- 8
9 **1. That [name of defendant] made [one or more of] the statement(s) to [a**
10 **person/persons] other than [name of plaintiff];**
11
12 **2. That [this person/these people] reasonably understood that the**
13 **statement(s) [was/were] about [name of plaintiff];**
14
15 **3. [That [this person/these people] reasonably understood the**
16 **statement(s) to mean that [insert ground(s) defamation per se, e.g., "[name**
17 **of plaintiff] had committed a crime"];**
18
19 **4. That the statement(s) [was/were] false; and**
20
21 **5. That [name of defendant] failed to use reasonable care to determine the**
22 **truth or falsity of the statement(s).**

23
24 **Actual Damages**

25
26 **If [name of plaintiff] has proven all of the above, then [he/she] is entitled to**
27 **recover if [he/she] proves that [he/she] sustained any of the following**
28 **actual damages:**

- 29
30 **a. Harm to [name of plaintiff]'s property, business, trade, profession, or**
31 **occupation;**
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33 **b. Expenses [name of plaintiff] had to pay as a result of the defamatory**
34 **statements.**

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- c. Harm to *[name of plaintiff]*'s reputation; and
- d. Shame, mortification, or hurt feelings.

Nominal Damages

If *[name of plaintiff]* has failed to prove any of the above actual damages but *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* knew the statement(s) *[was/were]* false or that *[name of defendant]* had serious doubts about the truth of the statement(s), then the law assumes that *[name of plaintiff]*'s reputation has been harmed. Without further evidence of damage *[name of plaintiff]* is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to *[name of plaintiff]*'s reputation under the circumstances of this case.

Punitive Damages

[Name of plaintiff] may also recover damages to punish *[name of defendant]* if *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* either knew the statement(s) *[was/were]* false or had serious doubts about the truth of the statement(s) and:

1. That *[name of defendant]* acted with intent to cause injury to *[name of plaintiff]*; or
2. That *[name of defendant]* acted with a willful and conscious disregard for the rights or safety of *[name of plaintiff]*; or
3. That *[name of defendant]*'s conduct was despicable and subjected *[name of plaintiff]* to cruel and unjust hardship in conscious disregard of *[name of plaintiff]*'s rights; [or]
4. That *[name of defendant]* intentionally misrepresented or concealed a material fact known to *[name of defendant]* with the intention of depriving *[name of plaintiff]* of property, a legal right, or otherwise causing *[name of plaintiff]* injury.]

74 **["Despicable conduct" is conduct that is so mean, vile, base, or**
75 **contemptible that it would be looked down on and despised by reasonable**
76 **people.]**

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The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction.

When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

**Defamation Per Quod—Essential Factual Elements
(Private Figure—Matter of Public Concern)**

1 **[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff]**
2 **by making [one or more of] the following statement(s): [insert all claimed per**
3 **quod defamatory statements].**

4
5 **Liability**

6
7 **To succeed on this claim, [name of plaintiff] must prove all of the following:**

- 8
- 9 **1. That [name of defendant] made [one or more of] the statement(s) to [a**
10 **person/ persons] other than [name of plaintiff];**
 - 11
 - 12 **2. That [this person/these people] reasonably understood that the**
13 **statement(s) [was/were] about [name of plaintiff];**
 - 14
 - 15 **3. That because of the facts and circumstances surrounding the making**
16 **of the statement(s), known to the [listener(s)/reader(s)] of the**
17 **statement(s), [it/they] tended to injure [name of plaintiff] in [his/her]**
18 **occupation [or to expose [him/her] to hatred, contempt, ridicule, or**
19 **shame] [or to discourage others from associating or dealing with**
20 **[him/her]];**
 - 21
 - 22 **4. That the statement(s) [was/were] false;**
 - 23
 - 24 **5. That [name of defendant] failed to use reasonable care to determine the**
25 **truth or falsity of the statement(s).**
 - 26
 - 27 **6. That [name of plaintiff] suffered harm to [his/her] property, business,**
28 **profession, or occupation [including money spent as a result of the**
29 **statement(s)]; and**
 - 30
 - 31 **7. That the statements [was/were] a substantial factor in causing [name**
32 **of plaintiff]’s harm.**
 - 33

34 **Actual Damages**

35
36 **If [name of plaintiff] has proven all of the above, then [he/she] is entitled to**
37 **recover if [he/she] proves that [he/she] sustained any of the following actual**
38 **damages:**

- 39
- 40 **a. Harm to [name of plaintiff]'s property, business, trade, profession, or**
 - 41 **occupation;**
 - 42
 - 43 **b. Expenses [name of plaintiff] had to pay as a result of the defamatory**
 - 44 **statements.**
 - 45
 - 46 **c. Harm to [name of plaintiff]'s reputation; and**
 - 47
 - 48 **d. Shame, mortification, or hurt feelings.**
 - 49

50 **Punitive Damages**

51
52 **[Name of plaintiff] may also recover damages to punish [name of defendant] if**
53 **[name of plaintiff] proves by clear and convincing evidence that [name of**
54 **defendant] either knew the statement(s) [was/were] false or had serious**
55 **doubts about the truth of the statement(s) and**

- 56
- 57 **1. That [name of defendant] acted with intent to cause injury to [name of**
 - 58 **plaintiff]; or**
 - 59
 - 60 **2. That [name of defendant] acted with a willful and conscious disregard**
 - 61 **for the rights or safety of [name of plaintiff]; or**
 - 62
 - 63 **3. That [name of defendant]'s conduct was despicable and subjected**
 - 64 **[name of plaintiff] to cruel and unjust hardship in conscious disregard**
 - 65 **of [name of plaintiff]'s rights; [or]**
 - 66
 - 67 **[4. That [name of defendant] intentionally misrepresented or concealed a**
 - 68 **material fact known to [name of defendant] with the intention of**
 - 69 **depriving [name of plaintiff] of property, a legal right, or otherwise**
 - 70 **causing [name of plaintiff] injury.]**
 - 71

72 **["Despicable conduct" is conduct that is so mean, vile, base, or**
73 **contemptible that it would be looked down on and despised by reasonable**
74 **people.]**

State Bar Committee Comments on Proposed Changes:

To prove a claim of defamation per quod, a plaintiff must "[allege] facts showing that the readers or hearers to whom it was published would understand it in [a] defamatory sense" (Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354, 387] (emphasis in original) quoting (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 690, pp. 141-142).) Defamation per quod requires that the "readers . . . recognize [defamation] through some knowledge of specific facts and/or circumstances." (Palm Springs Tennis Club v. Rangel, (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73, 76] (emphasis added).)

The proposed jury instructions do not describe this standard. Instructions 1201, 1203, and 1205, lines 12-14, ask the juror to consider: "That because of the facts and circumstances surrounding the making of the statement(s), [it/they] tended to injure [name of plaintiff] in [his/her] occupation." As the proposed jury instructions currently stand, the facts to be considered refer to the party who made the statement. The facts which must be proven, however, should be specific to the listener or reader.

Unlike the other draft instructions, each of these instructions attempts to combine in a single instruction legal requirements relating to liability, nominal damages, compensatory damages and punitive damages. Commonly used California Civil Jury Instructions separate the elements of the offense from the award of damages. (BAJI No. 7.01 (8th ed. 1994) (Libel/Slander—General or Compensatory Damages); BAJI No. 7.10.1 (1995 rev.) (8th ed. 1994) (Presumed General Damages); BAJI No. 7.11 (8th ed. 1994) (Libel/Slander—Special Damages); BAJI Nos. 7.12, 7.12.1, 7.12.2 (8th ed. 1994) (Libel/Slander—Punitive Damages/Media Defendant). While combining these concepts may be appropriate for this unique area of the law, it is potentially confusing due to length and the lack of any headings or internal divisions. The potential for confusion is exacerbated by the requirement of proof to different degrees (i.e. preponderance versus clear and convincing) for different relief.

The Committee believe that the instructions will be easier to read and more user friendly if internal headings are placed in front of each section identifying whether the instructions that follow deal with "Liability," "Nominal Damages," "Actual Damages," or "Punitive Damages." This will hopefully reduce the risk of confusion.

Burden of Proof.

The proposed jury instructions correctly, though inconsistently, instruct the juror to apply the preponderance of evidence standard, i.e., “more likely true than not true.” For example, in §§ 1204-1205, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following.” Although the standard is the same in §§ 1200-1203, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following are more likely true than not true” (emphasis added).

The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction.

When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

DEFAMATION

1204

Defamation Per Se—Essential Factual Elements
(Private Figure—Matter of Private Concern)

[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff] by making [one or more of] the following statement(s): [list all claimed per se defamatory statement(s)].

Liability

To succeed on this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] made [one or more of] the statement(s) to [a person/persons] other than [name of plaintiff];
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about [name of plaintiff];
- 3. [That [this person/these people] reasonably understood the statement(s) to mean that [insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"];
- 4. That [name of defendant] failed to use reasonable care to determine the truth or falsity of the statement(s).

Nominal Damages

If [name of plaintiff] has proven all of the above, the law assumes that [name of plaintiff]'s reputation has been harmed. Without further evidence of damage, [name of plaintiff] is entitled to a nominal sum such as one dollar or such greater sum as you believe is proper for the assumed harm to [name of plaintiff]'s reputation under the circumstances of this case.

Actual Damages

[Name of plaintiff] is also entitled to recover if [he/she] proves that [he/she] sustained any of the following actual damages:

- 35 a. Harm to *[name of plaintiff]*'s property, business, trade, profession, or
36 occupation;
37
38 b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory
39 statements;
40
41 c. Harm to *[name of plaintiff]*'s reputation in addition to that assumed by
42 the law; and
43
44 d. Shame, mortification, or hurt feelings.

45
46 **Punitive Damages**

47
48 *[Name of plaintiff]* may also recover damages to punish *[name of defendant]* if
49 *[name of plaintiff]* proves by clear and convincing evidence

- 50
51 1. That *[name of defendant]* acted with intent to cause injury to *[name of*
52 *plaintiff]*; or
53
54 2. That *[name of defendant]* acted with a willful and conscious disregard
55 for the rights or safety of *[name of plaintiff]*; or
56
57 3. That *[name of defendant]*'s conduct was despicable and subjected
58 *[name of plaintiff]* to cruel and unjust hardship in conscious disregard
59 of *[name of plaintiff]*'s rights; or
60
61 [4. That *[name of defendant]* intentionally misrepresented or concealed a
62 material fact known to *[name of defendant]* with the intention of
63 depriving *[name of plaintiff]* of property, a legal right, or otherwise
64 causing *[name of plaintiff]* injury.]

65
66 [“Despicable conduct” is conduct that is so mean, vile, base, or
67 contemptible that it would be looked down on and despised by reasonable
68 people.]

State Bar Committee Comments on Proposed Changes:

Unlike the other draft instructions, each of these instructions attempts to combine in a single instruction legal requirements relating to liability, nominal damages, compensatory damages and punitive damages. Commonly used California Civil Jury

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Instructions separate the elements of the offense from the award of damages. (BAJI No. 7.01 (8th ed. 1994) (Libel/Slander—General or Compensatory Damages); BAJI No. 7.10.1 (1995 rev.) (8th ed. 1994) (Presumed General Damages); BAJI No. 7.11 (8th ed. 1994) (Libel/Slander—Special Damages); BAJI Nos. 7.12, 7.12.1, 7.12.2 (8th ed. 1994) (Libel/Slander—Punitive Damages/Media Defendant). While combining these concepts may be appropriate for this unique area of the law, it is potentially confusing due to length and the lack of any headings or internal divisions. The potential for confusion is exacerbated by the requirement of proof to different degrees (i.e. preponderance versus clear and convincing) for different relief.

The Committee believe that the instructions will be easier to read and more user friendly if internal headings are placed in front of each section identifying whether the instructions that follow deal with “Liability,” “Nominal Damages,” “Actual Damages,” or “Punitive Damages.” This will hopefully reduce the risk of confusion.

Burden of Proof.

The proposed jury instructions correctly, though inconsistently, instruct the juror to apply the preponderance of evidence standard, i.e., “more likely true than not true.” For example, in §§ 1204-1205, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following.” Although the standard is the same in §§ 1200-1203, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following are more likely true than not true” (emphasis added).

The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction.

When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

**Defamation Per Quod-Essential Factual Elements
(Private Figure–Matter of Private Concern)**

1 **[Name of plaintiff] claims that [name of defendant] harmed [name of plaintiff]**
2 **by making [one or more of] the following statement(s): [insert all claimed per**
3 **quod defamatory statements].**

4
5 **Liability**

6
7 **To succeed on this claim, [name of plaintiff] must prove all of the following:**

- 8
9 **1. That [name of defendant] made [one or more of] the statement(s) to [a**
10 **person/persons] other than [name of plaintiff];**
- 11
12 **2. That [this person/these people] reasonably understood that the**
13 **statement(s) [was/were] about [name of plaintiff];**
- 14
15 **3. That because of the facts and circumstances surrounding the making of**
16 **the statement(s), known to the [listener(s)/reader(s)] of the**
17 **statement(s), [it/they] tended to injure [name of plaintiff] in [his/her]**
18 **occupation [or to expose [him/her] to hatred, contempt, ridicule, or**
19 **shame] [or to discourage others from associating or dealing with**
20 **[him/her]];**
- 21
22 **4. That [name of defendant] failed to use reasonable care to determine the**
23 **truth or falsity of the statement(s);**
- 24
25 **5. That [name of plaintiff] suffered harm to [his/her] property, business,**
26 **profession or occupation [including money spent as a result of the**
27 **statement(s)]; and**
- 28
29 **6. That the statement(s) [was/were] a substantial factor in causing**
30 **[name of plaintiff]'s harm.**
- 31

32 **Actual Damages**

33
34 **If [name of plaintiff] has proven all of the above, then [name of plaintiff] is**
35 **entitled to recover if [he/she] proves that [he/she] sustained any of the**
36 **following actual damages:**

- 37
- 38 **a. Harm to [name of plaintiff]’s property, business, trade, profession, or**
39 **occupation;**
 - 40
 - 41 **b. Expenses [name of plaintiff] had to pay as a result of the defamatory**
42 **statements;**
 - 43
 - 44 **c. Harm to [name of plaintiff]'s reputation; and**
 - 45
 - 46 **d. Shame, mortification, or hurt feelings.**

47
48 **Punitive Damages**

49
50 **[Name of plaintiff] may also recover damages to punish [name of defendant] if**
51 **[name of plaintiff] proves by clear and convincing evidence:**

- 52
- 53 **1. That [name of defendant] acted with intent to cause injury to [name of**
54 **plaintiff]; or**
 - 55
 - 56 **2. That [name of defendant] acted with a willful and conscious disregard**
57 **for the rights or safety of [name of plaintiff]; or**
 - 58
 - 59 **3. That [name of defendant]'s conduct was despicable and subjected**
60 **[name of plaintiff] to cruel and unjust hardship in conscious disregard**
61 **of [name of plaintiff]'s rights; or**
 - 62
 - 63 **[4. That [name of defendant] intentionally misrepresented or concealed a**
64 **material fact known to [name of defendant] with the intention of**
65 **depriving [name of plaintiff] of property, a legal right, or otherwise**
66 **causing [name of plaintiff] injury.]**

67
68 **[“Despicable conduct” is conduct that is so mean, vile, base, or**
69 **contemptible that it would be looked down on and despised by reasonable**
70 **people.]**

State Bar Committee Comments on Proposed Changes:

To prove a claim of defamation per quod, a plaintiff must “[allege] facts showing that the readers or hearers to whom it was published would understand it in [a] defamatory sense” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354, 387] (emphasis in original) quoting (5 Witkin, *Cal. Procedure* (3d ed. 1985) Pleading, § 690, pp. 141-142).) Defamation per quod requires that the “readers . . . recognize [defamation] through some knowledge of specific facts and/or circumstances.” (*Palm Springs Tennis Club v. Rangel*, (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73, 76] (emphasis added).)

The proposed jury instructions do not describe this standard. Instructions 1201, 1203, and 1205, lines 12-14, ask the juror to consider: “That because of the facts and circumstances surrounding the making of the statement(s), [it/they] tended to injure [name of plaintiff] in [his/her] occupation.” As the proposed jury instructions currently stand, the facts to be considered refer to the party who made the statement. The facts which must be proven, however, should be specific to the listener or reader.

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Burden of Proof.

The proposed jury instructions correctly, though inconsistently, instruct the juror to apply the preponderance of evidence standard, i.e., “more likely true than not true.” For example, in §§ 1204-1205, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following.” Although the standard is the same in §§ 1200-

1203, the instructions state: “To succeed on this claim, [name of plaintiff] must prove all of the following are more likely true than not true” (emphasis added).

The simplest solution is to explain to the juror that unless otherwise instructed, each element must be proven more likely true than not true. This can be done at the beginning of each instruction or in a separate instruction.

When an element must be proven more likely true than not, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following.

When an element must be proven by clear and convincing evidence, the new jury instruction should read:

To succeed on this claim, [name of plaintiff] must prove all of the following by clear and convincing evidence.

DEFAMATION

1212
Qualified Privilege (Civ. Code, § 47(c))

1 Under the circumstances of this case, [name of plaintiff] cannot recover
2 damages from [name of defendant], even if the statement(s) [was/were]
3 false, unless [name of plaintiff] also proves that [name of defendant] acted
4 with ~~with~~ made the statement due to hatred or ill will toward [name of plaintiff].
5

6 If [name of defendant] acted without reasonable grounds for believing the
7 truth of the statement(s), this is a factor you may consider in determining
8 whether [name of defendant] acted with hatred or ill will toward [name of
9 plaintiff].

State Bar Committee Comments on Proposed Changes:

To overcome a qualified privilege, a plaintiff must prove that the defendant hated or bore ill will toward plaintiff. Further, California cases require that the ill will be linked to the defendant's decision to make the false statement.

In Sheppard v. Freeman, Sheppard was unable to prove that the defendant acted with malice, despite her belief that one of the defendants harbored ill will toward her because of a previous argument. Because this argument, and any ill will resulting from it, was unrelated to the defamatory act, the court held that Sheppard had failed to prove malice. (Sheppard, *supra*, 67 Cal.App.4th 339, 351, fn.1.)

The court in Live Oak Publishing Co. v. Cohagan concurred with the decision in Sheppard. The court stated that, although it can be used as circumstantial evidence of malice, ill will alone does not constitute "actual malice." A deposition revealed that the defendant "bore animosity" toward the plaintiff, but the plaintiff failed to establish the necessary link between the animosity and the defendant's awareness that her statements were probably false. Without this connection, the existence of ill will cannot defeat the qualified privilege. (Live Oak, *supra*, 234 Cal.App.3d at pp.1292-1292.)

The decision in DeMott v. Amalgamated Meatcutters (1958) 157 Cal.App.2d 13 [320 P.2d 50] also supports the treatment of ordinary ill will as something less than malice. An example given by the court helps to illustrate the reason for the different treatment:

Suppose Smith is the county treasurer and the defendant obtains apparently authentic information from reliable sources that indicates Smith misappropriated funds. The defendant believes this information is true, and feels ill will toward Smith for his abuse of power. His ill will is no different than that of any other citizen who discovers that they have been deceived. This is not malice or evidence of malice.

The court concludes this illustration by stating that “ill will which is to [be] identified with malice must be redefined as ill will going beyond that which the occasion justifies” (DeMott, supra, 157 Cal.App.2d at pp.26-27.)

“Acted with” did not appear to reflect the required link. In the committee’s opinion, “made the statement due to” more properly conveys the need for proof of a connection between the statement and the defendant’s feelings.

1400
Inducing Breach of Contract

1 **[Name of plaintiff] claims that [name of defendant] intentionally caused [name**
2 **of third party] to breach [his/her/its] contract with [name of plaintiff]. To**
3 **succeed on this claim, [name of plaintiff] must prove all of the following:**

- 4
- 5 **1. That there was a contract between [name of plaintiff] and [name of third**
6 **party];**
 - 7
 - 8 **2. That [name of defendant] knew of the contract;**
 - 9
 - 10 **3. That [name of defendant] intended to cause [name of third party] to**
11 **breach the contract;**
 - 12
 - 13 **4. That [name of defendant]’s acts **conduct** caused [name of third party] to**
14 **breach the contract;**
 - 15
 - 16 **5. That [name of plaintiff] was harmed; and**
 - 17
 - 18 **6. That [name of defendant]’s conduct was a substantial factor in**
19 **causing [name of plaintiff]’s harm.**
-

State Bar Committee Comments on Proposed Changes:

The purpose of the suggested change is to avoid jury confusion as to whether a particular action is required, as opposed to the broader implication of the word conduct. In addition, use of the word conduct harmonizes with the use of the word conduct in paragraph 6 of the instruction.

Intentional Interference With Contractual Relations

1 **[Name of plaintiff]** claims that **[name of defendant]** intentionally interfered with
2 the contract between **[name of plaintiff]** and **[name of third party]**. To succeed
3 on this claim, **[name of plaintiff]** must prove all of the following:
4

- 5 **1. That there was a contract between [name of plaintiff] and [name of**
6 **third party];**
- 7
- 8 **2. That [name of defendant] knew of the contract;**
- 9
- 10 **3. That [name of defendant] intended to disrupt the performance of**
11 **this contract;**
- 12
- 13 **4. That [name of defendant]’s acts **conduct** prevented performance or**
14 **made performance more expensive or difficult;**
- 15
- 16 **5. That [name of plaintiff] was harmed; and**
- 17
- 18 **6. That [name of defendant]’s conduct was a substantial factor in**
19 **causing [name of plaintiff]’s harm.**

State Bar Committee Comments on Proposed Changes:

The purpose of the suggested change is to avoid jury confusion as to whether a particular action is required, as opposed to the broader implication of the word conduct. In addition, use of the word conduct harmonizes with the use of the word conduct in paragraph 6 of the instruction.

Intentional Interference With Prospective Economic Relations

1 **[Name of plaintiff] claims that [name of defendant] intentionally interfered**
2 **with an economic relationship between [name of plaintiff] and [name of third**
3 **party] that probably would have resulted in an economic benefit to [name of**
4 **plaintiff]. To succeed on this claim, [name of plaintiff] must prove all of the**
5 **following:**

- 6
 - 7 **1. That [name of plaintiff] and [name of third party] were in an**
8 **economic relationship that probably would have resulted in an**
9 **economic benefit to [name of plaintiff];**
 - 10
 - 11 **2. That [name of defendant] knew of the relationship;**
 - 12
 - 13 **3. That [name of defendant] intended to disrupt the relationship;**
 - 14
 - 15 **4. That [name of defendant] engaged in wrongful conduct through**
16 **[insert grounds for wrongfulness, e.g., misrepresentation, fraud,**
17 **violation of statute];**
 - 18
 - 19 **5. That the relationship was disrupted;**
 - 20
 - 21 **6. That [name of plaintiff] was harmed; and**
 - 22
 - 23 **7. That [name of defendant]’s wrongful conduct was a substantial**
24 **factor in causing [name of plaintiff]’s harm.**
-

State Bar Committee Comments on Proposed Changes:

The subcommittee suggests that in the opening paragraph the word economic be inserted before the word relationship so that it is clearer to jurors that the only type of relationship involved in this type of tort is an economic one. To harmonize with this change, the subcommittee suggests that the word economic also be inserted before the word relationship in paragraph 1 of the instruction.

In addition, the wording of paragraph 4 “That the defendant engaged in wrongful conduct through. . .” engendered significant discussion which the committee was unable to resolve. The committee was fairly evenly divided. One group believed that paragraph 4 is unnecessary if the Judge is going to announce as a matter of law that the conduct was wrongful. I.e., If, as the Della Penna and the use notes appear to require, the Judge simply announces that the defendant’s misrepresentation was wrongful, then there is no need for paragraph 4 of the instruction. The other group believed that the new wording was a clear way of expressing the elements of the tort, and would aid the jury in making its determination, especially if the instruction is given in conjunction with instructions for misrepresentation. One way to resolve the difference of opinion would be to clarify the use notes to state that paragraph 4 should only be included if there are other causes of action, or if the Judge does not give a specific instruction on the wrongfulness of the action described by paragraph 4.

ECONOMIC INTERFERENCE

1403
Intent

1 In deciding whether ~~[name of defendant]~~ acted intentionally, you may consider
2 whether ~~[he/she/it]~~ knew that a ~~[breach/disruption]~~ was substantially certain to
3 result from ~~[his/her/its]~~ conduct.
4

5 [Name of defendant] acted with intent if [name of defendant] knew that a
6 [breach/disruption] was substantially certain to result from [his/her/its]
7 conduct.

State Bar Committee Comments on Proposed Changes:

The subcommittee suggests that this instruction be changed for the purposes of clarity.

Negligent Interference With Prospective Economic Relations

1 **[Name of plaintiff] claims that [name of defendant] negligently interfered with**
2 **a relationship between [name of plaintiff] and [name of third party] that**
3 **probably would have resulted in an economic benefit to [name of plaintiff].**
4 **To succeed on this claim, [name of plaintiff] must prove all of the following:**
5

- 6 **1. That [name of plaintiff] and [name of third party] were in an economic**
7 **relationship that probably would have resulted in a future**
8 **economic benefit to [name of plaintiff];**
9
- 10 **2. That [name of defendant] knew or should have known of this**
11 **relationship;**
12
- 13 **3. That [name of defendant] knew or should have known that this**
14 **relationship would be disrupted if [he/she/it] failed to act with**
15 **reasonable care;**
16
- 17 **4. That [name of defendant] failed to act with reasonable care;**
18
- 19 **5. That [name of defendant] engaged in wrongful conduct through**
20 **[insert grounds for wrongfulness, e.g., breach of contract with another,**
21 **misrepresentation, fraud, violation of statute];**
22
- 23 **6. That the relationship was disrupted;**
24
- 25 **7. That [name of plaintiff] was harmed; and**
26
- 27 **8. That [name of defendant]’s wrongful conduct was a substantial**
28 **factor in causing [name of plaintiff]’s harm.**

State Bar Committee Comments on Proposed Changes:

The wording of paragraph 5 “That the defendant engage in wrongful conduct through. . .” engendered significant discussion which the committee was unable to resolve. The committee was fairly evenly divided. One group believed that paragraph 5 is unnecessary if the Judge is going to announce as a matter of law that the conduct

was wrongful. I.e., if, as the Della Penna and the use notes appear to require, the Judge simply announces that the defendant's misrepresentation was wrongful, then there is no need for paragraph 4 of the instruction. The other group believed that the new wording was a clear way of expressing the elements of the tort, and would aid the jury in making its determination, especially if the instruction is given in conjunction with instructions for misrepresentation. One way to resolve the difference of opinion would be to clarify the use notes to state that paragraph 4 should only be included if there are other causes of action.