MANUAL OF MODEL CIVIL JURY INSTRUCTIONS

FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT

PREPARED BY THE
NINTH CIRCUIT
JURY INSTRUCTIONS COMMITTEE

2017 Edition

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INTRODUCTION TO 2017 PRINT EDITION

This Manual of Model Civil Jury Instructions ("Manual") has been prepared to help judges communicate more effectively with juries.

The instructions in this Manual are models. They are not mandatory, and they must be reviewed carefully before use in a particular case. They are not a substitute for the individual research and drafting that may be required in a particular case; nor are they intended to discourage judges from using their own forms and techniques for instructing juries.

In addition to its ongoing consideration of legislative developments and appellate court decisions that may affect these model instructions, the Jury Instructions Committee (the "Committee") welcomes suggestions from judges, staff and practitioners about possible revisions, additions and deletions. After careful assessment and research, the Committee updates and revises instructions from time to time as necessary. Revisions are available online at the following website: http://www3.ce9.uscourts.gov/jury-instructions/model-civil. The revised instructions are later compiled and published in the printed version of the Manual. The Committee strongly recommends that the online version of any instruction be consulted to ensure that an up-to-date instruction is being considered. The Committee encourages users of this book to make suggestions for further revisions and updates. Suggestions may be submitted to juryinstructions@ce9.uscourts.gov.

This edition incorporates new and modified instructions. However, the print publication of the Manual necessarily presents only a snap-shot of an ongoing research and drafting process. Accordingly, even the most recent print edition does not necessarily represent the most up to date instructions. The entire publication and any later changes can be found online. This edition is current as to instructions approved as of January 2017. To assist users, the Committee has included a table listing the old instruction numbers from the 2007 print edition and the corresponding numbers in the present edition.

The Committee thanks the various members of the federal bench, bar and legal academy, who reviewed and commented on various parts of the book. The Committee also thanks Debra Landis, Esq., for her invaluable diligence, grace, and expertise, some of which she provided on a voluntary basis. In addition, the Committee acknowledges with gratitude the contributions of Joseph Franaszek, Esq. For many years, Mr. Franaszek has worked with the Committee on a voluntary basis, providing careful research and drafting assistance, as well as a unique "institutional memory" that has enabled the changing membership of the Committee to understand how existing instructions came to be formulated. He and Ms. Landis have performed an invaluable service to the bench and bar and have earned the Committee's enduring respect.

CAVEAT

These model jury instructions are written and organized by judges who are appointed to the Ninth Circuit Jury Instructions Committee by the Chief Circuit Judge.

The Ninth Circuit Court of Appeals does not adopt these instructions as definitive. Indeed, occasionally the correctness or incorrectness of a given instruction may be the subject of a Ninth Circuit opinion.

Ninth Circuit Jury Instructions Committee
January 2017

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1. INSTRUCTIONS ON THE TRIAL PROCESS

Instruction

Introductory Comment
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1.4 Duty of Jury (Court Reads and Provides Written Instructions at End of Case)
1.5 Claims and Defenses
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1.21 Outline of Trial
1.22 Self-Represented Party

Introductory Comment

Jury instructions are intended to give the jurors, in understandable language, information to make the trial more meaningful and to permit them to fulfill their duty of applying the law to the facts as they find them. The Committee suggests that judges work with counsel to provide as complete a set of instructions as possible as early as possible to aid jurors in the understanding of the evidence, the standards to be applied and the law that must be applied to the facts. Early discussion of the jury instructions has the dual benefit of focusing the court and counsel on the issues to be presented and the types of evidence to be admitted, as well as maximizing the capacity to anticipate problems before they arise. Preparation of instructions in advance of trial also eases the pressure at the end of the trial to assemble a set of instructions when counsel and the court may be short of time. It gives both the court and counsel time to avoid and/or correct errors.

The introductory instruction chapters are organized as follows: Preliminary Instructions (Chapter 1), Instructions in the Course of Trial (Chapter 2), and Instructions at the End of the Case (Chapter 3).

Some potentially useful or applicable instructions that a judge may wish to consider can be found in the Comments to instructions; these suggested instructions cover changing practices and attitudes concerning participation by jurors in the trial by asking questions, restrictions on discussion among jurors, and technology.

Practices vary among judges on how complete introductory instructions should be. Some judges prefer to instruct initially only on the trial process (Chapter 1). Some prefer to instruct not only on the process but also on types of evidence to be presented and/or on deliberations (Chapters 2 and 3). Finally, some include all topics in Chapters 1, 2, and 3 as well as substantive law instructions for particular claims made. There is no right or wrong way to accomplish this task. It depends on the nature of the case, the preliminary rulings, and the legal culture of each district.

Some judges provide written instructions at the beginning of the trial that jurors keep throughout the trial. Other judges only provide a set of instructions at the end of the trial for use during deliberations. This is a matter of judicial preference and the demands of each case. The Committee recommends that a written copy of the concluding instructions be given to each juror for deliberations.

1.1 Cover Sheet

IN THE UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

_____,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
	)	No. _____
	)	
_____,	)	
	)	
Defendant	)	
	)	
_____	)	

JURY INSTRUCTIONS

DATED: _____

_____
UNITED STATES [DISTRICT] [MAGISTRATE] JUDGE

1.2 Duty of Jury
(Court Reads and Provides Written Set of Instructions at the Beginning of Trial)

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

These instructions are preliminary instructions to help you understand the principles that apply to civil trials and to help you understand the evidence as you listen to it. You will be allowed to keep this set of instructions to refer to throughout the trial. These instructions are not to be taken home and must remain in the jury room when you leave in the evenings. At the end of the trial, these instructions will be collected, and I will give you a final set of instructions. It is the final set of instructions that will govern your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything I may say or do that I have an opinion regarding the evidence or what your verdict should be.

Comment

This instruction may be used as a preliminary instruction if the court decides to provide a written set of preliminary instructions at the beginning of the trial that the jurors are permitted to keep with them. In the final set of instructions, the court should substitute Instruction 1.3.

1.3 Duty of Jury
(Court Reads Instructions at the Beginning of Trial but Does Not Provide Written Copies)

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial, I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

Comment

This instruction may be used as an oral instruction if the court elects to read its preliminary instructions to the jury but not to provide the jury with a copy of the instructions.

1.4 Duty of Jury
(Court Reads and Provides Written Instructions at End of Case)

Members of the Jury: Now that you have heard all of the evidence [and the arguments of the attorneys], it is my duty to instruct you on the law that applies to this case.

[Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.]

or

[A copy of these instructions will be sent to the jury room for you to consult during your deliberations.]

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

Comment

This instruction should be used with the written final set of the instructions to be sent to the jury. Bracketed material should be selected to cover whether single or multiple sets of written instructions are provided.

1.5 Claims and Defenses

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiff [*name*] asserts that [*plaintiff's claims*]. The plaintiff [*name*] has the burden of proving these claims.

The defendant [*name*] denies those claims [and also contends that [*defendant's counterclaims and/or affirmative defenses*]]. [The defendant [*name*] has the burden of proof on these [*counterclaims and/or affirmative defenses.*]]

[The plaintiff [*name*] denies [*defendant's counterclaims and/or affirmative defenses*].]

1.6 Burden of Proof—Preponderance of the Evidence

When a party has the burden of proving any claim [or affirmative defense] by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim [or affirmative defense] is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

1.7 Burden of Proof—Clear and Convincing Evidence

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means that the party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true. This is a higher standard of proof than proof by a preponderance of the evidence, but it does not require proof beyond a reasonable doubt.

Comment

See Colorado v. New Mexico, 467 U.S. 310, 316 (1984) (defining clear and convincing evidence). *See also Sophanthavong v. Palmateer*, 378 F.3d 859, 866 (9th Cir. 2004) (citing *Colorado*).

1.8 Two or More Parties—Different Legal Rights

You should decide the case as to each [plaintiff] [defendant] [party] separately. Unless otherwise stated, the instructions apply to all parties.

1.9 What is Evidence

The evidence you are to consider in deciding what the facts are consists of:

(1) the sworn testimony of any witness;

(2) the exhibits that are admitted into evidence;

(3) any facts to which the lawyers have agreed; and

(4) any facts that I [may instruct] [have instructed] you to accept as proved.

Comment

During deliberation, jurors are generally entitled to examine all exhibits properly admitted into evidence. The decision to send exhibits to the jury room is within the discretion of the trial court. *United States v. DeCoito*, 764 F.2d 690, 695 (9th Cir. 1985); *see also United States v. Chadwell*, 798 F.3d 910, 914-15 (9th Cir. 2015).

Revised June 2025

1.10 What is Not Evidence

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they [may say] [have said] in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you [are] [have been] instructed to disregard, is not evidence and must not be considered. In addition, some evidence [may be] [was] received only for a limited purpose; when I [instruct] [have instructed] you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

(4) Anything you may [see or hear] [have seen or heard] when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

Comment

With regard to the bracketed material in paragraph 3, select the appropriate bracket depending on whether the instruction is given at the beginning or at the end of the case. *See also* Instruction 1.11 (Evidence for Limited Purpose).

1.11 Evidence for Limited Purpose

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [*describe purpose*] and not for any other purpose.]

Comment

As a rule, limiting instructions need only be given when requested and need not be given *sua sponte* by the court. *United States v. Palmer*, 691 F.2d 921, 923 (9th Cir. 1982) (citing *United States v. McLennan*, 563 F.2d 943, 947-48 (9th Cir. 1977)).

See United States v. Marsh, 144 F.3d 1229, 1238 (9th Cir. 1998) (when trial court fails to instruct jury in its final instructions regarding receipt of evidence for limited purpose, the Ninth Circuit examines trial court's preliminary instructions to determine if the court instructed jury on this issue).

See also Instructions 1.10 (What is Not Evidence) and 2.9 (Impeachment Evidence—Witness).

Revised March 2025

1.12 Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Comment

It may be helpful to include an illustrative example in the instruction:

> By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

1.13 Ruling on Objections

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered, or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

1.14 Credibility of Witnesses

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

(1) the opportunity and ability of the witness to see or hear or know the things testified to;

(2) the witness's memory;

(3) the witness's manner while testifying;

(4) the witness's interest in the outcome of the case, if any;

(5) the witness's bias or prejudice, if any;

(6) whether other evidence contradicted the witness's testimony;

(7) the reasonableness of the witness's testimony in light of all the evidence; and

(8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

Comment

The Committee recommends that the jurors be given some guidelines for determining credibility at the beginning of the trial so that they will know what to look for when witnesses are testifying.

1.15 Conduct of the Jury

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, or computer, or any other electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, the platform "X" formerly known as Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.
>
> Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it[, although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use the Internet or any other resource to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications,

then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result, requiring the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately, by sending a note through the [clerk] [bailiff] signed by any one or more of you.

Comment

This instruction has been updated specifically to instruct jurors against accessing electronic sources of information and communicating electronically about the case, as well as to inform jurors of the potential consequences if a juror violates this instruction. An abbreviated instruction should be repeated before the first recess, and as needed before other recesses.

The practice in federal court of repeatedly instructing jurors not to discuss the case until deliberations is widespread. *See*, *e.g.*, *United States v. Pino-Noriega*, 189 F.3d 1089, 1096 (9th Cir. 1999) ("most judges continually admonish their juries during trials not to discuss the evidence or begin deliberating until told to do so").

State court practice in some jurisdictions does allow discussion of the case by jurors prior to the beginning of deliberations. The Ninth Circuit has not addressed this practice.

Revised March. 2025

1.16 Publicity During Trial

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch, or listen to any news media account or commentary about the case or anything to do with it. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.

Comment

This instruction may be useful in cases involving significant media coverage and may be given more than once at appropriate times during the trial. *See United States v. Waters*, 627 F.3d 345, 364 (9th Cir. 2010) (reversing criminal conviction due to court's insufficient questioning of jury regarding negative publicity during jury deliberations); *see also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 2.2 (2013).

1.17 No Transcript Available to Jury

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

Comment

The court may wish to modify this instruction for use at the end of the trial.

1.18 Taking Notes

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the [courtroom] [jury room] [envelope in the jury room]. No one will read your notes.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

Comment

It is well settled in this circuit that the trial judge has discretion to allow jurors to take notes. *United States v. Baker*, 10 F.3d 1374, 1403 (9th Cir. 1993). *See also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 3.4 (2013).

1.19 Questions to Witnesses by Jurors During Trial

Option 1

Only the lawyers and I are allowed to ask questions of witnesses. A juror is not permitted to ask questions of witnesses. [*Specific reasons for not allowing jurors to ask questions may be explained.*] If, however, you are unable to hear a witness or a lawyer, please raise your hand and I will correct the situation.

Option 2

When attorneys have finished their examination of a witness, you may ask questions of the witness. [*Describe procedure to be used*.] If the rules of evidence do not permit a particular question, I will advise you. After your questions, if any, the attorneys may ask additional questions.

Comment

There may be occasions when a juror desires to ask a question of a witness, and the court has discretion in permitting or refusing to permit jurors to do so. *See United States v. Huebner*, 48 F.3d 376, 382 (9th Cir. 1994) ("Huebner does not point out prejudice resulting from any of the few questions [jurors] asked. There was no error or abuse of discretion"); *United States v. Gonzales*, 424 F.2d 1055, 1056 (9th Cir. 1970) (holding there was no error by trial judge in allowing juror to submit question to court); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.5 (2013) (providing practical suggestions).

Option 1 is for judges who want to disallow jury questions explicitly. Option 2 is for judges who want to tell jurors explicitly that they may submit questions to be asked of witnesses.

Revised Oct. 2019

1.20 Bench Conferences and Recesses

From time to time during the trial, it [may become] [became] necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury [is] [was] present in the courtroom, or by calling a recess. Please understand that while you [are] [were] waiting, we [are] [were] working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we [will do] [have done] what we [can] [could] to keep the number and length of these conferences to a minimum. I [may] [did] not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

1.21 Outline of Trial

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

1.22 Self-Represented Party

[*Name of party*] is representing [himself] [herself] [*other pronoun*] in this trial. This fact must not affect your consideration of the case. Self-represented parties and parties represented by an attorney are entitled to the same fair consideration.

Because [*name of party*] is acting as [his] [her] [*other pronoun*] own lawyer, you will hear [him] [her] [*other pronoun*] speak at various times during the trial. [He] [She] [*other pronoun*] may make an opening statement and closing argument and may ask questions of witnesses, make objections, and argue legal issues to the court. I want to remind you that when [*name of party*] speaks in these parts of the trial, [he] [she] [*other pronoun*] is acting as [his] [her] [*other pronoun*] own advocate, and [his] [her] [*other pronoun*] words are not evidence. The only evidence in this case comes from witnesses who testify under oath on the witness stand or by deposition and from exhibits that are admitted into evidence. When a self-represented party testifies, you should treat this testimony just as you would the testimony of any other witness.

Added Dec. 2019

2. INSTRUCTIONS ON TYPES OF EVIDENCE

Instruction

2.0 Cautionary Testimony
2.1 Stipulated Testimony
2.2 Stipulations of Fact
2.3 Judicial Notice
2.4 Deposition in Lieu of Live Testimony
2.5 Transcript of Recording in English
2.6 Transcript of Recording in Foreign Language
2.7 Disputed Transcript of Recording in Foreign Language
2.8 Foreign Language Testimony
2.9 Impeachment Evidence—Witness
2.10 Tests and Experiments
2.11 Use of Interrogatories
2.12 Use of Requests for Admission
2.13 [Expert] Opinion Testimony
2.14 Charts and Summaries Not Received in Evidence
2.15 Charts and Summaries Received in Evidence
2.16 Evidence in Electronic Format

2.0 Cautionary Instructions

At the End of Each Day of the Case:

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the Internet or your social media feeds.

At the Beginning of Each Day of the Case:

As I reminded you yesterday and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

[ALTERNATIVE 1 (in open court): if you think that you might have done so, please let me know now by raising your hand. [Wait for a show of hands]. I see no raised hands; however, if you would prefer to talk to the court privately in response to this question, please notify a member of the court's staff at the next break. Thank you for your careful adherence to my instructions.]

[ALTERNATIVE 2 (during voir dire with each juror, individually): Have you learned about or shared any information about this case outside of this courtroom? . . . Thank you for your careful adherence to my instructions.]

Comment

This instruction is derived from the model instruction prepared by the Judicial Conference Committee on Court Administration and Case Management in June 2020.

The practice in federal court of repeatedly instructing jurors not to discuss the case until deliberations is widespread. *See e.g., United States v. Pino-Noriega*, 189 F.3d 1089, 1096 (9th Cir. 1999).

Created Dec. 2020

2.1 Stipulated Testimony

The parties have agreed what [*witness*]'s testimony would be if called as a witness. You should consider that testimony in the same way as if it had been given here in court.

Comment

There is a difference between stipulating that a witness would give certain testimony and stipulating that the facts to which a witness might testify are true. *United States v. Lambert*, 604 F.2d 594, 595 (8th Cir. 1979); *United States v. Hellman*, 560 F.2d 1235, 1236 (5th Cir. 1977). On the latter, see Instruction 2.2 (Stipulations of Fact).

2.2 Stipulations of Fact

The parties have agreed to certain facts [to be placed in evidence as Exhibit __] [that will be read to you]. You must therefore treat these facts as having been proved.

Comment

When parties enter into stipulations as to material facts, those facts will be deemed to have been conclusively proved, and the jury may be so instructed. *United States v. Mikaelian*, 168 F.3d 380, 389 (9th Cir. 1999) (citing *United States v. Houston*, 547 F.2d 104, 107 (9th Cir. 1976)), *amended by* 180 F.3d 1091 (9th Cir. 1999).

2.3 Judicial Notice

The court has decided to accept as proved the fact that [*state fact*].You must accept this fact as true.

Comment

An instruction regarding judicial notice should be given at the time notice is taken. In a civil case, the Federal Rules of Evidence permit the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. Fed. R. Evid. 201(f). In a criminal case, however, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. *Id*.; *see United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994) (in a criminal case, "the trial court must instruct 'the jury that it may, but is not required to, accept as conclusive any fact judicially noticed'" (citing Fed. R. Evid. 201(g))).

Revised March 2025

2.4 Deposition in Lieu of Live Testimony

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. [When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.]

The deposition of [*name of witness*] was taken on [*date*]. Insofar as possible, you should consider deposition testimony, presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

[Do not place any significance on the behavior or tone of voice of any person reading the questions or answers.]

Comment

This instruction should be used only when testimony by deposition is used in lieu of live testimony. The Committee recommends that it be given immediately before a deposition is to be read. It need not be repeated if more than one deposition is read. If the judge prefers to include the instruction as a part of his or her instructions before evidence, it should be modified appropriately.

2.5 Transcript of Recording in English

You [are about to [hear] [watch]] [have [heard] [watched]] a recording that has been received in evidence. [Please listen to it very carefully.] Each of you [has been] [was] given a transcript of the recording to help you identify speakers and as a guide to help you listen to the recording. However, bear in mind that the recording is the evidence, not the transcript. If you [hear] [heard] something different from what [appears] [appeared] in the transcript, what you heard is controlling. [After] [Now that] the recording has been played, the transcript will be taken from you.

Comment

See United States v. Delgado, 357 F.3d 1061, 1070 (9th Cir. 2004), *abrogated on other grounds by United States v. Katakis*, 800 F.3d 1017, 1028 (9th Cir. 2015) (holding that district court properly instructed jury that transcripts were only aids to understanding and that recordings themselves were evidence); *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998) (noting that recording itself is evidence to be considered; transcript is merely aid); *see also* Instructions 2.6 (Transcript of Recording in Foreign Language), 2.7 (Disputed Transcript of Recording in Foreign Language), and 2.8 (Foreign Language Testimony).

The Committee recommends that this instruction be given immediately before a recording is played so that the jurors are alerted to the fact that what they hear is controlling. It need not be repeated if more than one recording is played.

2.6 Transcript of Recording in Foreign Language

You [are about to [hear] [watch]] [have [heard] [watched]] a recording in [*specify foreign language*] language. Each of you [has been] [was] given a transcript of the recording that has been admitted into evidence. The transcript is an English-language translation of the recording.

Although some of you may know the [*specify foreign language*] language, it is important that all jurors consider the same evidence. The transcript is the evidence, not the foreign language spoken in the recording. Therefore, you must accept the interpreter's translation contained in the transcript and disregard any different meaning of the non-English words.

Comment

This instruction is appropriate immediately before the jury hears a recorded conversation in a foreign language if the accuracy of the translation is not in issue; it may also be included in the concluding written instructions to the jury. *See*, *e.g.*, *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *United States v. Fuentes-Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995).

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.11.B (2013); *see also* Instructions 2.5 (Transcript of Recording in English), 2.7 (Disputed Transcript of Recording in Foreign Language) and 2.8 (Foreign Language Testimony).

2.7 Disputed Transcript of Recording in Foreign Language

You [are about to [hear] [watch]] [have [heard] [watched]] a recording in the [*specify foreign language*] language. A transcript of the recording has been admitted into evidence. The transcript is an English-language translation of the recording. The accuracy of the transcript is disputed in this case.

Whether a transcript is an accurate translation, in whole or in part, is for you to decide. In considering whether a transcript accurately describes the words spoken in a conversation, you should consider the testimony presented to you regarding how, and by whom, the transcript was made. You may consider the knowledge, training, and experience of the translator, the audibility of the recording, as well as the nature of the conversation and the reasonableness of the translation in light of all the evidence in the case.

Although some of you may know the [*specify foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must not rely in any way on any knowledge you may have of the language spoken on the recording; your consideration of the transcript must be based on the evidence in the case.

Comment

This instruction is appropriate immediately before the jury hears a recorded conversation in a foreign language if the parties are unable to produce an official transcript or stipulate to a transcript; it may also be included in the concluding written instructions to the jury. The jury may consider evidence of bias and credibility as it relates to an interpreter and the interpreter's translation. *See*, *e.g.*, *United States v. Abonce-Barrera*, 257 F.3d 959, 965 (9th Cir. 2001) (defense expert impeached the interpreter's credibility by testifying "that it was inadvisable to have a participant to a conversation transcribe and translate that conversation"). The court should encourage the parties to produce an official or stipulated transcript of the foreign language recording that satisfies all sides. *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985); *United States v. Wilson*, 578 F.2d 67, 69-70 (5th Cir. 1978). If the parties are unable to do so, then they should submit competing translations of the disputed passages, and each side may submit evidence supporting the accuracy of its version or challenging the accuracy of the other side's version. *United States v. Franco*, 136 F.3d 622, 626 (9th Cir. 1998); *Cruz*, 765 F.2d at 1023; *Wilson*, 578 F.2d at 70. Regardless of whether the accuracy of the translated transcript is an issue, a juror cannot rely on any knowledge the juror may have of the foreign language spoken on the recording. *United States v. Fuentes-Montijo*, 68 F.3d 353, 355 (9th Cir. 1995).

The Ninth Circuit reviews the admissibility of foreign language transcriptions for abuse of discretion, based on the following factors: "(1) whether the district court reviewed the transcriptions and translations for accuracy, (2) whether the defense counsel had the opportunity 'to highlight alleged inaccuracies and to introduce alternative versions,' and (3) whether 'the jury was allowed to compare the transcript to the tape and hear counsel's arguments as to the meaning of the conversations.'" *Abonce-Barrera*, 257 F.3d at 963 (quoting *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999)).

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.11.B (2013); *see also* Instructions 2.5 (Transcript of Recording in English), 2.6 (Transcript of Recording in Foreign Language) and 2.8 (Foreign Language Testimony).

Revised March 2025

2.8 Foreign Language Testimony

You [are about to hear] [have heard] testimony of a witness who [will be testifying] [testified] in the [*specify foreign language*] language. Witnesses who do not speak English or are more proficient in another language testify through an official court interpreter. Although some of you may know the [*specify foreign language*] language, it is important that all jurors consider the same evidence. Therefore, you must accept the interpreter's translation of the witness's testimony. You must disregard any different meaning.

You must not make any assumptions about a witness, or a party based solely on the use of an interpreter to assist that witness or party.

Comment

As to the use of interpreters, see generally 28 U.S.C. § 1827.

See United States v. Franco, 136 F.3d 622, 626 (9th Cir. 1998) (holding that district court properly instructed jury that it must accept translation of foreign language tape-recording when accuracy of the translation is not in issue); *United States v. Rrapi*, 175 F.3d 742, 746 (9th Cir. 1999); *United States v. Fuentes–Montijo*, 68 F.3d 352, 355-56 (9th Cir. 1995); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.11.B (2013).

See also Instructions 2.5 (Transcript of Recording in English), 2.6 (Transcript of Recording in Foreign Language) and 2.7 (Disputed Transcript of Recording in Foreign Language).

2.9 Impeachment Evidence—Witness

The evidence that a witness [*e.g., has been convicted of a crime, lied under oath on a prior occasion, etc.*] may be considered, along with all other evidence, in deciding whether or not to believe the witness and how much weight to give to the testimony of the witness and for no other purpose.

Comment

See Fed. R. Evid. 608-09; *United States v. Hankey*, 203 F.3d 1160, 1173 (9th Cir. 2000) (explaining that district court properly admitted impeachment evidence following limiting instruction to jury). If this instruction is given during the trial, the Committee recommends giving the second sentence in numbered paragraph 3 of Instruction 1.10 (What Is Not Evidence) with the concluding instructions. *See also* Instruction 1.11 (Evidence for Limited Purpose).

2.10 Tests and Experiments

[Arrangements have been made to conduct a test or experiment.] [A test or experiment was conducted.]

[Observe] [You observed] the conditions under which that test or experiment [is] [was] made. These conditions may or may not duplicate the conditions and other circumstances that existed at the time and place of the incident involved in this case.

It is for you to decide what weight, if any, you give to the test or experiment.

Comment

See d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 890 (9th Cir. 1977) (holding that district court properly allowed experiment evidence regarding flammability of carpet sample despite differences between test fire and actual fire); *Canada Life Assur. Co. v. Houston*, 241 F.2d 523, 537 (9th Cir. 1957) ("[T]he conditions surrounding a test or experiment of this nature need not be identical with those existing at the time of the occurrence in question provided there is a substantial similarity.") (internal quotations omitted).

2.11 Use of Interrogatories

Evidence [will now be] [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

Comment

Use this oral instruction before interrogatories and answers are read to the jury; it may also be included in the concluding written instructions to the jury. The attorney should warn the judge ahead of time and give the judge an opportunity to give this oral instruction. This oral instruction is not appropriate if answers to interrogatories are being used for impeachment only.

Do not use this instruction for requests for admission under Fed. R. Civ. P. 36. The effect of requests for admission under the rule is not the same as the introduction of evidence through interrogatories. *See* Instruction 2.12 (Use of Requests for Admission).

2.12 Use of Requests for Admission

Evidence [will now be] [was] presented to you in the form of admissions to the truth of certain facts. These admissions were given in writing before the trial, in response to requests that were submitted under established court procedures. You must treat these facts as having been proved.

Comment

See Fed. R. Civ. P. 36 ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."). A court may properly exclude evidence at trial that is inconsistent with a Rule 36 admission. *999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir. 1985).

Use this oral instruction before admissions are read to the jury; it may also be included in the concluding written instructions to the jury. The attorney should warn the judge ahead of time and give the judge an opportunity to give this oral instruction.

Do not use this instruction for interrogatories. The effect of requests for admission is not the same as the introduction of evidence through interrogatories. *See* Instruction 2.11 (Use of Interrogatories).

2.13 [Expert] Opinion Testimony

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] about [his] [her] [*other pronoun*] opinions and the reasons for those opinions. This opinion testimony is allowed, because of the specialized knowledge, skill, experience, training, or education of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's specialized knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

Comment

See Fed. R. Evid. 702-05.

According to Federal Rule of Evidence 702, "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed R. Evid. 702(a). An expert's general qualifications alone do not satisfy Federal Rule of Evidence 702, which governs the admissibility of expert opinion. *See*, *e.g.*, *United States v. Rodriguez*, 971 F.3d 1005, 1018 (9th Cir. 2020). Instead, district courts must ensure an expert's methods of forming her opinions "are both reliable and adequately explained." *Id*. (quoting *United States v. Vera*, 770 F.3d 1232, 1241 (9th Cir. 2014)). Under Federal Rule of Evidence 703, an expert's opinion must be based on facts or data in the case that the expert has been made aware of or personally observed. Fed. R. Evid. 703. The facts and data need not be admissible so long as experts in the particular field would reasonably rely on such facts and data. *Id*.

This instruction avoids labeling the witness as an "expert." If the court refrains from designating the witness as an "expert," this will "ensure[] that trial courts do not inadvertently put their stamp of authority" on a witness's opinion and will protect against the jury's being "overwhelmed by the so-called 'experts.'" *See* Advisory Committee Note, Fed. R. Evid. 702 (2000) (quoting Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials*, 154 F.R.D. 537, 559 (1994).

In addition, Fed. R. Evid. 703 (as amended in 2000) provides that facts or data that are the basis for an expert's opinion but are otherwise inadmissible may nonetheless be disclosed to the jury if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This instruction is appropriate for a witness who provides only expert opinion testimony. If the same witness provides expert opinion testimony and percipient witness testimony (whether fact testimony, lay opinion testimony, or both), these different roles should be clarified for the

jury, even in a civil case. Model Criminal Instruction 3.15 (Dual Role Testimony) provides guidance.

In *BillFloat Inc. v. Collins Cash Inc*., 105 F.4th 1269, 1276-77 (9th Cir. 2024), the plaintiff alleged trademark infringement. At trial, the plaintiff did not present survey evidence showing consumer confusion but was not required to do so. The defendant, however, called an expert witness who had conducted a survey that purportedly showed an absence of consumer confusion. The plaintiff also called an expert witness, who simply challenged the opinions of the defendant's expert. The Ninth Circuit held that the district court did not abuse its discretion by declining to instruct the jury that it "should not draw any inference about the existence or absence of consumer confusion from the fact that Plaintiff did not also offer market survey evidence," explaining that a jury is free to "use its common sense and experience when weighing the evidence offered by the parties, including the absence of a survey."

Revised March 2025

2.14 Charts and Summaries Not Received in Evidence

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Comment

This instruction applies only when the charts and summaries are not admitted into evidence and are used for demonstrative purposes. Demonstrative materials used only as testimonial aids should not be permitted in the jury room or otherwise used by the jury during deliberations. *See United States v. Wood*, 943 F.2d 1048, 1053-54 (9th Cir. 1991) (citing *United States v. Soulard*, 730 F.2d 1292, 1300 (9th Cir. 1984)); *see also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10.A (2013).

2.15 Charts and Summaries Received in Evidence

Certain charts and summaries [may be] [have been] admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

Comment

This instruction applies when the charts and summaries are received into evidence. *See United States v. Anekwu*, 695 F.3d 967, 981 (9th Cir. 2012) ("[T]he proponent of a summary must demonstrate the admissibility of the underlying writings or records summarized, as a condition precedent to introduction of the summary into evidence under [Fed. R. Evid. Evid.] 1006.") (quoting *United States v. Johnson*, 594 F.2d 1253, 1257 (9th Cir. 1979)); *United States v. Rizk*, 660 F.3d 1125, 1130-31 (9th Cir. 2011); *see also* Fed. R. Evid. 1006; JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 3.10.A (2013). This instruction may be unnecessary if there is no dispute as to the accuracy of the chart or summary.

2.16 Evidence in Electronic Format

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer, and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. You may request a paper copy of any exhibit received in evidence by sending a note through the [clerk] [bailiff]. If you need additional equipment or supplies or if you have questions about how to operate the computer or other equipment, you may send a note to the [clerk] [bailiff], signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with [the clerk] [the bailiff] present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any nonjuror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any nonjuror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any "outside" website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court immediately and refrain from viewing such materials. Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

Comment

This instruction is premised on the assumption that either the court has ordered these procedures, or the parties have agreed to the availability of electronic display devices in the jury room and to the procedures set forth in the instruction. If the parties' agreement is in the form of a written stipulation, the stipulation should be subject to approval by the judge and entered as an order. The following are possible provisions in such a stipulation:

1. The parties agree to an allocation of the costs of providing the necessary equipment, including the computer, hard drive, projector, cable, printer, monitor, and other accessories.

2. The parties jointly arrange to load images of the admitted exhibits onto a hard drive in "PDF" format. (This format is meant to assure maximum security.) They will ensure that the hard drive contains only such items and nothing else.

3. The parties jointly compile a document entitled "Admitted Exhibit List" that consists of all trial exhibits actually received into evidence, listed in numerical order and containing the date (where available) and a brief description of the exhibit. The Admitted Exhibit List should be text searchable. (In complicated or document-laden cases, it would be advisable for the parties to prepare a second exhibit list that would contain the same information, except that the exhibits would be listed in chronological order. That second list would be made available to the jury in "hard copy," not electronic form.)

4. Before the jury retires to deliberate, the parties will review the notebook computer, the exhibit list interface and the images of the exhibits, to ensure their accuracy. Unless a party objects before the jury retires to deliberate, that party waives all objections to the materials and equipment submitted to the jury.

5. The parties will maintain at the courthouse a backup notebook computer and a backup hard drive with images and data identical to what was loaded onto the hard drive sent into the jury room.

If the jury encounters a technical problem after it has begun to deliberate, the jury should communicate that issue in writing to the court. The technician may require and receive information from one or more jurors about the difficulty the jury is encountering. In many instances, the court technician will need to re-enter the jury room to address the problem. It is conceivable that the technician will be exposed to evidence that the jury was attempting to view or at least to the exhibit number(s) of such evidence. If the jurors themselves developed charts, summaries, vote tallies or other indicia of their deliberations, or if they wrote summaries of their findings thus far, the technician might be exposed to that information. (E.g., such matters could have been placed on a blackboard or in summaries strewn about the jury table.) The Committee suggests that in the event a nonjuror might be required to enter the jury room to deal with a technical problem, the judge should *sua sponte* raise these and related issues with counsel before authorizing such entry. Among the factors that the judge and counsel should discuss are the following:

(a) Can the technical problem be addressed without entry into the room; e.g., by removing the equipment for examination outside the presence of jurors?

(b) Can the technical problem be addressed without any information from the jury other than an innocuous statement to the effect that (for example) "the printer isn't working"?

(c) Can the risk of even inadvertent disclosure of the jury's deliberations be eliminated by instructing the jury to cover any charts and to remove or conceal any papers, etc.?

(d) Should the technician, bailiff, or clerk be sworn in, with an oath that requires him or her not to disclose whatever he or she sees or hears in the jury room, except for the nature of the technical problem and whether the problem has been fixed?

Whether or not these or other appropriate precautions to minimize or eliminate the risk of disclosure are taken, the judge may consider giving the jury this instruction:

> You have informed me that there is a technical problem that has interfered with your ability to review evidence electronically. I will send a technician into the jury room to deal with the problem while you are out of the deliberation room on a break. Please do not allow any materials reflecting any aspect of your deliberations to be visible during the technician's presence.

In a criminal case, the judge should not permit any tape-recorded conversation or evidence to be included in the electronic evidence loaded onto the hard drive that contains the PDF files, because under Fed. R. Crim. P. 43, the defendant has a right to be present at the replaying of a tape. *United States v. Felix-Rodriguez*, 22 F.3d 964, 966-67 (9th Cir. 1994)

3. INSTRUCTIONS CONCERNING DELIBERATIONS

Instruction

3.1 Duty to Deliberate
3.2 Consideration of Evidence—Conduct of the Jury
3.3 Communication with Court
3.4 Readback or Playback
3.5 Return of Verdict
3.6 Additional Instructions of Law
3.7 Deadlocked Jury
3.8 Continuing Deliberations After Juror is Discharged
3.9 Post-Discharge Instruction

3.1 Duty to Deliberate

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

Comment

A jury verdict in a federal civil case must be unanimous, unless the parties stipulate otherwise. *Murray v. Laborers Union Local No. 324*, 55 F.3d 1445, 1451 (9th Cir. 1995) (citing *Johnson v. Louisiana*, 406 U.S. 356, 369-70 n.5 (1972)); *see also* Fed. R. Civ. P. 48(b). A federal civil jury must also unanimously reject any affirmative defenses before it may find a defendant liable and proceed to determine damages. *Jazzabi v. Allstate Ins. Co.*, 278 F.3d 979, 985 (9th Cir. 2002).

3.2 Consideration of Evidence—Conduct of the Jury

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

> Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, computer, or any other means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, the platform "X" formerly known as Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.
>
> Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it[, although I have no information that there will be news reports about this case]; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own. Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses, or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect each party's right to have this case decided only on evidence that has been presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of their testimony is tested through the trial process. If you do any research or investigation outside the courtroom, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case based on information not presented in court, you will have denied the parties a fair trial. Remember, you have taken an oath to follow the rules, and it is very important that you follow these rules.

A juror who violates these restrictions jeopardizes the fairness of these proceedings[, and a mistrial could result that would require the entire trial process to start over]. If any juror is exposed to any outside information, please notify the court immediately.

3.3 Communication with Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the [clerk] [bailiff], signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

Comment

For guidance on the general procedures regarding jury questions during deliberations, *see* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.A (2013).

3.4 Readback or Playback

Comment

If during jury deliberations a request is made by the jury or by one or more jurors for a readback of a portion or all of a witness's testimony, and the court in exercising its discretion determines after consultation with the lawyers that a readback should be allowed, the Committee recommends the following admonition be given in open court with both sides present:

> Because a request has been made for a [readback] [playback] of the testimony of [*witness's name*] it is being provided to you, but you are cautioned that all [readbacks] [playbacks] run the risk of distorting the trial because of overemphasis of one portion of the testimony. [Therefore, you will be required to hear all the witness's testimony on direct and cross-examination, to avoid the risk that you might miss a portion bearing on your judgment of what testimony to accept as credible.] [Because of the length of the testimony of this witness, excerpts will be [read] [played].] The [readback] [playback] could contain errors. The [readback] [playback] cannot reflect matters of demeanor[, tone of voice,] and other aspects of the live testimony. Your recollection and understanding of the testimony controls. Finally, in your exercise of judgment, the testimony [read] [played] cannot be considered in isolation but must be considered in the context of all the evidence presented.

Although a court has broad discretion to read back excerpts or the entire testimony of a witness when requested by a deliberating jury, precautionary steps should be taken. Absent the parties' stipulation to a different procedure, the jury should be required to hear the readback in open court, with counsel for both sides present, and after giving the admonition set out above. *See United States v. Newhoff*, 627 F.3d 1163, 1167 (9th Cir. 2010); *see also* JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.C (2013).

3.5 Return of Verdict

A verdict form has been prepared for you. [*Explain verdict form as needed.*] After you have reached unanimous agreement on a verdict, your [presiding juror] [foreperson] should complete the verdict form according to your deliberations, sign and date it, and advise the [clerk] [bailiff] that you are ready to return to the courtroom.

Comment

The judge may also wish to explain to the jury the particular form of verdict being used.

3.6 Additional Instructions of Law

At this point I will give you an additional instruction. By giving an additional instruction at this time, I do not mean to emphasize this instruction over any other instruction.

You are not to attach undue importance to the fact that this instruction was read separately to you. You must consider this instruction together with all of the other instructions that were given to you.

[*Insert text of new instruction.*]

You will now retire to the jury room and continue your deliberations.

Comment

Use this instruction for giving an additional instruction to a jury while it is deliberating. If the jury has a copy of the instructions, send the additional instruction to the jury room. Unless the additional instruction is by consent of both parties, both sides must be given an opportunity to take exception or object to it. If this instruction is used, it should be made a part of the record. The judge and attorneys should make a full record of the proceedings.

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.1.B (2013).

3.7 Deadlocked Jury

Members of the jury, you have advised that you have been unable to agree upon a verdict in this case. I have decided to suggest a few thoughts to you.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict if each of you can do so without violating your individual judgment and conscience. Each of you must decide the case for yourself, but only after you consider the evidence impartially with the other jurors. During your deliberations, you should not be unwilling to reexamine your own views and change your opinion if you become persuaded that it is wrong. However, you should not change an honest belief as to the weight or effect of the evidence solely because of the opinions of the other jurors or for the mere purpose of returning a verdict.

All of you are equally honest and conscientious jurors who have heard the same evidence. All of you share an equal desire to arrive at a verdict. Each of you should ask yourself whether you should question the correctness of your present position.

I remind you that in your deliberations you are to consider the instructions I have given you as a whole. You should not single out any part of any instruction, including this one, and ignore others. They are all equally important.

You may now return to the jury room and continue your deliberations.

Comment

Before giving any supplemental jury instruction to a deadlocked jury, the Committee recommends the court review JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 5.5 (2013); *see also Warfield v. Alaniz*, 569 F.3d 1015, 1029 (9th Cir. 2009) (holding no error in standard *Allen* charge issued to deadlocked jury).

3.8 Continuing Deliberations After Juror is Discharged

[One] [Some] of your fellow jurors [has] [have] been excused from service and will not participate further in your deliberations. You should not speculate about the reason the [juror is] [jurors are] no longer present.

You should continue your deliberations with the remaining jurors. Do not consider the opinions of the excused [juror] [jurors] as you continue deliberating. All the previous instructions given to you still apply, including the requirement that all the remaining jurors unanimously agree on a verdict.

Comment

A court may not seat a jury of fewer than six nor more than twelve jurors. *See* Fed. R. Civ. P. 48. The selection of alternate jurors in civil trials has been discontinued. *See* Advisory Committee Note, Fed. R. Civ. P. 47(b) (1991).

3.9 Post-Discharge Instruction

Now that the case has been concluded, some of you may have questions about the confidentiality of the proceedings. Now that the case is over, you are free to discuss it with any person you choose. By the same token, however, I would advise you that you are under no obligation whatsoever to discuss this case with any person.

[If you do decide to discuss the case with anyone, I would suggest you treat it with a degree of solemnity in that whatever you do decide to say, you would be willing to say in the presence of the other jurors or under oath here in open court in the presence of all the parties.]

[Finally, always bear in mind that if you do decide to discuss this case, the other jurors fully and freely stated their opinions with the understanding they were being expressed in confidence. Please respect the privacy of the views of the other jurors.]

[Finally, if you would prefer not to discuss the case with anyone, but are feeling undue pressure to do so, please feel free to contact the courtroom deputy, who will notify me, and I will assist.]

Comment

See JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES, § 6.1 (2013).

Added Dec. 2019

4. AGENCY

Instruction

Introductory Comment
4.1 Corporations and Partnerships—Fair Treatment
4.2 Liability of Corporations—Scope of Authority Not in Issue
4.3 Liability of Partnerships—Scope of Authority Not in Issue
4.4 Agent and Principal—Definition
4.5 Agent—Scope of Authority Defined
4.6 Apparent Agency
4.7 Ratification
4.8 Act of Agent is Act of Principal—Scope of Authority Not in Issue
4.9 Both Principal and Agent Sued—No Issue as to Agency or Authority
4.10 Principal Sued but Not Agent—No Issue as to Agency or Authority
4.11 Both Principal and Agent Sued—Agency or Authority Denied
4.12 Principal Sued but Not Agent—Agency or Authority Denied
4.13 Adverse Interest Exception
4.14 Independent Contractor—Definition
4.15 General Partnership—Definition
4.16 General Partnership—Scope of Partnership Business Defined
4.17 General Partnership—Act of Partner is Act of All Partners
4.18 General Partnership—Liability of Partner—No Issue as to Partnership, Agency, or Scope of Authority
4.19 Partnership—Existence Admitted—Scope of Partnership Business in Issue—Effect
4.20 Partnership—Existence of Partnership in Issue—Effect

Introductory Comment

This chapter contains generic instructions. Modifications may be necessary to conform to state law applicable to any specific case.

4.1 Corporations and Partnerships—Fair Treatment

All parties are equal before the law and a [corporation] [partnership] is entitled to the same fair and conscientious consideration by you as any party.

4.2 Liability of Corporations—Scope of Authority Not in Issue

Under the law, a corporation is considered to be a person. It can only act through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

4.3 Liability of Partnerships—Scope of Authority Not in Issue

A partnership can only act through its employees, agents, or partners. Therefore, a partnership is responsible for the acts of its employees, agents, and partners performed within the scope of authority.

4.4 Agent and Principal—Definition

An agent is a person who performs services for another person under an express or implied agreement and who is subject to the other's control or right to control the manner and means of performing the services. The other person is called a principal. [One may be an agent without receiving compensation for services.] [The agency agreement may be oral or written.]

4.5 Agent—Scope of Authority Defined

An agent is acting within the scope of authority if the agent is engaged in the performance of duties which were expressly or impliedly assigned to the agent by the principal.

4.6 Apparent Agency

If [*name of alleged principal*] has intentionally or unintentionally caused the [plaintiff] [defendant] to believe that [*name of alleged agent*] was the principal's agent, a relationship known as "apparent agency" may be created, even if no actual authority was ever given to the agent. Apparent agency, however, can never arise solely from the acts of the alleged agent.

To establish apparent agency, the [plaintiff] [defendant] must prove that:

First, the alleged principal caused, by representation or action, the [plaintiff] [defendant] [*name*] to believe that [*name of alleged agent*] was the principal's agent;

Second, the [plaintiff] [defendant] [*name*] relied on this representation or action to [his] [her] [*other pronoun*] detriment; and

Third, such reliance was reasonably justified.

If an apparent agency has been established, the principal is liable for the acts of the apparent agent just as if the principal had authorized the agent from the outset.

Revised March 2025

4.7 Ratification

A purported principal who ratifies the acts of someone who was purporting to act as the principal's agent will be liable for the acts of that purported agent, provided that the principal made a conscious and affirmative decision to approve the relevant acts of the purported agent while in possession of full and complete knowledge of all relevant events.

Comment

See United States v. Alaska S. S. Co., 491 F.2d 1147, 1155 (9th Cir. 1974) ("Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.") (quoting Restatement (Second) of Agency § 82 (1958)); *Witt v. United States*, 319 F.2d 704, 710 (9th Cir. 1963) ("The doctrine of ratification has as its foundation, knowledge of all the facts.") (citation and quotation marks omitted).

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4.8 Act of Agent is Act of Principal—Scope of Authority Not in Issue

Any act or omission of an agent within the scope of authority is the act or omission of the principal.

4.9 Both Principal and Agent Sued—No Issue as to Agency or Authority

The defendants are sued as principal and agent. The defendant [*name of principal*] is the principal and the defendant [*name of agent*] is the agent. If you find against [*name of agent*], then you must also find against [*name of principal*]. However, if you find for [*name of agent*], then you must also find for [*name of principal*].

4.10 Principal Sued but Not Agent—No Issue as to Agency or Authority

[*Name of agent*] was the agent of the defendant [*name of principal*], and, therefore, any act or omission of [*name of agent*] was the act or omission of [*name of principal*].

4.11 Both Principal and Agent Sued—Agency or Authority Denied

[Defendant [*name of alleged principal*] is sued as the principal and the defendant [*name of alleged agent*] as the agent. [It is denied that any agency existed.] [It is [also] denied that [*name of alleged agent*] was acting within the scope of authority as an agent of [*name of alleged principal*].]]

If you find that [*name of alleged agent*] [was the agent of [*name of alleged principal*]] [and] [was acting within the scope of authority], and if you find against [*name of alleged agent*], then you must also find against [*name of alleged principal*]. If you do not find against [*name of alleged agent*], then you must find for both [*name of alleged principal*] and [*name of alleged agent*].

If you find against [*name of alleged agent*], but do not find that [*name of alleged agent*] was acting within the scope of authority as an agent of [*name of alleged principal*], then you must find that [*name of alleged principal*] is not liable.

4.12 Principal Sued but Not Agent—Agency or Authority Denied

The defendant [*name of alleged principal*] is sued as a principal. The plaintiff [*name*] claims that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent. [*Name of alleged principal*] [denies that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent] [admits that [*name of alleged agent*] was acting as [*name of alleged principal*]'s agent] [and] [denies that [*name of alleged agent*] was acting within the scope of authority.]

If you find that [*name of alleged agent*] [was the agent of [*name of alleged principal*] and] was acting within the scope of authority, then any act or omission of [*name of alleged agent*] was the act or omission of [*name of alleged principal*].

If you find that [*name of alleged agent*] was not acting within the scope of authority as [*name of alleged principal*]'s agent, then you must find for [*name of alleged principal*].

4.13 Adverse Interest Exception

If you find that [*name of alleged agent*] was acting solely for [his] [her] [*other pronoun*] own purposes or those of a third party, then [*name of the alleged agent*]'s acts or omissions are not considered the acts or omissions of defendant [*name of alleged principal*].

[However, if you find that plaintiff dealt with [*name of agent*] in good faith and did not know, or have reason to know, that [*name of agent*] was acting against the interests of defendant [*name of alleged principal*], then you may find defendant [*name of alleged principal*] liable if you find that [*name of agent*] acted within [his] [her] [*other pronoun*] authority.]

[However, if you find that defendant [*name of alleged principal*] ratified or knowingly received a benefit from the acts or omissions of [*name of agent*], then you may find defendant [*name of alleged principal*] liable if you find that [*name of agent*] acted within [his] [her] [*other pronoun*] authority.]

[However, if you find that [*name of agent*] was the sole [representative of] [officer in charge of] defendant [*name of alleged principal*], then you may find defendant [*name of alleged principal*] liable if you find that [*name of agent*] acted within [his] [her] [*other pronoun*] authority.]

Comment

The adverse interest exception is narrow and generally requires "an agent to completely abandon the principal's interests and act entirely for his own purposes." *Cement & Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128, 1144-45 (N.D. Cal. 2013) (quoting *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1218 (D. Nev. 2011)).

4.14 Independent Contractor—Definition

An independent contractor is a person who performs services for another person under an express or implied agreement and who is not subject to the other's control of, or right to control, the manner and means of performing the services.

One who engages an independent contractor is not liable to others for the acts or omissions of the independent contractor.

Comment

The second paragraph of this instruction does not apply to nondelegable duties. *See M.J. ex rel. Beebe v. United States*, 721 F.3d 1079, 1085 (9th Cir. 2013) (discussing nondelegable duties under Alaska law); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989) (defining independent contractor).

4.15 General Partnership—Definition

A partnership is an association of two or more persons to carry on a business as co-owners. The members of a partnership are called partners.

4.16 General Partnership—Scope of Partnership Business Defined

A partner is acting within the scope of the partnership business when doing anything which is either expressly or impliedly authorized by the partnership or which is in furtherance of the partnership business.

4.17 General Partnership—Act of Partner is Act of All Partners

An act or omission of a partner within the scope of the partnership business is the act or omission of all partners.

4.18 General Partnership—Liability of Partner—No Issue as to Partnership, Agency, or Scope of Authority

The defendants [*names of partners*] are partners. [*Name of partner*] was acting on behalf of the partnership and within the scope of authority. Therefore, if you decide for the plaintiff, your verdict must be against all of the partners.

4.19 Partnership—Existence Admitted—Scope of Partnership Business in Issue—Effect

The defendant [*name of acting partner*] and the defendant [*name of nonacting partner*] are partners.

It is denied that [*name of acting partner*] was acting within the scope of the partnership business.

If the defendant [*name of acting partner*] was acting within the scope of the partnership business, and if you find against [*name of acting partner*], then you must find against [both] [all] defendants.

If you find for [*name of acting partner*], then you must find for [all] [both] defendants.

If you find against [*name of acting partner*], but you do not find that [*name of acting partner*] was acting within the scope of the partnership business, then you must find for the defendant [*name of nonacting partner*].

4.20 Partnership—Existence of Partnership in Issue—Effect

The defendant [*name of acting partner*] and the defendants [*names of nonacting partners*] are sued as partners.

It is denied that any partnership existed.

If you find that [*name of acting partner*] and [*names of nonacting partners*] were partners and that [*acting partner*] was acting within the scope of the partnership business, and if you find against [*acting partner*], then you must find against [both] [all] defendants.

If you find against [*name of acting partner*], but you either find there was no partnership or that [*name of acting partner*] was not acting within the scope of the partnership business, then, in either case, you must find for the defendants [*names of nonacting partners*].

If you find for [*acting partner*], then you must find for [both] [all] of the defendants.

5. DAMAGES

Instruction

5.1 Damages—Proof
5.2 Measures of Types of Damages
5.3 Damages—Mitigation
5.4 Damages Arising in the Future—Discount to Present Cash Value
5.5 Punitive Damages
5.6 Nominal Damages

5.1 Damages—Proof

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find for the plaintiff [on the plaintiff's [*specify type of claim*] claim], you must determine the plaintiff's damages. The plaintiff [*name*] has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff [*name*] for any injury you find was caused by the defendant [*name*]. You should consider the following:

[*Insert types of damages. See Instruction 5.2 (Measures of Types of Damages)*]

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Comment

If liability is not disputed, this instruction should be modified accordingly.

5.2 Measures of Types of Damages

In determining the measure of damages, you should consider:

[The nature and extent of the injuries;]

[The [disability] [disfigurement] [loss of enjoyment of life] experienced [and that with reasonable probability will be experienced in the future];]

[The [mental,] [physical,] [and] [emotional] pain and suffering experienced [and that with reasonable probability will be experienced in the future];]

[The reasonable value of necessary medical care, treatment, and services received to the present time;]

[The reasonable value of necessary medical care, treatment, and services that with reasonable probability will be required in the future;]

[The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] lost up to the present time;]

[The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] that with reasonable probability will be lost in the future;]

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] required up to the present time;]

[The reasonable value of necessary [household help] [services other than medical] [and] [expenses] that with reasonable probability will be required in the future;]

[The reasonable value of necessary repairs to any property that was damaged;]

[The difference between the fair market value of any damaged property immediately before the occurrence and its fair market value immediately thereafter;] [and]

[The reasonable value of necessary repairs to any property that was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired.]

[The lesser of the following:

1. the reasonable cost of necessary repairs to any property that was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired; or

2. the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.]

[Such sum as will reasonably compensate for any loss of use of any damaged property during the time reasonably required for its [repair] [replacement].]

Comment

Insert only the appropriate bracketed items from this instruction into Instruction 5.1 (Damages—Proof). Additional paragraphs may have to be drafted to fit other types of damages. Particular claims may have special rules on damages. *See*, *e.g.*, Instructions 7.11 (Maintenance and Cure—Elements and Burden of Proof), 11.13 (Age Discrimination—Damages—Back Pay—Mitigation), and 11.14 (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

Punitive and compensatory damages are subject to caps in Title VII cases. *See* 42 U.S.C. 1981a(b)(3). Regarding the amount of damages available under Title VII, see *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148 (9th Cir. 1999). The cap does not apply to front pay and back pay. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 848 (2001). *See also Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1020 (9th Cir. 2000) (defining front pay and back pay); Introductory Comment to Chapter 10.

In Title VII and ADA cases, the court, not the jury, determines the amount of back pay. *Lutz v. Glendale Union High School*, 403 F.3d 1061, 1069 (9th Cir. 2005); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415-16 (1975). Under the Family Medical Leave Act, the court, not the jury, determines the amount of front pay. *Traxler v. Multnomah Cnty*., 596 F.3d 1007, 1011-14 (9th Cir. 2010).

5.3 Damages—Mitigation

The plaintiff has a duty to use reasonable efforts to mitigate damages. To mitigate means to avoid or reduce damages.

The defendant has the burden of proving by a preponderance of the evidence:

First, that the plaintiff failed to use reasonable efforts to mitigate damages; and

Second, the amount by which damages would have been mitigated.

Comment

As to mitigation of damages in an action under the Age Discrimination in Employment Act, see Instruction 11.13 (Age Discrimination—Damages—Back Pay—Mitigation).

5.4 Damages Arising in the Future—Discount to Present Cash Value

[Any award for future economic damages must be for the present cash value of those damages.]

[Noneconomic damages [such as [pain and suffering] [disability] [disfigurement] [and] [*specify other noneconomic damages*]] are not reduced to present cash value.]

Present cash value means the sum of money needed now, which, when invested at a reasonable rate of return, will pay future damages at the times and in the amounts that you find the damages [will be incurred] [or] [would have been received].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill. [You should also consider decreases in the value of money that may be caused by future inflation.]

Comment

There must be evidence to support this instruction. *See Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 339-42 (1988); *see also Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 508-09 (9th Cir. 2000).

5.5 Punitive Damages

If you find for the plaintiff [*name*], you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

The plaintiff [*name*] has the burden of proving by [a preponderance of the evidence] [clear and convincing evidence] that punitive damages should be awarded and, if so, the amount of any such damages.

You may award punitive damages only if you find that the defendant [*name*]'s conduct that harmed the plaintiff [*name*]was malicious, oppressive or in reckless disregard of the plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring the plaintiff [*name*]. Conduct is in reckless disregard of the plaintiff's rights if, under the circumstances, it reflects complete indifference to the plaintiff's safety or rights, or if the defendant acts in the face of a perceived risk that its actions will violate the plaintiff's rights under federal law. An act or omission is oppressive if the defendant injures or damages or otherwise violates the rights of the plaintiff with unnecessary harshness or severity, such as by misusing or abusing authority or power or by taking advantage of some weakness or disability or misfortune of the plaintiff.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice, or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant [*name*] conduct[, including whether the conduct that harmed the plaintiff [*name*] was particularly reprehensible because it also caused actual harm or posed a substantial risk of harm to people who are not parties to this case. You may not, however, set the amount of any punitive damages to punish the defendant [*name*]for harm to anyone other than the plaintiff [*name*] in this case]. [In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff [*name*].]

[Punitive damages may not be awarded against [*specify defendant*.] [You may impose punitive damages against one or more of the defendants and not others and may award different amounts against different defendants.] [Punitive damages may be awarded even if you award plaintiff only nominal, and not compensatory, damages.]

Comment

Punitive Punitive damages are not available in every case. For example, punitive damages are not available against municipalities, counties, or governmental entities unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981); *see also Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 771 (9th Cir. 2018) ("There is a 'presumption against the imposition of punitive damages on governmental entities.'") (quoting *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 785 (2000)). Punitive damages may,

however, be available against governmental employees acting in their individual capacities. *See City of Newport,* 453 U.S. at 254*; Monell v. New York City Dept. of Soc. Services,* 436 U.S. 658 (1978). In diversity cases, look to state law for an appropriate instruction.

Whether and under what criterion punitive damages are available depends upon the substantive standards applicable to the underlying claim for relief, and, therefore, the third paragraph of this instruction should be modified accordingly.

As to Title VII claims, an employer may be liable for punitive damages when the employer "discriminate[s] in the face of a perceived risk that its actions will violate federal law." *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 515 (9th Cir. 2000) (citing *Kolstad v. American Dental Ass'n*., 527 U.S. 526, 536 (1999). *See also Caudle v. Bristol Optical Co*., 224 F.3d 1014, 1026-27 (9th Cir. 2000). Punitive and compensatory damages are subject to caps in Title VII cases. *See* 42 U.S.C. § 1981a(b)(3); *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (en banc) (analyzing constitutionality of punitive damages under § 1981(b) when only nominal damages are awarded).

As to § 1983 claims, "[i]t is well-established that a 'jury may award punitive damages . . . either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others.'" *Morgan v. Woessner,* 997 F.2d 1244, 1255 (9th Cir. 1993). In *Dang v. Cross,* the Ninth Circuit held this "statement of the law of punitive damages is incomplete, however. The standard for punitive damages under § 1983 mirrors the standard for punitive damages under common law tort cases. . . . [M]alicious, wanton, or oppressive acts or omissions are within the boundaries of traditional tort standards for assessing punitive damages and foster 'deterrence and punishment over and above that provided by compensatory awards.' . . . Such acts are therefore all proper predicates for punitive damages under § 1983." 422 F.3d 800, 807 (9th Cir. 2005) (citing *Smith v. Wade,* 416 U.S. 30, 49 (1983)). The *Dang* court held it was reversible error to decline to instruct that "oppressive acts" were an alternative basis for punitive damages in a § 1983 case.

Similarly, punitive damages claim arising under state law are subject to state law standards for recovery which should be reflected in a modified jury instruction. *See*, *e.g.*, *Coughlin v. Tailhook Ass'n,* 112 F.3d 1052, 1056 (9th Cir. 1997).

Further, punitive damages are not an available remedy on an unseaworthiness or Jones Act claims. *Dutra Grp. v. Batteron*, 588 U.S. 358 (2019) *rev'g Batteron v. Dutra Grp.*, 880 F.3d 1089 (9th Cir. 2018) (no punitive damages on unseaworthiness claims); *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), *abrogated by Dutra Grp. v. Batterton*, 588 U.S. 358 (2019) (citing *Kopczynski v. The Jacqueline*, 753 F.2d 555, 560-61 (9th Cir. 1984)) (no punitive damages on Jones Act claims).

Whether punitive damages need to be proved by a preponderance of the evidence or clear and convincing evidence also depends on the standards applicable to the underlying claim for relief. For example, several states in the Ninth Circuit require proof by clear and convincing evidence before punitive damages are awarded on a state law claim. *See*, *e.g.*, *White v. Ford*

Motor Co., 312 F.3d 998, 1011 (9th Cir. 2002) (applying Nevada's clear and convincing standard). On the other hand, preponderance of the evidence standard has been upheld for punitive damages in certain federal claims. *See*, *e.g.*, *In re Exxon Valdez,* 270 F.3d 1215, 1232 (9th Cir. 2001) (holding that preponderance standard applied to punitive damages claim in maritime case (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991))).

If punitive damages are available and evidence of the defendant's financial condition is offered in support of such damages, a limiting instruction may be appropriate. *See* Instruction 1.11 (Evidence for Limited Purpose) and numbered paragraph (3) in Instruction 1.10 (What Is Not Evidence).

Regarding degree of reprehensibility and punitive damages generally, *see Philip Morris USA v. Williams*, 549 U.S. 346, 353-54 (2007), *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *see also Morgan v. Woessner*, 997 F.2d 1244, 1256 (9th Cir. 1993) ("*Haslip* said that instructions should be fashioned to describe the proper purposes of punitive damages so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish the defendant and to deter the defendant and others from such conduct in the future."); *White v. Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (holding that trial court's failure to give a "harm to nonparties" instruction violated due process and was reversible error after *Williams*). Bracketed language in the fourth paragraph of the instruction addresses this requirement when evidence concerning harm to nonparties is admitted on the issue of degree of reprehensibility.

Regarding whether to instruct the jury concerning the relationship of any award of punitive damages to compensatory damages, the Ninth Circuit noted in *White v. Ford Motor Co.* that this inquiry "is markedly different from the jury's determination of a specific amount of punitive damages; its purpose is to aid in ascertaining the constitutional *ceiling.* Unlike the initial damage calculation, determining the constitutional ceiling on a punitive damage award is a question of law, properly reserved for the court." 500 F.3d at 974 (emphasis in original). The court also observed that, although "states are certainly free to incorporate the reasonable relationship concept into jury instructions, . . . it is also constitutionally permissible for a district court to delay the reasonable relationship inquiry until the judge's post-verdict review." *Id.* Because Nevada chose the latter course, it was not error in *White* for the district court to decline a "relationship inquiry" instruction. *Id.*

Regarding the constitutional due process issues involved in the "relationship inquiry," *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), referring to *Gore* and *Haslip* and stating that "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1." In *State Farm*, the Court went on to say that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'" *Id*. (quoting *Gore*, 517 U.S. at 582). For an application of the *State Farm* ratio principles in the context of a 42 U.S.C. § 1981 case, *see Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 774-77

(9th Cir. 2005). *But see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (applying federal maritime common law to conclude punitive damages could not exceed 1:1 ratio in maritime cases).

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5.6 Nominal Damages

The law that applies to this case authorizes an award of nominal damages. If you find for the plaintiff but you find that the plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal damages may not exceed one dollar.

Comment

Nominal damages are not available in every case. The court must determine whether nominal damages are permitted. *See*, *e.g.*, *Chew v. Gates,* 27 F.3d 1432, 1437 (9th Cir. 1994) (Section 1983 action); *Parton v. GTE North, Inc.*, 971 F.2d 150, 154 (8th Cir. 1992) (Title VII action).

When a plaintiff has indisputably suffered an actual injury, an award of compensatory damages is mandatory. *Hazle v. Crofoot*, 727 F.3d 983, 991-92 (9th Cir. 2013). However, nominal damages "must be awarded in cases in which the plaintiff is not entitled to compensatory damages, such as cases in which no actual injury is incurred or can be proven." *Id*. at n.6.

Regarding cases brought under 42 U.S.C. § 1983, see *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (involving violation of procedural due process); *Hazle*, 727 F.3d at 991 n.6 (involving violation of substantive constitutional rights); *Floyd v. Laws*, 929 F.2d 1390, 1401 n.9 (9th Cir. 1991) (providing suggested language).

6. FEDERAL EMPLOYERS' LIABILITY ACT

Instruction

6.1 Preliminary Jury Instruction—Federal Employers' Liability Act (45 U.S.C. §§ 51 and 53)
6.2 FELA—Elements and Burden of Proof
6.3 FELA—Negligence Defined
6.4 FELA—Causation
6.5 FELA—Plaintiff's Compliance with Defendant's Request or Directions
6.6 FELA—Damages (Comment only)
6.7 FELA—Plaintiff's Negligence—Reduction of Damages (45 U.S.C. § 53)

6.1 Preliminary Jury Instruction—Federal Employers' Liability Act (45 U.S.C. §§ 51 and 53)

The plaintiff, [*name*], claims that while [he] [she] [*other pronoun*] was employed by the defendant [*name*], a railroad, [he] [she] [*other pronoun*] suffered an injury caused by the negligence of the defendant. The defendant denies the plaintiff's claim. To help you understand the evidence while it is being presented, I will now explain some of the legal terms you will hear during this trial.

Negligence is the failure to use reasonable care. Reasonable care is the degree of care that a reasonably prudent person would use under like circumstances. Someone can be negligent by doing something that a reasonably prudent person would not have done, or by failing to do something that a reasonably prudent person would have done.

It is not enough, however, that someone be negligent, because to be held responsible for an injury the person's negligence must also have been a cause of the injury. To be a cause of an injury, the negligence must have played some part, no matter how small, in bringing that injury about.

The plaintiff [*name*] claims that the defendant [*name*] should be required to pay damages because its negligence was a cause of an injury suffered by the plaintiff [*name*]. It is the plaintiff [*name*]'s burden to prove that by a preponderance of the evidence. The defendant [*name*], on the other hand, claims that the plaintiff [*name*]was negligent and that the plaintiff [*name*]'s own negligence was a cause of the claimed injury. The defendant [*name*] has the burden of proving that by a preponderance of the evidence.

Should you determine that negligence of both the plaintiff [*name*] and the defendant [*name*] were causes of an injury, then you will determine the percentage of fault attributable to the plaintiff [*name*].

Comment

This preliminary instruction may be given at the beginning of trial. The judge should be certain that the jury understands that after the jury calculates any percentage of fault attributable to the plaintiff, the court will deduct that percentage from any award of damages. *See* Instruction 6.7 (Plaintiff's Negligence—Reduction of Damages (45 U.S.C. § 53)).

The right to sue under FELA is limited to employees of a railroad common carrier engaged in interstate commerce. *Forrester v. Am. Dieselectric*, *Inc.,* 255 F.3d 1205, 1210 n.2 (9th Cir. 2001). No claim for relief is available under FELA against individuals. *Rivera v. Nat'l R.R. Passenger Corp.*, 331 F.3d 1074, 1081 (9th Cir. 2003).

6.2 FELA—Elements and Burden of Proof

[On the plaintiff's [*specify type of claim*] claim,] the plaintiff [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the defendant [*name*] was negligent; and

Second, the defendant [*name*]'s negligence was a cause of an injury to the plaintiff [*name*].

If you find that the plaintiff [*name*] has proved both of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove either of these elements, your verdict should be for the defendant [*name*].

The defendant [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was negligent; and

Second, the plaintiff [*name*]'s negligence was a cause of the plaintiff [*name*]'s own injury.

If you find that the defendant [*name*] has proved both of these elements, you must reduce the percentage of fault attributable to the defendant [*name*].

Comment

This instruction assumes the usual situation where the parties have stipulated that the defendant is a common carrier covered by the FELA and that the plaintiff was injured in the scope and course of employment with the defendant. If these issues are in dispute, the instruction must be modified accordingly.

Use the second half of this instruction in conjunction with Instruction 6.7 (FELA—Plaintiff's Negligence—Reduction of Damages).

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6.3 FELA—Negligence Defined

Negligence is the failure to use reasonable care. Reasonable care is the degree of care that reasonably prudent persons would use under like circumstances to avoid injury to themselves or others. Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under like circumstances.

6.4 FELA—Causation

Negligence is a cause of an injury if it played any part, no matter how slight, in bringing about the injury or damage, even if the negligence operated in combination with the acts of another, or in combination with some other cause.

Comment

The Supreme Court approved a similar instruction in *CSX Transportation, Inc. v. McBride*, 564 U.S. 685 (2011) (holding that in a FELA case, railroad employee need only establish that the railroad's negligence played a part, no matter how small, in bringing about injury to satisfy causation element).

6.5 FELA—Plaintiff's Compliance with Defendant's Request or Direction

The plaintiff [*name*] is not negligent simply because the plaintiff [*name*], upon the request or direction of the defendant [*name*], worked at a dangerous job, or in a dangerous place, or under dangerous conditions.

6.6 FELA—Damages

Comment

See Instructions 5.1 (Damages—Proof), 5.2 (Measures of Types of Damages), 5.3 (Damages—Mitigation), and 5.4 (Damages Arising in the Future—Discount to Present Cash Value).

In those cases under FELA where damages are recoverable arising out of the fear of contracting cancer, the Supreme Court has held that it is reversible error to refuse an instruction that such fear must be "genuine and serious." *CSX Transportation, Inc. v. Thurston Hensley*, 556 U.S. 838, 839 (2009).

6.7 FELA—Plaintiff's Negligence—Reduction of Damages (45 U.S.C. § 53)

If you decide that the plaintiff [*name*] was negligent, and that the plaintiff [*name*]'s negligence was a cause of [his] [her] [*other pronoun*] injury you must then decide to what extent [his] [her] [*other pronoun*] injury was caused by the plaintiff [*name*]'s negligence. This should be fixed as a percentage—for example, 10%, 50%, 90%. The percentage of the plaintiff [*name*]'s negligence, if any, is for you to decide. You must then write that percentage on the appropriate place on the verdict form. Do not make any reduction in the amount of damages that you award to the plaintiff [*name*]. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff [*name*].

Comment

Under FELA, the same standard of causation applies to a plaintiff's comparative negligence as to defendant's negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

For a discussion applying the FELA comparative negligence doctrine in a Jones Act case, see *Kopczynski v. The Jacqueline*, 742 F.2d 555, 558 (9th Cir. 1984).

The traditional defense of assumption of risk is barred under FELA and cannot be revived in the form of comparative negligence. *See Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1316-17 (9th Cir. 1986).

For an example of a verdict form for use in FELA cases, see below:

SUGGESTED VERDICT FORM

1. Do you find that the plaintiff has proved by a preponderance of the evidence:

   A. That the defendant was negligent?

   Answer YES or NO

If you answered NO to Question No. 1.A., do not answer the remaining questions. Sign and date the verdict form and notify the bailiff. If you answered YES to Question No. 1.A., proceed to Question No. 1.B.

   B. That the defendant's negligence was a cause of injury or damage to the plaintiff?

   Answer YES or NO

If you answered NO to Question No. 1.B., do not answer the remaining questions. Sign and date the verdict form and notify the bailiff. If you answered YES to Question No. 1.B., proceed to Question No. 2.

2. Do you find that the defendant has proved by a preponderance of the evidence:

A. That the plaintiff was also negligent?

Answer YES or NO

If you answered NO to Question No. 2.A., proceed to Question No. 4. If you answered YES to Question No. 2.A., proceed to Question No. 2.B.

B. That the plaintiff's own negligence was a cause of the plaintiff's injury or damage?

Answer YES or NO

If you answered NO to Question No. 2.B., proceed to Question No. 4. If you answered YES to Question No. 2.B., proceed to Question No. 3.

3. What proportion or percentage of the plaintiff's injury or damage do you find by a preponderance of the evidence to have been caused by the negligence of the respective parties?

Answer in Terms of Percentages

The defendant _____%
The plaintiff _____%

Note: The total of the percentages given in your answer should equal 100%. Proceed to Question No. 4.

4. If you answered YES to Question Nos. 1.A and 1.B, what sum of money do you find from a preponderance of the evidence to be the total amount of the plaintiff's damages (do not reduce any amount by percentages found in Question No. 3)?

(a) Lost wages and benefits to date of trial $

(b) Lost wages and benefits in the future [reduced to present value]
$

(c) Medical and hospital expenses incurred in the past $

(d) Medical and hospital expenses likely to be incurred in the future [reduced to present value] $

(e) Mental and emotional humiliation or pain and anguish $

(f) Physical pain and suffering $

DATED: _____ _____

PRESIDING JUROR

7. JONES ACT AND OTHER ADMIRALTY CLAIMS

Instruction

Introductory Comment
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7.2 Jones Act Negligence Claim—Elements and Burden of Proof (46 U.S.C. § 30104)
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7.12 Maintenance and Cure—Willful and Arbitrary Failure to Pay
7.13 Integrated Product Manufacturer's Duty to Warn

Introductory Comment

These instructions are for use in an action for negligence under the Jones Act, 46 U.S.C. § 30104, and under the general maritime law for unseaworthiness and for maintenance and cure. A plaintiff must be a "seaman" to recover under any of these theories, and therefore Instruction 7.l is a threshold instruction on seaman status. Instructions 7.2-7.4 pertain to Jones Act negligence claims, Instructions 7.5-7.7 pertain to claims under the doctrine of unseaworthiness, Instructions 7.8-7.10 pertain to damages under both Jones Act negligence and unseaworthiness, and Instructions 7.11 and 7.12 pertain to claims and damages under the doctrine of maintenance and cure. While a right to trial by jury does not attach to claims for unseaworthiness or maintenance and cure standing alone, as those claims sound in admiralty, a jury may determine those claims when brought in conjunction with a Jones Act negligence claim at law to which a right to trial by jury is permitted. 1 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 6-25 (5th Ed. 2012).

Definitions of "crew member," "vessel," "in the course of employment," and "in the service of the vessel" are not included because of the infinite variety of situations that arise. For assistance in dealing with these terms, it is preferable to refer to cases with fact patterns similar to the case under consideration. *See*, *e.g.*, *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 489-97 (2005) (discussing "vessel" under Longshore and Harbor Workers' Compensation Act); *Chandris, Inc. v. Latsis,* 515 U.S. 347 (1995) (discussing "crew member," and "vessel"); *Martinez v. Signature Seafoods Inc.*, 303 F.3d 1132, 1135-37 (9th Cir. 2002) (discussing "vessel in navigation").

7.1 Seaman Status

The plaintiff [*name*] seeks recovery against the defendant [*name*] under the Jones Act for negligence. [[He] [She] [*other pronoun*] also seeks recovery under [general maritime law for unseaworthiness] [and] [maintenance and cure].] Only a "seaman" can bring these claims. The parties dispute whether or not the plaintiff [*name*] was employed as a seaman.

The plaintiff [*name*] must prove that [he] [she] [*other pronoun*] was a "seaman" to recover. To prove seaman status, the plaintiff [*name*] must prove the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] contributed to the mission or operation of [a vessel] [an identifiable group of vessels] in navigation, whether underway or at anchor; and

Second, the plaintiff [*name*] had an employment-related connection to [the vessel] [an identifiable group of vessels] that was substantial in terms of both duration and nature.

The phrase "vessel in navigation" is not limited to traditional ships or boats but includes every type of watercraft or artificial contrivance used, or practically capable of being used, as a means of transportation on water.

The phrase "substantial in duration" means that the plaintiff [*name*]'s connection to [the vessel] [an identifiable group of vessels] must be more than merely sporadic, temporary, or incidental.

The phrase "substantial in nature" means that it must regularly expose [him] [her] [*other pronoun*] to the special hazards and disadvantages that are characteristic of a seaman's work.

Comment

To recover for negligence under the Jones Act, under the doctrine of unseaworthiness, or under a claim for maintenance and cure, the plaintiff must be a "seaman" and must satisfy a two-element test. *See Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995); *Gizoni v. Sw. Marine Inc.*, 56 F.3d 1138, 1141 (9th Cir. 1995). The seaman inquiry is a mixed question of law and fact, and when necessary, should be submitted to the jury. *Delange v. Dutra Constr. Co.*, 183 F.3d 916, 919 (9th Cir. 1999). The Jones Act does not define the term "seaman," and the issue of who is or is not covered by the statute has been repeatedly considered by the Supreme Court since 1991. *See Sw. Marine Inc. v. Gizoni*, 502 U.S. 81 (1991); *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991). *See also Stewart v. Dutra Constr. Co.*, 543 U.S. 481 (2005); *Papai*, 520 U.S. 548; *Chandris,* 515 U.S. 347. In defining the prerequisites for Jones Act coverage, the Supreme Court has found it preferable to focus upon the essence of what it means to be a seaman and to reject detailed tests that tend to become ends in and of themselves. "The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to the special hazards and disadvantages to

which they who go down to sea in ships are subjected." *Chandris,* 515 U.S. at 369-70. In *Chandris*, the Court said the essential test for seaman status "comprises two basic elements: The worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Id.* at 376.

The Supreme Court has cautioned against using a "snapshot" test and admonishes that a plaintiff's seaman status must be determined in the context of his or her "overall employment" with the defendant employer. *Id.* at 366-67. In the Court's view, the total circumstances of an individual's employment must be weighed to determine whether he or she had a sufficient relation to the navigation of vessels and the perils attendant thereon. The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. *Id.* at 369-70. The Court has also identified an appropriate rule of thumb for applying the temporal or durational requirement in the ordinary case: "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act." *Id.* at 371.

A plaintiff may be entitled to an instruction on the fleet seaman doctrine if it has some foundation in the evidence. *Gizoni*, 56 F.3d at 1141 ("Under the fleet doctrine, one can acquire 'seaman status' through permanent assignment to a group of vessels under common ownership or control.").

The Longshore and Harbor Workers' Compensation Act (LHWCA) excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). Masters and crew members are entitled to sue under the Jones Act and the doctrine of unseaworthiness. A person who is not a seaman is limited to the remedies of the LHWCA.

Revised March 2025

7.2 Jones Act Negligence Claim—Elements and Burden of Proof (46 U.S.C. § 30104)

On the plaintiff's Jones Act negligence claim, the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was a seaman;

Second, the defendant [*name*] was negligent; and

Third, the defendant [*name*]'s negligence was a cause of the injury or damage to the plaintiff [*name*].

If you find the plaintiff [*name*] has proved the elements on which [he] [she] [*other pronoun*] has the burden of proof, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

For a discussion of the elements of a Jones Act negligence claim, see *In re Hechinger*, 890 F.2d 202, 208 (9th Cir. 1989) ("To recover under a Jones Act claim, a plaintiff has the burden of establishing by a preponderance of the evidence, negligence on the part of his employer . . . [and] that the act of negligence was a cause, however slight, of his injuries." (quotations and citation omitted)). *See also Mohn v. Marla Marie, Inc.*, 625 F.2d 900, 901-02 (9th Cir. 1980) (distinguishing between Jones Act negligence claim and unseaworthiness claim). The Jones Act extends to a seaman the statutory rights accorded railway employees under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, *et seq*., and courts may look to cases decided under FELA in construing the Jones Act. *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 770 (9th Cir. 1981). For FELA instructions, see Chapter 6 ("Federal Employers' Liability Act").

Revised March 2025

7.3 Jones Act Negligence Claim—Negligence Defined

Negligence under the Jones Act is the failure to use reasonable care. Reasonable care is the degree of care that reasonably prudent persons would use under like circumstances to avoid injury to themselves or others. Negligence is the doing of something that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do, under the circumstances**.**

7.4 Jones Act Negligence Claim—Causation Defined

Negligence under the Jones Act is a cause of an injury if it played any part, no matter how slight, in bringing about the injury or damage, even if the negligence operated in combination with the acts of another, or in combination with some other cause.

Comment

Even the "slightest negligence" is sufficient for a finding of liability. *See Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 662 (9th Cir. 1997) (citing *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir. 1993)). This test is often described as a "featherweight causation standard" and allows a seaman to survive summary judgment by presenting even the slightest proof of causation. *Ribitzki*, 111 F.3d at 664.

The causal requirements for Jones Act negligence and under the doctrine of unseaworthiness are different. *See Lies v. Farrell Lines*, 641 F.2d 765, 769 n.7 (9th Cir. 1981). Separate causation instructions, therefore, will be necessary when both claims for relief are asserted.

Revised March 2025

7.5 Unseaworthiness Claim—Elements and Burden of Proof

On the plaintiff [*name*]'s unseaworthiness claim, the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was a seaman;

Second, the [*name of vessel*] was unseaworthy; and

Third, the unseaworthy condition was a cause of an injury or damage to the plaintiff [*name*].

If you find the plaintiff [*name*] has proved all the elements on which [he] [she] [*other pronoun*] has the burden of proof, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

"A shipowner has an absolute duty to furnish a seaworthy ship." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). A seaworthy ship is one reasonably fit for its intended use. *Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 664 (9th Cir. 1997); *Id.* at 550.

See also Comment to Instruction 7.6 (Unseaworthiness Defined).

Revised March 2025

7.6 Unseaworthiness—Defined

A vessel owner has a duty to provide and maintain a seaworthy vessel. [That duty cannot be delegated to anyone else.]

A vessel is seaworthy if the vessel and all of its parts and equipment are reasonably fit for their intended purpose [and it is operated by a crew reasonably adequate and competent for the work assigned].

A vessel is unseaworthy if the vessel, or any of its parts or equipment, is not reasonably fit for its intended purpose [or if its crew is not reasonably adequate or competent to perform the work assigned].

A vessel owner has a duty to provide adequate safety equipment for the vessel. However, the owner of the vessel is not required to furnish an accident-free ship. A vessel owner is not called on to have the best parts and equipment, or the finest of crews, but is required to have what is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

Comment

For a definition of a seaworthy vessel, see *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 664 (9th Cir. 1997), and *Havens v. F/T Polar Mist*, 996 F.2d 215, 217-
18 (9th Cir. 1993).

A shipowner has the duty to a seaman employed on the ship to furnish a vessel and appurtenances that are reasonably fit for their use. This includes maintaining a ship's equipment in proper operating condition. The failure of a piece of equipment under proper and expected use is sufficient to establish unseaworthiness. *Lee v. Pac. Far E. Line*, 566 F.2d 65, 67 (9th Cir. 1977); *see also Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (noting that a vessel owner has no obligation to furnish accident-free ship but rather "a duty to furnish a vessel and appurtenances reasonably fit for their intended use").

A vessel may be unseaworthy because of "defective" crew members. *Pashby v. Universal Dredging Corp.*, 608 F.2d 1312, 1313-14 (9th Cir. 1979) (noting that violent or assaultive crew members may make vessel unseaworthy).

Revised March 2025

7.7 Unseaworthiness—Causation Defined

The definition of causation for the plaintiff's unseaworthiness claim is different from that for the Jones Act negligence claim.

Unseaworthiness is a cause of injury or damage if it was a substantial factor in bringing about injury or damage.

Comment

A different test for causation applies to an unseaworthiness claim as compared to a Jones Act negligence claim. *See Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 665 (9th Cir. 1997) (causation is established for an unseaworthiness claim by showing the condition was a "substantial factor" in causing injury). When both Jones Act negligence and unseaworthiness claims exist, the court should instruct on the causal requirements for each. *See Lies v. Farrell Lines*, 641 F.2d 765, 769 n.7 (9th Cir. 1981).

7.8 Jones Act Negligence or Unseaworthiness—Damages—Proof

Comment

See Instruction 5.1 (Damages—Proof).

The collateral source rule applies in cases brought under the Jones Act. *See Folkestad v. Burlington N., Inc.*, 813 F.2d 1377, 1380 n.3 (9th Cir. 1987) (citing *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir. 1962)).

"Maintenance and cure" is a separate general maritime law doctrine, not arising from the Jones Act or doctrine of unseaworthiness. It is not tied to the period that the plaintiff would have worked aboard ship but extends to the point of maximum cure. *See* Instruction 7.11 (Maintenance and Cure—Elements and Burden of Proof).

Punitive damages are not an available remedy on an unseaworthiness claim. *Dutra Grp. v. Batterton*, 588 U.S. 358, 376 (2019), *rev'g Batteron v. Dutra Grp.*, 880 F.3d 1089 (9th Cir. 2018). Nor are punitive damages available for Jones Act claims. *Evich v. Morris*, 819 F.2d 256, 258 (9th Cir. 1987), *abrogated by Dutra Grp.*, 588 U.S. 358 (citing *Kopczynski v. The Jacqueline*, 753 F.2d 555, 560-61 (9th Cir. 1984)).

Revised March 2025

7.9 Jones Act Negligence or Unseaworthiness—Plaintiff's Negligence—Reduction of Damages

If you decide that the plaintiff [*name*] has established by a preponderance of the evidence that the plaintiff [*name*] is entitled to recover under [the Jones Act negligence claim] [[and] [or]] [the unseaworthiness claim], then you must determine whether the plaintiff [*name*]'s own negligence was a cause of the plaintiff [*name*]'s injury or damage. The defendant [*name*] has the burden of proving by a preponderance of the evidence that the plaintiff [*name*] was negligent, and that the plaintiff [*name*]'s negligence was also a cause of the plaintiff [*name*]'s injury or damage.

The plaintiff [*name*] has a duty to use the care that a reasonably prudent person would use under similar circumstances. The defendant [*name*] must prove by a preponderance of the evidence that the plaintiff [*name*]'s failure to use such care contributed in some way to bringing about the plaintiff [*name*]'s injury.

If you decide that the plaintiff [*name*] was negligent and that the plaintiff [*name*]'s negligence was a cause of the plaintiff [*name*]'s injury, you must then decide to what extent the injury was caused by the plaintiff [*name*]'s negligence. This should be fixed as a percentage—for example, 10%, 50%, 90%. The percentage of the plaintiff [*name*]'s negligence, if any, is for you to decide. You must then write that percentage on the appropriate place on the verdict form. Do not make any reduction in the amount of damages that you award to the plaintiff [*name*]. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff [*name*].

Comment

See 46 U.S.C. § 30104 (extending common-law rights or remedies in cases of personal injury to railway employees to seaman injured in course of employment); 45 U.S.C. § 53 (stating that contributory negligence will not bar railroad employee from suing employer for tort damages).

Section 53 of the Federal Employers' Liability Act, 45 U.S.C. § 53, which provides for a reduction in the plaintiff's damages as a result of the plaintiff's comparative negligence, is applicable to actions under both the Jones Act and general maritime law. *See Fuszek v. Royal King Fisheries,* 98 F.3d 514, 516-17 (9th Cir. 1996); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 557-58 (9th Cir. 1984). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) ("Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.").

There is no controlling legal authority on the level of plaintiff's causation required to trigger a reduction of damages for plaintiff's negligence. *See* Instructions 7.4 (Jones Act Negligence Claim—Causation Defined) and 7.7 (Unseaworthiness—Causation Defined). In the only reported judicial decision the Committee could find that addressed the question directly, *R.*

Bunting v. Sun Co., 434 Pa. Super. 404, 643 A.2d 1085 (1994), a Pennsylvania state appellate court held that a reduction of damages for a plaintiff's negligence under the Jones Act is permitted when the plaintiff is shown to have played any part, no matter how slight, in bringing about the injury or damage (featherweight causation). *See also Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) (holding that, under FELA, same standard of causation applies to plaintiff's comparative negligence as to defendant's negligence).

Comparative negligence is not applicable if a seaman is injured as a result of a defendant's violation of Coast Guard regulations. *See MacDonald v. Kahikolu Ltd.*, 442 F.3d 1199, 1202 (9th Cir. 2006); *Fuszek.*, 98 F.3d at 517.

A seaman who follows a supervisor's urgent call to the crew for help cannot be found contributorily negligent. *Simenoff v. Hiner*, 249 F.3d 883, 890-91 (9th Cir. 2001).

Revised March 2025

7.10 Jones Act Negligence or Unseaworthiness—Plaintiff's Compliance with Defendant's Request or Directions

A plaintiff may not be found negligent simply because the plaintiff, upon the request or direction of the defendant, worked at a dangerous job, or in a dangerous place, or under dangerous conditions.

Comment

Use this instruction only when the plaintiff's compliance with an employer's request or direction is an issue. Under the "primary duty" doctrine, "a seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment." *Cal. Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989); s*ee also N. Queen Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir. 2002).

The primary duty rule is not applicable "where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated." *See Bernard v. Maersk Lines, Ltd.*, 22 F.3d 903, 907 (9th Cir. 1994).

A seaman who follows a supervisor's urgent call to the crew for help cannot be found contributorily negligent. *Simenoff v. Hiner*, 249 F.3d 883, 890-91 (9th Cir. 2001).

7.11 Maintenance and Cure—Elements and Burden of Proof

On the plaintiff [*name*]'s maintenance and cure claim, the plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was a seaman;

Second, the plaintiff [*name*] was injured or became ill while in the service of the vessel; and

Third, the amount of maintenance and cure to which the plaintiff [*name*] was entitled.

If you find the plaintiff [*name*] has proved each of the elements on which [he] [she] [*other pronoun*] has the burden of proof, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Maintenance is the reasonable cost of food, lodging and transportation to and from a medical facility. The plaintiff [*name*] is not entitled to maintenance while hospitalized because hospitalization includes food and lodging.

The rate of maintenance includes the cost of obtaining room and board on land. In determining this amount, you may consider the actual costs incurred by the plaintiff [*name*] but shall not award an amount in excess of that of a seaman living alone in the plaintiff [*name*]'s locality.

Cure is the cost of medical attention, including the services of physicians and nurses, as well as the cost of hospitalization, medicines, and medical apparatus.

[When the defendant [*name*]'s failure to provide [maintenance] [[and] [or]] [cure] worsens the plaintiff [*name*]'s injury, the plaintiff [*name*] may recover resulting damages and expenses, including pain and suffering, and additional medical expenses.]

The injury or illness need not be work-related so long as it occurs while the plaintiff [*name*] is in the service of the vessel. Neither maintenance nor cure may be reduced because of any negligence on the part of the plaintiff [*name*]. [A plaintiff [*name*] may not recover for maintenance [and] [or] cure when the illness or injury results from the plaintiff [*name*]'s own willful misbehavior.]

The plaintiff [*name*] is entitled to receive maintenance and cure even though he was not injured as a result of any negligence on the part of his employer or any unseaworthy condition of the vessel. The plaintiff [*name*] is entitled to recover maintenance and cure from the date of departure from the ship to the time of maximum cure under the circumstances. Maximum cure is the point at which no further improvement in the plaintiff [*name*]'s medical condition may be reasonably expected.

There can be no double recovery for the plaintiff [*name*]. If you find that the plaintiff [*name*] is entitled to an award of damages under [the Jones Act negligence claim] [the unseaworthiness claim], and if you include medical expenses in the damage award relating to either of these claims, then cure cannot be awarded for the same expenses.

Comment

See Day v. Am. Seafoods Co., 557 F.3d 1056, 1057-58 (9th Cir. 2009); *Lipscomb v. Foss Maritime Co.*, 83 F.3d 1106, 1108 (9th Cir. 1996); *Gardiner v. Sea–Land Serv.*, 786 F.2d 943, 945-46 (9th Cir. 1986); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 557-58 (9th Cir. 1984).

The shipowner's duty to provide maintenance and cure arises irrespective of whether the illness or injury is suffered in the course of the seaman's employment, and negligence on the seaman's part will not relieve the shipowner of responsibility. *Vella v. Ford Motor Co.*, 421 U.S. 1, 4-5 (1975). A plaintiff may not recover for maintenance and cure when the injury or illness results from the plaintiff's own willful misbehavior. *See Omar v. Sea-Land Serv.*, 813 F.2d 986, 989-90 (9th Cir. 1987).

Only "medical expenses" would be duplicative of "cure." As the Ninth Circuit has explained, "the maintenance obligation is independent of that to compensate for lost wages and exists without regard to the fact that lost wages may be computed on the basis of employment ashore." *Crooks v. United States*, 459 F.2d 631, 635 (9th Cir. 1972); *see also Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 378 (5th Cir. 1989) ("Maintenance is neither a substitute for wages nor is it to be considered in lieu of seaman's wages, in whole or in part". . . . "[A]n award of maintenance by the trial court in addition to a general damage award that includes past and future wages is proper.").

Failure to pay maintenance and/or cure when due renders the defendant liable for not only the quantum of maintenance and/or cure that was not paid but also for any resulting harm. *See Cortes v. Baltimore Insular Line, Inc.* 287 U.S. 367, 371 (1932) ("If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him; the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt."). The bracketed paragraph on this point should be included only when the plaintiff is making a claim for such compensation.

A plaintiff can seek punitive damages for an employer's alleged willful and wanton disregard of its maintenance and cure obligation. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 (2009).

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7.12 Maintenance and Cure—Willful and Arbitrary Failure to Pay

The plaintiff [*name*] also contends the defendant [*name*] willfully and arbitrarily failed to pay [maintenance] [and] [cure] when it was due. On this issue, the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was entitled to [maintenance] [and] [cure];

Second, the defendant [*name*] willfully and arbitrarily failed to provide [maintenance] [and] [cure]; and

Third, the defendant [*name*]'s failure to provide [maintenance] [and] [cure] resulted in injury to the plaintiff [*name*].

If you find the plaintiff [*name*] has proved each of the elements on which [he] [she] [*other pronoun*] has the burden of proof, you should answer "yes" on the verdict form where indicated; otherwise answer "no."

Comment

If the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court. A special interrogatory will be required. *See Kopczynski v. The Jacqueline,* 742 F.2d 555, 559 (9th Cir. 1984) (leaving undisturbed jury's finding on special interrogatory that defendant's conduct was not "willful and arbitrary," and holding that plaintiff therefore was not entitled to recover attorneys' fees).

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7.13 Integrated Product Manufacturer's Duty to Warn

On the plaintiff [*name*]'s duty to warn claim, the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the defendant [*name*] manufactured a product that required the incorporation of a part for the integrated product to function as intended;

Second, the defendant [*name*] knew or had reason to know that the integrated product was likely to be dangerous for its intended use[s];

Third, the defendant [*name*] had no reason to believe that the product's users would realize that danger; and

Fourth, the product's dangerous condition caused foreseeable injury to the plaintiff [*name*].

If you find the plaintiff [*name*] has proven the elements on which [he] [she] [*other pronoun*] has the burden of proof, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

See Air & Liquid Sys. Corp. v. DeVries, 586 U.S. 446, 457 (2019).

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8. CIVIL RICO

Comment

A plaintiff may bring a private civil action for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). *See* 18 U.S.C. § 1964(c). The RICO statute prohibits four types of activities: (1) investing in, (2) acquiring, or (3) conducting or participating in an enterprise with income derived from a pattern of racketeering activity or collection of an unlawful debt, or (4) conspiring to commit any of the first three types of activity. 18 U.S.C. § 1962(a)-(d). RICO was "intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. Univ. Students Co-op. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992), *abrogated on other grounds by Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005). However, the statute is to "be liberally construed to effectuate its remedial purposes." *Odom v. Microsoft Corp*., 486 F.3d 541, 546 (9th Cir. 2007).

As to the element of causation, a plaintiff must prove that the defendant's unlawful conduct was the proximate cause of the plaintiff's injury. *Harmoni Int'l Spice, Inc. v. Hume*, 914 F.3d 648, 651 (9th Cir. 2019).

RICO claims are most commonly brought under 18 U.S.C. § 1962(c) and (d), the conduct and conspiracy prongs of the statute.

18 U.S.C. § 1962(c)

To recover under § 1962(c), a plaintiff must prove (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity (known as "predicate acts"), (5) causing injury to the plaintiff's "business or property" by the conduct constituting the violation. *See Living Designs, Inc. v. E.I. Dupont de Nemours & Co.*, 431 F.3d 353, 361 (9th Cir. 2005) (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)).

Conduct: The conduct element of § 1962(c) requires that the defendant have some part in directing the affairs of the enterprise. Liability is not limited to those with primary responsibility for the enterprise's affairs, nor is a formal position within the enterprise required. However, the defendant is not liable under § 1962(c) unless the defendant has participated in the operation or management of the enterprise itself. *See Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (holding that accountants hired to perform audit of a cooperative's records did not participate in "operation or management" of the cooperative's affairs by failing to inform the cooperative's board of directors that the cooperative was arguably insolvent). In determining whether the conduct element has been satisfied, relevant questions include whether the defendant "occup[ies] a position in the 'chain of command,'" "knowingly implement[s] [the enterprise's] decisions," or is "indispensable to achievement of the enterprise's goal." *Walter v. Drayson*, 538 F.3d 1244, 1249 (9th Cir. 2008) (holding that attorney's performance of services for alleged associated-in-fact enterprise was not sufficient to satisfy § 1962(c)'s conduct element).

Enterprise: An "enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The "definition is not very demanding." *Odom*, 486 F.3d at 548. RICO does not require that either the racketeering enterprise or the predicate acts of racketeering be motivated by an economic purpose. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262 (1994).

For purposes of § 1962(c), a single individual or entity cannot be both the RICO enterprise and an individual defendant. *See Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir. 1984) (holding that plaintiff could not assert RICO claim against defendant bank because bank was also alleged to be a RICO enterprise). However, "the inability of a corporation to operate except through its officers is not an impediment to section 1962(c) suits." *Sever v. Alaska Pulp Corp*., 978 F.2d 1529, 1534 (9th Cir. 1992) (holding that individual officers of avcorporation could be named as defendants even though the corporation was alleged to be an enterprise and could not act without its officers); *see United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir. 1986) (stating that the corporate form is the "sort of legal shield for illegal activity that Congress intended RICO to pierce").

An organizational defendant can be a member of a larger associated-in-fact enterprise. *See Living Designs*, 431 F.3d at 361 (stating that an associated-in-fact enterprise could be formed between the defendant corporation, law firms employed by it, and expert witnesses retained by the law firm). An associated-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." *Boyle v. United States*, 556 U.S. 938, 945-46 (2009) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)). Its existence is proven through evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit. No particular organizational structure, separate or otherwise, is necessary for an associated-in-fact enterprise. *Odom*, 486 F.3d at 551 (concluding that plaintiffs had sufficiently alleged associated-in-fact enterprise between defendant software manufacturer and co-defendant retailer when defendants established cross-marketing scheme for transferring plaintiffs' personal information from the retailer to the manufacturer to allow the manufacturer to improperly charge plaintiffs for services); *see also Boyle*, 556 U.S. at 946 ("It is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.").

Defendants in RICO actions must have had "some knowledge of the nature of the enterprise . . . to avoid an unjust association of the defendant[s] with the crimes of others," but the requirement of a common purpose may be met so long as the defendants were "each aware of the essential nature and scope of [the] enterprise and intended to participate in it." *United States v. Christensen*, 801 F.3d 970, 985 (9th Cir.), *opinion amended and superseded on denial of reh'g*, 828 F.3d 763 (9th Cir. 2015). A RICO enterprise is not defeated even when some of the enterprise's participants lack detailed knowledge of all the other participants or their activities. Instead, "it is sufficient that the defendant know the general nature of the enterprise and know that the enterprise extends beyond his individual role." *Id*. (quoting *United States v. Eufrasio*, 935 F.2d 553, 557 n. 29 (3rd Cir. 1991). In particular cases, "the evidence used to prove the

pattern of racketeering activity and the evidence establishing an enterprise" may overlap. *Boyle*, 556 U.S. at 947. However, "enterprise" and "conduct" are two separate and necessary elements of a civil RICO claim. *Odom*, 486 F.3d at 549 ("The 'enterprise' is the actor, and the 'pattern of racketeering activity' is an activity in which that actor engages.").

Pattern: A pattern is defined as "at least two acts of racketeering activity" within ten years of each other. 18 U.S.C. § 1961(5). Proving two predicate acts is a necessary condition for finding a violation but may not be sufficient. *See H.J., Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989). To establish a "pattern of racketeering activity," the predicate acts must be both "related" and "continuous." *Id*.; *Sever*, 978 F.2d at 1529. Related conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J., Inc*., 492 U.S. at 240. Relatedness of the alleged or proven predicate acts is rarely an issue. *See Medallion Television Enters., Inc. v. SelecTV of Cal., Inc.*, 833 F.2d 1360, 1363 (9th Cir. 1987) (concluding alleged predicate acts were related when all were directed toward inducing the plaintiff to enter the joint venture and provide funds to obtain certain rights). However, merely alleging that the predicate acts share the same participants is insufficient to establish that they are related. *See Howard v. Am. Online Inc*., 208 F.3d 741, 749 (9th Cir. 2000) (stating that when the purpose, result, victim, and method of one set of predicate acts were "strikingly different" from those of the other set of alleged predicate acts, even when both sets of predicate acts implicated the same participants, the evidence was not enough to establish relatedness).

The continuity requirement reflects Congress's concern in RICO with long-term criminal conduct. *See H.J., Inc*., 492 U.S. at 242. Plaintiffs must prove either "open-ended" or "closed-ended" continuity—that is, a plaintiff must either prove a series of related predicate acts committed over a substantial period of time (known as closed-ended continuity) or show past conduct that by its nature projects into the future with a threat of repetition (known as open-ended continuity). *See id.* at 241-42; *Howard*, 208 F.3d at 750. There is no bright line rule for what period of time will establish closed-ended continuity, but activity spanning only several months is unlikely to satisfy the requirement. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (noting that it would be "misguided" to state as a "hard and fast rule" that to establish closed-ended continuity, the pattern of activity must extend more than a year, but also stating that activity spanning only several months without threatening any future criminal conduct does not meet continuity requirement); *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir. 1992) ("[T]he alleged activity continued for six months at most . . . . We have found no case in which a court has held the [closed-ended continuity] requirement to be satisfied by a pattern of activity lasting less than a year."). Open-ended continuity is shown through "predicate acts that specifically threaten repetition or that become a regular way of doing business." *Allwaste*, 65 F.3d at 1528; *see*, *e.g.*, *Ikuno v. Yip*, 912 F.2d 306, 308 (9th Cir. 1990) (concluding that open-ended continuity was established based on two filings of false annual trading reports for a phantom commodity trading company and no evidence that the defendant would have stopped filing false annual reports if the company had continued to do business); *Medallion*, 833 F.2d at 1364 (concluding that the continuity requirement was not satisfied because the fraud at issue posed no threat of future activity).

Racketeering Activity: To constitute racketeering activity, the relevant conduct must consist of at least one of the indictable predicate acts listed in 18 U.S.C. § 1961. *Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479, 495 (1985) (noting that "racketeering activity' consists of no more and no less than commission of a predicate act"). Predicate acts must be proved by a preponderance of the evidence. *See Wilcox v. First Interstate Bank*, 815 F.2d 522, 531-32 (9th Cir. 1987).

Business or Property: Section 1964(c) "explicitly permit[s] recovery for harms to business and property, [and] it implicitly excludes recovery for harm to one's person." *Med. Marijuana, Inc. v. Horn*, 145 S. Ct. 931, 939 (2025). "A plaintiff has been 'injured in his business or property' if his business or property has been harmed or damaged. Section 1964(c) requires nothing more." *Id.* (quoting 18 U.S.C. § 1964(c)); *accord Diaz v. Gates*, 420 F.3d 897, 901 (9th Cir. 2005) (en banc) (per curiam). "[T]he 'business or property' requirement operates with respect to the *kinds* of harm for which the plaintiff can recover, not the *cause* of the harm for which he seeks relief." *Med. Marijuana*, 145 S. Ct. at 939. "For example, if the owner of a gas station is beaten in a robbery, he cannot recover for his pain and suffering. But if his injuries force him to shut his doors, he can recover for the loss of his business." *Id.* "In short, a plaintiff can seek damages for business or property loss regardless of whether the loss resulted from a personal injury." *Id.*

18 U.S.C. § 1962(d)

A RICO conspiracy under § 1962(d) may be established by proof of an agreement to commit a substantive violation of RICO. *Oki Semiconductor Co. v. Wells Fargo Bank, Nat. Ass'n*, 298 F.3d 768, 774-75 (9th Cir. 2002) ("It is the mere agreement to violate RICO that § 1962(d) forbids; it is not necessary to prove any substantive RICO violations ever occurred as a result of the conspiracy.") (citation omitted). The conspirator need not have agreed to commit or facilitate each and every part of the substantive offense. *Howard*, 208 F.3d 741, 751 (9th Cir. 2000) (citing *Salinas v. United States*, 522 U.S. 52, 65 (1997)). However, the conspirator must have been "aware of the essential nature and scope of the enterprise and intended to participate in it." *Id*. (citing *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993)). The "agreement need not be express as long as its existence can be inferred from words, actions, or interdependence of activities and persons involved." *Oki Semiconductor Co.*, 298 F.3d at 775. If a RICO conspiracy is demonstrated, "[a]ll conspirators are liable for the acts of their co-conspirators." *Id*. (citation omitted).

A defendant can be held liable for a RICO conspiracy if the evidence shows that he or she "knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise." *United States v. Fernandez*, 388 F.3d 1199, 1229-30 (9th Cir. 2004) (citation omitted). There is no requirement that the defendant have actually conspired to operate or manage the enterprise himself or herself. *Id*. (affirming conviction under § 1962(d) of defendant who collected money on behalf of member of enterprise, facilitated communications between conspirators and accepted payment for drugs sold through enterprise).

Section 1962(d) applies to intracorporate, as well as intercorporate conspiracies; thus, it is possible for a corporation to engage in a RICO conspiracy with its own officers and representatives. *Webster v. Omnitron Int'l*, 79 F.3d 776, 787 (9th Cir. 1996) (quoting with approval *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271 (7th Cir. 1998), for the proposition that "intracorporate conspiracies . . . threaten RICO's goals of preventing the infiltration of legitimate businesses by racketeers and separating racketeers from their profits").

For model jury instructions that may be helpful, see Eleventh Circuit Pattern Jury Instructions—Civil Cases (2024), Instructions 7.1 *et seq.* These instructions may be accessed at:

https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstructionsRevisedAPR2024.pdf or https://perma.cc/47JL-KDVS

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9. CIVIL RIGHTS ACTIONS—42 U.S.C. § 1983

Instruction

Introductory Comment
9.1 Section 1983 Claim—Introductory Instruction
9.2 Causation
9.3 Section 1983 Claim Against Defendant in Individual Capacity—Elements and Burden of Proof
9.4 Section 1983 Claim Against Supervisory Defendant in Individual Capacity—Elements and Burden of Proof
9.5 Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof
9.6 Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof
9.7 Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof
9.8 Section 1983 Claim Against Local Governing Body Defendants Based on a Policy that Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof
9.9 Particular Rights—First Amendment—Public Employees—Speech
9.10 Particular Rights—First Amendment—Public Employees—Speaking as Private Citizen
9.11 Particular Rights—First Amendment— "Citizen" Plaintiff
9.11A Particular Rights—First Amendment—Convicted Prisoner/Pretrial Detainee's Claim of Retaliation
9.12 Particular Rights—Fourth Amendment—Unreasonable Search—Generally
9.13 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest
9.14 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant
9.15 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Consent
9.16 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Exigent Circumstances
9.17 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Emergency Aid
9.17A Particular Rights—Fourth Amendment—Unreasonable Search—Judicial Deception
9.18 Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Generally
9.19 Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Exceptions to Warrant Requirement
9.20 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally
9.21 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Exception to Warrant Requirement—*Terry* Stop
9.22 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—*Terry* Frisk

9.23 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest
9.24 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Detention During Execution of Search Warrant
9.25 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force
9.25A Particular Rights—Sixth Amendment—Right to Compulsory Process—Interference with Witness
9.26 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Excessive Force
9.26A Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Sexual Assault
9.27 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim re Conditions of Confinement/Medical Care
9.28 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Failure to Protect
9.29 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force
9.30 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim re Conditions of Confinement/Medical Care
9.31 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect
9.32 Particular Rights—Fourteenth Amendment—Due Process— Interference with Parent/Child Relationship (Comment only)
9.32A Particular Rights—Fourteenth Amendment—Due Process—Civil Commitment
9.33 Particular Rights—Fourteenth Amendment—Due Process—Deliberate Fabrication of Evidence
9.33A Particular Rights—Fourteenth Amendment—Due Process—Deliberate or Reckless Suppression of Evidence
9.33B Particular Rights—Fourteenth Amendment—Due Process—State Created Danger
9.34 Qualified Immunity (Comment only)
9.35 Bivens Claim Against Federal Defendant in Individual Capacity— Elements and Burden of Proof
9.36 Discrimination in Making and Enforcing Contracts (42 U.S.C. § 1981)

Introductory Comment

This chapter focuses on 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This chapter is organized to provide separate "elements" instructions for 42 U.S.C. § 1983 claims against individuals (Instructions 9.3-9.4) and against local governing bodies (Instructions 9.5-9.8) because there are different legal standards establishing liability against these two types of defendants. Instructions 9.9-9.33 provide instructions to establish the deprivation of particular constitutional rights. An elements instruction should be used only in conjunction with a "particular rights" instruction appropriate to the facts of the case at hand.

Elements Instructions		
Type of Claim	Elements	Instruction No.
Against Individuals	Individual Capacity	9.3
	Supervisory Defendant in Individual Capacity	9.4
Against Local Governing Body	Based on Official Policy, Practice, or Custom	9.5
	Based on Act of Final Policymaker	9.6
	Based on Ratification	9.7
	Based on Policy that Fails to Prevent Violations of Law or Policy of Failure to Train	9.8

The chart below identifies the instructions for violations of particular federal rights to be used in conjunction with an elements instruction. "[W]here a particular amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion); *Kirkpatrick v. Cnty of Washoe*, 843 F.3d 784, 788 n.2 (9th Cir. 2016). When necessary, these instructions include right-specific mental states because § 1983 "itself 'contains no state-of-mind requirement independent of that necessary to state a violation' of the underlying federal right." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 405 (1997) (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)).

Particular Rights Instructions			
Type of Claim by Source	Protection		Instruction No.
First Amendment	Public Employee Speech		9.9 9.10
	"Citizen" Plaintiff		9.11
Fourth Amendment Unreasonable Search	Generally		9.12
	Exception to Warrant Requirement	Search Incident to Arrest	9.13 9.14 (vehicle)
		Consent	9.15
		Exigent Circumstances	9.16
		Emergency Aid	9.17
	Judicial Deception		9.17A
Fourth Amendment Unreasonable Seizure of Property	Generally		9.18
	Exception to Warrant Requirement		9.19
Fourth Amendment Unreasonable Seizure of Person	Generally		9.20
	Exception to Warrant Requirement – *Terry v. Ohio*		9.21 (stop) 9.22 (frisk)
	Probable Cause Arrest		9.23
	Detention During Execution of Search Warrant		9.24
	Excessive Force		9.25
Sixth Amendment	Interference with Witness		9.25A
Eighth Amendment	Convicted Prisoner's Claim of Excessive Force		9.26
	Convicted Prisoner's Claim of Sexual Assault		9.26A
	Convicted Prisoner's Claim re Conditions of Confinement/Medical Care		9.27
	Convicted Prisoner's Claim of Failure to Protect		9.28
Fourteenth Amendment	Pretrial Detainee's Claim of Excessive Force		9.29
	Pretrial Detainee's Claim re Conditions of Confinement/Medical Care		9.30
	Pretrial Detainee's Claim of Failure to Protect		9.31
	Interference With Parent/Child Relationship		9.32
	Civil Commitment		9.32A

	Deliberate Fabrication of Evidence	9.33
	Deliberate or Reckless Suppression of Evidence	9.33A
	State-Created Danger	9.33B

Person Subject to § 1983 Liability

It is well settled that a "person" subject to liability can be an individual sued in an individual capacity (*see Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc)) or in an official capacity (*see Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013)). A "person" subject to liability can also be a municipality, county, or other local governing body. (*See Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978); *Waggy v. Spokane County*, 594 F.3d 707, 713 (9th Cir. 2010) ("Municipalities are considered 'persons' under 42 U.S.C. § 1983."); *King v. County of Los Angeles*, 885 F.3d 548, 558 (9th Cir. 2018) ("A county is subject to Section 1983 liability . . . .")).

Local Governing Body Liability

A local governing body is not liable under § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. *But see* Instruction 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof) (addressing ratification and causation). "[A] municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Monell*, 436 U.S. at 691.

A local governing body defendant, such as a school district or municipality, is not entitled to qualified immunity. *See Owen v. Independence*, 445 U.S. 622, 638 (1980) (holding that "municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983").

"The 'official policy' requirement 'was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality,' and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479 (1986) (emphasis in original). Because there are several ways to establish "*Monell* liability," *see Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999); *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003), the Committee also includes in this chapter separate elements instructions for several bases of such liability (Instructions 9.5, 9.6, 9.7, and 9.8).

Good-Faith Defense

Private parties and local governments "may invoke a good faith defense to liability under section 1983." *Danielson v. Inslee*, 945 F.3d 1096, 1097 (9th Cir. 2019) (citing *Clement v. City of Glendale*, 518 F.3d 1090, 1096-97 (9th Cir. 2008)); *see Allen v. Santa Clara Cnty. Corr.*

Peace Officers Ass'n, 38 F.4th 68, 71 (9th Cir. 2022) (holding that municipalities may also be entitled to a good faith defense).

Specifically, both private parties and local governments "may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. § 1983, where they acted in direct reliance on then-binding Supreme Court precedent and presumptively-valid state law." *Danielson*, 945 F.3d at 1097 (holding that public-sector unions could rely on good-faith defense to avoid liability for unlawful fees collected when binding precedent authorized such fees); *see Allen*, 38 F.4th at 75 (holding that county which assisted public-sector union's efforts to collect unlawful fees could rely on same good-faith defense).

A private party that acted upon the instructions of a local police department may also invoke a good faith defense. *Clement*, 518 F.3d at 1096-97 (holding that towing company that relied on police officer's authorization, towed vehicle under close police supervision, and did its best to follow law could rely on good-faith defense to liability even though police officer's decision to tow vehicle violated plaintiff's due process rights).

Eleventh Amendment Immunity

Despite the language of § 1983, "every person" does not have a universal scope; it does not encompass claims against a state or a state agency because the Eleventh Amendment bars such encroachments on a state's sovereignty. *Doe v. Lawrence Livermore Nat'l Lab*., 131 F.3d 836, 839 (9th Cir. 1997) ("States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes are not 'persons' under § 1983," quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). Even if a plaintiff seeks only injunctive relief, a state that has not waived its Eleventh Amendment immunity cannot be sued in its own name under § 1983. *Will*, 491 U.S. at 64, 71, n.10.

The Ninth Circuit applies a three-factor test to determine whether a government entity is a state agency for Eleventh Amendment purposes: (1) what is the state's intent as to the status of the entity, including the functions performed by the entity; (2) what is the state's control over the entity; and (3) what is the entity's overall effects on the state treasury. *Kohn v. State Bar of California,* 87 F.4th 1021, 1031 (9th Cir. 2023) (en banc) (adopting the D.C. Circuit's three-factor test). The inquiry is an entity-based approach; the status of an entity does not change from one case to the next based on the nature of the suit. Waiver and abrogation are "second-stage inquiries as to whether, *if* an entity is immune, that immunity may be overcome." *Id*. (emphasis in original) (citations omitted); *see also Kohn v. State Bar of California*, 119 F.4th 693, 696 (9th Cir. 2024) (discussing the three-part inquiry for the abrogation analysis of Title II ADA claims).

In contrast to a state or state agency, a state official may be sued in his or her official capacity under § 1983, but only for prospective injunctive relief. This is because "official-capacity actions for prospective relief are not treated as actions against the State." *Will*, 491 U.S. at 71 n.10. In *Matsumoto v. Labrador*, 122 F.4th 787, 802 (9th Cir. 2024), the court held that a pre-enforcement action brought by abortion rights advocacy organizations against the Idaho attorney general fell within an exception to *Ex parte Young* for the state's Eleventh Amendment

immunity, which allows "actions for prospective declaratory or injunctive relief against state officers in their official capacities" provided that the officer has "some connection with the enforcement of the act." The attorney general had "some connection" to the enforcement because the statute specifically granted authority to the attorney general to prosecute "abortion trafficking." *Id. Accord Planned Parenthood Great Nw., Hawaii, Alaska, Indiana, Kentucky v. Labrador*, 122 F.4th 825, 843 (9th Cir. 2024). A state official may be sued under § 1983 in his or her individual capacity for damages. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *but see Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010) (holding that in to be individually liable under § 1983, the individual must personally participate in alleged rights deprivation). *K. J. v. Jackson*, 127 F.4th 1239, 1251 (9th Cir. 2025) (holding that the plaintiff could sue a public school superintendent for expungement of information from school records because such expungement was a form of prospective relief that the plaintiff could receive under the *Ex parte Young* doctrine).

The Committee also recommends the Section 1983 Outline prepared by the Office of Staff Attorneys, United States Court of Appeals for the Ninth Circuit, available at: https://www.ca9.uscourts.gov/guides/section-1983-outline/

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9.1 Section 1983 Claim—Introductory Instruction

The plaintiff [*name*] brings [his] [her] [*other pronoun*] claim[s] under the federal statute, 42 U.S.C. § 1983, which provides that any person or persons who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States shall be liable to the injured party.

Comment

Past decisions of the Supreme Court and the Ninth Circuit used the phrases "under color of law" and "under color of state law" interchangeably. *Compare*, *e.g.*, *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994), and *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1144 (9th Cir. 2021) (using phrase "under color of law"), *with Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 171 (2023), and *Chaudhry v. Aragon*, 68 F.4th 1161, 1171 (9th Cir. 2023) (using phrase "under color of state law").

Because recent Supreme Court and Ninth Circuit cases more frequently use the phrase "under color of state law," rather than "under color of law," the Committee uses the phrase "under color of state law." *See*, *e.g.*, *Talevski*, 599 U.S. at 171 (using phrase "color of state law"); *Torres v. Madrid*, 592 U.S. 306, 319 (2021) (same); *Chaudhry*, 68 F.4th at 1171 (same); *Roberts v. Springfield Util. Bd.*, 68 F.4th 470, 474 n.2 (9th Cir. 2023) (same).

Generally, "a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *Paeste v. Gov't of Guam*, 798 F.3d 1228, 1238 (9th Cir. 2015) (quoting *West v. Atkins*, 487 U.S. 42, 50 (1988)); *but see Thai v. County of Los Angeles*, 127 F.4th 1254, 1261 (9th Cir. 2025) (holding that law enforcement officers from the Los Angeles District Attorney's Office were acting under color of federal law, not under color of state law, where the source of authority for the joint federal-state task force was federal in nature and the challenged conduct was subject to immediate control of federal supervisors).

The color of law inquiry and the state action inquiry are the same. *Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020). When a private actor's conduct is challenged as "state action" under § 1983, a court looks to two requirements that the private actor must meet: (1) the state policy requirement; and (2) the state actor requirement. *Wright v. Serv. Emps. Int'l Union Loc. 503*, 48 F.4th 1112, 1121 (9th Cir. 2022). Under the first requirement, the question is whether the claimed constitutional deprivation resulted from the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. *Id*. at 1121-22. Under the second requirement, courts generally use one of four tests outlined by the Supreme Court to examine whether the party charged with the deprivation could be described in all fairness as a "state actor." *Id.* at 1122. Those tests are the public function test, the joint action test, the state compulsion test, and the governmental nexus test. *Id*.; *see Rawson v. Recovery Innovations, Inc.*, 975 F.3d 742, 747 (9th Cir. 2020).

For a discussion of the public function test, see *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 924-26 (9th Cir. 2011); *Wright*, 48 F.4th at 1124. For a discussion of the joint action test, see *Pasadena Republican Club v. W. Justice Ctr.*, 985 F.3d 1161, 1167-71 (9th Cir. 2021). For a discussion of the state compulsion test, see *Johnson v. Knowles*, 113 F.3d 1114, 1119-20 (9th Cir. 1997). For a discussion of the governmental nexus test, see *Lindke v. Freed*, 601 U.S. 187, 199 (2024) (holding that where a city manager deleted comments from posts on his individual social media page and blocked the commenter, a showing of state action would require a plaintiff to show that the city manager "(1) had actual authority to speak on behalf of the State on a particular matter, and (2) purported to exercise that authority in the relevant posts").

Revised March 2025

9.2 Causation

Comment

General Principles

"In a § 1983 action, the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Bearchild v. Cobban*, 947 F.3d 1130, 1150 (9th Cir. 2020) (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008)). "To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Id*. A defendant's conduct is an "actual cause," or "cause-in-fact," of a plaintiff's injury only if the injury would not have occurred but for that conduct. *Chaudhry v. Aragon*, 68 F.4th 1161, 1170 n.11 (9th Cir. 2023). For a general discussion of "but for causation" generally, see Civil Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—"Because of" Defined).

"A defendant's conduct is a 'proximate cause' of a plaintiff's injury if 'it was not just any cause, but one with a sufficient connection to the result.'" *Chaudhry*, 68 F.4th at 1170 n.12 (quoting *Paroline v. United States*, 572 U.S. 434, 444 (2014)). "'Proximate cause is often explicated in terms of foreseeability,' such that the proximate cause requirement 'preclude[s] liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.'" *Id.* (quoting *Paroline*, 572 U.S. at 445)

A person deprives another of a constitutional right, within the meaning of § 1983, "if he does an affirmative act, participates in another's affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made." *Lacey v. Maricopa County*, 693 F.3d 896, 915 (9th Cir. 2012) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). The requisite causation can be established either "'by some kind of direct personal participation in the deprivation' or 'by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" *Chaudhry*, 68 F.4th at 1169. A police officer's liability under section 1983 is predicated on his integral participation in the alleged violation." *Nicholson v. City of Los Angeles*, 935 F.3d 685, 691 (9th Cir. 2019) (quoting *Blankenhorn v. City of Orange*, 485 F.3d 463, 481 n.12 (9th Cir. 2007) (internal quotes omitted)). Thus, an "officer could be held liable where he is just one participant in a sequence of events that gives rise to [the alleged] constitutional violation." *Nicholson*, 935 F.3d at 692; *but see Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018) ("Officers may not be held liable merely for being present at the scene of a constitutional violation or for being a member of the same operational unit as a wrongdoer.").

"The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *see also Hines v. Youseff*, 914 F.3d 1218, 1228 (9th Cir. 2019) ("[Plaintiff] must show that each defendant personally played a role in violating the Constitution. An official is liable under § 1983 only if 'culpable action, or inaction, is directly attributed to them.'" (footnote omitted)).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

Supervisor Liability

"A defendant may be held liable as a supervisor under § 1983 'if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation.'" *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *see also Lacey*, 693 F.3d at 915-16 (discussing culpability and intent of supervisors). Supervisors can be held liable for: "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others." *Hyde v. City of Willcox*, 23 F.4th 863, 874 (9th Cir. 2022); s*ee Starr*, 652 F.3d at 1207-08; *see also OSU Student All. v. Ray,* 699 F.3d 1053, 1076 (9th Cir. 2012) ("Advancing a policy that requires subordinates to commit constitutional violations is always enough for § 1983 liability . . . so long as the policy proximately causes the harm—that is, so long as the plaintiff's constitutional injury in fact occurs pursuant to the policy."). However, supervisors may not be held liable under § 1983 for the unconstitutional actions of their subordinates based solely on a theory of *respondeat superior*. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). There can be no such supervisorial liability in the absence of an underlying constitutional violation by subordinates. *Puente v. City of Phoenix*, 123 F.4th 1035, 1064 (9th Cir. 2024).

Integral Participant Doctrine

Under Ninth Circuit cases, an official whose individual actions do not rise to the level of a constitutional violation "may be held liable under section 1983 only if the official is an 'integral participant' in the unlawful act." *Peck v. Montoya*, 51 F.4th 877, 889 (9th Cir. 2022) (quoting *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 941 (9th Cir. 2020)). An official may be deemed an "integral participant" in a constitutional violation, "only if (1) the defendant knew about and acquiesced in the constitutionally defective conduct as part of a common plan with those whose conduct constituted the violation, or (2) the defendant set in motion a series of acts by others which the defendant knew or reasonably should have known would cause others to inflict the constitutional injury." *Id.* at 891; *see Spencer v. Pew*, 117 F.4th 1130, 1144-45 (9th Cir. 2024) (rejecting plaintiff's claim that two officers were integral participants in a third officer's use of excessive force because plaintiff did not present evidence that two of the officers

knowingly acquiesced in a third officer's unlawful conduct as a part of a common plan with him or evidence that the two officers' conduct set in motion acts that they reasonably should have known would cause the third officer to engage in unlawful conduct). When liability is alleged against a defendant as an integral participant on this basis, the model instruction stated above will need to be modified.

Deliberate Fabrication

Typically, in constitutional tort cases, the filing of a criminal complaint usually immunizes the investigating officers "because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time." *Caldwell v. City & Cnty. of San Francisco*, 889 F.3d 1105, 1115 (9th Cir. 2018) (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)). However, in deliberate fabrication cases, the presumption can be overcome if a plaintiff establishes that officers "either presented false evidence to or withheld crucial information from the prosecutor." *Caldwell*, 889 F.3d at 1116. At that point, "the analysis reverts back to a normal causation question" and the issue again becomes whether the fabricated evidence was the cause in fact and proximate cause of the plaintiff's injury. *Id*. at 1115-16.

First Amendment Retaliation Claims

When a § 1983 claim alleges discrimination because of the plaintiff's exercise of a First Amendment right, use the "substantial or motivating factor" formulation already included in Instructions 9.9 (Particular Rights—First Amendment—Public Employees—Speech) and 9.11 (Particular Rights—First Amendment—"Citizen" Plaintiff).

***Monell* Claims**

"Under *Monell*, a plaintiff must also show that the policy at issue was the 'actionable cause' of the constitutional violation, which requires showing both but for and proximate causation." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1146 (9th Cir. 2012) (citing *Harper*, 533 F.3d at 1026). Regardless of what theory the plaintiff employs to establish municipal liability—policy, custom, or failure to train—the plaintiff must establish that the policy or custom is the "moving force" behind the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989); *see Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013). To meet the moving force requirement, "the plaintiff must show both causation-in-fact and proximate causation." *Gravelet-Blondin*, 728 F.3d at 1096. If the plaintiff relies on the theory of ratification, see Instruction 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof), which discusses ratification and causation.

In *Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir. 1992), the Ninth Circuit approved the trial court's "moving force" instruction on causation in a § 1983 *Monell* claim as follows:

> The district court instructed the jury that "in order for [the policy] to be the cause of injury, you must find that it is so closely related as to be the moving force causing the ultimate injury." Because this instruction closely tracks the language in *City of Canton*, we find that it correctly stated the law and adequately covered the issue of causation. *See City of Canton*, 489 U.S. at 391 ("the identified deficiency in a city's training program must be *closely related to the ultimate injury*.") (emphasis in original).

Concurrent Cause

In *Jones v. Williams*, the Ninth Circuit affirmed a defense verdict in a § 1983 case in which the district judge gave the following "concurrent cause" instruction to address allegations of supervisory and group liability: "[M]any factors or things or the conduct of two or more persons can operate at the same time either independently or together to cause injury or damage and in such a case each may be a proximate cause." *Jones v. Williams*, 297 F.3d 930, 937 n.6 (9th Cir. 2002).

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9.3 Section 1983 Claim Against Defendant in Individual Capacity—Elements and Burden of Proof

To prevail on a § 1983 claim against the defendant [*name of individual defendant*], the plaintiff must prove each of the following elements by a preponderance of the evidence:

First, the defendant [*name*] acted under color of state law; and

Second, the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions; and

Third, The defendant [*name*]'s conduct was an actual cause of the claimed injury.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated] [I instruct you] that the defendant [*name*] acted under color of state law.]

The defendant [*name*]'s conduct is an actual cause of a plaintiff [*name*]'s injury only if the injury would not have occurred 'but for' that conduct, and the conduct has a sufficient connection to the result.

If you find the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements the plaintiff is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff [*name*]. If, on the other hand, you find that the plaintiff [*name*] has failed to prove any one or more of these elements, your verdict should be for the defendant [*name*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any

single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The elements of a § 1983 claim are (1) the action the action was committed by a person acting "under color of state law" and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. *Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1107 (9th Cir. 2022) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). To be individually liable under § 1983, an individual must personally participate in an alleged rights deprivation. *Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010).

"In a § 1983 action, the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Bearchild v. Cobban*, 947 F.3d 1130, 1150 (9th Cir. 2020) (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). "To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Id.; see also Chaudhry v. Aragon*, 68 F.4th 1161, 1169 nn.11-12 (9th Cir. 2023) (defining causation-in-fact and proximate causation).

In *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 941-42 (9th Cir. 2020), the Ninth Circuit discussed, for the first time, the minimum level of involvement needed for § 1983 liability under the integral-participant doctrine. An actor may be deemed to have caused a constitutional violation under the "integral-participant doctrine," "only if (1) the defendant knew about and acquiesced in the constitutionally defective conduct as part of a common plan with those whose conduct constituted the violation, or (2) the defendant set in motion a series of acts by others which the defendant knew or reasonably should have known would cause others to inflict the constitutional injury." *Peck v. Montoya*, 51 F.4th 877, 891 (9th Cir. 2022); *see id.* at 889-92 (holding that when non shooting officers did not form a plan with shooting officers to shoot suspect, did not set in motion acts by shooting officers, and did not know or should have known constitutional violation would occur, non-shooting officers were not integral participants in constitutional violation); *see Spencer v. Pew*, 117 F.4th 1130, 1144-45 (9th Cir. 2024) (rejecting plaintiff's claim that two officers were integral participants in a third officer's use of excessive force because plaintiff did not present evidence that two of the officers knowingly acquiesced in a third officer's unlawful conduct as a part of a common plan with him or evidence that the two officers' conduct set in motion acts that they reasonably should have known would cause the third officer to engage in unlawful conduct). When liability is alleged against a defendant on this basis, the model instruction stated above will need to be modified.

Revised November 2024

9.4 Section 1983 Claim Against Supervisory Defendant In Individual Capacity—Elements and Burden of Proof

To prevail on the plaintiff's § 1983 claim against the supervisory defendant [*name*], the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, the supervisory defendant [*name*] acted under color of state law;

Second, the [act[s]] [failure to act] of the supervisory defendant [*name*]'s subordinate[s] [*name[s]*] deprived the plaintiff [*name*] of particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

Third, [the supervisory defendant [*name*] directed subordinate[s] in the [act[s]] [failure to act] that deprived the plaintiff [*name*] of these rights;]

or

[the supervisory defendant [*name*] set in motion a series of acts by subordinate[s], or knowingly refused to terminate a series of acts by subordinate[s], that the supervisor knew or reasonably should have known would cause the subordinate[s] to deprive the plaintiff [*name*] of these rights;]

or

[(a) the supervisory defendant [*name*] knew that the subordinate[s] were engaging in these act[s] and knew or reasonably should have known that the subordinate['s]['] conduct would deprive the plaintiff [*name*] of these rights; and

(b) the supervisory defendant [*name*] failed to act to prevent the subordinate[s] from engaging in such conduct;]

or

[(a) the supervisory defendant [*name*] disregarded the known or obvious consequence that a particular training deficiency or omission would cause [his] [her] [*other pronoun*] subordinate[s] to violate the plaintiff [*name*]'s constitutional rights; and

(b) that deficiency or omission actually caused the subordinates to deprive the plaintiff [*name*] of plaintiff [*name*]'s constitutional rights;]

or

[the supervisory defendant engaged in conduct that showed a reckless or callous indifference to the deprivation by the subordinate of the rights of others;]

and

Fourth, the supervisory defendant [*name*]'s conduct was so closely related to the deprivation of the plaintiff [*name*]'s rights as to be the moving force that caused the ultimate injury.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated that] [I instruct you that] the defendant [*name*] acted under color of state
law.]

If you find the plaintiff [*name*] has proved each of these elements, and if you find that the plaintiff [*name*] has proved all the elements [he] [she] [*other pronoun*] is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff [*name*].

If, on the other hand, you find that the plaintiff [*name*] has failed to prove any one or more of these elements, your verdict should be for the defendant [*name*].

Comment

A supervisor can be held liable in his or her individual capacity under § 1983 only if (1) the supervisor personally participated in the constitutional violation, or (2) there is a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (quoting *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989)). Moreover, for liability to attach, supervisors must have actual supervisory authority over the government actor who committed the alleged violations. *Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018). In other words, "[t]hey cannot be supervisors of persons beyond their control." *Id*.; *Olson v. County of Grant*, 127 F.4th 1193, 1998 (9th Cir. 2025) (declining "to impose supervisory liability for a constitutional violation where, at best, there was a cooperative relationship between [law enforcement] colleagues"). There also can be no such supervisorial liability in the absence of an underlying constitutional violation by subordinates. *Puente v. City of Phoenix*, 123 F.4th 1035, 1064 (9th Cir. 2024). If the plaintiff alleges a supervisor personally participated in a constitutional violation, use Instruction 9.3 (Section 1983 Claim Against Defendant in Individual Capacity—Elements and Burden of Proof). If the plaintiff alleges a subordinate committed a constitutional violation and there is a causal connection between the violation and the supervisor's wrongful conduct, use this instruction.

When there is a factual dispute concerning whether an individual is a supervisor for purposes of § 1983 liability, the court should also instruct the jury on the plaintiff's burden to prove the defendant's supervisory status.

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional

elements a plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

Element 3 of this instruction aims to include the principal formulations to establish a supervisor's § 1983 liability based on Ninth Circuit decisions.

Supervisors can be held liable for: "1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others." *Hyde v. City of Willcox*, 23 F.4th 863, 874 (9th Cir. 2022); *see Starr*, 652 F.3d at 1207-08.

A supervisor is liable for the acts of his subordinates if the supervisor participated in or directed the violations. *Vazquez v. County of Kern*, 949 F.3d 1153, 1166 (9th Cir. 2020).

In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir. 1991), the Ninth Circuit approved the district court's instruction that the jury could find a police chief liable in his individual capacity if he "set[ ] in motion a series of acts by others, or knowingly refused to terminate a series of acts by others, which he kn[e]w or reasonably should [have] know[n], would cause others to inflict the constitutional injury." *Id*. at 646 (citations omitted).

A supervisor can be held liable in his or her individual capacity if he or she "knew of the violations and failed to act to prevent them." *Maxwell v. County of San Diego*, 708 F.3d 1075, 1086 (9th Cir. 2013); *accord Vazquez*, 949 F.3d at 1166.

In *Flores v. County of Los Angeles*, 758 F.3d 1154, 1159 (9th Cir. 2014), the court held that plaintiffs must show that the supervisory defendant "was deliberately indifferent to the need to train subordinates, and the lack of training actually caused the constitutional harm or deprivation of rights." Under this standard, the supervisor must have "disregarded the known or obvious consequences that a particular omission in their training program would cause . . . employees to violate citizens' constitutional rights." *Id*. (quoting *Connick v. Thompson*, 563 U.S. 51, 51-52 (2011)). Also, a plaintiff "may state a claim against a supervisor for deliberate indifference based upon the supervisor's knowledge of and acquiescence in unconstitutional conduct by his or her subordinates." *Starr*, 652 F.3d at 1207.

Although § 1983 suits do not allow for the imposition of vicarious liability and a plaintiff must prove that each supervisory defendant, through that defendant's own actions, has violated the Constitution, the factors that a plaintiff must prove to establish a claim for supervisory liability depend on the alleged underlying constitutional deprivation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675-77 (2009) (explaining that the plaintiff needed to plead and prove that supervisors acted with discriminatory purpose or intent to state claim for supervisory liability for invidious discrimination in contravention of the First and Fifth Amendments); *Starr*, 652 F.3d at 1206-07 (explaining that because claim of unconstitutional conditions of confinement may be based on theory of deliberate indifference, unlike claim of unconstitutional discrimination, plaintiff need

only show that supervisor acted or failed to act in manner that was deliberately indifferent to inmate's Eighth Amendment rights to hold supervisor liable for his or her own culpable actions).

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9.5 Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof

To prevail on the plaintiff's § 1983 claim against defendant [*name of local governing body*] alleging liability based on an official policy, practice, or custom, the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, [*name of defendant's official or employee*] acted under color of state law;

Second, the act[s] of [*name of defendant's official or employee*] deprived the plaintiff [*name*] of particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

Third, [*name of defendant's official or employee*] acted pursuant to an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant [*name of local governing body*]; and

Fourth, the defendant [*name of local governing body*]'s official policy or widespread or longstanding practice or custom caused the deprivation of the plaintiff [*name*]'s rights by the [*name of defendant's official or employee*]; that is, the [*name of local governing body*]'s official policy or widespread or longstanding practice or custom is so closely related to the deprivation of the plaintiff [*name*]'s rights as to be the moving force that caused the ultimate injury.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated that] [I instruct you that] [*name of defendant's official or employee*] acted under color of state law.]

"Official policy" means a formal policy, such as a rule or regulation adopted by the defendant [*name of local governing body*], resulting from a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.

"Practice or custom" means any longstanding, widespread, or well-settled practice or custom that constitutes a standard operating procedure of the defendant [*name of local governing body*]. [A practice or custom can be established by repeated constitutional violations that were not properly investigated and for which the violator[s] [was] [were] not disciplined, reprimanded or punished.]

If you find that the plaintiff [*name*] has proved each of these elements, and if you find that the plaintiff [*name*] has proved all the elements the plaintiff [*name*] is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff [*name*]. If, on the other hand, you find that the plaintiff [*name*]

has failed to prove any one or more of these elements, your verdict should be for the defendant [*name of local governing body*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In addition, use this instruction only when *Monell* liability is based on an expressly adopted official policy or a widespread or longstanding practice or custom of the defendant that is alleged either to be itself unlawful or to direct employees to act in an unlawful manner. *See*, *e.g.*, *Endy v. Cnty. of Los Angeles*, 975 F.3d 757, 769 (9th Cir. 2020); *Jackson v. Barnes*, 749 F.3d 755, 763 (9th Cir. 2014). For other bases of *Monell* liability, see Instructions 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof), and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Failure to Prevent Violations of Law or a Failure to Train—Elements and Burden of Proof).

As noted in the Introductory Comment to this chapter, § 1983 liability of a local governing body may not be based on *respondeat superior*. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). Such liability may attach when an employee committed a constitutional violation pursuant to an expressly adopted official policy. *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Endy*, 975 F.3d at 769 (quoting *Connick v. Thompson*, 563 U.S. 51, 61 (2011)). "[A] rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell*'s policy requirement[.]" Thompson *v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Whether a municipal policy or custom exists is a question of fact. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996) ("Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate.").

"Official policy" means a formal policy, such as a rule or regulation adopted by the defendant, resulting from a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986); *accord Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021).

Such liability may also attach when an employee committed a constitutional violation pursuant to a widespread practice or custom. *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997); *Benavidez*, 993 F.3d at 1153. A widespread "custom or practice" must be so "persistent" that it constitutes a "permanent and well settled city policy." *Trevino*, 99 F.3d at 918 (quoting *Monell*, 436 U.S. at 691); *see also Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 984 (9th Cir. 2002) ("Showing a 'longstanding practice or custom which constitutes the "standard operating procedure" of the local government entity' is one way to establish municipal liability." (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989))). A widespread custom or practice cannot be based on "isolated or sporadic incidents; [liability] must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 884 (9th Cir. 2022) (quoting *Trevino*, 99 F.3d at 918).

"[A] custom or practice can be supported by evidence of repeated constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished." *Hunter v. County of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011); *see also Nehad v. Browder*, 929 F.3d 1125, 1141-42 (9th Cir. 2019) (citing evidence sufficient to create triable issue regarding informal practice or policy). The Ninth Circuit has used the term "longstanding" practice or custom interchangeably with the Supreme Court's more frequent usage of "widespread." *See*, *e.g.*, *Sabra*, 44 F.4th at 883; *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999); *Connick v. Thompson*, 563 U.S. 51, 61 (2011). Use the bracketed language in the last sentence of the penultimate paragraph of the instruction only when the plaintiff has presented substantial evidence of a failure to investigate or discipline and that theory is central to the plaintiff's case. *See Hunter*, 652 F.3d at 1235. "Official nonfeasance can constitute a *Monell* violation when the municipality in effect 'has a policy of inaction and such inaction amounts to a failure to protect constitutional rights.'" *Scanlon v. County of Los Angeles,* 92 F.4th 781, 812 (9th Cir. 2024) (quoting *Mortimer v. Baca*, 594 F3d 714, 722 (9th Cir. 2010)).

A plaintiff seeking to establish municipal liability must demonstrate that the government "had a deliberate policy, custom, or practice that was the 'moving force' behind the constitutional violation he suffered." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013) (citations and quotations omitted). "To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation." *Id.*

Revised March 2024

9.6 Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof

To prevail on plaintiff [*name*]'s § 1983 claim against defendant [*name of local governing body*] alleging liability based on the act of a final policymaker, plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, [*name of person the plaintiff alleges was a final policymaker*] acted under color of state law;

Second, the act[s] of [*name of final policymaker*] deprived plaintiff [*name*] of [his] [her] [*other pronoun*] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

Third, [*name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning these act[s];

Fourth, when [*name of final policymaker*] engaged in these act[s], [*name of final policymaker*] was acting as a final policymaker for defendant [*name of local governing body*]; and

Fifth, the [act[s] of [*name of final policymaker*] caused the deprivation of plaintiff [*name*]'s rights; that is, the [*name of final policymaker*]'s act[s] [was] [were] so closely related to the deprivation of plaintiff [*name*]'s rights as to be the moving force that caused the ultimate injury.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated that] [I instruct you that] defendant [*name*]'s [official] [employee] acted under color of state law.]

I instruct you that [*name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning the act[s] at issue and, therefore, the third element requires no proof.

If you find that plaintiff [*name*] has proved each of these elements, and if you find that plaintiff [*name*] has proved all the elements plaintiff [*name*] is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for plaintiff [*name*]. If, on the other hand, plaintiff [*name*] has failed to prove any one or more of these elements, your verdict should be for defendant [*name of local governing body*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional elements a

plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In addition, use this instruction only when *Monell* liability is based on the acts of a final policymaker. *See Hartzell v. Marana Unified Sch. Dist.*, 130 F.4th 722, 735 (9th Cir. 2025) (noting that "the 'final policymaker' theory [is] a separate theory from the 'policy, practice, or custom' theory" for purposes of establishing *Monell* liability (citation omitted)). For other bases of *Monell* liability, see Instructions 9.5 (Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof), 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof), and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Policy that Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof).

As noted in the Introductory Comment to this chapter, § 1983 liability of a local governing body may not be based on *respondeat superior*. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). Such liability may attach when the official or employee who caused a constitutional violation was acting as a "final policymaker." *Barone v. City of Springfield*, 902 F.3d 1091, 1107 (9th Cir. 2018) (citing *Lytle v. Carl*, 382 F.3d 978, 981 (9th Cir. 2004)). "To hold a local governing body liable for an official's conduct, a plaintiff must first show that the official (1) had final policymaking authority concerning the action . . . at issue; and (2) was the policymaker for the local governing body for the purposes of the particular act." *Goldstein v. City of Long Beach*, 715 F.3d 750, 753 (9th Cir. 2013); *Puente v. City of Phoenix*, 123 F.4th 1035, 1065-66 (9th Cir. 2024) (rejecting the argument that the police chief was the final policy maker sufficient to establish municipal liability because even assuming that the police chief "established municipal policy for the overall management of the event," there was no evidence that the police chief "caused the situation-specific use of force against" an individual).

Whether an official is a policymaker for *Monell* purposes is a question of state law for the court, rather than the jury, to decide. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *see Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1066 (9th Cir. 2013). The determination is made on a function-by-function approach analyzed under the state organizational structure. *Goldstein*, 715 F.3d at 753. A "policy" is a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. *Brown v. Lynch*, 831 F.3d 1146, 1152 (9th Cir. 2016)

A plaintiff seeking to establish municipal liability under this theory must demonstrate that an action of the final policymaker "was the 'moving force' behind the constitutional violation he suffered." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096 (9th Cir. 2013) (citing *Monell*, 436 U.S. at 694-95). "To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation." *Id.*

A municipality may be liable for the acts of a final policymaker if these acts caused a constitutional violation, even if the constitutional violation occurs only once. *Pembaur v. City of*

Cincinnati, 475 U.S. 469, 478 & n.6 (1986); *see Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 885 (9th Cir. 2022). In certain situations, a municipality is also liable if a policymaking official fully delegates his or her discretionary authority to a subordinate, and the subordinate uses that discretion. *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir. 2008); *see also Praprotnik*, 485 U.S. at 124. An official may be found to have been delegated final policymaking authority when the official's discretionary decision is unconstrained by policies not of that official's making and unreviewable by the municipality's authorized policymakers. *Lytle v. Carl*, 382 F.3d 978, 984 (9th Cir. 2004) (citing *Christie v. Iopa*, 176 F.3d 1231, 1236-37 (9th Cir. 1999)).

Revised June 2025

9.7 Section 1983 Claim Against Local Governing Body Defendants Based On Ratification—Elements and Burden of Proof

To prevail on the plaintiff's § 1983 claim against defendant [*name of local governing body*] alleging liability based on ratification by a final policymaker, the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, [*name of defendant's employee*] acted under color of state law;

Second, the [act[s]] [failure to act] of [*name of defendant's employee*] deprived the plaintiff [*name*] of particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

Third, [*name of person the plaintiff alleges was a final policymaker*] acted under color of state law;

Fourth, [*name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning the [act[s]] [failure to act] of [*name of defendant's employee*]; and

Fifth, [*name of final policymaker*] ratified [*name of defendant's employee*]'s [act[s] [failure to act], that is, [*name of alleged final policymaker*] knew of and specifically made a deliberate choice to approve [*name of defendant's employee*]'s [act[s]] [failure to act] and the basis for it.

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance, or regulation. [[The parties have stipulated that] [I instruct you that] the defendant's [employee] [official] acted under color of state law.]

I instruct you that [*name of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning the act[s] at issue and, therefore, the fourth element requires no proof.

If you find that the plaintiff [*name*] has proved each of these elements, and if you find that the plaintiff [*name*] has proved all the elements the plaintiff is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant [*name of local governing body*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional elements a

plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In addition, use this instruction only when *Monell* liability is based on ratification by a final policymaker. For other bases of *Monell* liability, see Instructions 9.5 (Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof), 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Policy that Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof).

As noted in the Introductory Comment to this Chapter, § 1983 liability of a local governing body lies when "action pursuant to official municipal policy of some nature caused a constitutional tort," and not on the basis of *respondeat superior*. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). A municipality can be liable for an isolated constitutional violation if a final policymaker "ratified" a subordinate's actions. *Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 885 (9th Cir. 2022); *Christie v. Iopa*, 176 F.3d 1231, 1238 (9th Cir. 1999); *see City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). To show ratification, a plaintiff must prove that the authorized policymaker approved a subordinate's decision and the basis for it. *Sabra*, 44 F.4th at 885. *See also Lytle v. Carl*, 382 F.3d 978, 987 (9th Cir. 2004) ("The policymaker must have knowledge of the constitutional violation and actually approve of it." (citing *Praprotnik*, 485 U.S. at 127)).

The policymaker must have knowledge (actual or constructive) of the constitutional violation and actually approve of it. *Lytle*, 382 F.3d at 987; *Sabra*, 44 F.4th at 885. Ratification generally requires more than acquiescence. *Dodge*, 56 F.4th at 788 ("a mere failure to discipline . . . does not amount to ratification"). A mere failure to overrule a subordinate's actions, without more, is insufficient to support a § 1983 ratification claim. *Lytle*, 382 F.3d at 987-88 ("[R]atification requires both knowledge of the alleged constitutional violation, and proof that the policymaker specifically approved of the subordinate's act."); *Christie*, 176 F.3d at 1239; *Puente v. City of Phoenix*, 123 F.4th 1035, 1066 (9th Cir. 2024) (rejecting a ratification argument absent evidence final policy maker "knew and approved" of a subordinate's decision and the "basis for it").

The court must determine as a matter of state law whether certain employees or officials have the power to make official or final policy on a particular issue or subject area. *Jett v. Dallas Indep. Sch. Dist*., 491 U.S. 701, 737-38 (1989); *see also Lytle,* 382 F.3d at 983 ("For a person to be a final policymaker, he or she must be in a position of authority such that a final decision by that person may appropriately be attributed to the [defendant public body].") *Sabra*, 44 F.4th at 885 (rejecting contention that "a professor becomes a 'final policymaker' for an entire community college district simply by assuming administrative responsibilities within his department").

Revised March 2025

9.8 Section 1983 Claim Against Local Governing Body Defendants Based on a Policy That Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof

To prevail on plaintiff [*name*]'s § 1983 claim against defendant [*name of local governing body*] alleging liability based on a policy [[that fails to prevent violations of law by its] [of a failure to train its]] [[police officers] [employees]], plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, the [act[s]] [failure to act] of [*name of defendant's* [*police officer[s]*] [*employee[s]*]] deprived plaintiff [*name*] of [his] [her] [*other pronoun*] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

Second, [*name of defendant's* [*police officer[s]*] [*employee[s]*]] acted under color of state law;

Third, the [training] policies of the defendant [*name of local governing body*] were not adequate to [prevent violations of law by its employees] [train its [police officers] [employees] to handle the usual and recurring situations with which they must deal];

Fourth, the defendant [*name of local governing body*] was deliberately indifferent to the [substantial risk that its policies were inadequate to prevent violations of law by its employees] [known or obvious consequences of its failure to train its [police officers] [employees] adequately]; and

Fifth, the failure of the defendant [*name of local governing body*] [to prevent violations of law by its employees] [to provide adequate training] caused the deprivation of plaintiff [*name*]'s rights by the [*name of defendant's* [*police officer[s]*] [*employee[s]*]]; that is, defendant [*name of local governing body*]'s failure [to prevent violations of law by its employees] [to train] played a substantial part in bringing about or actually causing the injury or damage to plaintiff [*name*].

A person acts "under color of state law" when the person acts or purports to act in the performance of official duties under any state, county, or municipal law, ordinance or regulation. [[The parties have stipulated that] [I instruct you that] [*name of defendant's* [*police officer[s]*] [*employee[s]*] acted under color of state law.]

A policy is a deliberate choice to follow a course of action made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. [A policy of inaction or omission may be based on a failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, plaintiff [*name*] must show, in addition to a constitutional violation, that this policy amounts to deliberate indifference to plaintiff [*name*]'s constitutional rights, and that the policy caused the violation, in the sense that the municipality could have prevented the violation with an appropriate policy.]

"Deliberate indifference" is the conscious choice to disregard a known or obvious consequences of one's acts or omissions. Plaintiff [*name*] may prove deliberate indifference in this case by showing that the facts available to defendant [*name of local governing body*] put it on actual or constructive notice that its [failure to implement adequate policies] [failure to train adequately] was substantially certain to result in the violation of the constitutional rights of persons such as plaintiff [*name*] due to [police officer[s]] [employee[s]]'s conduct.

If you find that plaintiff [*name*] has proved each of these elements, and if you find that plaintiff [*name*] has proved all the elements plaintiff [*name*] is required to prove under Instruction[s] [*specify the instruction[s] that deal with the particular right[s]*], your verdict should be for plaintiff [*name*]. If, on the other hand, plaintiff [*name*] has failed to prove any one or more of these elements, your verdict should be for defendant [*name of local governing body*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of the particular constitutional right or federal law at issue.

In addition, use this instruction only when *Monell* liability is based on a local governing body's policy of inaction, such as a failure to train its police officers.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer*s*"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer*s*" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

As noted in the Introductory Comment to this chapter, § 1983 liability of a local governing body may not be based on *respondeat superior*. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 691 (1978). Instead, a plaintiff must establish a "direct causal link" between the municipal policy or custom and the alleged constitutional violation. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 681 (9th Cir. 2021). This "requires showing both but for and proximate causation." *Tsao v. Desert Palace*, Inc., 698 F.3d 1128, 1146 (9th Cir. 2012) (quoting *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). In *Harper*, the Ninth Circuit approved of a jury instruction that explained that "proximate cause exists where 'an act or omission played a substantial part in bringing about or actually causing the injury or damage to plaintiffs.'" *Harper*, 533 F.3d at 1026; *Puente v. City of Phoenix*, 123 F.4th 1035, 1067 (9th Cir. 2024) (noting that "failure to train" claim rests on

showing that the plaintiff's injury "*in particular* was the obvious result of the allegedly inadequate training" and that the plaintiff failed to show that the particular constitutional injury was such an obvious consequence of "the failure to more thoroughly train its officers on the use of chemical agents that it amounted to 'deliberate indifference' toward her rights") (emphasis in original).

"A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations." *Tsao*, 698 F.3d at 1143. A local government's failure to train its employees "may serve as the basis for § 1983 liability . . . where the failure to train amounts to deliberate indifference to the rights of persons with whom the [employees] come into contact." *City of Canton*, 489 U.S. at 388; *see Connick v. Thompson*, 563 U.S. 51, 61 (2011). The elements of a failure to train *Monell* claim are: (1) a constitutional violation; (2) a municipal training policy that amounts to a deliberate indifference to constitutional rights; and (3) that the constitutional injury would not have resulted if the municipality properly trained their employees. *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153-54 (9th Cir. 2021).

"Deliberate indifference" requires proof that a municipal actor disregarded a known or obvious consequence of his action. *Connick*, 563 U.S. at 61 ("[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program."); *see also Castro v. County of Los Angeles*, 833 F.3d 1060, 1077 (9th Cir. 2016) (en banc) ("Where a § 1983 plaintiff can establish that the facts available to city policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of Monell are satisfied." (quoting *City of Canton*, 489 U.S. at 396)). In *Castro v. County of Los Angeles*, 833 F.3d at 1076 (9th Cir. 2016) (en banc), the Ninth Circuit held that the deliberate indifference inquiry is objective for pretrial detainees' failure-to-protect claims. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." *Connick*, 563 U.S. at 62; *see also Hyde v. City of Willcox*, 23 F.4th 863, 874-75 (9th Cir. 2022) (holding that "[w]hile deliberate indifference can be inferred from a single incident when the unconstitutional consequences of failing to train are patently obvious, an inadequate training policy itself cannot be inferred from a single incident.") (quotation marks and citation omitted); *Flores v. County of Los Angeles*, 758 F.3d 1154, 1159-60 (9th Cir. 2014) (holding that, absent pattern of sexual assaults by deputies, alleged failure to train officers not to commit sexual assault did not constitute deliberate indifference); *Marsh v. County of San Diego*, 680 F.3d 1148, 1159 (9th Cir. 2012) (holding that practice must be "widespread" and proof of single inadequately-trained employee was insufficient); *Doughtery v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) ("Mere negligence in training or supervision … does not give rise to a *Monell* claim.").

However, the Supreme Court has "left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference," using the hypothetical of a case in which an officer was provided firearms but given no training on the constitutional limits on the use of deadly force. *Connick*, 563 U.S. at 63-64 (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 409 (1997), and citing *Canton*, 489

U.S. at 389-90). In *Kirkpatrick v. Washoe County*, 843 F.3d 784 (9th Cir. 2016) (en banc), the Ninth Circuit held that a county social services agency's complete failure to train its social workers on the procedures for obtaining a warrant and when a warrant is required before taking a child from a parent was just such a "narrow circumstance" in which evidence of a pattern of similar violations was unnecessary. *See id.* at 796-97. In *Sandoval v. County of San Diego*, 985 F.3d 657, 682 (9th Cir. 2021), the Ninth Circuit applied an objective deliberate indifference standard to the county's policy of maintaining a mixed-use cell—sometimes using the cell for medical care and other times as a general holding cell—with only an informal verbal pass-off system for notifying nurses whether the detainee in the mixed-use cell required medical supervision. The court held that the standard "requires a showing that the facts available to the county put it on 'actual or constructive notice' that its practices with regard to [the mixed-use] cell were 'substantially certain to result in the violation of the constitutional rights of [its] citizens.'" *Id*. (footnote omitted) (quoting *Castro*, 833 F.3d at 1076).

If the plaintiff is alleging inadequate hiring or screening of employees, inadequate supervision, or failure to adopt a needed policy, elements 3 through 5 of this instruction should be modified accordingly. *See Brown*, 520 U.S. at 409-11 (addressing failure to screen candidates); *Jackson v. Barnes*, 749 F.3d 755, 763-64 (9th Cir. 2014) (addressing failure to supervise); *Tsao*, 698 F.3d at 1143 (addressing failure to implement policy). As with a failure to train claim, the plaintiff must show that the failure to properly hire, supervise, or adopt a policy amounted to deliberate indifference by the governing body. *See*, *e.g.*, *Brown*, 520 U.S. at 407; *Tsao*, 698 F.3d at 1143, 1145. For other bases of *Monell* liability, see Instructions 9.5 (Section 1983 Claim Against Local Governing Body Defendants Based on Official Policy, Practice, or Custom that Violates Law or Directs Employee to Violate Law—Elements and Burden of Proof), 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), and 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof).

In *Bell v. Williams*, 108 F.4th 809 (9th Cir. 2024), the Ninth Circuit reiterated that, under *Monell*, a plaintiff "must show a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Id*. at 824. The court added: "One way of doing so is by showing that the municipality demonstrated deliberate indifference to constitutional rights when it trained its employees. This requires proof that a municipal actor disregarded a known or obvious consequence of his action." *Id*. Where "the training program for jail officers . . . covered the relevant topics with reasonable specificity," the program "does not demonstrate deliberate indifference to a known risk" for purposes of *Monell* liability even if there are "narrow gaps" in the training. *Id.* at 825-26.

Revised June 2025

9.9 Particular Rights—First Amendment—Public Employees—Speech

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the First Amendment, a public employee has a qualified right to speak on matters of public concern. I instruct you that the plaintiff [*name*]'s speech was on a matter of public concern. To prove the defendant [*name*] deprived the plaintiff [*name*] of this First Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the plaintiff [*name*] spoke as a private citizen and not as part of [his] [her] [*other pronoun*] official duties as a public employee;

Second, the defendant [*name*] took an adverse employment action against the plaintiff; and

Third, the plaintiff [*name*]'s speech was a substantial or motivating factor for the adverse employment action.

An action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable worker from engaging in protected activity.

A substantial or motivating factor is a significant factor, though not necessarily the only factor.

If the plaintiff [*name*] establishes each of the foregoing elements, the burden shifts to the defendant [*name*] to prove by a preponderance of the evidence that the defendant [*name*] would have taken the action(s) in question, even in the absence of any motive to retaliate against the plaintiff [*name*]. If you find that the defendant [*name*] is able to demonstrate this, you must find for the defendant [*name*]. If you find that the defendant is not able to demonstrate this, you must find for the plaintiff [*name*].

Comment

Use this instruction only in conjunction with the applicable elements instruction, Instructions 9.3-9.8, and when the plaintiff is a private citizen, use Instruction 9.11 (Particular Rights—First Amendment—"Citizen" Plaintiff). Because this instruction is phrased in terms focusing the jury on the defendant's liability for certain acts, the instruction should be modified to the extent liability is premised on a failure to act to avoid any risk of misstating the law. *See Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009). If there is a dispute about whether the

public employee was speaking as a private citizen, use Instruction 9.10 (Particular Rights—First Amendment—Public Employees—Speaking as a Private Citizen).

As to whether a public employee's speech is protected under the First Amendment, the Supreme Court has "made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *see also Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) (applying *Garcetti* public concern test to public employee's First Amendment Petition Clause claims).

In *Hernandez v. City of Phoenix*, 43 F.4th 966, 976 (9th Cir. 2022), the Ninth Circuit reiterated that the "five sequential steps to analyze First Amendment retaliation claims brought by government employees," require considering

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. (quoting *Eng v. Cooley,* 552 F.3d 1062, 1070 (9th Cir. 2009)); *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 276 (1977); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *see also Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776-77 (9th Cir. 2022) (setting forth legal standard for public employee First Amendment retaliation claims); *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 721 (9th Cir. 2022) (same).

Under the framework above, the government employee bears the burden of proving the first three steps of the test. *See Moser v. L.V. Metro. Police Dep't*, 984 F.3d 900, 904 (9th Cir. 2021). If the employee succeeds in making that threshold showing, the burden then shifts to the government to prove steps four and five. *See id.*; *Ohlson v. Brady*, 9 F.4th 1156, 1162 (9th Cir. 2021); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 (2022) (discussing the burden shifting framework of the *Pickering*-*Garcetti* analysis).

The "public concern inquiry is purely a question of law," *Eng*, 552 F.3d at 1070, that depends on the "content, form, and context of a given statement, as revealed by the whole record." *Moser*, 984 F.3d at 905 (quoting *Connick v. Myers*, 461 U.S. 138, 147-48 (1983)); *see also Adams v. County of Sacramento*, 116 F.4th 1004 (9th Cir. 2024) (holding that private text exchange related to offensive images did not involve a matter of public concern).

In *Garcetti*, the Supreme Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421-22. The Supreme Court, however, limited its ruling in two respects.

First, in an explicit effort to avoid having its holding serve as an invitation for employers to restrict employees' rights "by creating excessively broad job descriptions," the Court noted that "the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id*. at 424-25. Second, the Court recognized that

> [t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence … [F]or that reason [we] do not[] decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.

Id. at 425.

In *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), however, the Ninth Circuit answered the latter question and held that "*Garcetti* does not apply to 'speech related to scholarship or teaching.'" Rather, the Ninth Circuit held that such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968) (considering speech by public school teacher critical of school board). *Id*. In *Demers*, the court went on to conclude that a state university professor's plan for changes in his department addressed a matter of public concern under *Pickering*. *Id*. at 414-17; *see also Jensen v. Brown*, 131 F.4th 677, 688-89, 694 (9th Cir. 2025) (relying on *Demers* to apply the *Pickering* test to a community college professor's First Amendment retaliation claim against his employer based on his criticism of curriculum changes). By contrast, in *Kennedy v. Bremerton School District*, the Supreme Court held that a football coach spoke not as a public employee, but as a private citizen, when he decided "to persist in praying quietly without his players after three games in October 2015," 597 U.S. 507, 525-26 (2022), which were "the three prayers that resulted in his suspension," *id.* at 529.

The definition of "adverse employment action" in this instruction is substantially the same as that in Instruction 10.10 (Civil Rights—Title VII—"Adverse Employment Action" in Retaliation Cases). See the Comment to that instruction for supporting authorities.

With respect to causation, "[i]t is clear . . . that the causation is understood to be but-for causation, without which the adverse action would not have been taken." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). Thus, "upon a prima facie showing of retaliatory harm, the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee)." *Id*. The Ninth Circuit has held that "a final decision maker's wholly independent, legitimate decision to terminate an employee [can] insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired" when, as a matter of causation, "the termination decision was not shown to be influenced by the subordinate's retaliatory motives." *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 799 (9th Cir. 2009); *see also Greisen v. Hanken*, 925 F.3d 1097, 1115-17 (9th Cir. 2019) (holding substantial evidence supported proximate causation conclusion even though plaintiff was terminated by defendant's successor because "[defendant]'s

actions were a casual factor in [the successor]'s decision").

Regarding motive, the defendant's actions must have been substantially motivated by a desire to deter or chill the employee's speech. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004); *see Dodge*, 56 F.4th at 781. Defining "substantial or motivating factor" as a "significant factor" does not misstate the law. *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884-85 (9th Cir. 2003); *see also Capp v. City of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019) (explaining that retaliatory intent may still be one substantial or motivating factor for retaliatory conduct even if other, non-retaliatory reasons exist).

This instruction should be modified when an employee was allegedly subjected to an adverse employment action based on an employer's erroneous belief that the employee engaged in protected speech. In such cases, it is the employer's motive for taking the adverse action that triggers the employee's right to bring an action. *See Heffernan v. City of Paterson*, 578 U.S. 266, 273 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior.").

This instruction also should be modified when a public employee alleges an adverse employment action based on the employee's refusal to enter into an unconstitutional prior restraint, limiting the public employee's right to speak as a private citizen on a matter of public concern. *See Barone v. City of Springfield*, 902 F.3d 1091, 1101-06 (9th Cir. 2018).

"Although the [Supreme] Court first applied this framework to government employees, it extended its application to retaliation cases brought by government contractors because 'the similarities between government employees and government contractors with respect to this issue are obvious.'" *Riley's Am. Heritage Farms*, 32 F.4th at 720 (quoting *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996)). Moreover, the Ninth Circuit has extended this framework "to a range of situations where 'the relationship between the parties is analogous to that between an employer and employee,'" including cases involving "a business vendor operating under a contract with the government for weatherization services," "a domestic violence counselor employed by a private company that performed counseling services for a municipal court," and "a volunteer probation officer." *Id.* at 720-21. The Ninth Circuit has also extended this framework to a case in which a school district relied on a private company to provide educational services for public school students. *Id.* at 722.

This instruction does not apply to restrictions on the speech of elected officials because "an elected official's speech is protected regardless [of] whether the official is speaking 'as a citizen upon a matter of public concern.'" *See Boquist v. Courtney*, 32 F.4th 764, 780 (9th Cir. 2022) (quoting *Garcetti*, 547 U.S. at 418).

After a plaintiff establishes the first three steps, he or she has made out a prima facie case, and at step four the burden shifts to the government "to show that 'under the balancing test established by *Pickering*, [the government's] legitimate administrative interests outweigh the

employee's First Amendment rights.'" *Moser*, 984 F.3d at 906 (quoting *Eng*, 552 F.3d at 1071) (holding the government failed to satisfy its step four burden because it did not produce any evidence indicating the speech at issue caused or would cause disruption). "[T]he *Pickering* balancing test is a legal question, but its resolution often entails underlying factual disputes that need to be resolved by a fact-finder." *Id*. at 911 (quoting *Eng*, 552 F.3d at 1071).

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9.10 Particular Rights—First Amendment—Public Employees—Speaking as a Private Citizen

A plaintiff speaks as a public employee when he or she makes statements pursuant to his or her official duties. In contrast, a plaintiff speaks as a private citizen if the plaintiff had no official duty to make the statements at issue, or if the speech was not the product of performing the tasks the plaintiff was paid to perform.

In deciding whether a public employee was speaking as a citizen and not as part of his or her official duties, and thus whether his or her speech was constitutionally protected under the First Amendment, you may consider the following factors:

(1) Did the plaintiff confine the communications to the plaintiff's chain of command? If so, then such speech may fall within the plaintiff's official duties. If not, then such speech may fall outside of the plaintiff's official duties.

(2) Was the subject matter of the communication within the plaintiff's job duties? If so, then such speech may fall within the plaintiff's official duties. If not, then such speech may fall outside of the plaintiff's official duties.

(3) Did the plaintiff speak in direct contravention to the plaintiff's supervisor's orders? If so, then such speech may fall outside of the plaintiff's official duties. If not, then such speech may fall within the plaintiff's official duties.

(4) Was the subject matter of the communication about broad concerns over corruption or systemic abuse beyond the specific department, agency, or office where the plaintiff worked? If so, then such speech may fall outside of the plaintiff's official duties. If not, then such speech may fall within the plaintiff's official duties.

Comment

"Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in their private capacity as a citizen is." *Brandon v. Maricopa Cnty.*, 849 F.3d 837, 843 (9th Cir. 2017) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)); *see also Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022) ("If a public employee speaks 'pursuant to [his or her] official duties,' this Court has said the Free Speech Clause generally will not shield the individual from an employer's control and discipline . . . ."). The Ninth Circuit has described the inquiry into whether the employee's speech is protected as "fact-intensive" and explained that "no single formulation of factors can encompass the full set of inquiries relevant to determining the scope of a plaintiff's job duties." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1074-76 (9th Cir. 2013) (en banc); *see also Lindke v. Freed*, 601 U.S. 187, 203 (2024) (noting that, in the context of analyzing whether a public official's social media activity is speech pursuant to their official duties or in their personal capacity, the court ought to engage in a fact-specific undertaking in which each post's "content and function are the most important considerations"). For a discussion of "guiding principles for undertaking

the practical factual inquiry," see *Brandon*, 849 F.3d at 843 (citing *Dahlia*, 735 F.3d at 1074-76); *see also Kennedy*, 597 U.S. at 528 (describing *Garcetti* and explaining that the prosecutor's memorandum at issue in that case was government speech because it was speech the government itself had commissioned or created and speech the employee was expected to deliver in the course of carrying out his job).

In *Kennedy v. Bremerton School District*, the Supreme Court held that a public high school football coach spoke not as a public employee, but as a private citizen, when he decided "to persist in praying quietly without his players after three games in October 2015," 597 U.S. at 508, which were "the three prayers that resulted in his suspension," *id.* at 2424. The Supreme Court explained:

> [The coach] did not speak pursuant to government policy. He was not seeking to convey a government-created message. He was not instructing players, discussing strategy, encouraging better on-field performance, or engaged in any other speech the District paid him to produce as a coach. Simply put: Mr. Kennedy's prayers did not "ow[e their] existence" to Mr. Kennedy's responsibilities as a public employee.

Id. (citations omitted); *see also Moonin v. Tice*, 868 F.3d 853 (9th Cir. 2017) (holding prior restraint prohibiting highway patrol officers from speaking about controversial canine drug interdiction program with anyone outside of law enforcement violates First Amendment); *Barone v. City of Springfield*, 902 F.3d 1091, 1101-06 (9th Cir. 2018) (holding that prior restraint prohibiting police officer from speaking or writing "anything of a disparaging or negative manner related to the Department/Organization/City of Springfield or its Employees" violated First Amendment); *Ohlson v. Brady*, 9 F.4th 1156 (9th Cir. 2021) (concluding that forensic scientist who testified in court as part of his job duties spoke as employee rather than private citizen entitled to First Amendment protection); *Dodge v. Evergreen School District*, 56 F.4th 767, 778 (9th Cir. 2022) (concluding that teacher engaged in expression as private citizen entitled to First Amendment protection rather than employee when he "display[ed] a message on a personal item while attending a teacher-only training").

On the other hand, in *Linthicum v. Wagner*, 94 F.4th 887 (9th Cir. 2024) the Ninth Circuit determined that senators who staged a walkout in protest of a legislative assembly and were subsequently disqualified from appearing on the next election ballot due to a prohibited number of unexcused absences were not engaging in protected speech. The court based their reasoning on *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), a Supreme Court case that addressed the interplay between legislative power and the First Amendment and concluded that the senators' right to walk out was an exercise of legislative power rather than personal expressive speech. *Linthicum*, 94 F.4th at 893 ("No private citizen enjoys the privilege to advance or frustrate legislative action directly in the legislature . . . . The use of that power [(the walk out)] therefore implicates the 'governmental mechanics' of the legislative process, and *Carrigan* makes clear that a legislator has no right under the First Amendment to use that official power for expressive purposes.'") (quoting *Carrigan*, 564 U.S. at 127)); *see also Sullivan v. Univ. of Wash.*, 60 F.4th 574, 581-82 (9th Cir. 2023) (holding that the First Amendment right of

expressive association did not protect the work of committee members individually or collectively when they were appointed to serve a public function and their work fell within the scope of their official duties on a university committee).

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9.11 Particular Rights—First Amendment—"Citizen" Plaintiff

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived the plaintiff [*name*] of rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the First Amendment, a citizen has the right [to free expression] [to petition the government] [to access the courts] [*other applicable right*]. To establish the defendant [*name*] deprived the plaintiff [*name*] of this First Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the plaintiff [*name*] was engaged in a constitutionally protected activity;

Second, the defendant [*name*]'s actions against the plaintiff [*name*] would chill a person of ordinary firmness from continuing to engage in the protected activity; and

Third, the plaintiff [*name*]'s protected activity was a substantial or motivating factor in the defendant [*name*]'s conduct.

[I instruct you that the plaintiff [*name*]'s [speech in this case about [*specify*]] [*specify conduct*] was protected under the First Amendment and, therefore, the first element requires no proof.]

A substantial or motivating factor is a significant factor, though not necessarily the only factor.

If the plaintiff [*name*] establishes each of the foregoing elements, the burden shifts to the defendant [*name*] to prove by a preponderance of the evidence that the defendant [*name*] would have taken the action(s) in question, even in the absence of any motive to retaliate against the plaintiff [*name*]. If you find that the defendant [*name*] is able to demonstrate this, you must find for the defendant [*name*]. If you find that the defendant [*name*] is not able to demonstrate this, you must find for the plaintiff [*name*].

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and when the plaintiff is a private citizen. Use Instruction 9.9 (Particular Rights—First Amendment—Public Employees—Speech**)** when the plaintiff is a public employee. Because this instruction is phrased in terms focusing the jury on the defendant's liability for certain acts, the instruction should be modified to the extent liability is premised on a failure to act to avoid any risk of misstating the law. *See Clem v. Lomeli*, 566 F.3d 1177, 1181-82 (9th Cir. 2009).

Under the First Amendment to the United States Constitution, a citizen has the right to be free from governmental action taken to retaliate against the citizen's exercise of First Amendment rights or to deter the citizen from exercising those rights in the future. *Sloman v. Tadlock,* 21 F.3d 1462, 1469-70 (9th Cir. 1994); *see also Hartzell v. Marana Unified Sch. Dist*., 130 F.4th 722, 737 (9th Cir. 2025) (concluding that a policy that allowed "the District to prohibit speech that it finds 'offensive or inappropriate'" violated the "bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable") (citation omitted). "Although officials may constitutionally impose time, place, and manner restrictions on political expression carried out on sidewalks and median strips, they may not 'discriminate in the regulation of expression on the basis of content of that expression.' 'State action designed to retaliate against, and chill political expression strikes at the very heart of the First Amendment.'" *Id*. at 1469 (citations omitted).

However, "members of the public do not have a constitutional right to force the government to listen to their views . . . [a]nd the First Amendment does not compel the government to respond to speech directed toward it." *L.F. v. Lake Washington School Dist. #414*, 947 F.3d 621, 626 (9th Cir. 2020) (citing *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 283 (1984); *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam)).

"A plaintiff may bring a [§] 1983 claim alleging that public officials, acting in their official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff's First Amendment rights." *Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir. 2016). In *Matsumoto v. Labrador*, 122 F.4th 787, 802 (9th Cir. 2024), the court held that a pre-enforcement action brought by abortion rights advocacy organizations against the Idaho attorney general fell within an exception to *Ex parte Young* for the state's Eleventh Amendment immunity, which allows "actions for prospective declaratory or injunctive relief against state officers in their official capacities" provided that the officer has "some connection with the enforcement of the act." The attorney general had "some connection" to the enforcement because the statute specifically granted authority to the attorney general to prosecute "abortion trafficking." *Id.* "To bring a First Amendment retaliation claim, the plaintiff must allege that (1) it engaged in constitutionally protected activity; (2) the defendant's actions would 'chill a person of ordinary firmness' from continuing to engage in the protected activity; and (3) the protected activity was a substantial or motivating factor in the defendant's conduct—i.e., that there was a nexus between the defendant's actions and an intent to chill speech." *Ariz. Students' Ass'n*, 824 F.3d at 867; *Sanderlin v. Dwyer*, 116 F.4th 905, 910-11 (9th Cir. 2024); *Koala v. Khosla*, 931 F.3d 887, 905 (9th Cir. 2019).

Defining "substantial or motivating factor" as a "significant factor" does not misstate the law. *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 884-85 (9th Cir. 2003); *see also Capp v. City of San Diego*, 940 F.3d 1046, 1056 (9th Cir. 2019) (explaining that retaliatory intent may still be one substantial or motivating factor for retaliatory conduct even if other, non-retaliatory reasons exist). And "[i]f a factfinder concludes that there was no legitimate justification for [the defendant's] actions, they could reasonably infer that those actions were motivated by retaliatory

animus." *Sanderlin*, 116 F.4th at 911. A plaintiff need not prove, however, that "his speech was actually inhibited or suppressed." *Mendocino Env't Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Ariz. Students' Ass'n*, 824 F.3d at 867.

But see Sharp v. County of Orange, 871 F.3d 901, 919 (9th Cir. 2017) (applying but-for causation standard in summary judgment context); *see also Skoog v. County of Clackamas*, 469 F.3d 1221, 1231-32 (9th Cir. 2006).

In determining whether the First Amendment protects student speech in a public school, it is error to use the "public concern" standard applicable to actions brought by governmental employees. *Pinard v. Clatskanie Sch. Dist. 6J,* 467 F.3d 755, 759 (9th Cir. 2006). Instead, the proper standard to apply to on campus student speech is set forth in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969). *Pinard*, 467 F.3d at 759*; see Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 188 (2021) (noting the Court's prior applications of *Tinker* standard as recognizing schools' "special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others'" (citation omitted)); *see also Waln v. Dysart School District*, 54 F.4th 1152, 1161-63 (9th Cir. 2022).

Relevant considerations into whether speech bears a sufficient nexus to the school include: "(1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school." *Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 720 (9th Cir. 2022); *see also C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1150-52 (9th Cir. 2016); *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F. 3d. 1062, 1069 (9th Cir. 2013).

The Supreme Court has declined to set forth a "broad, highly general First Amendment rule stating just what counts as 'off campus' speech" and, instead, set forth three features of off-campus speech that "diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." *Mahanoy*, 594 U.S. at 189. First, "a school, in relation to off-campus speech, will rarely stand *in loco parentis*." *Id.* Second, regulation of off-campus speech coupled with regulation of on-campus speech, encompasses the entirety of the speech a student utters in a day. *Id.* at 189-90. Third, schools must be mindful of their own interest in protecting students' unpopular expression, particularly when that expression occurs off-campus, consistent with the role of America's public schools as "nurseries of democracy." *Id.* at 190.

The additional considerations articulated in *Mahanoy* are not inconsistent with the sufficient-nexus test articulated in *McNeil. Chen*, 56 F.4th at 720. Thus, the proper inquiry "must apply the *McNeil* sufficient-nexus test to the speech at issue . . . , keeping in mind the additional considerations identified in *Mahanoy*." *Id*.

"[A] speech restriction cannot satisfy the time, place, manner test if the restriction does not contain clear standards." *OSU Student All. v. Ray*, 699 F.3d 1053, 1066 (9th Cir. 2012); *see also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988) ("[T]he absence of

express standards makes it difficult to distinguish, 'as applied,' between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech."). Off-campus student speech may not be protected under the First Amendment when, based on the totality of the circumstances, the speech bears a sufficient nexus to the school. *McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019).

For a discussion of the boundaries between First Amendment protected expression and unprotected business activity by a street performer, *see Santopietro v. Howell*, 857 F.3d 980 (9th Cir. 2017). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted); *accord Chavez v. Robinson*, 12 F.4th 978, 1001 (9th Cir. 2021); *Bird v. Dzurenda,* 131 F.4th 787, 790-91 (9th Cir. 2025) (concluding that "grievances *against other prisoners* implicate different penological interests than grievances *against prison officials*"). The filing of a grievance or complaint, whether it be verbal or written, formal or informal, is protected conduct. *Entler v. Gregoire*, 872 F.3d 1031, 1039 (9th Cir. 2017). Threats to sue and/or pursue criminal charges fall within the purview of the constitutionally protected right to file grievances. *Id.* at 1044. "Prisoners have a First Amendment right to receive information while incarcerated," but this right must be balanced against a prison's need for effective administration and reform. *Jones v. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022). Prison regulations that affect information or mailings available to inmates are reviewed pursuant to the four-factor deferential standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987). *Id.* at 1134-35 (applying *Turner* standard to music CDs confiscated as contraband per prison regulations); *see also Prison Legal News v. Ryan*, 39 F.4th 1121, 1131-35 (9th Cir. 2022) (applying *Turner* standard to prison rule prohibiting inmates from receiving mail containing sexually explicit material).

Within the context of First Amendment retaliatory arrest claims, plaintiffs "must generally 'plead and prove the absence of probable cause,' because the presence of probable cause generally 'speaks to the objective reasonableness of an arrest' and suggests that the 'officer's animus' is not what caused the arrest." *Ballentine v. Tucker*, 28 F.4th 54, 62 (9th Cir. 2022) (quoting *Nieves v. Bartlett*, 587 U.S. 391, 400 (2019)). However, the Supreme Court has "carved out a 'narrow' exception for cases where 'officers have probable cause to make arrests, but typically exercise their discretion not to do so,'" *Ballentine*, 28 F.4th at 62 (quoting *Nieves*, 587 U.S. at 406). In such cases, which involve offenses like jaywalking and defacing public property with chalk, "the *Nieves* exception only applies 'when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.'" *Id.* at 407; *see also Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024) (reversing the Fifth Circuit's "overly cramped view of *Nieves*" and explaining that to fall within the *Nieves* exception a plaintiff must produce objective evidence showing that in circumstances where officers have probable cause to make arrests, they "typically exercise their discretion not to do so").

If a plaintiff bringing a retaliatory arrest claim establishes that protected conduct was a substantial or motivating factor behind the plaintiff's arrest, then "the defendant can prevail only by a showing that the [arrest] would have been initiated without respect to retaliation." *Ballentine*, 28 F.4th at 63 (quoting *Nieves*, 587 U.S. at 404, 406-07). If a plaintiff has established that the police lacked probable cause for an arrest, the plaintiff must show that the alleged retaliation was a substantial or motivating factor behind the arrest, and, if that showing is made, the defendant can prevail only by showing that the arrest would have been initiated without respect to retaliation. *Hill v. City of Fountain Valley*, 70 F.4th 507, 518-19 (9th Cir. 2023) (relying on test set out in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

This instruction properly applies to First Amendment claims concerning speech by elected officials. *See Boquist v. Courtney*, 32 F.4th 764, 774 (9th Cir. 2022) (citing *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 542-43 (9th Cir. 2010)). The first element in Instruction 9.11 "is readily met when elected officials express their views and opinions." *Id.* at 775. However, the second element is more difficult for elected officials to establish. *Id.* at 776. This is because "the First Amendment . . . 'doesn't shield public figures from the give-and-take of the political process.'" *Id.* (citing *Blair*, 608 F.3d at 543-44) ("'more is fair in electoral politics than in other contexts'"). To establish the second element, an elected official would have to show that the adverse action in question either (i) prevented her from doing her job, (ii) deprived her of authority she enjoyed by virtue of her popular election, or (iii) otherwise prevented her from enjoying the full range of rights and prerogatives that came with being elected. *See Id.* at 777 (citing *Houston Cmty. Coll. Sys. v. Wilson*, 598 U.S. 468, 479 (2022); *Blair*, 608 F.3d at 544 & n.4).

For a discussion of the "commonality of political purpose" inquiry that applies to First Amendment claims made by, *inter alia,* an appointed volunteer in public service, see *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1241 (9th Cir. 2023) (quoting *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001).

If the plaintiff establishes a prima facie case of retaliation, "the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). In conducting this burden-shifting analysis, courts apply the "but-for" causation standard, under which causation is "established whenever a particular outcome would not have happened but for the purported cause." *Boquist*, 32 F.4th at 778 (quoting *Bostock v. Clayton County*, 590 U.S. 644, 656 (2020)). "If there is a finding that retaliation was not the but-for cause of the [adverse action], the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind." *Hartman*, 547 U.S. at 260. "Conversely, if the government officials would have taken the same adverse action even in the absence of their animus or retaliatory motive arising from the plaintiff's speech, then the officials' animus was not a but-for cause of the adverse action, and there was no violation of the plaintiff's constitutional rights." *Boquist*, 32 F.4th at 778. If state officials can show that they had "an objectively legitimate need to implement security measures in response to information conveyed

by the plaintiff's speech, and would have implemented the same security measures in the absence of any retaliatory motive . . . any unconstitutional motivation would not be a but-for cause of the officials' action." *Id.*

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9.11A Particular Rights—First Amendment—Convicted Prisoner/Pretrial Detainee's Claim of Retaliation

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the First Amendment to the Constitution when [*insert factual basis of the plaintiff's claims*].

Under the First Amendment, a [prisoner] [pretrial detainee] has the right to access the courts and petition the government for redress of grievances. This includes the right to [file prison grievances] [pursue civil rights litigation against prison officials] [*specify particular constitutional interest*]. To establish the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

First, the plaintiff [*name*] was engaged in conduct protected under the First Amendment;

Second, the defendant [*name*] took adverse action against the plaintiff [*name*];

Third, the defendant [*name*] took adverse action against the plaintiff because of the plaintiff [*name*]'s protected conduct;

Fourth, the adverse action taken by the defendant [*name*] chilled the plaintiff [*name*]'s exercise of [his] [her] [*other pronoun*] First Amendment rights; and

Fifth, the action taken by the defendant [*name*] did not reasonably advance a legitimate correctional goal.

For this type of claim, adverse action is action that would chill or silence a person of ordinary firmness from engaging in that activity.

To prevail, the plaintiff [*name*] must show that [his] [her] [*other pronoun*] protected conduct was the substantial or motivating factor behind the defendant [*name*]'s conduct. A substantial or motivating factor is a significant factor. [The chronology of events may be considered as circumstantial evidence of a causal connection between the adverse action and the plaintiff [*name*]'s protected conduct.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and when the plaintiff is a convicted prisoner or a pretrial detainee.

Allegations of retaliation against a prisoner's First Amendment rights to speech or to petition the government may support a section 1983 claim. *Pratt v. Rowland*, 65 F.3d 802, 807

(9th Cir. 1995); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1138 (9th Cir. 1989) (holding that labeling a prisoner a snitch in retaliation for petitioning prison and government officials for redress of grievances states a viable claim); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985) (holding that prison officials could not transfer an inmate to another prison in retaliation for the inmate's exercise of his First Amendment right). "Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005); *accord Bird v. Dzurenda,* 131 F.4th 787, 790 (9th Cir. 2025) (identifying same elements).

The filing of grievances and the pursuit of civil rights litigation against prison officials are both protected activities. *Rhodes*, 408 F.3d at 567-68; *see also Blaisdell v. Frappiea*, 729 F.3d 1237, 1243 (9th Cir. 2013) ("Prisoners have the right to litigate without active interference, a guarantee that exists so prisoners have a viable mechanism to remedy prison injustices.") (internal quotation marks, brackets, and citation omitted). However, the Ninth Circuit has not recognized a prisoner's filing of a grievance against another prisoner as a protected activity. *See Bird*, 131 F.4th at 791-92 (concluding that "neither the Supreme Court nor the Ninth Circuit has ever held that retaliation for complaints against other prisoners violates the First Amendment right to petition for redress of grievances" and thus that such a claim did not rest on a violation of "clearly established law" for purposes of the defendants' qualified immunity defense).

Adverse action taken against a prisoner "need not be an independent constitutional violation. The mere threat of harm can be an adverse action." *Watison v. Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012) (internal brackets and citations omitted). Adverse actions include threats of discipline, transfer, or harm and do not need to be an independent constitutional violation. *Brodheim v. Cry*, 584 F.3d 1262, 1269-70 (9th Cir. 2009) (holding that an inmate may prevail on a First Amendment claim against an officer where the officer threatens to transfer the inmate in retaliation for persistent use of the prison grievance system); *see Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004) (stating that a false accusation may constitute retaliation where deprivation of a benefit "was the natural and proximate result of" the false accusation and one can infer based on the facts alleged that the accuser "intended that result").

To establish a retaliatory motive, an inmate "must show that his protected conduct was the substantial or motivating factor behind the defendant's conduct." *Johnson v. Ryan*, 55 F.4th 1167, 1201-02 (9th Cir. 2022) (citing *Brodheim*, 584 F.3d at 1271). A plaintiff may offer "either direct evidence of retaliatory motive or at least one of three general types of circumstantial evidence [of that motive]." *McCollum v. Cal. Dep't of Corr. & Rehab.*, 647 F.3d 870, 882 (9th Cir. 2011) (quoting *Allen v. Iranon*, 283 F.3d 1070, 1077 (9th Cir. 2002)). Circumstantial evidence of motive includes: (1) proximity in time between the protected conduct and the alleged retaliation, (2) the defendant's expressed opposition to the conduct, or (3) other evidence that the reasons proffered by the defendant for the adverse action were false and pretextual. *McCollum*, 647 F.3d at 882 (citing *Allen*, 283 F.3d at 1077). A causal connection between the adverse action and the protected conduct can be shown by a chronology of events from which retaliation can be

inferred. *Watison*, 668 F.3d at 1114; *Pratt*, 65 F.3d at 808 ("[T]iming can properly be considered as circumstantial evidence of retaliatory intent."). Mere speculation that the defendants acted out of retaliation is not sufficient. *Wood v. Yordy*, 753 F.3d 899, 905 (9th Cir. 2014).

The plaintiff must also show that the exercise of First Amendment rights was chilled, though not necessarily silenced, by the alleged retaliatory conduct. *Rhodes*, 408 F.3d at 569. The plaintiff must allege either a chilling effect on future First Amendment activities, or that he suffered some other harm that is "more than minimal." *Watison*, 668 F.3d at 1114 (reversing dismissal of retaliation claim and holding that "chilling effect" pleading element was satisfied where prisoner alleged "more than minimal" harm because guard refused to serve him one breakfast in retaliation for filing an inmate grievance); *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) ("[A] retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights."). The plaintiff does not have to demonstrate that his speech was "actually inhibited or suppressed." *Rhodes*, 408 F.3d at 569. "That the retaliatory conduct did not chill the plaintiff from suing the alleged retaliator does not defeat the retaliation claim at the motion to dismiss stage." *Watison*, 668 F.3d at 1114.

The plaintiff bears the burden of proving the absence of a legitimate correctional goal for the adverse action. *Johnson*, 55 F.4th at 1202 (citing *Pratt*, 65 F.3d at 806). With respect to this fifth factor, the Supreme Court has cautioned that "'federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment,' especially with regard to 'the fine-tuning of the ordinary incidents of prison life, a common subject of prisoner claims.'" *Pratt*, 65 F.3d at 807 (quoting *Sandin v. Conner*, 515 U.S. 472, 482-83 (1995)). A plaintiff successfully pleads that the action did not reasonably advance a legitimate correctional goal by alleging, in addition to a retaliatory motive, that the defendant's actions were "arbitrary and capricious" or that they were "unnecessary to the maintenance of order in the institution." *Watison*, 668 F.3d at 1114-15.

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9.12 Particular Rights—Fourth Amendment—Unreasonable Search—Generally

As previously explained, plaintiff [*name*] has the burden of proving that the act[s] of defendant[s] [*name[s]*] deprived plaintiff [*name*] of particular rights under the United States Constitution. In this case, plaintiff [*name*] alleges defendant[s] [*name[s]*] deprived plaintiff [*name*] of rights under the Fourth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Fourth Amendment, a person has the right to be free from an unreasonable search of [[his] [her] [*other pronoun*]] [[person] [residence] [vehicle] [*other object of search*]]. To prove defendant[s] [*name[s]*] deprived plaintiff [*name*] of this Fourth Amendment right, plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, [*name[s] of applicable defendant[s]*] searched plaintiff [*name*]'s [person] [residence] [vehicle] [*other object of search*];

Second, in conducting the search, [*name[s]*] acted intentionally; and

Third, the search was unreasonable.

[A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, plaintiff [*name*] must prove defendant [*name*] intended to search plaintiff [*name*]'s [person] [residence] [vehicle] [*other object of search*]. It is not enough if plaintiff [*name*] only proves defendant [*name*] acted negligently, accidentally or inadvertently in conducting the search. However, plaintiff [*name*] does not need to prove defendant [*name*] intended to violate plaintiff [*name*]'s Fourth Amendment rights.]

[In determining whether the search was unreasonable, consider all of the circumstances, including:

(a) the scope of the particular intrusion;
(b) the manner in which it was conducted;
(c) the justification for initiating it; and
(d) the place in which it was conducted.]

[If the search was conducted pursuant to a search warrant, then also consider whether the actual search conducted exceeded the terms of the warrant.]

Comment

Use this instruction in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and an applicable definition of an unreasonable search, such as Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest) and Instruction 9.15 (Particular Rights—Fourth

Amendment—Unreasonable Search—Exception to Warrant Requirement—Consent). In cases in which there is no applicable definition of unreasonableness in another instruction, consider using the second bracketed paragraph of this instruction, which sets out general principles for assessing the reasonableness of a search, derived from *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); *see also Byrd v. Maricopa Cnty. Sherriff's Dep't*, 629 F.3d 1135, 1141 (9th Cir. 2011) (en banc).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer*s*"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer*s*" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

"When the Government obtains information by physically intruding on persons, houses, papers, or effects, a 'search' within the original meaning of the Fourth Amendment has undoubtedly occurred." *United States v. Ngumezi*, 980 F.3d 1285, 1289 (9th Cir. 2020) (quoting *Florida v. Jardines*, 569 U.S. 1, 5 (2013)); *see also United States v. Dixon*, 984 F.3d 814, 820 (9th Cir. 2020) ("[A] search occurs when the government 'physically occup[ies] private property for the purpose of obtaining information.'" (quoting *United States v. Jones*, 565 U.S. 400, 404 (2012))); *Jardines*, 569 U.S. at 11-12 (holding government's use of drug dog within curtilage of home used "to investigate the home and its immediate surroundings" was search within meaning of Fourth Amendment); *Jones*, 565 U.S. at 404 (holding installation of GPS device tracking device on underside of vehicle to monitor vehicle's movements constitutes search within meaning of Fourth Amendment); *Olson v. County of Grant*, 127 F.4th 1193, 1998 (9th Cir. 2025) (holding that the county attorney's review, without consent, without a warrant, and without suspicion of further criminal activity, of a cell phone extraction obtained by another state's law enforcement agency with the plaintiff's consent, was an unreasonable search violating the plaintiff's Fourth Amendment rights); *cf. United States v. Esqueda*, 88 F.4th 818 (9th Cir. 2023) (holding that when "an officer enters a premises with express consent, and secretly uses recording equipment to capture only what he can see and hear by virtue of that consented entry, no Fourth Amendment search occurs under the trespassory, unlicensed physical intrusion framework as articulated in *Jones* and *Jardines*"). In addition to cabining physical intrusions on a constitutionally protected area, "the Fourth Amendment protects 'certain expectations of privacy.'" *United States v. Rosenow*, 50 F.4th 715, 737 (9th Cir. 2022) (quoting *Carpenter v. United States*, 585 U.S. 296, 304 (2018)). "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Id.*; *see also Carpenter*, 585 U.S. at 315 (holding that the government's acquisition of cell-site records that provide comprehensive details

of a user's past movements was search within the meaning of Fourth Amendment). For assessing a reasonable expectation of privacy in a commercial premise, *see generally United States v. SDI Future Health, Inc.*, 568 F.3d 684, 695 (9th Cir. 2009).

The Fourth Amendment's protection against unreasonable searches extends beyond criminal investigations. *See Grady v. North Carolina*, 575 U.S. 306, 309 (2015) (per curiam) (holding that the state conducts search subject to the Fourth Amendment when it attaches a tracking device to recidivist sex offender's person without consent after civil proceedings); *United States v. Motley*, 89 F.4th 777, 786 (9th Cir. 2023) (holding that a defendant does not have an objectively reasonable expectation of privacy in his prescription opioid records maintained in government database, given the long-standing and pervasive regulation of opioids as a controlled substance and regulatory disclosure of opioid prescription records).

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student All. v. Ray*, 699 F.3d 1053, 1072 n.12 (9th Cir. 2012) (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). It is well settled that "negligent acts do not incur constitutional liability." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds by County of Los Angeles v. Mendez*, 581 U.S. 420 (2017); *see Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1110 (9th Cir. 2022) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." (quoting *Daniels*, 474 U.S. at 328)). The question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *United States v. Reese*, 2 F.3d 870, 885-86 (9th Cir. 1993); *see also Reese v. County of Sacramento*, 888 F.3d 1030, 1044-45 (9th Cir. 2018).

With respect to the Fourth Amendment, the Supreme Court has defined a seizure as "a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see also Nelson v. City of Davis*, 685 F.3d 867, 876-77 (9th Cir. 2012) (discussing intent and concluding that defendant officers intentionally seized plaintiff under the Fourth Amendment). The Committee assumes the same intentional mental state is required to prove a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment, although there does not appear to be any Supreme Court or Ninth Circuit decision directly on point. Thus, this instruction includes an optional definition of the term "intentionally" for use when it would be helpful to the jury.

"Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *C.B. v. City of Sonora*, 769 F.3d 1005, 1023 (9th Cir.2014) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985)); *see also Cates v. Stroud*, 976 F.3d 972, 978-84 (9th Cir. 2020) (examining search of prison visitor and holding that prior to strip search, the visitor must be given opportunity

to leave prison); *Ortega v. O'Connor*, 146 F.3d 1149, 1162-64 (9th Cir. 1998) (examining search of a private office); *cf. Maryland v. King*, 569 U.S. 435, 448 (2013) (holding that court should weigh "the promotion of legitimate governmental interests against the degree to which [the search] intrudes upon an individual's privacy" (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)) (internal quotation marks omitted)).

"[T]o determine whether the government exceeded the scope of a warrant, we compare the terms of the warrant to the search actually conducted." *Snitko v. United States,* 90 F.4th 1250, 1263 (9th Cir. 2024) (deciding that search of contents of safe deposit boxes exceeded the terms of warrant and violated the owners' Fourth Amendment rights).

When a warrantless search is conducted pursuant to a condition of probation, the court may wish to consider drafting a "totality of the circumstances" instruction. *See United States v. Knights*, 534 U.S. 112, 118 (2001); *Smith v. City of Santa Clara*, 876 F.3d 987, 992 (9th Cir. 2017). Similarly, the Supreme Court has upheld suspicionless searches of parolees based on the totality of the circumstances. *Samson v. California*, 547 U.S. 843, 856-57 (2006). *See also United States v. Payne*, 99 F.4th 495, 505 (9th Cir. 2024) ("This totality of the circumstances approach is sound, especially considering that a parole search is an exception to the warrant requirement, well-situated in broader Fourth Amendment jurisprudence."); *United States v. Cervantes*, 859 F.3d 1175, 1183 (9th Cir. 2017) ("A search of a parolee that complies with the terms of a valid search condition will usually be deemed reasonable under the Fourth Amendment."); *United States v. Dixon*, 984 F.3d 814 (9th Cir. 2020) ("[B]efore [a search] condition authorizes a warrantless search, officers must have a sufficient 'degree of knowledge' that the search condition applies to the place or object to be searched.").

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9.13 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest

In general, a search of [a person] [a person's [residence] [property]] is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if the search is incident to a lawful arrest.

[I instruct you that the arrest of the plaintiff [*name*] was a lawful arrest.] [I instruct you that the arrest of the plaintiff [*name*] was a lawful arrest if [*insert applicable legal standard; i.e., insert elements to show probable cause to arrest for a particular crime*]].

A search is "incident to" a lawful arrest if:

(1) it occurs roughly contemporaneously with the arrest, that is, at the same time or shortly after the arrest and without any intervening events separating the search from the arrest; and

(2) it is limited to a reasonable search of the person arrested and to the immediate area within which that person might gain possession of a weapon or might destroy or hide evidence at the time of the search.

To prove the search in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply; that is, that the search was not incident to a lawful arrest.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally). When the search incident to arrest involves a vehicle, refer to Instruction 9.14 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant).

"A search incident to a lawful arrest is an exception to the general rule that warrantless searches violate the Fourth Amendment." *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014); *see Arizona v. Gant*, 556 U.S. 332, 338 (2009). There are two general requirements of a valid search incident to an arrest. *Camou*, 773 F.3d at 937-38 ("The determination of the validity of a search incident to arrest in this circuit is a two-fold inquiry: (1) was the searched item 'within the arrestee's immediate control when he was arrested'; [and] (2) did 'events occurring after the arrest but before the search ma[k]e the search unreasonable'?" (second alteration in original) (quoting *United States v. Maddox*, 614 F.3d 1046, 1048 (9th Cir. 2010)).

The first requirement is that the search must be "limited to the arrestee's person or areas in the arrestee's 'immediate control' at the time of arrest." *Id.* at 937 (quoting *Gant*, 556 U.S. at 339). "Immediate control" means "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Gant*, 556 U.S. at 335 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)). "Those areas include the arrestee's person and the inside pockets of the arrestee's clothing." *United States v. Williams*, 846 F.3d 303, 312 (9th Cir. 2016) (citing *United States v. Robinson*, 414 U.S. 218, 224-25 (1973)). But those areas do not "extend to 'a strip search or bodily intrusion.'" *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (quoting *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir. 1984)).

The second requirement is that the search must be "spatially and temporally incident to the arrest," and, to satisfy the temporal requirement, must be "roughly contemporaneous with the arrest." *Camou*, 773 F.3d at 937 (quoting *United States v. Smith*, 389 F.3d 944, 951 (9th Cir. 2004) (per curiam)) (holding border patrol agent's search of arrestee's cell phone 80 minutes after arrest not roughly contemporaneous with arrest). A search remote in time or place from the arrest is not justified. *Id.* (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 580 (1991)). Further, "[m]ere temporal or spatial proximity of the search to the arrest does not justify a search; some threat or exigency must be present to justify the delay." *Maddox*, 614 F.3d at 1049 (holding that after arrestee was secured in the patrol car, search of a keychain that was within the arrestee's "immediate control" at the time of the arrest but subsequently tossed into arrestee's car was invalid under search-incident-to-arrest exception because, at the time of the search, arrestee was "incapable of either destroying [the keychain] or presenting any threat to the arresting officer").

An actual arrest is a prerequisite for this exception to the warrant requirement. *Menotti v. City of Seattle*, 409 F.3d 1113, 1153 (9th Cir. 2005) (holding that probable cause to make an arrest insufficient to trigger the exception in absence of actual arrest).

If the court is able to determine as a matter of law that an arrest was lawful, the Committee recommends the court instruct the jury accordingly. However, when there are factual disputes about the lawfulness of an arrest, it will be necessary for the court to instruct the jury concerning the standards or elements for a lawful arrest under the facts of a particular case. *See* Instruction 9.23 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest).

The United States Supreme Court has held that officers may perform a warrantless breath test as a search incident to arrest, but may not perform a warrantless blood test as a search incident to arrest. *Birchfield v. North Dakota*, 579 U.S. 438, 474 (2016). The Court held that a breath test incident to a drunk driving arrest is categorically included within the search-incident-to-arrest exception. *Id.* at 2176, 2179-80, 2183.

In *Riley v. California*, 573 U.S. 373 (2014), the Court considered the search-incident-to-arrest exception as it pertained to cell phones. The Court held that the phone itself may be searched incident to an arrest, but officers must generally secure a search warrant before conducting a search of the data stored on the cell phone. *Id*. at 401, 403; *Olson v. County of*

Grant, 127 F.4th 1193, 1999 (9th Cir. 2025) (extending *Riley* to a phone extraction or a "phone dump" which is typically an exact replica of the data contained on a cell phone at the time of the extraction, easily searchable and reviewable by law enforcement); *but see United States v. Payne*, 99 F.4th 495, 507 (9th Cir. 2024) (declining to extend *Riley* to cell phone data belonging to parolees).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in a claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]").

Revised March 2025

9.14 Particular Rights—Fourth Amendment—Unreasonable Search— Exception to Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant

In general, a search of a person's vehicle is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if the search of the vehicle is incident to a lawful arrest.

[I instruct you that the arrest of the plaintiff [*name*] was a lawful arrest.] [I instruct you that the arrest of the plaintiff [*name*] was a lawful arrest if [*insert applicable legal standard, i.e., insert elements to show probable cause to arrest for a particular crime*]].

A search of a vehicle [*specify area searched*] is "incident to" the arrest of a recent occupant of the vehicle only if:

(1) The person is arrested but is not securely in police custody and the [*specify area searched*] is "within the reaching distance" of the person arrested; or

(2) It is reasonable to believe the vehicle contains evidence of the offense that is the subject of the arrest.

To prove the search in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply—that is, that the search of the vehicle was not incident to a lawful arrest.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally).

"A search incident to a lawful arrest is an exception to the general rule that warrantless searches violate the Fourth Amendment." *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014); *see Arizona v. Gant*, 556 U.S. 332, 338 (2009). For a discussion of the search incident to a lawful arrest exception generally, see Comment to Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest).

In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court held that an officer can search the passenger compartment of a vehicle when the officer has made a lawful custodial arrest of its recent occupant, so long as the passenger compartment of the vehicle is within reaching distance of the arrestee. *Id*. at 460 (holding also that the officer may search containers in the passenger compartment because "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach").

In *Arizona v. Gant*, 556 U.S. 332, 335 (2009), the Supreme Court narrowed the search-incident-to-arrest exception as applied to vehicle searches in *Belton*. *Id.* at 335. *Gant* held that a warrantless search of a vehicle, incident to the arrest of a driver or recent occupant, is constitutionally permissible only if: (1) the arrestee is within reaching distance of the passenger compartment at the time of the search, or (2) it is reasonable to believe the vehicle contains evidence of the offense of arrest. *Id.* at 351. Thus, when the arrestee is secured by police, and there is no reason to believe the vehicle contains relevant evidence, officers may not rely on the search-incident-to-arrest exception to justify the search of a vehicle. *Id.* at 335 ("*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.").

If the court is able to determine as a matter of law that an arrest was lawful, the Committee recommends the court instruct the jury accordingly. When, however, there are factual disputes about the lawfulness of an arrest, it will be necessary for the court to instruct the jury concerning the standards or elements for a lawful arrest under the facts of a particular case. *See* Instruction 9.23 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest). The plaintiff may not always be the same person who was the subject of the arrest giving rise to the search. *See e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 134 (1978). In such cases, the instruction should be altered as appropriate.

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]").

Revised Dec. 2023

9.15 Particular Rights—Fourth Amendment—Unreasonable Search—Exception To Warrant Requirement—Consent

In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant.[A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if [the person] [a person in lawful possession of the area to be searched] knowingly and voluntarily consents to the search [and there is not any express refusal to consent by another person who is physically present and also in lawful possession of the area to be searched].

In determining whether a consent to search is voluntary, consider all of the circumstances, including:

(1) whether the consenting person was in custody;

(2) whether the officers' guns were drawn;

(3) whether *Miranda* warnings were given;

(4) whether the consenting person was told [he] [she] [*other pronoun*] had the right to refuse a request to search;

(5) whether the consenting person was told a search warrant could be obtained;

(6) [*any other circumstances applicable to the particular case*].

Miranda warnings consist of advising a criminal suspect that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

To prove the search in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment —Unreasonable Search—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions

stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officers"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officers" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

It is a well-settled exception to the warrant requirement that an "individual may waive his Fourth Amendment rights by giving voluntary and intelligent consent to a warrantless search of his person, property, or premises." *United States v. Cormier*, 220 F.3d 1103, 1112 (9th Cir. 2000); *see also Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). Whether a consent to search was voluntarily given is a question of fact to be determined from the "totality of all the circumstances." *United States v. Taylor*, 60 F.4th 1233, 1243 (9th Cir. 2023) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). The Ninth Circuit considers five factors in determining voluntariness, which have been incorporated into the above instruction. *See*, *e.g.*, *Liberal v. Estrada*, 632 F.3d 1064, 1082 (9th Cir. 2011) (applying five-factor test for voluntariness in § 1983 case). "No one factor is determinative in the equation" and "[b]ecause each factual situation surrounding consent to a search is unique," a court may also consider other relevant factors. *Id.*; *United States v. Taylor*, 60 F.4th 1233, 1243 (9th Cir. 2023) (rejecting argument that "racial disparities in the policing of America" invalidated consent, the court noted tensions between officers and suspects "may be heightened by personal experiences and other sociocultural factors," but there was no evidence in this case that race affected the voluntariness of consent); *Olson v. County of Grant*, 127 F.4th 1193, 1200 (9th Cir. 2025) (holding that a plaintiff's consent allowing Idaho law enforcement to search plaintiff's cell phone did not extend to a search by a different law enforcement agency, in Oregon, for evidence of her boyfriend's theoretical misdeeds in Oregon).

In *Georgia v. Randolph*, 547 U.S. 103, 106 (2006), the Supreme Court reiterated this rule: "The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." The Court, however, also held that, as between a wife's consent to a search of the family residence and her husband's refusal to consent, "a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." *Id.*; *see also Bonivert v. City of Clarkston*, 883 F.3d 865, 875 (9th Cir. 2018) ("Applying *Randolph*, we hold that the consent exception to the warrant requirement did not justify the officers' entry into *Bonivert's* home. Even though the officers secured [co-occupant] *Ausman's* consent, *Bonivert* was physically present inside and expressly refused to permit the officers to enter on two different occasions" (emphasis added)). The Ninth Circuit clarified that "*Randolph* requires that the resident who is refusing consent both be present at the house and expressly refuse to allow the search." *United States v. Moore*, 770 F.3d 809, 811 (9th Cir. 2014). In addition, the Supreme Court has clarified that *Randolph* does not apply when the objecting occupant has been removed and is no longer physically present, including removal through a lawful arrest. *Fernandez v. California*, 571 U.S. 292, 302-03 (2014) (upholding

warrantless search of apartment when consent later obtained from co-occupant after initially objecting occupant arrested on suspicion of assaulting co-occupant); *United States v. Parkins*, 92 F.4th 882, 890-91 (9th Cir. 2024) (explaining that a defendant need not stand at the doorway to count as being physically present—presence on the premises (including its immediate vicinity) is sufficient); *see also United States v. Brown*, 563 F.3d 410, 416-18 (9th Cir. 2009) (holding that voluntary consent from co-occupant of residence when defendant had been arrested pursuant to valid arrest warrant and placed in squad car prior to consent discussion with co-occupant).

Randolph's exception to the consent rule for third parties does not apply when the "consent" consists of a probationer's search condition. That scenario requires an examination of whether a warrantless search "was reasonable under the Court's general Fourth Amendment approach of 'examining the totality of the circumstances,' with the probation search condition being a salient circumstance." *Smith v. City of Santa Clara*, 876 F.3d 987, 992 (9th Cir. 2017) (internal quotation marks and brackets omitted) (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001) (rejecting jury instruction framed in terms of consent based on warrantless probation search condition)).

Whether an individual was told he or she was "free to leave" may implicate both the first factor—whether the individual was in custody—and the fourth factor—whether he or she was informed he or she could refuse consent. *See*, *e.g.*, *United States v. Russell*, 664 F.3d 1279, 1281 (9th Cir. 2012) (noting that officer's instruction that individual is free to leave is "an instructive, but certainly less clear, way of saying that consent could be refused"); *United States v. Bassignani*, 575 F.3d 879, 886 (9th Cir. 2009) (noting that officer's instruction that individual is free to leave is important consideration in determining whether individual is in custody); *but see United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (noting that, when searching bus passengers, "free to leave" warning is inadequate to ensure voluntariness).

Under certain circumstances, a third party may have actual or apparent authority to give consent to the search of another's property. *Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 536 (9th Cir. 2010) (citing *United States v. Ruiz*, 428 F.3d 877, 880-81 (9th Cir. 2005) (stating three-part test to determine apparent authority of third person)). When authority to consent is factually disputed, it may be necessary to instruct the jury on these standards.

Relatedly, the "knock and talk" exception, which allows officers to approach a home and knock on the door, does not apply when the officers' purpose in conducting the "knock and talk" is to arrest the occupant. *United States v. Lundin*, 817 F.3d 1151, 1160 (9th Cir. 2016).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in a claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]").

When "an officer enters a premises with express consent, and secretly uses recording equipment to capture only what he can see and hear by virtue of that consented entry, no Fourth Amendment search occurs under the trespassory, unlicensed physical intrusion framework." *United States v. Esqueda*, 88 F.4th 818 (9th Cir. 2023). Although no search occurs when an undercover government agent misrepresents his identity to gain consent to enter, *id.* at 825, 830, a Fourth Amendment search does occur when "a known government agent affirmatively misrepresents his *purpose* to gain consent to enter," *id.* at 826 n.4 (emphasis in original) (citing *Whalen v. McMullen*, 907 F.3d 1139, 1147-48 (9th Cir. 2018)).

Revised June 2025

9.16 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Exigent Circumstances

In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not conducted pursuant to a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if:

(1) all of the circumstances known to the officer[s] at the time of the entry or the search would cause a reasonable person to believe that the entry or the search of the [person] [residence] [vehicle] [property] was necessary to prevent [destruction of evidence] [escape of a suspect] [physical harm to the officers or other persons] or [some other consequence improperly frustrating legitimate law enforcement efforts];

(2) at the time the officer made the entry or the search, the officer had probable cause to believe that a crime had been or was being committed; and

(3) there was insufficient time to get a search warrant.

"Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

To prove the search in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

It is a well-settled exception to the warrant requirement that "exigent circumstances" can justify a warrantless search consistent with the Fourth Amendment. *See Missouri v. McNeely*, 569 U.S. 141, 148-49 (2013) (discussing various "circumstances [that] may give rise to an exigency sufficient to justify a warrantless search, including law enforcement's need to provide emergency assistance to an occupant of a home, engage in 'hot pursuit' of a fleeing suspect, or enter a burning building to put out a fire and investigate its cause" (citations omitted)); *see also Fisher v. City of San Jose*, 558 F.3d 1069, 1076-78 (9th Cir. 2009) (en banc) (discussing exigent circumstances exception to warrant requirement in context of hours-long police standoff). This exception has two requirements: "(1) that the officer had probable cause to search or arrest; and (2) that exigent circumstances justified the warrantless intrusion." *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1221 (9th Cir. 2014) (citing *Hopkins v. Bonvicino*, 573 F.3d 752, 766-67 (9th Cir. 2009)), *rev'd in part on other grounds*, 575 U.S. 600 (2015). The Ninth Circuit generally defines "exigent circumstances as those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. Martinez*, 406 F.3d 1160, 1164 (9th Cir. 2005).

However, officers cannot create the exigency themselves by engaging in conduct that violates the Fourth Amendment. *See United States v. Lundin*, 817 F.3d 1151, 1158 (9th Cir. 2016) (citing *Kentucky v. King*, 563 U.S. 452, 462 (2011) (holding that officers unlawfully created exigency when (1) their knock caused suspect to make crashing noises inside home that were basis for exigency, and (2) officers were unlawfully standing on curtilage of suspect's home because it was three a.m. and their only purpose was to arrest defendant)).

The Ninth Circuit has explained that the exigency exception "stems from police officers' investigatory function [and] allows an officer to enter a residence without a warrant if he has probable cause to believe that a crime has been or is being committed and a reasonable belief that [his] entry is needed to stop the destruction of evidence or a suspect's escape or carry out other crime-prevention or law enforcement efforts." *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 534 (9th Cir. 2010) (second alteration in original) (internal quotation marks omitted) (quoting *Hopkins*, 573 F.3d at 763). Furthermore, whether a law enforcement officer faced an exigency "must be viewed from the totality of the circumstances known to the officers at the time of the warrantless intrusion." *Id.* at 535 (quoting *United States v. Licata*, 761 F.2d 537, 543 (9th Cir. 1985)); *see McNeely*, 569 U.S. at 149 ("To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances.").

The exigency exception may of course be invoked when police are in hot pursuit of a fleeing suspect. *See McNeely*, 569 U.S. at 149; *Fisher*, 558 F.3d at 1082. "[A] 'hot pursuit' excuses a warrantless intrusion into the home only if the 'officers [were] in "immediate" and "continuous" pursuit of a suspect from the scene of the crime' at the moment they made entry." *Newman v. Underhill*, 134 F.4th 1025, 1032 (9th Cir. 2025) (quoting *United States v. Johnson*, 256 F.3d 895, 907 (9th Cir. 2001) (en banc)). In other words, the "hot pursuit" exception has an

immediacy requirement and a continuity requirement. *Id.* Not all delays extinguish continuity. *See id.* (noting that "in certain circumstances," the decision to wait for backup delays, rather than breaks, the chase's continuity). To determine whether a chase's continuity has been delayed instead of broken, two considerations are relevant: (1) "whether, and to what degree, the officers lost track of the suspect's whereabouts" and (2) "whether the officers, after losing sight of the suspect, continued to act with speed in attempting to apprehend the suspect." *Id.* at 1032-33. Timing is relevant to both considerations. *Id.* at 1033. It should also be noted that exigent circumstances will rarely justify entry without a warrant while in hot pursuit of a fleeing misdemeanant. *See Stanton v. Sims*, 571 U.S. 3, 7-10 (2013) (concluding that the officer was entitled to qualified immunity, yet emphasizing that prior Court precedent "held not that warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare"); *see also Lange v. California*, 594 U.S. 295, 306 (2021) ("This Court has held that when a minor offense alone is involved, police officers do not usually face the kind of emergency that can justify a warrantless home entry.").

The Supreme Court has also ruled that the natural dissipation of alcohol in the blood does not establish a *per se* exigency, and that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 156; *cf.* Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest).

Whether officers rely upon the emergency aid or exigent circumstances exceptions to the Fourth Amendment's general warrant requirement, they are required to conduct the search or seizure in a reasonable manner, including use of reasonable force. *Sheehan*, 743 F.3d at 1222 (applying the Supreme Court's excessive force standard under the Fourth Amendment to both emergency aid and exigency exceptions). To assess whether the force used was reasonable, see Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish an absence of imminent danger in a claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]").

Revised June 2025

9.17 Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Emergency Aid

In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not conducted pursuant to a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if, under all of the circumstances:

(1) the officer[s] had objectively reasonable grounds at the time of the entry or the search to believe that there was an emergency at hand and there was an immediate need to protect others or themselves from serious harm; and

(2) the search's scope and manner were reasonable to meet the need.

To prove the search in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Supreme Court has consistently recognized an emergency aid exception to the warrant requirement, which allows law enforcement officers to "enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *United States v. Snipe*, 515 F.3d 947, 951 (9th Cir. 2008) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)); *see also Bonivert v. City of Clarkston*, 883 F.3d 865, 877 (9th Cir. 2018) (noting that "the emergency exception is 'narrow' and 'rigorously guarded'").

The emergency doctrine recognizes that police function as community caretakers in addition to their roles as criminal investigators and law enforcers. *Espinosa v. City & County of San Francisco*, 598 F.3d 528, 534 (9th Cir. 2010).

As the Ninth Circuit has clarified, this exception has two requirements: "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1221 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S. 600 (2015) (quoting *Snipe*, 515 F.3d at 952); *see also Hopkins v. Bonvicino*, 573 F.3d 752, 763-66 (9th Cir. 2009) (explaining difference between emergency and related exigency exceptions).

Whether officers rely on the emergency aid or exigent circumstances exception to the Fourth Amendment's general warrant requirement, they are required to conduct the search or seizure in a reasonable manner, including use of reasonable force. *Sheehan*, 743 F.3d at 1222 (applying the Supreme Court's excessive force standard under the Fourth Amendment to both emergency aid and exigency exceptions). To assess whether the force used was reasonable, see Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on the plaintiff to establish an absence of imminent danger in a claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]").

Revised June 2025

9.17A Particular Rights—Fourth Amendment—Unreasonable Search— Judicial Deception

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant[s] [*insert name[s] of defendant[s]*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant[s] [*insert name[s] of defendant[s]*] deprived the plaintiff [*name*] of rights under the Fourth Amendment to the Constitution when the defendant[s] [*insert name[s] of defendant[s]*] intentionally or in reckless disregard of the truth made one or more material misrepresentations or omissions in a search warrant affidavit submitted to a judge.

Under the Fourth Amendment, a person has the right to be free from an unreasonable search of the person's [person] [residence] [vehicle] [*insert other object of search*]. In general, a search of a [person] [residence] [vehicle] [*insert other object of search*] is unreasonable under the Fourth Amendment if the search is not conducted pursuant to a search warrant. A search warrant is a written order signed by a judge that permits a law enforcement officer to search a particular location and seize specific items. To obtain a search warrant, a law enforcement officer must show probable cause that a crime has been committed and that items related to that crime are likely to be found in the place specified in the warrant. In deciding whether to issue a search warrant, a judge generally relies on the facts stated in a warrant affidavit signed by a law enforcement officer.

To prove the defendant[s] [*insert name[s] of defendant[s]*] deprived the plaintiff [*name*] of this Fourth Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the defendant[s] [*insert name[s] of defendant[s]*] submitted to a judge a warrant affidavit that contained one or more misrepresentations or omissions material to the finding of probable cause; and

Second, the defendant[s] [*insert name[s] of defendant[s]*] made those misrepresentations or omissions either intentionally or with reckless disregard for the truth.

To show materiality in the context of this claim, the plaintiff [*name*] must demonstrate that the judge would not have issued the warrant if the false information had been excluded (or redacted) or if the omitted or missing information had been included (or restored).

"Probable cause" exists when, under all of the circumstances known to the officers at the time, an objectively reasonable police officer would conclude there is a fair probability that contraband or evidence of a crime will be found in the place to be searched; a fair probability that the item to be seized is contraband or evidence of a crime; or a fair probability that the person to be seized has committed or was committing a crime.

In the context of this claim, a "reckless disregard for the truth" means highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading a reasonable judge into concluding that probable cause has been established, when

that danger is either known to the defendant[s] or is so obvious that the defendant[s] must have been aware of it.

Comment

Use this instruction only in conjunction with the applicable elements instruction from Instructions 9.3-9.8.

See Bravo v. City of Santa Maria, 665 F.3d 1076, 1083-84 (9th Cir. 2011) (stating elements of a civil rights claim based on judicial deception in procuring search warrant); *Smith v. Almada*, 640 F.3d 931, 937 (9th Cir. 2011) (discussing false arrest claim based on judicial deception in procuring an arrest warrant and also discussing materiality requirement); *Blight v. City of Manteca*, 944 F.3d 1061, 1069 (9th Cir. 2019) (stating elements of judicial deception claim including materiality requirement).

Revised Dec. 2023

9.18 Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Generally

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant[s] [*name[s]*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant [*name[s]*] deprived the plaintiff [*name*] of rights under the Fourth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Fourth Amendment, a person has the right to be free from an unreasonable seizure of the person's property. To prove the defendant[s] [*name[s]*] deprived the plaintiff [*name*] of this Fourth Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, [*name[s] of applicable defendant[s]*] seized the plaintiff's property;

Second, in seizing the plaintiff's property, [*names of same person[s]*] acted intentionally; and

Third, the seizure was unreasonable.

A person "seizes" the property of the plaintiff when the person takes possession of or controls the property in a manner that meaningfully interferes with the plaintiff's right to possess the property.

[A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove that the defendant intended to [*insert the factual basis for the plaintiff's claim*]. It is not enough to prove that the defendant negligently or accidentally engaged in that action. But while the plaintiff must prove that the defendant intended to act, the plaintiff need not prove that the defendant intended to violate the plaintiff's Fourth Amendment rights.].]

[A seizure done pursuant to a search warrant is "unreasonable" if the search conducted exceeds the terms of the warrant.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and with an appropriate definition of an unreasonable seizure. *See* Instruction 9.19 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Exceptions to Warrant Requirement).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions

stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027, 1030-33 (9th Cir. 2012) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)) (recognizing a homeless person's possessory interest in unabandoned property left temporarily unattended, even if person, who was in violation of city ordinance prohibiting leaving of any personal property on public sidewalk, could not be said to have had expectation of privacy); *see United States v. Baker*, 58 F.4th 1109, 1116 (9th Cir. 2023); *see also Patel v. City of Los Angeles*, 738 F.3d 1058, 1061-62 (9th Cir. 2013) (en banc) (citing *Florida v. Jardines*, 569 U.S. 1, 12-13 (2013) (Kagan, J., concurring)) (recognizing hotel's property and privacy interest in guest records "are more than sufficient to trigger Fourth Amendment protection"). *Snitko v. United States,* 90 F.4th 1250, 1263 (9th Cir. 2024) ("[T]o determine whether the government exceeded the scope of a warrant, we compare the terms of the warrant to the search actually conducted.").

"The destruction of property has long been recognized as a seizure." *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (citing *Jacobsen*, 466 U.S. at 124-25).

A seizure lawful at its inception can nevertheless violate the Fourth Amendment if its manner of execution unreasonably infringes possessory interests. *Brewster v. Beck*, 859 F.3d 1194, 1196-97 (9th Cir. 2017) ("The Fourth Amendment doesn't become irrelevant once an initial seizure has run its course."); *see also Sandoval v. Cnty. of Sonoma*, 912 F.3d 509, 516 (9th Cir. 2018) (holding that the community caretaking exception to a warrant requirement does not categorically permit government officials to retain impounded private property)."The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment." *Miranda v. City of Cornelius*, 429 F.3d 858, 862 (9th Cir. 2005); *see*, *e.g.*, *Brewster*, 859 F.3d at 1196-97 (holding that 30-day impound of vehicle constitutes seizure that requires compliance with Fourth Amendment).

With respect to the Fourth Amendment, the Supreme Court has defined a seizure of a person as "a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see Torres v. Madrid*, 592 U.S. 306, 322 (2021) ("[A] seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement."); *see also Nelson v. City of Davis*, 685 F.3d 867, 876-77 (9th Cir. 2012) (discussing intent and concluding that the defendant officers intentionally seized plaintiff under the Fourth Amendment). It is well settled that "negligent acts do not incur constitutional liability." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds by County*

of Los Angeles v. Mendez, 581 U.S. 420 (2017); *see Ochoa v. Pub. Consulting Grp., Inc.*, 48 F.4th 1102, 1110 (9th Cir. 2022) ("'[T]he Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property.'" (quoting *Daniels v. Williams*, 474 U.S. 327, 328 (1986))). The Committee assumes the same intentional mental state is required to prove a § 1983 claim based on an unreasonable seizure of property in violation of the Fourth Amendment. Thus, this instruction includes an optional definition of the term "intentionally" for use when it would be helpful to the jury.

Revised March 2024

9.19 Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Exceptions to Warrant Requirement

In general, a seizure of a person's property is unreasonable under the Fourth Amendment unless the seizure is authorized by a warrant. [A "warrant" is a written order signed by a judge that permits a law enforcement officer to seize particular property.] Under an exception to this rule, a warrant is not required, and a seizure of property is reasonable if [*set forth applicable exception to warrant requirement*]. Therefore, to prove the seizure in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that this exception does not apply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and in conjunction with Instruction 9.18 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Property—Generally).

"[I]n the ordinary case, seizures of personal property are unreasonable within the meaning of the Fourth Amendment . . . unless . . . accomplished pursuant to a judicial warrant issued by a neutral and detached magistrate after finding probable cause." *Menotti v. City of Seattle*, 409 F.3d 1113, 1154 (9th Cir. 2005) (quoting *Illinois v. McArthur*, 531 U.S. 326, 330-31 (2001)).

Although the Committee has not provided instructions for the many exceptions to the warrant requirement for the seizure of property, the following decisions may be helpful in formulating an instruction tailored to particular facts:

(1) *Menotti*, 409 F.3d at 1152 n.72 (collecting case citations authorizing warrantless seizures of property in the context of administrative searches, searches incident to arrest, automobile checkpoint searches, and *Terry v. Ohio*, 392 U.S. 1 (1968)).

(2) *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030-31 (9th Cir. 2012) (concluding that the warrantless seizure of a homeless person's abandoned property was properly subjected to Fourth Amendment's reasonableness requirement); *see also Garcia v. City of Los Angeles*, 11 F.4th 1113, 1119 (9th Cir. 2021) (holding a city ordinance allowing the city to discard bulky items of personal property stored in public areas, when such areas were not designated as shelters, authorized unreasonable seizures in violation of the Fourth Amendment).

(3) *United States v. Stafford*, 416 F.3d 1068, 1076 (9th Cir. 2005) (discussing the plain view exception to the warrant requirement).

(4) *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1140 (9th Cir. 2019) (discussing the emergency exception and "community caretaking function" exception in the context of seizure of firearms from a home when police had probable cause to detain a resident experiencing an acute

mental health episode who otherwise would have access to firearms and present a serious public safety threat upon returning home).

(5) *Kilgore v. City of South El Monte*, 3 F.4th 1186, 1189-93 (9th Cir. 2021) (discussing warrantless administrative searches for "closely regulated" businesses).

(6) *United States v. Anderson*, 101 F.4th 586, 596-97 (9th Cir. 2024) (discussing the scope of the inventory search exception to the warrant requirement).

(7) *United States v. Baker*, 58 F.4th 1109, 1116 (9th Cir. 2023) ("Because warrantless searches or seizures of abandoned property do not violate the [F]ourth [A]mendment, persons who voluntarily abandon property lack standing to complain of its search or seizure.") (quoting *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986)).

(8) *Brewster v. Beck*, 859 F.3d 1194, 1196-97 (9th Cir. 2017) (explaining the state's interest in keeping unlicensed drivers off the road is governed by the "community caretaking" exception, which permits government officials to remove vehicles from the streets when they "jeopardize public safety and the efficient movement of vehicular traffic").

(9) *Woodward v. City of Tucson*, 870 F.3d 1154, 1160 (9th Cir. 2017) ("One who has been formally evicted has no reasonable expectation of privacy in his or her previous residence" and "[b]ecause the undisputed evidence shows that [the former tenant] was aware of her eviction, this case differs from situations where the individuals claiming privacy rights either did not know they had been evicted or claimed that they still had tenancy rights.").

(10) *Verdun v. City of San Diego*, 51 F.4th 1033, 1046-48 (9th Cir. 2022) (holding that the longstanding practice of chalking tires for parking enforcement purposes does not violate the Fourth Amendment warrant requirement for searches because it fits with the "administrative search" (or "special needs") exception).

(11) *United States v. Steinman*, 130 F.4th 693, 711-17 (9th Cir. 2025) (discussing automobile exception to warrant requirement and holding that state law enforcement officer can seize suspect's automobile if officer has probable cause to believe that it contains evidence of federal crime, even though the same conduct was not criminalized under state law).

A plaintiff alleging a § 1983 claim based on an unreasonable seizure in violation of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994) ("Larez at all times had the ultimate burden of proving to the jury that she had been seized unreasonably in violation of the Fourth Amendment."); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that the plaintiff in § 1983 action "carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]"); *see also Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing the burden on the plaintiff to establish absence of imminent danger in a claim of interference with the parent-child relationship). In *Mueller*, parents brought a § 1983 suit against law enforcement officers who

removed their infant child to secure testing and treatment advised by physicians. On appeal, the Muellers argued that the jury instructions erroneously put the burden on them to show an absence of imminent danger to their child. *Mueller*, 700 F.3d at 1193. The Ninth Circuit held that "[b]ecause the Muellers' claims arise under section 1983 the jury instructions properly placed the burden on the Muellers." *Id*.; *cf. Hopkins v. Bonvicino*, 573 F.3d 752, 764 (9th Cir. 2009) (placing the burden on the defendant to show existence of exigent circumstance at the summary judgment stage).

Revised June 2025

9.20 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendants [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Fourth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Fourth Amendment, a person has the right to be free from an unreasonable seizure of [his] [her] [*other pronoun*] person. To prove the defendant [*name*] deprived the plaintiff [*name*] of this Fourth Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the defendant [*name*] seized the plaintiff's person;

Second, in seizing the plaintiff [*name*]'s person, the defendant [*name*] acted intentionally; and

Third, the seizure was unreasonable.

A defendant "seizes" the plaintiff's person when [he] [she] [*other pronoun*] restrains the plaintiff's liberty through coercion, physical force, or a show of authority. A person's liberty is restrained when, under all of the circumstances, a reasonable person would not have felt free to ignore the presence of law enforcement officers and to go about [his] [her] [*other pronoun*] business.

In determining whether a reasonable person in the plaintiff's position would have felt free to leave, consider all of the circumstances, including:

(1) the number of officers present;

(2) whether weapons were displayed;

(3) whether the encounter occurred in a public or nonpublic setting;

(4) whether the officer's manner would imply that compliance would be compelled; and

(5) whether the officers advised the plaintiff that [he] [she] [*other pronoun*] was free to leave.

[A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove that the defendant intended to [*insert the factual basis for the plaintiff's claim*]. It is not enough to prove that the defendant negligently or accidentally engaged in that action. But while the plaintiff must prove that the

defendant intended to act; the plaintiff need not prove that the defendant intended to violate the plaintiff's Fourth Amendment rights.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and with an appropriate definition of an unreasonable seizure such as Instructions 9.21-9.25.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Fourth Amendment protects "against unreasonable searches and seizures." U.S. Const. amend IV. "A 'seizure' triggering the Fourth Amendment's protections occurs only when government actors have, 'by means of physical force or show of authority, . . . in some way restrained the liberty of a citizen.'" *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989) (omissions in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)). This may occur through coercion, physical force, or a show of authority. *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997). A person's liberty is restrained when, "taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *see also Dees v. County of San Diego*, 960 F.3d 1145, 1154 (9th Cir. 2020) (holding that a seizure occurs if, in view of all circumstances surrounding incident, a reasonable person would have believed she was not free to leave).

A seizure requires the use of force with an intent to restrain. The Supreme Court has defined a seizure of a person as "a governmental termination of freedom of movement *through means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see also Torres v. Madrid,* 592 U.S. 306, 317 (2021) ("A seizure requires the use of force with intent to restrain. Accidental force will not qualify."); *Brendlin v. California*, 551 U.S. 249, 254 (2007). Thus, this instruction includes an optional definition of the term "intentionally" for use when it would be helpful to the jury. "[A] passenger struck by a bullet intended to stop the driver of a vehicle" has been seized. *Villanueva v. California*, 986 F.3d 1158, 1165 (9th Cir. 2021). In *Sanderlin v. Panighetti*, the Ninth Circuit held that the defendant seized the plaintiff when he "intentionally applied physical force, and as a result, [the plaintiff's] 'freedom of movement [was] restrained.'" 116 F.4th 905, 912 (9th Cir. 2024) (citation omitted). It did not

matter that the defendant's incapacitation of the plaintiff was limited in duration nor was it relevant that the plaintiff was able to walk away. *Id.* Further, the method of force that the defendant used—firing foam batons—incapacitated its target, and a reasonable trier of fact could conclude that by firing a projectile at plaintiff, the defendant objectively manifested an intent to restrain the plaintiff. *Id.* The defendant's subjective intent was irrelevant. *Id.*

A seizure, however, "does not occur simply because a police officer approaches an individual and asks a few questions." *Bostick,* 501 U.S. at 434; *accord United States v. Brown*, 996 F.3d 998, 1005 (9th Cir. 2021). The general rule is that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices"); *see also Dees*, 960 F.3d at 1154 (holding that a seizure occurs if, in view of all circumstances surrounding incident, a reasonable person would have believed she was not free to leave). In addition, a seizure "requires either physical force . . . or, where that is absent, submission to the assertion of authority." *California v. Hodari D*., 499 U.S. 621, 626 (1991); *Hill v. City of Fountain Valley*, 70 F.4th 507, 514 (9th Cir. 2023) ("Put another way, if a plaintiff did not comply with an officer's orders, then the officer did not seize the plaintiff."). Attempted seizures are not protected by the Fourth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 n.7 (1998) ("Attempted seizures . . . are beyond the scope of the Fourth Amendment."); *Cuevas v. City of Tulare*, 107 F.4th 894, 899 (9th Cir. 2024) (holding that a driver was not seized when the driver's vehicle became stuck in the mud on the roadside as driver attempted to flee a felony stop but was seized when officer put police canine through broken window of vehicle, instructing canine to bite driver, and when officers fired at driver after driver shot the canine and his handler). An "application of force with an objective intent merely to *disperse or exclude* persons from an area—and without any measures objectively aimed at detaining or confining them in the process—does not involve the necessary 'intent to restrain' that might give rise to a 'seizure.'" *Puente v City of Phoenix*, 123 F.4th 1035, 1052 (9th Cir. 2024) (emphasis in original) (holding that the use of chemical irritants to disperse a crowd did not constitute a seizure because there was no basis in the record for concluding that it was undertaken with the necessary objective intent to restrain).

In determining whether a reasonable person would have felt free to ignore police presence, the Ninth Circuit considers five factors: "(1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or nonpublic setting; (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter." *United States v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009) (quoting *United States v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004)). In *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), the Ninth Circuit explained that "stops" under the Fourth Amendment fall into three categories:

> First, police may stop a citizen for questioning at any time, so long as that citizen recognizes that he or she is free to leave. Such brief, "consensual" exchanges need not be supported by any suspicion that the citizen is engaged in wrongdoing, and such stops are not considered seizures. Second, the police may "seize" citizens for brief, investigatory stops. This class of stops is not consensual, and such stops must be supported by "reasonable suspicion." Finally, police stops may be full-scale arrests. These stops, of course, are seizures, and must be supported by probable cause.

Id. at 1252 (citations omitted).

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student All. v. Ray*, 699 F.3d 1053, 1071-72 (9th Cir. 2012) (citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986)). It is well settled that "negligent acts do not incur constitutional liability." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002), *abrogated on other grounds by County of Los Angeles v. Mendez*, 581 U.S. 420 (2017). Specific intent to violate a person's rights "is not a prerequisite to liability under § 1983." *Caballero v. City of Concord*, 956 F.2d 204, 206 (9th Cir. 1992) (holding the district court erred in instructing the jury that, to prevail on his § 1983 claim for false arrest, the plaintiff was required to show that the defendant specifically intended to deprive him of his constitutional rights).

> In a school setting, however, "while the traditional Fourth Amendment analysis 'is predominantly an objective inquiry,' the 'actual motivations' of officers may be considered when applying the special needs" exception to the warrant and probable cause requirements of the Fourth Amendment. *Scott v. City of San Bernardino*, 903 F.3d 943, 949 (9th Cir. 2018) (affirming summary judgment in favor of the plaintiff middle school students unreasonably arrested without probable cause). A Fourth Amendment seizure of a bystander can occur when officers intentionally use force that injures the bystander. *Villanueva v. California*, 986 F.3d 1158, 1168 (9th Cir. 2021) (citing *Nelson v. City of Davis*, 685 F.3d 867, 876 (9th Cir. 2012)).

No separate instruction is provided for a child's claim for unreasonable removal by social workers. Such action may violate the child's Fourth Amendment rights if the child is removed in the absence of either a warrant or exigent circumstances. *See*, *e.g.*, *Kirkpatrick v. County of Washoe*, 843 F.3d 784, 790-91 (9th Cir. 2016) (en banc) (holding that a government official may take child away from parents' home without judicial authorization only "when officials have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant"); *see also Demaree v. Pederson*, 887 F.3d 870, 878 (9th Cir. 2018) ("There are narrow circumstances in which the government may constitutionally remove children from their families temporarily without judicial authorization."); *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (stating the facts did not support an imminent risk of serious bodily harm, and therefore, a warrant was required).

A parent may also be able to assert a Fourteenth Amendment claim in such circumstances for interference with the parent–child relationship. *See* Instruction 9.32 (Particular Rights—Fourteenth Amendment—Due Process—Interference with Parent/Child Relationship).

If the court is able to determine as a matter of law that the plaintiff was seized, the Committee recommends the court instruct the jury accordingly and omit the portions of this instruction that define a seizure.

Revised June 2025

9.21 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Exception to Warrant Requirement—*Terry* Stop

In general, a seizure of a person for an investigatory stop is reasonable if, under all of the circumstances known to the officer[s] at the time:

(1) the officer[s] had a reasonable suspicion that the person seized was engaged in [criminal activity] [*other conduct justifying investigation, e.g., a traffic infraction*]; and

(2) the length and scope of the seizure was reasonable.

To prove the seizure in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that the officer[s] lacked reasonable suspicion to stop [him] [her] [*other pronoun*] or that the length or scope of the stop was excessive.

"Reasonable suspicion" is a particularized and objective basis for suspecting the plaintiff of criminal activity. The officer[s] [is] [are] permitted to draw on [his] [her] [*other pronoun*] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] [her] [*other pronoun*].

In determining whether the length or scope of the seizure was reasonable, consider all of the circumstances, including:

(1) the intrusiveness of the stop, such as the methods the police used, the restriction on the plaintiff's liberty, and the length of the stop;

(2) whether the methods used were reasonable under the circumstances; and

[(3) *insert other factors applicable to this case*.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instruction 9.3-9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any

single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

A police officer may conduct a brief stop for investigatory purposes when the officer has "reasonable suspicion" to believe the stopped individual is engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 23-27 (1968). An investigatory stop of a vehicle is justified under the Fourth Amendment if the officer reasonably suspects that a traffic violation has occurred. *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012). However, a traffic stop "exceeding the time needed to handle the matter for which the stop was made" violates the constitutional protection against unreasonable seizures. *Rodriguez v. United States*, 575 U.S. 348, 351 (2015). Handling the traffic stop includes checking driver's licenses, determining whether there are outstanding warrants, and inspecting the car's registration and proof of insurance. *Id*. at 355; *United States v. Steinman*, 130 F.4th 693, 703 (9th Cir. 2025). A stop is not prolonged beyond the mission of the original traffic stop where officers conduct an investigation into matters such as a criminal history check, because such an investigation "stems from the mission of the stop itself" and "is a 'negligibly burdensome precaution' necessary 'to complete the stop safely.'" *United States v. Taylor*, 60 F.4th 1233, 1241 (9th Cir. 2023) (quoting *United States v. Hylton*, 30 F.4th 842, 848 (9th Cir. 2022)). In addition, an officer may lawfully attend to related safety concerns, such as ordering the driver to exit the vehicle during a traffic stop. *Steinman*, 130 F.4th at 704. Likewise, officers do not prolong a stop by conducting a pat down search for weapons where the officers have reasonable suspicion "that the driver 'might be armed and presently dangerous.'" *Taylor*, 60 F.4th at 1242 (quoting *Arizona v. Johnson*, 555 U.S. 323, 331 (2009)). Further, there is no Fourth Amendment violation "even if officers prolonged the encounter beyond the original mission of the traffic stop," so long as the officers "had a sufficient basis to do so," which includes "reasonable suspicion of an independent offense." *Taylor*, 60 F.4th at 1242 (holding that the stop was not prolonged where "officers knew about [defendant's] traffic offenses and that he was on federal supervision for being a felon in possession, and once [defendant] stepped out of the car, the officers could clearly see [defendant's] unzipped, empty fanny pack," which officers knew from experience was commonly used to store weapons); *see Steinman*, 130 F.4th at 704, 708-10. An officer may not conduct unrelated checks (such as a dog sniff) "in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." *Rodriguez*, 575 U.S. at 355.

"Reasonable suspicion" is defined as "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Valdes-Vega*, 738 F.3d 1074, 1078 (9th Cir. 2013). The reasonable suspicion standard "is not a particularly high threshold to reach." *United States v. Bontemps*, 977 F.3d 909, 915 (9th Cir. 2020) ("[A] bulge suggestive of a firearm can be sufficient to create reasonable suspicion."). It requires only "a minimal level of objective justification." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). Because the standard is objective, an officer need not tell the individual the real reason for the stop. *United States v. Magallon-Lopez*, 817 F.3d 671, 675 (9th Cir. 2016) (holding that an officer may lie to individual about basis for *Terry* stop). An officer is permitted to draw on the officer's own "experience and specialized training to make inferences from and deductions about the cumulative information available to the officer that might otherwise elude an untrained person." *Valdes-Vega*, 738 F.3d

at 1078 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). A court must consider the totality of the circumstances when determining whether reasonable suspicion existed. *Id*. Additional information acquired through consensual questioning combined with an officer's knowledge and training can give rise to reasonable, articulable suspicion. *See United States v. Brown*, 996 F.3d 998, 1007 (9th Cir. 2021); *Taylor*, 60 F.4th at 1242 (upholding a *Terry* search where officers knew about defendant's traffic offenses and that he was on federal supervision for being felon in possession of firearm; after defendant stepped out of car, officers could clearly see defendant's unzipped, empty fanny pack, which officers knew from their experience was commonly used to store weapons). However, "avoidance of the police, standing alone, does not give rise to a particularized, reasonable suspicion that a person is committing a crime." *Liberal v. Estrada*, 632 F.3d 1064, 1078 (9th Cir. 2011) (stating that no reasonable suspicion existed where "Plaintiff was trying to avoid him by making several turns and then parking next to a dumpster in a darkened alley. [Although in] some circumstances, a suspect's unprovoked, headlong flight can support an officer's reasonable suspicion."), *abrogated in part*, *Hampton v. California*, 83 F.4th 754, 773 (9th Cir. 2023) (concluding that immunities stated in California's Government Claims Act are defenses to liability, not immunities from suit).

In cases involving multiple individuals who are searched or seized, "[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (listing several limited circumstances where suspicionless searches are permitted). However, an officer's lack of individualized suspicion does not, standing alone, make the search and seizure automatically unlawful. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1194-95 (9th Cir. 2015) ("the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful"). The reasonableness of the search and seizure must be determined in light of the circumstances. *Id*.

"[R]ace is a trait that, when *combined with others*, can reasonably lead an officer to zero in on a particular suspect," but "[r]ace is of little value in distinguishing one suspect from others, particularly where everyone in the pool of possible suspects is of the same race." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1174-75 (9th Cir. 2013).

In the case of a *Terry* stop to investigate a completed misdemeanor, the court must "consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (*e.g.*, drunken and/or reckless driving), and any risk of escalation (*e.g.*, disorderly conduct, assault, domestic violence)" when determining "whether the Fourth Amendment permits an officer to detain a suspected misdemeanant." *Johnson*, 724 F.3d at 1175.

"There is no bright-line rule to determine when an investigatory stop becomes an arrest." *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (citing *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988)). The analysis depends on the "totality of the circumstances" and is "fact-specific." *Id.*

> In looking at the totality of the circumstances, we consider both the intrusiveness of the stop, *i.e.*, the aggressiveness of the police methods and how much the plaintiff's liberty was restricted, and the justification for the use of such tactics, *i.e*., whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken. In short, we decide whether the police action constitutes a *Terry* stop or an arrest by evaluating not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances. As a result, we have held that while certain police actions constitute an arrest in certain circumstances, *e.g.*, where the "suspects" are cooperative, those same actions may not constitute an arrest where the suspect is uncooperative or the police have specific reasons to believe that a serious threat to the safety of the officers exists. The relevant inquiry is always one of reasonableness under the circumstances.

Id. (citations omitted); *see also Lyall*, 807 F.3d at 1193 n.13 (permitting the jury to conclude that detention of plaintiffs for 30-45 minutes for field identification did not transform detention from a *Terry* stop into an arrest requiring a more demanding showing of probable cause).

In *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 937-40 (9th Cir. 2020), the court held that detaining individuals based solely on reasonable suspicion or knowledge that a person was unlawfully present in the United States, which is not a crime under 8 U.S.C. §1325, is not sufficiently "premised on criminality" to justify a stop under *Terry*. *See also United States v. Cabrera*, 83 F.4th 729, 735 (9th Cir. 2023) (explaining that a stop meets the requirements of *Terry* when an officer has reasonable suspicion to believe that the defendant may have been entering the country illegally, the detention was brief, the limited restraint was reasonable under the circumstances, and the questioning was reasonably related to the justification for the stop).

Revised June 2025

9.22 Particular Rights—Fourth Amendment—Unreasonable Search—Exception To Warrant Requirement—*Terry* Frisk

In general, a search of a person is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant. [A "search warrant" is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a warrantless search of a person for weapons is permissible when an officer reasonably believes that the person is armed and dangerous.

A search for weapons is permissible if, under all the circumstances known to the officer[s] at the time:

(1) the officer[s] had a reasonable suspicion that the person was armed and presently dangerous to the officer[s] or to others; and

(2) the scope of the search was strictly limited to that which is necessary for the discovery of weapons.

"Reasonable suspicion" is a particularized and objective basis for suspecting the plaintiff is armed. The officer[s] [is] [are] permitted to draw on [his] [her] [*other pronoun*] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] [her] [*other pronoun*].

Comment

For *Terry* stops, use Instruction 9.21 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Exception to Warrant Requirement—*Terry* Stop).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer***s***"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

A police officer may conduct a patdown search to determine whether a person is carrying a weapon when the officer has a reasonable suspicion that the person is armed and presently dangerous to the officer or to others. *Terry v. Ohio*, 392 U.S. 1, 24 (1983). "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence." *Adams v. Williams*, 407 U.S. 143, 146 (1972). Thus, the scope of the search "must be strictly 'limited to that which is necessary for the discovery of

weapons which might be used to harm the officer or others nearby.'" *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993) (quoting *Terry*, 392 U.S. at 24).

A *Terry* search must be "confined in scope" to a "carefully limited search of the outer clothing . . . in an attempt to discover weapons." *United States v. Baker*, 58 F.4th 1109, 1117 (9th Cir. 2023) (citing *Terry*, 392 U.S. at 29). In *Baker*, a police officer exceeded the permissible scope of *Terry* stop and frisk by removing a car key visibly hanging from defendant's belt loop and searching for the car that corresponded to it. *Baker*, 58 F.4th at 1117-18. In *United States v. Brown*, 996 F.3d 998 (9th Cir. 2021), the court considered whether an officer conducting a *Terry* stop could lawfully reach into the detainee's pocket as the initial means of conducting a patdown search. *Id.* at 1009. The court held that even if the officer "was authorized to conduct a protective frisk, his search of [the defendant's] right pocket exceeded what *Terry* and its progeny allow." *Id*. at 1008. Thus, "[a] lawful frisk does not always flow from a justified stop." *United States v. Thomas*, 863 F.2d 622, 628 (9th Cir. 1988). Rather, "[e]ach element, the stop and the frisk, must be analyzed separately; the reasonableness of each must be independently determined." *Id*.

Reasonable suspicion is an objective standard, which requires consideration of the totality of the circumstances. *Terry*, 392 U.S. at 28.

> In assessing the totality of the circumstances, relevant considerations may include: observing a visible bulge in a person's clothing that could indicate the presence of a weapon; seeing a weapon in an area the suspect controls, such as a car; "sudden movements" suggesting a potential assault or "attempts to reach for an object that was not immediately visible"; "evasive and deceptive responses" to an officer's questions about what an individual was up to; unnatural hand postures that suggest an effort to conceal a firearm; and whether the officer observes anything during an encounter with the suspect that would dispel the officer's suspicions regarding the suspect's potential involvement in a crime or likelihood of being armed.

Thomas v. Dillard, 818 F.3d 864, 877 (9th Cir. 2016) (internal citations omitted). The reasonable suspicion standard "is not a particularly high threshold to reach." *United States v. Bontemps*, 977 F.3d 909, 915 (9th Cir. 2020) ("[A] bulge suggestive of a firearm can be sufficient to create reasonable suspicion."). While suspected domestic violence is a relevant consideration in assessing whether a person is armed and dangerous, suspicion of such a crime by itself does not provide a reason to suspect a person is armed. *Thomas*, 818 F.3d at 878; *see United States v. Taylor*, 60 F.4th 1233, 1242 (9th Cir. 2023) (upholding a *Terry* search where officers knew about defendant's traffic offenses, that he was on federal supervision for being felon in possession of firearm; after defendant stepped out of car, officers could clearly see defendant's unzipped, empty fanny pack, which officers knew from their experience was commonly used to store weapons).

Revised June 2025

9.23 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Probable Cause Arrest

In general, a seizure of a person by arrest without a warrant is reasonable if the arresting officer[s] had probable cause to believe the plaintiff has committed or was committing a crime.

To prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] [*other pronoun*] was arrested without probable cause.

"Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.

Although the facts known to the officer are relevant to your inquiry, the officer's intent or motive is not relevant to your inquiry.

Under [federal] [state] law, it is a crime to [*insert elements or description of applicable crime for which probable cause must have existed*].

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

"In the context of a § 1983 action, a Fourth Amendment violation occurs when a person is arrested 'without probable cause or other justification.'" *Vanegas v. City of Pasadena*, 46 F.4th 1159, 1164 (9th Cir. 2022) (quoting *Lacey v. Maricopa County*, 693 F.3d 896, 918 (9th Cir. 2012) (en banc)). "Probable cause exists if the arresting officers had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097-98 (9th Cir. 2013) (alteration in original) (quoting *Maxwell v. County of San Diego*, 697 F.3d 941, 951 (9th Cir. 2012)). "To determine whether an officer had probable cause

for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of legal rules. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. Probable cause is not a high bar." *District of Columbia v. Wesby*, 583 U.S. 48, 57 (2018) (internal quotations and citations omitted); *see also Miller v. City of Scottsdale*, 88 F.4th 800, 804 (9th Cir. 2023) ("For probable cause, officers may rely on information gained by other officers under the 'collective knowledge' doctrine.").

In *Devenpeck v. Alford*, the Supreme Court reiterated the Fourth Amendment standards applicable in a § 1983 claim for false arrest:

> The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed. Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest.
>
> Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." . . . "[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent."

Devenpeck v. Alford, 543 U.S. 146, 152-53 (2004) (citations omitted) (emphasis in original).

"There is probable cause for a warrantless arrest and a search incident to that arrest if, under the totality of the facts and circumstances known to the arresting officer, a prudent person would have concluded that there was a fair probability that the suspect had committed a crime." *United States v. Struckman*, 603 F.3d 731, 739 (9th Cir. 2010). "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). "'[S]tate restrictions [on arrest] do not alter the Fourth Amendment's protections,' and under federal law, 'warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution.'" *Edgerly v. City & County of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010) (second alteration in original) (quoting *Virginia v. Moore*, 553 U.S. 164, 176 (2008)). A warrantless arrest for a crime committed in the presence of an arresting officer is permitted, even if the offense, as a matter of

state law, was one for which the officers should have issued a summons rather than made an arrest. *Moore*, 553 U.S. at 167-72.

Absent exigent circumstances, however, authority to make a warrantless arrest based on probable cause ends at the threshold of a private dwelling, and police may not make a warrantless, nonconsensual entry into a suspect's residence to make a felony arrest. *Payton v. New York*, 445 U.S. 573, 590 (1980); *see also Hopkins v. Bonvicino*, 573 F.3d 752, 773 (9th Cir. 2009) (stating that police officers may not execute a warrantless arrest in a home unless they have both probable cause and exigent circumstances). "[A] 'person may not be arrested, or must be released from arrest, if previously established probable cause has dissipated.'" *Nicholson* v. *City of Los Angeles*, 935 F.3d 685, 691 (9th Cir. 2019) ("[I]t was soon apparent to the officers that the teenagers were unarmed, posed no threat to anyone, and were not engaged in any criminal activity.").

In *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 940-41 (9th Cir. 2020), the Ninth Circuit explained that to determine whether a *Terry* stop has escalated into a full-blown arrest, courts evaluate the severity of the intrusion, the aggressiveness of the officer's actions, and the reasonableness of the officer's methods under the circumstances.

Additionally, in a school setting, "while the traditional Fourth Amendment analysis 'is predominantly an objective inquiry,' the 'actual motivations' of officers may be considered when applying the special needs" exception to the warrant and probable cause requirements of the Fourth Amendment. *Scott v. City of San Bernardino*, 903 F.3d 943, 949 (9th Cir. 2018) (affirming summary judgment in favor of the plaintiff middle school students unreasonably arrested without probable cause).

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9.24 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Detention During Execution of Search Warrant

In general, a law enforcement officer may detain [a person in the immediate vicinity] [an occupant] of a premises during a search of that premises authorized by a search warrant so long as the officer detains the person in a reasonable manner and does not detain the person any longer than the time it takes to complete the search.

To prove the seizure in this case was unreasonable, the plaintiff [*name*] must prove by a preponderance of the evidence that [he] [she] [*other pronoun*] was detained in an unreasonable manner or for an unreasonable period of time after the search was completed or both.

In determining whether the officer[s] detained the plaintiff [*name*] unreasonably in this case, consider all of the circumstances known to the officer[s] on the scene, including:

(1) the severity of the suspected crime or other circumstances that led to the search warrant;

(2) whether the plaintiff was the subject of the investigation that led to the search warrant;

(3) whether the plaintiff posed an immediate threat to the safety of the officer[s] or to others or to the ability of the officer[s] to conduct the search safely;

(4) whether the plaintiff was actively resisting arrest or attempting to flee;

(5) whether the detention of the plaintiff was unnecessarily painful, degrading, prolonged, or involved an undue invasion of privacy;

(6) whether the detention of the plaintiff facilitated the orderly completion of the search; and

[(7) *insert other factors particular to the case.*]

Under the Fourth Amendment, an officer may use only such force to detain a person as is "objectively reasonable" under the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

This instruction is based on the district court's jury instructions approved in *Muehler v. Mena*, 544 U.S. 93, 104 n.2, 108 (2005) (Stevens, J., concurring). In *Muehler*, the Supreme Court reiterated its holding in *Michigan v. Summers*, 452 U.S. 692 (1981), that "officers executing a search warrant for contraband have the authority 'to detain the occupants of the premises while a proper search is conducted.'" *Id*. at 98. The Court noted that *Summers* had

> posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search," as detainees' "self-interest may induce them to open locked doors or locked containers to avoid the use of force" . . . Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention.

Muehler, 544 U.S. at 98-99 (citations omitted); *see also Blight v. City of Manteca*, 944 F.3d 1061, 1068 (9th Cir. 2019) ("The reasons for such a detention are particularly applicable in the context of a narcotics search because there is a heightened risk that an occupant could destroy evidence."). *Summers* applies only to search warrants and does not give law enforcement officers the categorical authority to detain home occupants incident to the execution of an arrest warrant. *Sharp v. County of Orange*, 871 F.3d 901, 915 (9th Cir. 2017) (noting, however, that "entry into a home for the purpose of arresting an occupant can be a dangerous effort, and officers ought to have reasonable tools at their disposal to take command of the situation to protect their own safety and the safety of others"). Whether such a detention is authorized depends on the particular circumstances confronting the officer, such as the need to detain "occupants to stabilize the situation while searching for the subject of an arrest warrant or conducting a lawful protective sweep of the premises." *Sharp*, 871 F.3d at 915; *see also Blight*, 944 F.3d at 1068 (detention of the suspect's elderly mother for duration of the search of his property was reasonable under Fourth Amendment, notwithstanding her age, lack of evidence linking her to suspect's marijuana operation, and length of time of detention, where the detainee was never personally searched or interrogated, and detention lasted no longer than one hour).

After *Muehler*, the Ninth Circuit noted in *Dawson v. City of Seattle* that "[t]o determine whether a detention incident to a search is constitutionally reasonable, [a court should] balance the law enforcement interests served by the detention against the public's privacy interests." 435

F.3d 1054, 1065-66 (9th Cir. 2006). "[D]etaining a building's occupants serves at least three law enforcement interests: first, detention prevents a suspect from fleeing before the police discover contraband; second, detention minimizes the risk that an officer or an occupant might be harmed during the search; and third, detention often expedites a search." *Id*. at 1066. The court held:

> [T]he duration of a detention may be coextensive with the period of a search and require no further justification. The police do not, however, have unfettered authority to detain a building's occupants in any way they see fit. *Muehler* confirms an officer's authority to detain a building's occupants during a search so long as the officer conducts the detention in a reasonable manner.

Id. (citations omitted); *see also Howell v. Polk*, 532 F.3d 1025, 1026 (9th Cir. 2008) (per curiam) (holding that whether "knock-and-announce" search warrant was unreasonably executed was a jury question to be determined under the totality of the circumstances).

A spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. In *Bailey v. United States*, 568 U.S. 186, 201 (2013), the Supreme Court concluded that because the rule announced in *Summers* "grants substantial authority to police officers to detain outside of the traditional rules of the Fourth Amendment, it must be circumscribed." The Court decided "[a] spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant." *Id.* (holding that detention of a person one mile from premises, who had left premises before search began, was not sufficiently connected to search of premises). "Confining an officer's authority to detain under *Summers* to the immediate vicinity of a premises to be searched is a proper limit because it accords with the rationale of the rule." *Id.* Thus, as in *Bailey,* when law enforcement waits to stop or detain a suspect until after he or she has left the search location, "the lawfulness of detention is controlled [not by *Summers*, but] by other standards," namely, probable cause or reasonable suspicion. *Id.* at 202; *see also United States v. Ramirez*, 976 F.3d 946, 956 (9th Cir. 2020) (holding a Fourth Amendment violation occurred where "[i]t was only by posing as police officers investigating a fictitious home burglary that the agents convinced Ramirez to drive home, thereby creating the authority to seize him and his car that did not otherwise exist at the time").

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9.25 Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force

In general, a seizure of a person is unreasonable under the Fourth Amendment if a police officer uses excessive force [in making a lawful arrest] [and] [or] [in defending [himself] [herself] [others] [*other pronoun*]] [and] [or] [in attempting to stop a fleeing or escaping suspect]. Therefore, to establish an unreasonable seizure in this case, the plaintiff [*name*] must prove by a preponderance of the evidence that the officer[s] used excessive force.

Under the Fourth Amendment, a police officer may use only such force as is "objectively reasonable" under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer's subjective intent or motive is not relevant to your inquiry.

In determining whether the officer[s] used excessive force in this case, consider all of the circumstances known to the officer[s] on the scene, including:

(1) the nature of the crime or other circumstances known to the officer[s] at the time force was applied;

(2) whether the [plaintiff] [decedent] posed an immediate threat to the safety of the officer[s] or to others;

[(3) whether the plaintiff was actively resisting arrest or attempting to evade arrest by flight;]

(4) the amount of time the officer[s] had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;

(5) the relationship between the need for the use of force and the amount of force used;

(6) the extent of the [plaintiff's] [decedent's] injury;

(7) any effort made by the officer[s] to temper or to limit the amount of force;

(8) the severity of the security problem at issue;

[(9) the availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;]]

[(10) the number of lives at risk (motorists, pedestrians, police officers) and the parties' relative culpability; *i.e.*, which party created the dangerous situation, and which party is more innocent;]

[(11) whether it was practical for the officer[s] to give warning of the imminent use of force, and whether such warning was given;]

[(12) whether the officer[s] [was] [were] responding to a domestic violence disturbance;]

[(13) whether it should have been apparent to the officer[s] that the person [he] [she] [*other pronoun*] used force against was emotionally disturbed;]

[(14) whether a reasonable officer would have or should have accurately perceived a mistaken fact;]

[(15) whether there was probable cause for a reasonable officer to believe that the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm; and]

["Probable cause" exists when, under all of the circumstances known to the officer[s] at the time, an objectively reasonable police officer would conclude there is a fair probability that the plaintiff has committed or was committing a crime.] [and]

[(16) *insert other factors particular to the case.*]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and in conjunction with Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

In general, all claims of excessive force, whether deadly or not, should be analyzed under the objective reasonableness standard of the Fourth Amendment as set forth in *Lombardo v. City*

of St. Louis, 594 U.S. 464, 467 (2021), *County of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017), *Scott v. Harris*, 550 U.S. 372, 381-85 (2007), *Graham v. Connor*, 490 U.S. 386, 397 (1989), and *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985); *see also Lombardo*, 594 U.S. at 467 n.2 (explaining that the objective reasonableness standard applies whether the excessive force claim is brought under Fourth Amendment or Fourteenth Amendment). The objective reasonableness of such conduct is assessed by balancing the nature and quality of the intrusion on Fourth Amendment rights against the government's countervailing interest in the force used. *Estate of Aguirre v. County of Riverside (Aguirre I)*, 29 F.4th 624, 628 (9th Cir. 2022) (quoting *Graham*, 490 U.S. at 396); *see Mendez*, 581 U.S. at 427 ("[D]etermining whether the force used to effect a particular seizure is reasonable requires balancing of the individual's Fourth Amendment interests against the relevant government interests." (internal quotation marks omitted) (quoting *Graham*, 490 U.S. at 396)).

In assessing "whether an officer's actions were objectively reasonable, we consider: '(1) the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted, (2) the government's interest in the use of force, and (3) the balance between the gravity of the intrusion on the individual and the government's need for that intrusion.'" *Williamson v. City of National City*, 23 F.4th 1146, 1151 (9th Cir. 2022) (quoting *Rice v. Morehouse*, 989 F.3d 1112, 1121 (9th Cir. 2021)). "Our analysis must make 'allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Williamson*, 23 F.4th at 1151. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396; *see Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) ("A court must make this determination from the perspective of a reasonable officer on the scene, including what the officer knew at the time, not with the 20/20 vision of hindsight."); *see also Demarest v. City of Vallejo*, 44 F.4th 1209, 1226 (9th Cir. 2022) ("[A]n 'officer's use of force cannot be deemed excessive based on facts that he [or she] reasonably would not have known or anticipated.'" (quoting *Lowry v. City of San Diego*, 858 F.3d 1248, 1256 (9th Cir. 2017) (en banc)). Further, the "analysis is not static, and the reasonableness of force may change as the circumstances evolve." *Hyde v. City of Willcox*, 23 F.4th 863, 870 (9th Cir. 2022); *see also Andrews v. City of Henderson*, 35 F.4th 710, 715 (9th Cir. 2022) ("The detectives' interest in using significant force against Andrews is undermined by their knowledge that he was unarmed; his lack of any aggressive, threatening, or evasive behavior; and the detectives' failure to provide any prior warning or consider less intrusive alternatives before forcibly tackling him to the ground."). An officer's subjective intent or motivation is not relevant to the reasonableness inquiry. *See Graham*, 490 U.S. at 397; *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1116 (9th Cir. 2017); *see Singh v. City of Phoenix*, 124 F.4th 746, 751-54 (9th Cir. 2024) (explaining that although the plaintiff failed to comply with the officers' commands to drop a knife, and the plaintiff had established a plausible but not conclusive constitutional violation, the Ninth Circuit's decision in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011) clearly established that the officer's use of deadly "force was objectively unreasonable in the circumstances," and further explaining that, in *Glenn*, a number of other circumstances weighed "against deeming [the plaintiff] 'an immediate threat to the safety of the officers or others,'" including that he "was 'not in possession of any guns,' that he

was 'not in a physical altercation with anyone,'" and he "did not attack the officers . . . [nor] did he even threaten to attack any of them.") (quoting *Glenn*, 673 F.3d at 873).

In assessing the governmental interest in the use of force, the jury should consider the three non-exclusive factors set forth by the Supreme Court in *Graham v. Connor*. *See Williamson*, 23 F.4th at 1153; *Rice*, 989 F.3d at 1121. These factors are commonly referred to as *Graham* factors. *See*, *e.g.*, *Aguirre I*, 29 F.4th at 628. The three *Graham* factors are: (1) the severity of the crime at issue; (2) whether the individual posed an immediate threat to the safety of the officers or others; and (3) whether the individual was actively resisting arrest or attempting to evade arrest by flight. *Graham*, 490 U.S. at 396; *Seidner v. de Vries*, 39 F.4th 591, 599 (9th Cir. 2022); *see also Aguirre I*, 29 F.4th at 628 (describing the second *Graham* factor as "the level of immediate threat [the individual] posed to the officer or others"). The Ninth Circuit has repeatedly emphasized that "the most important *Graham* factor" is whether the individual posed an immediate threat to the safety of the officers or others. *Bernal v. Sacramento Cnty. Sheriff's Dep't*, 73 F.4th 678, 692 (9th Cir. 2023) (characterizing the threat to the officer as "minimal and quickly mitigated" when the officer was standing momentarily behind an operational vehicle); *see*, *e.g.*, *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc). The importance of this second *Graham* factor was highlighted by the Ninth Circuit when it held that the immediacy of the threat of a person pointing a replica gun at officers outweighed the bulk of *Graham* factors favoring the person fatally shot. *Estate of Strickland v. Nevada County*, 69 F.4th 614, 621-22 (9th Cir. 2023) (distinguishing the case from other replica/toy gun cases on the basis that in those cases the persons holding the toy/replica guns did not point it at officers and the courts' analysis did not hinge on the misidentification of the gun). When faced with a threat, officers "need not avail themselves of the least intrusive means of responding to an exigent situation." *Napouk v. L. V. Metro. Police Dep't*, 123 F.4th 906, 919 (9th Cir. 2024) (declining "to create a rule by which officers have a duty to indefinitely retreat when faced with an immediate threat" (quoting *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994)).

"Other factors, in addition to the three *Graham* factors, may be pertinent in deciding whether a use of force was reasonable under the totality of the circumstances." *Nehad v. Browder*, 929 F.3d 1125, 1137 (9th Cir. 2019); *see also Mattos*, 661 F.3d at 441 ("[W]e examine the totality of the circumstances and consider whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." (internal quotation marks omitted)).

In *Kingsley*, the Supreme Court listed several additional factors that are relevant to an excessive force inquiry. *See* 576 U.S. at 397. The Supreme Court has referred to these factors as the *Kingsley* factors. *See*, *e.g.*, *Lombardo*, 594 U.S. at 466-67. The *Kingsley* factors are:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Lombardo, 594 U.S. at 467 (quoting *Kingsley*, 576 U.S. at 397); *accord Demarest*, 44 F.4th at 1225.

Additional factors set forth by the Ninth Circuit in other cases include:

1. the type and amount of force used, *see Chinaryan v. City of Los Angeles*, 113 F.4th 888, 907 (9th Cir. 2024) ("The district court's instruction on excessive force, adapted from the Manual of Model Civil Jury Instructions, provided the general reasonableness standard and listed eight case-relevant factors to consider, including 'the type and amount of force used.' This instruction sufficiently covered the officers' use of high-risk tactics in this case."); *Seidner*, 39 F.4th at 596; *Williamson*, 23 F.4th at 1151-52 ("The nature and degree of physical contact are relevant to this analysis, as are the 'risk of harm and the actual harm experienced.'" (citations omitted)); *see also Lombardo*, 594 U.S. at 467 (listing as a factor: "the relationship between the need for the use of force and the amount of force used" (quoting *Kingsley*, 576 U.S. at 397));

2. "whether 'less intrusive alternatives' were available to law enforcement," *Seidner*, 39 F.4th at 599; *see Nehad*, 929 F.3d at 1138 (listing as a factor: "the availability of alternative methods of capturing or subduing a suspect" (quoting *Smith v. City of Hemet*, 394 F.3d 689, 703 (9th Cir. 2005))); *see also Lombardo*, 594 U.S. at 467 (listing as a factor: "any effort made by the officer to temper or to limit the amount of force" (quoting *Kingsley*, 576 U.S. at 397)); *Nehad*, 929 F.3d at 1138 ("Police need not employ the least intrusive means available; they need only act within the range of reasonable conduct."); *Rice*, 989 F.3d at 1124 ("officers 'need not avail themselves of the least intrusive means of responding to an exigent situation'");

3. "the number of lives at risk" and the parties' "relative culpability," *Mattos*, 661 F.3d at 441 (quoting *Scott*, 550 U.S. at 384); *see Williamson*, 23 F.4th at 1153 ("Where an arrestee's conduct risks the lives or safety of innocent bystanders, the court also considers her relative culpability under the second [*Graham*] factor.");

4. whether the officers independently evaluated the situation when they arrived, *see Rice*, 989 F.3d at 1122 ("[O]fficers have a duty to independently evaluate a situation when they arrive, if they have an opportunity to do so.");

5. whether the individual "was given 'proper warnings' before force was used," *Seidner*, 39 F.4th at 599 (quoting *Rice*, 989 F.3d at 1122); *see Nehad*, 929 F.3d at 1137 ("Whether an officer warned a suspect that failure to comply with the officer's commands would result in the use of force is another relevant factor in an excessive force analysis."); *see also Aguirre I*, 29 F.4th at 628 ("Before using deadly force, law enforcement must, 'where feasible,' issue a warning." (quoting *Garner*, 471 U.S. at 11-12));

6. whether the officers were responding to a domestic violence disturbance, *see George v. Morris*, 736 F.3d 829, 839 (9th Cir. 2013) ("Domestic violence situations are 'particularly dangerous' because 'more officers are killed or injured on domestic violence calls than on any other type of call.'" (quoting *Mattos*, 661 F.3d at 450));

7. "whether it should have been apparent to officers that the person they used force against was emotionally disturbed," *Tabares v. City of Huntington Beach*, 988 F.3d 1119, 1126

(9th Cir. 2021) (quoting *Glenn*, 673 F.3d at 872); *see Crawford v. City of Bakersfield*, 944 F.3d 1070, 1078 (9th Cir. 2019) ("[W]hether the suspect has exhibited signs of mental illness is one of the factors the court will consider in assessing the reasonableness of the force used.");

8. where "an officer's particular use of force is based on a mistake of fact, . . . whether a reasonable officer would have or *should* have accurately perceived that fact," *Nehad*, 929 F.3d at 1133 (emphasis in original); *Torres v. City of Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011) ("[U]nder *Graham*, whether the mistake was an *honest* one is not the concern, only whether it was a *reasonable* one."); *Napouk*, 123 F.4th at 916 (concluding no rational jury could find officers' mistake of fact was unreasonable where no facts "suggest[ed] circumstances by which the officers should have known the object, which was made to look like a knife, was not actually a knife"); *see also Estate of Aguirre v. County of Riverside (Aguirre II)*, 131 F.4th 702, 709-10 (9th Cir. 2025) (rejecting the defendant officer's argument that his Rule 50(b) motion for judgment as a matter of law "turned on the question of 'reasonable mistake' that did not reach the jury," and concluding that the jury instructions established that the jury considered and rejected his argument that "any mistake was reasonable").

9. whether the police officer failed "to identify himself or herself as such," *Nehad*, 929 F.3d at 1138;

10. when the use of deadly force is at issue, whether the officer has probable cause to believe that the individual poses a significant threat of death or serious physical injury to the officer or others, *see Tabares*, 988 F.3d at 1126 ("Under federal law, deadly force can be reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." (internal quotation marks omitted) (quoting *Garner,* 471 U.S. at 3)); *see also Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017) ("use of deadly force against a non-threatening suspect is unreasonable" (citing *Garner,* 471 U.S. at 11-12)); *Villanueva v. California*, 986 F.3d 1158 (9th Cir. 2021) (holding that an officer who shoots at a slow-moving car when the officer can easily step out of the way violates the Fourth Amendment); and

11. when deadly force is at issue, how quickly the officer used deadly force after encountering the individual, *see A. K. H v. City of Tustin*, 837 F.3d 1005, 1012 (9th Cir. 2016) (determining that "perhaps most important" was that the officer at issue "escalated to deadly force very quickly").

The jury must consider "the type and amount of force," *Seidner*, 39 F.4th at 596, which may be quantified. "Some uses of force can be quantified categorically. The best example is shooting a firearm, which by definition is 'deadly force': force that 'creates a substantial risk of causing death or serious bodily injury.'" *Id.* "Most often, however, quantifying a particular use of force requires consideration of the 'specific factual circumstances' surrounding the event." *Id.* "For example, [the Ninth Circuit] has classified deployment of a police dog as both a severe use of force and a moderate use of force depending on the suspect's condition when the dog was ordered to attack, how long the attack lasted, and whether the dog was within its handler's control." *Id.*; *see also Rosenbaum v. City of San Jose*, 107 F.4th 919, 922 (9th Cir. 2024)

(holding that whether officers acted reasonably in permitting a police dog to hold a bite for 20 seconds after a suspect had fully surrendered and was under officer control presents a triable question to be decided by a jury).

Similarly, "physical contact like hitting and shoving" and "roadblocks" are each "a type of force that must be quantified in reference to the surrounding circumstances." *Seidner*, 39 F.4th at 597. In *Seidner*, the Ninth Circuit held that an officer who used his patrol car to block a suspect fleeing on his bicycle had used "intermediate force," defined as "force *capable* of inflicting significant pain and causing serious injury." *Id.* at 599. The court declined to create "a blanket rule that using a vehicle to block the path of a quickly moving cyclist, without allowing sufficient distance for the cyclist to avoid a collision, constitutes deadly force," because "[n]ot all roadblocks used [to stop cyclists] present the same level of risk, and the extent of the 'risk of harm and the actual harm experienced' are essential inquiries in determining whether an officer's actions were reasonable under the Fourth Amendment." *Id.*

The "deprivation of necessary medical care" may also constitute a violation of the Fourth Amendment. *D'Braunstein v. Cal. Highway Patrol*, 131 F.4th 764, 769 (9th Cir. 2025) ("We have also said that for persons who are detained by police in the course of an arrest, the Fourth Amendment's prohibition on the use of excessive force protects against the deprivation of necessary medical care.") (citing *Tatum v. City & County of San Francisco*, 441 F.3d 1090, 1098-99 (9th Cir. 2006)). "[I]t is clearly established that officers must seek to provide an injured detainee or arrestee with objectively reasonable medical care in the face of medical necessity creating a substantial and obvious risk of serious harm, including by summoning medical assistance." *Id.* at 771. Officers need not "provide what hindsight reveals to be the most effective medical care for an arrested suspect." *Id.* at 769 (quoting *Tatum*, 441 F.3d at 1098). The failure to provide necessary medical care may also violate an arrestee's Fourteenth Amendment rights as a pretrial detainee. In *D'Braunstein*, the Ninth Circuit held that a police officer was not entitled to qualified immunity from the plaintiff's Fourth and Fourteenth Amendment claims when the officer knew that the plaintiff was in a serious car accident but failed to summon medical care because she believed the plaintiff was on drugs. *Id.* at 766-68. In evaluating whether a reasonable jury could conclude that the officer violated the plaintiff's clearly established rights, the court stated that "the common underlying constitutional question reflected in Fourth and Fourteenth Amendment case law is whether an officer's provision (or deprivation) of medical care was objectively unreasonable." *Id.* at 769.

If deadly force is used, it is excessive unless the officer has "probable cause to believe that the suspect poses a significant threat of death or serious physical injury." *Garner*, 471 U.S. at 3. By contrast, "the use of intermediate force must be justified by more than 'a minimal interest' held by the government." *Seidner*, 39 F.4th at 600. "[A] suspect's previous violent conduct does not justify non-trivial force where the suspect poses no immediate safety threat." *Andrews*, 35 F.4th at 719.

The first *Graham* factor, the "severity of the crime at issue," should be modified as appropriate when officers are acting in a "community caretaking capacity" rather than to counter crime. *Ames v. King County*, 846 F.3d 340, 349 (9th Cir. 2017). In such circumstances, "the

better analytical approach" focuses the inquiry on the seriousness of the situation that gives rise to the community-caretaking function. *See id.* Also, with respect to the severity-of-the-crime *Graham* factor, the factor slightly weighs in favor of defendant officers who used force when the plaintiff was not involved in a crime but nevertheless had information useful to address an unfolding emergency of a threatened school shooting. *Bernal v. Sacramento Cnty. Sheriff's Dep't*, 73 F.4th 678, 694 (9th Cir. 2023) (citing *Ames*, 846 F.3d at 349). In *Sabbe v. Washington County Board of Commissioners*, 84 F.4th 807, 819-25 (9th Cir. 2023), the Ninth Circuit applied the *Graham* factors to law enforcement's use of an armored personnel carrier, which weighs several times as much as a typical police cruiser, to collide with a suspect's pickup in the hope of stopping it. "Because a reasonable jury could decide that Sabbe did not pose an imminent threat to the officers or to others at that point, and that the balance of the other factors also favors Plaintiff, a jury could decide that the second PIT maneuver constituted the use of excessive force within the meaning of the Fourth Amendment." *Sabbe*, 84 F.4th at 825; *see also Hyer v. City & County of Honolulu*, 118 F.4th 1044, 1061 (9th Cir. 2024) (in assessing the severity of the crime at issue—which is the first of the three primary *Graham* factors for determining the strength of the government's interests—the courts look at whether the circumstances of the case warrant the conclusion that the suspect was a particularly dangerous criminal or that his offense was especially egregious, which may entail consideration of, first, the time that had elapsed between the alleged crimes, and second, the fact that the crimes were not the reason the police initially sought to apprehend the suspect).

It is not error for a trial court to decline to single out one factor in the reasonableness inquiry, when the instructions properly charge the jury to consider all of the circumstances that confronted the officer. *See Lam v. City of San Jose*, 869 F.3d 1077, 1087 (9th Cir. 2017) (affirming district court declining to give an instruction as to the officers' "bad tactics"). It is not error for a trial court to decline to instruct explicitly on the availability of "alternative courses of action" when the instructions as a whole "fairly and adequately cover[ed] the issues presented." *Brewer v. City of Napa*, 210 F.3d 1093, 1096-97 (9th Cir. 2000).

In *County of Los Angeles v. Mendez*, 581 U.S. 420, 427 (2017), the Supreme Court rejected the Ninth Circuit's "provocation rule" and abrogated *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). The provocation rule had permitted a law enforcement officer to be held responsible for an otherwise reasonable use of force when the officer intentionally or recklessly provoked a violent confrontation through a warrantless entry that was itself an independent Fourth Amendment violation.

Revised June 2025

9.25A Particular Rights—Sixth Amendment—Right to Compulsory Process—Interference with Witness

Under the Sixth Amendment, a criminal defendant has the right to have compulsory process for obtaining witnesses in his or her favor. This right includes both the right to offer the testimony of witnesses, and to compel their attendance, if necessary. The plaintiff asserts [*name*] that the defendant [*name*] interfered with this right and caused a favorable witness not to testify in the plaintiff's trial.

To prove that the defendant [*name*] unlawfully interfered with the plaintiff [*name*]'s right to present testimony, the plaintiff [*name*] must prove by a preponderance of the evidence:

First, that the defendant [*name*]'s conduct substantially interfered with the plaintiff [*name*]'s witness;

Second, that the defendant [*name*]'s conduct caused the witness not to testify; and

Third, that the witness' testimony would have been favorable and material.

Testimony is material if it would have been sufficient to cast doubt on the government's case.

[Testimony could have been material to the plaintiff [*name*]'s trial even if the plaintiff [*name*] was not convicted.]

Comment

This instruction is based on *Park v. Thompson*, 851 F.3d 910 (9th Cir. 2017). As discussed in *Park*, the Ninth Circuit has not yet decided what the appropriate standard is to satisfy the causation element of this claim. *See id.* at 921-22 (comparing the various circuit court tests, including "plausible showing," "plausible nexus," "but for," and "decisive factor"). Although the Committee recognizes that trial courts may need to instruct juries regarding the standard for proving causation, it takes no position on the appropriate test pending further guidance from the Ninth Circuit or the Supreme Court.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

9.26 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Excessive Force

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." To establish the defendant [*name*] deprived the plaintiff [*name*] of this Eighth Amendment right, the plaintiff [*name*] must prove the following elements by a preponderance of the evidence:

First, the defendant [*name*] used excessive and unnecessary force under all of the circumstances;

Second, the defendant [*name*] acted maliciously and sadistically for the purpose of causing harm, and not in a good faith effort to maintain or restore discipline; and

Third, the act[s] of the defendant [*name*] caused harm to the plaintiff [*name*].

In determining whether these three elements have been met in this case, consider the following factors:

(1) the extent of the injury suffered;

(2) the need to use force;

(3) the relationship between the need to use force and the amount of force used;

(4) any threat reasonably perceived by the defendant; and

(5) any efforts made to temper the severity of a forceful response, such as, if feasible, providing a prior warning or giving an order to comply.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and when the plaintiff is a convicted prisoner. For claims of sexual assault when the plaintiff is a convicted prisoner, use Instruction 9.26A (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Sexual Assault). When the plaintiff is a pretrial detainee, see Instruction 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force). When the plaintiff is not in custody, use Instruction 9.25 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Excessive Force). When the

prisoner claims unconstitutional conditions of confinement, including inadequate medical care, use Instruction 9.27 (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim re Conditions of Confinement/Medical Care), which sets out the applicable deliberate indifference standard.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Eighth Amendment prohibits cruel and unusual punishment in penal institutions. *Wood v. Beauclair*, 692 F.3d 1041,1045 (9th Cir. 2012). "[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Bearchild v. Cobban*, 947 F.3d 1130, 1140 (9th Cir. 2020) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)). The focus of this inquiry is therefore not on officer intent, but on the lack of any penological justification for harming the inmate. *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018). "Whether a particular event or condition in fact constitutes 'cruel and unusual punishment' is gauged against 'the evolving standards of decency that mark the progress of a maturing society.'" *Schwenk v. Hartford*, 204 F.3d 1187, 1196 (9th Cir. 2000) (quoting *Hudson*, 503 U.S. at 8.

In excessive force cases, the relevant inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hughes v. Rodriguez*, 31 F.4th 1211, 1221 (9th Cir. 2022) (quoting *Hudson*, 503 U.S. at 7). The Ninth Circuit applies a five factor test as set forth in *Hudson* "to determine whether the use of force was malicious and sadistic:" "(1) the extent of injury suffered by an inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any efforts made to temper the severity of a forceful response." *Hughes,* 31 F.4th at 1221; *see also Furnace v. Sullivan*, 705 F.3d 1021, 1029 (9th Cir. 2013) ("Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.").

The "malicious and sadistic" standard applies when prison guards "use force to keep order . . . [w]hether the prison disturbance is a riot or a lesser disruption[.]" *Hudson*, 503 U.S. at 6 (citing *Whitley v. Albers*, 475 U.S. 312, 321-22 (1986)); *see also LeMaire v. Maass*, 12 F.3d 1444, 1452-53 (9th Cir. 1993) (holding malicious and sadistic "heightened state of mind" controlling when applied to any "measured practices and sanctions either used in exigent circumstances or imposed with considerable due process and designed to alter [the] manifestly murderous, dangerous, uncivilized, and unsanitary conduct" of repeat offenders housed in

disciplinary segregation); *Jordan v. Gardner*, 986 F.2d 1521, 1528 (9th Cir. 1993) (en banc) (noting that a "greater showing" than deliberate indifference is required "in the context of a prison-wide disturbance or an individual confrontation between an officer and prisoner," when "corrections officers often must act immediately and emphatically to defuse a potentially explosive situation"). Although *de minimis* use of physical force is insufficient to prove an Eighth Amendment violation, *Hudson*, 503 U.S. at 9-10, a prison guard's use of force violates the Eighth Amendment when the guard acts maliciously for the purpose of causing harm whether or not significant injury is evident. *See Wilkins v. Gaddy*, 559 U.S. 34, 36-38 (2010) ("An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury.").

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 ("Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement."). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed "policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain "substantial evidence showing [that the prison's] policies are an unnecessary or unjustified response to problems of jail security." *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that "two conditions" inform whether the deference instruction should be given when prisoners assert Eighth Amendment claims challenging their treatment in prison, namely "whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs").

In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing "substantial evidence" in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 ("In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters" (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at

648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter,* 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide.'" *Fierro*, 39 F.4th at 648-49 (citing *Coston*, 13 F.4th at 735).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. *See Fierro*, 39 F.4th 648. n.6 ("This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth Amendment."). A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 576 U.S. at 397 (quoting *Bell v. Wolfish*, 441 U.S. at 540). *See also Bell v. Williams*, 108 F.4th 809, 828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail's security interests for pretrial detainee's claims under the ADA and Rehabilitation Act: "consider a detention facility's

legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it.").

The Eighth Amendment applies equally to convicted prisoners who are inside the walls of a penal institution and convicted prisoners, such as escapees, who are outside the walls of a penal institution. *See Hughes v. Rodriguez*, 31 F.4th 1211, 1220-21 (9th Cir. 2022).

Revised June 2025

9.26A Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Sexual Assault

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." To prove the defendant [*name*] deprived the plaintiff [*name*] of this Eighth Amendment right, the plaintiff [*name*] must establish the following elements by a preponderance of the evidence:

First, the defendant [*name*] acted under color of law;

Second, the defendant [*name*] acted without penological justification; and

Third, the defendant [*name*] [touched the prisoner in a sexual manner] [engaged in sexual conduct for the defendant's own sexual gratification] [acted for the purpose of humiliating, degrading, or demeaning the prisoner].

Comment

"We now hold that a prisoner presents a viable Eighth Amendment claim where he or she proves that a prison staff member, acting under color of law and without legitimate penological justification, touched the prisoner in a sexual manner or otherwise engaged in sexual conduct for the staff member's own sexual gratification, or for the purpose of humiliating, degrading, or demeaning the prisoner." *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020).

"Sexual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment" as "sexual contact between a prisoner and a prison guard serves no legitimate role and is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" *Wood v. Beauclair*, 692 F.3d 1041, 1046, 1050 (9th Cir. 2012) (internal citations omitted). Because there is no "legitimate penological purpose" served by sexual assault, the subjective component of "malicious and sadistic intent" is presumed if an inmate can demonstrate that a sexual assault occurred. *Bearchild,* 947 F.3d at 1143 *(*quoting *Wood*, 692 F.3d at 1050-51. Further, "our cases have clearly held that an inmate need not prove that an injury resulted from sexual assault in order to maintain an excessive force claim under the Eighth Amendment." *Bearchild*, 947 F.3d at 1144 ("Any sexual assault is objectively 'repugnant to the conscience of mankind' and therefore not *de minimis* for Eighth Amendment purposes."); *Schwenk v. Hartford*, 204 F.3d 1187, 1197 (9th Cir. 2000) ("A sexual assault on an inmate by a guard—regardless of the gender of the guard or of the prisoner—is deeply offensive to human dignity."). Allegations of sexual harassment that do not involve touching have routinely been

found "not sufficiently serious" to sustain an Eighth Amendment claim. *Austin v. Terhune*, 367 F.3d 1167, 1172 (9th Cir. 2004) ("[Officer] was in an elevated, glass-enclosed control booth when he exposed himself to [plaintiff] and this isolated incident lasted for a period of no more than 30–40 seconds. [Officer] never physically touched [plaintiff].").

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

Revised June 2025

9.27 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim Re Conditions of Confinement/Medical Care

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." This includes the right to [*specify particular constitutional interest*]. To prove the defendant [*name*] deprived the plaintiff [*name*] of this right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, [the plaintiff [*name*] faced a substantial risk of serious harm] [the plaintiff [*name*] faced a serious medical need];

Second, the defendant [*name*] was deliberately indifferent to that [risk] [medical need], that is, the defendant [*name*] knew of it and disregarded it by failing to take reasonable measures to address it; and

Third, the [act[s]] [failure to act] of the defendant [*name*] caused harm to the plaintiff [*name*].

"Deliberate indifference" is the conscious choice to disregard the consequences of one's acts or omissions.

[When the defendant lacks authority over budgeting decisions, the issue of whether a prison official met [his] [her] [*other pronoun*] duties to an inmate under the Eighth Amendment must be considered in the context of the personnel, financial and other resources available to the defendant or which [he] [she] [*other pronoun*] could reasonably obtain.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8, and when the plaintiff is a convicted prisoner and claims the defendants' deliberate indifference to a substantial risk of serious harm or serious medical needs.

When a convicted prisoner claims unconstitutional use of force, use Instruction 9.26 (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Excessive Force). When a pretrial detainee claims unconstitutional use of force, see Instruction 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force). When a pretrial detainee claims unconstitutional failure to protect, use Instruction 9.31 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect).

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Eighth Amendment imposes certain duties on prison officials: (1) to provide humane conditions of confinement; (2) to ensure that inmates receive adequate food, clothing, shelter, and medical care; and (3) to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). An Eighth Amendment claim based on deliberate indifference must satisfy both an objective and a subjective component test. *Farmer*, 511 U.S. at 834. A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official "knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.' *Id.* at 837; *accord Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) ("The inmates must demonstrate that they were confined under conditions posing a risk of 'objectively, sufficiently serious' harm and that the officials had a 'sufficiently culpable state of mind' in denying the proper medical care. Thus, there is both an objective and a subjective component to an actionable Eighth Amendment violation." (citation omitted)) "Deliberate indifference has both subjective and objective components. A prison official must 'be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and . . . must also draw the inference.'" *Labatad v. Corr. Corp. of Am*., 714 F.3d 1155, 1160 (9th Cir. 2013) (quoting *Farmer*, 511 U.S. at 837); *Hampton v. California,* 83 F.4th 754, 767 (9th Cir. 2023) (stating the plaintiff alleged a claim of "a conscious disregard to the health and safety" when the defendants "did not take precautions to avoid transferring COVID-positive inmates to San Quentin or to decrease the likelihood that COVID-19 would spread" once the inmates arrived).

In *Estelle v. Gamble*, the Supreme Court held that a prison official's deliberate indifference to serious medical needs violates the Eighth Amendment. 429 U.S. 97, 106 (1976). An Eighth Amendment claim for inadequate medical care requires the plaintiff to show that an official acted with deliberate indifference to a serious medical need, that is, that "the course of treatment the official chose was medically unacceptable under the circumstances and that the official chose this course in conscious disregard of an excessive risk to the plaintiff's health." *Edmo v. Corizon, Inc*., 935 F.3d 757, 786 (9th Cir. 2019). Accepted standards of care and practice within the medical community are highly relevant in determining what care is medically acceptable and unacceptable. *Id.* at 786 (explaining transgender prisoner established that the course of treatment chosen by the Idaho Department of Corrections and its medical provider to alleviate her gender dysphoria was medically unacceptable under the circumstances.) A serious

medical need is present, when, for example, the "failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.'" *Clement*, 298 F.3d at 904 (citations omitted). A serious medical need includes the "existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain." *Russell v. Lumitap*, 31 F.4th 729, 739 (9th Cir. 2022) (quoting *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014). For example, a prisoner who suffered from a cataract in one eye but did not suffer from pain and retained good vision in the other eye, has a serious medical need for cataract removal surgery because "his monocular blindness caused him physical injury." *Colwell,* 763 F.3d at 1067.

Denying, delaying, or intentionally interfering with medical treatment can violate the constitution. *Stewart v. Aranas*, 32 F.4th 1192, 1195 (9th Cir. 2022) (quoting *Colwell*, 763 F.3d at 1066). In *Stewart*, years-long denial and delay of medical treatment of the plaintiff's enlarged prostate resulted in long-term issues including kidney disease and erectile dysfunction, where the prisoner's condition sharply deteriorated during his last few years at the correctional facility. *Stewart*, 32 F.4th at 1195-96 (noting that "[a]t some point 'wait and see' becomes deny and delay").

Appropriate mental health care is also mandated by the Eighth Amendment. "[T]he Eighth Amendment's prohibition against cruel and unusual punishment requires that prisons provide mental health care that meets 'minimum constitutional requirements.' *Disability Rights Montana v. Batista*, 930 F.3d 1090, 1097 (9th Cir. 2019), *quoting Brown v. Plata*, 563 U.S. 493, 510 (2011).

Certain conditions of confinement may violate the Eighth Amendment. For example, excess noise and prison conditions may deprive inmates of "identifiable human need[s]," such as sleep. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *accord Rico v. Ducart*, 980 F.3d 1292, 1299 (9th Cir. 2020) (addressing the lawfulness of officer-created noise while conducting court-ordered suicide-prevention welfare checks in a maximum security facility). While an inmate does not have a right to a quiet environment, an inmate has a right to an environment that is "reasonably free" from constant, excessive noise caused by other inmates. *Keenan v Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996), amended by, 135 F.3d 1318 (9th Cir. 1998) (holding that an inmate had stated a separate Eighth Amendment claim for being subjected to constant illumination with no legitimate penological purpose). An inmate has the right to outdoor exercise and personal hygiene. *Keenan*, 83 F.3d at 1089-91 (noting that "[d]eprivation of outdoor exercise violates the Eighth Amendment rights of inmates confined to continuous and long-term segregation" and that "[i]ndigent inmates have the right to personal hygiene supplies such as toothbrushes and soap"); *Polanco v. Diaz,* 76 F.4th 918, 929 (9th Cir. 2023) (describing a "textbook case of deliberate indifference: Defendants were repeatedly admonished by experts that their COVID-19 policies were inadequate, yet they chose to disregard those warnings"). In addition, while adequate food is a basic human need protected by the Eighth Amendment (*see Keenan*, 83 F.3d at 1091), "[t]he Eighth Amendment 'requires only that prisoners receive food that is adequate to maintain health.'" *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1259 (9th Cir. 2016) (citation omitted). Some conditions of confinement may establish an Eighth

Amendment violation "in combination" when each alone would not suffice, but only when they have a combined effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets. *Wilson*, 501 U.S. at 304-05.

The Ninth Circuit rejected the argument that a plaintiff need only prove the defendant's constructive knowledge of a substantial risk of serious harm. *Harrington v. Scribner*, 785 F.3d 1299, 1304 (9th Cir. 2015) (noting, however, that the "obviousness of a risk may be used to prove subjective knowledge"). With respect to claims arising under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978), a plaintiff must show the municipality's deliberate indifference under an "objective inquiry." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1076 (9th Cir. 2016) (en banc). "[T]his objective standard necessarily applied to municipalities for the practical reason that government entities, unlike individuals, do not themselves have states of mind[.]" *Id*.

Whether a prison official met his or her duties to an inmate under the Eighth Amendment must be considered in the context of the personnel, financial, and other resources available to the official or that he or she could reasonably obtain, at least when the official lacks authority over budgeting decisions. *Peralta v. Dillard*, 744 F.3d 1076, 1083-84 (9th Cir. 2014) (en banc) (holding that weighing the resources available for prison dental care and the security concerns related to providing care in prison was appropriate in determining if the defendants acted with deliberate indifference).

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 ("Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement."). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed "policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain "substantial evidence showing [that the prison's] policies are an unnecessary or unjustified response to problems of jail security." *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that "two conditions" inform whether the deference instruction should be given when prisoners assert Eighth

Amendment claims challenging their treatment in prison, namely "whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs").

In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing "substantial evidence" in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 ("In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters" (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at 648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter,* 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide.'" *Fierro*, 39 F.4th at 648-49 (citing *Coston*, 13 F.4th at 735).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. *See Fierro*, 39 F.4th 648. n.6 ("This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth Amendment."). A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 576 U.S. at 397 (quoting *Bell v. Wolfish*, 441 U.S. at 540). *See also Bell v. Williams*, 108 F.4th 809, 828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail's security interests for pretrial detainee's claims under the ADA and Rehabilitation Act: "consider a detention facility's legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it.").

The Ninth Circuit also addressed the relationship between the principle of deference to prison officials and strict scrutiny in a case which included a race discrimination equal protection claim. When a prisoner case includes an equal protection claim involving strict scrutiny, "prison security and deference to prison authorities do not trump" the narrow tailoring required for equal protection claims. *See Harrington*, 785 F.3d at 1306. Indeed, "[p]risoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). When a prisoner brings an equal protection claim, "the plaintiff must prove by a preponderance of the evidence that defendants . . . acted with an intent or purpose to discriminate against the plaintiff, or against a class of which the plaintiff is a member, based on his race." *Harrington*, 785 F.3d at 1305. In this context, "[i]ntentional discrimination means that a defendant acted at least in part because of the plaintiff's race." *Id.*

The state must show that its race-based action is "necessary to further a compelling governmental interest" and is "narrowly tailored to serve such a governmental interest." *Id.* "The necessities of prison security and discipline, are a compelling government interest justifying only those uses of race that are narrowly tailored to address those necessities." *Johnson v. California*, 543 U.S. 499, 512 (2005) (internal quotation omitted); *Harrington*, 785 F.3d at 1307 ("[T]he court also erred by allowing the jury to defer generally to officials when considering [the plaintiff's] equal protection claim, rather than assessing whether the challenged race-based actions were narrowly tailored.").

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9.28 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Failure to Protect

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Eighth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Eighth Amendment, a convicted prisoner has the right to be free from "cruel and unusual punishments." To prove the defendant [*name*] deprived the plaintiff of this Eighth Amendment right, the plaintiff [*name*] must prove the following elements by a preponderance of the evidence:

First, the defendant [*name*] made an intentional decision with respect to the conditions under which the plaintiff [*name*] was confined;

Second, those conditions put the plaintiff [*name*] at substantial risk of suffering serious harm;

Third, the defendant [*name*] did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant [*name*]'s conduct obvious; and

Fourth, by not taking such measures, the defendant caused the plaintiff [*name*]'s injuries.

With respect to the third element, the defendant's conduct must be both objectively unreasonable and done with a subjective awareness of the risk of harm. In other words, the defendant must have known facts from which an inference could be drawn that there was a substantial risk of serious harm, and the defendant must have actually drawn that inference.

Comment

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Eighth Amendment imposes on prison officials a duty to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citing *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). This includes a duty to protect prisoners from violence at the hands of other prisoners. *Id*. at 833. *See also Cortez v. Skol*, 776 F.3d 1046, 1050-53 (9th Cir. 2015) (holding that the mother of prisoner who suffered severe brain damage following an attack by two other inmates raised genuine issues on Eighth Amendment claim in light of evidence that one guard escorted three hostile, half-restrained, high-security prisoners through isolated prison passage in contravention of prison policy and practice). "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer*, 511 U.S. at 828 (citing *Wilson v. Seiter*, 501 U.S. 294 (1991); and *Estelle v. Gamble*, 429 U.S. 97 (1976)). "While *Estelle* establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id*. at 835.

In *Farmer*, the Supreme Court held that an Eighth Amendment claim based on deliberate indifference must satisfy both an objective and a subjective component test. *Farmer*, 511 U.S. at 834. "The Eighth Amendment imposes a duty on prison officials to protect inmates from violence at the hands of other inmates. A prison official violates this duty when two requirements are met. First, objectively viewed, the prison official's act or omission must cause a substantial risk of serious harm. Second, the official must be subjectively aware of that risk and act with deliberate indifference to inmate health or safety. In other words, the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Cortez*, 776 F.3d at 1050 (9th Cir. 2015) (holding that an officer leading three inmates through a prison was deliberately indifferent to the risk that the inmates would be violent with one another, citing evidence that the officer knew about (1) the hostility between the inmates, (2) the inmate victim's protective custody status, and (3) a prison policy requiring leg restraints when moving detention unit inmates) (internal quotations and citations omitted). *See also Castro v. County of Los Angeles*, 833 F.3d. 1060, 1068, 1070-71 (9th Cir. 2016) (en banc) (distinguishing a convicted prisoner's claim of failure to protect under the Eighth Amendment from pretrial detainee's claim under Fourteenth Amendment, and noting that in the prison context, "the official must demonstrate a *subjective awareness* of the risk of harm"); *but see Kingsley v. Hendrickson*, 576 U.S. 389, 402 (2015) ("We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.").

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well

established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 ("Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement."). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed "policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain "substantial evidence showing [that the prison's] policies are an unnecessary or unjustified response to problems of jail security." *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that "two conditions" inform whether the deference instruction should be given when prisoners assert Eighth Amendment claims challenging their treatment in prison, namely "whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs").

In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing "substantial evidence" in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 ("In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters" (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at 648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate

when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter,* 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide.'" *Fierro*, 39 F.4th at 648-49 (citing *Coston*, 13 F.4th at 735).

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9.29 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force

As previously explained, the plaintiff [*name*] has the burden to prove that the acts or failures to act of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Fourteenth Amendment to the Constitution when the defendant [*name*] used excessive force against the plaintiff [*name*].

Under the Fourteenth Amendment, an officer may use only such force as is "objectively reasonable" under all of the circumstances. You must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Although the facts known to the officer are relevant to your inquiry, an officer's subjective intent or motive is not relevant to your inquiry.

To prove the defendant [*name*] deprived the plaintiff [*name*] of this Fourteenth Amendment right, the plaintiff [*name*] must prove the following elements by a preponderance of the evidence:

First, the defendant [*name*] purposely or knowingly used force against the plaintiff [*name*];

Second, the force used against the plaintiff [*name*] was objectively unreasonable; and

Third, the acts of the defendant [*name*] caused harm to the plaintiff [*name*].

In determining the objective reasonableness or unreasonableness of the force used, consider the following factors:

(1) The relationship between the need for the use of force and the amount of force used;

(2) The extent of the plaintiff's injury;

(3) Any effort made by the defendant to temper or to limit the amount of force;

(4) The severity of the security problem at issue;

(5) The threat reasonably perceived by the defendant; and

(6) Whether the plaintiff was actively resisting.

Comment

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each

individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The Fourteenth Amendment applies to excessive force claims brought by pretrial detainees. Specifically, the Supreme Court has held, "It is clear … that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). In *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015), the Supreme Court held that to prove an excessive force claim under the Fourteenth Amendment, a pretrial detainee must show that the officers' use of force was "objectively" unreasonable; the detainee is not required to show that the officers were "subjectively" aware that their use of force was unreasonable. Claims of excessive force asserted by pretrial detainees, while governed by the Fourteenth Amendment's Due Process Clause, are likewise analyzed under an objective reasonableness standard. *See Kingsley*, 576 U.S. at 395 (holding that excessive force claims asserted by pretrial detainees are governed under an objective reasonableness standard which should account for the government's need to maintain order). "The following considerations may bear on the reasonableness (or unreasonableness) of the force used: 'the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.'" *Id.* at 397; *accord Bell v. Williams*,108 F.4th 809, 819 (9th Cir. 2024) (citing *Kingsley* factors bearing on reasonableness of force used.).

In *Hyde v. City of Willcox*, 23 F.4th 863 (9th Cir. 2022), the Ninth Circuit held that the use of force was constitutionally excessive when officers continued to use force after a pretrial detainee had been restrained and was not resisting, at least where the officers had sufficient time to realize that the detainee could no longer resist and did not pose a threat. *Id.* at 871. "The most important factor is whether the suspect posed an immediate threat." *Id.* at 870(citing *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011) (en banc)). "This analysis is not static, and the reasonableness of force may change as the circumstances evolve." *Hyde*, 23 F.4th at 870 (citing *Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1130 (9th Cir. 2017)). Courts review these claims "from the perspective of a reasonable officer on the scene," and take into account the particular facts and circumstances of each case. *Bell,* 108 F.4th at 819 (quoting *Kingley*, 576 U.S. at 397).

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the

judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 ("Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement."). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed "policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain "substantial evidence showing [that the prison's] policies are an unnecessary or unjustified response to problems of jail security." *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that "two conditions" inform whether the deference instruction should be given when prisoners assert Eighth Amendment claims challenging their treatment in prison, namely "whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs").

In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing "substantial evidence" in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 ("In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters" (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at 648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter,* 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide.'" *Fierro*, 39 F.4th at 648-49 (citing *Coston*, 13 F.4th at 735).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. *See Fierro*, 39 F.4th 648. n.6 ("This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth Amendment."). A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 576 U.S. at 397 (quoting *Bell v. Wolfish*, 441 U.S. at 540). *See also Bell v. Williams*, 108 F.4th 809, 828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail's security interests for pretrial detainee's claims under the ADA and Rehabilitation Act: "consider a detention facility's legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it.").

The Fourth Amendment may also be applicable. In *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Supreme Court observed that it was an open question "whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." But with regard to pre-arraignment custody, the Ninth Circuit held that the Fourth Amendment provides protection against the use of excessive force. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) ("We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest.").

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9.30 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim Re Conditions of Confinement/Medical Care

The plaintiff [*name*] has brought a claim under the Fourteenth Amendment to the United States Constitution against the defendant [*name*]. The plaintiff [*name*] asserts the defendant [*name*] failed to provide [safe conditions of confinement] [needed medical care].

To prevail on this claim, the plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the defendant [*name*] made an intentional decision regarding [the conditions under which the plaintiff was confined] [the denial of needed medical care];

Second, the [conditions of confinement] [denial of needed medical care] put the plaintiff [*name*] at substantial risk of suffering serious harm;

Third, the defendant [*name*] did not take reasonable available measures to abate or reduce the risk of serious harm, even though a reasonable officer under the circumstances would have understood the high degree of risk involved—making the consequences of the defendant [*name*]'s conduct obvious; and

Fourth, by not taking such measures the defendant [*name*] caused the plaintiff [*name*]'s injuries.

With respect to the third element, the defendant's conduct must be objectively unreasonable.

Comment

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer***s***"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

In *Castro v. County of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc), the Ninth Circuit overruled *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1253-54 (9th Cir. 2010), "to the extent that it identified a single deliberate indifference standard for all § 1983 claims." The Ninth Circuit in *Castro* also approved a jury instruction for a pretrial detainee's claim of failure to protect. *See* Instruction 9.31 (Particular Rights—Fourteenth Amendment—

Pretrial Detainee's Claim of Failure to Protect); *see also Gordon v. County of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018) ("[W]e hold that claims for violations of the right to adequate medical care 'brought by pretrial detainees against individual defendants under the Fourteenth Amendment' must be evaluated under an objective deliberate indifference standard.") (extending *Castro*); *Sandoval v. County of San Diego*, 985 F.3d 657, 662 (9th Cir. 2021) (applying *Gordon* to nurses' alleged failure to provide proper care to pretrial detainee).

"[I]t is clearly established that officers must seek to provide an injured detainee or arrestee with objectively reasonable medical care in the face of medical necessity creating a substantial and obvious risk of serious harm, including by summoning medical assistance." *D'Braunstein v. Cal. Highway Patrol*, 131 F.4th 764, 771 (9th Cir. 2025). "Officers may not act with objective deliberate indifference to such a medical need." *Id.* In *D'Braunstein*, the Ninth Circuit held that a police officer was not entitled to qualified immunity from the plaintiff's Fourth and Fourteenth Amendment claims when the officer knew that the plaintiff was in a serious car accident but failed to summon medical care because she believed the plaintiff was on drugs. *Id.* at 766-68. In evaluating whether a reasonable jury could conclude that the officer violated the plaintiff's clearly established rights, the court stated that "the common underlying constitutional question reflected in Fourth and Fourteenth Amendment case law is whether an officer's provision (or deprivation) of medical care was objectively unreasonable." *Id.* at 769.

The Ninth Circuit has held "pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment." *Gordon*, 6 F.4th at 973. While there is "no § 1983 liability for simply acting contrary to prison policy," the standardized medical procedures of a prison can "help to underscore" that prison officials "had access to facts from which a reasonable person would infer" that a particular patient "was at serious medical risk." *Russell v. Lumitap*, 31 F.4th 729, 742 (9th Cir. 2022).

In *Alexander v. Nguyen*, 78 F.4th 1140, 1144 (9th Cir. 2023), the Ninth Circuit noted that "the law governing pretrial detainees' claims of inadequate medical care and other dangerous conditions of confinement is still developing in the wake of the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)." The court added that under the third element discussed in the 2018 decision in *Gordon*, "[t]he plaintiff must 'prove more than negligence but less than subjective intent—something akin to reckless disregard.'" *Alexander*, 78 F.4th at 1145 (stating that the "mere lack of due care by a state official is not enough to show a constitutional violation" under the Fourteenth Amendment) (quoting *Gordon*, 888 F.3d at 1125).

The Fourth Amendment may also be applicable. In *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Supreme Court observed that it was an open question "whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." But with regard to pre-arraignment custody, the Ninth Circuit held that the Fourth Amendment provides protection against the use of excessive force. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) ("We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the

time such arrestee is released or found to be legally in custody based upon probable cause for arrest."); *see also D'Braunstein*, 131 F.4th at 768-69 (explaining the relationship between Fourth and Fourteenth Amendment protections for arrestees and pretrial detainees regarding medical care).

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

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In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference

instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter*, 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston*, 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide,'" *Fierro*, 39 F.4th at 648-49 (quoting *Coston*, 13 F.4th at 735).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. *See Fierro*, 39 F.4th 648. n. 6 ("This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth Amendment."). A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 576 U.S. at 397 (quoting *Bell*, 441 U.S. at 540); *see also Bell v. Williams*, 108 F.4th 809, 828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail's security interests for pretrial detainee's claims under the ADA and Rehabilitation Act: "consider a detention facility's legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it").

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9.31 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*]. Under the Fourteenth Amendment, a pretrial detainee has the right to be protected while in custody.

To prove the defendant [*name*] deprived the plaintiff [*name*] of this right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the defendant [*name*] made an intentional decision regarding the conditions under which the plaintiff [*name*] was confined;

Second, those conditions put the plaintiff [*name*] at substantial risk of suffering serious harm;

Third, the defendant [*name*] did not take reasonable available measures to abate or reduce that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant [*name*]'s conduct obvious; and

Fourth, by not taking such measures, the defendant [*name*] caused the plaintiff [*name*]'s injuries.

With respect to the third element, the defendant's conduct must be objectively unreasonable.

Comment

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

After the Supreme Court decided *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), the Ninth Circuit decided *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc).

In *Castro*, the Ninth Circuit held that Castro, a pretrial detainee who was injured by an inmate while detained in a sobering cell, "had a due process right to be free from violence from other inmates." *Id.* at 1067. The Ninth Circuit focused its discussion on the Fourteenth Amendment, but "neither Castro nor the majority claim[ed] that any other constitutional right [was] at issue." *Id*. at 1067-70, 1084 (Ikuta, J., dissenting). Analogizing to the Supreme Court's excessive force analysis in *Kingsley*, the Ninth Circuit in *Castro* approved the following elements for a pretrial detainee's failure-to-protect claim under the Fourteenth Amendment:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (2) Those conditions put the plaintiff at substantial risk of suffering serious harm; (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (4) By not taking such measures, the defendant caused the plaintiff's injuries.

Id. at 1071.

In the appropriate case, the trial court may instruct the jury that in considering the elements, it should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts "must defer to the judgment of correctional officials unless the record contains substantial evidence showing [that] their policies are an unnecessary or unjustified response to problems of jail security." *Florence v. Bd. of Chosen Freeholders Cnty. of Burlington*, 566 U.S. 318, 322-23 (2012). "It is well established that judges and juries must defer to prison officials' expert judgments." *Norwood v. Vance*, 591 F.3d 1062, 1066 (9th Cir. 2010).

The Ninth Circuit has held that failing to give a jury deference instruction based on the general principles outlined in *Bell* was an error. *Norwood*, 591 F.3d at 1066-67 ("Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement."). In subsequent cases, the Ninth Circuit explained that a deference instruction should be given only where both of the conditions in *Bell* were present: first, the prison officials adopted and executed "policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Shorter v. Baca*, 895 F.3d 1176, 1183 (9th Cir. 2018) (quoting *Bell*, 441 U.S. at 547), and second, the record did not contain "substantial evidence showing [that the prison's] policies are an unnecessary or unjustified response to problems of jail security." *Id.* (quoting *Florence*, 566 U.S. at 323); *see also Fierro v. Smith*, 39 F.4th 640, 648 (9th Cir. 2022) (restating the rule that "two conditions" inform whether the deference instruction should be given when prisoners assert Eighth Amendment claims challenging their treatment in prison, namely "whether the treatment the prisoner challenges (1) was provided pursuant to a security-based policy or practice, and, if so, (2) was a necessary, justified, and non-exaggerated response to security needs").

In light of the two *Bell* conditions, the Ninth Circuit has explained the contours of giving a deference instruction in different scenarios. The plaintiff bears the burden of producing "substantial evidence" in the record that the two conditions are not met. *Shorter*, 895 F.3d at 1183 ("In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations courts should ordinarily defer to their expert judgment in such matters" (citing *Block v. Rutherford*, 468 U.S. 576, 584-85 (1984)). If the plaintiff has failed to carry this burden, or if the parties do not dispute that both *Bell* conditions are met, the trial court must give a jury the deference instruction. *Fierro*, 39 F.4th at 648; *Norwood*, 591 F.3d at 1067. Where the parties agree that one condition is met and one is absent, or that both conditions are absent, then the trial court may not give the jury deference instruction. *Fierro*, 39 F.4th at 648.

In cases involving the denial of medical care to prisoners, which highlight *Bell*'s first condition (whether the policy or procedure addressed the need for prison security), the deference instruction should not be given "unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." *Chess v. Dovey*, 790 F.3d 961, 972 (9th Cir. 2015); *see also Shorter*, 895 F.3d at 1184 (holding that "the [jury deference] instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy"); *Coston v. Nangalama*, 13 F.4th 729, 734 (9th Cir. 2021) (holding, in a medical care case, that the deference instruction should not have been given because, among other things, defendants "did not draw a plausible connection between a security-based policy or practice and the challenged decision to terminate [defendant's] morphine prescription without tapering").

In a case highlighting *Bell*'s second condition (whether there was substantial evidence that prison officials had exaggerated their response), a deference instruction was not appropriate when the record contained substantial evidence that the jail's search practice "was an unnecessary, unjustified, and exaggerated response to jail officials' need for prison security." *Shorter,* 895 F.3d at 1184 (stating that "jail officials concede[d] that there was no legitimate penological purpose for shackling mentally ill, virtually unclothed, female pretrial detainees to their cell doors for hours at a time").

Finally, in some cases, whether or not to give deference to prison officials should be left to the jury to decide. *Coston,* 13 F.4th 735. If the plaintiff offered substantial evidence that the prison official's action "was not provided pursuant to a security-based policy or practice," and the policy at issue was "an unnecessary, unjustified, or exaggerated response," but in response the prison adduced substantial evidence that the prison official's "actions were (1) taken because of a security-based policy or practice and (2) necessary, justified, and not exaggerated," *Coston*, 13 F.4th at 735, then "it might be appropriate to instruct the jury that 'whether to give deference to prison officials [is] left to the jury to decide.'" *Fierro*, 39 F.4th at 648-49 (citing *Coston*, 13 F.4th at 735).

This framework also applies to pretrial detainees challenging use of force and other conditions of confinement. See *Fierro*, 39 F.4th 648. n. 6 ("This framework also applies to pretrial detainees challenging their conditions of confinement under the Fourteenth

Amendment."). A court must also account for the "legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained," appropriately deferring to "policies and practices that in th[e] judgment" of jail officials "are needed to preserve internal order and discipline and to maintain institutional security." *Kingsley*, 576 U.S. at 397 (quoting *Bell*, 441 U.S. at 540). *See also Bell v. Williams*, 108 F.4th 809,828 (9th Cir. 2024) (approving instructing the jury on deference owed to jail's security interests for pretrial detainee's claims under the ADA and Rehabilitation Act: "consider a detention facility's legitimate correctional interests, and whether there is a valid, rational connection between the action taken and the legitimate and neutral governmental interest put forward to justify it.").

The Fourth Amendment may also be applicable. In *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989), the Supreme Court observed that it was an open question "whether the Fourth Amendment continues to provide individuals with protection against deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins." But with regard to pre-arraignment custody, the Ninth Circuit held that the Fourth Amendment provides protection against the use of excessive force. *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996) ("We hold, therefore, that the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest.").

In *Alexander v. Nguyen*, 78 F.4th 1140, 1144 (9th Cir. 2023), the Ninth Circuit noted that "the law governing pretrial detainees' claims of inadequate medical care and other dangerous conditions of confinement is still developing in the wake of the Supreme Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015)." *Alexander* involved alleged failure to prevent violence among pretrial detainees. After Alexander was injured by another pretrial detainee, the defendant doctor evaluated the circumstances, consulted with others, and opted not to move Alexander. Less than two weeks later, the same pretrial detainee struck Alexander again. The Ninth Circuit concluded under *Gordon* that "[t]hough Alexander was, regrettably, attacked a second time, the evidence shows that [the defendant doctor's] responses to both incidents were thorough and careful." *Alexander*, 78 F.4th at 1145 ("[T]he benefit of hindsight from the fact that Alexander was attacked a second time [by the same pretrial detainee] does not show that [the defendant doctor's] original decision was unreasonable.").

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9.32 Particular Rights—Fourteenth Amendment—Due Process—Interference with Parent/Child Relationship

Comment

I. Introduction

Parents and children possess a constitutionally protected liberty interest in companionship and society with each other. *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999) (en banc). This liberty interest is rooted in the Fourteenth Amendment, which states in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. State interference with these liberty interests may give rise to a Fourteenth Amendment due process claim that is cognizable under 42 U.S.C. § 1983. *Kelson v. City of Springfield*, 767 F.2d 651, 654 (9th Cir. 1985), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986)).

The protected liberty interest is independently held by both parent and child. *City of Fontana*, 818 F.2d at 1418. A parent's right includes a custodial interest (but only while the child is a minor), and a companionship interest (even after a child reaches the age of majority). *Id.* at 1419; *see*, *e.g.*, *Strandberg v. City of Helena*, 791 F.2d 744, 748 n.1 (9th Cir. 1986) (recognizing that parents of deceased 22-year-old son could not allege constitutional right to parent a minor child, but could claim violation of right to companionship and society). Children, including adult children, may claim a violation of their right to familial association, but that right includes only a companionship interest. *City of Fontana*, 818 F.2d at 1419; *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir. 1998). Parents and children raising such claims are alleging a deprivation of their own liberty rights; they are not asserting the rights of the decedent or injured child or parent. *Kelson*, 767 F.2d at 653 n.2.

The mere existence of a biological link between parent and child is not a sufficient basis to support a Fourteenth Amendment claim for loss of familial relationship rights. *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1058 (9th Cir. 2018). To bring a Fourteenth Amendment due process claim, the parent and child must have relationships "which reflect some assumption 'of parental responsibility.'" *Kirkpatrick v. County of Washoe*, 843 F.3d 784, 789 (9th Cir. 2016) (en banc) ("It is when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child that his interest in personal contact with his child acquires substantial protection under the due process clause.") (internal quotation marks and brackets omitted). Parents can bring a Fourteenth Amendment due process claim only if they demonstrate "consistent involvement in a child's life and participation in child-rearing activities." *Wheeler*, 894 F.3d at 1058. Children must make the same showing. *See id.* (holding relationship between child adopted as infant and biological mother insufficient for child to bring Fourteenth Amendment loss of companionship claim).

Other familial relationships may not give rise to a protectable liberty interest. The extent to which grandparents have such an interest has not been decided, although a noncustodial

grandparent generally does not have a protectable interest. *See Miller v. California*, 355 F.3d 1172, 1176 (9th Cir. 2004) (holding that grandparents had neither a "substantive due process right to family integrity or association as noncustodial grandparents of children who are dependents of the court, nor of a liberty interest in visiting their grandchildren"). Siblings cannot bring claims under the Fourteenth Amendment for the deprivation of their liberty interest arising out of their relationship with their sibling. *Ward v. City of San Jose*, 967 F.2d 280, 284 (9th Cir. 1991), *as amended on denial of reh'g* (June 16, 1992).

In *Peck v. Montoya*, 51 F.4th 877, 893 (9th Cir. 2022), the Ninth Circuit noted that it had not previously held whether a substantive due process right exists in the context of a familial association claim asserted by a spouse, rather than a parent or child and that other courts of appeal have reached conflicting conclusions. The Ninth Circuit did not reach this issue in this case.

II. Two Types of Claims: Procedural and Substantive

A claim of interference with the parent/child relationship in violation of the Fourteenth Amendment may be brought as either a procedural due process claim or a substantive due process claim. *See City of Fontana*, 818 F.2d at 1419-20 ("whether a particular interference with a liberty interest constitutes a substantive or a procedural due process violation depends on whether the interference was 'for purposes of oppression,' rather than for the purpose of furthering legitimate state interests" (citation omitted)).

A procedural due process claim may arise when the state interferes with the parent-child relationship for the purpose of furthering a legitimate state interest. *See id.* at 1419. Thus, "where the best interests of the child arguably warrants termination of the parent's custodial rights, the state may legitimately interfere so long as it provides 'fundamentally fair procedures.'" *Id.* (quoting *Santosky v. Kramer*, 455 U.S. 745, 754 (1982)).

A substantive due process claim may arise when the state interferes with the parent-child relationship "for purposes of oppression." *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). For instance, "the state has no legitimate interest in interfering with this liberty interest through the use of *excessive* force by police officers." *Id.* at 1419-20. Each type of claim is evaluated under a distinct standard.

A. Standard for Procedural Due Process Violation

Procedural due process claims typically arise when a state official removes a child from a parent's care. For such claims, "[t]he Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1294 (9th Cir. 2007) (quoting *Mabe v. San Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1107 (9th Cir. 2001)). Removing a child from a parent's custody violates the Fourteenth Amendment unless the removal (1) is authorized by a court order (typically a warrant); or (2) is supported by "reasonable cause to believe that the child is in imminent danger of serious bodily injury," and the scope of intrusion does not extend

beyond that which is reasonably necessary. *Id.* (quoting *Mabe*, 237 F.3d at 1106). Even if the removal is pursuant to a court order, the right may be violated if the court order was obtained through judicial deception, that is, if a plaintiff alleges "(1) a misrepresentation or omission (2) made deliberately or with a reckless disregard for the truth, that was (3) material to the judicial deception." *David v. Kaulukukui*, 38 F.4th 792, 801 (9th Cir. 2022). "A misrepresentation or omission is material if a court would have declined to issue the order had [the defendant] been truthful." *Id.* Judicial deception can arise when true observations are made misleading by omission of facts "that are not themselves material[, but] may result in an affidavit that, considered as a whole, is materially misleading." *Scanlon v. County of Los Angeles*, 92 F.4th 781, 799 (9th Cir. 2024). The "mere threat of separation" is insufficient to give rise to a Fourteenth Amendment claim "based on a minor being separated from his or her parents." *Dees v. County of San Diego*, 960 F.3d 1145, 1152 (9th Cir. 2020).

Removing children from their parents' custody without court authorization is permissible when officials have reasonable cause to believe that the children are at imminent risk of serious bodily injury or molestation in the time it would take them to get a warrant. *Rogers*, 487 F.3d at 1294-95; *see also Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000). Serious allegations of abuse must be investigated and corroborated before they will give rise to "a reasonable inference of imminent danger sufficient to justify taking children into temporary custody." *Demaree v. Pederson*, 887 F.3d 870, 879 (9th Cir. 2018) (per curiam) (internal quotation marks omitted). There must be "specific, articulable evidence that provides reasonable cause to believe that a child is in imminent danger of abuse." *Wallis*, 202 F.3d at 1138; *see also Sjurset v. Button*, 810 F.3d 609, 622 (9th Cir. 2015) (holding officials' belief of imminent danger objectively reasonable where mother who had tested positive for drugs and had previously been convicted of child endangerment prevented officers from verifying child's safety, and officials could not have obtained court order for 36 hours).

Conversely, removing children from their parents' custody without a court's authorization can give rise to a violation of a liberty interest when there is no imminent risk of physical or sexual abuse. *Demaree*, 887 F.3d at 879 (holding that officials unconstitutionally removed children from parents' custody because officials' fear of "sexual exploitation" based on nude photos of children was not objectively reasonable since photos were not distributed, did not depict sexual conduct, and did not reflect risk of physical sexual abuse). Evidence that children are malnourished, their home is disorderly or unsanitary, or that their parents lack health insurance or fail to provide them daycare does not constitute exigent circumstances. *Rogers*, 487 F.3d at 1296.

B. Standard for Substantive Due Process Violation

A substantive due process claim of impermissible interference with familial association arises when a state official harms a parent or child in a manner that shocks the conscience. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). Parents and children have a substantive due process right to a familial relationship free from unwarranted state interference. *Scott v. Smith*, 109 F.4th 1215, 1228 (9th Cir. 2024); *Hardwick v. County of Orange*, 980 F.3d 733, 740-41 & n.9 (9th Cir. 2020). To show a violation of the right to familial association under the Fourteenth

Amendment based on an officer's use of force, a plaintiff must establish that an officer's conduct "shocks the conscience." *Scott*, 109 F.4th at 1228; *Nicholson v. City of Los Angeles*, 935 F.3d 685, 692 (9th Cir. 2019*).*

A Fourteenth Amendment substantive due process claim is distinct from a claim arising under the Fourth Amendment. *See Lewis*, 523 U.S. at 843. A Fourth Amendment excessive force claim requires the victim to establish that the officer's conduct was objectively unreasonable. *Ochoa v. City of Mesa*, 26 F.4th 1050, 1056 (9th Cir. 2022). But that Fourth Amendment standard is less demanding than the "shocks the conscience" standard that applies to substantive due process familial association claims under the Fourteenth Amendment brought by the parent or child of the victim. *See id.* at 1056-57. Accordingly, "it may be possible for an officer's conduct to be objectively unreasonable under the Fourth Amendment yet still not infringe the more demanding standard that governs substantive due process claims under the Fourteenth Amendment." *Id.* at 1057 (internal quotation marks and brackets omitted).

"There are two tests used to decide whether officers' conduct 'shocks the conscience.'" *Id.* at 1056. A state official's conduct may shock the conscience if (1) the official acted with a "purpose to harm" the victim for reasons unrelated to legitimate law enforcement objectives; or (2) the official acted with "deliberate indifference" to the victim. *Scott* 109 F.4th at 1228. Which test applies turns on the specific circumstances of the underlying events in each case. *Ochoa*, 26 F.4th at 1056 ("Which test applies turns on whether the officers had time to deliberate their conduct."). If the encounter at issue escalated so quickly that the officer had to make a snap judgment, the plaintiff must show the officer acted with a "purpose to harm." *See Porter*, 546 F.3d at 1137. However, if the situation evolved within a time frame that allowed officers to reflect before acting, the plaintiff must show the officer acted with "deliberate indifference." *See id.* To decide which test to apply, we must thus ask whether actual deliberation by the officer was "practical." *Scott*, 109 F.4th at 1228, citing *Porter*, 546 F.3d at 1137.

1. Purpose to Harm Standard

The Supreme Court developed the purpose-to-harm standard in recognition that not every harm caused by government officials gives rise to a Fourteenth Amendment claim. *See Lewis*, 523 U.S. at 848-49. For instance, "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose" so as to shock the conscience. *Id.* at 853. These circumstances may include high speed police chases, *see id.* at 855, responding to a gunfight in a crowded parking lot, *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 368 (9th Cir. 1998), and other situations requiring split-second decisions, where the officer did not have a "practical" opportunity for "actual deliberation." *Lewis*, 523 U.S. at 851; *see also Puente v. City of Phoenix*, 123 F.4th 1035, 1056 (9th Cir. 2024) (explaining that the Fourteenth Amendment's "purpose to harm" standard (rather than the Fourth Amendment's reasonableness standard) governs the defendant officers' use of chemical irritants and flash-bangs where the situation had escalated quickly, requiring officers to respond promptly without the luxury of having time to make unhurried judgments).

In *Porter v. Osborn,* 546 F.3d 1131, 1137 (9th Cir. 2008), the Ninth Circuit held that the "purpose to harm" standard applied to a Fourteenth Amendment familial association claim brought by the surviving parents of a motorist who was shot and killed, "[d]ue to the rapidly escalating nature of the confrontation" with the motorist, such that actual deliberation was not practical. *Id.* at 1137. Similarly, in *Ochoa,* the Ninth Circuit applied the purpose to harm standard to a familial association claim brought by the surviving relatives of a suspect who was fatally shot after he took a step towards officers while carrying a knife. *Ochoa*, 26 F.4th 1056 (stating that under the purpose to harm standard of culpability the plaintiffs must prove that the officer's purpose was "to cause harm unrelated to the legitimate object of arrest").

By contrast, when an officer shot twelve rounds at an occupied vehicle even though the car presented no immediate threat, the Ninth Circuit held that the jury could have reasonably concluded that the officer "acted with the purpose to harm unrelated to a legitimate law enforcement objective," and upheld the jury's verdict for the suspect's surviving children. *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 458 (9th Cir. 2013) (stating that the officer acted "with a purpose to harm unrelated to the legitimate law enforcement objectives of arrest, self-defense, or defense of others").

Zion v. County of Orange exemplifies the distinction between legitimate and illegitimate official conduct. The officer in *Zion* did not violate the Fourteenth Amendment when he emptied his weapon at a suspect who was fleeing after stabbing an officer because the officer had no time for reflection, and "[w]hether excessive or not, the shootings served the legitimate purpose of stopping a dangerous suspect." 874 F.3d 1072, 1077 (9th Cir. 2017). However, there was a genuine issue of fact as to whether the officer acted with a purpose to harm when, after the suspect was lying on the ground in a fetal position, the officer walked around in a circle for several seconds, then took a running start and stomped on the suspect's head three times. *See id.* (reversing summary judgment in favor of officer defendant).

2. Deliberate Indifference Standard

The deliberate indifference standard applies in situations where the officers who caused the harm to the parent or child acted (or failed to act) in a situation when "actual deliberation is practical." *Lewis*, 523 U.S. at 851. When officials have "time to make unhurried judgments," and "extended opportunities to do better," but unreasonably allow harm to occur, then their "protracted failure even to care" can shock the conscience, thus giving rise to a substantive due process claim. *Id*. "Actual deliberation" requires a longer period of time than "deliberation" as that term is used in homicide law. *See id.* at 851 n.11 ("By 'actual deliberation,' we do not mean 'deliberation' in the narrow, technical sense in which it has sometimes been used in traditional homicide law."). Deliberation may be practical even without an extended timeline of events. *See Scott*, 109 F.4th at 1228; *Nicholson v. City of Los Angeles*, 935 F.3d 685, 693-94 (9th Cir. 2019) ("An officer had time to deliberate when, after seeing a teenager with a toy gun, he jumped out of a car and fired several shots."). Because it shocks the conscience for officials to cause harm to a parent or child with deliberate indifference, a substantive due process claim of impermissible interference with familial association can arise in these circumstances. *Porter*, 546 F.3d at 1137; *Scott*, 109 F.4th at 1228 (stating the officers had time to deliberate because the encounter was not

escalating, officers had time to consider their next steps, seven minutes passed after the officers arrived on the scene and had called their sergeant to ask for guidance).

The deliberate indifference standard often applies in cases of state officials' inaction or failure to protect. Although the Fourteenth Amendment's due process clause generally does not create an affirmative right to governmental aid, *see DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195-96 (1989), a state actor's failure to protect "may give rise to a § 1983 claim under the state-created danger exception when the state affirmatively places the plaintiff in danger by acting with deliberate indifference to a known or obvious danger." *Herrera v. Los Angeles Unified Sch. Dist.*, 18 F.4th 1156, 1158 (9th Cir. 2021) (internal quotation marks omitted). A state actor's failure to protect may also create liability under § 1983 if the state "takes a person into its custody and holds him there against his will." *DeShaney*, 489 U.S. at 199-200 ("[T]he Constitution imposes upon [the state] a corresponding duty to assume some responsibility for his safety and general well-being."). The types of custody giving rise to the duty to protect are "incarceration, institutionalization, or other similar restraint of personal liberty." *Id.* at 200. The Ninth Circuit has clarified that "the only two exceptions to the general rule against failure-to-act liability for § 1983 claims presently recognized by this court are the special-relationship exception and the state-created danger exception." *Murguia v. Langdon*, 61 F.4th 1096, 1108 (9th Cir. 2023) ("we make clear that the only two exceptions to the general rule against failure-to-act liability for § 1983 claims presently recognized by this court are the special-relationship exception and the state-created danger exception"); *Sinclair v. City of Seattle*, 61 F.4th 674, 684 (9th Cir. 2023) (stating that police abandoning a portion of the city to unchecked lawlessness is a "shocking contempt towards its promise to citizens" that "[t]here shall be maintained adequate police protection in each district of the City." (quotations omitted)). "[T]he mere failure to perform a legally required act is [not] grounds for § 1983 liability based on a substantive due process violation." *Murguia*, 61 F.4th at 1108.

The deliberate indifference standard as it applies in cases alleging a deprivation of a familial relationship is a subjective standard. For a defendant to act with deliberate indifference, he must "recognize the unreasonable risk and actually intend to expose the [victim] to such risks without regard to the consequences to the [victim]." *Herrera*, 18 F.4th at 1158 (internal quotation marks and brackets omitted). "Ultimately, a state actor needs to know that something is going to happen but ignore the risk and expose the [victim] to it." *Id.* at 1158-59 (internal quotation marks and brackets omitted); *see*, *e.g.*, *Polanco v. Diaz*, 76 F.4th 918, 926-27 (9th Cir. 2023) (upholding claim of state-created danger by prison officials in a case arising from prison guard's death from COVID-19 complications after 122 COVID ill inmates were transferred from another prison, placing decedent in a more dangerous position); *Murguia*, 61 F.4th at 1115-116 (determining that father stated a plausible claim against a social worker for subjective deliberate indifference under the state-created danger theory by alleging that social worker was aware of mother's history of violence and mental health issues, including multiple specific instances of physical violence against her own family members, but falsely represented to police sergeant that mother was homeless and had no criminal history or history of child abuse); *Sinclair*, 61 F.4th at 674 (explaining the danger of uncontrolled lawlessness allegedly created by the city's decision to withdraw law enforcement from neighborhood and surrender it to protestors was not sufficiently particularized to support mother's claim that city's actions deprived her of her substantive due

process right to companionship of son pursuant to state-created danger doctrine because it was a generalized danger experienced by all members of the public).

Herrera shows how the subjective standard applies to a parent's claim for deprivation of familial relationship. In *Herrera*, parents claimed that a school aide's failure to protect their autistic child from drowning in a park swimming pool during a school outing was actionable under the state-created danger exception, and gave rise to a § 1983 claim for deprivation of a parent-child relationship in violation of the Fourteenth Amendment. *See* 18 F.4th at 1161. The Ninth Circuit held that the school aide had not acted with deliberate indifference because he was unaware of any immediate danger to the child (mistakenly thinking the child was in the locker room rather than in the pool), and there was therefore no evidence that the aide subjectively recognized the risk to the child. *See id.* at 1162. Accordingly, no reasonable jury could conclude that the parents' Fourteenth Amendment rights were violated. *See id.*; *see also Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971–72 (9th Cir. 2011) (holding that schoolteacher did not violate student's Fourteenth Amendment rights by failing to protect the student from having sex with another student in restroom, because there was no proof that teacher knew about any immediate risk).

Pretrial detainees have a Fourteenth Amendment due process right "to be free from violence from other inmates." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1067 (9th Cir. 2016) (en banc). In cases where the victim is a detainee and the plaintiff is the victim or the victim's estate, the Ninth Circuit has applied an objective standard for the deliberate indifference inquiry. *Castro*, 833 F.3d at 1070-71. Under the objective standard, a pretrial detainee can maintain a Fourteenth Amendment claim by proving the conduct was objectively unreasonable. *See id.* at 1071. The objective standard has been extended to cases where the detainee is in an immigration facility, *see Roman v. Wolf*, 977 F.3d 935, 943 (9th Cir. 2020) (per curiam), and where the detainee alleges that state officials failed to provide medical care, *see Gordon v. County of Orange*, 888 F.3d 1118, 1122-24 (9th Cir. 2018). See Instructions 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force), 9.30 (Particular Rights—Fourteenth Amendment— Pretrial Detainee's Claim re Conditions of Confinement/Medical Care), 9.31 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect), and 9.32A (Particular Rights—Fourteenth Amendment—Due Process—Civil Commitment).

In considering whether the objective or subjective standard applied, *Herrera* discussed the objective standard as applied in *Castro* and its progeny, but concluded that the subjective standard for deliberate indifference applied because the victim in the case was not a detainee. *See* 18 F.4th at 1160 ("Erick was not detained at the time of his death . . . . We therefore apply a purely subjective standard, consistent with our precedent, requiring the plaintiff to show that the state actor recognized an unreasonable risk and actually intended to expose the plaintiff to such risk."). *Herrera*'s analysis suggests that the objective standard applies in a case alleging a deprivation of familial association when the victim is a detainee. However, the Ninth Circuit has not squarely addressed that question.

Revised March 2025

9.32A Particular Rights–Fourteenth Amendment—Due Process—Civil Commitment

Comment

In *King v. County of Los Angeles*, 885 F.3d 548 (9th Cir. 2018), the Ninth Circuit recognized a substantive due process constitutional claim for individuals confined pursuant to a civil commitment, if the conditions of confinement "amount to punishment." *Id*. at 557. In determining whether the conditions of confinement amount to punishment, a comparison is made between the conditions of confinement of the civil detainee and the conditions of confinement of the "criminal counterparts" of a civil detainee. *Id*.

Relying on the court's prior decision in *Jones v. Blanas*, 393 F.3d 918 (9th Cir. 2004), the court reiterated that "under the Due Process Clause of the Fourteenth Amendment, an individual detained under civil process cannot be subjected to conditions that amount to punishment." *King*, 885 F.3d at 556-57. Conditions of confinement are presumed to be punitive if: (1) they are "identical to, similar to, or more restrictive than, those in which a civil pretrial detainee's criminal counterparts are held," or (2) they are "more restrictive than those the individual would face following SVPA commitment." *Id*. at 557. "If either presumption applies, the burden shifts to the defendant to show (1) legitimate, non-punitive interests justifying the conditions of the detainee's confinement; and (2) that the restrictions imposed are not excessive in relation to those interests." *Id*. Legitimate interests may include "ensuring a detainee's presence at trial, maintaining jail security, and effective management of a detention facility." *Id*. at 558. However, conditions of confinement may still be considered punitive if "alternative and less harsh" methods exist to achieve the specified interests. *Id*.; *see also Fraihat v. U.S. Immigration & Customs Enf't*, 16 F.4th 613, 648-49 (9th Cir. 2021) (assuming without deciding that *King v. County of Los Angeles* and *Jones v. Blanas* would "be appropriate to invoke that presumption in the immigration context" but ultimately stating that the "record lacks evidence from which to draw any relevant comparisons between the overall conditions of confinement of ICE detainees as compared to those in criminal custody").

For a pretrial detainee, violations arise under the Due Process Clause of the Fourteenth Amendment. Use Instructions 9.29 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Excessive Force), 9.30 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim re Conditions of Confinement/Medical Care), and 9.31 (Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect).

Revised September 2024

9.33 Particular Rights—Fourteenth Amendment—Due Process—Deliberate Fabrication of Evidence

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. The Fourteenth Amendment protects against being subjected to criminal charges on the basis of false evidence that was deliberately fabricated. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

For the plaintiff [*name*] to prevail on [his][her] [*other pronoun*] claim of deliberate fabrication of evidence, the plaintiff [*name*] must prove [at least one of] the following element[s] by a preponderance of the evidence:

> [The defendant [*name*] deliberately fabricated evidence that was used to [[criminally charge] [prosecute] [convict] [*other deprivation of liberty*]] the plaintiff [*name*].]
>
> *or*
>
> [The defendant [*name*] continued [his] [her] [*other pronoun*] investigation of the plaintiff [*name*] despite the fact that [he] [she] [*other pronoun*] knew that the plaintiff [*name*] was innocent, or was deliberately indifferent to the plaintiff [*name*]'s innocence, and the results of the investigation were used to [[criminally charge] [prosecute] [convict] [*other deprivation of liberty*]] the plaintiff [*name*].]
>
> *or*
>
> [The defendant [*name*] used techniques that were so coercive and abusive that [he] [she] [*other pronoun*] knew, or was deliberately indifferent, that those techniques would yield false information that was used to [[criminally charge] [prosecute] [convict] [*other deprivation of liberty*]] the plaintiff [*name*].

"Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions.

[If the plaintiff proves that the defendant deliberately fabricated evidence that was used to [criminally charge] [prosecute] [convict] [*other deprivation of liberty*] the plaintiff, then the plaintiff is not required to prove that the defendant knew the plaintiff was innocent or was deliberately indifferent to the plaintiff's innocence.]

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

"[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). The deliberate fabrication of evidence implicates "the fundamental due process right to a fair trial." *Richards v. County of San Bernadino*, 39 F.4th 562, 572 (9th Cir. 2022). This is true "regardless of the plaintiff's innocence or guilt . . . the right to a fair trial is impinged either way." *Id.* In *Devereaux*, the Ninth Circuit stated that to establish deliberate fabrication of evidence, a plaintiff:

> must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [the plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information.

263 F.3d at 1076. Stated another way, "[t]o prevail on a § 1983 claim of deliberate fabrication, a plaintiff must prove that (1) the defendant official deliberately fabricated evidence and (2) the deliberate fabrication caused the plaintiff's deprivation of liberty." *Spencer v. Peters*, 857 F.3d 789, 798 (9th Cir. 2017) (citations omitted). To establish the second element of causation, the plaintiff must show "that (a) the act was the cause in fact of the deprivation of liberty, meaning that the injury would not have occurred in the absence of the conduct; and (b) the act was the 'proximate cause' or 'legal cause' of the injury, meaning that the injury is of a type that a reasonable person would see as a likely result of the conduct in question." *Spencer*, 857 F.3d at 798 (citations omitted). In *Richards*, the court said that rather than a but-for causation standard, the appropriate standard of causation is the "materiality causation standard," under which causation is established if the plaintiff "can show a reasonable likelihood that the allegedly fabricated [] evidence could have affected the judgment of the jury." *Richards*, 39 F.4th at 573-74; s*ee Caldwell v. City & County of San Francisco,* 889 F.3d 1105, 1115 (9th Cir. 2018) ("[P]laintiff need not be convicted on the basis of the fabricated evidence to have suffered a deprivation of liberty—being criminally charged is enough.").

Inaccuracies in an investigative report do not all give rise to a constitutional claim. "Mere carelessness is insufficient, as are mistakes of tone. Errors concerning trivial matters cannot

establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot show the fabrication actually injured her in some way." *Spencer*, 857 F.3d at 798 (citations and internal quotations omitted); *see also O'Doan v. Sanford*, 991 F.3d 1027, 1046 (9th Cir. 2021) (following *Devereaux v. Abbey*, but noting that "a minor discrepancy" is not fabrication).

The language in a Ninth Circuit case suggests that the mere use of fabricated evidence is violative of due process regardless of whether the person was convicted. In *Richards*, the plaintiff had been convicted of first-degree murder, but that conviction was later vacated based on false evidence. *Richards*, 39 F.4th at 566. The plaintiff then filed a § 1983 action against the County and various law enforcement officers. The court said "regardless of the plaintiff's innocence or guilt, that "[i]t would be anomalous to turn away a plaintiff who has been injured by deliberately fabricated evidence simply because that evidence alone was not sufficient to cause the conviction - the right to a fair trial is impinged either way." *Id.* at 573. Other courts have held that such evidence may not be used to prosecute or convict an individual. *Devereaux*, 263 F.3d. at 1075 ("the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution"); *Cole v. Carson*, 802 F.3d 752, 768 (5th Cir.2015) ("a victim of intentional fabrication of evidence by officials is denied due process when he is either convicted or acquitted"). Thus, the instruction should be modified depending on whether the plaintiff was criminally charged, prosecuted, or convicted based on fabricated evidence. This instruction includes prosecution as a means to satisfy the three elements for a trial court to consider.

"Typically, in constitutional tort cases the '[f]iling of a criminal complaint immunizes investigating officers . . . because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time.'" *Caldwell*, 889 F.3d at 1115 (quoting *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981), *overruled on other grounds by Beck v. City of Upland*, 527 F.3d 853, 865 (9th Cir. 2008)). However, the presumption can be overcome if a plaintiff establishes that officers "either presented false evidence to or withheld crucial information from the prosecutor." *Caldwell*, 889 F.3d at 1116. At that point, "the analysis reverts back to a normal causation question" and the issue again becomes whether the constitutional violation caused the plaintiff's harm. *Id*.

An official's deliberate fabrication of evidence or use of perjury also violates the rights of a parent or child when introduced in a civil dependency proceeding. "[G]overnment perjury and knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts . . . There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017). For claims against social workers involving fabrication of evidence in child dependency proceedings, see 9.32 (Particular Rights—Fourteenth Amendment—Due Process—Interference with Parent/Child Relationship).

Imposing a deliberate indifference or reckless disregard for an accused's rights or for the truth standard is appropriate in the substantive due process context. *See Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013) (approving a deliberate indifference instruction, stating that "[d]eliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions. It entails something more than negligence but is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result"); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1089 (9th Cir. 2009). Deliberate indifference encompasses recklessness. *Castro v. County of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc), noted that the "deliberate indifference" standard, at least in the context of a Fourteenth Amendment failure to protect claim, requires the plaintiff "to prove more than negligence but less than subjective intent—something akin to reckless disregard." *See Gantt*, 717 F.3d at 708 (concluding no error in the portion of instruction stating "deliberate indifference is the conscious or reckless disregard of the consequences of one's acts or omissions"); *see also Tatum v. Moody*, 768 F.3d 806, 821 (9th Cir. 2014) (approving alternative instruction that also encompassed recklessness).

Revised June 2025

9.33A Particular Rights—Fourteenth Amendment—Due Process—Deliberate or Reckless Suppression of Evidence

As previously explained, the plaintiff [*name*] has the burden of proving that the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution. The Fourteenth Amendment protects against a person being subjected to a criminal trial when favorable evidence has been deliberately or recklessly withheld from the prosecutor. In this case, the plaintiff [*name*] alleges the defendant [*name*] deprived [him] [her] [*other pronoun*] of [his] [her] [*other pronoun*] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

For the plaintiff [*name*] to prevail on [his] [her] [*other pronoun*] claim of deliberate or reckless suppression of evidence, the plaintiff [*name*] must prove the following elements by a preponderance of the evidence:

First, the defendant [*name*] suppressed evidence that was favorable to the accused from the prosecutor and the defense;

Second, the suppression harmed the accused; and

Third, the defendant [*name*] acted with deliberate indifference to an accused's rights or for the truth in suppressing the evidence.

"Deliberate indifference" is the conscious or reckless disregard of the consequences of one's acts or omissions.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3-9.8.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

In *Tatum*, the Ninth Circuit permitted a criminal defendant to pursue a due process claim for 27 months of pretrial detention that would not have occurred if "significant exculpatory evidence" had been disclosed by law enforcement to prosecutors. *Tatum v. Moody*, 768 F.3d 806,

819-820 (9th Cir. 2014). The Ninth Circuit resolved the appeal without deciding "the scope and protections established by *Brady* and its progeny," *id.*, instead, the court "emphasize[d] the narrowness of the constitutional rule we enforce today," which it restricted to: "detentions of (1) unusual length, (2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that the officers understood the risks to the plaintiff's rights from withholding the information or were completely indifferent to those risks." *Id*. ("If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.").

See also Mellen v. Winn, 900 F.3d 1085, 1096 (9th Cir. 2018) (stating elements); *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1087, 1089 (9th Cir. 2009) ("We therefore hold that a § 1983 plaintiff must show that police officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors. This standard is consistent with the standard imposed in the substantive due process context, in which government action may violate due process if it 'shocks the conscience.'"); *see also Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1219 (9th Cir. 2015) ("The law in 1984 clearly established that police officers were bound to disclose material, exculpatory evidence.").

Revised June 2025

9.33B Particular Rights—Fourteenth Amendment—Due Process—State-Created Danger

As previously explained, the plaintiff [*name*] has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff [*name*] of particular rights under the United States Constitution.

In this case, the plaintiff [*name*] alleges that the defendant [*name*] deprived the plaintiff [*name*] of [his] [her] [*other pronoun*] rights under the Fourteenth Amendment to the Constitution when [*insert factual basis of the plaintiff's claim*].

Under the Fourteenth Amendment, a person has the constitutional right to be free from a government employee affirmatively placing that person in a position of actual, particularized danger (or in a situation of actual, particularized danger that is more dangerous than the position that the person already faced) if the government employee acted with deliberate indifference to a known or obvious danger.

To prove the defendant deprived the plaintiff [*name*] of this Fourteenth Amendment right, the plaintiff [*name*] must prove the following additional elements by a preponderance of the evidence:

First, the defendant [*name*] committed an affirmative act;

Second, the affirmative act placed the plaintiff [*name*] in a position of an actual, particularized danger by creating or exposing the plaintiff [*name*] to a danger that [he] [she] [*other pronoun*] not have otherwise faced;

Third, the defendant [*name*] acted with deliberate indifference to a known or obvious danger; and

Fourth, the affirmative act that created the actual, particularized danger caused injury to the plaintiff [*name*] that was foreseeable.

In this context, "deliberate indifference" means that the defendant [*name*] disregarded a known or obvious consequence of [his] [her] [*other pronoun*] action[s]. In other words, the defendant [*name*] must have known that something was going to happen but ignored the risk and still exposed the plaintiff [*name*] to that risk.

Comment

Use this instruction only in conjunction with the applicable elements instruction from Instructions 9.3-9.8.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a

preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer**s**" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

The "state may be constitutionally required to protect a plaintiff that it affirmatively places in danger by acting with deliberate indifference to a known or obvious danger." *Martinez v. City of Clovis*, 943 F.3d 1260, 1271 (9th Cir. 2019) (quotations omitted); *see also Martinez v. High*, 91 F.4th 1022, 1028-29 (9th Cir. 2024) (explaining that an officer acted with deliberate indifference when the police officer disclosed a domestic violence victim's confidential report of domestic violence to victim's alleged abuser, who was another police officer, and knew victim was in the room with the abuser and would thus be exposed to his violent reaction, after which the abuser further physically abused the plaintiff); *Polanco v. Diaz*, 76 F.4th 918, 925-29 (9th Cir. 2023) (upholding a claim of state-created danger against prison officials in a case arising from prison guard's death from COVID-19 complications after 122 ill inmates with COVID-19 were transferred from another prison); *Murguia v. Langdon*, 61 F.4th 1096, 1110-17 (9th Cir. 2023) ("In examining whether an officer affirmatively places an individual in danger, . . . we examine whether the officers left the person in a situation that was more dangerous than the one in which they found him."); *Sinclair v. City of Seattle*, 61 F.4th 674, 682 (9th Cir. 2023) (holding that the danger of uncontrolled lawlessness created by the city's decision to withdraw law enforcement from a neighborhood and surrender it to protestors failed to allege that the danger was sufficiently particularized to support a mother's claim that the city's actions deprived her of her substantive due process right to son's companionship); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133-35 (9th Cir. 2018) (stating police officers "shepherding" of presidential candidate's supporters into a crowd of violent counter-protesters increased the danger to the attendees and was in deliberate indifference to that danger).

Revised June 2025

9.34 Qualified Immunity

Comment

The Committee has not formulated any instructions concerning qualified immunity because most issues of qualified immunity are resolved before trial, or the ultimate question of qualified immunity is reserved for the judge to be decided after trial based on the jury's resolution of the disputed facts. The trend of the Ninth Circuit's qualified immunity jurisprudence has been toward resolving qualified immunity as a legal issue before trial whenever possible. *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017).

To guide the trial court and the parties, this Comment provides general authority related to qualified immunity. This Comment also provides guidance should factual disputes preclude resolution of qualified immunity before trial, and the issue proceeds to trial for resolution.

Two-Prong Analysis

The qualified immunity analysis consists of two prongs: whether the defendant's conduct "(1) violated a constitutional right that (2) was clearly established at the time of the violation." *Polanco v. Diaz*, 76 F.4th 918, 925 (9th Cir. 2023); *Orn v. City of Tacoma*, 949 F.3d 1167, 1174 (9th Cir. 2020) (explaining that the qualified immunity analysis consists of a two-prong analysis: (1) "whether the facts taken in the light most favorable to the plaintiff show that the officer's conduct violated a constitutional right"; and (2) if so, "whether the right in question was clearly established at the time of the officer's actions, such that any reasonably well-trained officer would have known that his conduct was unlawful"). A court may "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009); *Evans v. Skolnik*, 997 F.3d 1060, 1064 (9th Cir. 2021) (noting that a court may address the two prong analysis in either order"); *O'Doan v. Sanford*, 991 F.3d 1027, 1036 (9th Cir. 2021) ("Although qualified immunity involves a two-step analysis, we may exercise our discretion to resolve a case only on the second ground when no clearly established law shows that the officers' conduct was unconstitutional.") (citations omitted).

"Under the first prong [of the qualified immunity inquiry,] we ask whether, '[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?'" *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022); *Pearson*, 555 U.S. at 236 (noting that analyzing the first then second prong, while not mandatory, "is often beneficial[,] . . . promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable"). To evaluate whether there is a constitutional violation, the court applies the current law. *See Sandoval v. County of San Diego*, 985 F.3d 657, 678 (9th Cir. 2021) (stating that "when the governing law has changed since the time of the incident, we apply the current law to determine if a constitutional violation took place under the first prong of qualified immunity analysis"); *see Singh v. City of Phoenix*, 124 F.4th 746 (9th Cir. 2024) (comparing the instant case with key facts from a plaintiff-identified similar case for the

second step of qualified immunity which purportedly put the defendant officer on notice that the officer's conduct might violate the Constitution and the instant case).

Regarding the second prong, the Ninth Circuit has explained: "We begin our inquiry into whether this constitutional violation was clearly established by defining the law at issue in a concrete, particularized manner." *Shafer v. County of Santa Barbara*, 868 F.3d 1110, 1117-18 (9th Cir. 2017) (stating that the plaintiff bears the burden of showing that the rights allegedly violated were clearly established); *Gordon v. County of Orange*, 6 F.4th 961, 969 (9th Cir. 2021) ("[t]he plaintiff bears the burden of proving that the right allegedly violated was clearly established" at the time of the violation). Moreover, to show that a right was clearly established, the plaintiff must demonstrate that, at the time of the alleged violation, the state of the law gave fair warning that the relevant conduct was unconstitutional. *See Ballentine*, 28 F.4th at 64. A case directly on point is not necessary to defeat qualified immunity, but existing case law must have put "every reasonable official" on notice that the conduct was unconstitutional. *Martinez v. High*, 91 F.4th 1022, 1031 (9th Cir. 2024); *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (stating that a plaintiff need not find "a case directly on point," but existing precedent must have placed the statutory or constitutional question beyond debate); *accord Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5-6 (2021) (per curiam) ("Although this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." (internal quotation marks and citations omitted)); *Sandoval*, 985 F.3d at 674 (stating that the second prong remains what it has always been: an objective examination "that compares the factual circumstances faced by the defendant to the factual circumstances of prior cases to determine whether the decisions in the earlier cases would have made clear to the defendant that his conduct violated the law").

In deciding which precedents apply, the Ninth Circuit routinely relies "on the intersection of multiple cases when holding that a constitutional right has been clearly established." *Polanco*, 76 F.4th at 930 n.8 ("We routinely rely on the intersection of multiple cases when holding that a constitutional right has been clearly established…This approach is required by the Supreme Court's instruction that qualified immunity is improper where 'a legal principle [has] a sufficiently clear foundation in then-existing precedent.'") (citations omitted); *see also Russell v. Lumitap*, 31 F.4th 729, 737 (9th Cir. 2022) ("The precedent must be 'controlling'—from the Ninth Circuit or the Supreme Court—or otherwise be embraced by a 'consensus' of courts outside the relevant jurisdiction."); *accord Martinez,* 91 F.4th at 1031 ("existing case law must be 'controlling law'—from the Ninth Circuit, the Supreme Court, or from a consensus of courts outside the relevant jurisdiction."). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Scanlon v. County of Los Angeles*, 92 F.4th 781, 809 (9th Cir. 2024) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)). Only the judge can decide whether a particular constitutional right was "clearly established" once any factual issues are resolved by a fact finder. *See Morales*, 873 F.3d at 823.

Qualified Immunity as a Matter of Law

A defendant is entitled to qualified immunity as a matter of law only if, taking the facts in the light most favorable to the nonmoving party, he or she did not violate any clearly established constitutional right. *Torres v. City of Los Angeles*, 548 F.3d 1197, 1210 (9th Cir. 2008). If reasonable jurors could believe that the defendant violated the plaintiff's constitutional right, and the right at issue was clearly established, the case should proceed to trial. *Id.*; *see also LaLonde v. County of Riverside*, 204 F.3d 947, 953 (9th Cir. 2000) ("If . . . there is a material dispute as to the facts regarding what the officer or the plaintiff actually did, the case must proceed to trial, before a jury if requested."). "Though we may excuse the reasonable officer for . . . a mistake, it sometimes proves necessary for a jury to determine first whether the mistake, was, in fact, reasonable." *Johnson v. Bay Area Rapid Transit Dist.*, 724 F.3d 1159, 1168 (9th Cir. 2013) (citations omitted).

The Ninth Circuit has decided numerous cases of "clearly established" law. Limited examples of "clearly established" law follow. The Committee suggests review of the Ninth Circuit's website for a more robust accumulation of case authorities. *See* Ninth Circuit Section 1983 Outline.

1. *Excessive Force*

In *Rice v. Morehouse*, the Ninth Circuit reiterated that, for purposes of clearly established law, "we clearly established one's 'right to be free from the application of non-trivial force for engaging in mere passive resistance.'" 989 F.3d 1112, 1125 (9th Cir. 2021) (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013)) (citing *Nelson v. City of Davis*, 685 F.3d 867, 881 (9th Cir. 2012) (explaining that cases dating back to 2001 established that "a failure to fully or immediately comply with an officer's orders neither rises to the level of active resistance nor justifies the application of a non-trivial amount of force"); *Sanderlin v. Dwyer*, 116 F.4th 905, 915-17 (9th Cir. 2024) (holding that, under *Nelson v. City of Davis*, it was clearly established that an officer's use of a foam projectile on protestor who was standing in front of the officer holding a sign above his head and who did not move when ordered to stand aside constituted excessive force).

An arrestee's right to be free from the use of deadly force as long as he was not directly threatening a police officer with a weapon was clearly established at the time of the decedent's death in June 2018. And an arrestee's right to be free from the use of chemical munitions as long as he was suspected of a minor crime, posed no threat to officers or others, and was engaged in only passive resistance was also clearly established at that time. But the arrestee's right to be free from the use of a police dog under the circumstances was not then clearly established. *Hyer v. City & County of Honolulu*, 118 F.4th 1044, 1067-70 (9th Cir. 2024).

It is clearly established that officers cannot use intermediate force when a suspect is restrained, has stopped resisting, and does not pose a threat. *See Hyde v. City of Willcox*, 23 F.4th 863, 873 (9th Cir. 2022) (stating, however, that "we are generally loath to second-guess law enforcement officers' actions in a dangerous situation by analyzing each act without looking at the entire event and considering the officers' mindset amid the uncertainty and chaos"); *Tuuamalemalo v. Greene*, 946 F.3d 471, 477 (9th Cir. 2019) (per curiam) ("[I]t was clearly

established that the use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment's prohibition on the use of excessive force."). Police officers were not entitled to qualified immunity for continuing to detain bystanders for five hours, while handcuffed, in violation of the plaintiffs' Fourth Amendment rights, because it became apparent to officers almost immediately that the bystanders were not armed, were not engaging in any criminal activity, and were minors, and the detention continued long after any probable cause had dissipated. *Nicholson v. City of Los Angeles*, 935 F.3d 685, 691 (9th Cir. 2019). It was clearly established that the use of deadly force against a man who was walking down the street carrying gun in his waistband, posing no immediate threat, and failing to comply with conflicting commands violated Fourth Amendment. *Calonge v. City of San Jose*, 104 F.4th 39, 48 (9th Cir. 2024) ("When a man is walking down the street carrying a gun in his waistband, posing no immediate threat, police officers may not shout conflicting commands at him and then kill him."); *Rosenbaum v. City of San Jose*, 107 F.4th 919, 926 (9th Cir. 2024) (stating that is clearly established that a suspect has right to be free from excessive force under the Fourth Amendment when the officer allows a police dog to continue biting the suspect after the suspect has fully surrendered and is under officer control when he lay on his stomach with his arms outstretched, was not actively resisting arrest or attempting to get up or flee, and where officers had immobilized his arms and legs and were pointing their firearm at him); *Scott v. Smith*, 109 F.4th 1215, 1226 (9th Cir. 2024) (stating that it was clearly established that bodyweight force on the back of a prone, unarmed person suffering a mental health crisis, who is not suspected of a crime is constitutionally excessive); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1056-57 (9th Cir. 2003) (holding that police officers' alleged act of continuing to press their weight onto mentally ill detainee's neck and torso as he lay handcuffed on ground and begged for air constituted use of excessive force under the circumstances); *Spencer v. Pew*, 117 F.4th 1130, 1143-44 (9th Cir. 2024) (holding that *Drummond* was "sufficiently materially similar to this case to provide adequate notice to [the defendant] that his post-handcuffing compression of [plaintiff's] back and neck with his knee was excessive"); *compare Perez v. City of Fresno*, 98 F.4th 919, 926 (9th Cir. 2024) ("Given the specific context of this case, we cannot conclude that *Drummond* put the officers on fair notice that their actions—pressing on a backboard on top of a prone individual being restrained for medical transport, at the direction of a paramedic working to provide medical care—was unlawful."). In *Seidner v. De Vries*, the Ninth Circuit held that because "[t]here are material differences between motorized and non-motorized vehicles," it was not clearly established that police officer's use of a patrol car as a roadblock to stop a bicyclist suspected of a minor traffic violation violated the Fourth Amendment's prohibition against use of excessive force. 39 F.4th 591, 602 (9th Cir. 2022).

2. *First Amendment*

It is clearly established that the First Amendment protects a person's right to record or attempt to record police when the person is in a place where the person is permitted to be, is unarmed, and is not a suspect. *See Bernal v. Sacramento Cnty. Sheriff's Dep't*, 73 F.4th 678, 698-99 (9th Cir. 2023) (holding that qualified immunity did not shield law enforcement officers who forcibly restrained the unarmed, non-suspect plaintiff after he yelled at and filmed the officers in his front yard). "It was clearly established at the time of Defendants' conduct that the First Amendment prohibits public officials from threatening to remove a child from an

individual's custody to chill protected speech out of retaliatory animus for such speech." *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1020 (9th Cir. 2020). For a discussion of when a law enforcement officer may rely on a policy, an ordinance, or a permit scheme underlying the officer's challenged actions that is not itself challenged, *see Saved Mag. v. Spokane Police Dep't*, 19 F.4th 1193, 1200-01 (9th Cir. 2021).

For a discussion of public employees' First Amendment rights, see the Comment to Instruction 9.9. "[G]enerally, 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'" *Jensen v. Brown*, 131 F.4th 677, 688 (9th Cir. 2025) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). But this rule "does not apply to 'speech related to scholarship or teaching,'" that is "performed 'pursuant to the official duties' of a teacher and professor." *Demers v. Austin*, 746 F.3d 402, 406, 412 (9th Cir. 2014) (quoting *Garcetti*, 547 U.S. at 425). "Rather, speech 'related to scholarship or teaching' is covered by the *Pickering* [*v. Board of Education*, 391 U.S. 563 (1968)] doctrine even if it was made pursuant to a public employee's official duties." *Jensen*, 131 F.4th at 688 (quoting *Demers*, 746 F.3d at 412). It is "clearly established that a professor has a right to speak about a school's curriculum without being reprimanded, given negative performance reviews, and put through an investigation and termination hearing." *Id.* at 694.

3. *Search and Seizure*

It is also "clearly established" that "officers can be held liable for conducting a high-risk vehicle stop based on nothing more than a reasonable suspicion that the vehicle was stolen." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 893 (9th Cir. 2024) (citing *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), and *Green v. City & County of San Francisco*, 751 F.3d 1039 (9th Cir. 2014)). Property owners brought § 1983 action against city and city police officers, alleging that officers violated the owners' Fourth Amendment rights by stealing their property after conducting search and seizure pursuant to a warrant. *Jessop v. City of Fresno*, 936 F.3d 937, 939 (9th Cir. 2019). The Ninth Circuit stated that there was "no clearly established law holding that officers violate the Fourth or Fourteenth Amendment when they steal property seized pursuant to a warrant," since the Ninth Circuit had not decided the issue and other circuits are divided. *Id.* Although officers "ought to have recognized that" stealing seized property "was morally wrong, they did not have clear notice that it violated the Fourth Amendment." *Id.* at 942.

In *Olson v. County of Grant*, 127 F.4th 1193, 1203 (9th Cir. 2025), the Ninth Circuit held that a plaintiff's consent to allowing one law enforcement agency to search the plaintiff's cell phone did not extend to a search by a different law enforcement agency. The plaintiff, Olson, was arrested in Idaho for marijuana possession and signed a form giving Idaho police consent to search her phone, and an "extraction," or copy, of her phone contents was made. Defendant Carpenter, county prosecutor in Oregon, requested and reviewed Olson's phone data for evidence of criminal activity, found none, and deleted his copy of the extraction. Olson sued Carpenter for violation of the Fourth Amendment. The court upheld qualified immunity for Carpenter because the law was not clearly established at the time, but took the opportunity to conclude that "[b]ecause it is important to lay down a marker for future cases, we heed the

Court's call in *Pearson* to develop constitutional precedent and conclude that Carpenter's search infringed on Olson's Fourth Amendment rights." Here, Carpenter's review of the cell phone extraction was without consent, without a warrant, and without a reasonable suspicion of further criminal activity by Olson. Thus, after *Olson*, the law is clearly established that this kind of search is a violation of the Fourth Amendment.

4. "*Obvious" Unlawful Conduct without Controlling Case Law*

"[T]here can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."

District of Columbia v. Wesby, 583 U.S. 48, 64 (2018) (citing *Brosseau*, 543 U.S. at 199); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (stating police officers "shepherding" of presidential candidate's supporters into crowd of violent counter-protesters to be one such rare but obvious circumstance); *Hardwick v. Vreeken*, 844 F.3d 1112, 1120 (9th Cir. 2017) (identifying intentional use of perjured or fabricated evidence in child dependency hearing to be one such rare but obvious circumstance); *Rieman v. Vazquez*, 96 F.4th 1085, 1094 (9th Cir. 2024) (providing incomplete and false information to the juvenile court to convince the court the social worker had satisfied the due process notice requirement constitutes judicial deception and was an obvious violation of the Fourth Amendment). "[A] right can be clearly established despite a lack of factually analogous preexisting case law, and officers can be on notice that their conduct is unlawful even in novel factual circumstances." *Ballentine*, 28 F.4th at 66 (stating it was "clearly established" that an arrest supported by probable cause, but made in retaliation for protected speech, violates the First Amendment) (quoting *Ford v. City of Yakima*, 706 F.3d 1188, 1195 (9th Cir. 2013) (holding that a plaintiff pressing a retaliatory arrest claim based on speech protected by the First Amendment generally must plead and prove the absence of probable cause for the arrest), *abrogated on other grounds by Nieves v. Bartlett*, 587 U.S. 391 (2019); *Spencer*, 117 F.4th at 1138-40 (rejecting plaintiff's assertion that his excessive force claim was an "obvious case," because it was not obvious "from the *Graham* factors alone, that every reasonable official would have understood that what he is doing violates the right to be free from excessive force" (citing *Graham v. Connor*, 490 U.S. 386 (1989) (additional quotations and citations omitted)). The Ninth Circuit noted the scarcity of such rare and obvious cases: "[W]e have repeatedly emphasized that such cases are few and far between, and thus, we are hesitant to find a right clearly established without a body of relevant case law." *Sabra v. Maricopa Cnty. Cmty. Coll. Dist*., 44 F.4th 867, 888 (9th Cir. 2022) (citations omitted).

5. *State Action Required*

The Ninth Circuit's historical view of qualified immunity finds no basis to grant qualified immunity to officials not engaged in their duties as public servants. "State action for § 1983 purposes is not necessarily co-extensive with state action for which qualified immunity is available." *Bracken v. Okura*, 869 F.3d 771, 776, 778 (9th Cir. 2017) (explaining that the inquiry is whether the person acted "in performance of public duties" or to "carry out the work of government."). Thus, when an off-duty police officer, wearing his uniform, is working as a private security guard, qualified immunity does not apply, even if the off-duty work is with the

consent of the police department and the off-duty officer may be found to have been acting under the color of state law. *Id*. at 776-78 (stating that qualified immunity would not be available when a government officer uses the badge of his authority in service of a private non-governmental goal).

6. *State-Created Danger*

"As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992)). One exception to this general rule is the state-created danger doctrine. Under this exception, a government employee must have affirmatively placed the plaintiff in a position of danger, that is, the employee's actions must have created or exposed an individual to a danger that he or she would not have otherwise faced. *Id*. To prove that the exception applies, "[t]he affirmative act must create an actual, particularized danger," "the ultimate injury to the plaintiffs must be foreseeable," and "the employees must have . . . acted with 'deliberate indifference' to a 'known or obvious danger.'" *Id*. (citations omitted). As an example, it was not clearly established that at the time a police officer disclosed the victim's confidential report of domestic violence to the victim's alleged abuser, who was another police officer, such disclosure violated victim's substantive due process rights under the state-created danger doctrine. The disclosing officer was entitled to qualified immunity from the victim's § 1983 substantive due process claim. *Martinez*, 91 F.4th at 1031-32 ("[W]e now clarify that right going forward. An officer is liable under the state-created danger doctrine when the officer discloses a victim's confidential report to a violent perpetrator in a manner that increases the risk of retaliation against the victim."). For a discussion of the state-created danger doctrine and the clearly established requirement in the context of a state prison exposing guards and inmates to a heightened danger from COVID-19, *see Polanco*, 76 F.4th at 926-31. For a discussion of foster children's clearly established right to state protection in the supervision, protection, and safe foster care placement by a social worker, *see Tamas v. Dep't of Soc. & Health Servs*., 630 F.3d 833, 846-47 (9th Cir. 2010).

7. *Fourteenth Amendment*

There is a clearly established Fourteenth Amendment right to bodily privacy. *Vazquez v. County of Kern*, 949 F.3d 1153, 1165 (9th Cir. 2020) (stating that a correctional officer at a juvenile detention facility was not entitled to qualified immunity for allegedly violating female ward's Fourteenth Amendment right to bodily privacy by peering through a gap in a curtain to shower stalls so that he could observe inmate as she showered in violation of clearly established law, "the Juvenile Hall administrative policies, and the training [defendant] likely attended."). The Ninth Circuit has held that "casual, restricted, and obscured viewing of a prison inmate's naked body is constitutionally permitted if it is justified by legitimate government interests such as prison security needs." *Ioane v. Hodges*, 939 F.3d 945, 957 (9th Cir. 2019).

There is a clearly established Fourteenth Amendment right "to be free from judicial deception in child custody proceedings." *Benavidez v. County of San Diego*, 993 F.3d 1134, 1152-53 (9th Cir. 2021) (stating that county social workers were not entitled to qualified

immunity for obtaining medical examinations of children that they had removed from parents' home by means of knowingly or recklessly false representations to the juvenile court judge who authorized the examinations).

In *Gordon v. County of Orange*, the Ninth Circuit stated that "[w]e now hold that pre-trial detainees do have a right to direct-view safety checks sufficient to determine whether their presentation indicates the need for medical treatment." 6 F.4th 961, 973 (9th Cir. 2021) ("[L]aw enforcement and prison personnel should heed this warning because the recognition of this constitutional right will protect future detainees."); *see also Sandoval v. County of San Diego*, 985 F.3d 657, 679-81 (9th Cir. 2021) (holding it was clearly established that nurses at county jail were not entitled to qualified immunity for their alleged conduct in failing to monitor pretrial detainee who exhibited severe sweating, shaking, and other symptoms of being under the influence of drugs for several hours and failing to provide or obtain any medical treatment for detainee).

In *Scott*, the Ninth Circuit recognized as a clearly established right under the Fourteenth Amendment "going forward," that a child has a constitutionally protected interest in the companionship of a parent. 109 F.4th at 1229-30. That right was violated by the officers' "conscience shocking" use of force against the child's parent, where the parent presented no immediate risk, was unarmed and in mental distress, complied with officers' orders, and was not suspected of a crime, yet the officers used their bodyweight to forcefully restrain the parent, who "cried out in distress," became "increasingly muffled and incoherent," and shortly after lost consciousness (and ultimately died). *Id.* at 1121, 1128-30.

In *K.J. v. Jackson*, 127 F.4th 1239, 1250 (9th Cir. 2025) (citing *Goss v. Lopez*, 419 U.S. 565 (1975)), the Ninth Circuit recognized as a clearly established right under the Fourteenth Amendment that a student facing suspension or extended suspension based on "a new accusation" has a right to "oral or written notice of the charges," "an explanation of the evidence the authorities have in support of that charge," and "an opportunity to present his side of the story" in response.

In *D'Braunstein v. Cal. Highway Patrol*, the Ninth Circuit stated that "it is clearly established [under the Fourth and Fourteenth Amendments] that officers must seek to provide an injured detainee or arrestee with objectively reasonable medical care in the face of medical necessity creating a substantial and obvious risk of serious harm, including by summoning medical assistance." 131 F.4th 764, 771 (9th Cir. 2025). "Officers may not act with objective deliberate indifference to such a medical need." *Id.* In evaluating whether a reasonable jury could conclude that the officer violated the plaintiff's clearly established rights, the court stated that "the common underlying constitutional question reflected in Fourth and Fourteenth Amendment case law is whether an officer's provision (or deprivation) of medical care was objectively unreasonable." *Id.* at 769.

8. Monell *Liability*

Qualified immunity does not apply to municipalities. *Owen v. City of Independence*, 445

U.S. 622, 645-47 (1980); *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass'n*, 38 F.4th 68, 71 (9th Cir. 2022) ("[P]recedent recognizes that municipalities are generally liable in the same way as private corporations in § 1983 actions" and a good faith defense may apply in limited circumstances).

The Ninth Circuit has rejected the view that municipal liability is precluded as a matter of law under § 1983 when the individual officers are exonerated of constitutional wrongdoing. *Richards v. County of San Bernardino*, 39 F.4th 562, 574 (9th Cir. 2022). If a plaintiff established he suffered constitutional injury by the county, the fact that individual officers are exonerated is immaterial to liability under § 1983. *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1250 n.12 (9th Cir. 2016) (citing *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002)). "This is true whether the officers are exonerated on the basis of qualified immunity, because they were merely negligent, or for other failure of proof." *Fairley*, 281 F.3d at 917 n.4.

For instructions against local governing bodies, see the following: 9.5 (Section 1983 Claim Against Local Governing Body Defendants Based on Unlawful Official Policy, Practice, or Custom—Elements and Burden of Proof), 9.6 (Section 1983 Claim Against Local Governing Body Defendants Based on Act of Final Policymaker—Elements and Burden of Proof), 9.7 (Section 1983 Claim Against Local Governing Body Defendants Based on Ratification—Elements and Burden of Proof), and 9.8 (Section 1983 Claim Against Local Governing Body Defendants Based on a Policy that Fails to Prevent Violations of Law or a Policy of Failure to Train—Elements and Burden of Proof).

Qualified Immunity at Trial

In most cases in which qualified immunity remains an issue at trial, the court will have found some underlying factual dispute that precluded a pretrial ruling. Qualified immunity is then transformed from a doctrine providing immunity from suit to one providing a defense at trial. *See Torres*, 548 F.3d at 1211 n.9. When a case proceeds to trial "qualified immunity can no longer rightly be called an 'immunity from suit' (since the suit has already proceeded to its conclusion); rather, it is now effectively a defense." *Sloman v. Tadlock,* 21 F.3d 1462, 1468 n.6 (9th Cir. 1994).

A dilemma arises when a qualified immunity case goes to trial because disputed factual issues remain. *Torres*, 548 F.3d at 1211 n.9. When there are disputed factual issues that are necessary to a qualified immunity decision, these issues must first be determined by the jury before the court can rule on qualified immunity. *Morales*, 873 F.3d at 824. "[C]omparing a given case with existing statutory or constitutional precedent is quintessentially a question of law for the judge, not the jury. A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved." *Id*.

Special interrogatories to the jury can be used to establish disputed material facts. *Morales*, 873 F.3d at 824 (acknowledging jury interrogatories should be restricted to the who-what-when-where-why type of historical fact issues) (citing cases from the First, Second, Third,

Fourth, Sixth, Seventh, Eighth, Eleventh, and District of Columbia Circuits); *Conner v. Heiman*, 672 F.3d 1126, 1131 n.2 (9th Cir. 2012) ("[W]hile determining the facts is the jury's job (where the facts are in dispute), determining what objectively reasonable inferences may be drawn from such facts may be determined by the court as a matter of logic and law."). When the qualified immunity issue goes to trial, the jury itself decides the issues of historical fact that are determinative of the qualified immunity defense, but the jury does not apply the law relating to qualified immunity to those historical facts it finds; that is the court's duty. *Morales*, 873 F.3d at 824-25. Thus, consistent with this case law, there may be particular cases in which a special verdict on a discrete fact is warranted to resolve a qualified immunity claim.

But a special verdict is not required in every qualified immunity case involving disputed issues of material fact for the purpose of evaluating a post-verdict qualified immunity defense. *See Lam v. City of San Jose*, 869 F.3d 1077, 1086 (9th Cir. 2017) ("[T]he decision 'whether to submit special interrogatories to the jury is a matter committed to the discretion of the district court.'"(quoting *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 522 (9th Cir. 1999)); *see also Ruvalcaba*, 167 F.3d at 522 (stating that submitting special interrogatories to the jury is a matter of trial court discretion, but that "[w]e now expressly hold that a district court shall disclose [to the parties] at least the substance of special interrogatories before closing arguments have been completed")); *Sloman*, 21 F.3d at 1468 (noting that sending the factual issues to the jury but reserving to the judge the ultimate "reasonable officer" determination leads to serious logistical difficulties: "Special jury verdicts would unnecessarily complicate easy cases, and might be unworkable in complicated ones").

At trial a litigant may preserve the qualified immunity issue by making a Rule 50(a) motion for judgment as a matter of law. Whether the right was clearly established is an issue for a judgment as a matter of law under Rule 50(a) and (b) and should be preserved in a Rule 50(a) motion at the close of evidence and then revisited, if appropriate, after the verdict in a Rule 50(b) motion. *Tortu v. L. V. Metro. Police Dep't*, 556 F.3d 1075, 1083 (9th Cir. 2009) ("When a qualified immunity claim cannot be resolved before trial due to a factual conflict, it is a litigant's responsibility to preserve the legal issue for determination after the jury resolves the factual conflict. A Rule 50(a) motion meets this requirement."); *Lam,* 869 F.3d at 1089 (stating that the qualified immunity defense at trial is waived by "failure to preserve the defense by filing rule 50 motions"); *see also A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452 n.2 (9th Cir. 2013) (noting that the defendant preserved his position on qualified immunity—renewed in Rule 50(b) motion after trial—by bringing Rule 50(a) motion for judgment as a matter of law before the case was submitted to jury). "[P]ost-verdict, a court must apply the qualified immunity framework to the facts that the jury found (including the defendant's subjective intent)." *A.D.*, 712 F.3d at 459.

Please also refer to the Ninth Circuit Section 1983 Outline for further discussion of qualified immunity cases maintained therein.

Revised June 2025

9.35 *Bivens* Claim Against Federal Defendant in Individual Capacity—Elements and Burden of Proof

The plaintiff [*name*] brings [his] [her] [*other pronoun*] claim[s] under a Supreme Court decision known as "*Bivens*," which permits a plaintiff to seek damages from any person who, acting under color of federal law, deprives the plaintiff of certain rights, privileges, or immunities secured by the Constitution of the United States.

To prevail on [his] [her] [*other pronoun*] *Bivens* claim against the defendant [*name*], the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, the defendant [*name*] acted under color of federal law; and

Second, the [act[s]] [failure to act] of the defendant [*name*] deprived the plaintiff [*name*] of [his] [her] [*other pronoun*] particular rights under the United States Constitution, as explained elsewhere in these instructions.

A person acts "under color of federal law" when the person acts or purports to act in the performance of official duties under any federal law. [[The parties have stipulated] [I instruct you] that the defendant acted under color of federal law.]

If you find the plaintiff [*name*] has proved each of these two elements, and if you also find that the plaintiff [*name*] has proved all the elements [he] [she] [*other pronoun*] is required to prove under Instruction[s] [*specify the instruction[s] that deal*[*s*] *with the particular right*[*s*]], your verdict should be for the plaintiff [*name*]. If, on the other hand, you find that the plaintiff [*name*] has failed to prove any one or more of these elements, your verdict should be for the defendant [*name*].

Comment

Use this instruction only in conjunction with an applicable "particular rights" instruction, such as Instructions 9.9-9.33, modified as necessary to reflect that the defendant is a federal actor, not a state actor. Such an instruction should set forth the additional elements a plaintiff must establish to prove the violation of a particular constitutional right.

In a multi-plaintiff or multi-defendant case, the trial judge should consider naming each individual specifically in lieu of using the generic term "officers" or "defendants." In *Chinaryan*, the Ninth Circuit explained that the jury instructions were "confusing" where the instructions stated that "to establish an unreasonable seizure in this case, the plaintiffs must prove by a preponderance of the evidence that the officer**s**"—plural—"used excessive force." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 905 (9th Cir. 2024) (emphasis in original). The "officer***s***" jury instruction language was confusing because it "required the jury to evaluate the excessiveness of the force used by the officers collectively rather than consider whether any single officer used excessive force." *Id.* In light of *Chinaryan*, the trial judge may consider using a special verdict to identify the specific findings as to each plaintiff and defendant.

In 1971, the Supreme Court in *Bivens* adopted an "implied cause of action theory" that permits a plaintiff to seek damages from federal officers for the unreasonable search and seizure in plaintiff's home. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Since then, the Supreme Court has limited the scope of *Bivens* actions. *See Egbert v. Boule*, 596 U.S. 482 (2022). *Egbert* "emphasized that recognizing a cause of action under *Bivens* is a 'disfavored judicial activity.'" *Id.* at 491 (quoting *Ziglar v. Abassi*, 582 U.S. 120, 121 (2017)).

With that consideration in mind, *Egbert* explained that to determine whether a *Bivens* remedy exists in a particular case, the court must undertake a two-step process. At the first step, a court must "ask whether the case presents a new *Bivens* context—*i.e*., is it meaningfully different from the three cases in which the [Supreme] Court has implied a damages action." *Egbert*, 596 U.S. at 492 (internal quotations and alterations omitted). The three cases in which the Supreme Court has held that the Constitution provides an implied cause of action through which plaintiffs can seek damages from federal officers who violate their constitutional rights are *Bivens*, in which the Court held that a plaintiff could seek damages from the Federal Bureau of Narcotics agents who allegedly violated his Fourth Amendment right to be free from unreasonable searches and seizures; *Davis v. Passman*, 442 U.S. 228 (1979), in which the Court provided a remedy for the plaintiff who alleged that her employer, a Member of Congress, had discriminated against her because of her sex, which was a Fifth Amendment due process violation; and *Carlson v. Green*, 446 U.S. 14 (1980), in which the Court held that the estate of a deceased prisoner could seek damages from federal prison officials for violating the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *Pettibone v. Russell*, 59 F.4th 449, 454 (9th Cir. 2023). In *Pettibone*, the Ninth Circuit explained that the plaintiff's asserted *Bivens* claim that the defendant violated the Fourth Amendment presented a new context because the federal officer defendant was of a different rank than the officers in *Bivens*, his actions took place at a higher level of generality than the *Bivens* officers, his legal mandate of directing a multi-agency operation to protect federal property was under an executive order, and providing a *Bivens* remedy would create an increased risk of disruptive intrusion by the courts into the other branches' functioning. *Id.* at 455, 457 (concluding that "no *Bivens* cause of action exists in this case").

The Ninth Circuit likewise rejected a claim in *Mejia v. Miller*, 61 F.4th 663, 668-69 (9th Cir. 2023), where the plaintiff's *Bivens* excessive force claim against Bureau of Land Management (BLM) agents created a new context because the alleged conduct occurred on public lands, not in the plaintiff's home, and a Fourth Amendment claim against BLM agents would have "systemwide consequences" for BLM's mandate to maintain order on public lands. Further, in *Harper v. Nedd*, 71 F.4th 1181, 1187-8 (9th Cir. 2023), the court held that the employee plaintiff's Fifth Amendment due process *Bivens* claim presented a new context from *Davis*, "because extending Bivens to allow government employees to sue their supervisors for damages over disciplinary actions would significantly intrude into [the Executive Branch in addressing disciplinary disputes]." *See also Sheikh v. U.S. Dep't of Homeland Sec*., 106 F.4th 918, 926 (9th Cir. 2024) (holding Fourth and Fifth Amendment claims based on alleged

fabrication of evidence by Department of Homeland Security agents arose in a new context from *Bivens*, and special factors counseled against extending *Bivens* to new context).

On the other hand, the Ninth Circuit has held that a prisoner's claim of deliberate medical indifference under the Eighth Amendment was not meaningfully different from *Carlson* because, applying the *Ziglar* factors, the plaintiff's claim involved an officer of the same rank, it implicated the same constitutional right, the claim was of the same specificity, there was extensive judicial guidance on how an officer should respond to the problem, the officer operated under the same legal framework, and there was the same risk of judicial disruption by recognizing a cause of action. *Watanabe v. Derr*, 115 F.4th 1034, 1039-40 (9th Cir. 2024). In *Watanabe*, the Ninth Circuit rejected the defendant's arguments that Watanabe's claim meaningfully differed from *Carlson* because Watanabe's injury was less serious or that a distinction existed based on whether the allegedly unconstitutional conduct was an overt act or an omission. *Id.* at 1041-42 (collecting cases). The Ninth Circuit also clarified that consideration of alternative remedial schemes is improper during the first step and is only relevant at step two. *Id.* at 1042.

If the answer at the first step is yes, meaning that the "claim arises in a new context," the second step dictates that "a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert*, 596 U.S. at 492 (quoting *Ziglar,* 582 U.S. at 136). "If there is even a single 'reason to pause before applying *Bivens* in a new context,' a court may not recognize a *Bivens* remedy." *Id.* (quoting *Hernández v. Mesa*, 589 U.S. 93, 102 (2020)). For example, "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, 'an alternative remedial structure.'" *Id.* at 493 (quoting *Ziglar,* 582 U.S. at 137); *accord Harper*, 71 F.4th at 1188 (noting that Congress provided alternative remedies for employment disputes which the plaintiff pursued). The existence of an alternative remedial structure precludes a *Bivens* action even where the available remedial scheme does not provide monetary relief. *Pettibone,* 59 F.4th at 457; *see also Stanard v. Dy,* 88 F.4th 811, 818 (9th Cir. 2023) (concluding Fifth Amendment claim for disparate treatment between pre-trial and post-sentencing inmates arises in new context but special factors existed, therefore *Bivens* remedy not available). Nor may a *Bivens* cause of action lie "where . . . national security is at issue." *Egbert*, 596 U.S. at 494. *See also Pettibone*, 59 F.4th at 455 (holding that *Bivens* remedy cannot be extended where, *"*because [defendant] was carrying out an executive order, providing a *Bivens* remedy. . . would carry a greater risk of 'disruptive intrusion by the Judiciary into the functioning of other branches' than was present in *Bivens*.") (quoting *Ziglar*, 582 U.S. at 122). *See also Marquez v. Rodriguez*, 81 F.4th 1027, 1031 (9th Cir. 2023) (rejecting the *Bivens* claim of a pretrial detainee alleging that federal correctional officers failed to protect him from other detainees because the claim presents a new *Bivens* context, there were no special factors, and Congress has already legislated on prison administration without providing a damages remedy against jail officials); *Mejia*, 61 F.4th at 669 (explaining plaintiff has alternative remedies to address his grievance).

A *Bivens* defendant is at risk of personal liability, including punitive damages, and a plaintiff is entitled to a jury trial in a *Bivens* action. *See Carlson*, 446 U.S. at 22. Because a

Bivens action is brought against a federal official in the official's personal capacity, it is not considered to be an action against the United States and thus is not barred by sovereign immunity. To be individually liable in a *Bivens* action, an individual must personally participate in an alleged deprivation of rights. *See Avalos v. Baca*, 596 F.3d 583, 587 (9th Cir. 2010). In a *Bivens* action, as with a § 1983 action, "the plaintiff must also demonstrate that the defendant's conduct was the actionable cause of the claimed injury." *Harper v. City of Los Angeles*, 533 F.3d 1010, 1026 (9th Cir. 2008). "To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." *Id*.

In a *Bivens* action, a supervisor can be held liable in his or her individual capacity only if (1) he or she personally participated in the constitutional violation, or (2) there is a "sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989); *see also Chavez v. United States*, 683 F.3d 1102, 1110 (9th Cir. 2012) ("[T]aking qualified immunity into account, a supervisor faces liability under the Fourth Amendment only where it would be clear to a reasonable [supervisor] that his conduct was unlawful in the situation he confronted." (quotation marks omitted; first brackets added; second brackets in original)). Moreover, for liability to attach, supervisors must have actual supervisory authority over the government actor who committed the alleged violations. *See Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018). In other words, "[t]hey cannot be supervisors of persons beyond their control." *Id*.

If the plaintiff alleges that a supervisor personally participated in a constitutional violation, use the instruction shown above. If, however, the plaintiff alleges that a subordinate committed a constitutional violation and there is a causal connection between the violation and the supervisor's wrongful conduct, use Instruction 9.4 (Section 1983 Claim Against Supervisory Defendant in Individual Capacity—Elements and Burden of Proof) and replace "state law" with "federal law."

One of the defenses that may be available to a federal official in a *Bivens* lawsuit is official immunity from actions for damages. There are two types of official immunity available as affirmative defenses: absolute and qualified. Absolute immunity is often granted to judges, prosecutors, legislators, and the President, so long as they are acting within the scope of their duties. *Trump v. United States*, 603 U.S. 593, 614 (2024) (discussing the scope of absolute presidential immunity as within the outer perimeter of his official responsibility). Qualified immunity applies to all other federal officials. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982). "For purposes of immunity, we have not distinguished actions brought under 42 U.S.C. § 1983 against state officials from *Bivens* actions brought against federal officials." *Antoine v. Byers & Anderson, Inc*., 508 U.S. 429, 433 n.5 (1993). For a discussion of qualified immunity under § 1983, *see* Comment at Instruction 9.34 (Qualified Immunity).

Revised March 2025

9.36 Discrimination in Making and Enforcing Contracts (42 U.S.C. § 1981)

The plaintiff [*name*] claims that the defendant [*name*] prevented [him] [her] [*other pronoun*] from [making] [performing] [modifying] [terminating] [enjoying a benefit, privilege, term, or condition of] a contract because of the plaintiff [*name*]'s race. To prevail on this claim, the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

[First, the plaintiff [*name*] was a party to a contract. [I instruct you that the plaintiff has established this element.]

or

[First, the plaintiff [*name*] attempted but was unable to [make a contract] [perform a contract] [modify a contract] [terminate a contract] [enjoy all benefits, privileges, terms and conditions of the contractual relationship]].

Second, the plaintiff [*name*]'s inability to [make a contract] [perform a contract] [modify a contract] [terminate a contract] *or* [enjoy all benefits, privileges, terms and conditions of the contractual relationship] was "because of" defendant [*name*]'s purposeful discrimination against the plaintiff [*name*] on the basis of the plaintiff [*name*]'s race.

If the plaintiff [*name*] has proven both of these elements by a preponderance of the evidence, the plaintiff [*name*] is entitled to your verdict.

Comment

The definition of "because of" in this instruction is the same as that in Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—"Because of" Defined).

Section 1981(a) states in relevant part as follows: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). "[T]he term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id.* § 1981(b).

Section 1981 does not provide a cause of action against state actors. *See Yoshikawa v. Seguirant*, 74 F.4th 1042, 1047 (9th Cir. 2023) (en banc) ("Section 1981 establishes substantive rights that a state actor may violate. It does not itself contain a remedy against a state actor for such violations. A plaintiff seeking to enforce rights secured by § 1981 against a state actor must bring a cause of action under § 1983."); *see also* 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.").

Section 1981 "can be violated only by purposeful discrimination." *Gen. Bldg. Contractor's Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). The statute "reaches only intentional discrimination" on the basis of race, *id.* at 396, and does not impose liability for "practices that merely result in a disproportionate impact on a particular class." *Id.* at 386.

A plaintiff bringing a race discrimination claim under § 1981 must first "identify an impaired 'contractual relationship,' § 1981(b), under which the plaintiff has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). The "contractual relationship" can be one that the plaintiff seeks to create, or one that already exists, "so long as the plaintiff has or would have rights under the existing or proposed contractual relationship." *Id.*; *see also id.* at 479-80 ("[A] plaintiff cannot state a claim under § 1981 unless he has (or would have) rights under the existing (or proposed) contract that he wishes 'to make and enforce.'"). Further, the plaintiff may bring an action against a person who interferes with the plaintiff's right "to make and enforce contracts," for purposes of 42 U.S.C. § 1981. *See Woods v. Graphic Commc'ns*, 925 F.2d 1195, 1202-03 (9th Cir. 1991) ("[A] union, entrusted with the enforcement of a labor contract, may violate [Title VII and § 1981] if by racial discrimination it interferes with its members' ability to enforce their contract.").

After the plaintiff has identified an "existing or proposed contractual relationship," *Domino's Pizza*, 546 U.S. at 476, the plaintiff must establish that he or she was unable to make, perform, modify, terminate or otherwise enjoy all benefits, privileges, terms, and conditions of the contractual relationship, 42 U.S.C. § 1981(a), (b). Section 1981's "prohibition against racial discrimination in the making and enforcement of contracts applies to all phases and incidents of the contractual relationship, including discriminatory contract terminations." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 302 (1994).

Finally, the plaintiff must establish that "purposeful discrimination" was the reason why he or she was unable to make or enforce the contract. *Gen. Bldg. Contractor's Ass'n*, 458 U.S. at 391.To establish this element, the plaintiff must "ultimately prove that, but for race, [he or she] would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 340 (2020). Thus, "[i]f the defendant would have responded the same way to the plaintiff even if he had been" a member of a favored race, then "the plaintiff received the 'same' legally protected right as" that member of a favored race and the plaintiff cannot prevail. *Id.* "Conversely, if the defendant would have responded differently but for the plaintiff's race, it follows that the plaintiff has not received the same right as a white person." *Id. See* Instruction 10.3 (Civil Rights—Title VII—Disparate Treatment—"Because of" Defined).

In evaluating whether a plaintiff had presented sufficient evidence to survive summary judgment on his claim for race discrimination under § 1981, the Ninth Circuit applies a burden-shifting analysis based on the *McDonnell-Douglas* framework that applies in employment discrimination cases under Title VII. *Lindsey v. SLT L.A., LLC*, 447 F.3d 1138, 1144-45 (9th Cir. 2005). The *McDonnell-Douglas* framework, however, "is an evidentiary standard, not a pleading requirement" that sets forth the elements of the plaintiff's claim. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-11 (2002). The framework is "a tool for assessing claims,

typically at summary judgment, when the plaintiff relies on indirect proof of discrimination." *Comcast Corp.*, 589 U.S. at 340. Thus, the Ninth Circuit has explained that *McDonnell-Douglas* provides a "summary judgment evidentiary approach to employment discrimination claims under 42 U.S.C. § 1981."*Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004). For this reason, in cases of employment discrimination brought under Title VII, "it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case." *Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir. 2003). The foregoing authority indicates that, in cases alleging race discrimination under § 1981, it would be error to charge the jury with the elements of the *McDonnell Douglas* prima facie case. *See id.*; *Swierkiewicz*, 534 U.S. at 510-11; *Comcast Corp.*, 589 U.S. at 340 ("[A] plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right."). However, the Ninth Circuit has not directly addressed that question.

Revised November 2024

10. CIVIL RIGHTS—TITLE VII—EMPLOYMENT DISCRIMINATION; HARASSMENT; RETALIATION

Instruction

Introductory Comment
10.1 Civil Rights—Title VII—Disparate Treatment—Without Affirmative Defense of "Same Decision"
10.2 Civil Rights—Title VII—Disparate Treatment—With Affirmative Defense of "Same Decision"
10.3 Civil Rights—Title VII—Disparate Treatment—"Because of" Defined
10.4 Civil Rights—Title VII—Hostile Work Environment—Harassment
10.4A Civil Rights—Title VII—Hostile Work Environment—Definition
10.5 Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements
10.6 Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense
10.7 Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence
10.7A "Hostile Work Environment" Defined
10.8 Civil Rights—Title VII—Retaliation—Elements and Burden of Proof
10.9 Civil Rights—Title VII— "Adverse Employment Action" Defined
10.10 Civil Rights—Title VII— "Adverse Employment Action" in Retaliation Cases
10.11 Civil Rights—Title VII— "Adverse Employment Action" in Disparate Treatment Cases
10.12 Civil Rights—Title VII— "Tangible Employment Action" Defined
10.13 Civil Rights—Title VII— "Constructive Discharge" Defined
10.14 Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification
10.15 Civil Rights—Title VII—Defense—Bona Fide Seniority System
10.16 Civil Rights—Title VII—Defense—After-Acquired Evidence
10.17 Civil Rights—Title VII—Defense—Undue Hardship in Religious Accommodation Cases

Introductory Comment

Employment discrimination law under Title VII of the Civil Rights Act of 1964 (Title VII), codified as Subchapter VI of Chapter 21 of title 42 of the United States Code, 42 U.S.C. § 2000e *et seq*., is both complex and evolving.

Overview of Title VII for Employment Discrimination Claims

The Civil Rights Act of 1991 amended Title VII. Before 1991, Title VII provided only equitable remedies, and jury trials were not available. 42 U.S.C. § 2000e-5(g)(1) (providing for reinstatement, back pay and "any other equitable relief as the court deems appropriate"). The 1991 amendments added the legal remedies of compensatory and punitive damages and the right to trial by jury for those remedies. 42 U.S.C. § 1981a(a)(1). Title VII plaintiffs now may recover injunctive and other equitable relief, compensatory and punitive damages, and attorneys' fees. 42 U.S.C. §§ 1981a(a)(1), 2000e-5(g)(1), (k).

Recovery of compensatory and punitive damages under Title VII, however, may not exceed certain statutory limits under 42 U.S.C. § 1981a(b)(3). The level at which damages are capped depends on the size of the employer. 42 U.S.C. § 1981a(b)(3)(A)-(D). A jury must not be advised of these limitations 42 U.S.C. § 1981a(c)(2). Because awards of back pay are not an element of compensatory damages, they are not subject to the statutory limits. 42 U.S.C. § 1981a(b)(2). The Supreme Court has extended this rationale to exclude front pay from the statutory limits. *Pollard v. E.I. du Pont de Nemours & Co*., 532 U.S. 843, 848 (2001) (holding that the 1991 amendments did not alter the nature of front pay as an equitable remedy provided for in 42 U.S.C. § 2000e-5(g)), U.S.C. § 2000e-5(g)) *Teutscher v. Woodson*, 835 F.3d 936, 954 (9th Cir. 2016) ("Reinstatement and front pay are alternative remedies, which cannot be awarded for the same period of time." (citing *Pollard*, 532 U.S. at 846)).

Although the Supreme Court has declined to address definitively whether a Title VII plaintiff has a right to a jury trial on the issue of back pay, *see Landgraf v. USI Film Prods*., 511 U.S. 244, 252 n.4 (1994), the Ninth Circuit has held that there is no such right. *Lutz v. Glendale Union High Sch*., 403 F.3d 1061, 1069 (9th Cir. 2005). The holding in *Pollard* that front pay is excluded from the statutory limits because it is an equitable remedy suggests that similarly there is no entitlement to a jury trial for that remedy. *See Pollard*, 532 U.S. at 848. The court, however, may consider submitting questions of front and back pay to a jury for advisory findings under Rule 39(c) of the Federal Rules of Civil Procedure. If advisory findings from a jury are sought, the court should state on the record that it is not bound by any such findings and make a record of independent findings, as discussed in Rule 52(a). *See generally* Chapter 5 ("Damages") and Comments to Instructions 5.2 (Measures of Types of Damages) and 5.5 (Punitive Damages), discussing rules of special damages that apply to Title VII cases. However, front pay can be awarded by a jury as a legal remedy for a state-law cause of action. *Teuscher*, 835 F.3d at 947 n.5 (noting jury awards of front pay have been upheld where state law provides for that remedy (citing *Passatino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 512 (9th Cir. 2000))).

Further, a *McDonnell Douglas* burden-shifting instruction should not be given in a Title VII case. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc) ("[I]t is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury."), *aff'd*, 539 U.S. 90 (2003); *see also Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir. 2003) ("[I]t is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case."). Cases discussing pretext and burden shifting arise only in the context of summary judgment and motions for judgment as a matter of law. *See*, *e.g.*, *Opara v. Yellen*, 57 F.4th 709, 721 (9th Cir. 2023); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987).

The Evolving Interpretation of "Because of" and But-for Causation in Title VII Cases

One of the more difficult aspects of Title VII jury instructions involves the meaning and application of the term "because of." Indeed, in 2020, the legal landscape changed significantly. A bit of history may be helpful.

As explained by the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 347 (2013), since its passage in 1964, Title VII "has prohibited employers from discriminating against their employees on any of seven specified criteria. Five of them—race, color, religion, sex, and national origin—are personal characteristics and are set forth in § 2000e-2." Discrimination based on any one or more of these five characteristics often is referred to as status-based discrimination. "The two remaining categories of wrongful employer conduct—the employee's opposition to employment discrimination, and the employee's submission of or support for a complaint that alleges employment discrimination—are not wrongs based on personal traits but rather types of protected employee conduct. These latter two categories are covered by a separate, subsequent section of Title VII, § 2000e-3(a)." *Id*. at 347-38. Claims alleging discrimination based on these latter forms of protected employee conduct often are referred to as retaliation claims.

Section 2000e-2(a)(1) reads, in relevant part, that it shall be an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin" (emphasis added). In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court addressed what it means for an employment action to be taken "because of" an individual's protected characteristic. The Supreme Court in *Nassar* explained the *Price Waterhouse* decision as follows:

> Although no opinion in [*Price Waterhouse*] commanded a majority, six Justices did agree that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a "motivating" or "substantial" factor in the employer's decision. If the plaintiff made that showing, the burden of persuasion would shift to the employer, which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus.

Nassar, 570 U.S. at 348 (citations to separate opinions in *Price Waterhouse* omitted). The Supreme Court in *Nassar* continued:

> Two years later, Congress passed the Civil Rights Act of 1991 (1991 Act), 105 Stat. 1071. This statute (which had many other provisions) codified the burden-shifting and lessened-causation framework of *Price Waterhouse* in part but also rejected it to a substantial degree.
> Legislation first added a new subsection to the end of § 2000e-2, *i.e.*, Title VII's principal ban on status-based discrimination. *See* § 107(a), 105 Stat. 1075. The new provision, § 2000e-2(m), states:
>
> > [A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.
>
> This, of course, is a lessened causation standard.

Nassar, 570 U.S. at 348-49 (emphasis added) (alteration in *Nassar*).

> *Nassar* further explained that
>
> the 1991 Act substituted a new burden-shifting framework for the one endorsed by *Price Waterhouse*. Under that new regime, a plaintiff could obtain declaratory relief, attorney's fees and costs, and some forms of injunctive relief based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action; but the employer's proof that it would still have taken the same employment action would save it from monetary damages and a reinstatement order.

Id. at 349. The Supreme Court's opinion in *Nassar* continued its march through history, stating: "After *Price Waterhouse* and the 1991 Act, considerable time elapsed before the Court returned again to the meaning of 'because' and the problem of causation. This time it arose in the context of a different, yet similar statute," the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a). *Id*. (citing *Gross v. FBL Fin. Servs., Inc*., 557 U.S. 167 (2009)). As *Nassar* explained: "Much like the Title VII statute in *Price Waterhouse*, the relevant portion of the ADEA provided that '[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.'" *Id*. at 349-50 (emphasis added) (alterations in original).

In its 2009 decision in *Gross*, the Supreme Court held "that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was *the* 'but-for' cause of the challenged adverse employment action." *Id*. at

180 (emphasis added). The use of the definite article "the," as opposed to the indefinite articles "a" and "an," implied that there was only one but-for cause.

The Supreme Court in *Nassar* then applied this analysis from *Gross* when interpreting the meaning of "because of" in the antiretaliation provision of Title VII, set forth in § 2000e-3(a). After noting that the antiretaliation provision "appears in a different section from Title VII's ban on status-based discrimination," the Supreme Court in *Nassar*, citing *Gross*, explained:

> This enactment, like the statute at issue in *Gross*, makes it unlawful for an employer to take adverse employment action against an employee "because" of certain criteria. *Cf*. 29 U.S.C. § 623(a)(1). Given the lack of any meaningful textual difference between the text in this statute and the one in *Gross*, the proper conclusion here, as in *Gross*, is that Title VII retaliation claims require proof that the desire to retaliate was *the* but-for cause of the challenged employment action

Nassar, 570 U.S.at 351-52 (emphasis added); *see Gross*, 557 U.S. at 176 ("To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was *the* 'but-for' cause of the employer's adverse decision." (emphasis added)).

Based on these Supreme Court decisions plus the 1991 amendments, which added § 2000e-2(m), for quite some time courts required that if plaintiff in a Title VII employment discrimination case proceeded under § 2000e-2(a), which required discrimination "because of" the plaintiff's protected status or characteristic, that plaintiff would need to show that the protected status was *the* but-for cause, or the sole cause, of the challenged employment action. A similar test applied (and continues to apply after *Nassar*) if the plaintiff alleged retaliation in violation of § 2000e-3(a). On the other hand, a Title VII plaintiff alleging discrimination based on a protected status proceeding under § 2000e-2(m) need only show "that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (emphasis added). *Hittle v. City of Stockton, California*, 101 F.4th 1000, 1012 (9th Cir. 2024) (stating plaintiff need only show race color, religion, sex, or national origin was a motivating factor for employment practice). In that event, however, an employer could limit its liability if the employer could show, by a preponderance of the evidence, that it "would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B); *see also Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 337 (2020) (stating lack of but-for causation is an affirmative defense to stave off damages and reinstatement but not liability); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir. 1996).

In 2002, the Ninth Circuit issued its en banc decision in *Costa*. In that case, the Ninth Circuit held that a plaintiff alleging disparate treatment could prevail under Title VII merely by showing that the discrimination was "a motivating factor" in the employment decision, even though other factors also may have motivated the action. "Put simply, the plaintiff in any Title VII case may establish a violation through a preponderance of evidence (whether direct or circumstantial) that a protected characteristic played 'a motivating factor.'" *Costa*, 299 F.3d at 853-54; *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc*., 575 U.S. 768, 772-73 (2015)

(explaining that phrase "because of" "typically imports, at a minimum, the traditional standard of but-for causation," but Title VII relaxes this standard in status cases "to prohibit even making a protected characteristic a 'motivating factor' in an employment decision").

In *Costa*, the Ninth Circuit discussed jury instructions on causation in Title VII disparate treatment cases. In that decision, the Ninth Circuit stated that a district court may provide either a "single motive" or a "mixed motive" instruction. *Costa* added that "mixed" and "single" motives are not two "fundamentally different" theories of liability. *Costa*, 299 F.3d at 857. Instead, they are merely two avenues of instruction by which the plaintiff may meet the ultimate burden of proof: "to show by a preponderance of the evidence that the challenged employment decision was 'because of' discrimination.'" *Id*.

As stated by the Ninth Circuit in *Costa*, "[a]fter hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly." *Id*. at 856.

> If, based on the evidence, the trial court determines that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played *no* role at all in the employer's decisionmaking, then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason. . . .
>
> In contrast, in cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was "a motivating factor" in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII. However, if the jury then finds that the employer has proved the "same decision" affirmative defense by a preponderance of the evidence, 42 U.S.C. § 2000e–5(g)(2)(B), the employer will escape the imposition of damages and any order of reinstatement, hiring, promotion, and the like, and is liable solely for attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions.

Id. at 856-57. After *Costa*, the Ninth Circuit Jury Instructions Committee developed several alternative model instructions. As those model instructions explained, the proper formulation of the actual instructions depends on the trial court's assessment of the evidence presented and what findings a reasonable jury could make.

The causation analysis, however, significantly changed after *Bostock v. Clayton County*, 590 U.S. 644 (2020). *Bostock* is mostly known for its interpretation of the phrase "because of such individual's . . . sex" in § 2000e-2(a) and its holding that an employer violates Title VII by taking an adverse employment action based on an individual's sexual orientation, gender identity, or transgender status. *Id.* at 659-60, 681-82. But *Bostock* also is significant for interpreting "because of" in § 2000e-2(a) to refer to but-for causation, which courts traditionally

have recognized can include more than one but-for cause. *See id.* at 656-57.

As explained in *Bostock*, "the ordinary meaning of 'because of' is 'by reason of' or 'on account of.'" *Id.* at 656 (quoting *Nassar*, 570 U.S. at 350). "In the language of law, this means that Title VII's 'because of'" test incorporates the 'simple' and 'traditional' standard of but-for causation." *Id*. (citing *Nassar*, 570 U.S. at 346). "That form of causation is established whenever a particular outcome would not have happened 'but for' the purported cause." *Id*. (citing *Gross*, 557 U.S. at 176). "In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id*. "This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred *both* because the defendant ran a red light *and* because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision." *Id*. "When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id*. Further, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action." *Id*. at 665.

Thus, any reading of Title VII's prohibition of discrimination based on a protected status that implies that a plaintiff must show that forbidden discrimination was the sole or primary cause of the challenged action must be carefully examined to determine if it remains good law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) ("We hold that in circumstances like those presented here, where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled."). For example, to the extent *Costa* indicates that the phrase "because of" in 42 U.S.C. § 2000e-2(a) requires a trial court to determine "that the only reasonable conclusion a jury could reach is that discriminatory animus is the *sole* cause for the challenged employment action," 299 F.3d at 856, it would be inconsistent with *Bostock*. After *Bostock*, the Jury Instructions Committee substantially modified its Chapter 10 Introductory Comment and Instructions 10.1, 10.2, and 10.3. Indeed, current Instruction 10.3 now defines "because of" based on *Bostock*.

Organization of Instructions

The instructions in this chapter are arranged in accordance with the three theories of liability that are most frequently asserted in Title VII cases. Instructions 10.1 through 10.3 pertain to a claim of disparate treatment (intentional discrimination). Instructions 10.4 through 10.7 pertain to a claim of harassment or hostile work environment. Instruction 10.8 relates to a claim of retaliation. Finally, because there are certain terms and defenses that are common to Title VII employment cases, they are set forth and defined in Instructions 10.9 through 10.16.

The Committee recommends that the court first identify the theory under which the plaintiff has asserted a Title VII claim, and then refer to the relevant group of instructions. The basic instructions set forth in Instructions 10.1 through 10.7 may be used regardless of a

particular plaintiff's protected status. Thus, depending on whether the claim is based on race, color, religion, sex, or national origin, Instructions 10.1 through 10.7 can be adjusted to reflect the protected trait or characteristic at issue in a particular case.

No instructions have been provided for a claim of disparate impact under Title VII, although such an instruction is provided for a disparate impact claim for age discrimination under the ADEA. *See* Instruction 11.4 (Age Discrimination—Disparate Impact—Elements). In many instances, instructions for a disparate-impact claim under Title VII may be made with minor alterations to the instruction for a disparate impact claim under the ADEA. *Compare* Instruction 11.4 *with Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002) ("To establish a prima facie case of disparate impact under Title VII, the plaintiffs must (1) show [that specific employment practice or selection criterion had] a significant disparate impact on a protected class or group; (2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact."); *see also Ricci v. DeStefano*, 557 U.S. 557 (2009).

And while Title VII plaintiffs often use statistics to meet the first element of their disparate-impact claims, they are not necessary "where a disparate impact" to a protected class "is obvious" from the face of the complaint. *See Bolden-Hardge v. Off. Cal. State Controller*, 63 F.4th 1215, 1227 (9th Cir. 2023). For a detailed discussion of a disparate impact claim arising under the Fair Housing Act, see *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519 (2015) (relying on cases interpreting Title VII and the ADEA).

In some cases when an employer is a state or local public entity, a plaintiff has the option of suing under 42 U.S.C. § 1983. The general elements of such a claim, however, are the same as under Title VII. Accordingly, in addition to the essential elements of a claim under 42 U.S.C. § 1983, the court may wish to refer to Instructions 10.1 through 10.7 when a claim under § 1983 is based on disparate treatment or harassment by a state or local employer.

Revised June 2025

10.1 Civil Rights—Title VII—Disparate Treatment—Without Affirmative Defense of "Same Decision"

For the plaintiff [*name*]'s claim that [he] [she] [*other pronoun*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant [*name*] because of the plaintiff [*name*]'s [[race] [color] [religion] [sex] [national origin]], the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant [*name*]; [and]

Second, the defendant [*name*] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse action*] the plaintiff [*name*] because of the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] [.] [;]

[Third, the plaintiff [*name*] was qualified for [his] [her] [*other pronoun*] position [.] [;] [and]

[Fourth, similarly situated individuals outside the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] were treated more favorably.]

If the plaintiff [*name*] has proven each of these elements by a preponderance of the evidence, the plaintiff [*name*] is entitled to your verdict.

Comment

To establish a prima facie case of disparate treatment under Title VII, a plaintiff must show "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry v. Dep't of Soc. Servs*., 447 F.3d 642, 656 (9th Cir. 2006). If it is disputed that plaintiff is qualified for position and that similarly situated individuals outside of plaintiff's protected class were treated more favorably, add the bracketed elements. "Other employees are similarly situated to the plaintiff when they have similar jobs and display similar conduct." *Id*. (quoting *Earl v. Nielsen Media Rsch., Inc*., 658 F.3d 1108, 1114 (9th Cir. 2011) (internal quotation marks omitted)). For detailed discussions of disparate treatment claims arising under the Fair Housing Act, *see Ohio House, LLC v. City of Costa Mesa*, 135 F.4th 645, 661-66 (9th Cir. 2025) and *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1048-53 (9th Cir. 2007).

When the alleged discrimination is based on sexual orientation, gender identity, transgender status, or the like, the word "sex" in the instruction should be modified or explained consistent with *Bostock v. Clayton County*, 590 U.S. 644, 682-83 (2020) (holding employer violates Title VII by firing individual based on sexual orientation or gender identity). "Paramour preference," however, does not constitute discrimination on the basis of sex. *Maner v. Dignity Health*, 9 F.4th 1114, 1116 (9th Cir. 2021).

Finally, even in the absence of a "same decision" (or "same action") affirmative defense, a plaintiff might prefer to use an instruction that provides, as the second element, that the plaintiff's protected characteristic was "a motivating factor" in the defendant's employment decision. *See* 42 U.S.C. § 2000e-5(g)(2)(B). Based on 42 U.S.C. § 2000e-2(m), there does not appear to be any reason to deny a plaintiff that option. If a plaintiff so elects, a model instruction on that point is found in 10.2.

Revised June 2025

10.2 Civil Rights—Title VII—Disparate Treatment—With Affirmative Defense of "Same Decision"

For the plaintiff [*name*]'s claim that [he] [she] [*other pronoun*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant [*name*] because of the plaintiff [*name*]'s [[race] [color] [religion] [sex] [national origin]], the plaintiff [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant [*name*]; [and]

[Second, the defendant [*name*] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse action*] the plaintiff because of the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] [.] [;]]

[or]

[Second, the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] was a motivating factor in the defendant [*name*]'s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff] [.] [;]

[Third, the plaintiff [*name*] was qualified for [his] [her] [*other pronoun*] position [.] [;] [and]

[Fourth, similarly situated individuals outside the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] were treated more favorably.]

The defendant [*name*] has the burden of proving by a preponderance of the evidence both that the defendant [*name*]'s decision to [*state adverse action*] also was motivated by a lawful reason and that the defendant [*name*] would have made the same decision to [*state adverse action*] even if the plaintiff [*name*]'s [race] [color] [religion] [sex] [national origin] had played no role in the defendant [*name*]'s decision to [*state adverse action*].

Comment

When the defendant is asserting a "same decision" (or "same action") affirmative defense in a "mixed motive" case, it may be appropriate to allow the plaintiff to choose between the two versions of the second element shown above. As explained by the Supreme Court, Congress supplemented Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait or characteristic was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e-2(m); *see Bostock v. Clayton County*, 590 U.S. 644, 656-57 (2020). In *Bostock*, the Supreme Court described the "motivating factor" test as a "more forgiving standard." *Id*. at 657. Because it is a more forgiving standard, a plaintiff asserting a claim under Title VII should be allowed to choose whether to use that standard rather than "but-for causation." When a plaintiff proves a violation under 42 U.S.C.

§ 2000e-2(m), using the more forgiving standard of "motivating factor," however, a defendant may assert a "same decision" (or "same action") affirmative defense under § 2000e-5(g)(2)(B) in an effort to foreclose compensatory and punitive damages. *See also Ohio House, LLC v. City of Costa Mesa*, 135 F.4th 645, 661-62 (9th Cir. 2025) (explaining that the "motivating factor" standard applies to a disparate treatment claim arising under the Fair Housing Act).

To establish a prima facie case of disparate treatment under Title VII, a plaintiff must show "(1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably." *Berry v. Dep't of Soc. Servs*., 447 F.3d 642, 656 (9th Cir. 2006). If it is disputed that the plaintiff is qualified for the position and that similarly situated individuals outside of the plaintiff's protected class were treated more favorably, add the bracketed elements. "Other employees are similarly situated to the plaintiff when they have similar jobs and display similar conduct." *Id*. (quoting *Earl v. Nielsen Media Rsch., Inc*., 658 F.3d 1108, 1114 (9th Cir. 2011) (internal quotation marks omitted)).

When the alleged discrimination is based on sexual orientation, gender identity, transgender status, or the like, the word "sex" in the instruction should be modified or explained consistent with *Bostock*, 590 U.S. at 659-60, 683 (holding employer violates Title VII by firing individual based on sexual orientation or gender identity). "Paramour preference," however, does not constitute discrimination on the basis of sex. *Maner v. Dignity Health*, 9 F.4th 1114, 1116 (9th Cir. 2021).

Sample Special Verdict for Use with Same Decision Affirmative Defense

[1. Has the plaintiff proven by a preponderance of the evidence that the defendant [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse action*] the plaintiff because of the plaintiff's [race] [color] [religion] [sex] [national origin]?

Yes _____ No _____]

[or]

[1. Has the plaintiff proven by a preponderance of the evidence that the plaintiff's [race] [color] [religion] [sex] [national origin] was a motivating factor in the defendant's decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff]?

Yes _____ No _____]

If the answer to Question No. 1 is "yes," proceed to Question No. 2. If the answer to Question No. 1 is "no," do not answer any further questions [on the plaintiff's claim of disparate treatment].

2. Has the defendant proven by a preponderance of the evidence that the defendant's decision to [*state adverse action*] also was motivated by a lawful reason?

Yes _____ No _____]

If your answer to Question No. 2 is "yes," proceed to Question No. 3. If your answer to Question No. 2 is "no," proceed to Question No. 4.

3. Has the defendant proven by a preponderance of the evidence that the defendant would have made the same decision to [*state adverse employment action*] even if the plaintiff's [race] [color] [religion] [sex] [national origin] had played no role in the defendant's decision to [*state adverse employment action*]?

Yes _____ No _____]

If your answer to Question No. 3 is "yes," do not answer any further questions on damages related to the plaintiff's claim of disparate treatment. If your answer to Question No. 3 is "no," proceed to Question No. 4.

4. [The judge should draft further special verdict questions to cover damages, including punitive damages if appropriate.]

Revised June 2025

10.3 Civil Rights—Title VII—Disparate Treatment—"Because of" Defined

"Because of" means "by reason of" or "on account of." This is sometimes referred to as "but-for causation." This form of causation is shown whenever a particular outcome would not have happened "but for" the purported cause. It is a reason without which the [*state adverse employment action*] would not have occurred.

A but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a "but-for cause." Often, events have multiple but-for causes. For example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a "but-for cause" of the collision.

In the context of this claim, a defendant cannot avoid liability just by citing some other factor that contributed to the challenged employment decision. So long as the plaintiff's [race] [color] [religion] [sex] [national origin] was one but-for cause of that decision, that is enough to trigger the law. A "but-for cause" does not mean the sole cause or even a primary cause.

Comment

See Bostock v. Clayton County, 590 U.S. 644, 656 (2020) (explaining "because of" and but-for causation in context of claim under Title VII).

Revised Mar. 2022

10.4 Civil Rights—Title Vii—Hostile Work Environment—Harassment

Comment

The Supreme Court addressed the law of harassment claims under Title VII in two companion cases, *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) [collectively, *Ellerth/Faragher*]. Although those cases relate to sexual harassment, the Committee does not discern any conceptual difference between harassment because of sex and harassment because of race or any other protected status. Accordingly, the following instructions are applicable to harassment based on race, color, sex, religion and national origin.

Ellerth/Faragher clarified the standards governing an employer's liability for harassment. Essentially, when an employee suffers a tangible employment action resulting from a direct supervisor's harassment, the employer's liability is established by proof of the harassment and a resulting tangible employment action. *See Faragher*, 524 U.S. at 807-08. No affirmative defense is available to the employer in those cases. When no tangible employment action has been taken, the employer may interpose an affirmative defense to defeat liability by proving (a) that the employer exercised reasonable care to prevent and correct promptly any discriminatory conduct, and (b) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Id.*; *Ellerth*, 524 U.S. at 764-65; *see also Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1166-67 (9th Cir. 2003); *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). *See* Instruction 10.6 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense). In *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137-38 (2004), the Supreme Court applied the framework of *Ellerth/Faragher* to a case of constructive discharge due to a hostile work environment. In such a case, the *Ellerth/Faragher* affirmative defense is available to the employer, unless an official act, i.e., a tangible employment action, of the employer precipitated the employee's decision to resign. *Id.* at 148.

If, however, harassment is committed by a co-worker or a nondirect supervisor of the plaintiff's, the employer is liable only under a negligence theory. In this situation, the employer may not invoke the *Ellerth/Faragher* affirmative defense. *See Swinton*, 270 F.3d at 803-04 (noting that principle embodied in affirmative defense is contained in requirements for prima facie case based on negligence). *See also* Instruction 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence).

An employer may be held liable for the actionable third-party harassment of its employees or customers when it ratifies or condones the conduct by failing to investigate and remedy it after learning of it. *See Christian v. Umpqua Bank*, 984 F.3d 801, 811-12 (9th Cir. 2020). Title VII prohibits discrimination against any individual and makes no distinction between managers and other employees; both are entitled to its protection. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir. 2005).

10.4A Civil Rights—Title VII—Hostile Work Environment—Definition

A hostile work environment is one permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the condition of the plaintiff's employment and create an abusive working environment.

Comment

The definition for "hostile work environment" for this instruction is derived from *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), *abrogated on other grounds* by *Burlington Indus. Inc. v. Ellerth,* 524 U.S. 742 (1998).

This instruction should be given in conjunction with other appropriate instructions, including Instructions 10.6 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense); 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based On Negligence); and, if necessary, 10.12 (Civil Rights—Title VII—"Tangible Employment Action" Defined).

Added November 2024

10.5 Civil Rights—Title VII—Hostile Work Environment—Harassment Because Of Protected Characteristics—Elements

The plaintiff [*name*] seeks damages against the defendant [*name*] for a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment while employed by the defendant [*name*]. To establish a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment, the plaintiff [*name*] must prove each of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was subjected to [slurs, insults, jokes or other verbal comments or physical contact or intimidation of a racial nature] [sexual advances, requests for sexual conduct, or other verbal or physical conduct of a sexual nature] [*conduct affecting other Title VII protected characteristics*];

Second, the conduct was unwelcome;

Third, the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff [*name*]'s employment and create a [racially] [sexually] [*other Title VII protected characteristic*] abusive or hostile work environment;

Fourth, the plaintiff [*name*] perceived the working environment to be abusive or hostile; and

Fifth, a reasonable person [with the plaintiff [*name*]'s protected characteristic] in the plaintiff [*name*]'s circumstances would consider the working environment to be abusive or hostile.

Whether the environment constituted a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment is determined by looking at the totality of the circumstances, including the frequency of the harassing conduct, the severity of the conduct, whether the conduct was physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interfered with an employee's work performance.

Comment

The elements of this instruction are derived from *Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995). The language in the instruction regarding the factors used to determine whether a working environment was sufficiently hostile or abusive is derived from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

This instruction should be given in conjunction with other appropriate instructions, including Instructions 10.6 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense); 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based On Negligence); and, if necessary, 10.12 (Civil

Rights—Title VII—"Tangible Employment Action" Defined). When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

"A plaintiff must show that the work environment was both subjectively and objectively hostile." *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1113 (9th Cir. 2004); *see also Fuller*, 47 F.3d at 1527 (citing *Harris*, 510 U.S. at 21-22). For the objective element, the Ninth Circuit has adopted the "reasonable victim" standard. *Ellison v. Brady*, 924 F.2d 872, 878-80 (9th Cir. 1991). Therefore, if the plaintiff/victim is a woman, element five of the instruction should state "reasonable woman," and if the plaintiff/victim is a man, "reasonable man." *Ellison*, 924 F.2d at 879, n.11; *see also Reynaga v. Roseburg Forest Prods*., 847 F.3d 678, 687 (9th Cir. 2017) (conducting objective inquiry from perspective of reasonable member of applicable ethnic group); *Fuller v. Idaho Dept. of Corr.*, 865 F.3d 1154, 1158 (9th Cir. 2017) (holding that because women are disproportionately victims of rape and sexual assault, "a jury armed with common sense and an appropriate sensitivity to social context could reasonably conclude that the actions of [a female plaintiff's supervisor, siding with the alleged male rapist over plaintiff,] were because of her sex").

In determining whether the harassment was sufficiently severe or pervasive, the fact finder should consider all circumstances, "including those incidents that do not involve verbal communication between the plaintiff and harasser, physical proximity, or physical or sexual touching," including interactions between the harasser and third persons. *Christian v. Umpqua Bank*, 984 F.3d 801, 810-11 (9th Cir. 2020) (citing *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1095 (9th Cir. 2008)). When harassment is of the "same type of conduct," "occurred relatively frequently," and was "perpetrated by the same individual," that harassment should be evaluated together when assessing its severity. *Id*. at 810 (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 120-21 (2002)). By contrast, "harassment is not sufficiently severe or pervasive to establish a hostile work environment where the conduct at issue consists of limited or isolated behavior." *See Mattioda v. Nelson*, 98 F. 4th 1164, 1177 (9th Cir. 2024) (citing *Kortan v. Cal. Youth Auth*., 217 F.3d 1104, 1110 (9th Cir. 2000) (in affirming summary judgment in favor of the defendant, the court considered that, although offensive, the comments that the plaintiff complained of were "concentrated on one occasion")).

Targeting specific individuals with hostile conduct is not required to establish a Title VII violation. *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 979 (9th Cir. 2023) (holding that "repeated and prolonged exposure to sexually foul and abusive music" falls within a broader category of auditory harassment that can pollute a workplace and violate Title VII). Further, an employer cannot claim as a defense that it is an equal opportunity harasser, *i.e.*, male and female plaintiffs can coexist in the same Title VII action. *Id*. (observing that the rule also applies in the context of race discrimination).

Revised June 2024

10.6 Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense

An employer may be liable when an employee's supervisor creates a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment for that employee. A "supervisor" is someone who is empowered by the employer to take tangible employment actions regarding the employee, such as hiring, firing, failing to promote, reassigning with significantly different responsibilities, or significantly changing benefits

The plaintiff [*name*] claims that [he] [she] [*other pronoun*] was subjected to a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment by _____, and that _____ was [his] [her] [*other pronoun*] supervisor empowered by _____ to take tangible employment actions against the plaintiff [*name*].

The defendant [*name*] denies the plaintiff [*name*]'s claim. The plaintiff [*name*] must prove [his] [her] [*other pronoun*] claim by a preponderance of the evidence.

[*If Ellerth/Faragher affirmative defense applies, add the following:*]

In addition to denying the plaintiff [*name*]'s claim, the defendant [*name*] has asserted an affirmative defense. Before you consider this affirmative defense, you must first decide whether the plaintiff [*name*] has proved by a preponderance of the evidence that [he] [she] [*other pronoun*] suffered a tangible employment action as a result of harassment by the supervisor.

If you find that the plaintiff [*name*] has proved that [he] [she] [*other pronoun*] suffered a tangible employment action as a result of harassment by the supervisor, you must not consider the affirmative defense.

If the plaintiff [*name*] has not proved that [he] [she] [*other pronoun*] suffered a tangible employment action, then you must decide whether the defendant [*name*] has proved by a preponderance of the evidence each of the following elements:

First, the defendant [*name*] exercised reasonable care to prevent and promptly correct the [racially] [sexually] [*other Title VII protected characteristic*] harassing behavior, and

Second, the plaintiff [*name*] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or unreasonably failed to otherwise avoid harm.

If the defendant [*name*] proves these elements, the plaintiff [*name*] is not entitled to prevail on this claim.

Comment

See Introductory Comment to this chapter. This instruction should be given in conjunction with Instruction 10.5 (Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements) and, if applicable, Instruction 10.12 (Civil Rights—Title VII—Tangible Employment Action Defined). When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

This instruction is based on *Vance v. Ball State University,* 570 U.S. 421 (2013), *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998), and *Swinton v. Potomac Corp.*, 270 F.3d 794, 802 (9th Cir. 2001).

This instruction addresses harassment by a plaintiff's supervisor. Use the first two paragraphs if no *Ellerth/Faragher* affirmative defense is applicable. Use the entire instruction if an *Ellerth/Faragher* defense is to be considered by the jury.

When harassment is by the plaintiff's supervisor, an employer is vicariously liable, subject to a potential affirmative defense. *Vance v. Ball State Univ.*, 570 U.S. 424 (2013). For vicarious liability to attach the supervisor must be empowered by the employer "to take tangible employment actions against the [plaintiff], *i.e*., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" *Id*. at 2443 (quoting *Ellerth*, 524 U.S. at 761); *see also Reynaga v. Roseburg Forest Prods*., 847 F.3d 678, 698 (9th Cir. 2017) (explaining that employee was not a supervisor, although he "had the authority to direct the work of other [employees] and tell them which tasks to perform," because he "did not have hiring, firing, or disciplinary authority").

An employee who contends that he or she submitted to a supervisor's threat to condition continued employment on participation in unwanted sexual activity alleges a tangible employment action, which, if proved, deprives the employer of an *Ellerth/Faragher* defense. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1173 (9th Cir. 2003) (affirming summary judgment for the employer due to insufficient evidence of any such condition imposed by plaintiff's supervisor). *See Penn. State Police v. Suders*, 542 U.S. 129, 137-38 (2004), for discussion of tangible employment action.

The adequacy of an employer's anti-harassment policy may depend on the scope of its dissemination and the relationship between the person designated to receive employee complaints and the alleged harasser. *See*, *e.g.*, *Faragher*, 524 U.S. at 808 (holding policy ineffective when (1) the policy was not widely disseminated to all branches of the municipal employer and (2) the policy did not include any mechanism by which an employee could bypass the harassing supervisor when lodging a complaint).

"While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy

suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

Although proof that the plaintiff failed to use reasonable care in avoiding harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the defendant, a demonstration of such failure will normally suffice to satisfy this prong. *See Faragher,* 524 U.S. at 807-08*; Ellerth*, 524 U.S. at 765.

If the harasser is not the plaintiff's supervisor, an employer's liability can only be based on negligence. The *Ellerth/Faragher* affirmative defense is not applicable if the claim is based on negligence. *See* Instruction 10.7 (Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence).

Revised Sept. 2017

10.7 Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence

The plaintiff [*name*] seeks damages from the defendant [*name*] for a hostile work environment caused by [sexual] [racial] [*other Title VII protected characteristic*] harassment. The plaintiff [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was subjected to a [sexually] [racially] [*other Title VII protected characteristic*] hostile work environment by a [non-immediate supervisor] [co-worker]; and

Second, the defendant [*name*] or a member of the defendant [*name*]'s management knew or should have known of the harassment and failed to take prompt, effective remedial action reasonably calculated to end the harassment.

A person is a member of management if the person has substantial authority and discretion to make decisions concerning the terms of the harasser's employment or the plaintiff's employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the plaintiff's employment. A person who lacks such authority is nevertheless part of management if he or she has an official or strong duty in fact to communicate to management complaints about work conditions. You should consider all the circumstances in this case in determining whether a person has such a duty.

The defendant's remedial action must be reasonable and adequate. Whether the defendant's remedial action is reasonable and adequate depends on the remedy's effectiveness in stopping the individual harasser from continuing to engage in such conduct and in discouraging other potential harassers from engaging in similar unlawful conduct. An effective remedy should be proportionate to the seriousness of the offense.

If you find that the plaintiff [*name*] has proved both of the elements on which the plaintiff [*name*] has the burden of proof, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove either of these elements, your verdict should be for the defendant [*name*].

Comment

See Introductory Comment to this chapter. *See also Swinton v. Potomac Corp.*, 270 F.3d 794, 803-05 (9th Cir. 2001). Use this instruction when the claim against the employer is based on negligence and involves harassment by another co-worker or a supervisor who is not the plaintiff's direct (immediate or successively higher) supervisor.

Use this instruction in conjunction with Instruction 10.5 (Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements).

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

Under a negligence theory, an employer is liable if the employer (or its "management") knew or should have known of the harassing conduct and failed to take reasonably prompt corrective action to end the harassment. *Swinton*, 270 F.3d at 803-04. There are two categories of employees who constitute "management" for purposes of a negligence claim. *Id.* at 804. The first category is a member of management who possesses substantial authority and discretion to make decisions over the plaintiff's or the harasser's employment, such as "authority to counsel, investigate, suspend or fire the accused harasser, or to change the conditions of the harassee's employment." *Id.* The second category of employees who qualify as management consists of any supervisor who lacks this authority but nonetheless "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *Id.* at 805 (citations omitted).

It should be noted, however, that neither *Swinton* nor any of the cases relied on by *Swinton* provides a definition of a supervisor or other employee with "an official or strong de facto duty to act as a conduit to management for complaints about work conditions." *See Swinton*, 270 F.3d at 804-05. To aid jury understanding, the Committee has modified the *Swinton* language of "de facto duty to act as a conduit to management . . .." to "duty in fact to communicate to management . . .."

The two elements of this instruction are based on *Burrell v. Star Nursery, Inc.*, 170 F.3d 951, 955 (9th Cir. 1999), and *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998). The text of the instruction addressing remedial action is based on *Mockler*, 140 F.3d at 813 (citing *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991)).

The burden is on the plaintiff to "show that the employer knew or should have known of the harassment and took no effectual action to correct the situation." *Mockler*, 140 F.3d at 812 (citations omitted). "This showing can . . . be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment." *Id.*

In determining whether an employer's response to the harassment is sufficient to absolve it from liability, "the fact that [the] harassment stops is only a test for measuring the efficacy of a remedy, not a way of excusing the obligation to remedy." *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995), *as amended* (Apr. 24, 1995). "Once an employer knows or should know of harassment, a remedial obligation kicks in." *Id.* Therefore, "if 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach." *Id.* at 1528-29; *see also Reynaga v. Roseburg Forest Prods*., 847 F.3d 678, 690 (9th Cir. 2017) ("[P]rompt action is not enough. The remedial measures must also be effective."); *Christian v. Umpqua Bank*, 984 F.3d 801, 811 (9th Cir. 2020) ("Inaction is not a remedy 'reasonably calculated to end the harassment[.]'").

For purposes of proving that the defendant "knew or reasonably should have known of the harassment," it is appropriate to impute this knowledge to a defendant employer if a

management-level employee of the employer defendant knew or reasonably should have known that harassment was occurring. *Swinton*, 270 F.3d at 804.

In *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024), the Ninth Circuit summarized the law governing a claim of subjecting a person to a sexually hostile work environment and explained that there are three factors: (1) whether the plaintiff was subjected to verbal or physical conduct of a sexual nature; (2) whether the conduct was unwelcome; and (3) whether the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. *Id*. at 1178-79. The court also noted that "[i]n analyzing the objective hostility of a working environment, we must look to the totality of the circumstances surrounding the plaintiff's claim," *id*. at 1179, and "conduct that took place outside of the physical work environment is part of the totality of the circumstances we evaluate when considering a hostile work environment claim." *Id*. at 1180.

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10.7A "Hostile Work Environment" Defined

In determining whether the plaintiff [*name*] was subjected to a [sexually] [racially] [*other protected category*] hostile work environment, you should consider three factors:

(1) whether the plaintiff [*name*] was subjected to verbal or physical conduct of a [sexual nature], or to verbal or physical conduct evincing hostility on the basis of [race] *[other protected category*];

(2) whether the conduct was unwelcome; and

(3) whether the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.

The third factor requires the plaintiff to show that the work environment was both subjectively and objectively hostile. In analyzing the objective hostility of a working environment, you should look to the totality of the circumstances surrounding the plaintiff's claim. That includes assessing the frequency of the discriminatory conduct; its severity; whether it was physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance. In considering the totality of the circumstances, "[n]o single factor in this non-exhaustive list is required." You should also consider that the required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct and the cumulative effect of conduct over time. In all cases, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not trigger Title VII's protections.

[In addition, conduct that took place outside of the physical work environment is part of the totality of the circumstances that you may evaluate when considering a hostile work environment claim.]

Comment

This instruction is based on the law of a sexually hostile work environment as explained in *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024).

For an analogous instruction regarding the subjective element or plaintiff's perception, see Instruction 10.5 (Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements).

10.8 Civil Rights—Title VII—Retaliation—Elements and Burden of Proof

The plaintiff [*name*] seeks damages against the defendant [*name*] for retaliation. The plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*]:

[participated in an activity protected under federal law, that is [*specify protected activity, e.g., filing a discrimination complaint*]]

or

[opposed an unlawful employment practice, that is [*specify unlawful employment practice*]]; and

Second, the employer subjected the plaintiff [*name*] to an adverse employment action, that is [*specify adverse employment action*]; and

Third, the plaintiff [*name*] was subjected to the adverse employment action because of [[his] [her] [*other pronoun*]] [[participation in a protected activity] [opposition to an unlawful employment practice]].

A plaintiff is "subjected to an adverse employment action" because of [[his] [her] [*other pronoun*]] [[participation in a protected activity] [opposition to an unlawful employment practice]] if the adverse employment action would not have occurred but for that [participation] [opposition].

If you find that the plaintiff [*name*] has proved all three of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

Because the third element is whether the plaintiff was subjected to the adverse employment action "because of" his or her participation in a protected activity or opposition to an unlawful employment practice, consider including the definition of "because of" from Instruction 10.3.

Title VII makes it an unlawful employment practice for a person covered by the Act to discriminate against an individual "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). *See Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn*., 555

U.S. 271, 274 (2009) (noting that the "antiretaliation provision has two clauses . . .. The one is known as the 'opposition clause,' the other as the 'participation clause'"); *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) ("An employer can violate the anti-retaliation provisions of Title VII in either of two ways: '(1) if the [adverse employment action] occurs because of the employee's opposition to conduct made an unlawful employment practice by the subchapter, or (2) if it is in retaliation for the employee's participation in the machinery set up by Title VII to enforce its provisions.'" (alterations in original) (citations omitted)).

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

For a definition of "adverse employment action" in the context of retaliation, see Instruction 10.10 (Civil Rights—Title VII— "Adverse Employment Action" in Retaliation Cases).

To be a protected activity, the plaintiff's opposition must have been directed toward a discriminatory act by an employer or an agent of an employer. *See E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013-14 (9th Cir. 1983) (holding that employee's objections to discriminatory practices by warehouse personnel manager, on facts presented, constituted opposition to discriminatory actions of employer); *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir. 1994) (stating that employee only needs to show "reasonable belief" that conduct being opposed was discriminatory).

Informal as well as formal complaints or demands are protected activities under Title VII. *See Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000).

Regarding the third element, "a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013) (rejecting motivating factor test in retaliation claim). The causation element may be inferred based on the proximity in time between the protected action and the retaliatory act "when there is a close proximity between the two." *Thomas v. City of Beaverton*, 379 F.3d 802, 812 (9th Cir. 2004); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). There is no per se too long or too short period of time that satisfies the causation requirement. *Howard v. City of Coos Bay*, 871 F.3d 1032, 1046 (9th Cir. 2017).

Individuals who violate 42 U.S.C. § 1981 for retaliatory conduct can be held personally liable for punitive damages "1) if they participated in the deprivation of Plaintiffs' constitutional rights; 2) for their own culpable action or inaction in the training, supervision, or control of their subordinates; 3) for their acquiescence in the constitutional deprivations; or 4) for conduct that showed a reckless or callous indifference to the rights of others." *Flores v. City of Westminster*, 873 F.3d 739, 757 (9th Cir. 2017).

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10.9 Civil Rights—Title VII— "Adverse Employment Action" Defined

Comment

The definition of "adverse employment action" in the context of a retaliation claim is different from that in a disparate treatment claim. Whereas an adverse employment action for purposes of a disparate treatment claim must materially affect the terms and conditions of a person's employment, an adverse action in the context of a retaliation claim need not materially affect the terms and conditions of employment so long as a reasonable employee would have found the action materially adverse, which means it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006); *see also Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (applying *Burlington* standard).

10.10 Civil Rights—Title VII— "Adverse Employment Action" in Retaliation Cases

An action is an adverse employment action if a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable worker from making or supporting a charge of discrimination.

Comment

In *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006), the Supreme Court settled the definition of what is an adverse employment action in the retaliation context. This definition introduces the objective standard of a "reasonable employee" but includes the concept of "materially adverse."

Actions such as firing and demoting are adverse employment actions for purposes of a retaliation claim. In addition, other actions that do not rise to the level of ultimate employment actions, such as a lateral transfer, an unfavorable reference that had no effect on a prospective employer's hiring decision, and the imposition of a more burdensome work schedule, may also be considered adverse employment actions in this context. These actions may dissuade a reasonable worker from making or supporting a charge of discrimination. *See White*, 548 U.S. at 68; *Ray v. Henderson*, 217 F.3d 1234, 1242-43 (9th Cir. 2000).

Adverse employment actions take many forms. *See*, *e.g.*, *Dodge v. Evergreen School District*, 56 F.4th 767, 774 (9th Cir. 2022) (in action brought under 42 U.S.C. § 1983, concluding statement that employee would "need to have [your] union rep" if he persisted in engaging in speech on matter of public concern made as private citizen); *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (en banc) (considering employee's placement on administrative leave, deprivation of ability to take promotional exam, and loss of pay and opportunities for investigative or other job experience); *Manatt v. Bank of Am., NA,* 339 F.3d 792, 802 (9th Cir. 2003) (discussing denial of transfer); *Little v. Windermere Relocation, Inc.,* 301 F.3d 958, 970 (9th Cir. 2002) (considering cut in monthly base salary); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 500-01, 506 (9th Cir. 2000) (considering low rating on job performance review, decreased job responsibilities, and failure to receive promotions); *Hashimoto v. Dalton*, 118 F.3d 671, 674 (9th Cir. 1997) (considering negative job reference); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9th Cir. 1989) (discussing layoff); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987) (considering transfer of job duties and "undeserved" performance ratings); *Ruggles v. Cal. Poly. State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986) (discussing failure to hire); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir. 1983) (discussing four-month disciplinary suspension).

Other conduct, however, may not constitute an adverse employment action. *See*, *e.g.*, *Lyons v. England,* 307 F.3d 1092, 1118 (9th Cir. 2002) (giving "mediocre" performance evaluation not made available to other potential employers and unaccompanied by any meaningful change in work assignments); *Brooks v. City of San Mateo*, 229 F.3d 917, 929 (9th Cir. 2000) (ostracizing by co-workers); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238-39 (9th Cir. 1999) (refusing to hold job open beyond period dictated by company's leave

policy), *amended by* 201 F.3d 1211; *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998) ("badmouthing" of employee); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir. 1996) (transferring with no effect on salary). However, for First Amendment retaliation cases, "even minor acts of retaliation can infringe on an employee's First Amendment rights." *Coszalter v. City of Salem*, 320 F.3d 968, 975 (9th Cir. 2003) (citing *Rutan v. Republican Party,* 497 U.S. 62, 75-79 (1990)).

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10.11 Civil Rights—Title VII— "Adverse Employment Action" in Disparate Treatment Cases

An action is an adverse employment action if it materially affects the compensation, terms, conditions, or privileges of employment.

Comment

See Comment at 10.9 (Civil Rights—Title VII—"Adverse Employment Action" Defined) and Comment to Instruction 10.10 **(**"Adverse Employment Action" in Retaliation Cases).

The definition of "adverse employment action" for purposes of a disparate treatment claim comes from *Chuang v. University of California Davis, Board of Trustees*, 225 F.3d 1115, 1126 (9th Cir. 2000) (holding that "[t]he removal of or substantial interference with work facilities important to the performance of the job constitutes a material change in the terms and conditions of a person's employment" and therefore qualifies as an adverse employment action, but that the employer's failure to respond to grievances did not amount to an adverse employment action because "it did not materially affect the compensation, terms, conditions, or privileges of the [plaintiffs'] employment"). *See also Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (stating definition); *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818-19 (9th Cir. 2002) (holding that plaintiff established prima facie case of disparate treatment when defendant subjected plaintiff "to a number of adverse employment conditions, including severe verbal and physical abuse, discriminatory overtime, and termination, that constituted 'a material change in the terms and conditions' of [plaintiff's] employment"). While a plaintiff must show that the adverse employment action brought about some disadvantageous change in the employment terms or conditions, that change need not be significant. *See Muldrow v. City of St. Louis*, 601 U.S. 346, 359 (2024) ("[T]he transfer must have left [the plaintiff] worse off, but need not have left her significantly so.")

An "adverse employment action" is not necessarily the same as a "tangible employment action." Although many tangible employment actions may also be adverse employment actions, a tangible employment action need not be adverse, such as when a supervisor coerces an employee into engaging in sexual acts by threats of discharge. In such a case, an employee need not actually suffer discharge or other adverse employment action to demonstrate a tangible employment action. *See Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003) ("[D]etermining not to fire an employee who has been threatened with discharge constitutes a 'tangible employment action,' at least where the reason for the change in the employment decision is that the employee has submitted to coercive sexual demands."); *see also* Instruction 10.12 (Civil Rights—Title VII—"Tangible Employment Action" Defined).

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10.12 Civil Rights—Title VII— "Tangible Employment Action" Defined

Tangible employment actions are the means by which a supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment action requires an official act of the enterprise, a company act. A tangible employment action consists of a significant change in employment status such as [hiring] [firing] [failing to promote] [reassignment] [a significant change in responsibilities] [undesirable reassignment] or [a significant change in benefits]. [A tangible employment action occurs when a superior obtains sexual favors from an employee by conditioning continued employment on participation in unwelcome acts.]

Comment

This instruction should be given in conjunction with Instruction 10.6 (Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor —Claim Based on Vicarious Liability —Tangible Employment Action—Affirmative Defense).

The Supreme Court defined "tangible employment action" in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742. 761 (1998), stating, "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Accord Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013) (holding that employer may be vicariously liable for employee's unlawful harassment only when employer has empowered that employee to take tangible employment actions against victim).

The meaning of the term "tangible employment action" is also discussed in *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137-38 (2004), which resolved a split in the circuits as to whether a constructive discharge brought about by supervisor harassment constitutes a tangible employment action and bars the affirmative defense set out in *Ellerth*, 524 U.S. 742, and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). *Suders*, 542 U.S. at 140.

Suders concluded that a constructive discharge, in itself, does not constitute a tangible employment action that bars the *Ellerth/Faragher* affirmative defense. That defense "is available to the employer whose supervisors are charged with harassment," and is barred only if a "tangible employment action" carried out under a supervisor's official authority was part of the conduct leading to the constructive discharge. *Id.* at 148-49.

In the context of quid pro quo sexual harassment, the Ninth Circuit has held that a "tangible employment action" occurs when a supervisor who abuses his supervisory authority succeeds in coercing an employee to engage in sexual acts by threats of discharge or other material job-related consequence or fails in his efforts to coerce the employee but then actually discharges her on account of her refusal to submit to his demands. *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1169 (9th Cir. 2003). In such situations, the employer may be held vicariously liable for the direct supervisor's unlawful conduct and may not take advantage of the *Ellerth/Faragher* affirmative defense. *Id.* However, an "unfulfilled, or inchoate, quid pro quo

threat by a supervisor is not enough" to constitute a tangible employment action. *Id.* at 1170. Rather, the threat must culminate in the actual coercion of a sexual act or some other "form of sufficiently concrete employment action" on account of the employee's refusal to submit. *Id.*

10.13 Civil Rights—Title VII— "Constructive Discharge" Defined

A constructive discharge occurs when the working conditions are so intolerable that a reasonable person in the plaintiff's position would feel compelled to resign.

Comment

This instruction is based on *Pennsylvania State Police v. Suders*, 542 U.S. 129, 147 (2004). *Accord Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007); *see also Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1225 (9th Cir. 2012) (holding in Title VII retaliation case that constructive discharge occurs when "a retaliating employer creates working conditions so extraordinary and egregious as to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job" (quotation marks and alterations omitted)). *Green v. Brennan*, 578 U.S. 547, 555 (2016) (stating that constructive discharge has two elements – discrimination by the employer to the point where a reasonable person would have felt compelled to resign, and actual resignation).

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10.14 Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification

The defendant [*name*] contends that [religion] [sex] [national origin] is part of a bona fide occupational qualification. The defendant [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, that the occupational qualification is reasonably necessary to the normal operation of the defendant [*name*]'s business or enterprise; and

Second, [that the defendant [*name*] had reasonable cause to believe that all [*describe the class*] would be unable to perform the job safely and efficiently] [or] [that it was impossible or highly impractical to consider the qualifications of each [*describe the class*] employee.]

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved this defense, in which event your verdict should be for the defendant [*name*].

Comment

See 42 U.S.C. § 2000e-2(e)(1) ("it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .."). "We reiterate our holdings in [*Western Airlines, Inc., v. Criswell*, 472 U.S. 400 (1985)] and [*Dothard v. Rawlinson*, 433 U.S. 321 (1977)] that an employer must direct its concerns about a woman's ability to perform her job safely and efficiently to those aspects of the woman's job-related activities that fall within the 'essence' of the particular business." *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206-07 (1991) (holding that no "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved"); *see also Criswell*, 472 U.S. at 413 (suggesting that bona fide occupational qualification relates to the "essence" or "central mission" of employer's business) (citing *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976)); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 855 (9th Cir. 2000) (discrimination pursuant to bona fide occupational qualification must be "reasonably necessary" to the "normal operation" of the employer's particular business, and must concern "job-related skills and aptitudes").

When asserting a "business necessity" defense, an employer may offer proof that it "relied on a government safety standard, even where the standard is not applicable to the category of conduct at issue." *Bates v. United Parcel, Inc*., 511 F.3d 974, 998 (9th Cir. 2007) (involving employer's requirement that employee meet DOT hearing standard even when vehicle driven was non-DOT regulated package vehicle).

A bona fide occupational qualification defense does not bar a claim for discrimination if this defense is merely pretextual. *See Zeinali v. Raytheon Co*., 636 F.3d 544 (9th Cir. 2011)

(holding Iranian engineer may have Title VII claim for discrimination based on race and national origin when termination was based on failure to obtain security clearance while non-Iranian engineers who did not have security clearances were retained).

"Under Title VII, the [bona fide occupational qualification] defense is not available at all where discrimination is based on race or color." *Morton v. United Parcel Serv*., 272 F.3d 1249, 1260 n.11 (9th Cir. 2001). Limited gender discrimination may be permissible in prison employment but the employer must have an objective "basis in fact" that the gender discrimination is "reasonably necessary" to the business operation. *Teamsters Local Union No. 117 v. Washington Dep't of Corr.*, 789 F.3d 979, 986 (9th Circ. 2015).

Revised June 2024

10.15 Civil Rights—Title VII—Defense—Bona Fide Seniority System

The defendant [*name*] contends that the treatment of the plaintiff [*name*] was based on a bona fide seniority system. The defendant [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the seniority system had legitimate goals and was not designed to discriminate on the basis of [race] [color] [religion] [sex] [national origin]; and

Second, the seniority system used the employee's length of service as the primary consideration in selecting the employees who would not be [*describe the alleged discriminatory action*].

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved this defense, in which event your verdict should be for the defendant [*name*].

Comment

In relevant part 42 U.S.C. § 2000e-2(h) provides:

> [I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . ..

Bona fide seniority systems are valid under Title VII pursuant to 42 U.S.C. § 2000e-2(h), even though such systems may perpetuate pre-Act discrimination. *See Int'l. Bhd. of Teamsters v. United States*, 431 U.S. 324, 348-55 (1977). Seniority systems do not violate Title VII even if they have a disproportionate effect on a protected group, so long as they are not intentionally discriminatory. *See Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982); *Balint v. Carson City*, 180 F.3d 1047, 1051 (9th Cir. 1999) (noting that under Title VII, "seniority systems are a valid method of providing different levels of compensation and privileges, even if they have a discriminatory impact on employees"). A seniority system is not illegal provided it is not the result of an intent to discriminate on prohibited grounds; the issue of intent is a necessary element of a Title VII action challenging the seniority system and is not merely an affirmative defense to such a challenge. *See Lorance v. AT&T Technologies, Inc*., 490 U.S. 900, 905 (1989) (ruling on filing period for timely charge superseded by statute as stated in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007)); *AT&T Corp. v. Hulteen*, 556 U.S. 701, 710 (2009) (stating that a bona fide seniority system is a system that has no discriminatory terms). Seniority systems necessarily "contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604, 607 (1980) (reversing

circuit determination that "fundamental component" of seniority system is "the concept that employment rights should increase as the length of an employee's service increases.").

Revised June 2024

10.16 Civil Rights—Title VII—Defense—After-Acquired Evidence

The defendant [*name*] contends that the defendant [*name*] would have made the same decision to [discharge] [not hire] [not promote] [demote] the plaintiff [*name*] because [*describe the after-discovered misconduct*]. If the defendant [*name*] proves by a preponderance of the evidence that the defendant [*name*] could have made the same decision and [would have discharged] [would not have hired] [would not have promoted] [would have demoted] the plaintiff [*name*] because of [*describe the after-discovered misconduct*], you should limit any award of back pay to the date the employer would have made the decision to [[discharge] [not hire] [not promote] [demote]] the plaintiff [*name*] as a result of [*describe the after-discovered misconduct*].

Comment

If an employer takes an adverse employment action such as discharging an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability, but the employer does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362 (1995); *see also Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1071 n.16 (9th Cir. 2004); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 761–62 (9th Cir. 1996). The employer must prove by a preponderance of the evidence that it would have fired the employee because of the after-acquired evidence. *O'Day*, 79 F.3d at 761.

The defense of after-acquired evidence is similar to, but not the same as, an employer's affirmative defense to a charge that a protected characteristic was a "motivating factor" in an adverse employment decision, as explained in Instruction 10.2 (Civil Rights—Title VII—Disparate Treatment—With Affirmative Defense of "Same Decision"). In both situations, the "same decision" theory is more a limitation on remedies than an affirmative defense that defeats a claim of employment discrimination. In the case of the "same decision" theory in a mixed motive case discussed in Instruction 10.2, information establishing a lawful basis for the employer's decision is known to the employer at the time of the decision and limits a plaintiff's remedies. In the case of "after-acquired evidence," the information establishing a lawful basis for the employer's adverse employment decision is acquired after the adverse decision and limits remedies.

The Ninth Circuit has concluded that "back pay" under various federal statutes, including Title VII, generally includes tips, holiday pay, and overtime pay. *See Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001).

Revised Mar. 2022

10.17 Civil Rights—Title VII—Defense—Undue Hardship in Religious Accommodation Cases

Comment

Title VII requires employers to make accommodations for an employee's religious beliefs or practices unless the employer can show that the employee's religious practice cannot "reasonably" be accommodated without "undue hardship." The Supreme Court, in *Groff v. DeJoy*, 600 U.S. 447, 468-71 (2023), clarified the standard for undue hardship. Before *Groff*, an employer's burden to show undue hardship had been, since *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977), understood by lower courts as relieving an employer of providing a religious accommodation if it can show that doing so would impose "more than . . . *de minimis*" cost. *See*, *e.g.*, *Balint v. Carson City*, 180 F.3d 1047, 1053-54 (9th Cir. 1999). The *Groff* court disavowed that understanding, stating that the "more than a *de minimis* cost" test was a mistaken view of *Hardison*. Rather, the Court explained that an employer must accommodate an employee's religious beliefs unless it can show that doing so would "result in substantial increased costs in relation to the conduct of" the employer's business. *Groff*, 600 U.S. at 470. Although the Court left it to the lower courts to perform the context-specific application of the clarified standard, it noted two things: (1) "a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice cannot be considered 'undue'"; and (2) "Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations." *Id*. at 472-73.

11. AGE DISCRIMINATION

Instruction

Introductory Comment
11.1 Age Discrimination—Disparate Treatment—Elements and Burden of Proof
11.2 Age Discrimination—Hostile Work Environment (Comment only)
11.3 Age Discrimination—Retaliation (Comment only)
11.4 Age Discrimination—Disparate Impact—Elements
11.5 Age Discrimination—Definition of Common Terms (Comment only)
11.6 Age Discrimination—Defenses (Comment only)
11.7 Age Discrimination—Defenses—Bona Fide Occupational Qualification (Comment only)
11.8 Age Discrimination—Defenses—Bona Fide Seniority System
11.9 Age Discrimination—Defenses—After-Acquired Evidence (Comment only)
11.10 Age Discrimination—Defenses—Bona Fide Employee Benefit Plan
11.11 Age Discrimination—Defenses—Reasonable Factor Other Than Age
11.12 Age Discrimination—Damages (Comment only)
11.13 Age Discrimination—Damages—Back Pay—Mitigation
11.14 Age Discrimination—Damages—Willful Discrimination—Liquidated Damages

Introductory Comment

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., protects workers aged forty or older from employment discrimination on the basis of their age. The Act applies to private employers who have twenty or more employees for each working day. The Act also applies to States and political subdivisions of a State, regardless of the number of employees who work in that subdivision. 29 U.S.C. § 630(b); *Mount Lemmon Fire Dist. v. Guido*, 586 U.S. 1 (2018).

Because of the numerous similarities between the ADEA and Title VII, the instructions in this chapter generally mirror the Committee's organization of Title VII instructions by theory of liability, as used in Chapter 10 (Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation). As with Title VII, the ADEA recognizes claims under both disparate treatment and disparate impact theories of liability. *See Smith v. City of Jackson*, 544 U.S. 228, 231-34 (2005); *see also Sheppard v. David Evans & Assoc*., 694 F.3d 1045, 1049 & n.1 (9th Cir. 2012). The Committee recommends that the court first identify the theory under which the plaintiff has asserted an ADEA claim, and then refer to the relevant subchapter for applicable jury instructions.

In some cases of employment discrimination under Title VII (*i.e*., when the employer is a public entity), the plaintiff has the option of suing under 42 U.S.C. § 1983. However, the ADEA is the exclusive remedy for a federal age discrimination claim. *See Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1056 (9th Cir. 2009).

"The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publ'g Co*., 513 U.S. 352, 358 (1995) (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979)). Further, certain "language in the ADEA . . . was 'derived *in haec verba* from Title VII.'" *Smith*, 544 U.S. at 234. On issues when the ADEA and Title VII are in substantial accord, appropriately modified Title VII instructions should be given, as cross-referenced in this chapter. *See* Comments to Instructions 11.2 (Age Discrimination—Hostile Work Environment); 11.3 (Age Discrimination—Retaliation); 11.5 (Age Discrimination—Definition of Common Terms); 11.7 (Age Discrimination—Defenses—Bona Fide Occupational Qualification); 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System); and 11.9 (Age Discrimination—Defenses—After-Acquired Evidence).

The ADEA and Title VII are not identical. A brief summary of their differences is set forth below.

Mixed Motives: A Title VII plaintiff need only prove that a protected status was "a motivating factor" for an adverse employment action. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003). However, "textual differences between Title VII and the ADEA . . . prevent . . . [application of] *Desert Palace* to federal age discrimination claims." *Gross v. FBL Fin. Services, Inc*., 557 U.S. 167, 175 & n.2 (2009). In *Gross*, the Court held that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the

evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision." *Id. at* 180. Thus, it was reversible error to instruct the jury using Title VII's "motivating factor" formulation. *Id*. at 170-71. Earlier Ninth Circuit cases applying the same standards to cases proceeding on disparate treatment or retaliation theories under the two statutes must now be read carefully in light of *Gross*. *See generally Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) ("The analysis under Title VII is the same as that under ADEA."); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) ("This Court applies the same standards to disparate treatment claims pursuant to Title VII [and] the Age Discrimination in Employment Act . . . ."); *Stillwell v. City of Williams*, 831 F.3d 1234, 1246-47 (9th Cir. 2016) ("Section 623(d) is the ADEA equivalent of the anti-retaliation provision of Title VII."). *See* Instructions 11.2 (Age Discrimination—Hostile Work Environment), 11.3 (Age Discrimination—Retaliation).

Disparate Impact: After longstanding uncertainty on the issue, *Smith* held that an ADEA claim may be predicated on a disparate impact theory. 544 U.S. at 240. However, the Court held that because the Civil Rights Act of 1991 did not amend the ADEA, the pre-1991 heightened disparate impact standard applies. *Id.* (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989)). Thus, to prove a disparate impact claim, plaintiffs must identify a "specific test, requirement, or practice . . . that has an adverse impact on older workers." *Id*. at 241; *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 100 (2008); Instruction 11.4 (Age Discrimination—Disparate Impact—Elements).

Defenses: Unlike race or gender, certain business costs correlate directly with age. Thus, the ADEA permits an affirmative defense for certain actions related to the cost of noncompensation employment benefits. 29 U.S.C. § 623(f)(2)(B). *See* Instruction 11.10 (Age Discrimination—Defenses—Bona Fide Employee Benefit Plan).

The ADEA's bona fide seniority system defense imposes the additional requirement, not found in the Title VII context, that the seniority system may not "require or permit . . . involuntary retirement[.]" 29 U.S.C. § 623(f)(2)(A). *See* Instruction 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System).

Generally, in a disparate impact case, the ADEA provides a broad defense when the employer's action is based on a reasonable factor other than age. 29 U.S.C. § 623(f)(1). This is substantially broader than the "business necessity" defense afforded by Title VII. *See Smith*, 544 U.S. at 243 ("Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the [reasonable factor other than age] inquiry includes no such requirement." *See* Instruction 11.11 (Age Discrimination—Defenses—Reasonable Factor Other than Age).

The First Amendment's religion clauses give rise to an affirmative defense that "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181,

195 n.4 (2012) (applying this defense to an ADA retaliation claim); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738, 756 (2020) (foreclosing discrimination claims by employees of religious organizations under the Age Discrimination in Employment Act and ADA).

Remedies: The remedies provision in the ADEA is borrowed from a wholly different body of law—the Fair Labor Standards Act (FLSA). *See Lorillard v. Pons*, 434 U.S. 575, 582 (1978) ("[Other than] those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."). This creates substantial differences in damages instructions. *See* Comment to Instruction 11.13 (Age Discrimination—Damages—Back Pay—Mitigation). Thus, the ADEA provides the FLSA's remedies of back pay, liquidated damages and equitable relief. *See* 29 U.S.C. § 216. Additionally, front pay may be awarded in lieu of reinstatement if the court finds that reinstatement is not a feasible remedy. *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) (ADEA case).

The ADEA does not provide for nonwage compensatory damages, such as damages for emotional distress, or for punitive damages. *See Ahlmeyer*, 555 F.3d at 1059 (9th Cir. 2009) ("Compensatory damages for pain and suffering and punitive damages are not available under the ADEA . . . ."); *Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1317 (9th Cir. 1982) (noting punitive damages not available); *Naton v. Bank of Cal.*, 649 F.2d 691, 698 (9th Cir. 1981) (noting nonwage compensatory damages not available); *compare* 42 U.S.C. § 1981a(a)(1) (permitting recovery of compensatory and punitive damages under Title VII). *See* Instructions 11.13 (Age Discrimination—Damages—Back Pay—Mitigation), and 11.14 (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

Because the ADEA's remedies analogue is the FLSA, not Title VII, the ADEA provides for a jury trial on the issue of back pay. *See Lorillard*, 434 U.S. at 582-84; *compare Lutz v. Glendale Union High Sch.*, 403 F.3d 1061, 1067-68 (9th Cir. 2005) (holding plaintiff not entitled to jury determination of Title VII back pay award). On the question of whether or not front pay is an issue for the court or for the jury, *see Traxler v. Multnomah County*, 596 F.3d 1007, 1009-14 (9th Cir. 2010), and *Cassino*, 817 F.2d at 1346-48 (9th Cir. 1987).

Revised March 2025

11.1 Age Discrimination—Disparate Treatment—Elements and Burden of Proof

The plaintiff [*name*] has brought a claim of employment discrimination against the defendant [*name*]. The plaintiff [*name*] asserts the defendant [*name*] [discharged] [*specify other adverse action*] the plaintiff [*name*] because of [his] [her] [*other pronoun*] age. The defendant [*name*] denies that the plaintiff w[*name*] as [discharged] [*specify other adverse action*] because of [his] [her] [*other pronoun*] age [[and further asserts the decision to [discharge] [*specify other adverse action*] the plaintiff [*name*] was based on [a] lawful reason[s]].

To prevail on this claim, the plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the defendant [*name*] [discharged] [*specify other adverse action*] the plaintiff [*name*];

Second, the plaintiff [*name*] was 40 years of age or older at the time [he] [she] [*other pronoun*] was [discharged] [*specify other adverse action*]; and

Third, the defendant [*name*] [discharged] [*specify other adverse action*] the plaintiff [*name*] because of [his] [her] [*other pronoun*] age, that is, the defendant [*name*] would not have [discharged] [*specify other adverse action*] the plaintiff [*name*] but for [his] [her] [*other pronoun*] age.

If you find that the plaintiff [*name*] has proved all three of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

Although a Title VII plaintiff need only prove that a protected status was "a motivating factor" for an adverse employment action, *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003), an ADEA plaintiff may not proceed on a mixed-motives theory. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

Despite the fact that both Title VII and the ADEA prohibit discrimination "because of" a specified protected status, other "textual differences between Title VII and the ADEA . . . prevent . . . [application of] *Desert Palace* to federal age discrimination claims." *Gross*, 557 U.S. at 175 n.2; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013). Specifically, 1991 amendments to Title VII, but not to the ADEA, provide that discrimination is "established" when a plaintiff shows the protected status was "a motivating factor" for the adverse employment actions. Without this additional language in the ADEA, the Court held in *Gross* that "a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the 'but-for' cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence

that age was one motivating factor in that decision." *Id. at* 180. Thus, earlier Ninth Circuit cases applying the same standards to disparate treatment cases under the two statutes must now be read in light of *Gross*.

In describing the "but for" standard applicable in ADEA cases, the Court in *Gross* noted:

> The words "because of" mean "by reason of: on account of." . . . Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that the claim "cannot succeed unless the employee's protected trait actually played a role in [the employer's decisionmaking] process *and had a determinative influence on the outcome* " (emphasis added)). To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.

Gross, 557 U.S. at 176 (emphasis in original).

The Supreme Court clarified that federal employees are not required to meet the "but-for" causation standard to establish age discrimination. *Babb v. Wilkie*, 589 U.S. 399, 411-13 (2020) (analyzing 29 U.S. § 633a(a)). Rather, a federal employee is entitled to relief upon a showing of being "subjected to unequal consideration." *Id.* However, that showing will support only "injunctive or other forward-looking relief." *Id.* at 414. To "obtain reinstatement, backpacy, compensatory damages, or other forms of relief related to the end result of an employment decision," a federal employee must satisfy the "but-for" causation standard. *Id.* at 413.

Revised June 2024

11.2 Age Discrimination—Hostile Work Environment

Comment

At least one Ninth Circuit case suggests that a viable hostile work environment claim can be stated under the ADEA. *Sischo-Nownejad v. Merced Cmty. Coll. Dist*., 934 F.2d 1104, 1109 (9th Cir. 1991), superseded on other grounds as recognized by *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1041 (9th Cir. 2015) ("A plaintiff may show violations of [the ADEA] by . . . proving the existence of a hostile work environment."). This is consistent with the general practice that, absent reasons to the contrary, intentional discrimination under the ADEA should be treated in the same fashion as Title VII. *See generally Coleman v. Quaker Oats Co*., 232 F.3d 1271, 1295 (9th Cir. 2000) ("The analysis [of disparate treatment claims] under Title VII is the same as that under ADEA."); *Mustafa v. Clark County Sch. Dist*., 157 F.3d 1169, 1180 n.11 (9th Cir. 1998) ("This Court applies the same standards to disparate treatment claims pursuant to Title VII [and] the Age Discrimination in Employment Act . . . .").

As with Title VII, the ADEA defines "employer" to include the employer's agents. 29 U.S.C. § 630(b). Thus, the liability framework for Title VII harassment addressed in the Supreme Court's decisions in *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), should also apply to cases brought under the ADEA.

As applicable, the parallel Title VII instructions concerning hostile work environment claims (Instructions 10.4, 10.5, 10.6, and 10.7) should be given, in a form modified to take into account that age is the protected characteristic by adding the element that the plaintiff was 40 years of age or older at the time of the harassment. *See* 29 U.S.C. § 631(a).

11.3 Age Discrimination—Retaliation

Comment

The ADEA "makes it unlawful for an employer to retaliate against an employee for opposing the employer's discriminatory practices or participating in any investigation or proceeding under the ADEA[.]" *O'Day v. McDonnell Douglas Helicopter Co*., 79 F.3d 756, 763 (9th Cir. 1996). See 29 U.S.C. § 623(d). The Ninth Circuit applies the same standard in both ADEA and Title VII retaliation cases. *See Hashimoto v. Dalton*, 118 F.3d 671, 675 n.1 (9th Cir. 1997) ("[T]he ADEA anti-retaliation provision is 'parallel to the anti-retaliation provision contained in Title VII,' and . . . 'cases interpreting the latter provision are frequently relied upon in interpreting the former.'"); *O'Day*, 79 F.3d at 763 ("Section 623(d) is the ADEA equivalent of the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a), and like its counterpart it makes it unlawful for an employer to retaliate against an employee for opposing the employer's discriminatory practices or participating in any investigation or proceeding under the ADEA."); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1441 (9th Cir. 1990) ("We rely on cases involving retaliation claims brought under Title VII or Section 1981 as well as the ADEA. Few published opinions involve ADEA retaliatory claims. Those circuits that have considered ADEA retaliation claims have generally adopted the analysis used in Title VII cases without comment.").

As applicable, Instruction 10.8 (Civil Rights—Title VII—Retaliation—Elements and Burden of Proof) should be given in a form modified to take into account that the activity protected under federal law is opposition to practices made unlawful by the ADEA. *See* 29 U.S.C. § 623(d).

11.4 Age Discrimination—Disparate Impact—Elements

The plaintiff [*name*] seeks damages based on age discrimination in violation of federal law. To prevail on this claim, the plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the plaintiff [*name*] was 40 years of age or older at the time the plaintiff [*name*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*];

Second, the defendant [*name*] used a specific [test] [requirement] [practice] [selection criterion] that had a significantly adverse or disproportionate impact on employees 40 years of age or older; and

Third, the defendant [*name*]'s [test] [requirement] [practice] [selection criterion] resulted in the plaintiff [*name*] being [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*].

If you find that the plaintiff [*name*] has proved all three of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

"A disparate impact claim challenges employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . ." *Pottenger v. Potlatch Corp*., 329 F.3d 740, 749 (9th Cir. 2003) (internal quotation marks and citation omitted). In *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005), the Supreme Court affirmed the availability of a disparate impact claim under the ADEA. For detailed discussions of ~~a~~ disparate impact claims arising under the Fair Housing Act, see *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc*., 576 U.S. 519 (2015) (relying on cases interpreting Title VII and the ADEA) and *Ohio House, LLC v. City of Costa Mesa*, 135 F.4th 645, 667 (9th Cir. 2025) ("To establish prima facie disparate impact, a plaintiff must present evidence of: (1) the existence of a policy . . . that is outwardly neutral; (2) a significant, adverse, and disproportionate effect on a protected class; and (3) robust causality that shows, beyond mere evidence of a statistical disparity, that the challenged policy, and not some other factor or policy, caused the disproportionate effect." (alteration in original) (internal quotation marks and citation omitted)).

The first element states the age threshold necessary to fall within the ADEA. *See* 29 U.S.C. § 631(a).

The second element reflects *Smith*'s holding that "it is not enough to simply allege that there is a disparate impact on workers or point to a generalized policy that leads to such an impact. Rather, the employee is responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." *Smith*, 544 U.S.

at 240-41 (internal quotation omitted) (emphasis in original) (holding that heightened disparate impact standard of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989), applies in ADEA cases because Civil Rights Act of 1991, which abrogated Wards Cove in Title VII cases, did not amend ADEA). Thus, the plaintiff must establish that the employer uses a "specific test, requirement, or practice . . . that has an adverse impact on older workers." *Id*. at 241.

The third element states the requirement that the plaintiff "must show that he was subject to the particular employment practice with the alleged disparate impact." *Pottenger*, 329 F.3d at 750.

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

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11.5 Age Discrimination—Definition of Common Terms

Comment

The ADEA defines several common terms in the same manner as Title VII. As applicable, the following Title VII instructions should be given: Instructions 10.10 ("Adverse Employment Action" in Retaliation Cases), 10.11 ("Adverse Employment Action" in Disparate Treatment Cases), 10.12 ("Tangible Employment Action" Defined), and 10.13 ("Constructive Discharge" Defined).

11.6 Age Discrimination—Defenses

Comment

The following instructions address affirmative defenses and limitations on remedies. The appropriate affirmative defenses will depend on the plaintiff's theory of liability.

The bona fide occupational qualification (BFOQ) defense allows, under certain circumstances, an employer to facially discriminate on the basis of age when the discrimination is reasonably necessary to its business. 29 U.S.C. § 623(f)(1). *See* Instruction 11.7 (Age Discrimination—Defenses—Bona Fide Occupational Qualification).

The bona fide seniority system defense provides that an employer is not liable under the ADEA when its decisions are based on a legitimate seniority system that does not require involuntary retirement. 29 U.S.C. § 623(f)(2)(A). *See* Instruction 11.8 (Age Discrimination—Defenses—Bona Fide Seniority System).

After-acquired evidence is a judicially crafted equitable doctrine that allows an employer to avoid reinstatement and front pay and to limit an award of back pay to the period of time between unlawful termination and the time at which the employer discovered that plaintiff's "wrongdoing was of such severity that the [plaintiff] in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 362-63 (1995); *see also O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996). *See* Instruction 11.9 (Age Discrimination—Defenses—After-Acquired Evidence).

The bona fide employee benefit plan defense allows an employer to approximately equalize the costs of providing nonwage benefits to employees of differing ages. 29 U.S.C. § 623(f)(2)(B). *See* Instruction 11.10 (Age Discrimination—Defenses—Bona Fide Employee Benefit Plan).

The reasonable factor other than age (RFOA) defense excuses liability under the ADEA when a decision is based on any reasonable and legitimate business consideration other than the age of the employee. 29 U.S.C. § 623(f)(1). *See* Instruction 11.11 (Age Discrimination—Defenses—Reasonable Factor Other Than Age).

11.7 Age Discrimination—Defenses—Bona Fide Occupational Qualification

Comment

Under 29 U.S.C. § 623(f)(1) an employer may take action that would otherwise be prohibited where "age is a bona fide occupational qualification [('BFOQ')] reasonably necessary to the normal operation of the particular business." The BFOQ defense is also available in Title VII cases, and the same standard applies. *See W. Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414-17 (1985) (interpreting ADEA's BFOQ exception in light of Title VII's BFOQ exception); *see also Smith v. City of Jackson*, 544 U.S. 228, 234 (2005) (noting that certain "language in the ADEA . . . was derived *in haec verba* from Title VII" (internal quotation omitted)). Thus, when a BFOQ defense is at issue, the court should give the parallel Title VII instruction (Instruction 10.14) with appropriate modification. *See also* Comment to Instruction 10.14 (Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification).

11.8 Age Discrimination—Defenses—Bona Fide Seniority System

The defendant [*name*] contends that its treatment of the plaintiff [*name*] was based on a bona fide seniority system. The defendant [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the seniority system had legitimate goals and was not designed to discriminate on the basis of age;

Second, the seniority system used the employee's length of service as the primary consideration in selecting the employees who would [describe the alleged discriminatory action][.] [; and]

[Third, the seniority system did not place the plaintiff in a position in which a reasonable person in that position would believe that [he] [she] [*other pronoun*] had no choice but to retire.]

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s] in accordance with Instruction[s] [*insert cross reference to the pertinent instruction[s] on the plaintiff's theory of liability*], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved this defense, in which event your verdict should be for the defendant [*name*].

Comment

The bracketed third element should be given only when involuntary retirement is at issue.

The ADEA provides an affirmative defense for age discrimination undertaken as part of a bona fide seniority system. 29 U.S.C. § 623(f)(2)(A). *See generally Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("[I]t is incorrect to say that a decision based on years of service is necessarily age-based[.]").

Because Title VII provides a similar bona fide seniority system defense, the first two elements are based on the parallel Title VII instruction. *See Hiatt v. Union Pac. R.R. Co.,* 65 F.3d 838, 842 (10th Cir. 1995) (analogizing § 623(f)(2)(A) to similar language in Title VII). *See also Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982) (discussing Title VII seniority exception). *See also* Instruction 10.15 (Civil Rights—Title VII—Defense—Bona Fide Seniority System).

The ADEA was substantially amended in 1978 to add a provision prohibiting the use of a seniority system to "require or permit . . . involuntary retirement[.]" 29 U.S.C. § 623(f)(2)(A). The Committee is unable to find Ninth Circuit authority construing the post-1978 version of this provision, and the pre-1978 cases invariably concern involuntary retirement. *See*, *e.g.*, *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 195-203 (1977) (construing text and history of former version of statute); *EEOC v. Santa Barbara County*, 666 F.2d 373, 375 n.6 & 377 (9th Cir. 1982).

Because there is no authority construing the provision, and because the literal text of "require or permit . . . involuntary retirement" is less than clear, the language of the third element is adopted from a Ninth Circuit case construing identical involuntary retirement language in 29 U.S.C. § 623(f)(2)(B), the ADEA's employee benefit plan defense. *See Kalvinskas v. Cal. Inst. of Tech.*, 96 F.3d 1305, 1308 (9th Cir. 1996) (holding that an employee benefits plan "require[s] or permit[s] the involuntary retirement of any individual," when "a reasonable person in [the plaintiff's] position would feel he had no choice but to retire.").

11.9 Age Discrimination—Defenses—After-Acquired Evidence

Comment

The ADEA applies the after-acquired evidence doctrine in the same manner as Title VII. *See McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 358–59 (1995); *O'Day v. McDonnell Douglas Helicopters Co.*, 79 F.3d 756, 759-60 (9th Cir. 1996). Thus, the parallel Title VII instruction, Instruction 10.16 (Civil Rights—Title VII—Defense—After-Acquired Evidence) should be given with appropriate modifications.

If an employer takes an adverse employment action such as discharging an employee for a discriminatory reason, later-discovered evidence that the employer could have used to discharge the employee for a legitimate reason does not immunize the employer from liability; however, the employer does not have to offer reinstatement or front pay and only has to provide back pay "from the date of the unlawful discharge to the date the new information was discovered." *McKennon*, 513 U.S. at 362 (1995) (ADEA case); *see also Rivera v. Nibco, Inc.*, 364 F.3d 1057, 1071 n.16 (9th Cir. 2004); *O'Day*, 79 F.3d at 761-62 (9th Cir. 1996). The employer must prove by a preponderance of the evidence that it would have fired the employee because of the after-acquired evidence. *Id.* at 761.

In Title VII cases, the defense of after-acquired evidence is similar to, but not the same as, an employer's affirmative defense to a charge that a protected characteristic was a "motivating factor" in an adverse employment decision, because both defenses provide limitations on remedies without absolving an employer of liability. In the case of "after-acquired evidence," the information establishing a lawful basis for the employer's adverse employment decision is not acquired until after the adverse decision and thus only limits remedies as set forth in Instruction 10.16.

11.10 Age Discrimination—Defenses—Bona Fide Employee Benefit Plan

The defendant [*name*] contends that any age-related disparate treatment afforded to the plaintiff [*name*] resulted from the plaintiff's participation in a bona fide employee benefit plan. "Disparate" means "different." The defendant [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, [*describe the alleged discriminatory action*] occurred as part of the defendant [*name*]'s policy of providing its workers with nonwage benefits under an employee benefit plan;

Second, the benefit plan was bona fide, that is, it existed and provided for and paid benefits to employees;

Third, the defendant [*name*] was actually following the plan at the time it is alleged to [describe the alleged discriminatory action]; [and]

[Fourth, the defendant [*name*]'s employee benefit plan did not place the plaintiff [*name*] in a position where a reasonable person in that position would believe that [he] [she] [*other pronoun*] had no choice but to retire; and]

[Fourth/Fifth, [*describe the alleged discriminatory action*] is justified by significant cost considerations.

Evaluating whether the disparate treatment is justified requires considering that some benefits cost more to provide to older workers than to younger ones. The law allows employers to provide less in benefits to older workers when (a) the employer spends approximately the same amount for benefits for older and younger workers, and (b) the extent of the difference in benefits is necessary to keep the cost approximately equivalent. Thus, a plan is justified by significant cost considerations when any age-related differential in employee benefits exists only to the extent necessary to achieve approximate equivalency in costs between older and younger workers.

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s] in accordance with Instruction[s] [*insert cross reference to the pertinent instruction[s] on the plaintiff's theory of liability*], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved all [four] [five] elements of this defense, in which event your verdict should be for the defendant [*name*].

Comment

The bracketed fourth element should only be used when involuntary retirement is at issue.

The ADEA exempts certain employer actions taken pursuant to a "bona fide employee benefit plan" from general liability under the statute. *See* 29 U.S.C. § 623(f)(2)(B).

Prior to 1989, the Ninth Circuit used a four-element test in applying this provision. *EEOC v. Orange County*, 837 F.2d 420, 421 (9th Cir. 1988) ("To qualify for exemption under section [623](f)(2), [a] plan must fulfill four criteria: 1) it must be the sort of 'plan' covered by the section, 2) it must be 'bona fide,' 3) the [employer]'s action must be in observance of the plan, and 4) the plan must not be a subterfuge to evade the purposes of the Act.").

Subsequent to the establishment of the Ninth Circuit test, the Supreme Court substantially redefined the "subterfuge" element and placed the burden on the plaintiff to show that the plan "was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation." *Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 181 (1989). Then, in 1990, Congress amended the statute, effectively abrogating the holding of *Betts* in two respects. The amendment: (1) removed the word "subterfuge" from the text of the statute and replaced it with the definition that had been used by the EEOC prior to *Betts*; and (2) clarified that the employer claiming the defense bears "the burden of proving that such actions are lawful"—thus establishing that the provision is, contrary to the characterization in *Betts*, an affirmative defense. *See* Older Workers Benefit Protection Act (OWBPA), Pub.L. 101-433, Title I, § 103, Oct. 16, 1990, 104 Stat. 978; *see also Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 94-95 (noting enactment of OWBPA and holding that the added phrase "otherwise prohibited" is an affirmative defense). After the 1990 amendment, there is little Ninth Circuit law interpreting the bona fide employee benefit provision. However, Congress was clear that the amendment was meant to return the law to its pre-*Betts* state. *See* OWBPA § 101 ("Congress finds that, as a result of the decision of the Supreme Court in . . . *Betts*, . . . legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA]."). Thus, the general state of the law pre-*Betts* is persuasive, and some version of the four-element test should apply. *See Orange County*, 837 F.2d at 421; *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984), *disapproved by Betts*, 492 U.S. at 172.

As to the first element, it appears reasonable to retain the relatively broad definition of "employee benefit plan" as discussed in *Betts*. *Betts* relied on an EEOC regulation's definition of these benefits as "fringe"—i.e., other than monetary compensation—and gave the examples (then in the statute) of retirement, pension, and insurance plans. 492 U.S. at 174. *See also Am. Assoc. Ret. Pers. v. Farmers Group, Inc.*, 943 F.2d 996, 1003 (9th Cir. 1991) (following *Betts*; distinguishing "wages" from "benefits"). The OWBPA did not alter the substance of that definition.

The second element is straightforward. "'[B]ona fide' . . . has been held to mean no more than that the plan exists and pays substantial benefits." *Borden's*, 724 F.2d at 1395.

The third element is a question of historical fact.

The text of the statute also provides that no affirmative defense is available (even if justified by cost) if a plan "require[s] or permit[s] the involuntary retirement of any individual." 29 U.S.C. § 623(f)(2). This section has been construed to mean that discrimination that occurs pursuant to a benefits plan must not lead a reasonable person in the position of the plaintiff to

believe that he has "no choice but to retire." *Kalvinskas v. Cal. Inst. of Tech.*, 96 F.3d 1305, 1308 (9th Cir. 1996). As the statute requires the employer to prove the legality of its conduct, when relevant, the court should instruct the jury on this additional fourth element.

The final element was clearly altered by the OWBPA. Instead of using the word "subterfuge," Congress used the definition of subterfuge applied by the EEOC prior to *Betts*. Thus, the fifth element now requires that the plan be "justified by significant cost considerations." 29 C.F.R. § 1625.10 (incorporated by reference in 29 U.S.C. § 623(f)(2)(B)(i)). More specifically, an age-based differential in employee benefits is exempted under the ADEA only "to the extent necessary to achieve approximate equivalency in cost for older and younger workers." *Id*.

Cost of benefits cannot excuse a failure to hire. 29 U.S.C. § 623(f)(2)(B).

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11.11 Age Discrimination—Defenses—Reasonable Factor Other Than Age

The defendant [*name*] contends that its [test] [requirement] [practice] [selection criterion] is based on a reasonable factor other than the plaintiff [*name*]'s age. The defendant [*name*] has the burden of proving the following elements by a preponderance of the evidence:

First, the [test] [requirement] [practice] [selection criterion] is based on a factor other than the age of [the plaintiff [*name*]] [those similarly situated];

Second, [*insert justification for factor*] is a legitimate interest of the defendant [*name*]'s business; and

Third, the [test] [requirement] [practice] [selection criterion] is reasonably related to achieving [*insert justification for factor*].

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s] in accordance with Instruction[s] [*insert cross reference to the pertinent instruction[s] on the plaintiff's theory of liability*], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved this defense, in which event your verdict should be for the defendant [*name*].

Comment

Distinctions "based on reasonable factors other than age" (RFOA) are not unlawful under the ADEA. 29 U.S.C. § 623(f)(1). Thus, in a disparate impact case, the defendant is entitled to an instruction on this defense if the evidence can support a finding that the defendant's test, requirement, or practice is based on a factor other than age. *See generally Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) ("It is . . . in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"); *see also Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008) (noting that factor relied on by employer must be reasonable one, which may lean more heavily on older workers, as against younger ones).

In a disparate treatment case, instruction on RFOA as an affirmative defense will be unnecessary because the plaintiff already bears the burden of proving that the employer's decision was, in fact, based on age. *See Smith*, 544 U.S. at 238 ("In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under [the ADEA] in the first place."). Instructing the jury on RFOA in a disparate treatment case may cause confusion regarding the allocation of the burden of proof.

Unlike the "business necessity" defense applicable to disparate impact cases under Title VII, RFOA requires only that the factor have a reasonable relationship to a legitimate business purpose. The employer is not required to tailor the factor narrowly to minimize its disparate impact on older workers. *See Smith*, 544 U.S. at 243. Thus, the instruction requires the defendant to show: (1) a factor other than age; (2) a legitimate business purpose; and (3) a reasonable

relationship between the two. *See id.* at 242 (non-age consideration disparately impacting older workers is "reasonable factor other than age" when it "respond[s] to the [employer's] legitimate goal").

The Supreme Court clarified that federal employees are not required to meet the "but-for" causation standard to establish age discrimination. *Babb v. Wilkie*, 589 U.S. 399, 411-12 (2020) (analyzing 29 U.S. § 633a(a)). Rather, a federal employee is entitled to relief upon a showing of being "subjected to unequal consideration." *Id.* However, that showing will support only "injunctive or other forward-looking relief." *Id.* at 413. To "obtain reinstatement, backpay, compensatory damages, or other forms of relief related to the end result of an employment decision," a federal employee must satisfy the "but-for" causation standard. *Id.*

Revised June 2024

11.12 Age Discrimination—Damages

Comment

The following instructions address damages calculations in ADEA cases. For general discussion of damages in civil cases, see Chapter 5 (Damages).

11.13 Age Discrimination—Damages—Back Pay—Mitigation

If you find for the plaintiff [*name*] [on the plaintiff's ADEA claim], you must determine the plaintiff [*name*]'s damages. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any loss of [pay] [wages] [benefits] you find was caused by the discriminatory act of the defendant [*name*]. You may award the following:

Back Pay:

1. Award: Back pay includes any [back wages] [lost pay] [and employee benefits] the plaintiff would have received from the date the defendant [*name*] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff [*name*] to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement]]. The plaintiff [*name*] has the burden of proving both the existence and the amount of back pay by a preponderance of the evidence.

2. Mitigation of Back Pay Award: The plaintiff [*name*] has a duty to undertake reasonable measures to minimize [his] [her] [*other pronoun*] damages and the defendant [*name*] is not required to compensate the plaintiff [*name*] for avoidable damages. Thus, your award of back pay should be reduced by the amount of damages that the plaintiff [*name*] actually avoided, or could have avoided, if [he] [she] [*other pronoun*] had made reasonable efforts. The defendant [*name*] has the burden of proving by a preponderance of the evidence that a reduction should be made and the amount by which the award should reduced.

Therefore:

a. You must deduct any wages or other earnings that the defendant [*name*] proved that the plaintiff [*name*] received from other employment from the date the defendant [*name*] [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff [*name*] to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement].

[b. You must deduct any severance pay [and pension benefits] that the defendant [*name*] proved the plaintiff [*name*] received after the discharge.]

[b.] [c.] If the defendant [*name*] proves by a preponderance of the evidence either:

(i) that the plaintiff [*name*] unjustifiably failed to take a new job of like kind, status, and pay which was available to plaintiff [*name*], or

(ii) that the plaintiff [*name*] failed to make reasonable efforts to find such new job;

you must subtract from the back pay award the amount of money you find that the plaintiff could have earned from the time the plaintiff [*name*] could have obtained such new job [or should have obtained from such new job, had [he] [she] [*other pronoun*] made reasonable efforts to find such new job] to the [date of trial] [date the plaintiff [*name*] [declined] [accepted] reinstatement].]

Comment

On the issue of whether or not front pay is an issue for the court or for the jury, *see Traxler v. Multnomah County*, 596 F.3d 1007, 1012-14 (9th Cir. 2010), and *Cassino v. Reichold Chemicals*, 817 F.2d 1338, 1346-47 (9th Cir. 1987). If it is determined that the front pay issue should go to an advisory jury, consider using the following language:

Front Pay:

a. Award: An award for front pay compensates the plaintiff [*name*] for the loss of future [wages] [pay] [and employee benefits] that have been caused by the defendant [*name*]'s discriminatory act. You should award front pay to the plaintiff [*name*] to compensate for these losses. The plaintiff [*name*] bears the burden of proving these losses by a preponderance of the evidence.

b. Limit on Front Pay Award: Front pay is intended to be temporary in nature. The plaintiff [*name*] has a duty to make reasonable efforts to obtain a new job of like kind, status, and pay. Thus, you must limit any award of front pay to compensate only for the period of time you find will be necessary for the plaintiff [*name*] to obtain such a job if [he] [she] [*other pronoun*] makes a reasonable effort. The defendant [*name*] has the burden of proving by a preponderance of the evidence that a reduction should be made and the amount by which the award should be reduced.

c. Reduction to Present Cash Value: Any award of front pay must also be reduced to the present cash value of the award.

Present cash value means the sum of money needed now that, when invested at a reasonable rate of return, would be sufficient to pay the front pay at the time in the future when the money would have been earned by the plaintiff [*name*].

The rate of return to be applied in determining present cash value should be the interest that can reasonably be expected from safe investments that can be made by a person of ordinary prudence, who has ordinary financial experience and skill.

d. You should also consider decreases in the value of money that may be caused by future inflation.

Unlike a Title VII plaintiff, an ADEA plaintiff has a right to jury trial on the issue of back pay, as well as any mitigation issues. *See Lorillard v. Pons*, 434 U.S. 575, 582-83 (1978) (characterizing this remedy as "legal"); *Tamosaitis v. URS Inc.*, 781 F.3d 468, 485 (9th Cir. 2015) (discussing *Lorillard*); *Cassino*, 817 F.2d at 1346 (9th Cir. 1987) (discussing jury trial on mitigation).

The remedies provisions of the ADEA incorporate the remedies from the Fair Labor Standards Act (FLSA). *See Lorillard*, 434 U.S. at 578; *see also* 29 U.S.C. § 626(b) (ADEA remedies provision). Thus, like the FLSA, the ADEA provides for the recovery of "unpaid minimum wages or unpaid overtime compensation," which includes back pay, liquidated damages and equitable relief. *See* 29 U.S.C. § 216 (FLSA remedies provision).

The Ninth Circuit has concluded that "back pay" under various federal statutes, generally includes tips, holiday pay, and overtime pay. *See Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir. 2001).

An award of back pay is subject to the plaintiff's duty to mitigate. "An ADEA plaintiff must attempt to mitigate damages by exercising reasonable care and diligence in seeking re-employment after termination. The defendant bears the burden of showing that there were suitable positions available and that the plaintiff failed to use reasonable care in seeking them." *Cassino*, 817 F.2d at 1345 (citation omitted). The Ninth Circuit has not definitively taken a position on whether a jury should be instructed that, "after a period of looking for work unsuccessfully, [the plaintiff is] obligated to 'lower his sights'" to procure mitigating employment. *See EEOC v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997) (declining to reach issue because instruction was not requested at trial) (citing *Ford Motor Co. v. EEOC*, 458 U.S. 219, 232 n.16 (1982) (noting, without adopting principle, that some lower courts have indicated that "after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position")).

The ADEA does not provide for nonwage compensatory or punitive damages. *Ahlmeyer v. Nevada Sys. of Higher Educ.,* 555 F.3d 1051, 1059 (9th Cir. 2009); *Naton v. Bank of California*, 649 F.2d 691, 698-99 (9th Cir. 1981). Thus, a plaintiff cannot recover for emotional distress or pain and suffering under the ADEA. *Id.*; *see also Comm'r v. Schleier*, 515 U.S. 323, 326 (1995) ("[T]he Courts of Appeals have unanimously held . . . that the ADEA does not permit a separate recovery of compensatory damages for pain and suffering or emotional distress."). Nor were these remedies extended to the ADEA (as they were to Title VII actions) by the Civil Rights Act of 1991. *See Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (holding that while the Civil Rights Act of 1991 "expanded the coverage of Title VII, [it] did not amend the ADEA or speak to the subject of age discrimination").

See also Instruction 11.14 (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

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11.14 Age Discrimination—Damages—Willful Discrimination—Liquidated Damages

If you find that the plaintiff [*name*] is entitled to recover back pay, you must also determine if the defendant [*name*]'s conduct was willful. The plaintiff [*name*] has the burden of proving willfulness by a preponderance of the evidence.

A defendant's conduct is willful if the defendant knew or showed reckless disregard for whether, the [*describe the alleged discriminatory act*] was prohibited by law.

Comment

The ADEA incorporates the liquidated damages provision of the Fair Labor Standards Act (FLSA). 29 U.S.C. § 626(b) (ADEA remedies provision); *see* 29 U.S.C. § 216 (FLSA remedies provision). However, unlike the FLSA, the ADEA awards liquidated damages only if the defendant's violation is willful. 29 U.S.C. § 626(b) (ADEA remedies provision); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *compare Bratt v. County of Los Angeles*, 912 F.2d 1066, 1071 (9th Cir. 1990) (holding that under the FLSA, employer can only avoid liquidated damages by proving that it acted with "a good faith intent to comply with the FLSA and a reasonable basis for its interpretation of the FLSA and the applicable regulations.").

Willfulness is a question for the jury to decide. *See EEOC. v. Pape Lift, Inc.*, 115 F.3d 676, 681 (9th Cir. 1997). If the jury finds willfulness, the plaintiff is entitled to double the amount of back pay awarded. *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1348 (9th Cir. 1987) ("By the express terms of the statute, liquidated damages are an additional amount equal to the backpay and benefits award."). The verdict form should provide a separate question as to willfulness.

An employer acts willfully when it "'knew or showed reckless disregard' for whether the ADEA prohibited its conduct." *Cassino*, 817 F.2d at 1348; *see also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615 (1993) (reaffirming that "[t]he standard of willfulness that was adopted in *Thurston*—that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute"—applies to all disparate treatment cases under the ADEA); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 (1985); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1495 (9th Cir. 1986).

12. AMERICANS WITH DISABILITIES ACT

Instruction

Introductory Comment
12.1 ADA Employment Actions—Actual Disability—Elements
12.2 ADA Employment Actions—Record of Disability—Elements
12.3 ADA Employment Actions—Regarded as Disability—Elements
12.4 ADA—Physical or Mental Impairment
12.5 ADA—Work as a Major Life Activity
12.6 ADA—Interacting with Others as Major Life Activity
12.7 ADA—Qualified Individual
12.8 ADA—Ability to Perform Essential Functions—Factors
12.9 ADA—Reasonable Accommodation
12.10 ADA—Defenses—Undue Hardship
12.11 ADA—Defenses—Business Necessity
12.12 ADA—Defenses—Direct Threat
12.13 ADA—Defenses—Good Faith in Interactive Process
12.14 ADA—Damages (Comment only)

Introductory Comment

This chapter provides jury instructions for actions brought under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.* The ADA was first enacted in 1990 and became effective July 26, 1992. The ADA Amendments Act of 2008 (ADAA) became effective January 1, 2009. The ADAA reflected Congress' view that the Supreme Court had interpreted the ADA in an unduly narrow fashion in *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002), and *Sutton v. United Air Lines*, 527 U.S. 471 (1999). *See Weaving v. City of Hillsboro*, 763 F.3d 1106 (9th Cir. 2014). The jury instructions in this chapter are consistent with the ADAA, which is not retroactive. *Becerril v. Pima Cnty. Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009).

The legislative purposes of, and findings for, the ADA are set forth in § 12101 and are very broad. Essentially, the ADA provides a national mandate for the elimination of discrimination against individuals with disabilities in critical areas such as employment, housing, public accommodations, education, and access to public services. § 12101(a)(3), (b).

As the Supreme Court has observed, "[t]o effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life, among them employment (Title I of the Act) [42 U.S.C. §§ 12111–12117], public services (Title II) [§§ 12131–12165], and public accommodations (Title III) [§§ 12181–12189]." *PGA Tour, Inc. v. Martin*, 432 U.S. 661, 675 (2001). Title I protects only employees of employers with 15 or more employees. 42 U.S.C. § 12111(5)(A); *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 444-51 (2003) (defining "employee"); *Castle v. Eurofresh*, 731 F.3d 901 (9th Cir. 2013) (analyzing whether prisoner can be deemed "employee").

Under the ADA, a "disability" is defined as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2).

Because a substantial majority of the reported Supreme Court and Ninth Circuit decisions arise under the employment provisions of the ADA, these instructions focus on employment claims under the ADA. In the employment context, a qualified individual with a disability may show an ADA discrimination primarily in either of two ways: by presenting evidence of disparate treatment or by showing a failure to accommodate. *Dunlap v. Liberty Natural Prods., Inc*., 878 F.3d 794, 798 (9th Cir. 2017) ("We have recognized that a failure-to-accommodate claim is 'analytically distinct from a claim of disparate treatment or impact under the ADA.'") (quoting *Johnson v. Bd. of Trustees of Boundary Cty. Sch. Dist*., 666 F.3d 561, 567 (9th Cir. 2011)).

"Both disparate-treatment and disparate-impact claims are cognizable under the ADA." *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Lopez v. Pacific Maritime Ass'n*, 657 F.3d 762, 767 (9th Cir. 2011) (leaving open the question of how § 12112(b)(6) applies to a disparate impact claim). For a case involving a pre-employment claim under the ADA, *see E.E.O.C. v. BNSF Rwy. Co.*, 902 F.3d 916 (9th Cir. 2018).

In *Mattioda v. Nelson*, 98 F. 4th 1164, 1174 (9th Cir. 2024), the Ninth Circuit held that disability-based claims for hostile work environment are actionable under the ADA, joining all other circuits that have addressed the issue.

In *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court expanded the business necessity defense based on EEOC regulations. *Chevron* involved the propriety of a worker with a liver condition being laid off by his employer due to the unavoidable exposure to toxins at a refinery creating health risks for the worker. There exists under the ADA, 42 U.S.C. §§ 12112(b)(6), 12113(a), an affirmative defense for an employment action under a qualification standard "shown to be job-related and consistent with business necessity," which "may include a requirement that an individual should not pose a direct threat to the health or safety of other individuals in the workplace." The unanimous opinion in *Chevron* held that it was reasonable for the EEOC, through the enactment of a regulation (29 C.F.R. § 1630.15(b)(2) (2001)) to carry "the defense one step further, in allowing an employer to screen out a potential worker with a disability not only for risks that he would pose to others in the workplace but for risks on the job to his own health or safety as well . . . ." *Id*. at 78-79, 86-87; *Hutton v. Elf Atochem North America, Inc.,* 273 F.3d 884, 892-94 (9th Cir. 2001) (applying "direct threat" affirmative defense factors in EEOC regulations to the analysis of qualification standards).

In *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 368 (2001), the Supreme Court held that the Eleventh Amendment barred claims for money damages against a State under Title I of the ADA, which addresses disability discrimination in employment. And in *United States v. Georgia*, 546 U.S. 151 (2006), the Court articulated a three-part inquiry for courts to apply to determine whether sovereign immunity has been abrogated as to claims against States under Title II of the ADA, which addresses disability discrimination as to services, programs, or activities of a public entity.

The First Amendment's religion clauses give rise to an affirmative defense that "bar[s] the government from interfering with the decision of a religious group to fire one of its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 181, 195 n.4 (2012) (applying this defense to an ADA retaliation claim); *see also Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 591 U.S. 732, 738, 756 (2020) (foreclosing discrimination claims by employees of religious organizations under the Age Discrimination in Employment Act and ADA).

A plaintiff's remedies in employment actions under the ADA are generally the same remedies available under Title VII governing employment discrimination. 42 U.S.C. § 12117(a). See Introductory Comment to Chapter 10 ("Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation") for a summary of available remedies under Title VII. Compensatory and punitive damages are not available, however, in a retaliation claim under the ADA. *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) ("Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available.").

The Committee recommends that Chapter 10 be consulted to instruct a jury on hostile work environment, definition of common terms, constructive discharge, or defenses such as bona fide occupational qualification, bona fide seniority system, or after-acquired evidence.

The Committee notes, as stated above, that these instructions focus on employment claims under Title I of the ADA, and not Title III, which addresses public accommodations. In *Lopez v. Catalina Channel Express, Inc.*, 974 F.3d 1030 (9th Cir. 2020), the Ninth Circuit explained that discrimination under Title III of the ADA specifically includes a failure to remove architectural barriers in existing facilities of public accommodation when such removal is readily achievable. Announcing a new rule of burden-shifting in the Ninth Circuit, the Court stated, "only if the plaintiff first makes a plausible showing that the barrier removal is readily achievable, does the defendant then have to negate that showing and prove that the removal is not readily achievable." *Id.* at 1036. Even if a defendant can demonstrate that the removal of a barrier is not readily achievable, the defendant may still be liable under the ADA if it fails to make its goods, services, facilities, privileges, advantages, or accommodations available through alternative methods so long as such methods are readily achievable.

A retaliation instruction has been withdrawn based on the Ninth Circuit's decision in *Alvarado v. Cajun Operating Co.*, 588 F.3d 1261, 1270 (9th Cir. 2009) ("Because we conclude that ADA retaliation claims are redressable only by equitable relief, no jury trial is available."). A district court, however, may award nominal damages as equitable relief in an ADA retaliation claim. *Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 874 (9th Cir. 2017).

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12.1 ADA Employment Actions—Actual Disability—Elements

The plaintiff [*name*] claims that [his] [her] [*other pronoun*] disability was the reason for the defendant [*name*]'s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] [him] [her] [*other pronoun*]. To succeed on this claim, the plaintiff [*name*] has the burden of proving each of the following four elements by a preponderance of the evidence:

First, the plaintiff [*name*] has a physical or mental impairment;

Second, such physical or mental impairment substantially limited one or more major life activities;

Third, the plaintiff [*name*] was a qualified individual as that term is later defined in these instructions; and

Fourth, the plaintiff [*name*] was [[discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] because of [his] [her] [*other pronoun*] physical or mental impairment.

If you find that the plaintiff [*name*] has proved each of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Major life activities are the normal activities of living that a nondisabled person can do with little or no difficulty, such as [*specify applicable major life activities*].

Comment

Major life activities are defined in § 12102(2)(A)-(B) and include caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function such as the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. The Ninth Circuit has recognized interacting with others as a major life activity. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014). Whether obesity without an underlying physiological cause is an impairment under the ADA is unclear. *See Valtierra v. Medtronic, Inc*., 934 F.3d 1089 (9th Cir. 2019).

"[A]lthough the 'duration of an impairment' remains 'one factor that is relevant in determining whether the impairment substantially limits a major life activity,'" *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1225 (9th Cir. 2022) (citation omitted), a plaintiff need not establish permanent or long-term effects, *id.* at 1224.

The term "substantially limits" must be interpreted consistently with the ADAA. *Id.* § 12102(4)(B). "'An impairment is a disability . . . if it substantially limits the ability of an

individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.'" *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1111 (9th Cir. 2014) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

The ADA places on the plaintiff the burden of showing that the plaintiff is qualified. The plaintiff must show the ability to perform the essential functions of the job either with or without a reasonable accommodation. 42 U.S.C. § 12112(b)(5)(A), 12111(8); *Smith v. Clark Cnty. Sch. Dist.*, 727 F.3d 950, 955 (9th Cir. 2013); *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997) (stating elements).

An employee who commits an act of misconduct may be fired, regardless of whether he or she is disabled within the meaning of the ADA. *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir. 1996) (holding that while alcoholism is a "disability" under the ADA, an employee's arrest for criminal assault while intoxicated was a nondiscriminatory reason for termination).

In *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Supreme Court addressed an employer's policy not to re-hire employees who left the company for violating personal conduct rules such as illegal drug use. *Id.* at 46. Under a disparate treatment theory, a neutral "no-rehire" policy was a legitimate, nondiscriminatory reason under the ADA. *Id.* at 53-55. Because the plaintiff had failed to raise a disparate impact claim on a timely basis, *id.* at 49, the Court held that the question of whether the neutral no-rehire policy fell more harshly on drug addicts who were successfully rehabilitated could not be considered. *Id.* at 52, 55.

Title I provides that "[n]o covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual." 42 U.S.C. § 12112(a) (emphasis added). An ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show that the adverse employment action would not have occurred but for the disability. *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019).

The Supreme Court has held that in a retaliation claim under Title VII, a plaintiff "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 362 (2013). The Court explained that the "because" language in the anti-retaliation provision (42 U.S.C. § 2000e3(a)) lacked any meaningful textual difference from the statutory provision at issue in *Gross*. 570 U.S. at 351-53; *see also Burrage v. United States*, 571 U.S. 204, 210-13 (2014) (defining "results from" in Controlled Substances Act to mean "but for" causation). The Ninth Circuit has applied "but for" causation in retaliation claims under the ADA. *T.B. v. San Diego Unified Sch. Dist.*, 795 F.3d 1067, 1088 (9th Cir. 2015). For further discussion of "but-for" causation, *see* Ninth Cir. Civ. Jury Instr. 10.3 (Civil Rights—Title VII—Disparate Treatment—"Because of" Defined).

The regulations contain examples of impairments whose inherent nature "virtually always [will] be found to impose a substantial limitation on a major life activity" and, therefore, involve "simple and straightforward" individualized assessment. 29 C.F.R. § 1630.2(j)(3)(ii). The

examples include: intellectual disability, which substantially limits brain function; cancer, which substantially limits normal cell growth; diabetes, which substantially limits endocrine function; and HIV, which substantially limits immune function. *Id.* § 1630.2(j)(3)(iii).

"An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." 42 U.S.C. § 12102(4)(D).

In general, "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures" such as medication, medical equipment, prosthetics, hearing aids, low-vision devices, oxygen therapy equipment or assistive technology. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered. 42 U.S.C. § 12102(4)(E)(i)-(ii); 29 C.F.R. § 1630.2(j)(1)(vi). The distinction between low-vision devices and ordinary eyeglasses or contact lenses is that glasses or lenses correct visual acuity or eliminate refractive error, whereas low-vision devices magnify or enhance a visual image. 42 U.S.C. § 12102(4)(E)(iii).

In an appropriate case, the trial court must instruct the jury that conduct resulting from a disability is part of the disability and is not a separate basis for termination. *See Gambini v. Total Renal Care, Inc.*, 486 F.3d 1087, 1093 (9th Cir. 2007) (in case brought under the FMLA and Washington law by a plaintiff terminated after engaging in profanity-laced outburst allegedly caused by bipolar disorder, the Ninth Circuit held that it was error to refuse an instruction stating that conduct resulting from disability is part of the disability and not a separate basis for termination, citing ADA case of *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128, 1139-40 (9th Cir. 2001)). However, *Gambini* did not preclude the employer from arguing that the plaintiff was not a qualified individual or raising a business necessity or direct threat defense. *Id.* at 1095-96. In *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015), the Ninth Circuit held that an employee who makes serious and credible threats to kill coworkers is not a qualified individual regardless of whether the threats stemmed from mental illness. *See* Instruction 12.10 (ADA—Defenses—Business Necessity) and Instruction 12.11 (ADA—Defenses—Direct Threat).

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12.2 ADA Employment Actions—Record of Disability—Elements

The plaintiff [*name*] claims that [his] [her] [*other pronoun*] record of disability was the reason for the defendant [*name*]'s decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] [him] [her] [*other pronoun*]. To succeed on this claim, the plaintiff [*name*] has the burden of proving each of the following four elements by a preponderance of the evidence:

First, the plaintiff [*name*] has a record of a physical or mental impairment;

Second, such physical or mental impairment substantially limited one or more major life activities;

Third, the plaintiff [*name*] was a qualified individual as that term is later defined in these instructions; and

Fourth, the plaintiff [*name*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] because of [his] [her] [*other pronoun*] record of a physical or mental impairment].

If you find that the plaintiff [*name*] has proved each of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

See Comment to Instruction 12.1 (ADA Employment Action—Actual Disability—Elements).

"[A]lthough the 'duration of an impairment' remains 'one factor that is relevant in determining whether the impairment substantially limits a major life activity,'" *Shields v. Credit One Bank, N.A.*, 32 F.4th 1218, 1225 (9th Cir. 2022) (citation omitted), a plaintiff need not establish permanent or long-term effects, *id.* at 1224.

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12.3 ADA Employment Actions—Regarded as Disability—Elements

The plaintiff [*name*] claims that because the defendant [*name*] regarded [him] [her] [*other pronoun*] as disabled, the defendant [*name*] [discharged] [did not hire] [did not promote] [demoted] [*state other adverse action*] [him] [her] [*other pronoun*]. To succeed on this claim, the plaintiff [*name*] has the burden of proving each of the following three elements by a preponderance of the evidence:

First, the plaintiff [*name*] was regarded as having a physical or mental impairment;

Second, the plaintiff [*name*] was a qualified individual as that term is later defined in these instructions; and

Third, the plaintiff [*name*] was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] because [he] [she] [*other pronoun*] was regarded as having a physical or mental impairment.

If you find that the plaintiff [*name*] has proved each of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

See Comment to Instruction 12.1 (ADA Employment Action—Actual Disability—Elements).

This instruction is intended to address the ADA Amendments Act of 2008, which clarified two points about "regarded as" disability claims:

1. A plaintiff meets the requirements of being "regarded as" having a disability if he establishes that he has been discriminated against "because of an actual or perceived impairment *whether or not the impairment limits or is perceived to limit a major life activity*." (emphasis added). 42 U.S.C. § 12102(3)(A).

2. A plaintiff cannot be "regarded" as having a disability if the actual or perceived impairment is "transitory and minor." 42 U.S.C. § 12102(3)(B). A "transitory" impairment is defined as one "with an actual or expected duration of 6 months or less." *Id.*; *Shields v. Credit One Bank*, *N.A.*, 32 F.4th 1218, 1224 (9th Cir. 2022).

The "transitory and minor" exception is an affirmative defense, and the employer bears the burden of establishing that defense. *Nunies v. HIE Holdings, Inc*., 908 F.3d 428, 435 (9th Cir. 2018).

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12.4 ADA—Physical or Mental Impairment

The first element of the ADA claim that the plaintiff must prove is that the plaintiff has a recognized disability under the ADA. A "disability" under the ADA is [a physical or mental impairment] [a record of physical or mental impairment] [being regarded as having a physical or mental impairment] that substantially limits one or more of the major life activities of such individual.

The terms "disability" and "physical or mental impairment" include [[(1) any physiological disorder, or condition,] [cosmetic disfigurement, or anatomical loss] affecting one or more of the following body systems: [neurological,] [musculoskeletal,] [special sense organs,] [respiratory (including speech organs),] [cardiovascular,] [reproductive,] [digestive,] [genito-urinary,] [hemic and lymphatic,] [skin and endocrine][;] [or] [(2) any mental or psychological disorder such as] [intellectual disability,] [organic brain syndrome,] [emotional or mental illnesses,] [and] [learning disabilities]].

Comment

Some form of this instruction should be given when a claim involves a theory of actual or record disability. Whether this instruction or a modified version should be given when a claim involves only a theory that the plaintiff was "regarded as" having a disability may require further analysis. *See Nunies v. HIE Holdings, Inc*., 908 F.3d 428, 434 (9th Cir. 2018).

See 42 U.S.C. § 12102(1). The definition of disability in the first paragraph is taken from § 12102(1)(A)-(C). The definition of physical or mental impairment in the second paragraph is taken from 29 C.F.R. § 1630.2(h)(1)-(2).

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12.5 ADA—Work as a Major Life Activity

When the major life activity under consideration is that of working, the plaintiff must prove, by a preponderance of the evidence, that the plaintiff was substantially limited in [his] [her] [*other pronoun*] ability to work compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting. Factors that you may consider include the condition, manner, or duration under which the plaintiff performs the work as compared to most people in the general population.

Comment

See Weaving v. City of Hillsboro, 763 F.3d 1106, 1112 (9th Cir. 2014) (discussing the ADAA's relaxed standard for determining whether a plaintiff is substantially limited in engaging in major life activity). The ADA lists working as a major life activity. 42 U.S.C. § 12102(2)(A). The definition of "substantially limited" is taken from 29 C.F.R. § 1630.2(j)(1)(ii). The factors are taken from 29 C.F.R. § 1630.2(j)(4).

"Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity." *Id.* § 1630.2(j)(4)(ii). The focus is not necessarily on what a disabled individual can achieve. For example, "someone with a learning disability may achieve a high level of academic success but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." *Id.* § 1630.2(j)(4)(iii).

This instruction may be modified according to the major life activity alleged by the plaintiff.

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12.6 ADA—Interacting with Others as Major Life Activity

When the major life activity under consideration is the ability to interact with others, the plaintiff must prove, by a preponderance of the evidence, that [he] [she] [*other pronoun*] was substantially limited compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity to be considered substantially limiting.

Difficulty getting along with others is not enough. A plaintiff must show that [his] [her] [*other pronoun*] interactions with others were characterized on a regular basis by severe problems, such as consistently high levels of hostility, social withdrawal, or failure to communicate when necessary.

Comment

The Ninth Circuit has recognized interacting with others as a major life activity. *Weaving v. City of Hillsboro*, 763 F.3d 1106, 1112 (9th Cir. 2014).

The wording of this instruction was taken from *McAlindin v. County of San Diego*, 192 F.3d 1226, 1235 (9th Cir. 1999) ("Recognizing interacting with others as a major life activity of course does not mean that any cantankerous person will be deemed substantially limited in a major life activity."). *See also Weaving*, 763 F.3d at 1114 (noting that interacting with others is not the same as getting along with others: "One who is able to communicate with others, though his communications may at time be offensive, 'inappropriate, ineffective, or unsuccessful,' is not substantially limited in his ability to interact with others within the meaning of the ADA.") (citation omitted). The definition of "substantially limited" is taken from 29 C.F.R. § 1630.2(j)(1)(ii).

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12.7 ADA—Qualified Individual

The second element of the ADA claim that the plaintiff must prove is that the plaintiff is a qualified individual under the ADA.

The term "qualified individual" means an individual with a disability who, either with or without a reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. The individual must satisfy the requisite skill, experience, education, and other job-related requirements of the employment position.

Comment

See 42 U.S.C. § 12111 (employment-related definitions); 29 C.F.R. § 1630.2(m) (qualified individual). For a definition of "disability," *see* Instruction 12.2 (ADA—Physical or Mental Impairment).

An individual who fails to satisfy job prerequisites, such as having a license, cannot be considered qualified within the meaning of the ADA unless he or she can show that the prerequisite is itself discriminatory. *Johnson v. Bd. of Trustees*, 666 F.3d 561, 567 (9th Cir. 2011) (noting that a law firm that requires lawyers to have graduated from an accredited law school and passed a bar examination need not provide accommodation to disabled individual who does not meet this selection criteria).

"[O]ne must be able to perform the essential functions of employment at the time that one is discriminated against in order to bring suit." *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1112 (9th Cir. 2000); *see Johnson*, 666 F.3d at 564. A disabled employee or applicant who engaged in the use of illegal drugs at the time of the discriminatory incident will not be considered a "qualified individual with a disability" when the covered entity acts on the basis of such use. 42 U.S.C. § 12114(a); *Lopez v. Pacific Maritime Ass'n*, 657 F.3d 762, 764-68 (9th Cir. 2011) (rejecting discrimination claim challenging one-strike rule that permanently eliminated candidates who tested positive for drug use; leaving open question of how disparate impact claim might be affected by 42 U.S.C. § 12112(b)(6), governing selection criteria that tends to screen out individuals with a disability). *See also Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944 (9th Cir. 2015) (holding that under Oregon disability law, which is interpreted consistently with the ADA, an employee who makes serious and credible threats to kill coworkers is not a qualified individual, regardless of whether the threats stem from mental illness; ADA regulations do not require employer to analyze separately whether an employee poses a direct threat to health or safety of others in workplace under 42 U.S.C. § 12113).

The phrase "holds or desires" has been interpreted by the Ninth Circuit to apply in situations when employees request reassignment "even if they cannot perform the essential functions of the current position." *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000), *vacated on other grounds*, 535 U.S. 391 (2002).

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12.8 ADA—Ability to Perform Essential Functions—Factors

"An essential function of an employment position" means the fundamental job duties of the employment position that the plaintiff holds or desires. It does not include the marginal functions that may occur through the course of a job.

You must consider the employer's judgment as to what functions of a job are essential. If any employer has prepared a written description before advertising or interviewing applicants for the job, this description is evidence of the essential functions of the job.

Other factors that may bear upon whether a job function is essential include, but are not limited to:

(1) [whether the reason the position exists is to perform that function][;]

(2) [whether there are a limited number of employees available among whom the performance of that job function can be distributed][;]

(3) [whether the job function is highly specialized, and the person in that particular position is hired for [his] [her] [*other pronoun*] expertise or ability to perform the particular function][;]

(4) [the amount of time spent performing the job function][;]

(5) [the consequences of not requiring the individual holding the position to perform the function][;]

(6) [the terms of any collective bargaining agreement][;]

(7) [the work experience of past employees who have held the position][;] [and]

(8) [the work experience of current employees who hold similar positions].

Comment

The second paragraph is based on 42 U.S.C. § 12111(8). The term "marginal functions" in the first paragraph and the factors in the third paragraph are in 29 C.F.R. § 1630.2(n) (1999). *See Dark v. Curry County*, 451 F.3d 1078, 1084-85 (9th Cir. 2006) (discussing essential functions and marginal functions); *see*, *e.g.*, *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238 (9th Cir. 2012) (holding that attendance is essential job function of neo-natal intensive care nurse).

The phrase "holds or desires" has been interpreted by the Ninth Circuit to refer to situations when employees request reassignment "even if they cannot perform the essential functions of the current position." *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1111 (9th Cir. 2000),

vacated on other grounds, 535 U.S. 391 (2002). A disabled individual who can no longer perform the essential functions of her position may be entitled to relief if reassignment is found to be a "reasonable accommodation."

In *Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1232-33 (9th Cir. 2003), the court held that an employer had no duty to accommodate a deputy marshal when it was undisputed that he could not perform the essential function of restraining prisoners through hand-to-hand combat, even though the cause of hand pain had been misdiagnosed.

In *Cripe v. City of San Jose*, 261 F.3d 877, 887 (9th Cir. 2001), the court observed that "an employer may not turn every condition of employment which it elects to adopt into a job function, let alone an essential job function, merely by including it in a job description." (quoting *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063, 1071 (9th Cir. 2000)). In *Cripe*, the Ninth Circuit held that the issue of whether the ability of all specialized police officers to make a forcible arrest constituted an essential function of the job presented a factual question under the circumstances of that case. *Id.* at 888-89.

In *Bates v. UPS, Inc*., 511 F.3d 974, 990 (9th Cir. 2007) (en banc), the court emphasized that "essential functions" are not to be confused with "qualification standards" established by an employer for a certain position. "Whereas 'essential functions' are 'basic duties,' 29 C.F.R. § 1630.2(n)(1), 'qualification standards' are 'personal and professional attributes' that may include 'physical, medical [and] safety' requirements. *Id.* § 1630.2(q)."

Revised March 2024

12.9 ADA—Reasonable Accommodation

To establish the plaintiff [*name*]'s claim that the defendant [*name*] discriminated against the plaintiff [*name*] in violation of the ADA by failing to provide a reasonable accommodation, the plaintiff [*name*] must prove, by a preponderance of the evidence, each of the following three elements:

First, the plaintiff [*name*] is a "qualified individual";

Second, the defendant [*name*] received adequate notice of the plaintiff [*name*]'s disability and desire for a reasonable accommodation; and

Third, a reasonable accommodation is available that would have enabled the plaintiff [*name*] to [apply or qualify for] [perform the essential functions of] the job.

Under the ADA, [an] accommodation[s] by the defendant may include, but [is] [are] not limited to:

(1) [modifying or adjusting a job application process to enable a qualified applicant with a disability to be considered for the position][;]

(2) [making existing facilities used by employees readily accessible to and usable by individuals with disabilities][;]

(3) [job restructuring][;]

(4) [part-time or modified work schedule][;]

(5) [reassignment to a vacant position][;]

(6) [acquisition or modifications of examinations, training materials or policies][;]

(7) [provision of qualified readers and interpreters][;] [or]

(8) [other similar accommodations for individuals with plaintiff's disabilities].

It is for you to determine whether the accommodation[s] requested by the plaintiff [*name*] [is] [are] reasonable.

A reasonable accommodation does not include changing or eliminating any essential function of employment, shifting any of the essential functions of the employment to others, or creating a new position for the disabled employee.

[If the plaintiff rejects a reasonable accommodation that could enable the plaintiff to perform the essential functions of the position, the plaintiff cannot be considered qualified for the position.]

[An accommodation is generally not reasonable when it consists of a request to be reassigned to another job position that would be in violation of an employer's seniority system. This general rule, however, does not apply if the plaintiff has proved, by a preponderance of the evidence, special circumstances such as [the seniority system provides for exceptions] [the employer has exercised changes to the seniority system] [*state other special circumstance*].]

Comment

See Snapp v. United Transp. Union, 889 F.3d 1088, 1095 (9th Cir. 2018) ("The ADA treats the failure to provide a reasonable accommodation as an act of discrimination if the employee is a 'qualified individual,' the employer receives adequate notice, and a reasonable accommodation is available that would not place an undue hardship on the operation of the employer's business."); *see also Dunlap v. Liberty Nat. Prods., Inc*., 878 F.3d 794, 798 (9th Cir. 2017) ("Liberty was aware of or had reason to be aware of Dunlap's desire for a reasonable accommodation. Such awareness triggered Liberty's duty to engage in the interactive process.") (internal citation omitted).

The bracketed words about special circumstances at the end of the instruction have been added based on *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405-06 (2002).

The factors listed in this instruction are derived from 42 U.S.C. § 12111(9) and 29 C.F.R. §§ 1630.2(o)(1)(i), (3), 1630.9(d); *see also Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1112-14 (9th Cir. 2000) (en banc) (holding that the interactive process is a mandatory, not permissive, duty of the employer, and the employer has a duty to initiate the interactive process in some circumstances), *vacated on other grounds*, 535 U.S. 391 (2002).

In *Barnett*, the Supreme Court addressed a requested accommodation (reassignment from the position of cargo handler to that of mailroom worker) that conflicted with a seniority system. 535 U.S. at 393-95. The Supreme Court recognized that while a proposed accommodation that would otherwise be reasonable typically becomes unreasonable when it conflicts with a seniority system, an employee should have an opportunity to establish any special circumstances that may constitute an exception to the general rule. *Id.* at 394, 405; *see also Willis v. Pac. Mar. Ass'n*, 244 F.3d 675, 679 (9th Cir. 2001) (holding that an employee's proposed accommodation was per se unreasonable because it directly conflicted with bona fide seniority system established under collective bargaining agreement).

In *PGA Tour v. Martin*, 532 U.S. 661 (2001), the Supreme Court held that the petitioner's use of a golf cart that is normally prohibited during professional tour events is a reasonable accommodation for a professional golfer disabled by a degenerative circulatory disorder impairing the ability to walk a golf course in a golf tournament. The Supreme Court found that such an accommodation would not "fundamentally alter" a tournament. *Id*. at 690.

Unpaid medical leave may be a reasonable accommodation. "Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." *Dark v. Curry County*, 451 F.3d 1078, 1090 (9th Cir. 2006). However, "recovery time of unspecified duration may not be a reasonable accommodation (primarily where the employee will not be able to return to his former position and cannot state when and under what conditions he could return to work at all)." *Id*. In those jobs for which performance requires attendance at the job, "irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237- 40 (9th Cir. 2012) (holding unreasonable an accommodation request that would allow a neo-natal intensive care unit nurse to miss work whenever that nurse felt missing work was needed and for so long as that nurse felt was needed).

In *Josephs v. Pacific Bell*, 443 F.3d 1050, 1060 (9th Cir. 2006), the court joined other circuits in expressly recognizing a discriminatory failure to reinstate as a separately actionable claim under the ADA.

The ADA does not impose a duty to create a new position to accommodate a disabled employee. *Wellington v. Lyon Cnty. Sch. Dist.*, 187 F.3d 1150, 1155-56 (9th Cir. 1999).

"Title II of the ADA applies to arrests." *Hyer v. City & County of Honolulu*, 118 F.4th 1044, 1065 (9th Cir. 2024) (internal brackets omitted) (quoting *Sheehan v. City & County of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part on other grounds*, 575 U.S. 600 (2015)). A reasonable accommodation in the context of an arrest of a person with a mental illness could include the use of a throw phone or a crisis negotiation team. *Id.* at 1066. In the context of an arrest of a deaf person, "there is no per se obligation to provide 'an on-site interpreter every time' one is requested; '[r]ather, the test is whether an individual has received an auxiliary aid sufficient to prevent any "real hindrance" in her ability to exchange information.'" *Mayfield v. City of Mesa*, 131 F.4th 1100, 1110 (9th Cir. 2025) (quoting *Bax v. Doctors Med. Ctr. Of Modesto, Inc.*, 52 F.4th 858, 867 (9th Cir. 2022)). "Assessing whether an entity provided appropriate auxiliary aids where necessary to afford effective communication is a fact-intensive exercise. The trier of fact must weigh several factors, including the method of communication used by the individual; the nature, length, and complexity of the communication involved;" and "in the specific context of *arrests*, . . . whether any 'exigent circumstances' surrounding the plaintiff's encounter with law enforcement would render a proposed reasonable accommodation impracticable." *Id.* (citations omitted).

Revised June 2025

12.10 ADA—Defenses—Undue Hardship

The defendant [*name*] has asserted the affirmative defense of "undue hardship." A defendant is not required to provide an accommodation that will impose an undue hardship on the operation of the defendant [*name*]'s business. If the defendant [*name*] proves by a preponderance of the evidence that providing an accommodation will impose an undue hardship on the operation of the defendant [*name*]'s business, the defendant [*name*] is not liable under the ADA for failure to provide that accommodation.

The term "undue hardship" means an action requiring significant difficulty or expense. It considers the financial realities of the particular defendant and refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

The factors you should consider in deciding whether an accommodation would cause undue hardship include:

(1) [the nature and net cost of the accommodation, accounting for tax credits or deductions and other outside funding][;]

(2) [the overall financial resources of the defendant's facility involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility][;]

(3) [the overall financial resources of the defendant's facility, the overall size of the business of a defendant's facility with respect to the number of its employees, the number, type, and location of its facilities][;]

(4) [the number of persons employed by defendant and the effect of accommodation][;]

(5) [the type of operations the defendant is involved in and the composition, structure, and functions of the work force][;]

(6) [the geographic separateness and administrative or fiscal relationship of the facility in question to the defendant][;] [and]

(7) [the overall impact of the proposed accommodation on the operation of the defendant's facilities, including the impact on other employees and the ability to conduct business].

Comment

A defendant has the burden of proving the defense of undue hardship. *See* 42 U.S.C. § 12112(b)(5)(A) (noting that disability discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, *unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity*") (emphasis added); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002) ("Once the plaintiff has made this showing [that an accommodation seems reasonable on its face], the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.").

The factors in this instruction are derived from 42 U.S.C. § 12111(10) and 29 C.F.R. § 1630.2(p), App. 1630.2(p).

Revised March 2024

12.11 ADA—Defenses—Business Necessity

Business necessity is a defense to a claim of discrimination under the ADA.

If you find that the defendant [*name*]'s application of a standard, criterion, or policy has [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff [*name*]'s disability] [a disparate impact on individuals with plaintiff's disability], the defendant [*name*] must prove, by a preponderance of the evidence, each of the following four elements regarding that standard, criterion, or policy:

First, it is uniformly applied;

Second, it is job-related;

Third, it is consistent with business necessity; and

Fourth, it cannot be met by a person with plaintiff [*name*]'s disability even with a reasonable accommodation.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*], unless you also find that the defendant [*name*] has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant [*name*].

Comment

See 42 U.S.C. § 12113(a) (describing defenses and terms) and 29 C.F.R. § 1630.15(b) (1999) (describing the four elements a defendant must prove to satisfy burden). For a discussion of the business necessity defense as it applies to an across-the-board employer qualification standard (hearing test for package car drivers), *see Bates v. UPS, Inc.,* 511 F.3d 974, 994-98 (9th Cir. 2007) (*en banc*). For an analysis of business necessity as it applies when an employer requires an employee to undergo a medical examination under 42 U.S.C. § 12112(d)(4)(A), *see Brownfield v. City of Yakima*, 612 F.3d 1140, 1146 (9th Cir. 2010) (holding that standard may be met even before employee's work performance declines if employer has significant evidence that could cause reasonable person to inquire whether employee is still capable of performing job; finding police officer exhibiting erratic behavior could be referred for fitness for duty examination); *see also Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049 (9th Cir. 2009) (defining medical examination).

The Supreme Court has recognized that the "direct threat" affirmative defense (*i.e.*, whether an employee poses a threat to others or to the employee himself or herself) is consistent with "business necessity" principles encompassed in the ADA (§ 12113) and the EEOC regulations (29 C.F.R. § 1630.15(b)(2) (2001). *Chevron U.S.A., Inc. v. Echazabal,* 536 U.S. 73, 76-77 (2002).

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12.12 ADA—Defenses—Direct Threat

It is a defense to the plaintiff's ADA claim if the plaintiff posed a direct threat to the health and safety of others [or if the requirements of the job would pose a direct threat to the plaintiff]. The defendant may require, as a qualification for the position, that an individual not pose a "direct threat" to the health or safety of [others] [himself] [herself] [*other pronoun*] in the workplace. A health or safety risk can only be considered if it is a significant risk of substantial harm. Assessment of the existence of a direct threat must be based on valid and objective evidence and not speculation.

The defendant claiming the "direct threat" defense must prove by a preponderance of the evidence that the plaintiff posed a direct threat to the health or safety of [others] [himself] [herself] [*other pronoun*] that could not be eliminated by a reasonable accommodation.

Factors that you should consider in determining whether an individual poses a direct threat to the health and safety of [others] [himself] [herself] [*other pronoun*] are:

(1) the nature and severity of the potential harm;

(2) the duration of the potential harm;

(3) the imminence of the potential harm; and

(4) the probability of the harm occurring.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*], unless you also find that the defendant [*name*] has proved this affirmative defense, in which event your verdict should be for the defendant [*name*].

Comment

See 42 U.S.C. §§ 12111(3) (defining "direct threat"), 12113(b) (providing that a qualification standard can include the condition that a person not pose a direct threat); *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987) (addressing a claim under the Rehabilitation Act and providing criteria for what is considered a direct threat).

Because an employee who makes serious and credible threats to kill coworkers is not a qualified individual, an employer is not required to invoke the direct threat defense. *See* Instruction 12.5 (ADA—Qualified Individual); *Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 945 (9th Cir. 2015). Similarly, an employer who terminates an employee based on past threats of violence against coworkers may show a legitimate nondiscriminatory reason for the termination without invoking the direct threat defense. *Curley v. City of North Las Vegas*, 772 F.3d 629, 632-33 (9th Cir. 2014).

This defense applies when the direct threat is to the disabled individual. *See Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 76-77 (2002) (recognizing the availability of a "direct threat" defense when toxins at oil refinery would exacerbate the plaintiff's liver condition).

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12.13 ADA—Defenses—Good Faith in Interactive Process

Good faith is a defense to a claim seeking damages for discrimination under the ADA where the alleged discriminatory practice involves the provision of a reasonable accommodation.

To prevail on this defense, the defendant [*name*] must prove, by a preponderance of the evidence, that the defendant [*name*] demonstrated good faith efforts, in consultation with the person who informed the defendant [*name*] that accommodation is needed, to identify and make a reasonable accommodation that would provide that person with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*], unless you also find that the defendant [*name*] has proved each of the elements of this affirmative defense, in which event your verdict should be for the defendant [*name*].

Comment

> In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of Title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. § 1981a (a)(3).

12.14 ADA—Damages

Comment

See Chapter 5 ("Damages") for damage instructions. *See also* 42 U.S.C. § 12117(a) (applying powers, remedies, and enforcement provisions of Title VII to any person alleging employment discrimination on basis of disability).

See 42 U.S.C. § 1981a (b) (providing for recovery of compensatory and punitive damages). Indeed,

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

42 U.S.C. § 1981a (b)(1). In addition, a district court may award nominal damages in an ADA retaliation claim as equitable relief. *Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 874 (9th Cir. 2017).

See 42 U.S.C. § 1981a(b)(3) (limiting the amount of damages recoverable based on a defendant's employee base). These limits do not apply to back pay or front pay, which are awarded under 42 U.S.C. § 2000e-5(g)(1), not 42 U.S.C. § 1981a. *See Pollard v. E.I. du Pont de Nemours & Company*, 532 U.S. 843, 848 (2001).

See 42 U.S.C. § 1981a(c)(2) (requiring that limits on damages not be disclosed to the jury).

The Ninth Circuit has held in the ADA context that back pay constitutes equitable relief within the discretion of the court, not the jury. *See Lutz v. Glendale Union High Sch*., 403 F.3d 1061, 1069 (9th Cir. 2005) (holding that under the ADA, "there is no right to have a jury determine the appropriate amount of back pay," which "remains an equitable remedy to be awarded by the district court in its discretion"). Although the Ninth Circuit has not directly addressed the issue, precedent indicates that front pay is also within the discretion of the court, not the jury. In the ADA context, front pay constitutes equitable relief. *See Bayer v. Neiman Marcus Grp., Inc*., 861 F.3d 853, 866 (9th Cir. 2017) (citing *Pollard*, 532 U.S. at 849-51) (stating in the ADA context that "money damages in the form of front pay are equitable when awarded in lieu of injunctive reinstatement"). Further, in a related context, the Ninth Circuit has indicated that front pay must be decided by the court, not the jury. *See Traxler v. Multnomah County*, 596 F.3d 1007, 1011-12 (9th Cir. 2010) (explaining in the context of an FMLA case that "front pay is an equitable remedy that must be determined by the court, both as to the availability of the remedy and the amount of any award" and that front pay is different from compensatory damages). A court may, however, empanel an advisory jury. *See id*. at 1013; Fed. R. Civ. P. 39(c).

See also the Introductory Comment to Chapter 10 ("Civil Rights—Title VII—Employment Discrimination; Harassment; Retaliation") and the Introductory Comment to this chapter.

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13. LABOR (INCLUDING FAIR REPRESENTATION)

Instruction

13.1 Employee Claim Against Union and/or Employer—Labor Management Relations Act (LMRA) § 301 (29 U.S.C. § 185)
13.2 LMRA § 301—Damages (29 U.S.C. § 185)

13.1 Employee Claim Against Union and/or Employer—Labor Management Relations Act (LMRA) § 301 (29 U.S.C. § 185)

To prevail, the plaintiff [*name*] must prove each of the following by a preponderance of the evidence:

First, that the plaintiff was discharged from employment by [*name of employer*];

Second, that such discharge was without "just cause";

Third, that the plaintiff filed a grievance with [*name of union*]; and

Fourth, that [*name of union*] breached its duty to fairly represent the plaintiff's interests under the collective bargaining agreement by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith.

The plaintiff [*name*] must prove all four of the elements listed above whether [he] [she] [*other pronoun*] is suing the union, the employer, or both. In this case, the plaintiff [*name*] is suing [[the union] [the employer] [both the union and the employer]].

If you find that the plaintiff [*name*] has proved all four of the elements listed above, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless "just cause" exists for the employee's dismissal. The term "just cause" means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

A union has a duty under the law to represent fairly the interests of its members in protecting their rights under a collective bargaining agreement. However, an individual employee does not have an absolute right to require the employee's union to pursue a grievance against the employer. A union has considerable discretion in controlling the grievance and arbitration procedure. The question is not whether the employee is satisfied with the union representation or whether that representation was perfect.

Breach of the duty of fair representation occurs only when a union acting in bad faith or in an arbitrary or discriminatory manner fails to process a meritorious grievance. So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee's grievance against the employer. Even if an employee's grievance has merit, the union's mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation.

Comment

This jury instruction applies when an employee or former employee files a suit against either the union or employer. It also applies in a hybrid suit against both the employer and union. A plaintiff may decide to sue one defendant and not the other but must prove the same case whether the suit is against one defendant or both. *Starla Rollins v. Cmty. Hosp. of San Bernadino*, 839 F.3d 1181, 1185 (9th Cir. 2016) (explaining that plaintiff could pursue claim against union after employer had settled, but must still show that employer breached collective bargaining agreement).

To support a breach of the duty of fair representation claim, the plaintiff must prove that the employer's action violated the terms of the collective bargaining agreement and that the union breached its duty to act honestly and in good faith and to avoid arbitrary conduct. *Bliesner v. Commc'n Workers of America*, 464 F.3d 910, 913–14 (9th Cir. 2006) (affirming summary judgment of hybrid suit based on failure to show employer's breach of collective bargaining agreement without deciding whether union breached duty of fair representation).

As a general rule, before bringing suit, a plaintiff "must first exhaust the grievance procedures established by the [collective bargaining agreement]." *Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 898-99 (9th Cir. 2002). However, a plaintiff need not do so if the employer repudiates those procedures. *Id*. (waiving exhaustion when union attempted to use grievance procedures on plaintiff's behalf and employer repeatedly refused). An alternative "exception to the general requirement of exhaustion exists, however, where the employee demonstrates that 'the union . . . [has acted] in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation.'" *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 986 (9th Cir. 2007) (quoting *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983)) (affirming summary judgment for defendant on § 301 claim when plaintiff "failed to exhaust his contractual remedies, and no breach of the duty of fair representation [wa]s alleged in the complaint"). "The determination whether to require exhaustion is left to the sound discretion of the trial court." *Scoggins v. Boeing Co.*, 742 F.2d 1225, 1229 (9th Cir. 1984).

The union's duty of fair representation extends to members of a collective-bargaining unit represented by the union, provided that the union is the exclusive representative in the collective bargaining process for the unit of employees. *Simo v. Union of Needletrades, Indus. & Textile Emps., Southwest Dist. Council*, 322 F.3d 602, 614 (9th Cir. 2003) (holding that no duty of fair representation attached because union was not acting as exclusive bargaining representative nor pursuant to collective bargaining agreement). The duty of fair representation arises when a union is representing the workers in question pursuant to either the "authority granted by statute or a collective bargaining agreement," and it applies "both to the negotiation and to the administration of collective bargaining agreements." *United Bhd. of Carpenters & Joiners of America v. Metal Trades Dept., AFL-CIO*, 770 F.3d 846, 848-49 (9th Cir. 2014).

A union is not liable for merely negligent conduct. *See Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir. 2000). A breach of the duty of fair representation occurs when "the union conduct at issue is a discriminatory or bad faith exercise of judgment, or is an arbitrary

(meaning wholly irrational, inexplicable, or unintentional) action that substantially injured an employee." *Beck v. United Food & Com. Workers Union, Loc.* 99, 506 F.3d 874, 880 (9th Cir. 2007). "Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation." *Simo*, 322 F.3d at 617 (quoting *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 657 (4th Cir. 2002)).

A union's actions or omissions are arbitrary if they are "unintentional, irrational, or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act." *Beck*, 506 F.3d at 880-81 (union's failure to file timely grievance after agreeing to do so was arbitrary). For example, "[a] union acts 'arbitrarily' when it simply ignores a meritorious grievance or handles it in a perfunctory manner" and fails to "conduct a 'minimal investigation' of a grievance that is brought to its attention." *Starla Rollins*, 839 F.3d at 1186 (quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1253-54 (9th Cir. 1985)). By contrast, if "a union's conduct constitutes an exercise of judgment," it is "entitled to deference" unless its decision is "wholly irrational." *Beck*, 506 F.3d at 879-80. This is a deferential standard that "gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Id.* (quoting *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45-46 (1998)); *see also Demetris v. Transp. Workers Union of America, AFL-CIO*, 862 F.3d 799, 805 (9th Cir. 2017) (explaining that "our threshold inquiry in assessing any duty of fair representation claim must be to determine whether the alleged conduct involved judgment or whether such conduct was merely ministerial or procedural in nature").

If a union's exercise of judgment is not wholly irrational and thus not arbitrary, "a union can still breach the duty of fair representation if it exercised its judgment in bad faith or in a discriminatory manner." *Beck*, 506 F.3d at 880. To establish that a union acted in "bad faith," a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct," *Beck*, 506 F.3d at 880 (quoting *Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 299 (1971)), or evidence that the union was motivated by personal animus toward the plaintiff. *See Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir. 1995) (including personal animus as basis for finding of bad faith); *see also United Bhd. of Carpenters & Joiners of America*, 770 F.3d at 852 (observing that union's failure to follow internal policies is "strong evidence of bad faith").

To establish that a union impermissibly discriminated against its members, "the aggrieved members must set forth 'substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.'" *Demetris*, 862 F.3d at 806 (quoting *Lockridge*, 403 U.S. at 301). The duty to not discriminate extends beyond "race or other constitutionally protected categories." *Simo*, 322 F.3d at 61-19. For example, "a union may not 'discriminate on the basis of union membership.'" *Id*. (quoting *Bernard v. Air Line Pilots Ass'n, Int'l*, 873 F.2d 213, 216 (9th Cir. 1989)); *see also Demetris*, 862 F.3d at 806 (explaining that "unions cannot discriminate against their members based on political animus or even political expediency"). However, there is "no requirement that the unions treat their members identically as long as their actions are related to legitimate union objectives." *Demetris*, 862 F.3d at 806 (quoting *Vaughn v. Air Line Pilots Ass'n, Int'l*, 604 F.3d 703, 712 (2d Cir. 2010)).

Revised Mar. 2023

13.2 LMRA § 301—Damages (29 U.S.C. § 185)

If you find for the plaintiff, you must then consider the issue of damages. The amount of your verdict should be a sum that you find will justly compensate the plaintiff for the damages the plaintiff has incurred. The measure of such damages, if any, is the amount that the plaintiff would have earned from employment with the employer if the discharge had not occurred, reduced by any earnings that the plaintiff received, or could have reasonably received, from other employment.

[*Insert type of damages recoverable. See Instructions 5.1 (Damages–Proof) and 5.2 (Measures of Types of Damages), and if mitigation is at issue, see Instruction 5.3 (Damages–Mitigation).*]

Once you have arrived at a figure for lost wages or damages, you must apportion those damages between the employer and the union. In making the apportionment, you should follow this guideline: The employer is liable for lost wages and benefits due solely to its breach of the collective bargaining agreement in discharging the plaintiff, up to the point in time that the employer's action would have been reversed had the union timely processed a grievance against the employer. The union is responsible for any lost wages and benefits after the point in time that the employer's action would have been reversed had the union timely processed the grievance.

Comment

In *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983), the Supreme Court held that "damages attributable *solely* to the employer's breach of contract should not be charged to the union but *increases* if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer." 459 U.S. at 223-24 (quoting *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967)). *Bowen* does not indicate exactly how damages are to be apportioned between the employer and union. *See* Murray, Steven L., *Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of Bowen v. United States Postal Service*, 32 DePaul L. Rev. 743, 767 (1983) (noting that Supreme Court's decision in *Bowen* could be interpreted to support three different apportionment rules). For example, *Bowen* could be read to hold that the employer and union are liable on the basis of relative degrees of fault. *See id*. at 767. *Bowen* could also be interpreted to stand for the more concrete, bright line rule that employers are liable for damages suffered up until the hypothetical date upon which an arbitration award would have issued had the union processed the grievance, and the union is liable for all damages incurred thereafter. *See id.*

The district court in *Bowen* had instructed the jury that apportionment between the employer and union could be based on the hypothetical arbitration date at which the employer would have reinstated the plaintiff if the union had fulfilled its duty. *See Bowen*, 459 U.S. at 215. The district court suggested that the employer was liable for damages before that date and the union for damages thereafter. *Bowen* was explicit, however, in leaving undecided "whether the District Court's instructions on apportionment of damages were proper." *Id.* at 230 n.19.

Some courts have held that *Bowen* does not mandate the hypothetical date method. *See Aguinaga v. United Food & Com. Workers Int'l*, 993 F.2d 1463, 1475 (10th Cir. 1993) ("We do not agree that *Bowen* requires that damages be apportioned based on chronology using the hypothetical arbitration date."). What is clear from *Bowen* and its progeny is that union liability is not limited to the litigation expenses and fees incurred by the employee-plaintiff as a result of the union's breach of the duty of fair representation. *See Bowen*, 459 U.S. at 220-25 (rejecting union's argument that its liability was limited to litigation expenses resulting from its breach of duty). Implicit (if not explicit) in *Bowen* is that a union may be held liable for a portion of the back pay owed to the employee. The Court held that if the plaintiff is unable to collect against the union, the employer "remains secondarily liable for the full loss of back pay." *Id.* at 223 n.12. Inherent in this statement is that a union may be primarily liable for a percentage of the employee's back pay. Numerous courts addressing this issue after *Bowen* have held that a union may be liable for back pay when it breaches the duty of fair representation. *See*, *e.g.*, *Aguinaga*, 993 F.2d at 1475 ("[I]n *Bowen*, the Supreme Court held that a union can be liable for back pay and benefits.").

Generally, damages are apportioned between the employer and union according to the damage caused by each. However, joint and several liability may be appropriate where the employer and union actively participated in each other's breach. *Lewis v. Tuscan Dairy Farms, Inc.,* 25 F.3d 1138, 1145-46 (2d Cir. 1994); *Aguinaga*, 993 F.2d at 1474-75. For example, when a union affirmatively causes the employer to breach the collective bargaining agreement, or when the union and employer actively participate in each other's breach, joint and several liability, as opposed to apportionment, may be appropriate. *See Aguinaga*, 993 F.2d at 1475; *Bennett v. Local Union No. 66*, 958 F.2d 1429, 1440-41 (7th Cir. 1992). *See* Instruction 5.1 (Damages—Proof) regarding causation.

Attorneys' fees and awards for costs incurred in suing the union may be awarded as compensatory damages for a breach of the duty to represent. *Vaca v. Sipes*, 386 U.S. 171, 195-96 (1967) (explaining that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach"); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983) (holding employee may recover from union attorneys' fees expended in pursuing his employer for breach of contract). When an employee proves both a breach of the duty of fair representation and a violation of the collective bargaining agreement, the union must pay attorneys' fees incurred by the employee in his suit against the employer and the union. *See*, *e.g.*, *Zuniga v. United Can Co.*, 812 F.2d 443, 451-52, 455 (9th Cir. 1987) (attributing wrongfully-denied sick leave benefits to employer, and attorneys' fees to union). Compensatory damages "may include lost wages and fringe benefits," but lost wages should be "offset by wages earned at other employment." *Galindo v. Stoody Co.*, 793 F.2d 1502, 1516 (9th Cir. 1986).

As of February 2023, the Ninth Circuit has not decided whether punitive and extra-contractual damages are recoverable in an action under the Labor Management Relations Act for breach of a collective bargaining agreement. *Alday v. Raytheon Co.*, 693 F.3d 772, 795 (9th Cir. 2012) (declining to decide whether court may award punitive damages "if it would deter persistent misconduct" or award extra-contractual damages if "defendant's conduct was

particularly likely to result in serious emotional distress"); *see also Bloom v. Int'l Bhd. of Teamsters Loc. 468*, 752 F.2d 1312, 1315 (9th Cir. 1984) (reversing emotional distress damages because "[t]he minimum level of outrageous conduct was not shown in this case," without deciding whether remedy for breach of duty of fair representation under Labor Management Relations Act might include damages for emotional distress).

For an example of a suggested verdict form, see below:

SUGGESTED VERDICT FORM

1. Do you find from a preponderance of the evidence that the plaintiff was discharged from employment by the defendant employer?

_____ Yes _____ No

If your answer to Question No. 1 is "no," do not answer the remaining questions. Sign and date the verdict form and notify the bailiff. If your answer to Question No. 1 is "yes," proceed to Question No. 2.

2. Do you find from a preponderance of the evidence that such discharge was without "just cause" (as defined in the Court's instructions)?

_____ Yes _____ No

If your answer to Question No. 2 is "no," do not answer the remaining questions. Sign and date the verdict form and notify the bailiff. If your answer to Question No. 2 is "yes," proceed to Question No. 3.

3. Do you find from a preponderance of the evidence that the defendant union breached its duty of fair representation owed to the plaintiff as one of its members by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith?

_____ Yes _____ No

If your answer to Question No. 3 is "no," do not answer the remaining questions. Sign and date the verdict form and notify the bailiff. If your answer to Question No. 3 is "yes," proceed to Question No. 4.

4. Do you find from a preponderance of the evidence that the plaintiff suffered damages from the above actions of [[the union] [the employer] [both the union and the employer]] in the amount of $_____?

[Proceed to Question No. 5 only if you found that the plaintiff suffered damages from the actions of both the union and the employer.]

5. Do you find from a preponderance of the evidence that the plaintiff's damages should be apportioned between the defendants, $_____ to the defendant employer, and $_____ to the defendant union?

DATED: _____ _____

PRESIDING JUROR

Revised Mar. 2023

14. ANTITRUST

Comment

These sources may be helpful:

AMERICAN BAR ASSOCIATION ANTITRUST SECTION, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES (A.B.A., Chicago, Ill., 2016).

KEVIN F. O'MALLEY, ET AL., 3A FEDERAL JURY PRACTICE AND INSTRUCTIONS, ch. 150 Antitrust—Private Action (6th ed. 2012).

LEONARD B. SAND, ET AL., 4 MODERN FEDERAL JURY INSTRUCTIONS–CIVIL (Matthew Bender), ch. 79, ¶ ¶ 79.01-79.08 (*Restraint of Trade*); ch. 80, ¶ ¶ 80.01-80.03 (*Monopolization*); ch. 81, ¶ ¶ 81.01-81.04 (*Patent Based Antitrust Claims*).

Revised March 2025

15. TRADEMARK

Instruction

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15.22 Defenses—Abandonment—Affirmative Defense—Defendant's Burden of Proof
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15.28 Trademark Damages—Plaintiff's Statutory Damages (15 U.S.C. § 1117(c) and (d))
15.29 Trademark Damages—Disgorgement of Defendant's Profits (15 U.S.C. § 1117(a))
15.30 Trademark Dilution (15 U.S.C. § 1125(c))
15.31 Anti-Cybersquatting (15 U.S.C. § 1125(d))

15.1 Preliminary Instruction—Trademark

The plaintiff [*name*] seeks damages against the defendant [*name*]for [trademark infringement] [unfair competition]. The defendant [*name*] denies [infringing the trademark] [unfairly competing] [and] [contends the trademark is invalid]. To help you understand the evidence that will be presented in this case, I will explain some of the legal terms you will hear during this trial.

DEFINITION AND FUNCTION OF A TRADEMARK

A trademark is a word, name, symbol, or device, or any combination of these items that indicates the source of goods. The [owner] [assignee] [licensee] of a trademark has the right to exclude others from using that trademark or a similar mark that is likely to cause confusion in the marketplace. The main function of a trademark is to identify and distinguish goods or services as the product of a particular manufacturer or merchant and to protect its goodwill.

[HOW A TRADEMARK IS OBTAINED]

[A person acquires the right to exclude others from using the same mark or a similar mark that is likely to cause confusion in the marketplace by being the first to use it in the marketplace, or by using it before the alleged infringer. Rights in a trademark are obtained only through commercial use of the mark.]

[TRADEMARK INTERESTS]

[The owner of a trademark may transfer, give, or sell to another person the owner's interest in the trademark. This type of [agreement] [gift] is called an assignment, and the person who receives the owner's interest is called an assignee and becomes the owner of the mark. An assignee has the right to exclude others from using the trademark or a similar mark that is likely to cause confusion in the marketplace. To be enforceable, the assignment must be in writing and signed. It must also include the goodwill of the business connected with the trademark.]

[The owner of a trademark may [also] enter into an agreement that permits another person to use the trademark. This type of agreement is called a license, and the person permitted to use the trademark is called a licensee.]

A trademark [owner] [assignee] [licensee] may enforce the right to exclude others in an action for [infringement] [or] [*insert applicable form of unfair competition from 15 U.S.C. § 1125(a)*].

[TRADEMARK REGISTRATION]

[After the owner of a trademark has obtained the right to exclude others from using the trademark, the owner may obtain a certificate of registration issued by the United States Patent and Trademark Office. Thereafter, when the owner brings an action for infringement, the owner

may rely solely on the registration certificate to prove that the owner has the right to exclude others from using the trademark or a similar mark that is likely to cause confusion in the marketplace in connection with the type of goods specified in the certificate.] [These presumptions in favor of the owner created by the certificate of registration can be overcome or rebutted only by certain types of evidence that I will describe to you later as appropriate.]

[LIKELIHOOD OF CONFUSION]

[To prove infringement, the plaintiff must prove, by a preponderance of the evidence, that the defendant, without the plaintiff's consent, used in commerce a reproduction, copy, counterfeit or colorable imitation of plaintiff's mark in connection with the distribution or advertisement of goods, such that the defendant's use of the mark is likely to cause confusion as to the source of the goods. It is not necessary that the mark used by the defendant be an exact copy of the plaintiff's mark. Rather, the plaintiff must demonstrate that, viewed in its entirety, the mark used by the defendant is likely to cause confusion in the minds of reasonably prudent purchasers or users as to the source of the product in question.]

THE PLAINTIFF'S BURDEN OF PROOF

In this case, the plaintiff [*name*] contends that the defendant [*name*] has infringed the plaintiff [*name*]'s trademark. The plaintiff [*name*] has the burden of proving by a preponderance of the evidence that the plaintiff [*name*] is the owner of a valid trademark and that the defendant [*name*] infringed that trademark. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the defendant infringed the plaintiff [*name*]'s trademark.

[THE DEFENDANT'S BURDEN OF PROOF]

[The defendant [*name*] contends that [the [registered] trademark is invalid] [,] [the trademark has been abandoned] [or] [*insert other affirmative defense*]. The defendant [*name*] has the burden of proving by a preponderance of the evidence that [the [registered] trademark] is invalid] [,] [the trademark has been abandoned] [or] [*insert other affirmative defense*].]

[Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the [[registered] trademark is invalid] [or] [*insert other affirmative defense*].]

Comment

This instruction is tailored to fit a classic trademark infringement case. If the case involves trade dress, trade name, or other unfair competition claims, this instruction will require modification.

Throughout these instructions, whenever the term "trademark" is used, as is appropriate for the facts of the case, a more specific term, such as "service mark," "collective mark," or

"certification mark" may be substituted. *Lahoti v. VeriCheck, Inc.*, 586 F.3d 1190, 1194 n.1 (9th Cir. 2009) ("Under the Lanham Act, the only difference between a trademark and a service mark is that a trademark identifies goods while a service mark identifies services." (internal quotation marks omitted)).

See generally 15 U.S.C. § 1051 *et seq.* The statute now protects both actual and intended use of a trademark. *See* 15 U.S.C. § 1051(b). In a case involving merely intended use of a trademark, these instructions must be tailored to fit the case.

A trademark infringement case can be brought under three different causes of action: (1) statutory trademark infringement, (2) common law trademark infringement, and (3) unfair competition.

Although elements of a claim in trademark may overlap with a claim in copyright, the acts do not preempt each other. *See Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 721 & n.18 (9th Cir. 2004) ("Copyright and trademark are related but distinct property rights, evidenced by different federal statutes governing their protection" so that "[a]lthough there is a general bar to double recovery, we caution that damages arising from a copyright violation do not necessarily overlap wholly with damages from a trademark violation, even though there might be only one underlying action."); *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (upholding award for statutory damages under Copyright Act and actual damages under trademark statute).

Additional useful references include: (1) *Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation*, Chapter Two, "Trademark" (Alan Nathan Harris & Todd S. Holbrook eds., American Bar Association 2008); and (2) *Model Jury Instructions: Business Torts Litigation*, Chapter Four, "Confusion of Source" (Brian A. Hill ed., American Bar Association 5th ed. 2022).

Revised March 2024

15.2 Definition—Trademark (15 U.S.C. § 1127)

A trademark is any word, name, symbol, device [, or any combination thereof,] used by a person to identify and distinguish that person's goods from those of others and to indicate the source of the goods [, even if that source is generally unknown].

[*Name of corporation, if a party*] is a person as that term is used in these instructions.]

[A person who uses the trademark of another may be liable for damages.]

Comment

This instruction is a model for any case involving a trademark as defined by the Lanham Act, 15 U.S.C. § 1127. Under the Lanham Act, the term "mark" is often used to define the various types of mark protected by the trademark law, such as trade and service marks, collective trade and service marks, and certification trade and service marks. *New Kids on the Block v. News Am. Publ'g, Inc*., 971 F.2d 302, 306 (9th Cir. 1992). For instructions on other trade devices protected by trademark law, see Instruction 15.3 (Definition—Trade Dress) and Instruction 15.4 (Definition—Trade Name/Commercial Name).

A corporation is a person. *See* Instruction 4.2 (Liability of Corporations–Scope of Authority Not in Issue).

A trademark is a limited property right in a particular word, phrase or symbol. *See New Kids on the Block*, 971 F.2d at 306. It identifies the source of goods. *See Brookfield Commc'ns Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1051 (9th Cir. 1999). But it fails to serve its source-identifying function when the public has never seen it, for instance when registered for an Internet domain name. *Id.* Accordingly, it is not protected until it is used in public in a manner that creates an association among consumers between the mark and the mark's owner. *Id.* The ability of a trademark to distinguish the source of the goods it marks, not the uniqueness of its color, shape, fragrance, word, or sign, entitles it to protection. *See Qualitex Co. v. Jacobson Prods. Co*., 514 U.S. 159, 164, 166 (1995). Accordingly, even "a color may sometimes meet the basic legal requirements for use as a trademark" if it can sufficiently serve the basic purpose of source identification. *Id.*

If other types of marks are involved in the case, adjustments to this instruction should be made as follows:

Service Mark Cases

If a service mark is at issue, the court should replace "goods" with "services" for the remaining instructions. Further, the court should substitute the following paragraph for the first paragraph of this instruction and substitute the word "service mark" for "trademark" in the second paragraph:

> A service mark is any word, name, symbol, device [, or any combination thereof,] used by a person to identify and distinguish such person's services from those of others and to indicate the source of the services [, even if that source is generally unknown]. [Titles, character names, and other distinctive features of radio or television programs may be registered as service marks as well].

"Generally speaking, a service mark is a distinctive mark used in connection with the sale or advertising of services . . . ." *Am. Int'l Grp. v. Am. Int'l Bank*, 926 F.2d 829, 830 n.1 (9th Cir. 1991).

Collective Trademark Cases

When a collective trademark is at issue, in lieu of this instruction, insert the following two paragraphs:

> A collective trademark is any [word] [name] [symbol] [device] [, or combination thereof,] used by [a cooperative] [an association] [, or other collective group or organization] to identify and distinguish its goods from those of others, and to indicate the source of the goods [, even if that source is generally unknown].
>
> [A person who uses the collective trademark of a [cooperative] [an association] [, or another collective group or organization] may be liable for damages].

For a description of a collective mark, *see Sebastian Int'l v. Longs Drug Stores*, 53 F.3d 1073, 1077-78 (9th Cir. 1995) (Ferguson, J., concurring).

Collective Service Mark Cases

When a collective service mark is at issue, in lieu of this instruction, insert the following two paragraphs:

> A collective service mark is any [word] [name] [symbol] [device] [, or combination thereof,] used by [a cooperative] [an association] [, or other collective group or organization] to identify and distinguish its services from those of others, and to indicate the source of the services [, even if that source is generally unknown].
>
> [A person who uses the collective service mark of a [cooperative] [an association] [, or another collective group or organization] may be liable for damages.].

Regarding a collective service mark, *see Robi v. Reed*, 173 F.3d 736, 739-40 (9th Cir. 1999) (holding that musical group members, as collective owners of group's service mark, do not retain right to use service mark when they leave group if members of original group continue to use service mark; manager of group, who was in position to control quality of its services, retained right to use service mark).

Certification Mark for Goods Cases

When a certification mark for goods is at issue, in lieu of this instruction, insert the following two paragraphs:

> A certification mark for goods is any [word] [name] [symbol] [device] [, or any combination thereof,] which its owner permits others to use to certify [[a good's [origin] [material] [mode of manufacture] [quality] [accuracy] [*fill in other certifiable characteristics*]] [that the work or labor on the goods was performed by members of a union or other organization].
>
> [A person who uses the certification mark for goods of a [cooperative] [an association] [, or another collective group or organization] may be liable for damages.]

Certification Mark for Services Cases

When a certification mark for services is at issue, in lieu of this instruction, insert the following two paragraphs:

> A certification mark for services is any [word] [name] [symbol] [device] [, or any combination thereof,] which its owner permits others to use to certify [a service's [origin] [quality] [accuracy] [*fill in other certifiable characteristics*]] [that a service is performed by members of a union or other organization].
>
> [A person who uses the certification mark of a [cooperative] [an association] [, or another collective group or organization] may be liable for damages.]

Revised March 2024

15.3 Definition—Trade Dress (15 U.S.C. § 1125(a))

Trade dress is the non-functional physical detail and design of a product or its packaging, which [indicates] [or] [identifies] the product's source and distinguishes it from the products of others.

Trade dress is the product's total image and overall appearance, and may include features such as size, shape, color, color combinations, texture, or graphics. In other words, trade dress is the form in which a person presents a product to the market, its manner of display.

[*Name of corporation, if a party*] is a person as that term is used in these instructions.]

Comment

In a trade dress case, it is reversible error to fail to give an instruction defining non-functionality. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 842-43 (9th Cir. 1987). For such an instruction, *see* Instruction 15.12 (Infringement—Elements—Validity—Trade Dress—Non-Functionality Requirement); Instruction 15.7 (Infringement—Elements and Burden of Proof—Trade Dress).

Trade dress encompasses the design of a product. Unregistered trade dress requires a showing of non-functionality, distinctiveness, and likelihood of confusion to support a finding of infringement. *See Wal-Mart Stores, Inc., v. Samara Bros., Inc.*, 520 U.S.205, 210 (2000); *Two Pesos, Inc. v. Taco Cabana, Inc*., 505 U.S. 763, 765 n. 1 (1992) (noting that trade dress involves "the total image of a product and may include features such as size, shape, color or color combination, texture, graphics, or even particular sales techniques."); *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001) (noting that "the design or packaging of a product may acquire a distinctiveness which serves to identify the product with its manufacturer or source; and a design or package which acquires this secondary meaning, assuming other requisites are met, is a trade dress which may not be used in a manner likely to cause confusion as to the origin, sponsorship, or approval of the goods. In these respects, protection for trade dress exists to promote competition."). *See generally* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8 (5th ed. 2019).

A corporation is a person. *See* Instruction 4.2 (Liability of Corporations–Scope of Authority Not in Issue).

Depending on the particular good or service to which the trade dress at issues applies, the instruction should be modified as indicated below:

Product Packaging Cases

Trade dress may involve the packaging or wrapping of the product at issue. This is the most frequent type of trade dress case. If such trade dress is at issue, the court may add the following after the third paragraph of this instruction:

In this case, you will hear evidence about the manner in which *[insert description of good*] was [packed] [wrapped] [boxed] [held in a container]. Trademark law protects such trade dress from others using the same or similar presentation of another product if that trade dress is non-functional and if consumers identify the packaging with the source of the product, distinguishing it from other sources.

Trade literature used in marketing constitutes trade dress. Unauthorized use by a competitor constitutes false designation of origin and unfair competition.

Product Design or Configuration Cases

Trade dress may be other than the packaging of the product. It may constitute the design or overall appearance or configuration of the product itself. In such cases, because the source identifying aspect is part of the physical product itself, functionality is an important issue. If such trade dress is at issue, add the following after the third paragraph of this instruction:

Trade dress concerns the overall visual impression created in the consumer's mind when viewing the non-functional aspects of the product and not from the utilitarian or useful aspects of the product. In considering the impact of these non-functional aspects, which are often a complex combination of many features, you must consider the appearance of features together, rather than separately.

See Millenium Labs., Inc. v. Ameritox, Ltd., 817 F.3d 1123 (9th. Cir. 2016) (holding that publication formats may be protectable trade dress); *Two Pesos, Inc., v. Taco Cabana, Int'l Inc.,* 932 F.2d 1113 (5th Cir. 1991), *aff'd,* 505 U.S. 763, 770-73 (1992); *Vision Sports, Inc. v. Meville Corp.*, 888 F.2d 609, 613 (9th Cir. 1989).

Business Image Cases

Although this instruction addresses the trade dress of a product, the cases suggest that services might also have a protectable trade dress. *See Two Pesos, Inc.*, 505 U.S. at 764-65 (noting that trade dress may include "even particular sales techniques"); *Fuddruckers, Inc.*, 826 F.2d at 841-42. This is treated much like trade dress comprised of product packaging. If business image trade dress is at issue in the case, the following paragraph can be added after the third paragraph of the instruction:

In this case, you will hear evidence about the manner in which [*insert name of business*] identifies its business and the product or services it sells. This is the total image of the business, suggested by the general shape and appearance of its business, such as its identifying signs, interior floor space, decor, equipment, dress of employees, and other features reflecting on the total image of the business.

See Taco Cabana Int'l, Inc., 932 F.2d at 1113; *Clicks Billiards Inc. v. Sixshooters Inc*., 251 F.3d 1252, 1258-59 (9th Cir. 2001) (providing definition of trade dress).

Revised November 2024

15.4 Definition—Trade Name/Commercial Name (15 U.S.C. § 1127)

A [trade name] [commercial name] is any word or words, a symbol, or combination of words and symbol, used by a person to identify that person's [business] [vocation] [or] [occupation] and to distinguish it from the business of others. A [trade name] [commercial name] symbolizes the reputation of a person's [business] [vocation] [or] [occupation] as a whole. [By comparison, a trademark identifies a person's goods.]

Any person who uses the [trade name] [commercial name] of another may be liable for damages.

[*Name of corporation, if a party*] is a person as that term is used in these instructions.]

[If a person owns a trade name, then that person has the exclusive right to use the name or to control the use of confusingly similar variations of the name by others in the market.]

Comment

Use of a term as a trade name and use of the same term as a trademark are properly analyzed separately for infringement when the term serves as both identification for an organization (trade name) and as an identification of the source of a product (trademark). *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 903, 908-09 (9th Cir. 1995). The right to use a term as a trade name is not necessarily coterminous with the right to use that term as a trademark for goods or services. *See Stephen W. Boney Inc. v. Boney Servs., Inc.*, 127 F.3d 821, 828-29 (9th Cir. 1997). Accordingly, each should be analyzed and instructed separately.

"Trade names symbolize the reputation of a business as a whole. In contrast, trademarks and service marks are designed to identify and distinguish a company's goods and services . . . . As a practical matter, courts are rarely called upon to distinguish between trade names, trademarks and service marks. Trade names often function as trademarks or service marks as well . . . . Perhaps because of this functional overlap, the same broad standards of protection apply to trademarks and trade names." *Accuride Int'l v. Accuride Corp.*, 871 F.2d 1531, 1534-35 (9th Cir. 1989).

A corporation is a person. *See* Instruction 4.2 (Liability of Corporations—Scope of Authority Not in Issue).

Revised March 2024

15.5 Trademark Liability—Theories and Policies (15 U.S.C. §§ 1114(1), 1125(a))

Trademark laws balance three often-conflicting goals: (1) protecting the public from being misled about the nature and source of goods and services, so that the consumer is not confused or misled in the market; (2) protecting the rights of a business to identify itself to the public and its reputation in offering goods and services to the public; and (3) protecting the public interest in fair competition in the market.

The balance of these policy objectives vary from case to case, because they may often conflict. Accordingly, each case must be decided by examining its specific facts and circumstances, of which you are to judge.

In these instructions, I will identify types of facts you are to consider in deciding if the defendant is liable to the plaintiff for violating trademark law. These facts are relevant to whether the defendant is liable for:

[(1) infringing plaintiff's registered trademark rights, by using a trademark in a manner likely to cause confusion among consumers;]
[(2) unfairly competing, by using a trademark in a manner likely to cause confusion as to the origin or quality of plaintiff's goods;]
[(3) unfairly competing, by using trade dress in a manner likely to cause confusion as to the origin or quality of plaintiff's goods;]
[(4) infringing plaintiff's trade name, by using similar corporate, business or professional names in a manner likely to cause confusion about the source of products in the minds of consumers;]
[(5) false advertising, by making a false statement that was material and that tended to deceive consumers, injuring the plaintiff in the market.]

Comment

Instruct the jury on one or more of the above theories based on the theories relied on by the parties.

"The limited purpose of trademark protections set forth in the Lanham Trade-Mark Act, is to 'avoid confusion in the marketplace' by allowing a trademark owner to 'prevent [ ] others from duping consumers into buying a product they mistakenly believe is sponsored by the trademark owner.'" *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 806 (9th Cir. 2003). *See id*. at 806-07 ("Generally, to assess whether a defendant has infringed on a plaintiff's trademark, we apply a 'likelihood of confusion' test that asks whether use of the plaintiff's trademark by the defendant is 'likely to cause confusion or to cause mistake, or to deceive as to the affiliation, connection, or association' of the two products.") (citations omitted)). Federal trademark law addresses "the dual purposes of infringement law: ensuring that owners of trademarks can benefit from the goodwill associated with their marks and that consumers can

distinguish among competing producers." *Thane Int'l v. Trek Bicycle Corp*., 305 F.3d 894, 900-01 (9th Cir. 2002).

The general test of liability under the trademark law is likelihood of confusion. *See* 15 U.S.C. §§ 1114(1), 1125(a). "[T]he ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks . . . . Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical–is there a 'likelihood of confusion?'" *New W. Corp. v. NYM Co. of Cal., Inc.*, 595 F.2d 1194, 1201 (9th Cir. 1997). "[T]he single type of confusion most commonly in trademark law's sights is confusion 'about the source of a product or service.'" *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140, 147 (2023) (quoting *Moseley v. V Secret Catalogue, Inc.*, 537 U. S. 418, 428 (2003)).

Generally, liability for infringement of a registered trademark is handled under 15 U.S.C. § 1114(1). Unfair competition through infringing an unregistered trademark or infringing trade dress is handled under 15 U.S. C. § 1125(a). A cause of action for false advertising is also found in 15 U.S.C. § 1125(a). *See Harper House Inc. v. Thomas Nelson, Inc*., 889 F.2d 197 (9th Cir. 1989); *U-Haul Int'l v. Jartran, Inc*., 601 F.Supp. 1140 (D. Ariz. 1984), *aff'd in part, modified in part & rev'd in part,* 793 F.2d 1034 (9th Cir. 1986). Elements required for a false advertising claim, cognizable under 15 U.S.C. § 1125(a)(1)(B), are set forth in *Rice v. Fox Broadcasting Co*., 330 F.3d 1170, 1180 (9th Cir. 2003).

For false endorsement claims under § 1125(a) based on the use of a celebrity's likeness or persona, *see Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1067-73 (9th Cir. 2015) (describing false endorsement claim and listing eight factors relevant to determination of likelihood of confusion as to sponsorship or approval and adding that when "plaintiff is not the celebrity himself, an additional factor becomes relevant: the strength of association between the mark and the plaintiff").

For a "false or misleading" description or representation of fact about "goods or services" in "commercial advertising or promotion," 15 U.S.C. § 1125(a) "[c]omparative assertions about effectiveness, riskiness, and security are the kinds of generalized statements of product superiority that [the Ninth Circuit has] routinely found to be nonactionable." *Oracle Int'l Corp. v. Rimini St., Inc.*, 123 F.4th 986, 1001 (9th Cir. 2024) (holding that a company's statements that its services were more effective than its competitor's services amounted to mere "puffery," and were not actionable factual statements under the Lanham Act's false advertising provision, as "[w]ithout an objective measure of the difference between" the services, any statement about their comparative effectiveness "was necessarily tinged with subjectivity").

The Ninth Circuit recognizes two theories of consumer confusion that support a claim of trademark infringement: forward confusion and reverse confusion. Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. By contrast, reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior mark holder. Reverse confusion is not a separate trademark claim that must be specifically pleaded. Instead, it is a

theory of likely confusion that may be alleged by itself or in addition to forward confusion. *Marketquest Grp., Inc. v. BIC Corp*., 862 F.3d 927, 932, 937 (9th Cir. 2017).

In *LegalForce RAPC Worldwide, PC v. LegalForce, Inc*., 124 F.4th 1122, 1125-26 (9th Cir. 2024), the Ninth Circuit held that using a mark to advertise and sell a defendant's equity shares is not a sale of goods or services and does not constitute trademark infringement. Equity is not a good or a service for purposes of the Lanham Act.

Revised March 2025

15.6 Infringement—Elements and Burden of Proof—Trademark (15 U.S.C. § 1114(1))

On the plaintiff [*name*]'s claim for trademark infringement, the plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, [*describe the plaintiff's symbol or term*] is a valid, protectable trademark;

Second, the plaintiff [*name*] owns [*describe the plaintiff's symbol or term*] as a trademark;

Third, the defendant [*name*] used [*describe symbol or term used by the defendant*] [a mark similar to [*describe the plaintiff's symbol or term*]] in interstate commerce; and

Fourth, the defendant [*name*] used [*describe symbol or term used by the defendant*] [a mark similar to [*describe the plaintiff's symbol or term*]] without the consent of the plaintiff [*name*] in a manner that is likely to cause confusion among ordinary consumers as to the source, sponsorship, affiliation, or approval of the goods.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

This instruction sets out the general standard for trademark infringement liability under the Lanham Act. Modify this instruction as necessary when other marks (e.g., service mark, collective trade or service marks, or certification trade or service marks), are at issue by inserting such terms in lieu of the word "trademark" in this instruction and "services" in lieu of "goods." When the defendant's infringing action consists of using a mark similar, but not identical to the plaintiff's, particular care should be exercised in the third numbered element of this instruction. *Gracie v. Gracie*, 217 F.3d 1060, 1066-67 (9th Cir. 2000) (noting that, when instructing jury to consider if defendant "used" plaintiff's mark, trial court should make it clear jury can consider whether the marks were similar).

To prove trademark infringement, a trademark holder must show that a defendant's use of its trademark is likely to cause confusion, to cause mistake, or to deceive. *See Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015); *see also Arcona, Inc. v. Farmacy Beauty, LLC*, 976 F.3d 1074, 1079 (9th Cir. 2020) (holding that "a counterfeit claim requires a showing of likelihood of confusion under Section 1114."). The second bracketed phrase in the third and fourth numbered elements of this instruction may be a sufficient specification in most cases involving defendant's use of mark similar, rather than identical, to the plaintiff's. In cases involving confusion "on the part of someone other than the purchaser" that occurs after the point of sale, the elements may be modified to reference members of the relevant public beyond the

direct purchaser. *See Abercrombie & Fitch, Inc. v. Moose Creek, Inc*., 486 F.3d 629, 635 (9th Cir. 2007).

"The intent of the Congress in passing section 43(a) was to create a right of action for a competitor to stop . . . unfair competition in interstate commerce." *U-Haul Int'l, Inc. v. Jartran, Inc*., 681 F.2d 1159, 1162 (9th Cir. 1982).

Consult the following instructions to explain the elements identified by this instruction: Instruction 15.8 (Infringement—Elements–Presumed Validity and Ownership– Registered Trademark); Instruction 15.13 (Infringement—Elements–Ownership–Generally); Instruction 15.18 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test).

"In trademark cases, it is not necessary for plaintiff to prove actual damage or injury to state a prima facie case of infringement. Injunctive relief does not require that injury be proven. . . . All that must be proven to establish liability and the need for an injunction against infringement is the likelihood of confusion." 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:2.50 (5th ed. 2019).

Generally, the burden of proof in infringement rests with the plaintiff. *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th Cir. 2002) ("Overall, the plaintiff retains the ultimate burden of persuasion in a trademark infringement action, namely proof of infringement. A necessary concomitant to proving infringement is, of course, having a valid trademark; there can be no infringement of an invalid mark.").

Although 15 U.S.C. § 1114(1) provides protection only to registered marks and 15 U.S.C. § 1125(a)(1) protects against infringement of unregistered and registered marks, trade dress and false advertising, the Ninth Circuit has explained that "[d]espite these differences, the analysis [for infringement] under the two provisions is sometimes identical." *Brookfield Commc'ns, Inc., v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046-47 n.8 (9th Cir. 1999) (noting that trademark infringement elements under either § 1114 or § 1125(a) involve plaintiff showing (1) that defendant used mark confusingly similar to (2) valid, protectable trademark (3) that was owned by plaintiff).

In *LegalForce RAPC Worldwide, PC v. LegalForce, Inc*., 124 F.4th 1122, 1125-26 (9th Cir. 2024), the Ninth Circuit held that using a mark to advertise and sell a defendant's equity shares is not a sale of goods or services and does not constitute trademark infringement. Equity is not a good or a service for purposes of the Lanham Act.

Revised March 2025

15.7 Infringement—Elements and Burden of Proof—Trade Dress (15 U.S.C. § 1125(a)(1))

On the plaintiff [*name*]'s claim for trade dress infringement, the plaintiff [*name*] has the burden of proving by a preponderance of the evidence each of the following elements:

First, [*describe the plaintiff's trade dress*] is distinctive;

Second, the plaintiff [*name*] owns [*describe the plaintiff's trade dress*] as trade dress;

Third, the [*describe the plaintiff's trade dress*] is nonfunctional; and

Fourth, the defendant [*name*] used [*describe trade dress used by the defendant*] [trade dress similar to [*describe the plaintiff's trade dress*]] without the consent of the plaintiff [*name*] in a manner that is likely to cause confusion among ordinary consumers as to the source, sponsorship, affiliation, or approval of the [plaintiff's] [defendant's] goods.

If you find that each of the elements on which the plaintiff [*name*] has the burden of proof has been proved, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

To provide the jury further guidance on the first element of this instruction (distinctiveness), use Instruction 15.9 (Infringement—Elements—Validity—Unregistered Marks), Instruction 15.10 (Infringement–Elements—Validity—Unregistered Marks—Distinctiveness) (*see* the Comment to that instruction on Modifications for Trade Dress cases), and 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). If the trade dress is registered, use Instruction 15.8 (Infringement—Elements—Presumed Validity and Ownership—Registered Trademark). For an instruction providing guidance on the third element of this instruction, *see* Instruction 15.12 (Infringement—Elements—Validity—Trade Dress—Non–Functionality Requirement). For an instruction covering the fourth element of this instruction, *see* Instruction 15.18 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test).

See Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 808 (9th Cir. 2003) ("Generally, to recover for trade dress infringement under [15 U.S.C.] § 1125, a plaintiff must show that 'its trade dress is protectable and that defendant's use of the same or similar trade dress is likely to confuse consumers.' A trade dress is protectable if it is 'nonfunctional and has acquired secondary meaning and if its imitation creates a likelihood of consumer confusion.'") (citations omitted); *Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.,* 349 F.3d 601, 603 (9th Cir. 2003) (citing as elements of proof necessary to show infringement of bottle design: "(1) nonfunctionality, (2) distinctiveness and (3) likelihood of confusion").

"In trademark cases, it is not necessary for plaintiff to prove actual damage or injury to state a prima facie case of infringement. Injunctive relief does not require that injury be proven. . . . All that must be proven to establish liability and the need for an injunction against infringement is the likelihood of confusion." 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:2.50 (5th ed. 2019).

Revised March 2024

15.8 Infringement—Elements—Presumed Validity and Ownership—Registered Trademark (15 U.S.C. §§ 1057, 1065 and 1115)

I gave you instruction number [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*] that requires the plaintiff [*name*] to prove by a preponderance of the evidence [that the trademark is valid and protectable] [and] [that the plaintiff owns the trademark]. [A valid trademark is a word, name, symbol, device, or any combination of these, that indicates the source of goods and distinguishes those goods from the goods of others. A trademark becomes protectable after it is used in commerce.]

One way for the plaintiff [*name*] to prove trademark validity is to show that the trademark is registered. An owner of a trademark may obtain a certificate of registration issued by the United States Patent and Trademark Office and may submit that certificate as evidence [of the validity and protectability of the trademark] [and] [of the certificate holder's ownership of the trademark] covered by that certificate.

Exhibit __ is a certificate of registration from the United States Patent and Trademark Office. [It was submitted by the plaintiff as proof of the validity of the trademark [and] [that the plaintiff owns the trademark].]

The facts recited in this certificate are: [*summarize certificate entries as to validity and ownership of trademark, as well as limitations on the registration*]. However, the defendant [*name*] submitted evidence to dispute these recitals. The defendant [*name*] alleges that the certificate cannot be considered proof of [[validity] [and] [ownership]] of the trademark because [*insert § 1115(b) defense[s] raised by defendant, e.g., the trademark had been abandoned, the defendant's fair use of the trademark, etc.*].

[Unless the defendant [*name*] proves by a preponderance of the evidence that *[insert § 1115(b) defense[s] raised by defendant, e.g., that the trademark was abandoned*], you must consider the trademark to be conclusively proved as [[valid] [and] [owned by the plaintiff [*name*]]]. However, if the defendant [*name*] shows that [*insert § 1115(b) defense[s] raised, e.g., the trademark was abandoned*] by a preponderance of the evidence, then the facts stated in the certificate [*summarize certificate entries disputed by defendant's proof*] are no longer conclusively presumed to be correct. [You should then consider whether all of the evidence admitted in this case, in addition to this certificate of registration, shows by a preponderance of the evidence that the trademark is [[valid] [and] [owned by the plaintiff]], as I explain in Instruction [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*].

Comment

Use this instruction when the plaintiff relies on registration of the mark to show two elements of the plaintiff's burden: ownership and validity. *See* Instruction 15.6 (Infringement—Elements and Burden of Proof—Trademark). This instruction is a model for any case involving

an incontestable trademark in which the defendant introduces a defense or exception under 15 U.S.C. § 1115(b). If other types of registration are at issue in the case, modification should be made as indicated in the supplementary section of these comments, below. Modify this instruction as necessary in any case involving service marks, trade dress, collective trade or service marks, or certification trade or service marks, by inserting such terms in lieu of the word "trademark" in this instruction.

See 15 U.S.C. § 1115(b). When a trademark has been registered, the defendant has the burden of proving that its registration is defective or subject to a defense. The defendant must show such defect or defense by a preponderance of the evidence. *See Sengoku Works Ltd. v. RMC Int'l, Ltd.,* 96 F.3d 1217, 1219-20 (9th Cir. 1996) (noting that registrant is granted presumption of ownership under the Lanham Act and "challenger must overcome this presumption by a preponderance of the evidence"*)*; *Vuitton et Fils S.A. v. J. Young Enters., Inc.*, 644 F.2d 769, 775-76 (9th Cir. 1981) (noting that presumption of validity of registered mark must be overcome by preponderance of the evidence); *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 783 (9th Cir. 2002) ("Validity… is a threshold issue. On this point, the plaintiff in an infringement action with a registered mark is given the prima facie or presumptive advantage on the issue of validity, thus shifting the burden of production to the defendant to prove otherwise … Or, to put it as we did in *Vuitton*, the defendant then bears the burden with respect to invalidity. Once the presumption of validity is overcome, however, the mark's registration is merely evidence 'of registration,' nothing more. This approach can be characterized as rebutting the prima facie case or 'piercing the presumption.'") (summary judgment case). *See also Social Techs. v. Apple*, 4 F.4th 811, 821-22 (9th Cir. 2021) (discussing petition to cancel registration).

Incontestability

This instruction treats the issue of incontestability as determined. When registered more than five years and if certain statutory formalities are met (*e.g.*, timely filed affidavit of continuous use), a registration is considered "incontestable" evidence of the registrant's right to use the mark. 15 U.S.C. § 1065. It is considered conclusive evidence of the validity of the registered mark as well as the registrant's ownership. 15 U.S.C. § 1115(b). The "validity and legal protectability, as well as the [registrant's] ownership therein, are all conclusively presumed," when a mark's registration becomes incontestable, subject to certain defenses. *Brookfield Commc'ns Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1046-47 n.10 (9th Cir. 1999).

On the other hand, if the mark has been registered less than five years, it is considered "contestable" and provides only prima facie evidence of the validity and ownership of the mark, subject to any limitations stated in the registration. 15 U.S.C. §§ 1057(b) & 1115(a). *See Applied Info. Sci. Corp. v. eBAY, Inc.*, 511 F.3d 966, 971 (9th Cir. 2007) (holding that plaintiff could not rely on mark's registration for pants as applying to its use in shirt market).

If the judge decides to place the issue of contestability before the jury, the following paragraph should be added in lieu of the fifth paragraph:

[Unless the defendant proves by a preponderance of the evidence that [*insert § 1115(b) defense[s] raised by defendant, e.g., that the mark was abandoned*], you must consider the trademark to be conclusively proved as [[valid] [and] [owned by the plaintiff]], [if the mark has been in continuous use for five consecutive years after the date of registration in the certificate and other statutory formalities have been observed]. However, if the defendant shows that [*insert § 1115(b) defense[s] raised, e.g., that the mark was abandoned*] by a preponderance of the evidence, then the facts stated in the certificate [*summarize certificate entries disputed by defendant's proof*] are no longer conclusively presumed to be correct. [You should then consider whether all of the evidence admitted in this case, in addition to this certificate of registration, shows by a preponderance of the evidence that the mark is [[valid] [and] [owned by the plaintiff]], as I explain in Instruction] [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*].]

If the plaintiff is not the registrant of the mark, but a successor to the registrant, this instruction should be modified to explain the plaintiff's claim of ownership of the mark, e.g., through assignment, exclusive license, etc. *See*, *e.g.*, Instructions 15.15 (Trademark Ownership—Assignee); 15.16 (Trademark Ownership—Licensee); 15.17 (Trademark Ownership—Merchant or Distributor).

If the defendant's proof of an exception or defense to incontestability includes the same elements as a defense to infringement, the last paragraph of the instruction should be modified so that if the jury finds the defense or exception to incontestability true by a preponderance of the evidence, the defendant is entitled to a verdict on the infringement charge.

Incontestable Marks: If registered more than five years and if certain statutory formalities are met (e.g., timely filed affidavit of continuous use), the registration is considered "incontestable" evidence of the registrant's right to use the mark. *See* 15 U.S.C.§ 1065. It is considered conclusive evidence of the validity of the registered mark as well as the registrant's ownership. *See* 15 U.S.C.§ 1115(b). Although a mark may become incontestable, it is still subject to certain defenses or defects, set forth in 15 U.S.C. § 1115. 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:147 (5th ed. 2019). McCarthy suggests that there are at least twenty-one exceptions to incontestability provided in 15 U.S.C. §§ 1115(b), 1065 and 1064. *Id.* The most frequently asserted exceptions include (1) fraud in obtaining the registration or incontestable status; (2) abandonment; (3) use of the mark to misrepresent source; (4) fair use of the mark; (5) limited territorial defense by a junior user; (6) prior registration by the defendant; (7) use of mark to violate federal antitrust law; (8) the mark is functional; and (9) equitable defenses, such as laches, estoppel and acquiescence. *See* 15 U.S.C. § 1115(b). *See also* 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:149 (5th ed. 2019).

Incontestability Exceptions and Defenses: If one of the exceptions to incontestable registration is proven, the registration is no longer conclusive but merely prima facie evidence of the registrant's right to ownership and the mark's validity (*i.e.*, it becomes simply a contestable registration). *See* 15 U.S.C. § 1115(b). *See also Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469

U.S. 189, 199 n.6 (1985). Accordingly, the fact-finder must still consider whether the defendant has met the defendant's burden of showing by a preponderance of the evidence that the mark is not valid or that the plaintiff does not own it. *See* 6 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:153 (5th ed. 2019). Similarly, if the defendant asserts and presents sufficient proof of an exception or defense to incontestability, the court will have to instruct the jury on the elements of these exceptions or defenses. As a practical matter, proof of an "exception to incontestability" may be sufficient to prove a defense to infringement as well.

Contestable Marks: The effect of a contestable registration is to shift the burden of proof of ownership and validity from the plaintiff to the defendant. The defendant must rebut the presumption of plaintiff's exclusive right to use the trademark by a preponderance of the evidence. *See Vuitton et Fils S.A.*, 644 F.2d at 775; *Maktab Tarighe Oveyssi Shah Maghsoudi v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999) (noting that registration of mark constitutes prima facie evidence that registrant owns mark and is constructive notice of claimed ownership of mark by registrant).

Other Registration Issues

Use this instruction in any case involving an incontestable trademark in which the defendant introduces a defense or exception under 15 U.S.C. § 1115(b). If other types of registration are at issue in the case, modification to the instruction should be made as follows:

A. Disputed Incontestable Registration: When the defendant disputes the incontestability of a trademark, use this instruction.

B. Disputed Contestable Registration: When a trademark registration is still contestable because the trademark has not been in continuous use for five consecutive years after the date of registration under 15 U.S.C. § 1065, substitute the following after the third paragraph of this instruction, if the defendant disputes the facts stated in the registration certificate:

> The law presumes that the facts noted in the certificate are true, that is that [*summarize certificate entries as to validity and ownership of trademark, as well as limitations on the registration*]. But this presumption can be overcome by sufficient evidence to the contrary. Here, the defendant has presented evidence that [*summarize defendant's contentions, e.g., that the trademark was abandoned, the registration was fraudulently obtained, etc.*]. If the defendant can show this evidence by a preponderance of the evidence, then you cannot rely on the registration as stating the truth of the matters contained therein.

C. Undisputed Incontestable Registration: When defendant does not dispute an incontestable trademark, substitute the following paragraph in lieu of the fourth and fifth paragraphs of this instruction:

In this case, there is no dispute that the plaintiff received a registration for the trademark [*identify the trademark*] and this registration is now "incontestable" under the trademark laws. This means that the plaintiff's registration of the trademark is conclusive evidence of plaintiff's ownership of that trademark and that the trademark is valid and protectable. [I instruct you that for purposes of Instruction [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*], you must find that the plaintiff owned the trademark and that the trademark was valid and protectable.]

D. Undisputed Contestable Registration: When a trademark registration is still "contestable" because the trademark has not been in continuous use for five consecutive years after the date of registration under 15 U.S.C. § 1065, but the defendant does not dispute the facts stated in the contestable registration certificate, substitute the following after the first and second paragraphs of this instruction:

The law presumes that the facts noted in the certificate are true. This means you must find that the plaintiff owned the trademark and that the trademark was valid and protectable as indicated by the registration certificate.

Revised June 2024

15.9 Infringement—Elements—Validity—Unregistered Marks

[*Describe plaintiff's alleged trademark*] is not registered. Unregistered trademarks can be valid and provide the trademark owner with the exclusive right to use that mark. Instruction [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*] requires the plaintiff to prove by a preponderance of the evidence that [*describe plaintiff's alleged trademark*] is valid. A valid trademark is a [word, name, symbol, device, or any combination of these items] that is either:

(1) inherently distinctive; or

(2) descriptive but has acquired a secondary meaning.

[Only a valid trademark can be infringed.] [Only if you determine plaintiff proved by a preponderance of the evidence that the [*describe plaintiff's alleged trademark*] is a valid trademark should you consider whether plaintiff owns it or whether defendant's actions infringed it.]

Only if you determine that [*describe plaintiff's alleged trademark*] is not inherently distinctive should you consider whether it is descriptive but became distinctive through the development of secondary meaning, as I will direct in Instruction [*insert number of instruction regarding Distinctiveness and Secondary Meaning, e.g., 15.11*].

Comment

A trademark is valid only if it is inherently distinctive or if it became distinctive through development of secondary meaning. *Two Pesos, Inc. v. Taco Cabana, Int'l Inc.,* 932 F.2d 1113 (5th Cir. 1991), *aff'd*, 505 U.S. 763, 769 (1992). Whether a symbol acquired secondary meaning is a question of fact for the jury. *See Transgo, Inc. v. Ajac Transmissions Parts Corp.*, 768 F.2d 1001, 1015 (9th Cir. 1985).

In trademark law, the Supreme Court has noted that using the term "secondary meaning" when referring to descriptive non-word marks that have acquired "source-identifying meaning" "is often a misnomer in that context, since non-word marks ordinarily have no 'primary' meaning" and "[c]larity might well be served by using the term 'acquired meaning' in both the word-mark and the non-word-mark contexts." *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 211 n.* (2000). However, the Ninth Circuit continues to use the term "secondary meaning." *See Jason Scott Collection, Inc. v. Trendily Furniture, LLC*, 68 F.4th 1203, 1212 (9th Cir. 2023) ("To obtain a judgment for trade dress infringement, a plaintiff must prove: (1) that its claimed trade dress is nonfunctional; (2) that its claimed dress serves a source-identifying role either because it is inherently distinctive or has acquired secondary meaning; and (3) that the defendant's product or service creates a likelihood of consumer confusion." (citation omitted)); *P & P Imps. LLC v. Johnson Enters., LLC*, 46 F.4th 953, 958 (9th Cir. 2022) (enumerating elements for trade dress infringement as "(1) the trade dress is nonfunctional, (2) the trade dress has acquired secondary meaning, and (3) there is a substantial likelihood of confusion between

[the parties'] products." (citation omitted)). If using the term "acquired meaning" would provide clarity for the jury in trademark cases involving non-word marks, the court may opt to use "acquired meaning" throughout its instructions in place of or in addition to "secondary meaning."

See also Instruction 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning).

Revised June 2024

15.10 Infringement—Elements—Validity—Unregistered Marks—Distinctiveness Strength as a Likelihood of Confusion Factor

In deciding whether there is infringement, an important factor is how strong and well-known a trademark is. [*See* Instruction *insert number of instruction regarding Sleekcraft Test, e.g., 15.18* for determining whether the trademark used by the defendant creates for consumers a likelihood of confusion with the plaintiff's trademark].]

The plaintiff [*name*] asserts [*insert claimed trademark*] is a valid and protectable trademark for its [*insert goods used in connection with the trademark*]. [The plaintiff [*name*] contends that the defendant [*name*]'s use of [those] [similar] words in connection with the defendant's [*insert the defendant's product or service or business*] [[infringes plaintiff [*name*]'s trademark] [and] [is likely to cause confusion about the [origin of goods] [business] associated with that trademark.]] To determine if the plaintiff [*name*] has met its burden of showing that [*insert claimed trademark*] is a valid trademark, you should classify it on the spectrum of trademark distinctiveness that I will explain in this instruction.

[An inherently distinctive trademark is a word, symbol or device, or combination of them, which intrinsically identifies a particular source of a good in the market. The law assumes that an inherently distinctive trademark is one that almost automatically tells a consumer that it refers to a brand or a source for a product, and that consumers will be predisposed to equate the trademark with the source of a product.]

Spectrum of Marks

Trademark law provides [great] protection to distinctive or strong trademarks. Conversely, trademarks that are not as distinctive or strong are called "weak" trademarks and receive less protection from infringing uses. Trademarks that are not distinctive are not entitled to any trademark protection. To decide trademark protectability, you must consider whether a trademark is inherently distinctive. Trademarks are grouped into five categories according to their relative [strength] [distinctiveness]. These five categories are, in order of strength or distinctiveness: arbitrary (which is inherently distinctive), fanciful (also inherently distinctive), suggestive (also inherently distinctive), descriptive (which is protected only if it acquires in consumers' minds a "secondary meaning" which I explain in Instruction [*insert number of instruction regarding secondary meaning, e.g., 15.11*] and generic names (which are entitled to no protection).

Arbitrary Trademarks. The first category of trademarks is arbitrary trademarks. They are considered strong marks and are clearly protectable. They involve the arbitrary use of a word to designate the source of a product. Such a trademark is a word that in no way describes or has any relevance to the particular product it is meant to identify. It may be a common word used in an unfamiliar way.

For instance, the common word "apple" became a strong and inherently distinctive trademark when used by a company to identify the personal computers that company sold. The

company's use of the word "apple" was arbitrary because "apple" did not describe and was not related to what the computer was, its components, ingredients, quality, or characteristics. "Apple" was being used in an arbitrary way to designate for consumers that the computer comes from a particular manufacturer or source.

Fanciful (or Coined) Trademarks. The next category is fanciful (or coined) trademarks. These trademarks are also inherently distinctive and have the same level of strength as arbitrary marks. They are therefore automatically protectable. Fanciful trademarks involve the use of a fanciful or fictitious word to designate the source of a product. Such a trademark is a word that in no way describes or has any relevance to the particular product it is meant to identify. It is a newly created (coined) word, which is used solely as a trademark. For instance, the fanciful trademark "Google" is a strong and inherently distinctive trademark, identifying a prominent technology company. "Google" is a coined word that had no meaning or application prior to its use as the name of this company.

Suggestive Trademarks. The third category is suggestive trademarks. These trademarks are inherently distinctive but are considered weaker than arbitrary and fanciful trademarks. Unlike arbitrary trademarks, [which are in no way related to what the product is or its components, quality, or characteristics,] suggestive trademarks imply some characteristic or quality of the product to which they are attached. If the consumer must use imagination or any type of multi-stage reasoning to understand the trademark's significance, then the trademark does not describe the product's features, but merely suggests them.

A suggestive use of a word involves consumers associating the qualities the word suggests to the product to which the word is attached. For example, when "apple" is used not to indicate a certain company's computers, but rather "Apple–A–Day" Vitamins, it is being used as a suggestive trademark. "Apple" does not describe what the vitamins are. However, consumers may come to associate the healthfulness of "an apple a day keeping the doctor away" with the supposed benefits of taking "Apple–A–Day" Vitamins.

Descriptive Trademarks. The fourth category is descriptive trademarks. These trademarks directly identify or describe some aspect, characteristic, or quality of the product to which they are affixed in a straightforward way that requires no exercise of imagination to be understood.

For instance, the word "apple" is descriptive when used in the trademark "CranApple" to designate a cranberry-apple juice. It directly describes ingredients of the juice. Other common types of descriptive trademarks identify where a product comes from, or the name of the person who makes or sells the product. Thus, the words "Apple Valley Juice" affixed to cider from the California town of Apple Valley is a descriptive trademark because it geographically describes where the cider comes from. Similarly, a descriptive trademark can be the personal name of the person who makes or sells the product. So, if a farmer in Apple Valley, Judy Brown, sold her cider under the label "Judy's Juice" (rather than "Apple Valley Juice") she is making a descriptive use of her personal name to indicate and describe who produced the apple cider [and she is using her first name as a descriptive trademark.]

Generic Names. The fifth and final category is entitled to no protection at all. They are called generic terms and are the names of a product, as opposed to a term that designates the source of a product. Generic names are part of our common language that we need to identify all such similar products. A generic name is a name for the product on which it appears.

If the primary significance of the alleged mark is to name the type of product rather than the manufacturer, the term is a generic name and cannot be a valid trademark. If the majority of [relevant] consumers would understand the term to name the type of product rather than the manufacturer, the primary significance of the term is generic and not entitled to protection as a trademark.

The word "apple" can be used as a generic name and not be entitled to any trademark protection. This occurs when the word is used to identify the fruit from an apple tree.

The computer maker who uses the word "apple" as a trademark to identify its personal computer, or the vitamin maker who uses that word as a trademark on vitamins, has no claim for trademark infringement against the grocer who used that same word to indicate the fruit sold in a store. As used by the grocer, the word is generic and does not indicate any particular source of the product. As applied to the fruit, "apple" is simply a commonly used name for what is being sold.

Mark Distinctiveness and Validity

If you decide that [*insert the plaintiff's claimed trademark*] is arbitrary or suggestive, it is considered inherently distinctive. An inherently distinctive trademark is valid and protectable.

On the other hand, if you determine that [*insert the plaintiff's claimed trademark*] is generic, it cannot be distinctive and therefore is not valid nor protectable. You must render a verdict for the defendant [*name*] on the charge of infringement in Instruction [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.6*].

If you decide that [*insert the plaintiff's claimed trademark*] is descriptive, you will not know if the trademark is valid or invalid until you consider whether it has gained distinctiveness by the acquisition of secondary meaning, which I explain in Instruction [*insert number of instruction regarding secondary meaning, e.g., 15.11*].

Comment

This instruction sets forth the first prong of the two-prong test of mark strength used in the Ninth Circuit. The second prong of the test is found in Instruction 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). This instruction sets out the general standard for assessing the strength of a trademark. It may require modifications in a case involving service marks, collective trade or service marks, or certification trade or service marks.

Often this adjustment is possible by inserting the term service, service mark, collective mark, etc., in lieu of the words "product" and "trademark" in this instruction.

While the elements of mark distinctiveness are the same in determining mark validity or likelihood of confusion, use Instruction 15.19 (Infringement—Likelihood of Confusion—Factor—Strength [Distinctiveness] of Trademark) for assessing distinctiveness in the context of alleged infringement of a valid mark; use this instruction (15.10) if distinctiveness goes to the question of whether a mark can be protected as a valid mark.

This instruction is based upon the test in *Abercrombie & Fitch Co. v. Hunting World, Inc*., 537 F.2d 4, 10-11 (2d Cir.1976) (setting forth spectrum of marks from arbitrary to generic). The Supreme Court notes this case sets out a "classic test" of trademark strength. *Wal-Mart Stores, Inc., v. Samara Brothers, Inc.*, 529 U.S. 205, 210 (2000). It sets out the traditional spectrum of marks. *See*, *e.g.*, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) ("Marks are often classified in categories of generally increasing distinctiveness; following the classical formulation ... they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful."); *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631-32 (9th Cir. 2005) (noting that trademarks are divided into five categories: arbitrary, fanciful, suggestive, descriptive, and generic). *See also KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc*., 328 F.3d 1061, 1067 (9th Cir. 2003) (noting that trademark categories of arbitrary and fanciful "are deemed inherently distinctive and are automatically entitled to protection"), *vacated on other grounds*, 543 U.S. 111 (2004). *U.S. Pat. & Trademark Off. v. Booking.com B.V.*, 591 U.S. 549, 564 (2020) (rejecting proposition that combining generic term with ".com" yields generic composite).

A mark's strength is equivalent to its distinctiveness. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992). Since 1988, the Ninth Circuit has utilized a two-prong test of mark strength. *See GoTo.Com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir. 2000) ("'strength' of the trademark is evaluated in terms of its conceptual strength and commercial strength"). Generally, use of the second prong is appropriate in cases of descriptive or suggestive marks. *See*, *e.g.*, *Japan Telecom, Inc. v. Japan Telecom Am., Inc*., 287 F.3d 866, 873-74 (9th Cir. 2002) (noting that descriptive trade name is not protectable unless owner shows it acquired secondary meaning and applying strength of mark analysis to tradename).

Traditionally, the Ninth Circuit has found that even though a mark has become incontestable, this status does not necessarily mean that it is a strong mark. *See Miss World (UK) Ltd. v. Mrs. Am. Pageants*, 856 F.2d 1445, 1449 (9th Cir. 1988). However, in 2003, the Ninth Circuit appeared to indicate that when a mark has become incontestable, it is presumed to be a strong mark as well. The Circuit noted that "[a] descriptive mark that has become incontestable is conclusively presumed to have acquired secondary meaning. *Entrepreneur Media,* [*Inc. v. Smith*,] 279 F.3d [1135, 1142 n.3 (9th Cir. 2002)]. This means that a defendant in a trademark infringement action cannot assert that an incontestable mark is invalid because it is descriptive and lacks secondary meaning. *Park 'N Fly*, 469 U.S. at 205." *KP Permanent Make-Up, Inc.*, 328 F.3d at 1071. *See id.* (holding that trademark's "incontestable registration is conclusive evidence that the mark is non-descriptive or has acquired secondary meaning, and there is no need to

require a showing of secondary meaning" of the mark), *vacated on other grounds*, 543 U.S. 111 (2004).

Supplemental Instructions

Trade Dress Adjustments

In *Wal-Mart Stores Inc. v. Samara Brothers, Inc.*, 529 U.S. 205, 212-13 (2000), the Supreme Court distinguished between two types of trade dress: product packaging and product design. Product packaging can be inherently distinctive, product design trade dress can never be classified as "inherently distinctive." *Id.* at 212-14 (noting that product packaging "is most often to identify the source of the product," while product design is "almost invariably . . . intended not to identify the source, but to render the product itself more useful or more appealing"). To be protected under § 43(a) of the Lanham Act, a product design must have secondary meaning.

Wal-Mart requires courts to distinguish between trade dress that is product packaging and trade dress that is product design. Courts generally "use[] a common sense approach" in making that classification, "asking what is the primary product that the buyer is purchasing." 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8:12 (5th ed. 2019) (collecting cases). In close cases, "courts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning." *Wal-Mart Stores*, 529 U.S. at 215. *See* Instruction 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning).

In cases involving product packaging, neither the Supreme Court nor the Ninth Circuit has adopted a specific test for determining inherent distinctiveness. The Ninth Circuit has generally suggested that inherently distinctive trade dress involves an overall impression that is arbitrary or uncommon. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc*., 826 F.2d 837, 844 (9th Cir. 1987) ("Fuddruckers claims trade dress protection for the impression created by a collection of common or functional elements of restaurant decor. Such an overall impression may receive protection, but it is simply not the sort of arbitrary or uncommon trade dress that might qualify as inherently distinctive." (citation omitted)). A combination of individual elements "that are separately unprotectable can be protected together as part of a trade dress." *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001).

Some courts apply the *Abercrombie* spectrum for word marks to assess whether product packaging is inherently distinctive. *E.g.*, *Fun-Damental Too, Ltd. v. Gemmy Indus.*, 111 F.3d 993, 1000-01 (2d Cir. 1997) ("We see no reason to abandon the *Abercrombie* distinctiveness spectrum in this [product packaging] case."). But courts and scholars have noted that the *Abercrombie* categories are not always useful outside the word mark context. *E.g.*, *Amazing Spaces, Inc. v. Metro Mini Storage*, 608 F.3d 225, 243 (5th Cir. 2010) (holding that *Abercrombie* test was unhelpful in assessing whether star symbol was inherently distinctive but declining to hold that *Abercrombie* test was never appropriate outside word mark context); MCCARTHY ON TRADEMARKS § 8:13 ("Only in rare cases do the word categories make sense when applied to the shapes, images and colors of product packaging.").

Other courts have used the test announced in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344-46 (C.C.P.A. 1977), either alone or in combination with the *Abercrombie* categories, to assess whether product packaging is inherently distinctive. *E.g.*, *Mattel, Inc. v. MGA Entertainment, Inc.*, 782 F. Supp. 2d 911, 1004 (C.D. Cal. 2011) (applying *Seabrook* test and observing that *Seabrook* test is the "predominant test for inherent distinctiveness" of product packaging); *Yankee Candle Co. v. Bridgewater Candle Co.*, 259 F.3d 25, 42 (1st Cir. 2001) ("[W]e have found it appropriate to supplement the somewhat bare-boned *Abercrombie* categories with the questions asked in *Seabrook*."). The *Seabrook* test requires that packaging trade dress meet four elements to be inherently distinctive: (1) the design or shape should not be a common, basic shape or design; (2) it should be unique or unusual in a particular field; (3) it should not be a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods or services which consumers would view as mere ornamentation; (4) it should create a separate commercial impression apart from any accompanying words. *Seabrook Foods*, 568 F.2d at 1344-46. *But see* MCCARTHY ON TRADEMARKS § 8:13 (contending that fourth element does not belong on the list because it does not relate to inherent distinctiveness).

This instruction can be modified for trade dress cases involving packaging by inserting the words "trade dress" in lieu of "trademark" and the words "symbol" or "design" in lieu of the term "word" when they are used in this instruction. Courts might also remove references to the "Spectrum of Marks," including everything that follows the "Spectrum of Marks" heading. After the first three paragraphs, the following should be added for trade dress cases:

> Trade dress is inherently distinctive if the total impression it gives the consumer is one that identifies it as coming from a specific origin or source, whether or not that source is known to the consumer. Inherently distinctive trade dress helps consumers identify the product, distinguishing the plaintiff's product from that produced by others, such as the defendant.
>
> You should consider the total visual impression of the trade dress, not each element of it in isolation. Inherently distinctive trade dress often uses common, non-distinctive elements when considered individually. However, it is the combination of elements and the total impression that the dress conveys to the consumer that shows if it is distinctive.

Revised November 2024

15.11 Infringement—Elements—Validity—Distinctiveness—Secondary Meaning

If you determined in Instruction [*insert number of instruction e.g. 15.10*] that [*identify plaintiff's claimed trademark*] is descriptive, you must consider the recognition that the mark has among prospective consumers to determine whether it is valid and protectable even though it is descriptive. This market recognition is called the trademark's "secondary meaning."

A [word] [name] [symbol] [device] [or any combination of these items] acquires a secondary meaning when it has been used in such a way that its primary significance in the minds of the prospective consumers is not the product itself, but the identification of the product with a single source, regardless of whether consumers know who or what that source is. You must find that the preponderance of the evidence shows that a significant number of the consuming public associates the [*identify the alleged trademark*] with a single source, to find that it has acquired secondary meaning.

When you are determining whether [*describe symbol or term*] has acquired a secondary meaning, consider the following factors:

(1) Consumer Perception. Whether the people who purchase the product that bears the claimed trademark associate the trademark with the [[owner] [assignee] [licensee]];

(2) Advertisement. To what degree and in what manner the [[owner] [assignee] [licensee]] may have advertised under the claimed trademark;

(3) Demonstrated Utility. Whether the [[owner] [assignee] [licensee]] successfully used this trademark to increase the sales of its product;

(4) Extent of Use. The length of time and manner in which the [[owner] [assignee] [licensee]] used the claimed trademark;

(5) Exclusivity. Whether the [[owner's] [assignee's] [licensee's]] use of the claimed trademark was exclusive;

(6) Copying. Whether the defendant intentionally copied the [[owner's] [assignee's] [licensee's]] trademark;

(7) Actual Confusion. Whether the defendant's use of the plaintiff's trademark has led to actual confusion among a significant number of consumers; and

(8) [*Insert any other factors that bear on secondary meaning*]

The presence or absence of any factor should not necessarily resolve whether [*identify the alleged trademark*] has acquired secondary meaning.

Descriptive marks are protectable only to the extent you find they acquired distinctiveness [[through secondary meaning] [by the public coming to associate the mark with the [owner of the mark] [a particular source]]. Descriptive marks are entitled to protection only as broad as the secondary meaning they have acquired, if any. If they have acquired no secondary meaning, they are entitled to no protection and cannot be considered a valid mark.

[The plaintiff [*name*] has the burden of proving that the [*identify plaintiff's trademark*] has acquired a secondary meaning.] [The defendant [*name*] has the burden of proving that the [*identify plaintiff's trademark*] lacks a secondary meaning.]

The mere fact that the plaintiff [*name*] is using [*describe symbol or term*], or that the plaintiff [*name*] began using it before the defendant [*name*], does not mean that the trademark has acquired secondary meaning. There is no particular length of time that a trademark must be used before it acquires a secondary meaning.

Comment

The test for secondary meaning is the same whether for product configuration or trade dress or trademark cases. *See Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 876 n. 6 (9th Cir. 1999). The penultimate paragraph to this instruction specifies two different burdens of persuasion as to secondary meaning. The burden is on the plaintiff if the mark is not registered, in which case part of the plaintiff's burden is to show the mark is distinctive (either by being inherently distinctive or by having acquired secondary meaning), and hence protectable. *See Self–Realization Fellowship Church v. Ananda*, 59 F.3d 902, 910-12 (9th Cir. 1995) (holding that plaintiff's unregistered mark was descriptive and lacked secondary meaning, and therefore, was invalid). *See also Filipino Yellow Pages. v. Asian J. Publ'ns*, 198 F.3d 1143, 1151-52 (9th Cir. 1999). On the other hand, if the mark is validly registered but has not yet attained incontestable status, the plaintiff's registration carries a presumption of secondary meaning, because registered marks are presumed distinctive. *Americana Trading, Inc., v. Russ Berrie & Co*., 966 F.2d 1284, 1287 (9th Cir. 1992). In that case, if the defendant wishes to argue that the plaintiff's mark was weak (e.g., was descriptive) and not entitled to trademark protection, the burden is on the defendant to prove that secondary meaning has not attached. *Id.*

Failure to list actual confusion as one of the factors the jury should consider in determining whether the plaintiff had established secondary meaning is not harmless error. *See Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 987 (9th Cir. 1995). *See also Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 822-23 (9th Cir. 1996) ("Factors considered in determining whether a secondary meaning has been achieved include: (1) whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer, (2) the degree and manner of advertising under the claimed trademark, (3) the length and manner of use of the claimed trademark, and (4) whether use of the claimed trademark has been exclusive." (citation omitted)).

Secondary meaning can be proved in a variety of ways, including "direct consumer testimony; survey evidence; exclusivity, manner, and length of use of mark; amount and manner

of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant." *P & P Imps. LLC v. Johnson Enters., LLC*, 46 F.4th 953, 961 (9th Cir. 2022). Because "[t]here is no logical reason for the precise copying save an attempt to realize upon a secondary meaning that is in existence," *Audio Fid., Inc. v. High Fid. Recordings, Inc.*, 283 F.2d 551, 558 (9th Cir. 1960), "[p]roof of copying strongly supports an inference of secondary meaning," *P & P Imps. LLC*, 46 F.4th at 961. The plaintiff does not have to prove that the defendant intended to confuse consumers and pass off its products as the plaintiffs to raise such an inference. Secondary meaning can also be established by evidence of a likelihood of confusion. *Id.* Evidence of retailer confusion may be appropriate when a market involves specialized distributors that leads to retailers functionally operating as consumers. *Jason Scott Collection, Inc. v. Trendily Furniture, LLC*, 68 F.4th 1203, 1217 (9th Cir. 2023).

When a mark is not in the public domain, a showing of secondary meaning requires a mark to be associated in common thought, not merely with the thing produced, but with the source or origin of the production, even if anonymous. *See Maljack Prods. v. Goodtimes Home Video Corp.*, 81 F.3d 881, 887 (9th Cir. 1996) (holding that when movie title is not in public domain, showing of secondary meaning only requires proof that public associates movie title with single source, even if anonymous); *Grupo Gigante SA De CV v. Dallo & Co*., *Inc.*, 391 F.3d 1088, 1095-96 (9th Cir. 2004) ("Secondary meaning refers to a mark's actual ability to trigger in consumers' minds a link between a product or service and the source of that product or service. That is, a mark has secondary meaning 'when, in the minds of the public, the primary significance of a mark is to identify the source of the product rather than the product itself.' Determining whether a mark has secondary meaning requires taking into account at least seven considerations") (quoting *Wal-Mart Stores, Inc. v. Samara Bros., Inc*., 529 U.S. 205, 211 (2000)). This rule also applies in trade dress infringement cases. *See P & P Imps. LLC*, 46 F.4th at 960 (holding with respect to trade dress that "[s]econdary meaning exists when in the minds of the public, the primary significance of [the trade dress] is to identify the source of the product rather than the product itself," and this requirement is satisfied by evidence establishing "association with only a single—even anonymous—source" (internal quotation marks omitted)).

"While evidence of a manufacturer's sales, advertising and promotional activities may be relevant in determining secondary meaning, the true test of secondary meaning is the effectiveness of this effort to create it. " *International Jensen v. Metrosound U.S.A.*, 4 F.3d 819, 824-25 (9th Cir. 1993) (citation omitted). The Ninth Circuit has said that when a descriptive mark is especially weak, "we require a 'strong showing of strong secondary meaning.'" *Japan Telecom, Inc.*, 287 F.3d at 873 (citations omitted).

Regarding how a descriptive word acquires a secondary meaning, the following text may be added to the second paragraph of this instruction:

> Only if a descriptive word acquires secondary meaning will the law protect it as a trademark. For instance, the words a business might use for its special oil change service, "10-Minute Oil Change," are descriptive when used in connection with this service because it literally describes a feature or attribute of the product or service available there. However, over time, the consuming public may come to associate

> those four words with a service offered only by that particular garage. The words would no longer designate their original ordinary, descriptive meaning. Instead the words have taken on a new, "secondary" meaning to identify the particular garage that performs the oil change.

"Secondary meaning" may be referred to as "acquired meaning." *See Wal-Mart Stores, Inc.*, 529 U.S. at 211, n.*. If it is not inherently distinctive, a mark may acquire distinctiveness if it has developed secondary meaning. *Id. at* 211. This means the mark's primary significance in the public mind is to identify the source of the product rather than the product itself. *Id.* But the term secondary meaning "is often a misnomer," particularly when applied to non-word marks. *Id.* "Clarity might well be served by using the term 'acquired meaning' in both the word-mark and the non-word mark contexts" rather than the term "secondary meaning." *Id.* However, the Ninth Circuit continues to use the term "secondary meaning." *See Jason Scott Collection, Inc. v. Trendily Furniture, LLC*, 68 F.4th 1203, 1212 (9th Cir. 2023) ("To obtain a judgment for trade dress infringement, a plaintiff must prove: (1) that its claimed trade dress is nonfunctional; (2) that its claimed dress serves a source-identifying role either because it is inherently distinctive or has acquired secondary meaning; and (3) that the defendant's product or service creates a likelihood of consumer confusion." (citation omitted)); *P & P Imps. LLC v. Johnson Enters., LLC*, 46 F.4th 953, 958 (9th Cir. 2022) (enumerating elements for trade dress infringement as "(1) the trade dress is nonfunctional, (2) the trade dress has acquired secondary meaning, and (3) there is a substantial likelihood of confusion between [the parties'] products." (citation omitted)). If using the term "acquired meaning" would provide clarity for the jury in trademark cases involving non-word marks, the court may opt to use "acquired meaning" throughout its instructions in place of or in addition to "secondary meaning."

Revised June 2024

15.12 Infringement—Elements—Validity—Trade Dress—Non-Functionality Requirement

For a product's design to be protected under trademark law, the design must be non-functional.

[A product may be functional in either of two ways. They are referred to as "utilitarian functionality" and "aesthetic functionality."]

A claimed trade dress has [utilitarian] functionality if it is essential to the use or purpose of a product or affects its cost or quality. To determine whether this definition is satisfied, you should consider the following factors:

(1) whether the design yields a utilitarian advantage in how well the product works;

(2) whether alternative designs are available;

(3) whether advertising touts the utilitarian advantages of the design; and

(4) whether the particular design results from a comparatively simple or inexpensive method of manufacture.

No one factor is dispositive; all should be weighed together.

[A claimed trade dress has aesthetic functionality if it serves an aesthetic purpose wholly independent of any source identifying function, such that the trade dress's protection under trademark law would impose a significant non-reputation-related competitive disadvantage on its owner's competitors. The inquiry is whether, if one seller were given exclusive rights to use the claimed trade dress, other sellers would be forced to use alternative designs that make their products more costly to sell, or for which consumers' willingness to pay would be lower for reasons having nothing to do with the reputation of any source (e.g., the alternative designs would not have as much intrinsic aesthetic appeal).]

[The plaintiff [*name*] has the burden of proving non-functionality by a preponderance of the evidence [to show that the trade dress is valid and protected from infringement].]

Comment

In *Blumenthal Distributing, Inc. v. Herman Miller, Inc*., 963 F.3d 859 (9th Cir. 2020), the Ninth Circuit rejected a portion of an earlier version of this model instruction. Accordingly, this instruction has been completely revised to reflect the holding in that case. Also, the district court should consider modifying this instruction if only utilitarian or aesthetic functionality is at issue, and not both.

It is reversible error to fail to give an instruction defining non-functionality in a trade dress case. *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 842-43 (9th Cir. 1987).

Functionality is a question of fact. *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 613 (9th Cir. 1989).

"The relationship between trademark protection and functionality is well established: 'The physical details and design of a product may be protected under the trademark laws only if they are nonfunctional.'" *Tie Tech, Inc. v. Kinedyne Corp.*, 296 F.3d 778, 782 (9th Cir. 2002). For a description of the four-factor test of functionality, *see Disc Gold Ass'n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006-09 (9th Cir. 1998). *See also Int'l Jensen v. Metrosound U.S.A.*, 4 F.3d 819, 822-23 (9th Cir. 1993) (setting forth a three-factor test); *Talking Rain Beverage Co. Inc. v. S. Beach Beverage Co.,* 349 F.3d 601, 603 (9th Cir. 2003) (applying four factor test from *Disc Gold*). The definition of functionality is reflected in *TrafFix Devices, Inc. v. Mktg. Displays, Inc*., 532 U.S. 23, 33 (2001) (referring to the "traditional rule" set forth in *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc*., 456 U.S. 844, 850 n. 10 (1982)).

The plaintiff asserting infringement of unregistered trade dress has the burden of proving nonfunctionality. 15 U.S.C. § 1125(a)(3) ("In a civil action for trade dress infringement … for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional."). Because registration is prima facie evidence of validity, the defendant has the burden of proving functionality when the trade dress in question is registered on the principal register. *Vuitton Et Fils S.A. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 775 (9th Cir. 1981) (with functionality at issue, explaining that, "under the Lanham Act, registration and entry of a trademark on the Principal Register … shifts the burden of proof from the plaintiff, who would have to establish his right to exclusive use in a common law infringement action, to the defendant, who must introduce sufficient evidence to rebut the presumption of plaintiff's right to such protected use"); 15 U.S.C. § 1115(a) (providing that any registration issued under the Act "shall be prima facie evidence of registrant's exclusive right to use the registered mark in commerce"). Functionality is an issue of fact. *Vuitton Et Fils S.A.*, 644 F.2d at 775.

In the Ninth Circuit, the plaintiff bears the burden of proving nonfunctionality. *See Sega Enters. Ltd., v. Accolade, Inc.,* 977 F.2d 1510, 1530-31 (9th Cir. 1992) (holding that nonfunctionality is question of fact, which plaintiff bears burden of proving); 15 U.S.C. § 1125(a)(3) ("In a civil action for trade dress infringement . . . for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional."). However, in some circuits, functionality is treated as an affirmative defense. *See*, *e.g.*, *Vaughan Mfg. Co. v. Brikam Int'l*, 814 F.2d 346, 349 (7th Cir. 1987); *Stormy Clime Ltd. v. ProGroup, Inc.*, 809 F.2d 971, 974 (2d Cir. 1987).

"[I]f exclusive use of a feature would put competitors at a significant non-reputation-related disadvantage, the feature in general terms is functional." *Qualitex Co. v. Jacobson Products Co*., 514 U.S. 159, 165 (1995). *See also Inwood Lab'ys, Inc..*, 456 U.S. at 850 n.10 ("In general terms, a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article."); *Vuitton et Fils S.A. v. J. Young Enters*., 644 F.2d 769, 774 (9th Cir. 1981) ("Functional features of a product are features 'which constitute the actual benefit that the consumer wishes to purchase, as distinguished from an assurance that a

particular entity made, sponsored, or endorsed a product."') (quoting *Int'l Ord. of Job's Daughters v. Lindeburg & Co.*, 633 F.2d 912, 917 (9th Cir. 1980)).

Functionality usually arises in cases of non-word symbols or devices, such as designs or container shapes. In the Ninth Circuit, functionality involves measuring the effect of a design or physical detail in the marketplace. A functional design has aesthetic appeal, or increases the utility or practicality of the product, or saves the consumer or producer time or money. *See Fabrica, Inc. v. El Dorado Corp.*, 697 F.2d 890 (9th Cir. 1983); *TrafFix Devices, Inc.,* 532 U.S. at 29-30 (noting that it is a "well-established rule that trade dress protection may not be claimed for product features that are functional" and that a prior patent for features claimed as trade dress can be "strong evidence" of functionality which adds "great weight to the statutory presumption" that trade dress features "are deemed functional until proved otherwise by the party seeking trade dress protection" and who will carry a "heavy burden" of showing that the feature "is merely an ornamental, incidental, or arbitrary aspect" of the trade dress rather than functional to the trade dress).

If features of claimed trade dress are all functional, plaintiff must show that the features are combined in a nonfunctional way to avoid finding of functionality. *HWE, Inc. v. JB Rsch., Inc.*, 993 F.2d 694, 696 (9th Cir. 1993).

On the trademark registration of trade dress and its implications for infringement litigation, *see Tie Tech, Inc.*, 296 F.3d at 782-83.

Revised November 2024

15.13 Infringement—Elements—Ownership—Generally

The law entitles the trademark owner to exclude others from using that trademark. A person acquires the right to exclude others from using a trademark by lawfully using it first in the marketplace or by lawfully using it before the alleged infringer. [A person also acquires the right to exclude others from using a trademark if industry or public usage creates, for a majority of [relevant] consumers, an association between the person and the mark prior to the alleged infringer's use.]

[If you find the plaintiff [*name*]'s [*describe trademark*] to be valid [that is, inherently distinctive] you must consider whether the plaintiff [*name*] used the [*describe trademark*] as a trademark for plaintiff [*name*]'s [*identify the plaintiff's product*] before the defendant [*name*] began to use the [*describe trademark*] to market its [*identify the defendant's product*] in the area where the plaintiff [*name*] sells its [*identify the plaintiff's product*].]

[A trademark is "used" for purposes of this instruction when it is transported or sold in commerce and the trademark is attached to the product, or placed on its label or container [or if that is not practical, placed on documents associated with the goods or their sale].]

[If the plaintiff [*name*] has not shown by a preponderance of the evidence that the plaintiff [*name*] used [*describe trademark*] before the defendant [*name*], then you cannot conclude that the plaintiff [*name*] is the owner of the trademark [for purposes of Instruction [*insert number of instruction regarding Infringement—Elements—Presumed Validity and Ownership—Registered Marks, e.g., 15.8*].]

Comment

This instruction is for use in a case involving an inherently distinctive mark. It reflects the traditional concept that trademark rights belong to the party who first makes an actual use of the trademark in business. *See Rolley v. Younghusband*, 204 F.2d 209 (9th Cir. 1953). However, if the trademark at issue is not inherently distinctive (but its validity was shown by proof of it acquiring secondary meaning), this instruction is not appropriate. In such a case, priority is established by the party who first uses the mark with secondary meaning. Accordingly, the plaintiff must prove the existence of secondary meaning in its trademark at the time and place that the junior user first began use of that mark. *Carter-Wallace, Inc. v. Procter & Gamble Co*., 434 F.2d 794 (9th Cir. 1970).

In trademark law, the standard test of ownership is priority of use. *See Sengoku Works Ltd. v. RMC Int'l, Ltd.*, 96 F.3d 1217, 1219 (9th Cir. 1996). "To acquire ownership of a trademark it is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services." *Id.* A person also acquires the right to exclude others from using a trademark if a person acquires a "constructive use date" under 15 U.S.C. § 1051, or an "extension of protection" under 15 U.S.C. § 1141. *Lodestar Anstalt v. Bacardi & Co.*, 31 F.4th 1228, 1237-38

(9th Cir. 2022). The test of ownership is different if a person acquires a right to exclude under either of those statutes. *See id*.

Sometimes, mark ownership is a jury question. When the jury is to determine the ownership of a mark between manufacturer and distributor, *see Sengoku Works Ltd.*, 96 F.3d at 1219 (reviewing jury instructions and factors for determining such mark ownership). *See* Comment following Instruction 15.17 (Trademark Ownership—Merchant or Distributor). *See also* Instruction 15.16 (Trademark Ownership—Licensee). In such a case, this instruction should be revised accordingly. The determination of priority of ownership is a question for the jury when it is a genuine issue of material fact. *See Grupo Gigante SA De CV v. Dallo & Co., Inc.,* 391 F.3d 1088, 1093-94, 1098-99, 1106-07 (9th Cir. 2004) (expressing no opinion as to whether evidence presented in case was sufficient as matter of law to establish that mark was famous for application of trademark priority principles).

In cases when the validity of the trademark is a result of its acquiring secondary meaning (e.g., a descriptive mark with secondary meaning), add the following in lieu of the third and fourth paragraphs:

> If the plaintiff's [*describe trademark*] is not inherently distinctive, but the plaintiff has shown that the trademark is descriptive and that the trademark has acquired secondary meaning, the plaintiff has the burden of showing by a preponderance of the evidence that the plaintiff's [*describe trademark*] had gained secondary meaning before the defendant first began to use the [*describe trademark*].

Trademark priority and the right to exclude others from using a trademark depend not merely on first use but on *lawful* first use. *See AK Futures LLC v. Boyd Street Distro, LLC*, 35 F.4th 682, 689 (9th Cir. 2022) (citing *CreAgri, Inc. v. USANA Health Scis., Inc.*, 474 F.3d 626, 630 (9th Cir. 2007)). However, "illegal activity of insufficient gravity or connection to a mark's use in commerce might not defeat an otherwise valid trademark." *Id.*

Under the "Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks," June 27, 1989, T.I.A.S. No. 03-1102, commonly known as the "Madrid Protocol," an individual or entity that possesses trademark protection in another country can apply for an extension of protection in the U.S., which will function like trademark registration in the U.S., without requiring use of the mark in U.S. commerce. *Lodestar Anstalt*, 31 F.4th at 1237-38. Any such applicant will receive protection, even if the applicant is unable to show that it has used the relevant mark in U.S. commerce, so long as the applicant declares a bona fide intent to use the mark in U.S. commerce. *Id.* at 1238. However, a failure to file a statement of use in commerce within the applicable time period will result in the cancellation of the extension of protection under 15 U.S.C. § 1141. *Id.* at 1238. *See* 15 U.S.C. § 1127 (defining "commerce" to include "all commerce which may lawfully be regulated by Congress.").

However, under the Madrid Protocol, an entity or individual with a right of priority will only be entitled to bring an infringement action after it begins actual use (as opposed to mere constructive use) of the mark in question. *Id.* at 1250. Moreover, that entity or individual will be

entitled to bring an infringement action, even if it only began to use the mark after the competing user had already begun to do so. *Id.* That said, to retain a right of priority, the mark's use must be a bona fide use and a genuine commercial endeavor, rather than a mere effort to retain rights in the mark. *Id.* at 1255. And, to assert a claim for infringement, the individual with a right of priority would still have to demonstrate the requisite likelihood of confusion and prevail against the defendant's applicable defenses. *Id.* at 1251. When considering likelihood of confusion, the Ninth Circuit has held it is erroneous to adopt a categorical temporal rule that excludes consideration of uses of the trademark made by the senior trademark holder *after* the infringer uses the mark. *Id.* at 1253.

Revised March 2024

15.14 Infringement—Elements—Ownership—Priority Through Tacking

Rights in a trademark are determined by the date of the mark's first use in commerce. The party who first uses a mark in commerce is said to have priority over other users, and the [plaintiff] [defendant] asserts that [his] [her] [*other pronoun*] mark has priority through the doctrine of "tacking." Tacking recognizes that trademark users ought to be permitted to make certain modifications to their marks over time without losing priority.

Tacking is available when the original and revised marks are "legal equivalents" in that they create the same, continuing commercial impression without material differences between them so that consumers would consider them the same mark. In other words, viewing the marks in context and in their entirety, an ordinary purchaser could perceive them as conveying the same idea or meaning.

Comment

The standard for tacking is exceedingly strict and applies only in "exceptionally narrow" circumstances. *Hana Fin., Inc. v. Hana Bank*, 735 F.3d 1158, 1164 (9th Cir. 2013), *aff'd*, 574 U.S. 418 (2015). A trademark user may tack the date of the user's first use of an earlier mark onto a subsequent mark only when "two marks are so similar that consumers generally would regard them as essentially the same." *Id.* (quoting *Brookfield Commc'ns, Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1048 (9th Cir. 1999)). The standard for tacking is considerably higher than the standard for likelihood of confusion. *Id.* at 1164-65. For examples of types of marks that have been properly and improperly tacked, *see* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §§ 17:26-28 (5th ed. 2019).

Revised March 2024

15.15 Trademark Ownership—Assignee
(15 U.S.C. § 1060)

The owner of a trademark may [transfer] [sell] [give] to another the owner's interest in the trademark, that is, the right to exclude others from using the mark. This [transfer] [sale] [gift] is called an assignment, and the person to whom this right is assigned is called an assignee and becomes the owner of the trademark.

[The assignment must be in writing and signed.] To be enforceable, the assignment must include the goodwill of the business connected with the mark.

An assignee may enforce this right to exclude others from using the trademark in an action for [infringement] [or] [*insert applicable form of unfair competition from 15 U.S.C. § 1125(a)*].

[The plaintiff is an assignee, who has received an enforceable ownership interest.]

Comment

"The purpose behind requiring that goodwill accompany the assigned mark is to maintain the continuity of the product or service symbolized by the mark and thereby avoid deceiving or confusing customers." *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1289 (9th Cir. 1992). Whether goodwill is transferred is a factual issue. *Id.*

A trademark assigned without the underlying goodwill (including a transfer of underlying assets or rights) is sometimes referred to as a trademark "assigned in gross," which fails to transfer enforceable trademark rights. "The law is well settled that there are no rights in a trademark alone and that no rights can be transferred apart from the business with which the mark has been associated." *Mister Donut of Am., Inc. v. Mr. Donut, Inc.*, 418 F.2d 838, 842 (9th Cir. 1969). For a discussion of the goodwill requirement, see 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 18:2 (5th ed. 2019).

In a case brought under the Lanham Act, a signed writing is necessary for an assignment to be valid. 15 U.S.C. § 1060. A signed writing is not required to prove an assignment in a common law trademark infringement claim. MCCARTHY, *supra*, § 18:11.

Revised March 2024

15.16 Trademark Ownership—Licensee

Comment

Although 15 U.S.C. § 1060 requires that assignments of registrations be written, a license can be oral.

The Ninth Circuit Court of Appeals has not addressed whether a licensee of a registered mark can bring a trademark infringement lawsuit under § 32 of the Lanham Act. But the plain text of that section and the majority view strongly suggest that a licensee cannot. *See* 15 U.S.C. § 1114(1) (An infringer "shall be liable in a civil action by the registrant."); 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:3 (5th ed. 2019) (collecting cases). *But see Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 158-59 (1st Cir. 1977) (indicating, in dictum, that licensee would be able to bring trademark infringement claim under § 32 of the Lanham Act if it was an "exclusive licensee").

For trademark infringement actions of unregistered marks, a licensee has a right to sue under Section 43(a) of the Lanham Act. *See* 15 U.S.C. § 1125(a)(1) (allowing for a trademark action "by any person who believes that he or she is likely to be damaged by" trademark infringement).

For a definition of licensee, see Instruction 15.1 (Preliminary Instruction—Trademark).

Revised March 2025

15.17 Trademark Ownership—Merchant or Distributor

A [merchant] [distributor] may own a trademark that identifies products the [merchant] [distributor] sells even though the products are manufactured by someone else.

Comment

When a dispute arises between a manufacturer and distributor, the courts first look to any agreement between the parties regarding trademark rights. *Sengoku Works Ltd. v. RMC Int'l, Ltd*., 96 F.3d 1217, 1220-21 (9th Cir. 1996). In the absence of an agreement, the manufacturer is presumed to own the trademark. *Id. See also Watec Co., Ltd. v. Liu*, 403 F.3d 645, 652 (9th Cir. 2005) (noting that, in a case between a foreign manufacturer and a former exclusive American distributor who had an incontestably registered mark in U.S., one issue to consider as to ownership of the mark was whether the parties had entered into a contract that disposed of rights in the mark, and that issue was properly determined by the jury).

That presumption—in the absence of an agreement the manufacturer is presumed to own the trademark—can be rebutted. To rebut the presumption, the following factors may be considered:

(1) which party invented and first affixed the mark to the product;

(2) which party's name appeared with the trademark;

(3) which party maintained the product's quality and uniformity;

(4) which party does the public identify with the product and make complaints to; and

(5) which party possesses the goodwill associated with the product.

See Sengoku Works Ltd., 96 F.3d at 1220-21, and *Premier Dental Prods. Co. v. Darby Dental Supply Co*., 794 F.2d 850, 853-54 (3d Cir. 1986).

Revised March 2024

15.18 Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test (15 U.S.C. §§ 1114(1) and 1125(a))

The plaintiff [*name*] asserts that [*insert trademark*] is a trademark for its goods. The plaintiff [*name*] contends that the defendant [*name*]'s use of [*insert the defendant's mark*] in connection with the defendant [*name*]'s [*insert the defendant's product*] infringes the plaintiff [*name*]'s trademark because it is likely to cause confusion.

You must consider whether a reasonably prudent consumer in the marketplace is likely to be confused as to the origin of the goods bearing one of the marks.

I will suggest some factors you should consider. You should not focus on any one factor to resolve whether there was a likelihood of confusion, because you must consider all relevant evidence. As you consider the likelihood of confusion you should examine the following:

(1) Strength or Weakness of the Plaintiff's Mark. The more distinctive the plaintiff's mark is and the more the consuming public recognizes the plaintiff's trademark, the more likely it is that consumers would be confused about the source of the defendant's goods if the defendant uses a similar mark.

(2) The Defendant's Use of the Mark. If the defendant and the plaintiff use their trademarks on the same, related, or complementary kinds of goods, there may be a greater likelihood of confusion about the source of the goods than otherwise.

(3) Similarity of the Plaintiff's and the Defendant's Marks. If the overall impression created by the plaintiff's trademark in the marketplace is similar to that created by the defendant's trademark in [appearance] [sound] [or] [meaning], there is a greater chance [that consumers are likely to be confused by the defendant's use of a mark] [of likelihood of confusion]. [Similarities in appearance, sound or meaning weigh more heavily than differences in finding the marks are similar.]

(4) Actual Confusion. If the defendant's use of the plaintiff's trademark has led to instances of actual confusion, this strongly suggests a likelihood of confusion. However, actual confusion is not required for a finding of likelihood of confusion. Even if actual confusion did not occur, the defendant's use of the trademark may still be likely to cause confusion. As you consider whether the trademark used by the defendant creates for consumers a likelihood of confusion with the plaintiff's trademark, you should weigh any instances of actual confusion against the opportunities for such confusion. If the instances of actual confusion have been relatively frequent, you may find that there has been substantial actual confusion. If, by contrast, there is a very large volume of sales, but only a

few isolated instances of actual confusion, you may find that there has not been substantial actual confusion.

(5) The Defendant's Intent. Knowing use by the defendant of the plaintiff's trademark to identify similar goods may strongly show an intent to derive benefit from the reputation of the plaintiff's mark, suggesting an intent to cause a likelihood of confusion. On the other hand, even in the absence of proof that the defendant acted knowingly, the use of the plaintiff's trademark to identify similar goods may indicate a likelihood of confusion.

(6) Marketing/Advertising Channels. If the plaintiff's and the defendant's goods are likely to be sold in the same or similar stores or outlets, or advertised in similar media, this may increase the likelihood of confusion.

(7) Consumer's Degree of Care. The more sophisticated the potential buyers of the goods or the more costly the goods, the more careful and discriminating the reasonably prudent purchaser exercising ordinary caution may be. They may be less likely to be confused by similarities in the plaintiff's and the defendant's trademarks.

(8) Product Line Expansion. When the parties' products differ, you may consider how likely the plaintiff is to begin selling the products for which the defendant is using the plaintiff's trademark. If there is a strong possibility of expanding into the other party's market, there is a greater likelihood of confusion.

[(9) Other Factors. [*Insert any other factors that bear on likelihood of confusion*.]

Comment

The Ninth Circuit has often reaffirmed the validity of the eight-factor test from *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), *abrogated in part on other grounds by Mattel, Inc., v. Walking Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003), that is covered in this instruction. *See*, *e.g.*, *Multi Time Mach., Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 935 & n.1 (9th Cir. 2015) ("To analyze likelihood of confusion, we utilize the eight-factor test set forth in *Sleekcraft*. However, '[w]e have long cautioned that applying the *Sleekcraft* test is not like counting beans.'" quoting *One Indus. LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d 1154, 1162 (9th Cir. 2009))).

Because the eight likelihood-of-confusion factors identified in *Sleekcraft* are neither exclusive nor exhaustive, the Committee recommends that the judge instruct only on the factors that are relevant in the case presented to the jury. *See Brookfield Commc'ns Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999) ("[I]t is often possible to reach a conclusion with

respect to likelihood of confusion after considering only a subset of the [*Sleekcraft*] factors[,] . . . [which do] not purport to be exhaustive, and non-listed variables may often be quite important."); *Metro Pub., Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640 (9th Cir. 1993) ("Because each [*Sleekcraft*] factor is not necessarily relevant to every case, this list functions as a guide and is neither exhaustive nor exclusive." (citation and internal quotation omitted)), *abrogated in part on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

Moreover, the third paragraph in this instruction warns that a jury should not focus on any one factor and to consider all relevant evidence in assessing likelihood of confusion. *See Kendall-Jackson Winery Ltd. v. E. & J. Gallo Winery*, 150 F.3d 1042, 1052 n.13 (9th Cir. 1998) (elaborating further on instructions on *Sleekcraft* factors dealing with defendant's intent to cause confusion and causing actual confusion); *Brookfield Commc'ns*, 174 F.3d at 1054 ("A word of caution: This eight-factor [*Sleekcraft*] test for likelihood of confusion is pliant. Some factors are much more important than others, and the relative importance of each individual factor will be case-specific.").

Although a plaintiff "should not be automatically penalized for failing to present evidence that is not required," a jury is "free [to] use its common sense and experience when weighing the evidence offered by the parties, including the absence of a survey supporting [the plaintiff's] position." *BillFloat Inc. v. Collins Cash Inc*., 105 F.4th 1269, 1276-77 (9th Cir. 2024) (holding that a district court does not abuse its discretion by declining to instruct the jury, after the defendant offered survey evidence showing the absence of consumer confusion, that the jury "should not draw any inference about the existence or absence of consumer confusion from the fact that Plaintiff did not also offer market survey evidence").

Domain Names. In trademark infringement cases involving domain names, the Ninth Circuit has affirmed the use of an additional instruction indicating that three of the *Sleekcraft* factors: (i) similarity of plaintiff's and defendant's mark; (ii) relatedness of services; and (iii) simultaneous use of the as a marketing channel, otherwise known as the "Internet Troika," are of greater importance. *Internet Specialties W., Inc. v. Milon-Digiorgio Enters., Inc.*, 559 F.3d 985, 989 (9th Cir. 2009) (holding that law of Ninth Circuit "places greater import on the 'Internet Troika' in Internet cases").

Relevant Consumer Market. In *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190 (9th Cir. 2012), the Ninth Circuit assessed the relevant market as it examined one of the *Sleekcraft* factors—evidence of actual confusion. 683 F.3d at 1214. This instruction does not ask the jury or the court to first define the relevant consumer market before proceeding to the *Sleekcraft* factors; *but see Ironhawk Techs., Inc. v. Dropbox* 2 F.4th 1150 (9th Cir. 2021).

Counterfeit Marks. There is a presumption of a likelihood of confusion "when the offending mark is a counterfeit mark, or a mark virtually identical to a previously registered mark coupled with the intent to pass off or borrow from established good will." *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 945 (9th Cir. 2011) (approving instruction). A counterfeit mark is "a counterfeit of a mark that is registered . . . , whether or not the person

against whom relief is sought knew such mark was so registered." *Id.* (quoting 15 U.S.C. § 1116(d)(1)(B)(i)).

Reverse Confusion. The Ninth Circuit recognizes two theories of consumer confusion that support a claim of trademark infringement: forward confusion and reverse confusion. Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. By contrast, reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior mark holder. Reverse confusion is not a separate trademark claim that must be specifically pleaded. Instead, it is a theory of likely confusion that may be alleged by itself or in addition to forward confusion. *Marketquest Grp., Inc. v. BIC Corp*., 862 F.3d 927, 932, 937 (9th Cir. 2017); *see also Ironhawk Techs.*, 2 F.4th at 1165 ("Evidence of actual confusion by consumers is strong evidence of likelihood of confusion." Nevertheless, "failure to prove instances of actual confusion is not dispositive." (citations omitted)).

Revised September 2024

15.19 Infringement—Likelihood of Confusion—*Sleekcraft* Factor 1—Strength or Weakness of the Plaintiff's Mark

As I have instructed you, one factor to consider in determining whether the trademark used by the defendant [*name*] is likely to cause confusion with the plaintiff [*name*]'s mark is the strength of the plaintiff [*name*]'s mark. The strength of the trademark is determined by its distinctiveness and recognition in the marketplace. How strongly the plaintiff [*name*]'s trademark indicates that the goods or services come from a particular source is an important factor to consider in determining whether the trademark used by the defendant [*name*] is likely to cause confusion with the plaintiff [*name*]'s mark.

The Strength of Marks

The strength of a trademark is determined by its distinctiveness and recognition in the marketplace. The stronger a mark is, the greater the scope of protection the law provides. Measuring the strength of a trademark requires two steps.

First, consider its **conceptual strength**. This is where the mark is placed on the spectrum of distinctiveness of marks.

Second, consider the trademark's **commercial strength**. This is how much marketplace recognition the mark has.

Conceptual Strength: What is "conceptual strength?" All trademarks are grouped into two categories: either inherently distinctive or not inherently distinctive. If a mark is inherently distinctive it is immediately protected when first used. If it is not inherently distinctive, to become a legally protected mark, a designation must acquire distinctiveness in consumers' minds by becoming known as an indication of source of goods or services. The law calls this "secondary meaning." [*See* Instruction 15.11 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). If the plaintiff's mark is determined to be inherently distinctive, there will be no need to instruct the jury on acquiring a secondary meaning for the mark.]

For determining the conceptual strength of a mark, trademarks are grouped on a spectrum according to the nature of the mark. In the spectrum, there are three categories of word marks that the law regards as being inherently distinctive: arbitrary, fanciful (or coined), and suggestive. Descriptive word marks are regarded as not being inherently distinctive and require a secondary meaning to become a valid trademark. Finally, generic names have no conceptual strength.

Arbitrary marks are words that in no way describe or suggest the nature of the goods or services with which they are used. For example, "apple" is a common word, but it does not describe or suggest anything about the nature of "Apple" brand computers or smart phones. It is an arbitrary word when used as a mark on those products. Arbitrary trademarks are regarded as conceptually strong marks.

Fanciful (or Coined) marks are words that are created solely to serve as trademarks. For example, “Clorox” and “Exxon” are coined marks for cleaning products and gasoline, respectively. Fanciful trademarks are regarded as conceptually strong marks and are equal to arbitrary marks in conceptual strength.

Suggestive word marks are not as conceptually strong as arbitrary or fanciful marks. Suggestive trademarks suggest some characteristic or quality of the goods or services with which they are used. If the consumer must use her imagination or think through a series of steps to understand what the trademark is telling about the product, then the trademark does not directly describe the product’s features but merely suggests them. For example, the trademark “Tail Wagger” for dog food merely suggests that your dog will like the food. As another example, when “apple” is used in the mark “Apple-A-Day” for vitamins, it is being used as a suggestive trademark. “Apple” does not describe what the vitamins are. However, it suggests the healthfulness of “an apple a day keeping the doctor away” with the supposed benefits of taking “Apple-A-Day” vitamins.

Descriptive word marks are not inherently distinctive. These marks directly describe some characteristic, or quality of the goods or services with which they are used in a straightforward way that requires no exercise of imagination. For instance, the word “apple” is descriptive when used in the trademark “Tomapple” to designate a tomato-apple juice. It directly describes one of the ingredients of the juice.

Generic Names. If the primary significance of an alleged mark is to name the type of product or service on offer, rather than to name the manufacturer or provider, the primary significance of the term is generic, and it cannot be a valid trademark. Such terms are known as generic names.

The word “apple” can be used as a generic name. This occurs when the word is used to identify the fruit of an apple tree. The computer maker who uses the word “apple” as a trademark to identify its personal computer, or the vitamin maker who uses that word as a trademark on vitamins, has no claim for trademark infringement against a grocer who uses that same word to indicate fruit sold in its stores. As used by the grocer, the word is generic and does not indicate any particular source of the product. As applied to the fruit, “apple” is simply a commonly used name for what is being sold. Generic names have no conceptual strength.

Commercial Strength: What is “commercial strength?” Not all marks are equally well known. Trademark strength is somewhat like the renown of people. Only a very few people are famous enough to be widely known and recognized around the world. Most people are known and recognized only by a small circle of family and friends.

Some trademarks have commercial strength” in the sense they are widely known and recognized. A few trademarks are in the clearly “famous” category. Examples of “famous” marks include “Apple” for computers and smart phones, “Google” for a search engine, “Coca-Cola” for beverages, and “Toyota” for vehicles. Some trademarks have commercial strength only

in a certain market niche such as mountain climbing gear, plumbing supplies, or commercial airplane electronics equipment, but relatively weak outside that field. How well known a trademark is determined by actual marketplace recognition, which includes advertising expenditures and number of sales.

Commercial strength can transform a mark that is not conceptually strong into a strong mark.

Comment

These instructions relate to the strength of a trademark in the likelihood of confusion context. For strength of trademark analysis in the context of a mark validity determination, see Instruction 15.10 (Infringement—Elements—Validity—Unregistered Mark—Distinctiveness). Modify this instruction as necessary in any case involving service marks, collective trade or service marks, or certification trade or service marks, by inserting such terms in lieu of the word "trademark." An adjustment will also be necessary when the mark consists of a designation other than a word, such as an image, package appearance, or the shape of a product.

This instruction uses a two-prong test of mark strength. *See One Industries, LLC v. Jim O'Neal Distrib., Inc.*, 578 F.3d 1154, 1164 (9th Cir. 2009) (noting that after placing mark on spectrum of distinctiveness, "[t]he second step is to determine the strength of this mark in the marketplace"); *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1126-27 (9th Cir. 2014) ("To determine the strength of Pom Wonderful's 'POM' mark, we begin by placing it on the conceptual distinctiveness spectrum . . . [W]e next consider whether the 'POM' mark has achieved sufficient marketplace recognition to transform it into a strong mark." (citations omitted)); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:83 (5th ed. 2019).

This instruction supplements Instruction 15.18 (Infringement—Elements—Likelihood of Confusion—Factors—*Sleekcraft* Test) by explaining how one *Sleekcraft* factor–strength of mark–is determined and describing the traditional spectrum of marks. *See*, *e.g.*, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992) ("Marks are often classified in categories of generally increasing distinctiveness; following the classical formulation . . . they may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful."); *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631-32 (9th Cir. 2005) (noting that trademarks are divided into five categories: arbitrary, fanciful, suggestive, descriptive, and generic); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1291 (9th Cir. 1992) (holding that strength of mark is determined by its placement on continuum of marks from "generic," afforded no protection; through "descriptive" or "suggestive," given moderate protection; to "arbitrary" or "fanciful," awarded maximum protection). *See also U.S. Patent & Trademark Office v. Booking.com B.V.*, 591 U.S. 549, 560-64 (2020) (rejecting proposition that combining generic term with ".com" yields generic composite).

The examples of the multiple uses of the word "apple" given in this instruction when used on a variety of different products are from 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:71 (5th ed. 2019).

Commercial strength takes into account a mark's "actual marketplace recognition." *See Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1034-35 (9th Cir. 2010) (observing that advertising expenditures, number of sales of shoes, and placement in a variety of popular magazines supported a finding of commercial strength).

For evaluating the strength of a mark in reverse confusion cases, the questions are "whether consumers doing business with the senior user might mistakenly believe that they are dealing with the junior user" and what the conceptual strength of the senior mark is compared to the commercial strength of the junior mark. *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1162 (9th Cir. 2021) (quoting *JL Beverage Co., LLC v. Jim Beam Brands Co*., 828 F.3d 1098, 1107 (9th Cir. 2016)).

Revised March 2024

15.19A Expressive Works

The defendant [*name*]'s work, [*insert name of allegedly infringing work*], is an expressive work that is protected by the First Amendment.

Therefore, you may proceed to the likelihood-of-confusion test for trademark infringement only if the plaintiff [*name*] proves by a preponderance of the evidence that the defendant [*name*]'s use of the plaintiff's mark is explicitly misleading as to the source or content of [*insert name of allegedly infringing work*]. The defendant [*name*]'s use of the mark is explicitly misleading if it is an explicit indication, overt claim, or explicit misstatement that the [*insert name of allegedly infringing work*] is sponsored by or somehow associated with the plaintiff.

Comment

This instruction concerns the Ninth Circuit's adoption of the Second Circuit's *Rogers* test, *see Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), which applies to cases involving "expressive works," *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 264 (9th Cir. 2018), and "in which a trademark is used not to designate a work's source, but solely to perform some other expressive function," *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140, 154 (2023). "[P]recedents applying *Rogers* were borne of the idea that some trademarks have expressive value and that in those situations, trademark law's traditional likelihood-of-confusion test 'fails to account for the full weight of the public's interest in free expression.'" *Punchbowl, Inc. v. AJ Press, LLC*, 90 F.4th 1022, 1027-28 (9th Cir. 2024) (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 900 (9th Cir. 2002)). If *Rogers* applies to an allegedly infringing mark, "it often precludes claims of trademark infringement." *Id*. at 1028.

When faced with a *Rogers*-test challenge by a defendant, the court must make two threshold determinations. First, the court must determine if the alleged infringing trademark is used "at least in part" as a trademark. *Jack Daniel's*, 599 U.S. at 155-56 (holding that where the alleged infringing mark is used as a trademark, meaning "to identify or brand [a defendant's] goods or services," the *Rogers* test is not to be applied, even if the use is also expressive). That determination is informed by looking at the context in which the alleged infringing mark is being used, including "the way the product is marketed." *Id*. at 160; *see also Punchbowl*, 90 F.4th at 1031 (stating that, because the alleged infringer had filed trademark applications to register its mark and used its mark to identify and distinguish its new products, it was using its mark to "designate the source of its own goods—in other words, has used a trademark as a trademark." (quoting *Jack Daniel's*, 599 U.S. at 145)). Trademark use may require factual findings made by jury. *See* 1 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 3:4 (5th ed. 2019) ("The key question is whether, as actually used, the designation is likely to be recognized . . . as an indication of origin for this particular product or service.").

Second, if the alleged infringing mark is not used as a trademark, the court must determine if the defendant met its burden by showing that "its allegedly infringing use is part of an expressive work protected by the First Amendment." *Punchbowl*, 90 F.4th 1022, 1028;

Twentieth Century Fox Television v. Empire Distrib., 875 F.3d 1192, 1196 (9th Cir. 2017) (noting that whether a mark is an expressive work is a legal question); *Punchbowl*, 90 F.4th at 1031 (observing that, because *Jack Daniel's* was confined to a "narrow" point of law (that is, *Rogers* does not apply when a mark is used as a mark), "preexisting Ninth Circuit precedent adopting and applying *Rogers* otherwise remains intact"). A work is expressive if it "is communicating ideas or expressing points of view." *Mattel*, 296 F.3d at 900 (quoting *L.L. Bean, Inc. v. Drake Publishers*, *Inc.*, 811 F.2d 26, 29 (1st Cir. 1987)). *See also Brown v. Electronic Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013) (observing that the *Rogers* test protects an expressive work even if it is "not the expressive equal of Anna Karenina or Citizen Kane").

If the alleged infringing mark is not used as a trademark and is an expressive work, the *Rogers* test tasks the plaintiff with proving that the defendant's use of the plaintiff's mark is not artistically relevant to the work or explicitly misleads consumers as to the source or the content of the work. *Punchbowl*, 90 F.4th at 1028 (citing *Gordon*, 909 F.3d at 264). Because "the level of artistic relevance of the trademark or other identifying material to the work merely must be above zero," this instruction assumes that the artistic relevance prong will have been decided by the trial court. *See Gordon*, 909 F.3d at 269 (noting that "the slightest artistic relevance" will suffice to prove first prong of *Rogers* test).

If the plaintiff has not met its burden of proving no artistic relevance, then the jury must decide if the alleged infringing mark is explicitly misleading. The defendant's use of the mark is explicitly misleading only if it explicitly misleads consumers into believing that the plaintiff sponsored or is somehow associated with the allegedly infringing mark. *Gordon*, 909 F.3d at 270; *see also Punchbowl*, 90 F.4th at 1028 (observing that to be explicitly misleading, "there must be an explicit indication, overt claim, or explicit misstatement about the source of the work" (citation and internal quotation marks omitted)).

If the plaintiff meets this burden, the plaintiff must proceed to prove trademark infringement under the Lanham Act. *See* Instructions 15.6, 15.8, 15.9, and 15.8. If the jury finds that the allegedly infringing mark was not explicitly misleading, the trademark infringement claim falls outside the Lanham Act.

Revised June 2024

15.20 Derivative Liability—Inducing Infringement

A person is liable for trademark infringement by another if the person intentionally induced another to infringe the trademark.

The plaintiff [*name*] has the burden of proving each of the following by a preponderance of the evidence:

First, [*name of direct infringer*] infringed the plaintiff [*name*]'s trademark;

Second, the defendant [*name*] intentionally induced [*name of direct infringer*] to infringe plaintiff [*name*]'s trademark; and

Third, the plaintiff [*name*] was damaged by the infringement.

If you find that the plaintiff [*name*] has proved all these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

Regarding liability for inducing another to infringe a trademark, *see Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 853-54 (1982) ("[I]f a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer is contributorily responsible for any harm done as a result of the deceit [by the direct infringer]."). *See also Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 983-84 (9th Cir. 1999) (noting that one branch of contributory infringement occurs when defendant "intentionally induces a third party to infringe the plaintiff's mark").

Revised March 2024

15.21 Derivative Liability—Contributory Infringement

A person is liable for trademark infringement by another if the person [sells] [supplies] [goods] [services] to another knowing or having reason to know that the other person will use the [goods] [services] to infringe the plaintiff [*name*]'s trademark.

The plaintiff [*name*] has the burden of proving each of the following by a preponderance of the evidence:

First, the defendant [*name*] [sold] [supplied] [goods] [services] to [*name of direct infringer*];

Second, [*name of direct infringer*] used the [goods] [services] the defendant [*name*] [sold] [supplied] to infringe the plaintiff [*name*]'s trademark;

Third, the defendant [*name*] knew or had reason to know [*name of direct infringer*] [would use the goods to infringe the plaintiff [*name*]'s trademark] [was infringing the plaintiff [*name*]'s trademark and continued to supply its services]; [and]

[Fourth, the defendant [*name*] providing the services to [*name of direct infringer*] had direct control and monitoring of the instrumentality used by [*name of direct infringer*] to infringe; and]

[Fourth] [Fifth], the plaintiff [*name*] was damaged by the infringement.

If you find that the plaintiff [*name*] has proved all these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

See Comment following Instruction 15.20 (Derivative Liability—Inducing Infringement) and 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25.17 (5th ed. 2019) (discussing contributory infringement).

Regarding the elements of contributory infringement, *see Lockheed Martin Corp. v. Network Sols., Inc.*, 194 F.3d 980, 984-85 (9th Cir. 1999) (discussing elements of contributory infringement); *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712-13 (9th Cir. 1999) (discussing intent element of contributory infringement). *See also Mini Maid Servs. Co. v. Maid Brigade Sys*., 967 F.2d 1516, 1521 (11th Cir.1992) (noting that although *Inwood Labs. Inc. v. Ives Labs., Inc.*, 456 U.S. 844 (1982), involved relationship between manufacturers and retailers, its analysis is equally applicable to relationship between franchisor and franchisees).

Willful Blindness. A party meets the "knows or has reason to know" standard for contributory infringement if it is willfully blind to the infringement by a direct

infringer. *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995, 1001 (9th Cir. 2023) (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996)), *cert. denied*, (U.S. Feb. 20, 2024). Willful blindness requires both subjective belief that trademark infringement was likely occurring and deliberate actions to avoid learning about the infringement. *Id*. (citing *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013)). Willful blindness also requires more than general awareness of trademark infringement—the defendant must have specific knowledge of infringers or instances of infringement. *Id.* at 1002 (holding that an online marketplace need not search for trademark infringement on its website because contributory infringement based on a willful blindness theory requires the defendant to be aware of specific instances of infringement or specific infringers).

Services. When a defendant provides services to a direct infringer, a plaintiff may prevail on a claim of contributory trademark infringement if the defendant "continued to supply its services to one who it knew or had reason to know was engaging in trademark infringement" and the defendant had "[d]irect control and monitoring of the instrumentality used by a third party to infringe." *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 942 (9th Cir. 2011) (citation omitted). This applies to defendants providing servers or other Internet services. *Id*. In addition, there is no requirement that contributory infringement be intentional for liability to arise; it is sufficient if the defendants provided their services "with actual or constructive knowledge that the users of their services were engaging in trademark infringement." *Id*. at 943 ("An express finding of intent is not required.").

Statutory Damages. Statutory damages may be awarded against contributory infringers. *Id.* at 944-45.

Revised March 2024

15.22 Defenses—Abandonment—Affirmative Defense—Defendant's Burden of Proof (15 U.S.C. § 1127)

The [owner] [assignee] [licensee] of a trademark cannot exclude others from using the trademark if it has been abandoned.

The defendant [*name*] contends that the trademark has become unenforceable because the [owner] [assignee] [licensee] abandoned it. The defendant [*name*] has the burden of proving abandonment by [clear and convincing] [a preponderance of the] evidence.

The [owner] [assignor] [licensor] of a trademark abandons the right to exclusive use of the trademark when the [owner] [assignor] [licensor] does any one of the following:

First, discontinues its [good faith] use in the ordinary course of trade, intending not to resume using it;

Second, [acts] [or] [fails to act] so that the trademark's [primary significance] [primary meaning] [principal significance] [principal meaning] to prospective consumers has become the [good] itself and not the [producer of the good]; or

Third, fails to exercise adequate quality control over the [goods] sold under the trademark by a licensee.

Comment

Abandonment is defined in 15 U.S.C. § 1127, paragraph 16. *See also* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 17:18 (5th ed. 2019); *Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 938 (9th Cir. 2006) ("[A]bandonment requires *complete* cessation or discontinuance of trademark use."). Abandonment "is generally a factual issue." *Id.* at 937. As to abandonment by uncontrolled or "naked" licensing, *see Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 595-96 (9th Cir. 2002).

The defendant has the burden of proving abandonment. Evidence of non-use of the mark for three consecutive years is prima facie evidence of abandonment. *See* 15 U.S.C. § 1127; *Abdul-Jabbar v. Gen. Motors Corp*., 85 F.3d 407, 411-12 (9th Cir. 1996) (holding that prima facie showing of abandonment creates only a rebuttable presumption of abandonment). When the defendant proves the necessary consecutive years of non-use, the burden shifts to the plaintiff to go forward with evidence to prove that circumstances do not justify the inference of intent not to resume use. *Exxon Corp. v. Humble Expl. Co.*, 695 F.2d 96, 99 (5th Cir. 1983).

No Ninth Circuit case establishes the standard of proof required to prove abandonment as between "clear and convincing" and "preponderance." *See Electro Source, LLC*, 458 F.3d at 935 n.2 (noting that defendant, "as the party asserting abandonment, is required to 'strictly prove' its claim. . . . We do not need to flesh out the contours of the 'strict proof' standard because our

resolution of this summary judgment appeal rests on the proper legal construction of § 1127.") (collecting other "strict proof" cases); *Grocery Outlet, Inc. v. Albertson's Inc.*, 497 F.3d 949, 951 (9th Cir. 2007) (stating that because appellant waived its challenge to clear and convincing standard, the Ninth Circuit "need not resolve the burden of proof issue"). Except for the Federal Circuit's view that in inter-partes proceedings before the Trademark Trial and Appeal Board preponderance of the evidence is the standard of proof, "all" courts follow a clear and convincing standard of proof of abandonment. *See* MCCARTHY, *supra*, § 17:12.

Revised March 2024

15.23 Defenses—Continuous Prior Use Within Remote Geographic Area—Affirmative Defense (15 U.S.C. § 1115(b)(5))

An owner of a registered trademark may not exclude others who began using [that] [a confusingly similar] trademark in a geographic area, without knowledge of the owner's prior use of [the] [a similar] trademark elsewhere, and before the owner had [applied for registration of the] [registered the] [published the registered] trademark.

The defendant [*name*] contends that defendant [*name*] has the right to use the trademark within the [*specify geographic region*] area.

The defendant [*name*] has the burden of proving each of the following by a preponderance of the evidence:

First, the [defendant [*name*]] [defendant's assignor] [defendant's licensor] continuously used the trademark, without interruption, in [*geographic region where defendant claims prior use*];

Second, the [defendant [*name*]] [defendant's assignor] [defendant's licensor] began using the trademark without knowledge of the plaintiff [*name*]'s prior use elsewhere; and

Third, the defendant [*name*] used the trademark before the plaintiff [*name*] [applied for registration of the] [registered the] [published the registered] trademark.

Comment

The defendant has the burden of pleading and proving the elements of this defense. *See Philip Morris, Inc. v. Imperial Tobacco Co*., 251 F. Supp. 362, 379 (E.D. Va. 1965), *aff'd*, 401 F.2d 179 (4th Cir. 1968); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 26:44 (5th ed. 2019).

"Continuous" means lack of interruption. *See Casual Corner Assocs., Inc. v. Casual Stores of Nev., Inc.*, 493 F.2d 709, 712 (9th Cir. 1974). The dimensions of the geographic area are a question of fact, determined in terms of the relevant zones of sales, advertising, and reputation as of the date of the plaintiff's registration. *Consol. Freightways Corp. v. Consol. Forwarding, Inc.*, 156 U.S.P.Q. (BL) 99 (N.D. Ill. 1967); *see also Watec Co., Ltd. v. Liu*, 403 F.3d 645, 653 (9th Cir. 2005) (approving trial court jury instruction that claimant of senior rights to trademark "must demonstrate that it has sufficient market penetration in a specific locality or localities. Market penetration must consider such factors as the total dollar value of sales, the proportion or percentage of the [trademark] claimants' sales of trademarked products in relation to the marketplace in the locality in question. The actual doing of business rather than the mere use of a flyer or advertisement is required [f]or the establishment of common-law rights in any locality.").

Even if marks are precisely identical, there may be no infringement if the marks are in

different geographic areas. *See Brookfield Commc'ns Inc. v. W. Coast Ent. Corp.*, 174 F.3d 1036, 1054 (9th Cir. 1999) (acknowledging that some courts permit the use of identical marks if in distinct geographic area).

Revised March 2024

15.24 Defenses—"Classic" Fair Use
(15 U.S.C. § 1115(b)(4))

The [owner] [assignee] [licensee] of a trademark cannot exclude others from making a fair use of that trademark. A defendant makes fair use of a mark when the defendant uses it as other than a trademark, to accurately describe the [geographic location] [maker] of the defendant's own [product] [services].

The defendant [*name*] contends that it fairly used the trademark to describe the defendant [*name*]'s [product] [service]. The defendant [*name*] has the burden of proving its fair use of the mark by a preponderance of the evidence.

The defendant [*name*] makes fair use of a trademark when the defendant:

First, used the mark [other than as a trademark] [other than to distinguish the defendant [*name*]'s goods from the plaintiff [*name*]'s and to indicate the source of the defendant [*name*]'s goods];

Second, used the mark fairly and in good faith; and

Third, used the mark only to describe the defendant [*name*]'s goods or services [or their geographic location] as those of the defendant's [and not at all to describe the plaintiff [*name*]'s product].

Comment

The Ninth Circuit identifies two types of fair use—classic and nominative. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150 (9th Cir. 2002) ("We distinguish two types of fair use: 'classic fair use,' in which 'the defendant has used the plaintiff's mark to describe the defendant's *own* product,' and 'nominative fair use,' in which the defendant has used the plaintiff's mark 'to describe the *plaintiff's* product' for the purpose of, for example, comparison to the defendant's product."). *See* Instruction 15.25 (Defenses—Nominative Fair Use).

The elements of the classic fair use defense set out in this instruction are drawn from: *Cairns*, 292 F.3d at 1150-51 (noting that to establish a classic fair use defense under 15 U.S.C. § 1115, a defendant must prove: "1. Defendant's use of the term is not as a trademark or service mark; 2. Defendant uses the term 'fairly and in good faith'; and 3. [Defendant uses the term] '[o]nly to describe' its goods or services."); *see also Horphag Rsch. Ltd. v. Pellegrini*, 337 F.3d 1036, 1041 (9th Cir. 2003).

The first element of the instruction reflects the limitation of the statute, requiring that the mark at issue be descriptive. The classic fair use defense applies only when the trademark at issue has both a primary meaning and a secondary meaning. *Horphag*, 337 F.3d at 1041 ("The classic fair use defense 'applies only to marks that possess both a primary meaning and a secondary meaning—and only when the mark is used in its primary descriptive sense rather than

its secondary trademark sense.'" (quoting *Brother Records, Inc. v. Jardine*, 318 F.3d 900, 905-06 (9th Cir. 2003))).

In considering the second element of fair use, the Ninth Circuit suggests as "relevant factors for consideration by the jury in determining the fairness of the use are the degree of likely confusion, the strength of the trademark, the descriptive nature of the term for the product or service being offered by [plaintiff] and the availability of alternate descriptive terms, the extent of the use of the term prior to the registration of the trademark, and any differences among the times and contexts in which [plaintiff] has used the term." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 608-09 (9th Cir. 2005).

The third element of the instruction is drawn from the definition of "classic" fair use involving a defendant's use of "the plaintiff's mark *only* to describe his [defendant's] own product, *and not at all to describe the plaintiff's product*." *Cairns*, 292 F.3d at 1151.

Prior to 2004, the Ninth Circuit applied fair use analysis only when it had been shown that there was no likelihood of confusion. *Cairns*, 292 F.3d at 1150-1151 ("In our Circuit, the classic fair use defense is not available if there is a likelihood of customer confusion . . . The classic fair use analysis, therefore, only *complements* the likelihood of customer confusion analysis . . . ."). The circuit subsequently revisited this application to find that "[t]he fair use defense only comes into play once the party alleging infringement has shown by a preponderance of the evidence that confusion is likely." *KP Permanent Make-Up, Inc.*, 408 F.3d at 608-09 (citing *KP Permanent Make-Up v. Lasting Impression I, Inc.*, 543 U.S. 111, 118, 121-22 (2004) (holding that application of classic fair use as complement to determining likelihood of confusion is "a long stretch" because it requires defendant to prove no likelihood of confusion, reversing proper allocation of burden in which "the burden of proving likelihood of confusion rests with the plaintiff, and the fair use defendant has no free-standing need to show confusion unlikely"; determining that it follows (contrary to Court of Appeals' view) that "some possibility of consumer confusion must be compatible with fair use, and so it is")).

The fair use defense also applies in the trade dress infringement context. *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 809-10 (9th Cir. 2003) ("Applying…fair use standards to the trade dress context, we hold that a defendant's use is classic fair use where the defendant has used the plaintiff's dress to describe or identify the defendant's own product and not at all to describe or identify the plaintiff's product." (emphasis omitted)).

The circuit occasionally refers to other types of "fair use" besides the classic or nominative fair use tests. For example, the doctrine of trade dress functionality (rendering a feature of trade dress non-infringing) was described as "one form of fair use." *See id.* at 809 n.18 ("It is well-established that use of a product feature or trade dress that has become functional will qualify as one form of fair use."). An instruction governing functionality is provided at Civil Instruction 15.12 (Infringement—Elements—Validity—Trade Dress—Non-Functionality Requirement). Similarly, First Amendment considerations may also be referred to under the rubric of "fair use" and defeat a claim of infringement. *See*, *e.g.*, *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 901 (9th Cir. 2002) (noting that the Lanham Act applies "to artistic works

only where the public interest in avoiding consumer confusion outweighs the public interest in free expression"; adopting the Second Circuit's First Amendment balancing test for whether title of artistic work infringes). Parody may also be characterized as a form of fair use because such use is non-commercial. *See Walking Mountain Prods.*, 353 F.3d at 812 (holding that trademark owner "cannot use 'trademark laws to ... censor all parodies or satires which use [its] name' or dress" (quoting *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 309 (9th Cir. 1992))).

In cases involving a fair use defense to a theory claiming reverse confusion, *see Marketquest Group, Inc. v. BIC Corp*., 862 F.3d 927, 932, 937 (9th Cir. 2017).

Although federal registration presumptively entitles the senior user to nationwide protection, 15 U.S.C. § 1057(b), the Lanham Act preserves legal and equitable defenses that could have been asserted prior to registration, *id*. § 1115(a). Under this rule, already-established common law rights are carved out of the registrant's scope of protection. *Stone Creek, Inc. Omnia Italian Design, Inc*., 875 F.3d 426, 436 (9th Cir. 2017). The *Tea Rose-Rectanus* doctrine is a common law affirmative defense separate and apart from an underlying infringement claim, and the doctrine provides that common law trademark rights extend only to the territory where a mark is known and recognized, so a later user may sometimes acquire rights in pockets geographically remote from the first user's territory. *Id*. Addressing a split in the circuits, the Ninth Circuit concluded "that there is no good faith if the junior user had knowledge of the senior user's prior use." *Id*. at 437.

Revised March 2024

15.25 Defenses—Nominative Fair Use

The [owner] [assignee] [licensee] of a trademark cannot exclude others from making a nominative fair use of that trademark. A defendant makes nominative fair use of a mark when the defendant uses it as other than a trademark, to accurately [describe] [name] [identify] the plaintiff's product, even if the defendant's ultimate goal was to describe its own product.

The defendant [*name*] contends that it did not infringe the trademark because the alleged infringement was a nominative fair use of the trademark to [describe] [name] [identify] the plaintiff [*name*]'s product. The plaintiff [*name*] has the burden of proving, by a preponderance of the evidence, that the defendant [*name*]'s use of the mark does not meet the requirements of nominative fair use.

A defendant makes nominative fair use of a trademark when:

First, the product in question was not readily identifiable without use of the trademark;

Second, the defendant used only so much of the trademark] as was reasonably necessary to identify the product in question; and

Third, the defendant did not do anything in connection with the trademark that would suggest sponsorship or endorsement by the plaintiff.

[A product is not readily identified without use of its trademark when there would be no other effective way to compare, criticize, refer to, or identify it without using the trademark.]

[A reasonably necessary use of a trademark occurs when no more of the mark's appearance is used than is necessary to identify the product and make the reference intelligible to the consumer. For example, if a particular word is the plaintiff's trademark, the defendant reasonably uses it when the defendant does not use any distinctive color, logo, abbreviation, or graphic that the plaintiff uses to display the trademark.]

[A use of the plaintiff's trademark does not suggest sponsorship or endorsement of the defendant's product when the defendant does not attempt to deceive, mislead, or capitalize on consumer confusion, or when the defendant does not appropriate the cachet of the plaintiff's product for the defendant's.]

[The fact that the defendant's use of the trademark may bring the defendant a profit or help in competing with the mark owner does not mean the use was not a fair use.]

Comment

The Ninth Circuit identifies two types of fair use: classic and nominative. *Cairns v. Franklin Mint Co*., 292 F.3d 1139, 1150 (9th Cir. 2002) ("We distinguish two types of fair use: 'classic fair use,' in which 'the defendant has used the plaintiff's mark to describe the

defendant's *own* product,' and 'nominative fair use,' in which the defendant has used the plaintiff's mark 'to describe the *plaintiff's* product' for the purpose of, for example, comparison to the defendant's product."). *See* Instruction 15.24 (Defenses—"Classic" Fair Use).

The nominative fair use test is "designed to address the risk that nominative use of the mark will inspire a mistaken belief on the part of consumers that the speaker is sponsored or endorsed by the trademark holder." *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1176 (9th Cir. 2010). The elements of the nominative fair use defense set out in this instruction are described in *Adobe Sys. Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir. 2015). If the nominative use elements are met, the nominative use does not infringe. *Toyota Motor Sales*, 610 F.3d 1176. If the nominative use does not satisfy all the elements, "the district court may order defendants to modify their use of the mark so that all three factors are satisfied; it may not enjoin nominative use of the mark altogether." *Id*. "A defendant seeking to assert nominative fair use as a defense need only show that it used the mark to refer to the trademarked good . . . The burden then reverts to the plaintiff" to show that the nominative fair use elements are not met. *Id*. at 1183. The nominative fair use defense is unavailable if the marks are not identical. *Playboy Enterprises, Inc. v. Welles*, 279 F.3d 796, 801 (9th Cir. 2002) ("When a defendant uses a trademark nominally, the trademark will be identical to the plaintiff's mark, at least in terms of the words in question.").

Earlier versions of this instruction placed the burden on the defendant to show that it made nominative fair use of the plaintiff's trademark. Despite being frequently referred to as a "defense," nominative fair use is an alternative test "to evaluate the likelihood of confusion" (an element of an infringement claim). *Adobe*, 809 F.3d at 1081. The nominative fair use analysis replaces the usual test for likelihood of confusion (the *Sleekcraft* factors) in cases where the defendant used the plaintiff's trademark to "refer[] to the trademarked good itself." *Toyota*, 610 F.3d at 1182; *Adobe*, 809 F.3d at 1081. Because it is the plaintiff's burden to show likelihood of confusion, "[the plaintiff] must bear the burden of establishing that the [defendant's] use of [the plaintiff's] mark was *not* nominative fair use." *Toyota*, 610 F.3d at 1182-83. *See also* 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:11 (5th ed. 2019).

The nominative fair use defense applies only if the defendant "does not attempt to capitalize on consumer confusion or to appropriate the cachet of one product for a different one." *Horphag Rsch. Ltd. v. Pellegrini*, 337 F.3d 1036, 1041 (9th Cir. 2003) (holding nominative fair use defense unavailable where record showed that defendant's use of plaintiff's trademark suggested sponsorship or endorsement by trademark holder of defendant's product) (citing *New Kids on the Block v. News Am. Pub., Inc.*, 971 F.2d 302, 306 (9th Cir. 1992)); *see also Brother Records, Inc. v. Jardine*, 318 F.3d 900, 905-08 (9th Cir. 2003) (discussing cases and application of nominative and classic fair use defenses, and finding neither available because defendant's use of trademark was not in primary descriptive sense, but instead suggested sponsorship or endorsement by trademark holder); *Cairns*, 292 F.3d at 1151 ("The nominative fair use analysis is appropriate where a defendant has used the plaintiff's mark to describe the plaintiff's product, even if the defendant's ultimate goal is to describe his own product." (emphasis omitted)).

For application of fair use defense in trade dress cases or for application of First Amendment doctrines as a "fair use," see Comment to Instruction 15.24 (Defenses—"Classic" Fair Use (15 U.S.C. § 1115(b)(4))).

Revised March 2024

15.25A Defenses—First Sale

The defendant [*name*] contends that [he] [she] [*other pronoun*] is not liable for trademark infringement for [distributing] [selling] [stocking] [displaying] the plaintiff [*name*]'s product under the plaintiff [*name*]'s trademark because there was previously an authorized sale of the item. After the first authorized sale of an item, the holder of the item's trademark may not claim trademark infringement for subsequent [sales] [distributions] [displays] of the item under that mark.

If you find that the item the defendant [*name*] [distributed] [sold] [stocked] [displayed] was previously subject to an authorized sale, your verdict should be for the defendant [*name*] on the plaintiff [*name*]'s trademark infringement claim.

Comment

The first sale doctrine is an affirmative defense to trademark infringement. *See Bluetooth SIG Inc. v. FCA US LLC*, 30 F.4th 870, 871 (9th Cir. 2022). "Under the first sale doctrine, 'with certain well-defined exceptions, the right of a producer to control the distribution of its trademarked product does not extend beyond the first sale of the product.'" *Id.* at 872 (quoting *Sebastian Int'l, Inc. v. Longs Drug Stores Corp.*, 53 F.3d 1073, 1074 (9th Cir. 1995) (per curiam)). "Trademark rights are 'exhausted' as to a given item upon the first authorized sale of that item." *Bluetooth*, 30 F.4th at 872 (quoting 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:41 (5th ed. 2019)).

Application of the first sale doctrine "has generally focused on the likelihood of confusion among consumers." *Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc.*, 603 F.3d 1133, 1136 (9th Cir. 2010). Its "essence" is that "a purchaser who does no more than stock, display, and resell a producer's product under the producer's trademark violates no right conferred upon the producer by the Lanham Act." *Sebastian*, 53 F.3d at 1076. However, "[b]inding precedent extends the first sale doctrine beyond what *Sebastian* described as the doctrine's 'essence.'" *Bluetooth*, 30 F.4th at 873. The first sale doctrine's accommodation between the policies of protecting good will and preventing confusion on the one hand, and preserving an area for competition on the other, raises different issues in the context of pure resales (where confusion ordinarily does not exist), than in the context of incorporated products, where the likelihood of confusion "will depend in some way on how a seller uses the mark of the incorporated product in connection with a new product." *Id.* at 874.

For instance, a retailer may repackage a producer's trademarked goods, so long as it discloses the fact of repackaging to the public. *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1086-87 (9th Cir. 1998). Similarly, a manufacturer may modify a producer's trademarked product and use the mark to indicate that the "[trademarked] product is a constituent in the article now offered as new and changed." *Prestonettes, Inc., v. Coty*, 264 U.S. 359, 369 (1924). The first sale doctrine permits use of a mark "to refer to a component incorporated into a new end product," such as an auto manufacturer's display of the word "Bluetooth" in a vehicle containing a Bluetooth-equipped head unit. *Bluetooth*, 30 F.4th at 872-73. However, the seller's disclosure

of how a trademarked product was incorporated must be adequate, and a seller's liability is limited by the first sale doctrine only "to the extent that adequate disclosures are made." *Id.*

Revised March 2024

15.26 Trademark Damages—Actual or Statutory Notice (15 U.S.C. § 1111)

To recover damages, the plaintiff [*name*] has the burden of proving by a preponderance of the evidence that the defendant [*name*] had [either statutory or] actual notice that the plaintiff [*name*]'s trademark was registered.

[Defendant had statutory notice if:]

[(1) plaintiff displayed the trademark with the words "Registered in U.S. Patent and Trademark Office"] [or]

[(2) plaintiff displayed the trademark with the words "Reg. U.S. Pat. & Tm. Off."] [or]

[(3) plaintiff displayed the trademark with the letter R enclosed within a circle, thus ®.]

Comment

For a discussion of the notice requirement, *see* 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:144 (5th ed. 2019).

Revised March 2024

15.27 Trademark Damages—Plaintiff's Actual Damages (15 U.S.C. § 1117(a))

If you find for the plaintiff [*name*] on the plaintiff [*name*]'s [infringement] [unfair competition] claim [and find that the defendant [*name*] had statutory notice or actual notice of the plaintiff's registered trademark], you must determine the plaintiff [*name*]'s actual damages.

The plaintiff [*name*] has the burden of proving that [he] [she] [*other pronoun*] sustained actual damages by a preponderance of the evidence. If you find that the plaintiff [*name*] proved actual damages, you may make reasonable inferences from the evidence to calculate the amount of damages. Damages means the amount of money which will reasonably and fairly compensate the plaintiff [*name*] for any [injury] [and] [or] [property damage] you find was caused by the defendant [*name*]'s infringement of the plaintiff [*name*]'s registered trademark.

You should consider the following:

(1) [The [injury to] [loss of] the plaintiff's reputation][;]

(2) [The [injury to] [loss of] the plaintiff's goodwill, including injury to the plaintiff's general business reputation][;]

(3) [The lost profits that the plaintiff would have earned but for the defendant's infringement. Profit is determined by deducting all expenses from gross revenue][;]

(4) [The expense of preventing customers from being deceived][;]

(5) [The cost of future corrective advertising reasonably required to correct any public confusion caused by the infringement][;] [and]

(6) [*Insert any other factors that bear on the plaintiff's actual damages*].

When considering prospective costs (e.g., cost of future advertising, expense of preventing customers from being deceived), you must not overcompensate. Accordingly, your award of such future costs should not exceed the actual damage to the value of the plaintiff [*name*]'s mark at the time of the infringement by the defendant.

Comment

The plaintiff must prove both the fact and the amount of damages. *Intel Corp. v. Terabyte Int'l, Inc*., 6 F.3d 614, 620 (9th Cir. 1993); *Lindy Pen Co. v. Bic Pen Corp*., 982 F.2d 1400, 1407 (9th Cir. 1993). "The trier of fact must distinguish between proof of the *fact* of damages and the *amount* of damages because a mark holder is held to a lower standard in proving the exact amount of actual damages." *Jason Scott Collection, Inc. v. Trendily Furniture, LLC*, 68 F.4th 1203, 1220-21 (9th Cir. 2023) (quoting *Skydive Ariz., Inc. v. Quattrocchi*, 673 F.3d 1105, 1112

(9th Cir. 2012)). The amount of damages need only be supported by "substantial evidence to permit the jury to draw reasonable inferences and make a fair and reasonable assessment." *Skydive Ariz.*, 673 F.3d at 1112 (emphasis omitted).

The plaintiff's actual damages are measured by any direct injury that plaintiff proves, and any lost profits plaintiff would have earned but for the infringement. *Lindy Pen Co*, 982 F.2d at 1407. Trademark damages, like tort damages, are assessed by the reasonably foreseeable harm caused by the infringement. *Jason Scott Collection* 68 F.4th 1220-21. A court may grant a monetary award based on "any damages sustained by the plaintiff." 15 U.S.C. § 1117(a)(2); *see also Jason Scott Collection*, 68 F.4th at 1221-22 (holding that "the district court did not abuse its wide discretion when it found that [plaintiff] suffered a compensable harm" in the form of "[d]amaged business relationships" due to defendant's infringement). An award of speculative damages is inappropriate. *See McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 361 (9th Cir. 1996) (holding that the jury's finding of lost profits, based on the theory that designer would have entered the market but for infringement, was too speculative when no one had in fact profited from designed products). Where the parties are competitors, the defendant's profits can serve as a rough measure of the plaintiff's lost profits. *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 121 (9th Cir. 1968); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:59 (5th ed. 2019).

However, the fact that the infringer did not profit from the infringement does not preclude an award of damages. *See Intel Corp*., 6 F.3d at 621 (holding that damages for mislabeling computer chips as faster, more expensive chips made by the same manufacturer were properly calculated by multiplying infringer's sales by plaintiff's lost profits and taking 95% of product, based on inference that great majority of chips were counterfeit).

For a general discussion of plaintiff's actual damages, see 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30:72 (5th ed. 2019). *See also* 2 ANNE GILSON LALONDE & JEROME GILSON, GILSON ON TRADEMARKS § 8.04(2) (2023) (listing examples of recoverable damages).

To avoid the risk of overcompensation in the award of prospective costs, damage instructions should inform the jury that the award of prospective costs should not exceed the damage to the value of the infringed mark. *See Adray v. Adry-Mart, Inc*., 76 F.3d 984, 989 (9th Cir. 1995).

Defendant may argue that plaintiff's loss in sales may be caused by other market factors and not as a result of defendant's infringement. If defendant makes such an argument, an appropriate instruction should be drafted.

"[A] court may grant 'a just monetary award' under § 1117 even where a plaintiff cannot prove actual damages, 'so long as [the award] constitutes compensation for the plaintiff's losses or the defendant's unjust enrichment and is not simply a penalty for the defendant's conduct.'" *Jason Scott Collection*, 68 F.4th at 1222 (quoting *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1146 (9th Cir. 1997)). When proof of actual damage is difficult, the court may order

disgorgement of defendant's profits, on a theory of unjust enrichment. *Lindy Pen Co.*, 982 F.2d at 1407. *See* Instruction 15.29 Trademark Damages—Defendant's Profits (15 U.S.C. § 1117(a)).

See Instructions 5.2 (Measure of Types of Damages), 5.3 (Damages—Mitigation), and 5.4 (Damages Arising in the Future—Discount to Present Cash Value).

Revised June 2024

15.28 Trademark Damages—Plaintiff's Statutory Damages (15 U.S.C. § 1117(c) and (d))

Comment

In cases involving the use of a counterfeit mark, the plaintiff may elect to receive statutory damages instead of actual damages and profits. 15 U.S.C. § 1117(c). Statutory damages are also available for "cybersquatting" in violation of 15 U.S.C. 1125(d)(1). 15 U.S.C. § 1117(d).

Statutory damages are available under 15 U.S.C. § 1117(c) and (d). Statutory damages may be awarded against contributory infringers. *Louis Vuitton Malletier, S.A. v. Akanoc Sols., Inc.*, 658 F.3d 936, 944-45 (9th Cir. 2011). A prevailing party who elects to receive statutory damages under § 1117(c) cannot also receive prejudgment interest under § 1117(b). *Y.Y.G.M. SA v. Redbubble, Inc.*, 75 F.4th 995, 1007-09 (9th Cir. 2023).

Revised November 2024

15.29 Trademark Damages—Disgorgement of Defendant's Profits (15 U.S.C. § 1117(a))

In addition to actual damages, the plaintiff [*name*] is entitled to any profits earned by the defendant [*name*] that are attributable to the infringement, which the plaintiff [*name*] proves by a preponderance of the evidence. You may not, however, include in any award of profits any amount that you took into account in determining actual damages.

Profit is determined by deducting all expenses from gross revenue.

Gross revenue is all the defendant [*name*]'s receipts from using the trademark in the sale of a [product]. The plaintiff [*name*] has the burden of proving the defendant [*name*]'s gross revenue by a preponderance of the evidence.

Expenses are all the defendant [*name*]'s [operating] [overhead] and production costs incurred in producing the gross revenue. The defendant has the burden of proving the expenses [and the portion of the profit attributable to factors other than use of the infringed trademark] by a preponderance of the evidence.

Unless you find that a portion of the profit from the sale of the [*specify goods*] using the trademark is attributable to factors other than use of the trademark, you should find that the total profit is attributable to the infringement.

Comment

"[D]isgorgement of profits is a traditional trademark remedy." *Jerry's Famous Deli, Inc. v. Papanicolaou*, 383 F.3d 998, 1004 (9th Cir. 2004). Besides seeking actual damages, *see* Instruction 15.27 Trademark Damages—Plaintiff's Actual Damages (15 U.S.C. § 1117(a)18.1), a trademark holder can seek disgorgement of a defendant's profits under a theory of unjust enrichment. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir. 1993); *Maier Brewing Co. v. Fleischmann Distilling Corp*., 390 F.2d 117, 123 (9th Cir. 1968). For purposes of disgorgement of the defendant's profits, the word "defendant" has its ordinary legal meaning as "the party against whom relief or recovery is sought in an action for suit." *Dewberry Grp., Inc., v. Dewberry Eng'rs, Inc.*, 145 S. Ct. 681, 686-87 (2025) (quoting Black's Law Dictionary 541 (3d ed. 1993)) (concluding that the defendant was the "entity named in Dewberry Engineers' complaint as liable for infringing the 'Dewberry' trademark" and that the entity's affiliates, who were not named in the complaint, were not defendants for purposes of § 1117(a)).

A plaintiff is not required to choose between actual damages and disgorgement: a plaintiff can recover both. *See*, *e.g.*, *Playboy Enters., Inc. v. Baccarat Clothing Co., Inc.*, 692 F.2d 1272, 1274 (9th Cir. 1982) (holding that district court abused its discretion by failing to award defendant's profits where the actual damages awarded were inadequate to remove defendant's incentive to infringe). But "recovery of both plaintiff's lost profits *and* disgorgement of defendant's profits is generally considered a double recovery under the Lanham Act." *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994).

The Ninth Circuit has held that the Seventh Amendment does not provide a right to a jury trial on the amount of profits to be disgorged. *Fifty-Six Hope Road Music*, *Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1074-76 (9th Cir. 2015). That is, "disgorgement of profits is an equitable issue ordinarily left to the court." *Harbor Breeze Corp. v. Newport Landing Sportfishing, Inc.*, 28 F.4th 35, 39 (9th Cir. 2022). Therefore, this instruction is being provided if the trial judge wants to impanel an advisory jury on this question.

Regarding establishing and calculating defendant's profits, *see Jerry's Famous Deli*, 383 F.3d at 1004-05 (9th Cir. 2004) (describing remedy, in enforcement of trademark injunction case, as "akin to an award of the infringer's profits under trademark law" and noting "[u]nder established law, once gross profits related to the infringement are established, [infringer] has the burden of documenting any legitimate offsets"); 15 U.S.C. § 1117(a) ("In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed."); *see also Am. Honda Motor Co. v. Two Wheel Corp.*, 918 F.2d 1060, 1063 (2d Cir. 1990) (holding that plaintiff is entitled to amount of gross sales unless defendant adequately proves amount of costs to be deducted from it); *Louis Vuitton S.A. v. Spencer Handbags Corp.*, 765 F.2d 966, 973 (2d Cir.1985) (holding that defendant's own statements as to profits provided sufficient basis for calculation of defendant's profits under 15 U.S.C. § 1117(a)); 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 30.65 (5th ed. 2019) (discussing computation of defendant's profits from infringing sales). Plaintiff has the burden of proof to show with "reasonable certainty" a defendant's gross sales from infringing activity. *Rolex Watch, U.S.A., Inc. v. Michel Co.*, 179 F.3d 704, 712 (9th Cir. 1999).

In addition to the defendant's burden of proving deductible costs and expenses to offset gross sales, the defendant can also prove that some sales, if any, were not attributable to the infringing activity. *See Lindy Pen Co.*, 982 F.2d at 1408 ("Once the plaintiff demonstrates gross profits, they are presumed to be the result of the infringing activity. The defendant thereafter bears the burden of showing which, if any, of its total sales are not attributable to the infringing activity, and, additionally, any permissible deductions for overhead." (citations omitted)); *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203, 206-07 (1942) ("The plaintiff of course is not entitled to profits demonstrably not attributable to the unlawful use of his mark. The burden is the infringer's to prove that his infringement had no cash value in sales made by him." (citations omitted)).

A district court "has discretion to increase the profit award above the net profits proven '[i]f the court shall find . . . the amount of the recovery . . . inadequate.'" *Fifty-Six Hope Road Music*, 778 F.3d at 1077 (stating the "district court should award actual, proven profits unless the defendant infringer gained more from the infringement than the defendant's profits reflect"). However, the court "ought to tread lightly . . . because granting an increase could easily transfigure an otherwise-acceptable compensatory award into an impermissible punitive measure." *Id.*; *see also Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir. 1986) (awarding receipts from at-cost sales when a profits calculation was inadequate to "take all

the economic incentive out of trademark infringement," which is the purpose of 15 U.S.C. § 1117(a)).

When infringing and noninfringing elements of a work cannot be readily separated, all the defendant's profits from the infringing sales should be awarded to the plaintiff. *Nintendo of Am.*, 40 F.3d at 1012.

"[A] trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate." *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 219 (2020); *Lindy Pen*, 982 F.2d at 1406 ("The intent of the infringer is relevant evidence on the issue of awarding profits and damages and the amount."). However, a plaintiff need not show that a defendant acted with a particular mental state, such as willfulness, to be entitled to an award of profits. *Romag Fasteners*, 590 U.S. at 219 (noting that willfulness is not an "inflexible precondition" to recover a defendant's profits); *Harbor Breeze Corp.*, 28 F.4th at 38 (same).

Revised June 2025

15.30 Trademark Dilution
(15 U.S.C. § 1125(c))

Comment

In 1995, Congress passed the Federal Trademark Dilution Act ("FTDA"), which remained in effect until 2006, when Congress passed the Trademark Dilution Revision Act of 2006 ("TDRA"). The TDRA significantly modified the FTDA, including overturning *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), which held that a plaintiff must prove actual dilution under the FTDA. Among other things, the TDRA established a "likelihood of dilution" standard (providing relief for "likely" dilution), eliminated the definition of "dilution," added definitions of "dilution by tarnishment" and "dilution by blurring," and modified the "fair use" exclusion. *See generally Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1165-71 (9th Cir. 2011). Thus, case law that pre-dates the TDRA generally should not be relied on in a dilution case.

In *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869-71 (9th Cir. 2020), the Ninth Circuit provided an extensive discussion of the concept of trade dress dilution.

In *Jack Daniel's Props. v. VIP Prods. LLC*, 599 U.S. 140 (2023), the Supreme Court held that the "noncommercial use" exclusion to trademark dilution does not include "every parody or humorous commentary." 599 U.S. at 162. That is, the fair-use exclusion, 15 U.S.C. § 1125(c)(3)(A), "has its own exclusion: It does not apply when the use is 'as a designation of source for the person's own goods or services.'" *Id*. (quoting 15 U.S.C. § 1125(c)(3)(A)). Put differently, if the alleged diluting mark is used as a trademark, the defendant cannot avail itself of the fair-use exclusion for trademark dilution.

Revised March 2024

15.31 Anti-Cybersquatting
(15 U.S.C. § 1125(d))

Comment

In 1999, Congress passed the Anti-Cybersquatting Consumer Protection Act ("ACPA"). The ACPA "establishes civil liability for 'cyberpiracy' where a plaintiff proves that (1) the defendant registered, trafficked in, or used a domain name; (2) the domain name is identical or confusingly similar to a protected mark owned by the plaintiff; and (3) the defendant acted 'with bad faith intent to profit from that mark.'" *DSPT Int'l., Inc. v. Nahum*, 624 F.3d 1213, 1218-19 (9th Cir. 2010). In addition, using in a domain name another's protected mark "to get leverage in a business dispute" is sufficient to establish "bad faith intent." *Id.* at 1219-20.

Revised March 2024

16. PATENTS

Comment

The Ninth Circuit's model patent jury instructions have been withdrawn. The following patent jury instructions are a helpful source:

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, MODEL PATENT JURY INSTRUCTIONS (2017 updated October 2019). The instructions can be accessed at:

https://cand.uscourts.gov/wp-content/uploads/forms/jury-instructions/NDCA_Model_Patent_Jury_Instructions_erroneous-citation-omitted-10-28-24.pdf or https://perma.cc/9XGC-LHVT

https://cand.uscourts.gov/wp-content/uploads/forms/jury-instructions/NDCA_Model_Patent_Jury_Instructions_erroneous-citation-omitted-10-28-24.docx

Other sources of patent jury instructions that may be helpful include:

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, MODEL JURY INSTRUCTIONS: PATENT LITIGATION (Matthew C. Acosta ed., 2d ed. 2023).

FEDERAL CIRCUIT BAR ASSOCIATION, MODEL PATENT JURY INSTRUCTIONS (2016). The instructions can be accessed at:

https://fedcirbar.org/publications/fcba-model-patent-jury-instructions-updated-draft-july-2016-pdf/

KEVIN F. O'MALLEY, ET AL., 3A FEDERAL JURY PRACTICE AND INSTRUCTIONS ch. 158 Patent Infringement (Thomson West 2006 6th ed.), available through WestLaw.

4-86 MODERN FEDERAL JURY INSTRUCTIONS–CIVIL ¶¶ 86.01-86.04(Matthew Bender), available through LexisNexis.

Revised March 2024

17. COPYRIGHT

Instruction

17.1 Preliminary Instruction—Copyright
17.2 Copyright—Defined (17 U.S.C. § 106)
17.3 Copyright—Subject Matter—Generally (17 U.S.C. § 102)
17.4 Copyright—Subject Matter—Ideas and Expression (17 U.S.C. § 102(b))
17.5 Copyright Infringement—Elements—Ownership and Copying (17 U.S.C. § 501(a)-(b))
17.6 Copyright Infringement—Ownership of Valid Copyright—Definition (17 U.S.C. §§ 201-205)
17.7 Copyright Interests—Copyright Registration Certificate (17 U.S.C. § 410(c))
17.8 Copyright Interests—Authorship (17 U.S.C. § 201(a))
17.9 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a))
17.10 Copyright Interests—Authors of Collective Works (17 U.S.C. § 201(c))
17.11 Copyright Interests—Work Made for Hire by Employee (17 U.S.C. § 201(b))
17.12 Copyright Interests—Assignee (17 U.S.C. § 201(d)(1))
17.13 Copyright Interests—Exclusive Licensee (17 U.S.C. § 201(d)(2))
17.14 Copyright Infringement—Originality
17.15 Copyright Interests—Derivative Work (17 U.S.C. §§ 101, 106(2))
17.16 Compilation (17 U.S.C. § 101)
17.17 Copying—Access and Substantial Similarity
17.18 Copyright Infringement—Copying—Access Defined
17.19 Substantial Similarity—Extrinsic Test; Intrinsic Test
17.20 Secondary Liability—Vicarious Infringement—Elements and Burden of Proof
17.21 Secondary Liability—Contributory Infringement—Elements and Burden of Proof
17.21A Copyright—Useful Articles/Functional Elements (17 U.S.C. § 101)
17.22 Copyright—Affirmative Defense—Fair Use (17 U.S.C. § 107)
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17.36 Copyright—Damages—Innocent Infringement (17 U.S.C. § 504(c)(2))
17.37 Copyright—Damages—Willful Infringement (17 U.S.C. § 504(c)(2))

17.1 Preliminary Instruction—Copyright

The plaintiff [*name*] claims ownership of a copyright and seeks damages against the defendant [*name*] for copyright infringement. The defendant [*name*] denies infringing the copyright [and] [contends that the copyright is invalid] [asserts an affirmative defense]. To help you understand the evidence in this case, I will explain some of the legal terms you will hear during this trial.

DEFINITION OF COPYRIGHT

The owner of a copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by copyright for a specific period of time.

A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.

Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot themselves be copyrighted.

The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.

[COPYRIGHT INTERESTS]

[The copyright owner may [transfer] [sell] [convey] to another person all or part of the owner's property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom a right is transferred is called an assignee.]

or

[The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [*describe the rights granted in the license*].]

[HOW COPYRIGHT IS OBTAINED]

[Copyright automatically attaches to a work the moment the work is fixed in any tangible medium of expression. The owner of the copyright may apply to register the copyright by

completing a registration form and depositing a copy of the copyrighted work with the Copyright Office. After determining that the material deposited constitutes copyrightable subject matter and that certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.]

PLAINTIFF'S BURDEN OF PROOF

In this case, the plaintiff, [*name of plaintiff*], contends that the defendant, [*name of defendant*], has infringed the plaintiff's copyright. The plaintiff has the burden of proving by a preponderance of the evidence that the plaintiff is the owner of the copyright, that the defendant copied original expression from the copyrighted work, and that the defendant caused the infringement. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the copyrighted work was infringed.

PROOF OF COPYING

To prove that the defendant copied the plaintiff's work, the plaintiff may use direct or indirect evidence. Direct evidence includes an admission that the defendant copied the plaintiff's work. Indirect evidence is evidence showing that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and the plaintiff's copyrighted work; or that there are striking similarities between the defendant's work and the plaintiff's copyrighted work that raises the inference of access.

The plaintiff must also prove that the defendant's copying of the copyrighted work was substantial. In determining whether the defendant's copying of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.

LIABILITY FOR INFRINGEMENT

One who causes a copyrighted work to be [reproduced] [publicly distributed] [publicly performed] [publicly displayed] [the basis of a derivative work] without authority from the copyright owner during the term of the copyright infringes the copyright.

[A person may be liable for another person's infringement d by [vicariously infringing] [contributorily infringing].]

[VICARIOUS INFRINGEMENT]

[A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and had the right and ability to supervise or control the infringing activity, whether or not the person knew of the infringement.]

[CONTRIBUTORY INFRINGEMENT]

[A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and [induces] [or] [materially contributes to] the activity.]

[DEFENSES TO INFRINGEMENT]

[The defendant contends that there is no copyright infringement. There is no copyright infringement when [the defendant's work is the result of independent creation, coincidence, or prior common source] [the defendant made fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment, news reporting, teaching, scholarship, or research] [the plaintiff abandoned ownership of the copyrighted work] [the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products] [the plaintiff granted the defendant an express license to [use] [copy] [*other*] the plaintiff's copyrighted work] [the plaintiff granted the defendant an implied license to use the plaintiff's copyrighted work] [the defendant, as an owner of a copy of the plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale].]

Comment

See generally 17 U.S.C. §§ 101-1511.

Regarding the "copyright interests" section of this instruction, when the entire bundle of rights is transferred, the person to whom the rights are transferred is called an assignee. When fewer than all rights are transferred, the person is an exclusive licensee. *Gardner v. Nike, Inc*., 279 F.3d 774, 778 (9th Cir. 2002). The examples of fair use given in Instruction 17.1 are representative, and other uses may qualify as fair use. *See* 17 U.S.C. § 107; *Perfect 10, Inc. v. Amazon.com, Inc*., 508 F.3d 1146, 1163 (9th Cir. 2007) ("The fair use defense permits the use of copyrighted works without the copyright owner's consent under certain situations. The defense encourages and allows the development of new ideas that build on earlier ones, thus providing a necessary counterbalance to the copyright law's goal of protecting creators' work product."); *id*. at 1163 ("We must be flexible in applying a fair use analysis; it is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis" (citation omitted)).

Regarding the "How Copyright Is Obtained" section of this instruction, "'registration . . . has been made' within the meaning of 17 U.S.C. § 411(a) not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application." *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com*, LLC, 586 U.S. 296, 309 (2019).

Regarding the requirement that copying of the plaintiff's work be substantial, "[f]or an unauthorized use of a copyrighted work to be actionable, the use must be significant enough to constitute infringement. This means that even where the fact of copying is conceded, no legal consequences will follow from that fact unless the copying is substantial." *Newton v. Diamond*, 388 F.3d 1189, 1192-93 (9th Cir. 2004) (citations omitted). "[W]e have consistently applied the de minimis principle to determine whether a work is infringing by analyzing the quantity and

quality of the copying to determine if the allegedly infringing work is a recognizable copy of the original work, in other words, whether the works are substantially similar." *Bell v. Wilmott Storage Services, LLC*, 12 F.4th 1065 (9th Cir. Sept. 9, 2021). A use is considered de minimis, and therefore not substantial, "if it is so meager and fragmentary that the average audience would not recognize the appropriation." *Newton, 388 F.3d* at 1193 (quoting *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986)).

Copying may also be considered de minimis when the use of the work is so fleeting or trivial that "a reasonable jury could not conclude that an average audience would recognize an appropriation of the [plaintiff's] composition," therefore rendering the works substantially dissimilar. *Bell*, 12 F.4th at 1078 (quoting *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886-87 (9th Cir. 2016). Unless the copying of the protected work is so de minimis as to "be non-recognizable as a copy," the "[w]holesale copying or reproduction of another's protected work . . . by definition cannot be de minimis copying." *Id*. at 1078-79.

Regarding the requirement that the defendant cause the violation of one of the exclusive rights in copyright under 17 U.S.C. § 106, where the defendant hosts third party content on its website, the Ninth Circuit has referred to the causation element as the requirement that the defendant engage in "volitional conduct." "[T]o demonstrate volitional conduct, a [plaintiff] must provide some evidence showing the alleged infringer exercised control (other than by general operation of its website); selected any material for upload, download, transmission, or storage; or instigated any copying, storage, or distribution of its [work]." *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) (brackets, internal quotation marks, and citation omitted). In this context, "volitional conduct" "does not really mean an 'act of willing or choosing' or 'an act of deciding,' but merely the unremarkable proposition that proximate causation historically underlies copyright infringement liability no less than other torts." *Bell*, 12 F.4th at 1081 (internal quotation marks and citation omitted). "[A] website or service that provides only a platform for third-party users to upload, download, and share content, *i.e.*, merely using the platform as a vehicle, has not engaged in volitional conduct in this sense, because it is the users who cause infringement." *Id.*

Regarding contributory infringement, a party is liable for contributory infringement where the party "(1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement." *Perfect 10, Inc. v. Visa Int'l Serv., Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007). The inducement theory has "four elements: (1) the distribution of a device or product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright, and (4) causation." *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1032 (9th Cir. 2013).

Revised March 2024

17.2 Copyright—Defined
(17 U.S.C. § 106)

Copyright is the exclusive right to copy. This right to copy includes the exclusive right[s] to [, or authorize others to]:

[1.] [reproduce the copyrighted work in [copies] [phonorecords];]

[2.] [[recast, transform, or adapt the work, that is] prepare derivative works based upon the copyrighted work;]

[3.] [distribute [copies] [phonorecords] of the copyrighted work to the public by [sale or other transfer of ownership] [or by] [rental or lease or lending];]

[4.] [perform publicly a copyrighted [literary work] [musical work] [dramatic work] [choreographic work] [pantomime work] [motion picture] [or] [*specify other audiovisual work*];]

[5.] [display publicly a copyrighted [literary work] [musical work] [dramatic work] [choreographic work] [pantomime work] [pictorial work] [graphic work] [sculptural work] [individual image of a motion picture] [or] [*specify other audiovisual work*]; and]

[6.] [perform a sound recording by means of digital audio transmission].

It is the owner of a copyright who may exercise [this] [these] exclusive right[s]. The term "owner" includes [the author of the work] [an assignee] [an exclusive licensee]. In general, copyright law protects against [reproduction] [adaptation] [public distribution] [public performance] [public display] of identical or substantially similar copies of the owner's copyrighted work without the owner's permission. An owner may enforce the[se] right[s] to exclude others in an action for copyright infringement.

Comment

This instruction identifies the types of rights involved in the term "copyright." *See Kalantari v. NITV, Inc*., 352 F.3d 1202, 1207-08 (9th Cir. 2003) ("Upon obtaining a copyright, an author automatically acquires certain rights that are inherent in the very nature of a copyright. Specifically, the copyright owner obtains the six exclusive rights of copyright … as well as the right to transfer any or all of those rights…." (citation omitted)).

There are exceptions to these "exclusive" rights. *See*, *e.g.*, 17 U.S.C. §§ 107-122. For definitions of various terms used in this instruction, including phonorecords and digital transmission, *see* 17 U.S.C. § 101.

17.3 Copyright—Subject Matter—Generally
(17 U.S.C. § 102)

The work[s] [*identify the works at issue*] involved in this trial are known as:

[1.] [literary works [in which words, numbers, or other verbal or numerical symbols are expressed];]

[2.] [musical works, including any accompanying words;]

[3.] [dramatic works, including any accompanying music;]

[4.] [pantomimes;]

[5.] [choreographic works;]

[6.] [pictorial works] [graphic works] [sculptural works][;] [, such as two- and three-dimensional works of fine, graphic or applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans;]

[7.] [motion pictures] [and other audiovisual works] [in which a series of related images convey an impression of motion when shown in succession];]

[8.] [sound recordings][;] [, which are works that result from fixation of a series of musical, spoken, or other sounds;]

[9.] [architectural works][;] [, which are building designs as embodied in buildings, architectural plans, drawings, or other modes of expression;]

[10.] [computer programs][, that is, sets of statements or instructions to be used directly or indirectly in a computer to bring about a certain result].]

You are instructed that a copyright may be obtained in [*identify the work[s] at issue*].

[[This] [These] work[s] can be protected by copyright law. Only that part of the work[s] consisting of original works of authorship [fixed] [produced] in any tangible [medium] [form] of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, is protected by the Copyright Act.]

[Copyright protection for an original work of authorship does not extend to any [idea] [procedure] [process] [system] [method of operation] [concept] [principle] [discovery], regardless of the form in which it is described, explained, illustrated, or embodied.]

Comment

Generally, whether a subject matter is copyrightable is a question of law to be determined by the court. This instruction is designed to inform the jury that the court has determined the subject matter to be appropriately copyrightable.

The court may wish to supplement this instruction by providing further instructions addressing these additional terms. For example, the term "literary works" "does not connote any criterion of literary merit or qualitative value: it includes catalogs, directories and similar factual, reference, or instructional works and compilations of data. It also includes computer data bases, and computer programs to the extent that they incorporate authorship in the programmer's expression of original ideas, as distinguished from the ideas themselves." H.R. Rep. No. 94-1476, at 54 (1976).

The Ninth Circuit has recognized that characters in comic books, television or motion pictures can be afforded copyright protection when they satisfy a three-part test. *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015) (Batmobile). The character (1) must generally have physical as well as conceptual qualities; (2) must be sufficiently delineated to be recognizable as the same character whenever it appears by displaying consistent, identifiable character traits and attributes, although it need not have a consistent appearance; and (3) must be especially distinctive and contain some unique elements of expression. *Id*.

Configurable works, like kinetic and manipulable sculptural works, can be sufficiently fixed in a tangible medium of expression so as to be afforded copyright protection. *Tangle, Inc. v. Aritzia, Inc*., 125 F.4th 991, 996 (9th Cir. 2025).

For additional definitions of terms used in this instruction, *see* 17 U.S.C. § 101 (defining numerous terms used here).

The United States Supreme Court has ruled that no copyright protection is available for material authored by a judge or a legislative body acting in an official capacity. *See Georgia v. Public Resources*, 590 U.S. 255 (2020).

Revised March 2025

17.4 Copyright—Subject Matter—Ideas and Expression (17 U.S.C. § 102(b))

Only the expression of an idea or fact can be copyrighted. The underlying ideas contained in the work, such as procedures, processes, systems, methods of operation, concepts, principles, or discoveries, or the underlying facts contained in the work, such as names and addresses in a telephone directory, cannot be copyrighted.

Comment

"No author may copyright his ideas or the facts he narrates." *Harper & Row Publishers, Inc. v. Nat. Enters.*, 471 U.S. 539, 556 (1985). "Copyrights protect 'expression' but not the 'ideas' that lie behind it." *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 18 (2021); *see also* 17 U.S.C. § 102(b) ("In no case does copyright protect[] . . . any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . described, explained, illustrated, or embodied in [the copyrighted] work.").

Although "facts are not copyrightable[,] . . . compilations of facts generally are." *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991).

Revised March 2024

17.5 Copyright Infringement—Elements—Ownership and Copying (17 U.S.C. § 501(a)-(b))

Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner's permission infringes the copyright.

On the plaintiff [*name*]'s copyright infringement claim, the plaintiff [*name*] has the burden of proving by a preponderance of the evidence that:

First, the plaintiff [*name*] is the owner of a valid copyright; and

Second, the defendant [*name*] copied original expression from the copyrighted work.

If you find that the plaintiff [*name*] has proved both of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, you find that the plaintiff [*name*], has failed to prove either of these elements, your verdict should be for the defendant [*name*],.

Comment

The elements in this instruction are explained in Instructions 17.6 (Copyright Infringement—Ownership of Valid Copyright—Definition), 17.14 (Copyright Infringement—Originality), 17.17 (Copying—Access and Substantial Similarity), 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 Substantial Similarity—Extrinsic Test; Intrinsic Test). Copying and improper appropriation are issues of fact for the jury. *See Three Boys Music Corp v. Bolton*, 212 F.3d 477, 481-82 (9th Cir. 2000).

The elements of copyright infringement cited in this instruction were stated in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); *see also Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th Cir. 2013); *Great Minds v. Office Depot*, 945 F.3d 1106, 1110 (9th Cir. 2019); *Aquarian Found., Inc. v. Lowndes*, 127 F.4th 814, 821 (9th Cir. 2025) (confirming that ownership of a copyright may be bequeathed by will under both the 1909 and 1976 Copyright Acts).

The Ninth Circuit considers the word "copying" as "shorthand" for the various activities that may infringe a copyright owner's six exclusive rights described at 17 U.S.C. § 106. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153-54 (9th Cir. 2012).

To establish the defendant's liability on a direct infringement theory, the plaintiff must show that the defendant was the cause of the infringement. *See Perfect 10, Inc. v. Giganews, Inc*., 847 F.3d 657, 666 (9th Cir. 2017) ("[W]here it is clear that infringement has occurred, courts must determine 'who is close enough to the [infringing] event to be considered the most important cause'" (citation omitted)); *see also VHT Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 732 (9th Cir. 2019) ("'[D]irect infringement requires 'active' involvement."). If causation is

contested, it may be appropriate to modify this instruction to explicitly include causation as an element. In *VHT, Inc. v. Zillow Group, Inc.*, the Ninth Circuit provided an extensive discussion of the causation requirement in a case involving alleged copyright infringement of website images. 918 F.3d at 731-32 ("[T]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.").

In *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020) (en banc), a case involving the alleged copyright infringement of a musical composition, the Ninth Circuit worded the elements slightly differently: "proof of copyright infringement requires [the plaintiff] to show: (1) that he owns a valid copyright in [the work]; and (2) that [the defendant] copied protected aspect of the work . . . The second prong of the infringement analysis contains two separate components: 'copying' and 'unlawful appropriation,'" *id.* at 1064 (citing *Rentmeester v. Nike, Inc*., 883 F.3d 1111, 1117 (9th Cir. 2018)).

Revised March 2025

17.6 Copyright Infringement—Ownership of Valid Copyright—Definition (17 U.S.C. §§ 201–205)

The plaintiff [*name*] is the owner of a valid copyright in [*identify work[s] allegedly infringed*] if the plaintiff [*name*] proves by a preponderance of the evidence that:

First, the plaintiff [*name*]'s work is original; and

Second, the plaintiff [*name*] [is the author or creator of the work] [received a transfer of the copyright] [received a transfer of the right to [*specify right transferred, e.g., make derivative works, publicly perform the work, etc.*]].

Comment

Under the Copyright Act, the party claiming infringement must show ownership. *See Lamps Plus, Inc. v. Seattle Lighting Fixture Co*., 345 F.3d 1140, 1144 (9th Cir. 2003) ("Ownership of the copyright is ... always a threshold question." (quoting *Topolos v. Caldewey*, 698 F.2d 991, 994 (9th Cir. 1983))).

Under the Copyright Act, no copyright infringement exists if an "owner of a copy of a computer program . . . mak[es] . . . another copy or adaptation of that computer program" for certain purposes, such as when is an "essential step" in using the program. 17 U.S.C. § 117(a)(1). To determine whether a party is an "owner of a copy" of a computer program, the court looks to whether the party has "sufficient incidents of ownership" over the copy of the software program. *Oracle Int'l Corp. v. Rimini St., Inc*., 123 F.4th 986, 997 (9th Cir. 2024) (deciding this question by reviewing "the totality of the parties' agreement"); *see* 17 U.S.C. § 202 ("Ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied.").

Revised March 2025

17.7 Copyright Infringement—Copyright Registration Certificate (17 U.S.C. § 410(c))

A copyright owner may obtain a certificate of registration from the Copyright Office.

The evidence in this case includes Exhibit ___, a certificate of copyright registration from the Copyright Office. If you find that this certificate was made within five years after first publication of the plaintiff [*name*]'s work, you must presume that there is a valid copyright in [*identify the work in question*] and presume to be true the facts stated in the certificate including [*state specifics of the certificate relevant to the case, e.g., that plaintiff's work is the original and copyrightable work of the author and that the plaintiff owns the copyright in that work*], which I explain in Instructions [*insert instruction numbers relevant to elements of plaintiff's burden*]. The defendant [*name*] has the burden of disproving these facts.

If you find that the evidence presented by [*state the name of defendant(s)*] disproves either the validity of the copyright or any of the facts stated in the registration certificate, you may find that [*state the name of plaintiff(s)*] has failed to show ownership of a copyrightable work.

Comment

Under the Copyright Act, the party claiming infringement must show ownership of a copyrightable work. *See Lamps Plus, Inc. v. Seattle Lighting Fixture Co*., 345 F.3d 1140, 1144 (9th Cir. 2003) ("Ownership of the copyright is … always a threshold question." (quoting *Topolos v. Caldewey*, 698 F.2d 991, 994 (9th Cir. 1983))), *abrogated on other grounds by Unicolors, Inc. v. H&M Hennes & Mauritz, L.P. (Unicolors II)*, 595 U.S. 178 (2022).

This instruction should be given if the plaintiff submits a copyright registration certificate and there is a dispute as to its validity or the facts stated in the certificate. *See* 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.")

I "[I]f a copyright holder secures a registration certificate within five years after first publication, such certificate will constitute prima facie evidence of both the validity of the copyright and the facts stated in the certificate." *Cosmetic Ideas, Inc. v. IAC/Interactivecorp,* 606 F.3d 612, 619 (9th Cir. 2010) (citing 17 U.S.C. § 410(c)), *abrogated on other grounds by Fourth Est.Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296 (2019). Such a registration certificate entitles the plaintiff "to a rebuttable presumption" of a valid copyright, *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir. 2000), and the burden shifts to the defendant to prove that the plaintiff lacks a valid copyright in the work or to prove the falsity of any "fact[] set forth in the copyright certificate," *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011); *see also Transgo Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1019 (9th Cir. 1985) ("Under both the Copyright Act of 1909 and the Copyright Act of 1976, registration by the Copyright Office is prima facie evidence of copyrightability. This

presumption shifts the burden of proof to the challenging party to demonstrate why the item in question is not copyrightable."). For a definition of publication, *see* 17 U.S.C. § 101. For a definition of when a "registration of the copyright claim has been made in accordance with [the Copyright Act]," see *Fourth Est. Pub. Benefit Corp.*, 485 U.S. at 299-300.

The Copyright Act contains a safe harbor, 17 U.S.C. § 411(b)(1)(A), which provides that a certificate of registration is valid even though it contains inaccurate information, as long as the copyright holder did not "*knowingly* transmit[] inaccurate *material* facts to the Register of Copyrights" when it submitted its application for the certificate of registration. *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P. (Unicolors III)*, 52 F.4th 1054, 1064 (9th Cir. 2022). The safe harbor "does not distinguish between a mistake of law and a mistake of fact. Lack of knowledge of either fact or law can excuse an inaccuracy in a copyright registration." *Id.* at 1063 (quoting *Unicolors II*, 595 U.S. at 182). A court need not accept a copyright holder's claim that it was unaware of the relevant copyright law. *See Unicolors II*, 595 U.S. at 187. Instead, "[c]ircumstantial evidence, including the significance of the legal error, the complexity of the relevant rule, the applicant's experience with copyright law, and other such matters, may also lead a court to find that an applicant was actually aware of, or willfully blind to, legally inaccurate information"; moreover, "willful blindness may support a finding of actual knowledge." *Id*., at 187-88.

Where a copyright holder has registered a derivative work, the certificate of registration for the derivative work does not establish a prima facie case of valid copyright in the underlying work (or, equivalently, "create[] a presumption of validity of the copyright of the underlying work"). *Cooling Sys. & Flexibles, Inc. v. Stuart Radiator, Inc.*, 777 F.2d 485, 490 (9th Cir. 1985) (derivative work). Likewise, where a copyright holder has registered a compilation, the certificate of registration for the compilation does not establish a prima facie case of copyright validity with respect to the component works. *See Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 203 (9th Cir. 1989) ("[A] copyrightable compilation [can] consist entirely of matter which is not itself copyrightable.").

Supplemental Instruction

[*If the certificate was made more than five years after first publication of the plaintiff's work, use the following in place of the second and third paragraphs of the instruction. If the date of first publication is in dispute, add the following at the end of the instruction.*]

If you find that this certificate was made more than five years after first publication of the plaintiff [*name*]'s work, you are instructed that the certificate is [*state the evidentiary weight that the court has accorded to the certificate*] to establish that there is a valid copyright in [*identify the work in question*] and to establish the facts stated in the certificate including [*state specifics of the certificate relevant to the case, e.g., that plaintiff's work is the original and copyrightable work of the author and that the plaintiff owns the copyright in that work*], which I explain in Instructions [*insert instruction numbers relevant to elements of plaintiff's burden*].

Comment

See 17 U.S.C. § 410(c) ("In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.").

Revised March 2024

17.8 Copyright Interests—Authorship
(17 U.S.C. § 201(a))

The creator of an original work is called the author of that work. An author originates or "masterminds" the original work, controlling the whole work's creation and causing it to come into being.

Others may help or may make valuable or creative contributions to a work. However, such [a contributor cannot be the author of the work unless that contributor] [contributors cannot be the authors of the work unless they] caused the work to come into being. One must translate an idea into a fixed, tangible expression to be the author of the work. Merely giving an idea to another does not make the giver an author of a work embodying that idea.

Comment

"Authorship is a question of fact." *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989) (citing *Del Madera Props. v. Rhodes & Gardner, Inc.*, 820 F.2d 973, 980 (9th Cir. 1987)).

For other instructions on particular types of authorship interests, see Instructions 17.9 (Copyright Interests—Joint Authors), 17.10 (Copyright Interests—Authors of Collective Works), and 17.11 (Copyright Interests—Work Made for Hire by Employee). For the requirement of an "original" work, see Instruction 17.14 (Copyright Infringement—Originality).

Copyright in a work "vests initially in the author or authors" of a work. 17 U.S.C. § 201(a). "As a general rule, the author is the party who actually creates the work …." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). Integral to the concept of authorship is the translation of an idea into a fixed tangible medium of expression. *See S.O.S.*, 886 F.2d at 1087 (quoting *Cmty. for Creative Non-Violence*, 490 U.S. at 737); *see also* 17 U.S.C. § 102(b) (no copyright protection for ideas). A work is "fixed" in a tangible medium when its authorized embodiment occurs in a concrete form that is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2010) (quoting 17 U.S.C. § 101) (a photographic image stored in a computer's server is fixed in a tangible medium of expression). Authorship is a designation for the "originator" of the work, who "causes something to come into being." *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000). In *Aalmuhammed*, the court noted that the Supreme Court had defined "author" as the person "to whom the work owes its origin and who superintended the whole work, the 'master mind.'" 202 F.3d at 1233 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58, 61 (1884)). The *Burrow-Giles* definition "is still good law." *Id.*

17.9 Copyright Interests— Joint Authors
(17 U.S.C. §§ 101, 201(a))

A copyright owner is entitled to exclude others from copying a joint work. A joint work is a work prepared by two or more authors. At the time of the joint work's creation, a joint work must have two or more authors, and:

(1) each author must have made a substantial and valuable contribution to the work;

(2) each author must have intended that [his] [her] [*other pronoun*] contribution be merged into inseparable or interdependent parts of a unitary whole; and

(3) each author must have contributed material to the joint work which could have been independently copyrighted.

Each author of a joint work shares an undivided interest in the entire joint work. A copyright owner in a joint work may enforce the right to exclude others in an action for copyright infringement.

In deciding whether parties intended their contributions to be merged [in element 2, above], you may consider whether the parties signed a written agreement stating that the copyright in the work is to be jointly owned. If there is no such agreement, you may consider whether:

(a) [both] [each of the] parties exercised control over the work;

(b) [both] [each of the] parties' actions showed they shared the intent to be co-authors when they were creating the work, for instance by publicly stating that the work was their shared project; and

(c) the audience-appeal of the work depends on the contribution of each party so that the share of each party's contribution to the work's success cannot be appraised.

In making a substantial and valuable contribution to a work, each author's contribution to the joint work need not be equal.

A written agreement stating the copyright in the work is to be jointly owned may show that each author of a joint work intended that [his] [her] [*other pronoun*] contribution be merged into inseparable or interdependent parts of a unitary whole.

In contributing material to the joint work that could have been independently copyrighted, each author's contribution should be entitled to copyright protection without the contributions by the other author[s].

Comment

Whether a work is a joint work, rendering a party a joint author, is often a question of fact for the jury to determine. *See S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989) (reversing summary judgment determination of joint authorship). *But see Richlin v. Metro-Goldwyn-Mayer Pictures, Inc.*, 531 F.3d 962, 967-70 (9th Cir. 2008) (affirming summary judgment determination of joint authorship); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1236 (9th Cir. 2000) (same). This instruction may also be inappropriate for use in a case involving joint authorship under the 1909 Copyright Act. *See Richlin*, 531 F.3d at 967 (explaining that 1909 Copyright Act did not expressly mention or define joint authorship but that joint authorship claims may be analyzed under the rubric of the 1976 Copyright Act because it incorporated common law principles that were well-established under the 1909 Act).

Although *Aalmuhammed* requires that a joint author be the work's "master mind," 202 F.3d at 1234, the fact that the joint work concept contemplates two or more co-authors implies that a work may have more than one "master mind," as long as each makes an independently copyrightable contribution. *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 521 (9th Cir. 1990). The fact that someone has contributed copyrightable material to a joint project does not mean that person is a sole author of that person's copyright expression. *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015).

While either author of a joint work may enforce the right to exclude others, each author of a joint work also "has the independent right to use or license the copyright subject only to a duty to account for any profits he earns from the licensing or use of the copyright." *Ashton-Tate Corp.*, 916 F.2d at 522 (9th Cir. 1990). Accordingly, a joint copyright owner may not exclude other joint owners or persons who have a license from another joint owner.

For definitions relevant to this instruction, see 17 U.S.C. §§ 101 (defining "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole"), 106 (listing exclusive rights of copyright), and 501 (copyright infringement). The initial ownership rights in a joint work under the 1976 Copyright Act are found at 17 U.S.C. § 201(a) ("authors of a joint work are coowners of the copyright"); *see also Pye v. Mitchell*, 574 F.2d 476, 480 (9th Cir. 1978) (co-authors automatically hold undivided interest in the whole).

Elements reflected in this instruction are drawn from: *Ashton-Tate Corp.*, 916 F.2d at 521 ("Even though this issue is not completely settled in the case law, our circuit holds that joint authorship requires each author to make an independently copyrightable contribution [to the joint work]."); *S.O.S.*, 886 F.2d at 1087 ("[O]ne must supply more than mere direction or ideas: one must 'translate [ ] an idea into a fixed, tangible expression entitled to copyright protection [to be

a joint author.]'" (quoting *Cmty. for Creative Non–Violence v. Reid*, 490 U.S. 730, 737 (1989))); and *Pye*, 574 F.3d at 480.

The elements suggested in the paragraph supplementing the second element of the instruction are derived from *Aalmuhammed*, 202 F.3d at 1234-35 (noting the above as "several factors [that] suggest themselves as among the criteria for joint authorship, in the absence of contract" control "in many cases is the most important factor"). *See also Richlin*, 531 F.3d at 968 (analyzing joint authorship under criteria set forth in *Aalmuhammed*).

A work can be jointly owned by assignment of an undivided interest, such as transfer of copyright from sole author to two or more transferees. This simply renders the work jointly owned, but does not make it a joint work, for which this instruction is appropriate. *Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984).

17.10 Copyright Interests—Authors of Collective Works (17 U.S.C. § 201(c))

An owner of a copyright in a collective work is entitled to exclude others from copying it. A collective work is a work [such as [a newspaper, magazine, or periodical issue] [anthology] [encyclopedia]] in which a number of contributions, constituting separate and independent works in themselves, are selected, coordinated or arranged into an original, collective whole. The person who assembles the contributions of independent works into the collective work is an author and is entitled to copyright.

Copyright in a collective work is distinct from copyright in the separate contributions to a collective work. In the absence of an express transfer of copyright in the separate contribution, the copyright owner of the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

A copyright owner of a collective work may enforce the right to exclude others from the work's original selection, coordination, or arrangement in an action for copyright infringement.

Comment

See 17 U.S.C. §§ 101 (defining "collective work"), 201(c) (stating that, in absence of express copyright transfer by contributor to author of collective work, it is presumed that copyright owner of collective work acquires "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series"); *Jarvis v. K2 Inc.*, 486 F.3d 526, 530-32 (9th Cir. 2007) (analyzing derivative versus collective works and holding that "collective work privilege" does not apply to derivative works). Whether a contribution to a collective work has been reproduced and distributed as part of a "revision" depends on how it is presented and how it is perceived by users in context. *N.Y. Times Co., Inc. v. Tasini*, 533 U.S. 483, 499-500 (2001) (considering use of contributions to periodicals and other collective works in databases).

Several sections of the Copyright Act concern the placement of the copyright notice on a collective work and on the contributions to the collective work. *See* 17 U.S.C. §§ 401-406. Regarding copyright notice, *see Abend v. MCA, Inc.*, 863 F.2d 1465, 1469 (9th Cir. 1988) (adopting Second Circuit's conclusion that copyright notice on collective work is sufficient to obtain valid copyright on behalf of author of contributed work when publication rights are limited and when there are no facts to suggest that author intended to donate work to public), *aff'd*, 495 U.S. 207 (1990). A different treatment applies if a collective work is covered by the Berne Convention Implementation Act, 17 U.S.C. § 405(a) (e.g., works distributed after March 1, 1989). *See Golan v. Holder*, 565 U.S. 302, 352 (2012) (noting that in 1989 United States adopted Berne Convention and abolished copyright notice requirement); *see also Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1078 (9th Cir. 2022) (discussing foreign copyrights under Berne Convention).

Revised Dec. 2022

17.11 Copyright Interests—Work Made for Hire by Employee (17 U.S.C. § 201(b))

A copyright owner is entitled to exclude others from copying a work made for hire.

A work made for hire is one that is prepared by an employee and is within the scope of employment.

A work is made for hire within the scope of employment if:

(1) it is the kind of work the employee is employed to create;

(2) it occurs substantially within the authorized time and space limits; and

(3) it is made, at least in part, for the purpose of serving the employer.

The employer is considered to be the author of the work and owns the copyright [unless the employer and employee have agreed otherwise in writing].

A copyright owner of a work made for hire may enforce the right to exclude others in an action for copyright infringement.

Comment

This instruction may not be appropriate in cases in which a copyright was obtained under the 1909 Copyright Act. For such cases, *see Dolman v. Agee*, 157 F.3d 708, 711-12 (9th Cir. 1998) (applying presumption of work for hire under 1909 Copyright Act).

See 17 U.S.C. §§ 101 (defining work for hire), 201(b) (describing rights in work for hire). Congress used the words "employee" and "employment" in 17 U.S.C. § 101 to describe the conventional relationship of employer and employee. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989); *U.S. Auto Parts Network, Inc. v. Parts Geeks, LLC*, 692 F.3d 1009, 1015 (9th Cir. 2012). "An employment (or commissioning) relationship at the time the work is created is a condition" for creation of a work for hire. *Urantia Found. v. Maaherra*, 114 F.3d 955, 961 (9th Cir. 1997). Absent a written agreement to the contrary, the employer is the author of a work made for hire within the scope of employment. *U.S. Auto Parts*, 692 F.3d at 1017 (explaining when work is made for hire within scope of employment); *Aquarian Found., Inc. v. Lowndes*, 127 F.4th 814, 820 (9th Cir. 2025) (holding works authored by the founder and head of a church and which were not part of the "traditional, hierarchical relationships in which the employee created the work" as part of the church's "regular course of business" did not constitute "works for hire").

Under copyright law, a work for hire clause in a contract, or a work for hire relationship, vests all rights of authorship in the employer or "person for whom the work was prepared." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1144 (9th Cir. 2003) (quoting 17 U.S.C.

§ 201) (holding that grant of royalties to creator of work for hire, absent express contractual provision to contrary, does not create beneficial ownership interest in that creator).

While all works created during the course of employment are works for hire, specially commissioned works prepared by independent contractors are considered works for hire only if they fall within certain categories of eligible works and the parties agree in writing that the works will become made for hire. *See* 17 U.S.C. § 101 (stating that "specifically ordered or commissioned" work made for hire exists only in nine specific categories); *Warren*, 328 F.3d at 1140 n.4.

This instruction does not address specially commissioned works created outside of an employment relationship.

Supplemental Instruction

[*If the issue of the employment status of the work's creator will be decided by the jury, insert the following after the second paragraph of the instruction.*]

You should consider the following factors in determining whether the creator of the work in this case was an employee of the [*name of party identified*]:

(1) The skills required to create the work. The higher the skills required, the more likely the creator was an independent contractor rather than an employee.

(2) The source of the tools or instruments used to create the work. The more the creator had to use his or her own tools or instruments, the more likely the creator was an independent contractor rather than an employee.

(3) The location of where the work was done. The less the creator worked at [*name of alleged employer's work site*], the more likely the creator was an independent contractor rather than an employee.

(4) Applicability of employee benefits, like a pension plan or insurance. The more the creator is covered by the benefit plans [*name of alleged employer*] offers to other employees, the less likely the creator was an independent contractor rather than an employee.

(5) Tax treatment of the creator by [*name of alleged employer*]. If [*name of alleged employer*] reported to tax authorities payments to the creator with no withholding or by use of a Form 1099, the more likely the creator was an independent contractor rather than an employee.

(6) Whether the creator had discretion over when and how long to work. The more the creator can control his or her work times, the more likely the creator was an independent contractor rather than an employee.

(7) Whether [*name of alleged employer*] has the right to assign additional projects to the creator. The more the creator could refuse to accept additional projects unless additional fees were paid, the more likely the creator was an independent contractor rather than an employee.

(8) Duration of the relationship between the parties. The more the creator worked on a project basis for [*name of alleged employer*], the more likely the creator was an independent contractor rather than an employee.

(9) The method of payment. The more the creator usually works on a commission or onetime-fee basis, the more likely the creator was an independent contractor rather than an employee.

(10) Whether the creator hired (or could have hired) and paid his or her own assistants. The more the creator hires and pays for his or her own assistants, the more likely the creator was an independent contractor rather than an employee.

(11) Whether [*name of alleged employer*] is a business. If the party that did the hiring is not a business, it is more likely that the creator was an independent contractor rather than an employee.

Comment

This eleven-factor test employing common-law agency principles to determine whether the creator of a work was an employee or an independent contractor was identified by the Supreme Court. *See Cmty. for Creative Non-Violence,* 490 U.S. at 751-52. No single factor is determinative. *Id*. at 752. For a discussion of the weight of any of the eleven *Reid* factors, *see JustMed, Inc. v. Byce,* 600 F.3d 1118, 1125-28 (9th Cir. 2010), and *Aymes v. Bonelli*, 980 F.2d 857, 860-64 (2d Cir.1992).

Revised March 2025

17.12 Copyright Interests—Assignee
(17 U.S.C. § 201(d)(1))

[In this case, the [[plaintiff] [defendant]] [*name*] does not claim to be the [author] [creator] [initial owner] of the copyright at issue. Instead, the [[plaintiff] [defendant]] [*name*] claims that it received the copyright by virtue of assignment from the work's [author] [creator] [initial owner] so that the [[plaintiff] [defendant]] [*name*] is now the assignee of the copyright.]

A copyright owner may [transfer] [sell] [convey] to another person all or part of the owner's property interest in the copyright; that is, the right to exclude others from copying the work. The person to whom the copyright is [transferred] [sold] [conveyed] becomes the owner of the copyright in the work.

To be valid, the [transfer] [sale] [conveyance] must be in a writing signed by the transferor. The person to whom this right is transferred is called an assignee. [The assignee may enforce this right to exclude others in an action for copyright infringement.]

Comment

When the owner of the copyright is not the author, the first bracketed paragraph may be appropriate.

"A 'transfer of copyright ownership' is an assignment . . . ." 17 U.S.C. § 101. Ownership of a copyright may be transferred in whole or in part by any means of conveyance. *See* 17 U.S.C. § 201(d)(1).

Transfer of a copyright, other than by operation of law, must be reflected by a written instrument, signed by the owner of the rights conveyed. *See* 17 U.S.C. § 204(a) ("A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."); *Konigsberg Int'l Inc. v. Rice*, 16 F.3d 355, 356-57 (9th Cir. 1994) (noting that § 204(a) provides that "a transfer of copyright is simply 'not valid' without a writing"). "No magic words must be included in a document to satisfy § 204(a). Rather, the parties' intent as evidenced by the writing must demonstrate a transfer of the copyright." *Radio Television Espanola S.A. v. New World Entm't Ltd.*, 183 F.3d 922, 927 (9th Cir. 1999). "Section 204's writing requirement is not unduly burdensome; it necessitates neither protracted negotiations nor substantial expense. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to be the Magna Charta; a one-line pro forma statement will do." *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990). Both the 1909 and 1976 Copyright Acts allow for the transfer of a copyright by will. *Aquarian Found., Inc. v. Lowndes*, 127 F.4th 814, 821 (9th Cir. 2025) (citing 17 U.S.C. § 42 (repealed) (providing that copyrights "may be bequeathed by will"); 17 U.S.C. § 201(d)(1) (providing that copyrights "may be bequeathed by will or pass as personal property by the applicable laws of intestate succession")).

Some case law suggests that the writing must be executed "more or less" contemporaneously with the agreement to transfer ownership. *See Koninsberg*, 16 F.3d at 356-57. However, this suggestion has been rejected as dicta, *see Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1429 n.1 (9th Cir. 1996), and the weight of authority holds that "[i]f an oral transfer of a copyright license is later confirmed in writing, the transfer is valid," *Vallente-Kritzer Video v. Pinckney*, 881 F.2d 772, 775 (9th Cir. 1989); *see also Magnuson*, 85 F.3d at 1428 ("Like the 1976 Copyright Act, the Copyright Act of 1909 provided that assignment of a copyright had to be made in writing. However, case law holds that under some circumstances a prior oral grant that is confirmed by a later writing becomes valid as of the time of the oral grant. . . ." (citations omitted)). This is especially so when there is no dispute between the conveyor and the conveyee regarding whether a transfer took place, for example when the dispute is between the conveyee and an alleged infringer. *See id.* (holding that § 204(a)'s writing requirement was satisfied by memorandum executed after litigation had begun, when there was no dispute regarding conveyor's intent to transfer).

The 1976 Copyright Act provides that only the "legal or beneficial owner of an exclusive right under a copyright [may] . . . institute an action for any infringement . . . ." 17 U.S.C. § 501(b). The Ninth Circuit interprets this section as requiring the plaintiff to have a "legal or beneficial interest in at least one of the exclusive rights described in § 106." *Silvers v. Sony Pictures Entm't, Inc*., 402 F.3d 881, 885 (9th Cir. 2005) (en banc) (concluding that though § 501(b) does not expressly say that only legal or beneficial owner of exclusive right may sue, Congress's explicit listing of who *may* sue should be understood as an exclusion of others); *see also Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1168 (9th Cir. 2013). Additionally, in order for a plaintiff to be "'entitled ... to institute an action' for infringement, the infringement must be 'committed while he or she is the owner of' the particular exclusive right allegedly infringed." *Silvers*, 402 F.3d at 885 (quoting 17 U.S.C. § 501(b)). As to exclusive rights, see Instruction 17.2 (Copyright—Defined).

Regarding an assignment of royalties, *see Broad. Music, Inc. v. Hirsch*, 104 F.3d 1163, 1166 (9th Cir. 1997) (holding that copyright owner's assignment of right to receive royalties is not transfer of ownership under 17 U.S.C. § 205 and does not affect existence, scope, duration or identification of rights under copyright). However, the beneficial owner of the copyright, such as the royalty assignee, may, by means of intervention, protect his or her interests if the legal owner of the copyright fails to do so. *See* 17 U.S.C. § 501(b); *see also Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 833-34 (9th Cir. 1996) (involving assignment of royalties).

Regarding a renewal interest in a copyright, *see Marascalco v. Fantasy, Inc.*, 953 F.3d 469, 476 (9th Cir. 1991) (holding that renewal interest in copyright vests in author's assignees only if author survives to start of renewal term under 17 U.S.C. § 304(a)). A work created on or after January 1, 1978, is protected from its creation for a term consisting of the life of the author and 70 years after the author's death. 17 U.S.C. § 302(a). In works created prior to January 1, 1978, and still in their first term of copyright, a copyright shall upon renewal endure for the further term of 67 years. 17 U.S.C. § 304(a)(1)(A). *See Stewart v. Abend*, 495 U.S. 207, 217 (1990). However, if the author dies before that time, the "next of kin obtain the renewal copyright free of any claim founded upon an assignment made by the author in his lifetime.

These results follow not because the author's assignment is invalid but because he had only an expectancy to assign; and his death, prior to the renewal period, terminates his interest in the renewal…." *Id.*

Revised March 2025

17.13 Copyright Interests—Exclusive Licensee (17 U.S.C. § 201(d)(2))

[In this case, the [[plaintiff] [defendant]] [*name*] does not claim to be the [author] [creator] [initial owner] of the copyright at issue. Instead, the [[plaintiff] [defendant]] [*name*] claims the copyright by virtue of an exclusive license from the work's [author] [creator] [initial owner] and that the [[plaintiff] [defendant]] [*name*] is now the exclusive licensee of the copyright.]

A copyright owner may [transfer] [sell] [convey] exclusively to another person any of the rights comprised in the copyright. [To be valid, the [transfer] [sale] [conveyance] must be in a writing signed by the copyright owner.] The person to whom this right is transferred is called a licensee.

[An exclusive licensee has the rights to exclude others from copying, adapting, distributing, performing, or displaying the work [to the extent of the rights granted in the license]]. An exclusive licensee is entitled to bring an action for copyright infringement of the right licensed.

Comment

The bracketed language in the instruction's first sentence of the third paragraph ("[to the extent of the rights granted in the license]") is not necessary when the extent of the license and its applicability to the alleged infringing activity were established in pretrial proceedings. *See*, *e.g.*, *Apple Computer, Inc. v. Microsoft Corp*., 35 F.3d 1435, 1447-48 (9th Cir. 1994).

"A 'transfer of copyright ownership' is an . . . exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright . . . but not including a nonexclusive license." 17 U.S.C. § 101.

An exclusive license, other than one granted by operation of law, must be in writing if it was granted after 1978. *See* P. Goldstein, GOLDSTEIN ON COPYRIGHT § 5.2.1.1 (2016); 3 M. Nimmer & D. Nimmer, NIMMER ON COPYRIGHT § 10.03[A][1]. If it was granted prior to 1978, however, an exclusive license may be oral or implied by conduct. *See id*. at § 10.03[B][1]; GOLDSTEIN ON COPYRIGHT § 5.2.1.2; *see also Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1113 (9th Cir. 1998); *Effects Assocs. Inc. v. Cohen*, 908 F.2d 555, 557-58 (9th Cir. 1990) (holding that exclusive licenses, because they transfer copyright ownership, must be in writing). The writing must be signed by the owner of the rights conveyed and be the product of the parties' negotiations. 17 U.S.C. § 204(a) (requiring that transfers of copyright be in writing); *Radio Television Espanola v. New World Entm't, Ltd.*, 183 F.3d 922, 926-27 (9th Cir. 1999) (holding that § 204(a) is satisfied by writing demonstrating transfer of copyright, indicating terms of license). "No magic words must be included in a document to satisfy § 204(a). Rather, the parties' intent as evidenced by the writing must demonstrate a transfer of a copyright." *Id.*

"[T]he various rights included in a copyright are divisible and . . . 'any of the exclusive rights comprised in a copyright . . . may be transferred . . . and owned separately.'" *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996) (quoting 17 U.S.C. § 201(d)(2)). "An exclusive licensee owns separately only the 'exclusive rights comprised in the copyright' that are the subject of his license." *Id.* at 1197-98 (citation omitted). The owner of any particular exclusive right "is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title." 17 U.S.C. § 201(d)(2). "In other words, . . . each separate owner of a subdivided exclusive right may sue to enforce that owned portion of an exclusive right." *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 887 (9th Cir. 2005).

Questions regarding the ownership of a copyright are governed by state law in some situations. *See Scholastic Entm't, Inc. v. Fox Entm't Group, Inc*., 336 F.3d 982, 983, 988 (9th Cir. 2003); *Rano v. Sipa Press, Inc.* 987 F.2d 580 (9th Cir. 1993); *Aquarian Found., Inc. v. Lowndes*, 127 F.4th 814, 822-23 (9th Cir. 2025) (explaining that because the Copyright Act's "Conditions of Termination" do not apply to *non-statutory* heirs, the court must turn to state law to fill the gaps for termination of a licensing agreement).

Regarding nonexclusive licenses, *see* NIMMER §§ 10.03[A][7] and 10.03[B][1]. Nonexclusive licenses differ in many respects from exclusive licenses and raise several unique issues. For example, a nonexclusive license need not be in writing, *see Cohen*, 908 F.2d at 558, and a nonexclusive licensee cannot bring suit to enforce a copyright, *see Righthaven LLC v. Hoehn*, 716 F.3d 1166, 1171-72 (9th Cir. 2013) (holding that nonexclusive licensee did not have standing to sue for copyright infringement); *Supersound Recordings, Inc. v. UAV Corp.*, 517 F.3d 1137, 1144 (9th Cir. 2008) (same); *see also* NIMMER § 10.03[B][1]. Further, a "copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement and can only sue for breach of contract." *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999), *implied overruling on other grounds recognized by Perfect 10, Inc. v. Google, Inc*., 653 F.3d 976, 979 (9th Cir. 2011). "If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement." *Id.*

Revised March 2025

17.14 Copyright Infringement—Originality

You may find that [*state name of work*] [*state specific components of the work*] [is] [are] original if [it was] [they were] created:

First, independently by the [work's] [components'] author, that is, the author did not copy [it] [them] from another work; and

Second, by use of at least some minimal creativity.

[The "original" part of a work need not be new or novel.]

Comment

"Original, as the term is used in copyright, means only that the work was independently created by the author . . . , and that it possesses at least some minimal degree of creativity." *Feist Pubs, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1991). A work is original if "the author contributed something more than a merely trivial variation, something recognizably his own." *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992) (citation omitted). The effort involved to create the work is "wholly irrelevant." *CDN, Inc. v. Kapes*, 197 F.3d 1256, 1260 (9th Cir. 1999). However, when a work embodies only the minimum level of creativity necessary for copyright, it is said to have "thin" copyright protection, which "protects against only virtually identical copying." *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

Whether a work involves sufficient creativity is a question of fact, *see Dezendorf v. Twentieth Century-Fox Film Corp.*, 99 F.2d 850, 851 (9th Cir. 1938) (holding that "question of originality" is "one of fact, not of law"); Paul Goldstein, *Goldstein on Copyright*, § 2.2.1 (3d ed. 2023) ("Courts have historically characterized originality as a question of fact.").

Because "[o]riginality in this context means little more than a prohibition of actual copying," *N. Coast Indus.*, 972 F.2d at 1033 (citation omitted), "a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying," *Feist*, 499 U.S. at 345. The defendant can establish that the plaintiff copied the work (as opposed to independently creating it) in the same manner that the plaintiff proves infringement. *See N. Coast Indus.*, 972 F.2d at 1034. *See* Instruction 17.5 (Copyright Infringement—Elements—Ownership and Copying).

Facts are not original and, therefore, are non-copyrightable. *See Feist*, 499 U.S. at 344 ("[T]here can be no valid copyright in facts."). But a compilation of facts may be entitled to copyright protection if the author's arrangement or selection of those facts is original. *See id.* at 348-49; *CDN, Inc.*, 197 F.3d at 1259; *see also* Instructions 17.10 (Copyright Interests—Authors of Collective Works), 17.16 (Compilation).

Revised Dec. 2023

17.15 Copyright Interests—Derivative Work
(17 U.S.C. §§ 101, 106(2))

A work is a derivative work if it [recasts,] [transforms,] or [adapts] a preexisting work. The owner of a copyright may exclude others from creating derivative works based on the owner's copyrighted work. If the owner allows others to create a derivative work based on the preexisting work, the owner retains a copyright in any elements of a derivative work that are [copied] [derived from] the preexisting work. The owner of a copyright in the preexisting work may enforce the right to exclude others from copying elements of the derivative work that were themselves [copied] [derived from] the preexisting work.

The creator of a derivative work may own a copyright in the original aspects of the work that the creator contributed, such as editorial revisions, annotations, elaborations, or other modifications to the pre-existing work, so long as the creator of the derivative work lawfully used the preexisting work and the contributions are more than trivial. The creator of a derivative work that lawfully used the preexisting work may enforce the right to exclude others from copying the original aspects of the derivative work.

You may find that the derivative work is copyrightable if:

First, the preexisting work is copyrightable or was copyrightable at the time it was created;

Second, the derivative work lawfully uses the preexisting work;

Third, the derivative work includes new material that is independent of the preexisting work and is itself copyrightable; and

Fourth, the derivative work's new material is not so minimal as to be trivial, such that a copyright in the derivative work could prevent the owner of the copyright in the preexisting work from exercising a right under copyright law.

A [work] [material] is copyrightable if it is an original work of authorship fixed in any tangible medium of expression.

A derivative work lawfully uses preexisting material if either the copyright holder of the preexisting material authorized the use or the material has entered the public domain.

Comment

A copyright owner has the exclusive right to prohibit or authorize the preparation of derivative works. 17 U.S.C. § 106(2). A derivative work must actually incorporate the copyrighted work, either literally or nonliterally. *Oracle Int'l Corp. v. Rimini St., Inc.*, 123 F.4th 986, 996 (9th Cir. 2024). In *Oracle*, the court rejected an "interoperability" test for derivative works—if a product can only interoperate with a preexisting copyrighted work, then it must be derivative. "Both the text of the Copyright Act and [Ninth Circuit] case law teach that derivative status does not turn on interoperability, even exclusive interoperability, if the work doesn't

substantially incorporate the preexisting work's copyrighted material." *Id.* "[A] derivative work must actually incorporate [the] copyrighted work, either literally or nonliterally . . . simply being an extension or modification of a copyrighted work without any incorporation is not enough to create a derivative work." *Id.*

Revised March 2025

17.16 Compilation
(17 U.S.C. § 101)

An owner is entitled to copyright protection of a compilation. A compilation is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.

The owner of a compilation may enforce the right to exclude others in an action for copyright infringement.

Comment

Facts and ideas are not copyrightable, but compilations of facts may be copyrightable even where the underlying facts are not. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co*., 499 U.S. 340, 344 (1991) (holding that factual compilations are sufficiently original to be copyrightable if choices as to selection and arrangement of facts are independently made by compiler); *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) ("[A] combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship."). Copyright in a compilation "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work." 17 U.S.C. § 103(b). The term "compilation" includes collective works. *See* 17 U.S.C. § 101.

For Ninth Circuit cases considering compilations, *see Lamps Plus, Inc. v. Seattle Lighting Fixture Co.,* 345 F.3d 1140, 1146 (9th Cir. 2003) ("[The] mechanical combination of four preexisting ceiling-lamp elements with a preexisting table-lamp base did not result in the expression of an original work of authorship . . . ."); *Satava*, 323 F.3d at 811 (holding that combination of six unprotectable elements that were "so commonplace in glass-in-glass sculpture and so typical of jellyfish physiology" were not eligible for copyright protection); *CDN Inc. v. Kapes*, 197 F.3d 1256, 1259-61 (9th Cir. 1999) (examining and reviewing major coin publications to create list of coin prices satisfied requisite level of originality for copyright as compilation).

When a plaintiff alleges infringement of a compilation, it is not enough to show that only part of the work has been copied. "[W]e have repeatedly recognized in this circuit that when dealing with factual compilations, infringement cannot be based on a showing that only a part of the work has been copied. In the context of factual compilations, we have held that infringement should not be found in the absence of "bodily appropriation of expression," or "unauthorized use of substantially the entire item." *Experian Info. Sols., Inc. v. Nationwide Mktg. Servs. Inc*., 893 F.3d 1176, 1186 (9th Cir. 2018) (affirming grant of summary judgment when defendant's database comprised at most 80 percent of plaintiff's copyrighted compilation) (quoting *Harper House, Inc. v. Thomas Nelson, Inc*., 889 F.2d 197, 205 (9th Cir. 1989)).

17.17 Copying—Access and Substantial Similarity

Instruction [*insert cross reference to the pertinent instruction, e.g., Instruction 17.5*] states that the plaintiff [*name*] has the burden of proving that the defendant [*name*] copied original elements from the plaintiff [*name*]'s copyrighted work. The plaintiff [*name*] can prove that the defendant [*name*] copied from the work [by proving by a preponderance of the evidence that the defendant [*name*] had access to the plaintiff [*name*]'s copyrighted work and that there are substantial similarities between the defendant [*name*]'s work and original elements of the plaintiff [*name*]'s work] [by proving by a preponderance of the evidence that there is a striking similarity between the defendant [*name*]'s work and the plaintiff [*name*]'s copyrighted work]. If the plaintiff [*name*] fails to prove that the defendant copied the plaintiff [*name*]'s work, your verdict should be for the defendant [*name*].

Comment

Regarding access, substantial similarity, and independent creation, *see Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1018 (9th Cir. 1985). *See also* Instruction 17.14 (Copyright Infringement—Originality), 17.18 (Copyright Infringement—Copying—Access Defined), and 17.19 (Substantial Similarity—Extrinsic Test; Intrinsic Test). The word "copying" is described by the Ninth Circuit as "shorthand" for the various activities that may infringe any of the copyright owner's "exclusive rights," which are described in 17 U.S.C. § 106. *Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1154 (9th Cir. 2012) (quoting *S.O.S., Inc. v. Payday, Inc.,* 886 F.2d 1081, 1085 n.3 (9th Cir. 1989)).

If it can be determined that either access or substantial similarity are lacking in a particular case, the remaining prong need not be addressed; failure on either prong is sufficient for failure of the claim. *See Gray v. Hudson*, 28 F.4th 87, 96 (9th Cir. 2022). "[I]n the absence of any proof of access, a copyright plaintiff can still make out a case of infringement by showing that the songs were 'strikingly similar.'" *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir. 2000) (citing *Smith v. Jackson*, 84 F.3d 1213, 1220 (9th Cir. 1996), and *Baxter v. MCA, Inc.*, 812 F.2d 421, 423, 424 n.2 (9th Cir. 1987)), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc). "[S]triking similarity shows that the similarities between the two works are due to copying rather than coincidence, independent creation, or prior common source." *Skidmore*, 952 F.3d at 1064 (quotation marks, ellipsis, and citation omitted).

Supplemental Instruction

[*If the defendant has submitted evidence that a similarity between the infringed and the allegedly infringing work is not due to the defendant's copying, replace the instruction with the following.*]

The plaintiff [*name*] has the burden of proving that the defendant [*name*] copied original elements from the plaintiff [*name*]'s copyrighted work. If the plaintiff [*name*] [proves by a preponderance of the evidence that the defendant [*name*] had access to the plaintiff [*name*]'s copyrighted work and that there are substantial similarities between the defendant [*name*]'s work

and original elements of the plaintiff [*name*]'s work] [proves by a preponderance of the evidence that there is a striking similarity between the defendant [*name*]'s work and the original elements of the plaintiff [*name*]'s copyrighted work] then there is a presumption that the defendant [*name*] copied from the plaintiff [*name*]'s copyrighted work. If the plaintiff [*name*] fails to prove that the defendant [*name*] copied from the plaintiff [*name*]'s work, your verdict should be for the defendant [*name*].

The defendant [*name*] may rebut the presumption of copying. If you find that the defendant [*name*] has proved by a preponderance of evidence that the similarities between the defendant [*name*]'s work and the copyrighted work are due to [*alternative case of similarity*], your verdict should be for the defendant [*name*].

Comment

A presumption of copying arises if the plaintiff proves that the defendant had access to the plaintiff's work and that there is a substantial similarity between the original elements of the infringed and alleged infringing works, or if there is a striking similarity between the infringed and alleged infringing works that raises the inference of access. *Three Boys*, 212 F.3d at 486 ("By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying." (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir. 1976))). The defendant may rebut the presumption through proof of independent creation. *Id.*; *cf. Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) ("It is true that defendants had access to plaintiff's [copyrighted] pin and that there is an obvious similarity between plaintiff's pin and those of defendants. These two facts constitute strong circumstantial evidence of copying. But they are not conclusive, and there was substantial evidence to support the trial court's finding that defendant's pin was in fact an independent creation.") (citations omitted); *Skidmore*, 952 F.3d at 1064 (holding that "probative or striking similarity shows that the similarities between the two works are due to copying rather than coincidence, independent creation, or prior common source") (quotation marks, ellipsis, and citation omitted).

Revised March 2024

17.18 Copyright Infringement—Copying—Access Defined

[As part of its burden in Instruction [*insert cross reference to the pertinent instruction e.g., Instruction 17.5*], the plaintiff [*name*] must prove by a preponderance of the evidence that [the defendant [*name*]] [whoever created the work owned by the defendant [*name*]] had access to the plaintiff [*name*]'s work.] You may find that the defendant [*name*] had access to the plaintiff [*name*]'s work if [the defendant [*name*]] [whoever created the work owned by the defendant [*name*]] had a reasonable opportunity to [view] [read] [hear] [copy] the plaintiff [*name*]'s work before the defendant [*name*]'s work was created.

Comment

Proof of access requires "an opportunity to view or to copy plaintiff's work." *See Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp*., 562 F.2d 1157, 1172 (9th Cir. 1977); *see also Art Attacks Ink, LLC v. MGA Ent. Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) (requiring "a reasonable possibility, not merely a bare possibility"); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000) (same), *overruled on other grounds by Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc).

Supplemental Instruction

[*If evidence offered at trial shows various ways of proving access, add the following at the end of the instruction*.]

Access may be shown by:

[1. a chain of events connecting the plaintiff's work and the defendant's opportunity to [view] [hear] [copy] that work [such as dealings through a third party (such as a publisher or record company) that had access to the plaintiff's work and with whom both the plaintiff and the defendant were dealing]] [or]

[2. the plaintiff's work being widely disseminated] [or]

[3. a similarity between the plaintiff's work and the defendant's work that is so "striking" that it is highly likely the works were not created independent of one another].

Comment

"Where there is no direct evidence of access, circumstantial evidence can be used to prove access either by (1) establishing a chain of events linking the plaintiff's work and the defendant's access, or (2) showing that the plaintiff's work has been widely disseminated." (citation omitted) *Loomis v. Cornish*, 836 F.3d 991, 995 (9th Cir. 2016); *see also Three Boys*, 212 F.3d at 482 (holding that reasonable access can be shown by a chain of events connecting plaintiff's work and defendant's access or by plaintiff's work being widely distributed, and stating that the widespread dissemination approach is often coupled with a theory of

"subconscious copying"); *Art Attacks Ink* 581 F.3d at 1143-45 (holding no access shown under chain of events or wide dissemination theories); *Kamar Int'l, Inc. v. Russ Berrie & Co*., 657 F.2d 1059 (9th Cir. 1981) (holding access shown by dealings between parties and third party on chain of events theory relating to same subject matter).

As to widespread dissemination, the plaintiff may show "the degree of a work's commercial success and on its distribution through . . . relevant mediums." *Loomis*, 836 F.3d at 997; *see also Three Boys*, 212 F.3d at 484-85 (holding that sufficient evidence supported the jury's conclusion that plaintiffs failed to prove widespread dissemination of their song when the protected song "never topped the Billboard charts or even made the top 100 for a single week," "was not released on an album or compact disc until . . . after [defendants] wrote their song," music experts "testified that they never heard" the protected song, and defendants "produced copies of 'TV Guide' from 1966 [the year the protected song was released] suggesting that the television shows playing the song never aired in Connecticut [where defendants lived at the time]"). In addition to raising an inference of access due to widespread dissemination, the plaintiff can raise an inference of access where the allegedly infringed work saturated a relevant market in which both the plaintiff and the defendant participate. *See Loomis*, 836 F.3d at 997; *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848 (9th Cir. 2012) (holding that "there was a reasonable possibility that Defendants had an opportunity to view and copy [the allegedly infringed] design" where plaintiff's fabric design "was widely disseminated in the Los Angeles-area fabric industry" over a four-year period and the parties both operated in that market during that period). The mere presence of the plaintiff's work on a website is insufficient to establish widespread dissemination. *See Art Attacks Ink*, 581 F.3d at 1145.

As to the plaintiff demonstrating that there is a "striking similarity" between works to support an inference of access, *see Three Boys.,* 212 F.3d at 483 (holding that in absence of any proof of access, copyright plaintiff can still make out case of infringement by showing that songs were "strikingly similar."

Revised March 2024

17.19 Substantial Similarity—Extrinsic Test; Intrinsic Test

Comment

As the Ninth Circuit confirmed in *Antonick v. Electronic Arts, Inc*., 841 F.3d 1062 (9th Cir. 2016), the court employs a two-part test for determining whether one work is substantially similar to another:

> [A plaintiff] must prove both substantial similarity under the "extrinsic test" and substantial similarity under the "intrinsic test." The "extrinsic test" is an objective comparison of specific expressive elements. The "intrinsic test" is a subjective comparison that focuses on whether the ordinary, reasonable audience would find the works substantially similar in the total concept and feel of the works.

Id. at 1065-66; *see also Williams v. Gaye*, 885 F.3d 1150, 1163 (9th Cir. 2018) (approving instructions and explaining that extrinsic test requires "analytical dissection of a work and expert testimony"). The extrinsic test is a question of law for the court. *See Gray v. Hudson*, 28 23 F.4th 87, 97 (9th Cir. 2022). If the court determines that the plaintiff has failed to satisfy the extrinsic test, then infringement claim fails and there is no need to proceed to the intrinsic test. *See Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020) (en banc); *Corbello v. Valli*, 974 F.3d 965, 974 (9th Cir. 2020); *Tangle, Inc. v. Aritzia, Inc.,* 125 F.4th 991, 997 (9th Cir. 2025) ("The extrinsic test thus serves to screen out objectively meritless claims, so courts can apply it as a matter of law.").

If the court determines that "the idea underlying the copyrighted work can be expressed in only one way," such that the idea and its expression merge (the "merger doctrine"), *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir. 2000) or where "the expression is as a practical matter indispensable, or at least standard in the treatment of a given idea" (the "scenes a faire doctrine"), *Frybarger v. Int'l Bus. Machines Corp.*, 812 F.2d 525, 530 (9th Cir. 1987), "the expression is protected only against . . . virtually identical copying," *Johnson Controls, Inc. v. Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989); *see also Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209 (9th Cir. 1988) (applying the virtually identical test to a work whose original features "necessarily follow from the idea of a martial arts karate game, or are inseparable from, indispensable to, or even standard of the idea of the karate sport").

If the extrinsic test is satisfied, the intrinsic test is a matter for the jury. *See Corbello*, 974 F.3d at 974; *Apple Comput., Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir. 1994). The court must instruct the jury as to: (1) the non-protectable elements of the plaintiff's work, (2) the appropriate standard (virtually identical or substantially similar), and (3) that the jury may consider the work as a whole. *See Apple Comput.*, 35 F.3d at 1443, 1446; *Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 988-89 (9th Cir. 2009). The jury must determine if the ordinary reasonable viewer would believe that the defendant's work appropriated the plaintiff's work as a subjective matter. *See Newton v. Diamond*, 388 F.3d 1189, 1193 (9th Cir. 2004); *Apple Comput.*, 35 F.3d at 1442; *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986). Expert testimony is inappropriate to aid the jury in applying the intrinsic test. *Olson v. Nat'l Broad. Co., Inc.*, 855 F.2d 1446, 1449 (9th Cir. 1988); *Antonick*, 841 F.3d at 1066.

The Committee recommends that the court and counsel specifically craft instructions on substantial similarity based on the particular work(s) at issue, the copyright in question, and the evidence developed at trial. The following cases may provide guidance in formulating substantial similarity instructions in specific subject areas:

Literary or Dramatic Works: *Shaw v. Lindheim*, 919 F.2d 1353, 1357 (9th Cir. 1990); *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977) (holding that commercials infringed television production; applying specific criteria to assessment of substantial similarity); *see also Corbello v.* Valli, 974 F.3d 965, 975 (9th Cir. 2020) (applying extrinsic test for similarity to elements of challenged work that are undisputedly factual); *Metcalf v. Bochco*, 294 F.3d 1069, 1073-74 (9th Cir. 2002) (applying *Shaw* factors applied to screenplay for television show); *Pasillas v. McDonald's Corp.*, 927 F.2d 440, 442-43 (9th Cir. 1991) (noting that *Shaw* "is explicitly limited to literary works" and *Krofft* test is still applicable to other than dramatic or literary works).

Musical Compositions: *Gray*, 28 F.4th at 97 (applying extrinsic test and noting that protection for original expression does not extend to ideas, concepts, common or trite musical elements, or commonplace elements firmly rooted in genre's tradition) (citing *Skidmore*, 952 F.3d at 1069)); *Swirsky v. Carey*, 376 F.3d 841, 848-49 (9th Cir. 2004) (noting factors and constituent elements applicable to "analyzing musical compositions," while noting that Ninth Circuit has "never announced a uniform set of factors" because "each allegation of infringement will be unique"); *Newton*, 388 F.3d at 1196 (noting musical elements); *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485-86 (9th Cir. 2000) (identifying "areas" of similarity of musical works); *Williams*, 885 F.3d at 1164 (noting that musical compositions are not "confined to a narrow range of expression"). In *Skidmore*, 952 F.3d at 1074, a case involving the alleged copyright infringement of a musical composition, the Ninth Circuit, reviewing for plain error, concluded that the district court did not err in omitting a "selection and arrangement" instruction. Such an instruction is appropriate only if the selection and arrangement of the unprotectable elements of a musical figure "is original in some way." *Gray*, 28 F.4th at 101 (quoting *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003)).

Choreographic Works: *Hanagami v. Epic Games, Inc.*, 85 F.4th 931, 942-45 (9th Cir. 2023) (explaining that choreography is composed of various elements that may be unprotectable when viewed in isolation, but what is protectable is the choreographer's selection and arrangement of the work's elements; and stating that although it is not "necessary to specify a discrete universe of elements from which a choreographic copyright infringement claim can be built," the district court erred in granting a motion to dismiss without considering "the movement of the limbs, movement of the hands and fingers, head and shoulder movement, and tempo").

Moveable and Manipulable Sculptural Works: *Tangle, Inc. v. Aritzia, Inc.,* 125 F.4th 991, 996 (9th Cir. 2025) (explaining that a toy manufacturer's kinetic and manipulable sculptural works were sufficiently "'fixed' in a tangible medium" of expression to be entitled to copyright protection, "even when its pose changes," analogizing the moveable sculptures to dance, movies, and music).

Computer Programs and Similar Technologies: *Apple Comput.*, 35 F.3d at 1445 (involving audiovisual and literary component of computer program); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1477 (9th Cir. 1992) ("[C]omputer programs are subject to a *Shawtype analytic dissection of various standard components*, e.g., screens, menus, and keystrokes"); *Data*, 862 F.2d at 210 (9th Cir. 1988) (involving home-computer karate game); *Frybarger*, 812 F.2d at 529-30 (involving video game).

Motion Picture, Television Production, or Copyrighted Script: *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 624-29 (2010) (involving movie and screenplay); *Funky Films, Inc. v. Time Warner Entm't Co., L.P.*, 462 F.3d 1072, 1076-77 (9th Cir. 2006) (involving screenplay and television series); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1177-78 (9th Cir. 2003) (involving video and television specials); *Metcalf v. Bochco*, 294 F.3d 1069 (9th Cir. 2002) (involving screenplay and television series); *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (involving novel and motion picture); *Litchfield v. Spielberg*, 736 F.2d 1352, 1356-57 (9th Cir. 1984) (involving musical play and movie).

"Other Than Dramatic or Literary Works": *Malibu Textiles, Inc., v. Label Lane Int'l, Inc*., 922 F.3d 946 (9th Cir. 2019) (involving original selection, coordination, and arrangement of floral-pattern-printed fabric); *L.A. Printex Indus., Inc. v. Aeropostale, Inc*., 676 F.3d 841, 848-52 (9th Cir. 2012) (same); *Mattel, Inc. v. MGA Entm't, Inc.*, 616 F.3d 904, 913-14 (9th Cir. 2010) (involving toy dolls); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 826 (9th Cir. 2002) (involving works of visual art); *Sid & Marty Krofft Television Prods.*, 562 F.2d at 1164 (providing dicta concerning application of specific criteria to plaster recreation of nude human figure); *Pasillas*, 927 F.2d at 442-43 (noting *Krofft* test applicable to other than dramatic or literary works; using test to assess similarity of Halloween mask and mask used in television commercial).

"Ordinary Observer" Test: *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1112 (9th Cir. 1998) (applying ordinary reasonable person standard); *see also L.A. Printex Indus., Inc.*, 676 F.3d at 852 (involving fabric designs); *Johnson Controls*, 886 F.2d at 1176 n.4 (involving computer software), *implied overruling on other grounds recognized by Perfect 10, Inc. v. Google, Inc*., 653 F.3d 976, 979 (9th Cir. 2011); *Data*, 862 F.2d at 209-10 (discussing intended audience); *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9th Cir. 1987) (involving perception of children); *Berkic*, 761 F.2d at 1293 (discussing reasonable reader or moviegoer).

Revised March 2025

17.20 Secondary Liability—Vicarious Infringement—Elements and Burden of Proof

If you find that [*name of direct infringer*] infringed the plaintiff [*name*]'s copyright in [*name of allegedly infringed work*], you must determine whether [*name of alleged vicarious infringer*] vicariously infringed that copyright. The plaintiff [*name*] has the burden of proving each of the following elements by a preponderance of the evidence:

First, the defendant [*name*] directly benefitted financially from the infringing activity of [*name of direct infringer*];

Second, the defendant [*name*] had the right and ability to [supervise] [control] the infringing activity of [*name of direct infringer*][; and]

[Third, the defendant [*name*] failed to exercise that right and ability.]

If you find that the plaintiff [*name*] has proved each of these elements, your verdict should be for the plaintiff [*name*] if you also find that [*name of direct infringer*] infringed plaintiff [*name*]'s copyright. If, on the other hand, the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name of alleged vicarious infringer*].

Comment

Copyright law "allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the defendant initially lacks knowledge of the infringement." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005); *see also Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) ("A defendant is vicariously liable for copyright infringement if he enjoys a direct financial benefit from *another's* infringing activity and 'has the right and ability to supervise' the infringing activity." (quoting *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001))).

In certain cases, it may be appropriate to instruct the jury on the meaning of "right and ability to supervise or control" or "financial benefit" for purposes of vicarious infringement. *See Napster*, 239 F.3d at 1023-24 (holding that defendant's ability to block or police use of its internet service is evidence of right and ability to supervise); *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir. 2017) (detailing elements of vicarious infringement in absence of employer-employee relationship).

Vicarious infringement is most commonly identified as having two elements: the defendant must have had both (1) the "right and ability to supervise the infringing activity" and (2) "a direct financial interest" in the activity. *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1022 (9th Cir. 2001); *see also VHT, Inc. v. Zillow Grp., Inc*., 918 F.3d 723, 745 (9th Cir. 2019). Implicit in the first element is that the defendant could have prevented the infringement but did not. "One . . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 930. "To

escape imposition of vicarious liability, the reserved right to police must be exercised to its fullest extent." *A&M Records, Inc*, 239 F.3d at 1023.

Right and Ability to Supervise or Control: A defendant's ability to supervise or control infringing activity is assessed based on the defendant's actual ability at the time of infringement. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F3d 788, 805 (9th Cir. 2007) ("[T]he defendant must have the right and ability to *supervise* and *control* the infringement, not just affect it . . . ."). To show an ability to supervise infringing conduct, a plaintiff must show that the defendant had the technical ability to identify and remove infringements. *VHT, Inc*., 918 F.3d at 746 (noting defendant's "failure to change its operations to avoid assisting [users] to distribute . . . infringing content . . . is not the same as declining to exercise a right and ability to make [third parties] stop their direct infringement." (quoting *Perfect 10, Inc. v. Amazon.com*, *Inc*., 508 F.3d 1146, 1175 (9th Cir. 2007))). The ability to exert an "indirect effect on the infringing activity" is not enough. *Id.*

Direct Financial Benefit: "A financial benefit is not 'direct' unless there is a 'causal relationship between the infringing activity and [the] financial benefit.'" *Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 829-30 (9th Cir. 2019) (quoting *Ellison*, 357 F.3d at 1079 (9th Cir. 2004)). A direct infringer's avoidance of licensing fees "alone" is not a "direct" financial benefit to the vicarious infringer. *Id*. at 840 (noting defendant benefitted only indirectly from website developer's avoidance of licensing fees).

Revised June 2019

17.21 Secondary Liability—Contributory Infringement—Elements and Burden of Proof

A defendant [*name*] may be liable for copyright infringement engaged in by another if [he] [she] [*other pronoun*] knew or had reason to know of the infringing activity and intentionally [induced] [materially contributed to] that infringing activity.

If you find that [*name of direct infringer*] infringed the plaintiff [*name*]'s copyright in [allegedly infringed work], you must determine whether [*name of alleged contributory infringer*] contributorily infringed that copyright. The plaintiff [*name*] has the burden of proving both of the following elements by a preponderance of the evidence:

First, the defendant [*name*] knew or had reason to know of the infringing activity of [name of direct infringer]; and

Second, the defendant [*name*] intentionally [induced] [materially contributed to] [name of direct infringer's] infringing activity.

[The defendant [*name*]'s intent to induce the infringing activity must be shown by clear expression of that intent or other affirmative steps taken by the defendant [*name*] to encourage.]

If you find that [*name of direct infringer*] infringed the plaintiff [*name*]'s copyright and you also find that the plaintiff [*name*] has proved both of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, the plaintiff [*name*] has failed to prove either or both of these elements, your verdict should be for the defendant [*name*].

Comment

This instruction is based on *Fonovisa, Inc. v. Cherry Auction, Inc*., 76 F.3d 259, 261-63 (9th Cir. 1996), *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004), and *MDY Industries., LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 937-38 (9th Cir. 2010), *amended* (Feb. 17, 2011).

This instruction is also supported by the following cases: *Erickson Products, Inc. v. Kast*, 921 F.3d 822, 831 (9th Cir. 2019) ("A party engages in contributory copyright infringement when it '(1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement.'" (quoting *VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 745 (9th Cir. 2019))); *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1147 (9th Cir. 2018) ("We have adopted the well-settled rule that '[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.' *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007) (alteration in original) (quoting *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, *Ltd.*, 545 U.S. 913, 930 (2005)). Stated differently, 'liability exists if the defendant engages in personal conduct that encourages or assists the infringement.'").

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court adopted "[t]he rule on inducement of infringement." The Court held that "one who distributes a device with the object of promoting its use to infringe a copyright, as shown by

clear expression or other affirmative steps to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 936-37. The Court clarified that, "in the absence of evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device were otherwise capable of substantial noninfringing uses." *Id.* at 940 n.12.

In *Columbia Pictures Industries, Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013), the Ninth Circuit recognized that, under *Grokster*, the inducement rule has four elements: "(1) the distribution of a device or product, (2) acts of infringement, (3) an object of promoting its use to infringe copyright, and (4) causation." *Id.* The court explained those elements and clarified that the inducement copyright rule "applies to services available on the internet as well as to devices or products." *Id.* at 1033-39; *see also Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007) (describing inducement rule and material contribution test as "non-contradictory variations on the same basic test").

In *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 671 (9th Cir. 2017), the court addressed material contribution to infringement in the online context and explained that "a computer system operator may be liable under a material contribution theory if it has actual knowledge that specific infringing material is available using its systems, and can take simple measures to prevent further" infringement, and yet fails to do so. *Id*. (internal quotation marks omitted); *see also VHT, Inc. v. Zillow Grp.*, 918 F.3d 723, 745 (9th Cir. 2019) (holding that Zillow's actions did not constitute "material contribution or inducement" because it had no means to identify the allegedly infringing images uploaded by users and thus did not have "appropriately 'specific' information necessary to take 'simple measures' to remedy the violation").

The bracketed language in the jury instruction paraphrases the test for inducement set forth in *Grokster*, 545 U.S. at 919, 936-37 (2005), and reiterated in *Columbia Pictures*, 710 F.3d at 1032. The court should include this language if there is a dispute regarding whether the defendant took sufficient action, or any action, demonstrating its intent to encourage infringement. *See*, *e.g.*, *id.* at 1035- 36 ("As for the necessary 'clear expression or other affirmative steps' evidence indicative of unlawful intent, the most important is Fung's active encouragement of the uploading of torrent files concerning copyrighted content.").

Revised Dec. 2023

17.21A Copyright—Useful Articles/Functional Elements (17 U.S.C. § 101)

A "useful article" is something that has an intrinsic use beyond displaying the appearance of the item or conveying information. A useful article, in and of itself, does not enjoy copyright protection. However, the pictorial, graphic, or sculptural features of the design of a useful article are copyrightable if they can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article. The "utilitarian aspects" of the article are those aspects that make it useful.

For example, a generic lamp base consisting of a post and wires is not copyrightable because it is a useful article with no separable copyrightable features. But if the lamp base is in the shape of a cat, the cat design itself might be copyrightable, because the cat design of the base can be viewed separately from the lamp and is capable of existing independently of the lamp.

The defendant [*name*] claims that the plaintiff [*name*]'s work is not copyrightable because it is a useful article. To prevail on this defense, the defendant [*name*] must prove by a preponderance of the evidence that the challenged article has an intrinsic use beyond displaying the appearance of the item or conveying useful information.

If the defendan t[*name*] proves this, you must find for the defendant [*name*] unless the plaintiff [*name*] proves that the work is copyrightable under the other instructions that I have given you, and proves that:

First, the plaintiff [*name*]'s work can be imagined as a freestanding two- or three-dimensional pictorial, graphic, or sculptural work separate from the utilitarian aspects of the useful article; and

Second, the plaintiff [*name*]'s work would be copyrightable under the other instructions I have given you if it were imagined separately from the useful article of which it is a part.

Comment

The elements of this instruction are based on the Supreme Court's holding in *Star Athletica, L.L.C. v. Varsity Brands, Inc*., 580 U.S. 405, 424 (2017). The example of the cat lamp is based on *Mazer v. Stein*, 347 U.S. 201, 202, 214 (1954).

Once the jury has mentally separated the copyrightable from the uncopyrightable aspects of the useful article, the useful article that remains need not continue to be useful for its intended purpose., *Star Athletica, L.L.C.*, 580 U.S. at 420 (stating that statute "does not require the imagined remainder to be a functioning useful article at all, much less an equally useful one").

Revised Dec. 2023

17.22 Copyright—Affirmative Defense—Fair Use (17 U.S.C. § 107)

One who is not the owner of the copyright may use the copyrighted work in a reasonable way under the circumstances without the consent of the copyright owner. Such use of a copyrighted work is called a fair use. The owner of a copyright cannot prevent others from making a fair use of the owner's copyrighted work.

The defendant [*name*] contends that [he] [she] [*other pronoun*] made fair use of the copyrighted work for the purpose of [criticism] [comment] [news reporting] [teaching] [scholarship] [research] [other purpose alleged]. The defendant [*name*] has the burden of proving this defense by a preponderance of the evidence.

In determining whether the use made of the work was fair, you should consider the following factors:

(1) the purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole;

(4) the effect of the use upon the potential market for or value of the copyrighted work; and

[(5)] [insert any other factor that bears on the issue of fair use].

If you find that the defendant [*name*] has proved by a preponderance of the evidence that the defendant made a fair use of the plaintiff [*name*]'s work, your verdict should be for the defendant [*name*].

Comment

"[T]he 'fair use' doctrine . . . [is] an 'equitable rule of reason' that 'permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Google LLC v. Oracle Am., Inc.*, 593 U.S. 1, 18 (2021) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)); *see also McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149, 1157 (9th Cir. 2022) (citing *id.*). "[T]he fair use of a copyrighted work . . . is not an infringement of copyright." 17 U.S.C. § 107. However, this instruction may be necessary if the parties consent to the jury determining the fair use question.

"The Supreme Court has held that "[f]air use is a mixed question of law and fact." *Harper & Row, Publishers, Inc. v. Nation Enters*, 471 U.S. 539, 560-69 (1985). But "the ultimate question whether . . . facts show[ ] a 'fair use' is a legal question for judges to decide de novo."

Google, LLC, 593 U.S. at 2 (approving the Federal Circuit's approach of "leaving factual determinations to the jury and reviewing the ultimate question, a legal question, de novo"). "Fair use may depend on factual findings, but the ultimate question of whether facts indicate fair use is legal in nature." *De Fontbrune v. Wofsy*, 39 F.4th 1214, 1226 (9th Cir. 2022) (citing *Google LLC*, 593 U.S. at 23-24); *McGucke*n, 42 F.4th at 1158 (noting that each of the statutory factors encompasses legal and factual questions, for example, how much of the copyrighted work was copied is a factual question (citation omitted)). "Fair use is . . . often resolved at summary judgment" because the parties "often dispute only the legal significance to be drawn from facts." *McGucken*, 42 F.4th at 1158.

While fair use is generally an affirmative defense, *see Tresóna Multimedia, LLC v. Burbank High Sch. Music Ass'n*, 953 F.3d 638, 647-52 (9th Cir. 2020), it is treated differently in the context of "takedown cases under the Digital Millennium Copyright Act. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152-53 (9th Cir. 2016) (noting that in DMCA cases, the copyright holder must have a good faith belief that allegedly infringing use was not fair use before sending a "takedown" notice). *See* Instruction 17.29 (Copyright—Affirmative Defense—Limitation on Liability for System Caching). "The fair use doctrine 'permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.'" *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1175 (9th Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)).

The Supreme Court and the Ninth Circuit have applied the fair use doctrine and the statutory factors in the context of computer programs. *See Google LLC*, 593 U.S. at 40 (holding that when "Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying on Sun Java API was fair use of that material as a matter of law"); s*ee also Sony Computer Ent., Inc. v. Connectix Corp.*, 203 F.3d 596, 600 n1., 602-10 (9th Cir. 2000) (applying the § 107 fair use factors and holding that "Connectix's reverse engineering of Sony's BIOS extracted from a Sony PlayStation console purchased by Connectix engineers is protected as a fair use").

As codified in the Copyright Act of 1976, the court must analyze [four] non-exhaustive factors in determining whether fair use applies." *McGucken*, 42 F.4th at 1157; 17 U.S.C. § 107. The fifth numbered paragraph of this instruction reflects that the elements set forth in the statutory test of fair use in 17 U.S.C. § 107 are not exhaustive or exclusive. *See Elvis Presley Enters., Inc. v. Passport Video*, 349 F.3d 622, 627 (9th Cir. 2003) ("[W]e may not treat the [fair use] factors in isolation from one another."), *overruling on other grounds recognized by Seltzer v. Green Day, Inc.,* 725 F.3d 1170, 1177 (9th Cir. 2013); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997). In appropriate circumstances, the court may enumerate additional factors. *See Campbell v. Acuff Rose Music, Inc*., 510 U.S. 569, 585 n.18 (1994) (considering defendant's state of mind/good faith as factor).

For an analysis of the fair use factors, *see Google LLC*, 593 U.S at 26-37; *Campbel*, 510 U.S. at 578-94; *Harper & Row*, 471 U.S. at 560-69; *Tresóna*, 953 F.3d at 647-52

The Supreme Court and the Ninth Circuit have considered the fair use factors in numerous cases. The following discussion includes a non-exhaustive list of cases that may help analyze the factors.

1. Purpose and Character of the Defendant's Use: The first factor focuses mainly on the degree to which the use is "transformative," meaning "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell*, 510 U.S. at 579 (internal quotation marks, brackets, and citations omitted); *see also Google LLC*, 593 U.S at 29 (explaining that "'transformative' . . . . describe[s] a copying use that adds something new and important"); *Dr. Seuss, Enters., L.P. v. Comicmix LLC*, 983 F.3d 443, 445 (9th Cir. 2020) (discussing the benchmarks of transformative use). "Adding informative captions does not necessarily transform copyrighted works." *De Fontbrune*, 39 F. 4th at 1225; *see Monge v. Maya Magazines, Inc.,* 688 F.3d 1164, 1176-77 (9th Cir. 2012) (concluding that publisher's use of newsworthy wedding photographs of celebrities was not fair use because such use was, among other things, minimally transformative and indisputably commercial).

Parody which "needs to mimic an original to make its point," *Campbell*, 510 U.S. at 580-81, is regularly held transformative. *See*, *e.g.*, *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir. 2003) (concluding that "transform[ative] associations" with the Barbie doll constituted parody); *but see Dr. Seuss*, 983 F.3d at 452-53 (holding that infringing use was not parody and not transformative because it did not critique or ridicule the original).

The first factor also considers "whether the use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C.§ 107(1). "If an original work and a secondary use share the same or highly similar purposes, and the secondary use is of a commercial nature, the first factor is likely to weight against fair use, absent some other justification for copying." *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith,* 598 U.S. 508, 540-42 (2023) (holding that commercial licensing to a magazine of an Andy Warhol silkscreen illustration derived from a copyrighted photo weighed against fair use under the "purpose and character" factor of the fair use defense). "The crux of the profit/nonprofit distinction is . . . whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562; *see A&M Recs., Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) ("Commercial use does not require direct financial benefit, such use "weighs against a finding of fair use but is not conclusive"). "For-profit news articles are generally considered commercial uses." *McGucken*, 42 F.4th at 1158.

Other cases that analyze the first factor include: *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 743 (9th Cir. 2019) (concluding website's tagging of photos for searchable functionality was not transformative); *Tresóna*, 953 F.3d at 648 (observing that use of song in show was for "nonprofit educational purposes and the resulting work was transformative") (internal quotation marks and citation omitted); *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848 (9th Cir. 2017) (concluding that removing objectionable content from film for streaming to customers is not transformative); *Seltzer*, 725 F.3d at 1176-77 (holding that band's use of artist's original work in its four-minute concert video backdrop transformative because original work took on new and different meaning in video); *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1278 (9th

Cir. 2013) (stating that use of seven- second television clip that introduces band as "biographical anchor" in musical about band supports finding of fair use); *Elvis Presley Enters.*, 349 F.3d at 629 ("Courts have described new works as 'transformative' when works use copyrighted material for purposes distinct from the purpose of original material.").

2. Nature of Copyrighted Work: The second factor considers "the nature of the copyrighted work." 17 U.S.C. § 107. This factor "typically has not been terribly significant in the overall fair use balancing." *Dr. Seuss*, 983 F.3d at 456 (citation omitted); *see also Campbell*, 510 U.S. at 586 (considering whether work is factual or creative in nature and whether it was published) (citation omitted); *Seltzer*, 725 F.3d at 1178 (noting that prior publication by original author tends to support finding of fair use); *Napster*, 239 F.3d at 1016 (stating that use of copyrighted creative work cuts against fair use finding); *Sony Computer Ent. Am. Inc. v. Bleem*, 214 F.3d at 1028 (explaining that nature of copyrighted work is most relevant when "the original material and the copy are of a different nature").

3. Amount and Substantiality of the Portion Used: The third factor concerns "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). This factor considers "the quantitative amount and the qualitative value of the original work used in relation to the justification for that use." *Dr. Seuss*, 983 F.3d at 456; *see also Campbell*, 510 U.S. at 586-88 (explaining importance of quantity of materials used, as well as their quality and importance). "This factor weighs against fair use if the infringer published 'the heart' of an 'individual copyrighted picture' without justification." *McGucken*, 42 F.4d at 1162 (quoting *Monge*, 688 F.3d at 1178); *see Tresóna,* 953 F.3d at 651 (noting that although "qualitatively significant" portion of original work was used, because of transformative nature of new material, this factor "did not weigh against fair use"); *Seltzer*, 725 F.3d at 1178-79 (addressing when original works are copied in full because they are "not meaningfully divisible"); *Bleem*, 214 F.3d at 1028 (noting that fair use finding is not likely when there is high degree of copying and "essence" of copyrighted work and copy are similar).

4. The Market Effect: The fourth factor concerns the "effect of the use upon the potential market for or the value of the copyrighted work." 17 U.S.C. § 107(4). This factor includes (1) the "extent of the market harm caused by the particular actions of the alleged infringer," and (2) "whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original" and the "market for the derivative works." *Campbell*, 510 U.S. at 590-91 (citations omitted).

The effect of the defendant's infringing work on the market for, or value of, the plaintiff's copyrighted work is the most important fair use factor. *Harper & Row*, 471 U.S. at 566; *SOFA Ent., Inc.*, 709 F.3d at 1280 (explaining that this factor favors finding of fair use when use "advances [the alleged infringers'] own original creation without any reasonable threat to [the original author's] business model"); *Monge*, 688 F.3d at 1181 (emphasizing that potential market exists independent of the copyright owner's present intent not to publish copyrighted work); *Bleem*, 214 F.3d at 1026-27 (noting that the market effect "factor may be the most important, [but] all factors must be considered, and the commercial nature of the copies is just one element"; use for comparative advertising can support first fair use factor but negate fourth fair use factor); *Dr. Seuss*, 109 F.3d at 1403 (balancing public benefit that will result from the

defendant's use against personal gain the copyright owner will receive if use is denied); *Triad Sys. Corp.*, 64 F.3d at 1336-37 (noting that when defendant's work competes in same market it is less likely fair use).

5. Additional Factors: *See Campbell*, 510 U.S. at 585 n.18 (considering the defendant's state of mind and explaining that permission is not necessary if use is fair); *Harper & Row*, 471 U.S. at 562 (explaining that the propriety of the defendant's conduct is relevant to the character of the use because fair use presupposes good faith and fair dealing) (quotation marks and citation omitted); *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("courts may weigh 'the propriety of the defendant's conduct' in the equitable balance of a fair use determination" (citation omitted)).

Revised Dec. 2023

17.23 Copyright—Affirmative Defense—Abandonment

The defendant [*name*] contends that a copyright does not exist in the plaintiff [*name*]'s work because the plaintiff [*name*] abandoned the copyright. The plaintiff [*name*] cannot claim ownership of the copyright if it was abandoned. To show abandonment, the defendant [*name*] has the burden of proving each of the following by a preponderance of the evidence:

First, the plaintiff [*name*] intended to surrender [ownership] rights in the work; and

Second, an act by the plaintiff [*name*] evidencing that intent.

Mere inaction [or publication without a copyright notice] does not constitute abandonment of the copyright; however, [this may be a factor] [these may be factors] for you to consider in determining whether the plaintiff [*name*] has abandoned the copyright.

If you find that the plaintiff [*name*] has proved [his] [her] [*other pronoun*] claim[s] in accordance with Instruction[s] [*insert cross reference to the pertinent instructions on the plaintiff's theory of infringement*], your verdict should be for the plaintiff [*name*], unless you find that the defendant [*name*] has proved each of the elements of this affirmative defense, in which case your verdict should be for the defendant [*name*].

Comment

Abandonment is an affirmative defense. *See*, *e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001); *Abend v. MCA, Inc*., 863 F.2d 1465, 1482 n.21 (9th Cir. 1988). The Ninth Circuit adopted the doctrine of copyright abandonment in *Hamptom v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960). *See Doc's Dream, LLC v. Dolores Press, Inc.*, 959 F.3d 357, 362 (9th Cir. 2020).

Abandonment of a right secured by the Copyright Act must be manifested by an overt act indicating an intention to abandon that right. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1114 (9th Cir. 1998). A copyright owner may abandon some rights and retain others. *Id.* at 1114 (holding that license permitting creation of derivative works from software, but also providing that licensees not distribute derivative works commercially, did not abandon copyright holder's rights to profit commercially from derivative works).

The bracketed portion of the second paragraph pertaining to publication without copyright notice should be used if the copyright infringement action is brought under the 1909 Copyright Act. Under the Copyright Act of 1909, a federal copyright was secured by publishing a work with the proper notice. *La Cienega Music Co. v. ZZ Top*, 53 F.3d 950, 953 (9th Cir. 1995). Before publication, common law copyright protected a work from the time of its creation. *Id.*

Under the 1909 Copyright Act, if a work was published without notice, the author (1) failed to obtain a federal copyright, and (2) lost the common law copyright. *See Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1165 (9th Cir. 1996). When a copyright owner loses its

rights in its work by publication without proper notice, the resulting loss is an involuntary forfeiture as opposed to abandonment. *See* William F. Patry, 2 *Patry on Copyright,* § 5:155 (2023) ("Abandonment refers to deliberate acts taken by the copyright owner to disclaim its interest in a protected work. . . . Forfeiture occurs by operation of law, without regard to the copyright owner's intent."); *American Vitagraph, Inc. v. Levy*, 659 F.2d 1023, 1026-27 (9th Cir. 1981) (citing *Nat'l Comics Publ'ns, Inc. v. Fawcett Publ'ns*, 191 F.2d 594, 599 (2d Cir. 1951), *supplemented sub nom. Nat'l Comics Publ'ns v. Fawcett Publ'ns*, 198 F.2d 927 (2d Cir. 1952)).

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17.24 Copyright—Affirmative Defense—Copyright Misuse

Comment

The Ninth Circuit explicitly adopted copyright misuse as a defense to copyright infringement in *Practice Management Information Corp. v. American Medical Association*, 121 F.3d 516, 520 (9th Cir. 1997), *amended by* 133 F.3d 1140 (9th Cir. 1998). "Copyright misuse is an equitable defense to copyright infringement which precludes the copyright holder's enforcement of its copyright during the misuse period." *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1115 (9th Cir. 2010). The defense applies only when there is an allegation of copyright infringement. *Altera Corp. v. Clear Logic, Inc*., 424 F.3d 1079, 1090 (9th Cir. 2005). Although copyright misuse precludes enforcement of a copyright during the period of misuse, it does not invalidate the copyright. *Prac. Mgmt*., 121 F.3d at 520 n.9.

The misuse doctrine "forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office." *Id*. at 520 (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977-79 (4th Cir.1990)). The purpose of the defense is to prevent copyright holders "from leveraging their limited monopoly to allow them control of areas outside the monopoly." *Apple Inc. v. Psystar Corp*., 658 F.3d 1150, 1157 (9th Cir. 2011) (quoting *A&M Recs., Inc. v. Napster, Inc*., 239 F.3d 1004, 1026 (9th Cir. 2001)); *see also Prac. Mgmt*., 121 F.3d at 520-21 (holding that a copyright holder misused its copyright when it required a licensee to exclusively use the copyright holder's copyrighted coding system, because that gave the copyright holder a "substantial and unfair advantage over its competitors").

The contours of the copyright misuse defense are still being defined because courts often do not address the issue when the underlying copyright infringement~~.~~ claim is unsuccessful. *See*, *e.g.*, *MDY Indus., LLC v. Blizzard Ent., Inc*., 629 F.3d 928, 941 (9th Cir. 2010) (declining to address copyright misuse issue because there was no infringement); *Vernor*, 621 F.3d at 1115 (noting that the district court did not decide copyright misuse because it found no infringement); *Sony Comput. Ent., Inc. v. Connectix Corp*., 203 F.3d 596, 608 (9th Cir. 2000) (declining to consider copyright misuse defense when the plaintiff failed to show a likelihood of success on the merits of its copyright infringement claim). There is a useful discussion of this affirmative defense in the concurring opinion in *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 699-706 (9th Cir. 2015) (Wardlaw, J., concurring).

The Ninth Circuit has not yet decided whether the equitable defense of copyright misuse should be submitted to a jury or is an issue for the court to decide. The Fifth Circuit appears to permit a jury to decide whether the defense applies. *See Alcatel USA, Inc. v. DGI Techs., Inc.*,166 F.3d 772, 793-95 (5th Cir. 1999) (concluding that "the district court abused its discretion when it ignored the jury's finding that [the plaintiff] misused its operating system copyright").

Revised Dec. 2023

17.25 Copyright—Affirmative Defense—Implied License

The defendant [*name*] contends that [he] [she] [*other pronoun*] is not liable for copyright infringement because the plaintiff [*name*] granted [him] [her] [*other pronoun*] an implied license in the plaintiff [*name*]'s copyrighted work. The plaintiff [*name*] cannot claim copyright infringement against a defendant [*name*] who [copies] [distributes] [uses] [modifies] [retains] the plaintiff's copyrighted work if the plaintiff [*name*] granted the defendant [*name*] an implied license to [copy] [distribute] [use] [modify] [retain] the work.

To show the existence of an implied license, the defendant has the burden of proving that:

First, the defendant [*name*] requested that the plaintiff [*name*] create a work;

Second, the plaintiff [*name*] made that particular work and delivered it to the defendant; and

Third, the plaintiff [*name*] intended that the defendant [*name*] [[copy] [distribute] [use] [modify] [retain]] the plaintiff [*name*]'s work.

If you find that the defendant [*name*] has proved by a preponderance of the evidence that the plaintiff [*name*] granted [him] [her] [other pronoun] an implied license to [copy] [distribute] [use] [modify] [retain] the copyrighted work, your verdict should be for the defendant [*name*] [on that portion of the plaintiff's copyright infringement claim].

Comment

This instruction is based on *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir. 1990), and *Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 754-57 (9th Cir. 2008). *See also U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1019-20 (9th Cir. 2012) (reversing a grant of summary judgment because a reasonable jury could find an implied license).

Although this model instruction accurately captures one recurring set of implied license facts, implied licenses arise in a wide variety of circumstances, including many—such as express contracts that fail because of the statute of frauds or partnership arrangements—for which the elements of an implied license defense will be different.

Implied license is an affirmative defense to copyright infringement. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1047 (9th Cir. 2020). When a plaintiff contributes copyrightable work to the defendant in exchange for some benefit (such as a share in partnership profits, a fee, or a salary), a license for the defendant to use the plaintiff's work may be implied. *See U.S. Auto Parts*, 692 F.3d at 1019-20 (discussing the existence of an implied license in the context of an employment relationship); *Asset Mktg.*, 542 F.3d at 750, 754-55 (involving an independent contractor relationship); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir. 1984) (involving a partnership relationship). A license is often implied when "without such a license, [the plaintiff's compensated] contribution . . . would have been of minimal value." *Id*.

A license may be implied by the parties' conduct. *See Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir. 2001). An implied license may be unlimited in scope or restricted to certain rights. *Compare Asset Mktg.*, 542 F.3d at 757 (that plaintiff granted defendant "unlimited" implied license "to retain, use, and modify" work), *with Oddo*, 743 F.2d at 634 (plaintiff granted defendant implied license to use work in a manuscript, but not "in any work other than the manuscript itself"). The defendant bears the burden of proof as to the scope and existence of an implied license. *See id.* at 634 & n.6.

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17.25A Copyright—Affirmative Defense—Express License

The defendant [*name*] contends that [he] [she] [*other pronoun*] is not liable for copyright infringement because the plaintiff [*name*] granted [him] [her] [*other pronoun*] an express license to [copy] [distribute] [use] the plaintiff [*name*]'s copyrighted work. The plaintiff [*name*] cannot claim copyright infringement against a defendant [*name*] who [copies] [distributes] [uses] the plaintiff [*name*]'s copyrighted work if the plaintiff [*name*] granted the defendant [*name*] an express license to [copy] [distribute] [use] the work.

To show the existence of an express license, the defendant [*name*] has the burden of proving that [he] [she] [*other pronoun*] received an express license to [copy] [distribute] [use] the plaintiff [*name*]'s copyrighted work.

If the defendant [*name*] proves this, the burden shifts to the plaintiff t[*name*] o show that the defendant [*name*]'s [copying] [distribution] [use] of the plaintiff [*name*]'s copyrighted work exceeded the scope of the license.

[I have separately instructed you on the scope of the license agreement between the parties.]

If you find that the defendant [*name*] has proved that the plaintiff [*name*] granted [him] [her] [*other pronoun*] an express license to [copy] [distribute] [use] the copyrighted work, your verdict should be for the defendant [*name*] [on that portion of the plaintiff's copyright infringement claim], unless the plaintiff [*name*] proves the defendant's [copying] [distribution] [use] of the plaintiff [*name*]'s copyrighted work exceeded the scope of the license. If the plaintiff [*name*] proves this, your verdict must be for the plaintiff [*name*].

Comment

"An applicable license may be dispositive of an infringement claim." *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1051 (9th Cir. 2020). "Anyone who is authorized by the copyright owner to use the copyrighted work in a way specified in [the Copyright Act]-. . . is not an infringer of the copyright with respect to such use." *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc*., 464 U.S. 417, 433 (1984)). "Thus, '[t]he existence of a license creates an affirmative defense to a claim of copyright infringement.'" *Oracle USA, Inc. v. Rimini St., Inc*., 879 F.3d 948, 954 (9th Cir. 2018) (quoting *Worldwide Church of God v. Phila. Church of God, Inc*., 227 F.3d 1110, 1114 (9th Cir. 2000)), *rev'd on other grounds*, 586 U.S. 334 (2019). A claim for copyright infringement fails "if the challenged use of the work falls within the scope of a valid license." *Great Minds v. Office Depot, Inc.*, 945 F.3d 1106, 1110 (9th Cir. 2019) (citation omitted). But a licensee is liable for infringement if its use of the work "exceeds the scope of the license granted by the copyright holder." *Oracle USA, Inc*., 879 F.3d at 954 (quoting *LGS Architects, Inc. v. Concordia Homes of Nev*., 434 F.3d 1150, 1156 (9th Cir. 2006)).

The trial court should modify this instruction as necessary to reflect the nature of the defendant's alleged copyright infringement. In a case in which the defendant claims to have acted under an express license, it is likely that the trial court will need to construe the terms of

the license for the jury. *See*, *e.g.*, *id*. at 955, 958. Federal courts "rely on state law to provide the canons of contractual construction, but only to the extent such rules do not interfere with federal copyright law or policy." *Great Minds*, 945 F.3d at 1110 (quoting *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1088 (9th Cir. 1989)).

Revised Dec. 2023

17.26 Copyright—Affirmative Defense—First Sale (17 U.S.C. § 109(a))

The defendant [*name*] contends that [he] [she] [*other pronoun*] is not liable for copyright infringement for [reselling] [redistributing] a particular copy of the plaintiff [*name*]'s copyrighted work because the plaintiff [*name*] sold or otherwise transferred ownership of that copy. The plaintiff [*name*] may not claim copyright infringement for subsequent distributions of a copy that it sold or otherwise transferred ownership of. [The defendant [*name*] may invoke this ["first sale"] defense only if [he] [she] [*other pronoun*] is an owner of a particular copy of the plaintiff's copyrighted work, and not a licensee.]

If you find that the defendant [*name*] was an owner of a particular copy of the plaintiff [*name*]'s copyrighted work and that the plaintiff [*name*] sold or otherwise transferred ownership of that particular copy, your verdict should be for the defendant on the plaintiff [*name*]'s copyright infringement claim.

Comment

The first sale doctrine is an affirmative defense to copyright infringement. *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908) (articulating first sale doctrine); *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010). The doctrine "allows owners of copies of copyrighted works to resell those copies," including copies lawfully made abroad, by limiting the copyright holder's exclusive distribution right to the first sale. *Id.* at 1106-07; *Kirtsaeng v. John Wiley & Sons*, *Inc.*, 568 U.S. 519, 529-30 (2013); *see also Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692, 695 (9th Cir. 2015) (holding that watch manufacturer had no infringement cause of action because its rights to control importation and distribution of its copyrighted work expired after the authorized first sale); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175, 1179 (9th Cir. 2011) ("Notwithstanding its distinctive name, the [first sale] doctrine applies not only when a copy is first sold, but when a copy is given away or title is otherwise transferred without the accouterments of a sale.").

The first sale defense is unavailable to those who have only a license to use the copyrighted work. *Vernor*, 621 F.3d at 1107. For an analysis of the owner versus licensee distinction, *see Adobe Systems Inc. v. Christenson*, 809 F.3d 1071, 1078 (9th Cir. 2015) (analyzing distinction with respect to computer software); *UMG Recordings*, 628 F.3d at 1180-83 (analyzing distinction with respect to recipients of promotional music CDs); *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1155-56 (9th Cir. 2011) (involving computer software); *Vernor*, 621 F.3d at 1111-12 (involving computer software); and *United States v. Wise*, 550 F.2d 1180, 1190-92 (9th Cir. 1977) (involving motion pictures in the criminal context). The party asserting the first sale defense has the initial burden of proving "ownership through lawful acquisition." *Adobe*, 809 F.3d at 1078-79. If the plaintiff contends that the defendant could not have owned the work, then the plaintiff must prove "a license or the absence of a sale." *Id.* at 1079.

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17.27 Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined (17 U.S.C. § 512(i), (k))

The defendant [*name*] qualifies as a service provider of network communication services if the defendant [*name*]:

First, engaged in transmitting, routing, or providing connections for online communication, between points specified by a user, of material of the user's choosing, without modification to the content of the material;

Second, adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers; and

Third, accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works.

Comment

Service providers of network communication services are defendants "who act only as 'conduits' for the transmission of information," and do not "select which users will communicate with each other" or perform nonconduit functions. *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1041 (9th Cir. 2013) (citations omitted). This limitation applies whether the nonconduit functions are "automatic or humanly controlled." *Id.* at 1042 (citations omitted).

Reasonably Implemented Policy for the Termination of Users Who Are Repeat Infringers: A reasonable policy for the termination of users who are repeat infringers requires the defendant to have a "working notification system, a procedure for dealing with DMCA-compliant notifications, and . . . [to] not actively prevent copyright owners from collecting information needed to issue such notifications." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007) (collecting cases). However, the notification system does not have to be perfect. *Id.* at 1110 (concluding that defendant's infringement log, which "largely kept track" of infringing users despite some omissions, satisfied the reasonably implemented policy requirement). To decide whether a policy was reasonably implemented, the jury may consider the defendant's response to valid notifications of claimed infringement from the plaintiff and nonparty copyright holders; it may not consider the defendant's response to invalid notifications of claimed infringement. *Id.* at 1112-13; *see also Ventura Content, Ltd. v. Motherless, Inc*., 885 F.3d 597, 617-19 (9th Cir. 2018) (holding that the jury could not reasonably conclude the website operator failed to reasonably implement repeat infringer policy when the operator terminated over 1,320 users for alleged infringement and only nine alleged repeat infringers "slipped through").

Revised Dec. 2023

17.28 Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications (17 U.S.C. § 512(a))

The defendant [*name*] contends that the defendant [*name*] is a service provider of network communication services and therefore is not liable for copyright infringement because the infringement occurred in the context of transitory digital communications. The defendant [*name*] has the burden of proving the following elements of this defense by a preponderance of the evidence:

First, the defendant [*name*] is a service provider of network communication services;

Second, the defendant [*name*] did not initiate or direct the transmission of the material;

Third, the transmission, routing, provision of connections, or storage of the copyrighted material was carried out through an automatic technical process, and the defendant[*name*] did not select the material;

Fourth, the defendant [*name*] did not select the recipients of the material except as an automatic response to a request of another person;

Fifth, the defendant [*name*] did not make the material accessible to anyone other than to anticipated recipients;

Sixth, the defendant [*name*] did not keep the copyrighted material for longer than is reasonably necessary for the transmission, routing, or provision of connections; and

Seventh, the defendant [*name*] transmitted the material through the system or network without modifying the content.

If you find that the defendant [*name*] has proved each of these elements, your verdict should be for the defendant [*name*]. If, on the other hand, you find that the defendant [*name*] has failed to prove any of these elements, the defendant [*name*] is not entitled to prevail on this affirmative defense.

Comment

This instruction is based on the Digital Millennium Copyright Act's ("DMCA") safe harbor provision for transitory digital network communications. *See* 17 U.S.C. § 512(a) and (k). The DMCA safe harbor provisions are affirmative defenses to copyright infringement. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1052 (9th Cir. 2017); *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013). They "provide protection from liability for: (1) transitory digital network communications; (2) system caching; (3) information residing

on systems or networks at the direction of users; and (4) information location tools." *Ellison v. Robertson*, 357 F.3d 1072, 1076-77 (9th Cir. 2004) (footnotes omitted).

The DMCA was "enacted to foster cooperation among copyright holders and service providers in dealing with infringement on the Internet." *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1021-22 (9th Cir. 2013) (citing congressional legislative history). It is intended to mediate "competing interests in protecting intellectual property interests and in encouraging creative development of devices for using the Internet to make information available." *Columbia Pictures*, 710 F.3d at 1024. This defense can be used by a service provider of network communication services when "the service provider merely acts as a conduit for infringing material without storing, caching, or providing links to copyrighted material." *UMG Recordings, Inc.*, 718 F.3d at 1019 n.10 (internal quotation marks and citations omitted).

For a definition of a service provider of network communication services, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined). For commentary on a reasonably implemented policy for the termination of users who are repeat infringers, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined).

Kept for No Longer Than Reasonably Necessary for Transmission: A period of fourteen days of temporary storage can qualify as storage for no longer than is reasonably necessary for transmission. *Ellison*, 357 F.3d at 1081.

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17.29 Copyright—Affirmative Defense—Limitation on Liability for System Caching (17 U.S.C. § 512(b))

If the defendant is a service provider and is facing liability for copyright infringement based on system caching of copyrighted material, the defendant is not liable for money damages.

The defendant [*name*] contends that the defendant is a service provider and is not liable for copyright infringement because the intermediate and temporary storage of copyrighted material occurred during system caching. The defendant [*name*] has the burden of proving by a preponderance of the evidence that the defendant is eligible to use this defense and that the defense applies.

The defendant [*name*] is eligible to use the defense of system caching if the defendant:

First, is a service provider of network communication services, online services, or network access;

Second, adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers;

Third, accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works; and

Fourth, designated an agent to receive notifications of claimed infringement, and made the agent's name, phone number, and email address available on its website and to the Copyright Office.

The defense of system caching applies if:

First, the material was made available online by a person other than the defendant [*name*];

Second, the material was not transmitted to, from, or at the request of the defendant [*name*];

Third, the storage of the copyrighted material occurred through an automatic technical process;

Fourth, the system caching did not modify the content of the material;

Fifth, the defendant [*name*] complied with the generally accepted rules concerning refreshing, reloading, or other updating of the material if specified by the person making material available online, unless the rules were used to prevent or unreasonably impair system caching;

Sixth, the defendant [*name*] did not interfere with the ability for the material to

return to the original provider of the information;

Seventh, if access to the material was limited by a condition, the defendant [*name*] did not allow access to the material unless the requester satisfied that condition.

If you find that the defendant [*name*] has proved each of these elements, your verdict should be for the defendant [*name*]. If, on the other hand, you find that the defendant [*name*] has failed to prove any of these elements, the defendant [*name*] is not entitled to prevail on this affirmative defense.

Comment

This instruction is based on 17 U.S.C. § 512(b), (c)(3), (i), and (k).

The seventh requirement for valid notification applies only to the system caching affirmative defense. *See* 17 U.S.C.A. § 512(b)(2)(E). The requirement that the defendant expeditiously remove or disable access to the infringing material upon valid notification applies only if "(i) the material has previously been removed from the originating site or access to it has been disabled, or a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled; and (ii) the party giving the notification includes in the notification a statement confirming that the material has been removed from the originating site or access to it has been disabled or that a court has ordered that the material be removed from the originating site or that access to the material on the originating site be disabled." *Id.*

For a definition of a service provider of network communication services, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined). For commentary on a reasonably implemented policy for the termination of users who are repeat infringers, *see* Instruction 17.27 (Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications).

[*If the defendant received notice of claimed infringement, insert the following before the final paragraph of the instruction.*]

[Eighth, the defendant [*name*] expeditiously removed or disabled access to the infringing material or activity upon receipt of a valid notification of claimed infringement].

A valid notification of claimed infringement is a written communication provided to the defendant's designated agent and must include:

First, a physical or electronic signature of a person authorized to act on behalf of the copyright owner;

Second, identification of the infringed copyrighted work or a representative list of infringed copyrighted works if there are multiple infringed works at a single

online site;

Third, identification of the infringing material or activity, and information reasonably sufficient to permit the defendant to locate the material;
Fourth, information reasonably sufficient to permit the defendant to contact the complaining party;

Fifth, a statement that the complaining party has a good faith belief that the material infringed a copyright;

Sixth, a statement that the information in the notification is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner; and

Seventh, a statement confirming that the infringing material has previously been removed from the originating site, or access to it has been disabled, or a court has ordered removal or disabling of access.

If the notification does not meet all the above requirements, then it is invalid and cannot be used as evidence of the defendant's knowledge of specific infringing activity. The defendant does not have a duty to expeditiously remove or disable access to infringing material or activity if the notice of claimed infringement is invalid.

A copyright holder must meet these formal notification requirements for the notice of infringement to constitute evidence of either subjective or objective knowledge. *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1025 (9th Cir. 2013). A valid notification is a single written communication that substantially complies "with *all* of § 512(c)(3)'s clauses, not just some of them." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1112-13 (9th Cir. 2007) (citations omitted) (stating that three separate notices, each of which was deficient in some way, cannot be combined to form one valid notice); *Luvdarts, LLC v. AT&T Mobility*, 710 F.3d 1068, 1072-73 (9th Cir. 2013) (holding that a mere list of plaintiff's copyrighted works without any further information is not valid notification). The burden of identifying and documenting infringing material rests with the copyright holder, not the defendant. *Perfect 10*, 488 F.3d at 1113. The requirement that the complaining party have a good faith belief that the material infringed a copyright only requires "subjective good faith." *Rossi v. Motion Picture Ass'n of Am. Inc.*, 391 F.3d 1000, 1005 (9th Cir. 2004). It does not require a copyright owner to "conduct a reasonable investigation into the allegedly offending website." *Id*. at 1003.

"[B]efore sending a takedown notification under § 512(c)," "a copyright holder must consider the existence of fair use." *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1153 (9th Cir. 2016); *see* Instruction 17.22 (Copyright—Affirmative Defense—Fair Use).

Revised March 2024

17.30 Copyright—Affirmative Defense—Limitation on Liability for Information Residing on Systems or Networks at Direction of Users (17 U.S.C. § 512(c))

The defendant [*name*] contends that the defendant is a service provider and therefore is not liable for copyright infringement because the infringement was caused by information residing on the defendant's systems or networks at the direction of users. The defendant [*name*] has the burden of proving each element of this defense by a preponderance of the evidence.

The defendant [*name*] is eligible to use this defense if the defendant:

First, is a service provider of network communication services, online services, or network access;

Second, adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers;

Third, accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works;

Fourth, designated an agent to receive notifications of claimed infringement, and made the agent's name, phone number, and email address available on its website and to the Copyright Office; and

Fifth, is facing liability for copyright infringement based on information residing on the defendant's systems or networks at the direction of users.

This defense applies if the defendant [*name*]:

First, either (a) lacked actual knowledge that the material or activity on the system or network was infringing, or (b) was not aware of facts or circumstances from which specific infringing activity was apparent, or (c) upon obtaining knowledge or awareness acted expeditiously to remove or disable access to the material;

Second, while having the right and ability to control the infringing activity, did not receive a financial benefit directly attributable to the infringing activity; and

Third, upon receiving a valid notification of claimed infringement, acted expeditiously to remove or disable access to the material.

If you find the defendant [*name*] has proved all of these elements, your verdict should be for the defendant [*name*]. If, on the other hand, you find that the defendant [*name*] has failed to prove any of these elements, the defendant [*name*] is not entitled to prevail on this affirmative defense.

Comment

This instruction is based on 17 U.S.C. § 512(c), (i), and (k).

For a definition of a service provider of network communication services, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined). For commentary on a reasonably implemented policy for the termination of users who are repeat infringers, *see* Instruction 17.28 (Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications). For an instruction on the requirements for a valid notice of claimed infringement, *see* Instruction 17.29 (Copyright—Affirmative Defense—Limitation on Liability for System Caching).

Liability for Acts of Moderators or Similar Persons: Applying the common law of agency, a website may be liable for the acts of its unpaid moderators or other third parties who select, screen, or curate the site's content. *Mavrix Photographs, LLC v. LiveJournal, Inc.*, 873 F.3d 1045, 1055 (9th Cir. 2017) (holding that "common law agency principles apply to the analysis of whether a service provider like LiveJournal is liable for the acts of [its] moderators").

Information Residing on Systems or Networks at the Direction of Users: Information residing on systems or networks need "not actually reside on [the defendant's] servers." *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1042-43 (9th Cir. 2013) (concluding that storage of "torrent" files that do not contain infringing content themselves, but are used to facilitate copyright infringement, would be "facially eligible for the safe harbor").

Actual Knowledge of Infringement: Actual knowledge of the specific infringing material is required; general knowledge that the defendant's services could be used for copyright infringement is insufficient. *UMG Recordings, Inc. v. Shelter Cap. Partners, LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013). Notifications about copyright infringement from a party who is not the copyright holder does not provide actual knowledge of infringement under § 512(c)(1)(A)(i). *Id.* at 1025.

Awareness of Facts or Circumstances from which Specific Infringing Activity Is Apparent (Also Known As "Red Flag" Knowledge): "Red flag knowledge arises when a service provider is aware of facts that would have made the specific infringement objectively obvious to a reasonable person." *Mavrix*, 873 F.3d at 1057 (internal quotation marks and citation omitted). A fact or circumstance from which infringing activity is apparent must be about a specific instance of copyright infringement. *Id.*; *see also UMG Recordings, Inc.*, 718 F.3d at 1024 (concluding that news reports discussing general problem of copyright infringement on website and CEO's acknowledgment of this general problem were not enough to meet the knowledge requirements under § 512(c)(1)(A)). However, evidence that the defendant actually knew about specific infringing activity could suffice to make that infringing activity apparent. *Columbia Pictures Indus., Inc.*, 710 F.3d at 1043 (holding that evidence that defendant encouraged and assisted users who were infringing copyright in "current and well-known" works created "red flag" knowledge of infringement). A characteristic of the website itself must be very apparent to qualify as a fact or circumstance from which infringing activity is apparent. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1114 (9th Cir. 2007) (holding that website names such as

"illegal.net" or "stolencelebritypics.com" do not automatically function as red flags signaling infringement); *see also UMG Recordings, Inc.*, 718 F.3d at 1022-23 ("[H]osting a category of copyrightable content" with knowledge that "services could be used for infringement is insufficient to constitute a red flag."). Although notices from noncopyright holders do not convey actual knowledge of infringement, they can serve as red flags that make infringing activity apparent. *Id.* at 1025.

Financial Benefit Directly Attributable to Infringing Activity/Right and Ability to Control: The requirement that the service provider have not received a financial benefit directly attributable to the infringement activity applies "in a case in which the service provider has the right and ability to control such activity." 17 U.S.C. § 512(c)(1)(B). To have "the right and ability to control," the service provider must exert "substantial influence on the activities of users." *UMG Recordings, Inc.*, 718 F.3d at 1030 (citation omitted). "Substantial influence" may include high levels of control over the activities of users; "purposeful, culpable expression and conduct"; active involvement by the service provider in the listing, bidding, sale and delivery of items offered for sale; or control of vendor sales through the previewing of products prior to their listing, the editing of product descriptions, or the suggesting of prices. *Id.* (quoting *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012)).

"In determining whether the financial benefit criterion is satisfied, courts should take a common-sense, fact-based approach, not a formalistic one." *Mavrix*, 873 F.3d at 1059 (9th Cir. 2017) (quoting S. Rep. No. 105-190, at 44 (1998)). The relevant inquiry regarding direct financial benefit is "whether the infringing activity constitutes a draw for subscribers, not just an added benefit." *Perfect 10*, 488 F.3d at 1117 (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1079 (9th Cir. 2004)). A "one-time set-up fee [or] flat, periodic payments" for the service provided does not qualify. *Id.* at 1118 (citation omitted). "The financial benefit need not be substantial or a large proportion of the service provider's revenue." *Mavrix*, 873 F.3d at 1059 (citation omitted).

Revised Dec. 2023

17.31 Copyright—Affirmative Defense—Limitation on Liability for Information Location Tools (17 U.S.C. § 512(d))

The defendant [*name*] contends that the defendant is a service provider and therefore not liable for copyright infringement because the infringement occurred in the context of the defendant's provision of information location tools, such as a directory, index, reference, pointer, or hypertext link, to refer or link users to infringing material or activity. The defendant [*name*] has the burden of proving this defense by a preponderance of the evidence.

The defendant [*name*] is eligible to use this defense if the defendant:

First, is a service provider of network communication services, online services, or network access;

Second, adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers;

Third, accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works;

Fourth, designated an agent to receive notifications of claimed infringement, and made the agent's name, phone number, and email address available on its website and to the Copyright Office; and

Fifth, is facing liability for copyright infringement for providing information location tools or services.

The defense applies if the defendant [*name*]:

First, lacked actual knowledge that the material or activity was infringing;

Second, was either (a) not aware of facts or circumstances from which specific infringing activity was apparent, or (b) upon obtaining knowledge or awareness or upon receiving a valid notification of claimed infringement, acted expeditiously to remove or disable access to the material; and

Third, while having the right and ability to control the infringing activity, did not receive a financial benefit directly attributable to the infringing activity.

If you find that the defendant has satisfied these requirements, your verdict should be for the defendant. If, on the other hand, you find that the defendant has failed to prove any of these elements, the defendant is not entitled to prevail on this affirmative defense but may assert other defenses.

Comment

This instruction is based on 17 U.S.C. § 512(d), as well as § 512(c)(2)-(3), (i), and (k).

For a definition of a service provider of network communication services, *see* Instruction 17.27 (Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined). For commentary on a reasonably implemented policy for the termination of users who are repeat infringers, *see* Instruction 17.27 (Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications). For an instruction on the requirements for a valid notice of claimed infringement, *see* Instruction 17.29 (Copyright—Affirmative Defense—Limitation on Liability for System Caching). For commentary on actual knowledge of infringement, awareness of facts or circumstances from which specific infringing activity is apparent, and financial benefit directly attributable to infringing activity, *see* Instruction 17.30 (Copyright—Affirmative Defense—Limitation on Liability for Information Residing on Systems or Networks at Direction of Users).

Information Location Tools: This defense applies only to "infringement of copyright *by reason of* the provider referring or linking users to an online location containing infringing material or infringing activity." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1116-17 (9th Cir. 2007) (explaining that § 512(d) did not create "blanket immunity" when a defendant provided users with a hyperlink to infringing material but also engaged in other infringing activity).

Revised Dec. 2023

17.32 Copyright—Damages
(17 U.S.C. § 504)

If you find for the plaintiff [*name*] on the plaintiff [*name*]'s copyright infringement claim, you must determine the plaintiff [*name*]'s damages. The plaintiff is entitled to recover the actual damages suffered as a result of the infringement. In addition, the plaintiff is also entitled to recover any profits of the defendant attributable to the infringement. The plaintiff must prove damages by a preponderance of the evidence.

Comment

Give this instruction along with Instructions 5.1 (Damages—Proof), 17.33 (Copyright—Damages—Actual Damages), and 17.34 (Copyright—Damages—Defendant's Profits).

Under 17 U.S.C. § 504(b), the copyright owner is entitled to recover the actual damages suffered as a result of the infringement, as well as any profits of the infringer that are attributable to the infringement and that are not taken into account in computing the actual damages. *See Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 708 (9th Cir. 2004) (noting additionally that "actual damages must be suffered 'as a result of the infringement,' and recoverable profits must be 'attributable to the infringement'"); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 n.5 (9th Cir. 1985).

Section 504(c)(1) provides that the plaintiff may "elect, *at any time* before final judgment is rendered" whether to seek actual or statutory damages. *See Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008); *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998). If the copyright owner elects to recover statutory damages, the owner cannot also recover actual damages. 17 U.S.C. § 504(c)(1); *see also* Instruction 17.35 (Copyright—Damages—Statutory Damages); *Derek Andrew*, 528 F.3d at 699; *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010-11 (9th Cir. 1994) (explaining punitive purpose of statutory damages and compensatory purpose of actual damages).

When injury is shown, but neither profits nor damages can be proved, statutory damages are mandatory. *Russell v. Price*, 612 F.2d 1123, 1129-30 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978). When the copyright owner fails to register its copyright before commencement of the infringement, it can recover only actual damages and profits and cannot seek statutory damages. *Derek Andrew*, 528 F.3d at 699; *Polar Bear Prods.*, 384 F.3d at 707 n.5.

Revised Dec. 2023

17.33 Copyright—Damages—Actual Damages (17 U.S.C. § 504(b))

The plaintiff [*name*] is entitled to recover the actual damages suffered as a result of the infringement. Actual damages mean the amount of money adequate to compensate the copyright owner for the reduction of the fair market value of the copyrighted work caused by the infringement. In determining actual damages, you should consider the following:

(1) [The amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendant of the plaintiff's work] [;] [and]

(2) [The profits the plaintiff should have received for any sales lost because of the infringement. Profits are the gross revenue the plaintiff would have made on sales that did not occur because of the infringement minus additional expenses the plaintiff would have incurred in making those sales] [;] [and]

(3) [*Insert any other factors that bear on the plaintiff's actual damages*].

Comment

Add applicable paragraphs from Instruction 17.34 (Copyright—Damages—Defendant's Profits).

This instruction is based upon a jury instruction approved by the Ninth Circuit as "properly stat[ing] the law of damages in a copyright infringement suit" and "in line with our circuit's caselaw." *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 787 (9th Cir. 2006). The circuit has noted that actual damages may be "awarded in the form of lost profits" or may be awarded based on "hypothetical-license damages," which are determined by "the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by [the infringer] of the plaintiff's work." *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014); *see also id.* at 1088 (explaining that a rule disallowing "hypothetical-license damages . . . could operate unfairly, given the difficulty [the copyright owner] might face in meeting the burden of proof for lost profits and infringer's profits" (citing *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001)). "[T]he market value approach is an objective, not a subjective, analysis." *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (quoting *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)). Therefore, "[e]xcessively speculative claims of damages are to be rejected." *Id.*

This instruction does not address whether the measures of actual damages (as either the plaintiff's lost profits or the fair market value of the use illegally appropriated by the infringer) are mutually exclusive or additive, nor the danger of double recovery if both measures are presented to the jury.

For commentary on the plaintiff's right to elect to recover statutory damages instead actual damages and the defendant's profits, *see* Instruction 17.35 (Copyright—Damages—Statutory Damages).

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17.34 Copyright—Damages—Defendant's Profits
(17 U.S.C. § 504(b))

In addition to actual damages, the plaintiff [*name*] is entitled to any profits of the defendant attributable to the infringement. You may not include in an award of profits any amount that you took into account in determining actual damages.

You may make an award of the defendant [*name*]'s profits only if you find that the plaintiff [*name*] showed a causal [relationship] [nexus] between the infringement and the [profits generated indirectly from the infringement] [defendant's gross revenue].

The defendant [*name*]'s profit is determined by [deducting] [subtracting] all expenses from the defendant's gross revenue.

The defendant [*name*]'s gross revenue is all of the defendant [*name*]'s receipts from the [use] [sale] of a [[product] [work]] [[containing or using the copyrighted work] [associated with the infringement]]. The plaintiff [*name*] has the burden of proving the defendant [*name*]'s gross revenue by a preponderance of the evidence.

Expenses are all [operating costs] [overhead costs] [and] production costs incurred in producing the defendant's gross revenue. The defendant [*name*] has the burden of proving the defendant's expenses by a preponderance of the evidence.

Unless you find that a portion of the profit from the [use] [sale] of a [product] [work] containing or using the copyrighted work is attributable to factors other than use of the copyrighted work, all of the profit is to be attributed to the infringement. The defendant [*name*] has the burden of proving the [portion] [percentage] of the profit, if any, attributable to factors other than [copying] [infringing] the copyrighted work.

Comment

In a multi-defendant case, this instruction may need to be tailored according to the defendant to whom it applies. Where there are multiple infringers of a copyright, all infringers are jointly and severally liable for the plaintiff's actual damages, but each defendant is severally liable for the defendant's own illegal profits. *See Frank Music Corp. v. Metro-Goldwyn- Mayer, Inc.*, 772 F.2d 505, 519 (9th Cir. 1985) (citations omitted).

"In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." 17 U.S.C. § 504(b). The statute "creates a two-step framework for recovery of indirect profits: (1) the copyright claimant must first show a causal nexus between the infringement and the [infringer's] gross revenue; and (2) once the causal nexus is shown, the infringer bears the burden of apportioning the profits that were not the result of infringement." *Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 711 (9th Cir. 2004); *see also id.* at 714 n.10 (approving jury instruction stating: "Indirect profits have a less direct

connection or link to the infringement. Plaintiff seeks indirect profits in this case. To recover indirect profits, Plaintiff must establish a causal relationship between the infringement and the profits generated indirectly from such infringement.").

The "fundamental standard" for whether a causal nexus is shown as required for an award of indirect profits is that the plaintiff "must proffer some evidence . . . [that] the infringement at least partially caused the profits that the infringer generated as a result of the infringement." *Polar Bear Prods.*, 384 F.3d at 711 (alteration in original) (quoting *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002)) (holding that a plaintiff seeking to recover indirect profits must "formulate the initial evidence of gross revenue duly apportioned to relate to the infringement" (citation omitted)); *see also Mackie*, 296 F.3d at 916 (holding that an artist could not recover indirect profits unless he demonstrated with "non-speculative evidence" a causal link between the infringement and subsequent indirect profits, such as how many individuals subscribed to the symphony because the artist's work appeared on one page of the symphony brochure).

In the Ninth Circuit, the calculation of actual damages under the 1909 Copyright Act differs from that under the 1976 Copyright Act. Prior to 1985, the Ninth Circuit interpreted the 1909 Copyright Act as allowing recovery of only the higher of actual damages or infringer profits. This differed from other circuits, where recovery of both actual damages and the infringer's profits was allowed. However, in the 1976 Copyright Act, Congress resolved these differing interpretations to allow recovery of both actual damages and the infringer's profits. *See Frank Music Corp.*, 772 F.2d at 512 & n.5.

A jury instruction on the defendant's profits must adequately convey the burden of proof on attribution of profit. The copyright owner is required to present proof "only of the infringer's gross revenue, and the infringer is required to prove . . . deductible expenses" and "what percentage of [the infringer's] profits" were not attributable to copying" the infringed work. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000) (quoting 17 U.S.C. § 504(b)). However, "gross revenue" for purposes of determining indirect profits means "the gross revenue associated with the infringement, as opposed to the infringer's overall gross sales resulting from all streams of revenue." *Polar Bear Prods.*, 384 F.3d at 711 n.8 (citations omitted); *see also id.* at 711 (noting that the Ninth Circuit applies a "rule of reason" so that "the causation element . . . serves as a logical parameter to the range of gross profits a copyright plaintiff may seek").

Where the defendant's profits are derived from both infringing and noninfringing activities, not all of the defendant's profits can be attributed to the infringement. Accordingly, the profits should be apportioned. *See Cream Records, Inc. v. Joseph Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985); *Polar Bear Prods.*, 384 F.3d at 711-12 ("[T]o conclude that a copyright plaintiff need only provide the company's overall gross revenue, without regard to the infringement, would make little practical or legal sense."). However, the benefit of the doubt in apportioning profits is given to the plaintiff. *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989) (appeal after remand). Precision is not required, as long as a "reasonable and just apportionment" of profits is reached. *See Frank Music Corp.*, 772 F.2d at 518. In the final analysis, "where

infringing and noninfringing elements of a work cannot be readily separated, all of a defendant's profits should be awarded to a plaintiff." *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1012 (9th Cir. 1994) (citation omitted).

For cases providing examples of the calculation of profits, *see Polar Bear Prods.*, 384 F.3d at 712-16 (upholding an award of profits based on expert testimony of certain sales figures but rejecting an award for enhanced brand prestige); *Frank Music Corp.*, 772 F.2d at 518-19 (discussing the calculation and proof of profits attributable to an infringement and holding that indirect profits are recoverable if they are ascertainable; e.g., the plaintiff could claim profits that resulted from hotel and gambling operations if those profits were attributable to an infringing stage show); *Cream Records*, 754 F.2d at 828-29 (awarding profits from the defendant's sale of beverage following the defendant's use of the plaintiff's song in a commercial); *Williams v. Gaye*, 895 F.3d 1106, 1129-30 (9th Cir. 2018) (explaining that the defendants "bore the burden of proof" and that the jury was free to apportion more than the percentage estimates of the defendant's expert, but less than the percentage estimates of the plaintiff's expert (citation omitted)); and *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1075 n.9 (9th Cir. 2022) (accepting that the plaintiff "satisfied its burden in proving disgorgement damages, even without placing an expert damages witness on the stand" because the "sales price" and "number of units sold" could be used to calculate the infringer's "gross revenue").

For cases providing examples of the deductions from the defendant's gross revenue, *see Frank Music Corp.*, 886 F.2d at 1548 (deducting direct costs of production from the defendant's gross profit); *Kamar Int'l, Inc. v. Russ Berrie & Co*., 752 F.2d 1326, 1332 (9th Cir. 1984) (allowing deduction of overhead when the infringer demonstrated that it actually assisted production, distribution, or sale of the infringing product); *Three Boys Music*, 212 F.3d at 487 (adopting the special master's recommendation to allow nonwillful infringers to deduct income taxes and management fees actually paid on infringing profits, but not on Net Operating Loss Carry- forward (NOL) because NOL did not have a "concrete financial impact").

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17.35 Copyright—Damages—Statutory Damages (17 U.S.C. § 504(c))

The plaintiff [*name*] is entitled to [statutory] damages for each work infringed. In determining [statutory] damages, you may consider the following factors:

(1) the revenue lost by the copyright holder as a result of the infringement;

(2) the profits earned by the defendant as a result of the infringement;

(3) the need to deter future infringement;

(4) the need to penalize the infringer;

(5) the circumstances of the infringement; and

(6) whether the infringement was intentional.

You may not award as statutory damages less than $750, nor more than $30,000 for each work you conclude was infringed.

[However, if you find the infringement was innocent, you may award as little as $200 for each work innocently infringed.]

[However, if you find the infringement was willful, you may award as much as $150,000 for each work willfully infringed.]

[Instruction[s] [*insert number of pertinent instruction, e.g., Instruction 17.36 (Copyright—Damages—Innocent Infringement), Instruction 17.37(Copyright— Damages—Willful Infringement)*] will tell you [what constitutes innocent infringement] [and] [what constitutes willful infringement]].

Comment

Electing to Pursue Statutory Damages: The plaintiff has the right to make an election before final judgment to recover statutory damages instead of actual damages and the defendant's profits. 17 U.S.C. § 504(c)(1). Once the copyright owner elects to recover statutory damages, the owner may not recover actual damages as well. *See Nintendo of Am., Inc. v. Dragon Pac. Int'l.*, 40 F.3d 1007, 1010 (9th Cir. 1994).

Because a copyright owner has until final judgment to make an election, it may often be appropriate to instruct the jury on actual damages and statutory damages. *See* 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect, *at any time before final judgment is rendered*, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action." (emphasis added)). But there may be circumstances when instructing on both actual damages and statutory damages is inappropriate—for example, if there

is a directed verdict on actual damages or if the plaintiff presents no actual damages theory. *See L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 995 n.8. (9th Cir. 1998). The word "statutory" in the first paragraph is bracketed and should not be used in those situations when the damages instructions include only statutory damages.

Relevant Factors to Determining Statutory Damages: The trier of fact has considerable discretion in determining the amount of statutory damages. *See Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009); *L.A. News Serv.*, 149 F.3d at 996 ("The [trier of fact] has 'wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.'" (citation omitted)).

The Copyright Act does not provide a list of relevant factors a trier of fact should consider when awarding statutory damages. *See* 17 U.S.C.§ 504(c)(1). But a trier of fact may consider multiple factors in making an award of statutory damages, including "evidence concerning actual damages and profits." H.R. Rep. No. 94-1476, at 161 (1976); *see also Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1271–72 (9th Cir. 2021) (citing *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (observing that a statutory damages award may account for the infringer's "expenses saved, and profits earned," "the revenue lost by the copyright holder," and "the deterrent effect on the infringer and third parties," among other factors)); *Nintendo of Am., Inc.*, 40 F.3d at 1011 (explaining that "statutory damages" have "punitive and deterrent purposes").

Jury Trial on Statutory Damages: The Seventh Amendment provides for the right to a jury trial on statutory damage issues, including the amount of such award. *See Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 355 (1998). The jury should be provided with a special interrogatory form to report its findings on the issue of statutory damages. The minimum for statutory damages is $750 per work infringed and the maximum is $30,000 per work infringed. 17 U.S.C. § 504(c)(1). The statutory minimum for innocent infringement is $200. 17 U.S.C. § 504(c)(2). In the case of willful infringement, the statutory maximum for damages is $150,000. 17 U.S.C. § 504(c)(2).

Availability of Statutory Damages: A plaintiff can recover statutory damages "whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant." *L.A. News Serv.*, 149 F.3d at 996 (citation omitted); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir. 1990). "Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy" of discouraging infringement. *F.W. Woolworth Co. v. Contemporary Arts, Inc*., 344 U.S. 228, 233 (1952). When an injury can be shown, but neither profits nor damages can be proven, statutory profits are mandatory. *See Russell v. Price*, 612 F.2d 1123, 1129-30 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978).

Statutory damages are precluded when the copyright holder does not register the copyright before commencement of the infringement. *See Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008); *Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 707 n.5 (9th Cir. 2004); *Mackie v. Rieser*, 296 F.3d 909, 912 n.3

(9th Cir. 2002). Nor are statutory damages awarded if the infringing activity started after the date of first publication but before the effective date of registration of the work unless the copyright for the infringed work was registered within three months after the work was first published. 17 U.S.C. § 412.

Joint and Several Liability: If statutory damages are assessed against one defendant or a group of defendants who are jointly and severally liable, "each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work." *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 946 (9th Cir. 2011) (quoting *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997)*, rev'd on other grounds sub nom by Feltner*, 523 U.S. 355. This is true even if there is incomplete joint and several liability between all parties. *Desire, LLC*, 986 F.3d at 1265 (holding that only one statutory award was available when "one infringer is jointly and severally liable with *all*-other infringers, but the other infringers are not completely jointly and severally liable with one another"). However, if separate copyright infringements are attributed to two or more defendants (in the same action) and those defendants are not jointly liable, separate awards of statutory damages are appropriate. *See Louis Vuitton Malletier, S.A.*, 658 F.3d at 946-47 ("[A] plaintiff may receive a single statutory award for all infringements of any one copyrighted work from either (1) any one defendant, where that defendant is separately liable or (2) multiple defendants, where those defendants are jointly and severally liable."); *Columbia Pictures Television*, 106 F.3d at 294 (holding that television stations owned by same owner and broadcasting episodes of same work, were separate copyright infringers for purposes of determining statutory damages).

One Compilation or Separate Works: Under 17 U.S.C. § 504(c)(1), statutory damages are awarded "with respect to any one work" and "all the parts of a compilation or derivative work constitute one work." Determining whether there is one compilation or separate works is "crucial" because, if "the 'one work' subject to the defendant's infringements is a compilation, Section 504(c) limits the copyright holder to a single statutory award." *VHT, Inc. v. Zillow Grp., Inc.*, 69 F.4th 983, 989 (9th Cir. 2023). The question is whether the individual components of a compilation "lived their own copyright lives, and value came from each [component's] individual content rather than their assembly within the [compilation]." *Id*. at 990. Relevant factors include whether the material was created or licensed by the owner on an individual basis or alongside other materials, whether the infringer selected that material based on how it was arranged alongside other materials or because of its individual content, and whether the material has "independent economic value." *Id.* (holding that photos were separate works when they were marketed and licensed individually, the infringer "used each photo independently to market home designs," and because "the photos had independent economic value"); *see also Columbia Pictures Television*, 106 F.3d at 295-96 (holding that each episode of a television series constituted a separate work, not a compilation, when episodes were produced, written, and registered separately, could be "repeated and rearranged at the option of the broadcaster," and "different episodes were broadcast over the course of weeks, months, and years").

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17.36 Copyright—Damages—Innocent Infringement (17 U.S.C. § 504(c)(2))

An infringement is considered innocent when the defendant has proved both of the following elements by a preponderance of the evidence:

First, the defendant [*name*] was not aware that [his] [her] [*other pronoun*] acts constituted infringement of the copyright; and

Second, the defendant [*name*] had no reason to believe that [his] [her] [*other pronoun*] acts constituted an infringement of the copyright.

Comment

The statutory damage minimum for innocent infringement is $200. 17 U.S.C. § 504(c)(2).

"Whether the defendants' infringement was innocent is a factual determination." *See L.A. News Serv. v. Reuters Television Int'l,, Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998). But even if the trier of fact finds that an infringement was innocent, this finding does not mandate a reduction in the statutory damages. *See L.A. News Serv. v. Tullo*, 973 F.2d 791, 800 (9th Cir. 1992).

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17.37 Copyright—Damages—Willful Infringement (17 U.S.C. § 504(c)(2))

An infringement is considered willful when the plaintiff has proved both of the following elements by a preponderance of the evidence:

First, the defendant [*name*] engaged in acts that infringed the copyright; and

Second, the defendant [*name*] knew that those acts infringed the copyright, or the defendant [*name*] acted with reckless disregard for, or willful blindness to, the copyright holder's rights.

Comment

The statutory damage maximum for willful infringement is $150,000. 17 U.S.C. § 504(c)(2).

Since at least 2008, the Ninth Circuit has recognized that "a finding of 'willfulness' . . . can be based on either 'intentional' behavior, or merely 'reckless' behavior." *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citations omitted); *see also Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 991 (9th Cir. 2017) ("[T]o prove 'willfulness' under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of 'reckless disregard' for, or 'willful blindness' to, the copyright holder's rights." (quoting *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 674 (9th Cir. 2012) (brackets in original)); *see also Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 833 (9th Cir. 2019) ("Negligence is a less culpable mental state than actual knowledge, willful blindness, or recklessness, the three mental states that properly support a finding of willfulness." (citations omitted)).

To refute evidence of willful infringement, the defendant must "not only establish its good faith belief in the innocence of its conduct, it must also show that it was reasonable in holding such a belief." *Peer Int'l Corp. v. Pausa Records, Inc*., 909 F.2d 1332, 1336 (9th Cir. 1990) (holding that a defendant who ignored revocation of its license to a copyrighted work, and continued to use work after revocation, willfully infringed that work). Even if one is notified of an alleged infringement, continued use of a work "does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing." *Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228 (9th Cir. 2012) (citations omitted); *see also VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 748-49 (9th Cir. 2019) (concluding that substantial evidence did not support the jury's finding of willfulness when the alleged infringer took "appropriate responsive measures after receiving" the notice of copyright infringement and the copyright owner refused to come forth with information to show copyright ownership).

A finding of willful infringement may also be relevant to whether the defendant's income taxes are deductible under 17 U.S.C. § 504(b). *See*, *e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487-88 (9th Cir. 2000) (holding in a case involving allocation of

defendant's profits under 17 U.S.C.§ 504(b), that "non-willful infringers" were entitled to deduct from damage assessment income taxes and management fees actually paid); *Oracle Am., Inc. v. Google Inc.*, 131 F. Supp. 3d 946, 949-53 (N.D. Cal. 2015) (providing an overview of Ninth Circuit precedent on whether a willful infringer may deduct expenses under 17 U.S.C.§ 504(b)).

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18. SECURITIES EXCHANGE ACT

Instruction

Introductory Comment
18.1 Securities—Purpose and Selected Definitions
18.2 Securities—Rule 10b-5 Claim
18.3 Securities—Misrepresentations or Omissions—Materiality
18.4 Securities—Forward-Looking Statements
18.5 Securities—Knowingly and Recklessly
18.6 Securities—Justifiable Reliance Generally
18.7 Securities—Justifiable Reliance—Fraud-on-the-Market Case
18.8 Securities—Causation
18.9 Securities—Damages
18.10 Securities—Controlling Person Liability
18.11 Securities—Good Faith Defense to Controlling Person Liability

Introductory Comment

The instructions in this chapter apply only to actions brought under the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), for false or misleading representations in connection with the purchase or sale of securities ("Rule 10b-5 actions"). As stated in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341 (2005):

> Section 10(b) of the Securities Exchange Act of 1934 forbids (1) the "use or employ[ment] . . . of any . . . deceptive device," (2) "in connection with the purchase or sale of any security," and (3) "in contravention of" Securities and Exchange Commission "rules and regulations." 15 U.S.C. § 78j(b). Commission Rule 10b-5 forbids, among other things, the making of any "untrue statement of material fact" or the omission of any material fact "necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b-5 (2004).
>
> The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation. And Congress has imposed statutory requirements on that private action.

(Ellipses in original; citations omitted.)

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-40 (1975), the Supreme Court, relying chiefly on "policy considerations," limited the Rule 10b-5 private right of action to plaintiffs who themselves were purchasers or sellers. As stated in *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 80-81 (2006), the policy the Court sought to promote in *Blue Chip Stamps* was that "[c]abining the private cause of action by means of the purchaser-seller limitation" minimizes the ill effects of vexatious private litigation brought to compel a substantial settlement. This limitation does not apply to government enforcement actions brought pursuant to Rule 10b-5. *Id.* at 81. The Supreme Court also limited the scope of liability under Section 10(b) of the 1934 Act to "primary violators," holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-78 (1994), that Section 10(b) does not allow recovery for aiding and abetting because the text of the Act "does not . . . reach those who aid and abet a § 10(b) violation. . . . The proscription does not include giving aid to a person who commits a manipulative or deceptive act." *Id*. at 177-78.

Rule 10b-5 forbids not only a defendant's material misrepresentations or omissions but also "any device, scheme, or artifice to defraud," as well as "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person." 17 C.F.R. § 240.10b-5(a), (c). Most private lawsuits under Rule 10b-5, however, involve "disclosure" claims, which Rule 10b-5(b) defines as "any untrue statement of a material fact or . . . omi[ssion] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." These instructions, therefore, focus on Rule 10b-5 disclosure claims. Moreover, the Supreme Court has stated that "[p]ure omissions are not actionable under Rule 10b-5(b)." *Macquarie Infrastructure Corp. v. Moab Partners*, 601

U.S. 257, 260, 263 (2024) (indicating that "a pure omission occurs when a speaker says nothing" in circumstances where the failure to speak does not render affirmative statements misleading).

In *Khoja v. Orexigen Therapeutics, Inc*., 899 F.3d 988 (9th Cir. 2018), the Ninth Circuit thoroughly discussed and applied many of the key concepts that appear in securities cases, such as falsity, omissions, and materiality. (The case also clarifies the circumstances for correctly applying the doctrine of incorporation-by-reference.)

Earlier editions of these instructions interspersed Rule 10b-5 instructions with instructions concerning Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k (the "1933 Act"), as well as instructions applicable to a claim by a customer of a brokerage firm that the customer's broker engaged in excessive trading ("churning") to run up commissions. In 2017, the Committee decided not to include 1933 Act instructions or churning instructions, nor instructions for claims arising out of insider trading or other federal securities statutes such as the Sarbanes-Oxley Act of 2002 (Pub. L. 107-204), because such claims are rarely tried to a jury. That decision continues in this edition.

In *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024), the Supreme Court held that when the SEC alleges that a defendant committed fraud in violation of the securities laws and seeks "money penalties," the defendant has a Seventh Amendment right to trial by jury. Previously, these types of claims often were adjudicated by an administrative law judge. After this decision, the SEC may be bringing these types of cases in district courts to be resolved by a jury.

Revised September 2024

18.1 Securities—Purpose and Selected Definitions

Congress enacted the securities laws to protect the integrity of financial markets. The plaintiff claims to have suffered a loss caused by the defendant's violation of certain of these laws.

There are terms concerning securities laws that have a specific legal meaning. The following definitions apply throughout these instructions, unless noted otherwise.

[A security is an investment of money in a commercial, financial, or other business enterprise, with the expectation of profit or other gain produced by the efforts of others. Some common types of securities are [stocks,] [bonds,] [debentures,] [warrants,] [and] [investment contracts].]

The buying and selling of securities are controlled by the Securities Laws. Many of these laws are administered by the United States Securities and Exchange Commission (SEC).

A "10b-5 Claim" is a claim brought under a federal statute, Section 10(b) of the Securities Exchange Act of 1934, which prohibits acts of deception in connection with the purchase or sale of a security and in violation of rules and regulations that the SEC has the duty and power to issue. A corresponding SEC Rule, Rule 10b-5, prohibits the misrepresentation of material facts and the omission of material facts in connection with the purchase or sale of securities. A person or business entity who violates the securities laws, including Rule 10b-5, may be liable for damages caused by the violation.

[A misrepresentation is a statement of material fact that is false or misleading when it is made. [A statement may be misleading even if it is literally true if the context in which the statement was made caused the listener or reader to remain unaware of the actual state of affairs.]]

[An omission is a failure to disclose a material fact that needed to be disclosed to prevent other statements that were made from being misleading.]

[A broker buys and sells securities for clients, usually for a commission. A broker can also be a dealer.]

[A dealer buys securities and resells them to clients. A dealer also can be a broker.]

[A controlling person is [an individual who] [a company that] possesses the power to direct the management or policies of a business enterprise or of another person involved in the management or policymaking of the enterprise. A broker or a dealer may be a controlling person.]

["In connection with" means that there was some relationship, or nexus, between the allegedly fraudulent conduct and the [sale] [purchase] of the securities. [The defendant's conduct

may be in connection with a purchase or sale of a security even if the defendant did not actually participate in any securities transaction.]]

An instrumentality of interstate commerce includes the postal mails, e-mails, telephone, telegraph, telefax, interstate highway system, internet and similar methods of communication, and travel from one state to another within the United States.

Comment

"Materiality" is defined in Instruction 18.3.

Whether a specific financial instrument qualifies as a security can be a threshold issue. *SEC v. Hui Feng*, 935 F.3d 721, 728-729 (9th Cir. 2019). This includes "investment contracts." The Supreme Court's decision in *Howey* and later case law hold that an "investment contract" exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. *See SEC v. W.J. Howey Co.*, 328 U.S. 298-99 (1946); *United Housing Fund., Inc. v. Forman*, 421 U.S. 837, 851-852 (1975). Courts applying *Howey* "conduct an objective inquiry into the character of the instrument or transaction offered based on what the purchasers were 'led to expect,'" including an analysis of the promotional materials associated with the transaction. *Hui Feng*, 935 F.3d at 729.

A statement of opinion does not constitute an "untrue statement of material fact" simply because the stated opinion ultimately proves incorrect. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 176 (2015). For example, a statement that is merely aspirational—such as a corporate code of conduct—generally is not actionable because it cannot be said to be false. *See Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275-76 (9th Cir. 2017). But an opinion is actionable as a false statement if the speaker does not sincerely hold the view or belief expressed regarding the material representation or if the opinion contains a material, verifiable statement of fact that is untrue. *Omnicare*, 575 U.S. at 183-85. Further, an opinion may be actionable if the speaker omits material facts necessary to make the opinion not misleading. *Id.* at 185-91. When the omission of a fact, taken in its full context, makes an opinion misleading to a reasonable investor, securities law "creates liability only for the omission of material facts that cannot be squared with such a fair reading." *Id*. at 190-91. Although *Omnicare* was decided under § 11 of the Securities Act of 1933, the Ninth Circuit has clarified that the pleading requirements set forth in *Omnicare* apply to claims under § 10(b) of the 1934 Act and Rule 10b-5. *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc*., 856 F.3d 605, 616 (9th Cir. 2017); *see also In re Alphabet, Inc. Sec. Litig*., 1 F.4th 687, 699 (9th Cir. 2021); *Glazer Cap. Mgmt. v. Forescout Techs., Inc.*, 63 F.4th 747, 764, 771, 779 (9th Cir. 2023) (applying *Omnicare* in the context of § 10(b) and Rule 10b-5 claims); *In re Cloudera*, 121 F.4th 1180, 1187-89 (9th Cir. 2024) (explaining that "cloud-related" terminology, such as "cloud-native," "native public cloud services," and "hybrid cloud," in the allegedly false statements was not pleaded with particularity because the "terms lack[ed] a plain or ordinary meaning," and the plaintiff failed to plead facts supporting his definitions of the terms).

As to "omissions," the Supreme Court has held that Rule 10b-5 is violated by nondisclosure only when there is a duty to disclose. *See Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5."). There is a duty to disclose "when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (citing 17 C.F.R. § 240.10b-5(b)); *see also Hanon v. Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992) ("Rule 10b-5 imposes a duty to disclose material facts that are necessary to make disclosed statements, whether mandatory or volunteered, not misleading"). In addition, the Supreme Court has stated that "[p]ure omissions are not actionable under Rule 10b-5(b)." *Macquarie Infrastructure Corp. v. Moab Partners*, 601 U.S. 257, 260, 264 (2024) (holding that the failure to disclose information that Item 303 of SEC Regulation S-K requires be provided in periodic public filings does not, by itself, support a private action under Rule 10b-5(b); that rule prohibits only misrepresenting material facts and omitting material facts that are necessary to make the statements that are made not misleading).

A duty of disclosure also may arise when the parties have "a fiduciary or agency relationship, prior dealings or circumstances such that one party has placed trust and confidence in the other." *Paracor Fin., Inc. v. Gen. Electric Capital Corp.,* 96 F.3d 1151, 1157 (9th Cir. 1996) (citations and internal quotation marks omitted) (holding that a financer of a leveraged buyout of a corporation did not have a duty to disclose material information regarding the corporation to investors in the corporation's debentures). A notable example of Rule 10b-5 liability for material omissions arising out of a fiduciary relationship is insider trading. *See Chiarella v. United States*, 445 U.S. 222, 228 (1980) (recognizing that insider trading is actionable under Section 10(b) because "a relationship of trust and confidence [exists] between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation"). It bears emphasis, however, that a trust relationship is not essential to establishing liability for failure to disclose under Rule 10b-5; a defendant can assume a duty to disclose by "affirmatively tell[ing] a misleading half-truth about a material fact to a potential investor[,] . . . independent of any responsibilities arising from a trust relationship." *United States v. Laurienti*, 611 F.3d 530, 541 (9th Cir. 2010).

Regarding "brokers," the Ninth Circuit has used the totality-of-the-circumstances approach. *See Hui Feng*, 935 F.3d at 731-31. In determining if an individual acted as a broker, courts may consider whether that individual:

(1) is an employee of the issuer of the security;
(2) received transaction-based income such as commissions rather than a salary;
(3) sells or sold securities from other issuers;
(4) was involved in negotiations between issuers and investors;
(5) advertis[ed] for clients;
(6) gave advice or made valuations regarding the investment;
(7) was an active finder of investors; and
(8) regularly participates in securities transactions.

Id.

Regarding "controlling persons," *see* Section 20(a) of the 1934 Act, 15 U.S.C. § 78f(a). *See also No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003) (discussing controlling person liability).

Regarding the phrase "in connection with," the Ninth Circuit has noted:

> To show a Rule 10b-5 violation, a private plaintiff must prove a "causal connection between a defendant's misrepresentation and [the] plaintiff's injury[,]" . . . a proximate relationship between the plaintiff's injury and the purchase or sale of a security[,] . . . [and] a connection between the defendant's alleged misrepresentation and the security at issue.

Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1485-86 (9th Cir. 1991) (citations omitted) (first alteration in original). A defendant need not, however, have participated in any securities transaction so long as that defendant was engaged in fraudulent conduct that was "in connection with" a purchase or sale. *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971) (holding that fraudulent conduct is "in connection with" a purchase or sale if the alleged fraudulent conduct is "touching" the securities transaction).

Regarding the phrase "instrumentality of interstate commerce," it is not necessary that interstate mailings, interstate telephone calls, or other interstate use of instrumentalities of interstate commerce be proved; intrastate use of such instrumentalities of interstate commerce is sufficient to satisfy the jurisdictional requirements. *Spilker v. Shayne Labs., Inc.*, 520 F.2d 523, 526 (9th Cir. 1975).

Revised June 2025

18.2 Securities—Rule 10b-5 Claim

The plaintiff [*name*] alleges that the defendant defrauded [him] [her] [*other pronoun*] [it] by [*describe the plaintiff's "10b-5" claim*]. This is referred to as "the plaintiff's 10b-5 claim."

To succeed on this claim, the plaintiff [*name*] has the burden of proving each of the following five elements by a preponderance of the evidence:

First, the defendant [*name*] [made an untrue statement of a material fact] [omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading] in connection with the [purchase] [sale] of securities;

Second, the defendant [*name*] acted [knowingly] [knowingly or recklessly] [recklessly];

Third, the defendant [*name*] [used] [caused the use of] [an instrumentality of interstate commerce, such as mail, telephone, or internet] [a facility of a national securities exchange] in connection with the [purchase] [sale] of securities, regardless of whether the [instrumentality] [facility] itself was used to make an untrue statement or a material omission;

Fourth, the plaintiff [*name*] justifiably relied on [the defendant [*name*]'s untrue statement of a material fact] [the defendant [*name*]'s omission to state a necessary material fact] in [buying] [selling] securities; and

Fifth, the defendant' [*name*] s [misrepresentation] [omission] caused the plaintiff [*name*] to suffer damages.

If you find that the plaintiff [*name*] has proved each of these elements, your verdict should be for the plaintiff [*name*]. If, on the other hand, you find that the plaintiff [*name*] has failed to prove any of these elements, your verdict should be for the defendant [*name*].

Comment

See Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co., 845 F.3d 1268, 1274 (9th Cir. 2017) (listing elements of claim).

See Instruction 18.1 (Securities—Purpose and Definitions) for definitions of "security," "10b-5 claim," "misrepresentation," "omission," "in connection with," and "instrumentality of interstate commerce." National security exchanges include the New York Stock Exchange and the NASDAQ Stock Market. *See* Instruction 18.5 (Securities—Knowingly and Recklessly) for definitions of "knowingly" and "recklessly."

See 15 U.S.C. § 78j(b) (making it unlawful to use deceptive device in connection with purchase or sale of security) and 17 C.F.R. § 240.10b-5 (making it unlawful to use device to defraud, to make untrue statement or omission of material fact, or to engage in fraudulent act in connection with purchase or sale of security). In *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884

(9th Cir. 1996), the Ninth Circuit confirmed that the elements described in this instruction are required to prove a 10b-5 claim.

A defendant "makes" a statement if the defendant has ultimate authority over the statement, including its content and whether and how to communicate it. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011). A plaintiff must show that a defendant had control over the statement; a defendant's significant involvement in the preparation of a prospectus containing an untrue or misleading statement is not enough to show that the defendant "made" that statement. *Id*.

A defendant also may be liable if the defendant disseminates a false statement with the intent to defraud. *Lorenzo v. S.E.C.*, 587 U.S. 71, 74 (2019). Where a defendant does not "make" a statement but disseminates information that is "understood to contain material untruths," such conduct can fall within the scope of a 10b-5 claim. *Id*. at 78; *see also id.* at 81 ("[U]sing false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud.").

Before 2017, these instructions phrased the fourth element as requiring that "the plaintiff *reasonably* relied" on the misrepresentation. Several Ninth Circuit cases, however, use the phrase "justifiable reliance." *See Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005) ("If [Plaintiff] justifiably relied on Defendants' misrepresentation about the stock sale and, in turn, bought [company] stock based on this reliance, it incurred damages from Defendants' fraud"); *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999); *Gray*, 82 F.3d at 884.

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18.3 Securities—Misrepresentations or Omissions—Materiality

The plaintiff [*name*] must prove by a preponderance of the evidence that the defendant [*name*]'s misrepresentation or omission was material. A factual representation concerning a security is material if there is a substantial likelihood a reasonable investor would consider the fact important in deciding whether to buy or sell that security. An omission concerning a security is material if a reasonable investor would have regarded what was not disclosed to [him] [her] [*other pronoun*] as having significantly altered the total mix of information [he] [she] [*other pronoun*] took into account in deciding whether to buy or sell the security.

You must decide whether something was material based on the circumstances as they existed at the time of the statement or omission.

Comment

In *Basic Inc. v. Levinson*, 485 U.S. 224, 231 (1988), the Supreme Court adopted the standard for materiality developed in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), (whether a reasonable shareholder would "consider it important" or whether the fact would have "assumed actual significance") as the standard for actions under 15 U.S.C. § 78j(b). The Ninth Circuit describes this standard as "objective materiality." *In re Alphabet, Inc. Sec. Litig*., 1 F.4th 687, 705 (9th Cir. 2021).

In discussing materiality, the Ninth Circuit has applied *TSC Industries* and *Basic Inc.* in various formulations. *See*, *e.g.*, *SEC v. Hui Feng*, 935 F.3d 721, 736 (9th Cir. 2019) (applying *TSC* materiality test); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946-48 (9th Cir. 2005) (applying *Basic Inc.* materiality test); *No. 84 Emp'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp*., 320 F.3d 920, 934 (9th Cir. 2003) (declining to adopt bright line rule for materiality that would require immediate change in stock price and instead engaging in "fact-specific inquiry" under *Basic Inc.*); *In re Stac Electrs. Sec. Litig.*, 89 F.3d 1399, 1408 (9th Cir. 1996) (applying test of whether there was substantial likelihood that omitted fact would have been viewed by reasonable investor as having significantly altered "total mix" of information made available); *Kaplan v. Rose*, 49 F.3d 1363, 1371 (9th Cir. 1994) (applying test of whether omission or misrepresentation would have misled reasonable investor about nature of his or her investment); *McGonigle v. Combs*, 968 F.2d 810, 817 (9th Cir. 1992) (applying test of whether there was substantial likelihood that, under all the circumstances, omitted fact would have assumed actual significance in deliberations of reasonable shareholder); *see also In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 795-96 (9th Cir. 2017) (discussing relationship between materiality and reliance and noting that "materiality" may be different when plaintiff alleges direct reliance on misrepresentation, rather than fraud-on-the-market theory).For a discussion of the distinction between mere puffery, which is not material, and a statement that is materially misleading, *see In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1143-44 (9th Cir. 2017). *See also In re Sorrento Therapeutics, Inc. Sec. Litig.,* 97 F.4th 634, 641 (9th Cir. 2024) (concluding that a biopharmaceutical company's statements regarding a promising cure for COVID-19 was simply enthusiasm and corporate optimism rather than materially misleading).In evaluating materiality, courts may consider SEC interpretive guidance. *See In re Alphabet, Inc. Sec. Litig*., 1 F.4th at 700.The Ninth Circuit has held that stock price movements

are relevant to reliance, and not to materiality. *See Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1277 (9th Cir. 2017).

The Ninth Circuit has also held that when plaintiffs make claims about the effect of highly technical information on investment decisions, they must provide enough context to make clear why investors would find one set of technical information meaningfully different from another set of technical information. *See In re Nektar Therapeutics Securities Litigation*, 34 F.4th 828, 837 (9th Cir. 2022).

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18.4 Securities—Forward-Looking Statements

In considering whether the defendant [made an untrue statement of a material fact] [omitted a material fact necessary under the circumstances to keep the statements that were made from being misleading], you must distinguish between statements of fact and what the law calls "forward-looking statements."

A prediction, projection, or other forward-looking statement, even if ultimately proven incorrect, generally is not statement of fact. Instead, it is merely a forecast about what may or may not occur in the future.

A prediction, projection, or other forward-looking statement may constitute a basis for a violation of Rule 10b-5 only if the plaintiff proves by a preponderance of the evidence that, at the time the forward-looking statement was made, (1) the defendant did not actually believe the statement, (2) there was no reasonable basis for the defendant to believe the statement, or (3) the defendant was aware of undisclosed facts tending to seriously undermine the accuracy of the statement.

Comment

This instruction addresses "forward-looking statements" that fall outside the coverage of the safe harbor afforded to forward-looking statements by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-5(c). The PSLRA's safe harbor has several exclusions. For example, the safe harbor does not apply to statements contained in audited financial statements, nor does it apply to various other categories of statements, such as statements made in connection with a going private transaction, a tender offer, or an initial public offering. *See generally* 15 U.S.C. § 78u-5(b). When the PSLRA's safe harbor does not apply, background judicial doctrines may nonetheless govern whether a statement of opinion or a statement accompanied by cautionary language is actionable under Rule 10b-5. *See*, *e.g.*, *Retail Wholesale & Dep't Store Union Local 338 Retirement Fund v. Hewlett-Packard* Co., 845 F.3d 1268, 1275-76 (9th Cir. 2017) (concluding that aspirational statements were not capable of being false); *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 388 & n.2 (9th Cir. 2010) (applying materiality test to forward-looking statements when PSLRA safe harbor did not apply); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010) (holding that "vague statements of optimism" are not actionable); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (applying the "bespeaks caution" doctrine).

The term "forward-looking statements" refers generally to management projections of future economic performance, such as sales, revenues, or earnings per share forecasts. In the context of the PSLRA safe harbor, the term means "any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions 'underlying or related to' any of these issues." *No. 84 Empl'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (quoting 15 U.S.C. § 78u-5(I)).

The Ninth Circuit has held that "transparently aspirational statements, as well as statements of 'mere corporate puffery, vague statements of optimism . . . or other feel-good monikers' are generally not actionable as a matter of law" unless the statements "provide [a] concrete description of the past and present that affirmatively create[s] a plausibly misleading impression of a state of affairs that differed in a material way from the one that actually existed." *In re Alphabet, Inc. Sec. Litig*., 1 F.4th 687, 700 (9th Cir. 2021).

When a defendant makes mixed statements containing both non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected by the safe harbor of the PSLRA. *In re Quality Systems, Inc. Sec. Litig.*, 865 F.3d 1130, 1146-48 (9th Cir. 2017).

Regarding forward-looking statements that are not expressly protected under the PSLRA safe harbor, the Ninth Circuit has stated that such statements are potentially actionable under the theory that "[a] projection or statement of belief contains at least three implicit factual assertions: (1) that the statement is genuinely believed, (2) that there is a reasonable basis for that belief, and (3) that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement." *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989); *see also In re Oracle*, 627 F.3d at 388; *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 501 (9th Cir. 1992). Accordingly, "[f]or a forward-looking statement . . . to constitute a material misrepresentation giving rise to Section 10(b) or Rule 10b-5 liability, a plaintiff must prove either '(1) the statement is not actually believed [by the speaker], (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy.'" *In re Oracle*, 627 F.3d at 388 (quoting *Provenz*, 102 F.3d at 1487) (alteration in original). "The fact that [a] forecast turn[s] out to be incorrect does not retroactively make it a misrepresentation." *Id.* at 389. "Risk disclosures that 'speak [] entirely of as-yet-unrealized risks and contingencies' and do not 'alert [] the reader that some of these risks may already have come to fruition' can mislead reasonable investors." *In re Alphabet, Inc. Sec. Litig*., 1 F.4th at 703.

A forward-looking statement that is not affirmatively exempted from the safe harbor's coverage under 15 U.S.C. § 78u-5(c), is afforded safe harbor protection "if it is forward-looking and *either* is accompanied by meaningful cautionary language *or* is made without actual knowledge that it is false or misleading." *Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1190 (9th Cir. 2021) (quoting *Quality Systems*, 865 F.3d at 1141).

Regarding the first category, the PSLRA provides a safe harbor for identified forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement[s]." 15 U.S.C. § 78u-5(c)(A)(i); *see also id.* § 78u-5(c)(2) (providing a conditional safe harbor for oral forward-looking statements). This prong of the PSLRA safe harbor codifies principles underlying the "bespeaks caution" doctrine. *See Empl'rs Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004). This instruction does not address the bespeaks caution doctrine because application of that doctrine is typically not a question for the jury. *See id.* ("The bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law [typically in a motion to dismiss for

failure to state a cause of action or a motion for summary judgment] that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud.") (alteration in original) (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413-15 (9th Cir. 1994)) (internal quotation marks omitted).

Regarding the second category, the PSLRA provides a safe harbor for forward-looking statements that the speaker believed were true. *See* 15 U.S.C. § 78u-5(c)(1)(B). To avoid application of the safe harbor under this category, "plaintiffs must prove that 'forward-looking' statements were made with 'actual knowledge' that they were false or misleading." *In re Daou Sys., Inc., Sec. Litig.*, 411 F.3d 1006, 1021 (9th Cir. 2005) (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 993 (1999) (Browning, J., concurring in part and dissenting in part)). By contrast, if the statement is not covered by the PSLRA safe harbor, "[t]he requisite state of mind, at a minimum, is deliberate or conscious recklessness." *Empl'rs Teamsters*, 353 F.3d at 1134.

There also is a third statutory safe harbor, which is not mentioned in this instruction. This third safe harbor exculpates any forward-looking statement that is "immaterial." *See* 15 U.S.C. § 78u-5(c)(1)(A)(ii). It is not referred to in this instruction because "materiality" already is an express element of the claim (*see* Instruction 18.2, first element) and is defined separately (*see* Instruction 18.3).

Revised September 2024

18.5 Securities—Knowingly and Recklessly

[A defendant acts knowingly when [he] [she] [*other pronoun*] makes an untrue statement with the knowledge that the statement was false or with reckless disregard for whether the statement was true.] [A defendant acts knowingly when [he] [she] [*other pronoun*] omits necessary information with the knowledge that the omission would make the statement false or misleading or with reckless disregard for whether the omission would make the statement false or misleading.]

[A defendant acts recklessly when [he] [she] [*other pronoun*] engages in highly unreasonable conduct that is an extreme departure from ordinary care, presenting a danger of misleading investors, which is either known to the defendant or is so obvious that the defendant must have been aware of it.]

Comment

This instruction addresses the element of "scienter," which was developed in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, *reh'g denied*, 425 U.S. 986 (1976). In *Nelson v. Serwold*, 576 F.2d 1332, 1337 (9th Cir. 1978), the court held that Congress intended Section 10(b) to reach both knowing and reckless conduct, and it interpreted the *Ernst & Ernst* decision as merely eliminating negligence as a basis for liability.

In the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 109 Stat. 737, Congress added "[e]xacting pleading requirements," among other things, as a "check against abusive litigation." *Tellabs, Inc. v. Makor Issues & Rts., Ltd*., 551 U.S. 308, 313 (2007). For pleading purposes, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id*. at 314 (quoting 15 U.S.C. § 78u–4(b)(2)). In *Webb v. SolarCity Corp*., 884 F.3d 844, 851 (9th Cir. 2018), the Ninth Circuit explained that the scienter standard requires facts demonstrating an intent to deceive, manipulate or defraud, or "deliberate recklessness." The court defined "deliberate recklessness" as "an extreme departure from the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id*. (brackets, emphasis, and citation omitted); *see also Glazer Cap. Mgmt. v. Forescout Techs., Inc.*, 63 F.4th 747,765 (9th Cir. 2023) (stating that deliberate recklessness "is a higher standard than mere recklessness and requires more than a motive to commit fraud," and "only satisfies scienter under § 10(b) to the extent that it reflects some degree of intentional or conscious misconduct" (citation omitted)). *See also Espy v. J2 Global, Inc.,* 99 F. 4th 527, 536-37 (9th Cir. 2024) (declining to hold that the complaint alleged facts giving rise to a strong inference of scienter where the "majority of [two witnesses'] statements fail to establish reliability or personal knowledge, or simply amount to criticisms of [the defendant's] management practices and compensation structures," and which, "even if . . . reliable," were "simply negative opinions of [the defendant] . . . not statements which are themselves indicative of scienter") (internal citations omitted)).

The PSLRA entitles a defendant in any private action arising under Rule 10b-5 to require the court to submit a written interrogatory to the jury regarding each defendant's state of mind at

the time of the alleged violation of the securities laws. 15 U.S.C. § 78u-4(d). For a discussion of when a corporate officer's scienter can be imputed to a corporation, particularly if that officer also defrauds the corporation, *see In re ChinaCast Education Corp*. *Securities Litigation*, 809 F.3d 471 (9th Cir. 2015).

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18.6 Securities—Justifiable Reliance Generally

The plaintiff must prove by a preponderance of the evidence that [he] [she] [*other pronoun*] justifiably relied on the alleged misrepresentation or omission in deciding to engage in the [purchase] [sale] of the [security] [securities] in question. The plaintiff may not intentionally close [his] [her] [*other pronoun*] [its] eyes and refuse to investigate the circumstances or disregard known or obvious risks.

Comment

Use this instruction unless the plaintiff relies on a fraud-on-the-market theory, in which case Instruction 18.7 (Securities—Justifiable Reliance—Fraud-on-the-Market Case) should be used. Even in a fraud-on-the-market theory case, however, this instruction may become applicable if the jury finds that the defendant rebutted the presumption of reliance on the market.

The element of "reliance [is] often referred to in cases involving public securities markets . . . as transaction causation*." Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

In *Atari Corp. v. Ernst & Whinney*, 981 F.2d 1025, 1030 (9th Cir. 1992), the court held that an investor cannot claim reliance on a misrepresentation if the investor already possessed information sufficient to call the representation into question.

A rebuttable presumption of reliance is deemed to arise when the fraud involves a material omission. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153-54 (1972). In a "mixed case of misstatements and omissions," the presumption will only apply if the case primarily alleges omissions. *Binder v. Gillespie*, 184 F.3d 1059, 1063-64 (9th Cir. 1999) (involving a case resolved on summary judgment). At trial, the court may resolve whether the presumption is applicable after considering the evidence.

To provide guidance to jurors required to determine whether the plaintiff's reliance was justifiable, the judge may consider adding the following to this instruction:

In deciding whether a plaintiff justifiably relied on the defendant's alleged misrepresentation[s] or omission[s,] you may consider evidence of:

(1) whether the plaintiff was sophisticated and experienced in financial and securities matters;

(2) whether the plaintiff and the defendant had a long-standing business or personal relationship, or a relationship in which the defendant owed a duty to the plaintiff to not interfere with or adversely affect the plaintiff's interests;

(3) whether the plaintiff ignored or refused to investigate the circumstances surrounding the transaction;

(4) whether the plaintiff disregarded risks so obvious that they should have been known or risks so great as to make it highly probable that harm would follow;

(5) whether the defendant concealed the fraud;

(6) whether the plaintiff had access to the relevant material information;

(7) whether the misrepresentation was general or specific;

(8) whether the plaintiff initiated or sought to expedite the transaction;

(9) whether the defendant prepared or provided to the plaintiff materials that contained adequate warnings about the risks associated with the investment or adequate disclaimers describing limitations on the scope of the defendant's representations or the defendant's involvement; and

(10) any other evidence you find helpful in deciding whether the plaintiff justifiably relied on the defendant's misrepresentation[s] or omission[s].

For out-of-circuit cases listing these factors, *see*, *e.g.*, *Brown v. E.F. Hutton Grp., Inc.*, 991 F.2d 1020, 1032 (2d Cir. 1993); *Davidson v. Wilson*, 973 F.2d 1391, 1400 (8th Cir. 1992); *Myers v. Finkle*, 950 F.2d 165, 167 (4th Cir. 1991); *Jackvony v. RIHT Fin. Corp.*, 873 F.2d 411, 416 (1st Cir. 1989); *Bruschi v. Brown*, 876 F.2d 1526, 1529 (11th Cir. 1989); *Zobrist v. Coal-X, Inc.*, 708 F.2d 1511, 1518-19 (10th Cir. 1983).

To establish that a defendant adequately warned the plaintiff of the attendant risks in a transaction, the defendant's disclosures must have been precise and relate directly to what the plaintiff alleges was misleading. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414-15 (9th Cir. 1994).

Revised September 2024

18.7 Securities—Justifiable Reliance—Fraud-on-the-Market Case

The plaintiff [*name*] does not have to prove that [he] [she] [*other pronoun*] justifiably relied on the alleged misrepresentation or omission in deciding to [purchase] [sell] the [security] [securities] in question if [he] [she] [*other pronoun*] proves by a preponderance of the evidence that there was an active, open market in the [security] [securities] at the time of the transaction[s] in question. An "active, open market" means that there were a large number of traders, a high level of activity, and frequent trades, such that the price of the security immediately reflects all publicly available information.

If you find that the plaintiff [*name*] has proved by a preponderance of the evidence that (1) an active, open market for the [security] [securities] existed at the time of the transaction[s] in question and (2) investors reasonably relied on that market as an accurate reflection of the current market value of the [security] [securities], you may find that the plaintiff [*name*] has proved that [he] [she] [*other pronoun*] justifiably relied on the defendant [*name*]'s statements.

If, however, the defendant [*name*] proves by a preponderance of the evidence either that (1) the plaintiff [*name*] did not actually rely on the integrity of the market or (2) the alleged misrepresentation or omission did not affect the market price of the security, then the defendant [*name*] has rebutted any presumption that the plaintiff [*name*] relied on the market. In that event, the plaintiff [*name*] must then prove that [he] [she] [*other pronoun*] justifiably relied directly on the alleged misrepresentation or omission.

Comment

Use this instruction when a theory of fraud on the market is involved. That theory is based on the premise that when persons buy or sell publicly-traded shares, they rely on the marketplace to ensure the integrity of the price, to the extent that price is a consideration in their decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 245-49 (1988); *see also Halliburton v. Erica P. John Fund, Inc.*, 573 U.S. 258, 271 (2014) (affirming *Basic*'s holding that "the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations"). Under the theory, a presumption of reliance is established "by demonstrating that a security is actively traded in an 'efficient market,' in which prices immediately reflect all publicly available information." *Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1103 (9th Cir. 2010). As explained by the Ninth Circuit, *Cammer v. Bloom*, 711 F. Supp. 1264, 1286-87 (D.N.J. 1989), "outlined a test for market efficiency in the context of a section 10(b) securities fraud class action." *Miller*, 615 F.3d at 1102; *see also id.* at 1103 (noting that the *Cammer* test "was developed in support of [the fraud-on-the-market] presumption" and "is not appropriate for assessing loss causation"). The Ninth Circuit in *Miller* observed that "*Cammer* sets out five well-recognized factors 'designed to help make the central determination of efficiency in a particular market.'" *Id.* (quoting *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999)). These factors are (1) whether the stock trades at a high weekly volume, (2) whether securities analysts follow and report on the stock, (3) whether the stock has market makers and arbitrageurs, (4) whether the company is eligible to file SEC registration form S-3, and (5) whether there are empirical facts showing a cause-and-effect relationship between new

information about the corporation and an immediate response in the stock price. *Binder*, 184 F.3d at 1065.

When the plaintiff demonstrates market efficiency, the law presumes that the market itself has factored in relevant information and the plaintiff need not prove that he or she individually or the class of purchasers whom the plaintiff seeks to represent relied on the statements or omissions on which the action is based. *In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 512 n.2 (9th Cir. 1991) (holding that in fraud-on-the-market case, plaintiff need not show actual reliance on misrepresentation or omission; instead, plaintiff must show reliance on integrity of price established by market, which was in turn influenced by misleading information or omission of information). However, the defendant may rebut evidence giving rise to the presumption of reliance. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989). The defendant may do so in a variety of ways too numerous to list here, and always dependent on the facts of the given case. In general, however, to rebut the presumption of reliance the defendant must show that there was no link between the plaintiff's decision to trade at a fair market price and the alleged misrepresentation or omission. *See Basic Inc.*, 485 U.S. at 248; *see also Kaplan v. Rose*, 49 F.3d 1363, 1376 (9th Cir. 1994) (holding that presumption can be rebutted by showing that information tending to refute misrepresentation had entered market through other channels). Even if some information was "out there," however, corporate insiders "are not relieved of their duty to disclose material information when the information has received only brief mention in a few poorly-circulated, lightly-regarded publications." *In re Apple Computer*, 886 F.2d at 1116.

If the jury finds in a fraud-on-the-market case that the defendant rebutted the presumption of reliance, use Instruction 18.6 (Securities—Justifiable Reliance—Generally) to instruct the jury on what the plaintiff must prove.

The Ninth Circuit has recognized that "[t]he burden of pleading loss causation is typically satisfied by allegations that the defendant revealed the truth through 'corrective disclosures" which 'caused the company's stock price to drop and investors to lose money.'" *Lloyd v. CVB Financial Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016) (quoting *Halliburton Co. v. Erica. P. John Fund, Inc.*, 573 U.S. at 264). "[T]he ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Id.* at 1210. Although a defendant's announcement of a government investigation does not, without more, qualify as a corrective disclosure, such an announcement can form the basis for a viable loss causation theory if accompanied by a subsequent corrective disclosure by the defendant. *Id.* Thus, in *Lloyd*, the Ninth Circuit concluded that the following allegations adequately pleaded loss causation: (1) the defendant disclosed that it had received a subpoena from the Securities and Exchange Commission, causing its stock price to drop 22 percent, (2) the market and analysts viewed the subpoena as related to the defendant's alleged earlier misrepresentations that there was no reason for "serious doubts" about a major borrower's ability to repay loans issued by the defendant, (3) the market's fears about the subpoena were confirmed when the defendant made a subsequent disclosure that it was writing off the bulk of the loans and classifying the remainder as nonperforming, and (4) the subsequent disclosure had a minimal effect on the defendant's stock price, indicating that the earlier 22 percent drop reflected the market's concern about the loans. *Id.*

In a case in which a plaintiff alleges a fraud-on-the-market theory, the definition of "materiality" may be different than when a plaintiff alleges direct reliance on a misrepresentation. *See In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 795-96 (9th Cir. 2017).

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18.8 Securities—Causation

The plaintiff [*name*] must prove by a preponderance of the evidence that the alleged material misrepresentations or omissions were the cause of [his] [her] [*other pronoun*] economic injury. To establish economic injury or loss, the plaintiff must prove that the alleged misrepresentation[s] or omission[s] artificially inflated the price of the security. To establish causation, the plaintiff [*name*] must prove that the alleged misrepresentation[s] or omission[s] played a substantial part in causing the injury or loss the plaintiff [*name*] suffered. The plaintiff [*name*] need not prove that the alleged misrepresentation[s] or omission[s] [was] [were] the sole cause of the economic injuries.

Comment

The Private Securities Litigation Reform Act of 1995 ("PSLRA") imposed the requirement that a private plaintiff prove that the defendant's fraud caused an economic loss. 15 U.S.C. § 78u-4(b)(4). This element of causation has been referred to as "'loss causation,' *i.e.*, a causal connection between the material misrepresentation and the loss." *Dura Pharms., Inc. v. Broudo*,544U.S. 336, 342 (2005); *see also In re Genius Brands Int'l, Inc. Sec. Litig*., 97 F.4th 1171, 1183 (9th Cir. 2024) ("[I]n the end, loss causation is simply a variant of proximate cause, [and] the ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss."). In *Dura*, the Supreme Court held that the PSLRA "makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss." *Id*. at 346. The Supreme Court reversed the Court of Appeals' ruling that a plaintiff may establish loss causation if the plaintiff merely shows that the price paid on the date of purchase was inflated because of the defendant's misrepresentation. The Supreme Court held that a plaintiff's mere purchase of stock at an inflated price is not sufficient to establish loss causation for a number of reasons, such as that at the moment of purchase the plaintiff has suffered no loss because the inflated price paid is offset by the value of the shares he or she acquired, which at that instant possess equivalent market value. Also, the purchaser could later sell those shares at a profit. Conversely, if the price drops, the cause of the decline could be attributable to a host of factors other than that the stock price previously had been inflated as a result of the defendant's misrepresentation or omission. The Court held that under the plaintiff's theory of liability, the complaint failed adequately to allege causation because it did not allege that the defendant corporation's share price fell significantly after the truth became known, did not specify the relevant economic loss, and did not describe the causal connection between that loss and the misrepresentation. *Id.* at 346-48.

Still, the Ninth Circuit has held that "loss causation begins with the allegation that the defendant's misstatements (or other fraudulent conduct) artificially *inflated* the price at which the plaintiff purchased [the] share." *In re BofI Holding, Inc. Sec. Litig*., 977 F.3d 781, 789 (9th Cir. 2020). In *Genius Brands*, the court emphasized that initial price inflation and initial price increase are not the same and that while a price increase following the fraudulent conduct is one way to demonstrate that the price is higher than it would have been, it is not the only way. *Genius Brands*, 97 F.4th at 1185. Indeed, as the court noted, inflation can be shown by plausibly alleging that the price remained stable but would have gone down if the misstatement had not

been made. *Id*. Similarly, where the price dropped, a plaintiff can allege that the drop would have been more significant had the misstatement not been made. *Id*. In either case, the court explained, "the plaintiff would plausibly allege that the stock's price was higher 'than it would have been had the false statements not been made,' even though the misstatements did not increase the stock's price." *Id*. (quoting *BofI Holding*, 977 F.3d at 789).

The Ninth Circuit has stated that "[t]ypically, 'to satisfy the loss causation requirement, the plaintiff must show that the revelation of that misrepresentation or omission was a substantial factor in causing a decline in the security's price, thus creating an actual economic loss for the plaintiff.'" *Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1119 (9th Cir. 2013) (quoting *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 425-26 (3d Cir. 2007)). While "an outright admission of fraud" is not required, "a mere 'risk' or 'potential' for fraud is insufficient to establish loss causation." *Loos v. Immersion Corp.*, 762 F.3d 880, 888-89 (9th Cir. 2014) (quoting *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 (9th Cir. 2008) (holding that revelation of investigation, on its own, amounts only to notice of potential disclosure of fraudulent conduct and thus does not satisfy causation element of § 10(b) and Rule 10b-5 claims). However, "[d]isclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss." *Nuveen*, 730 F.3d at 1120. Accordingly, "a plaintiff can satisfy loss causation by showing that 'the defendant misrepresented or omitted the very facts that were a substantial factor in causing the plaintiff's economic loss." *Id.* (quoting *McCabe*, 494 F.3d at 425). For example, in *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 949 (9th Cir. 005), the Ninth Circuit held that loss causation was sufficiently alleged when the plaintiff alleged that the very facts concealed by the defendants—facts concerning the company's dire financial situation—resulted in its going bankrupt, which caused the plaintiff to lose the entire value of its investment in the company. *See also id.* at 949 n.2 (concluding that *Dura* did not require plaintiff to allege corrective disclosure because plaintiff alleged "private sale of privately traded stock and . . . not only asserted that it purchased the security at issue at an artificially inflated price, but pled that the [d]efendants' misrepresentation was causally related to the loss it sustained"). *See also Wochos v. Tesla Motors, Inc.*, 985 F.3d 1180, 1198 (9th Cir. 2021) (upholding dismissal with prejudice when modest stock price drop quickly rebounded because "[t]o adequately plead loss causation . . . a plaintiff must allege that the 'share price fell significantly after the truth became known'" (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 392 (9th Cir. 2010))."To establish loss causation in a fraud-on-the-market case, the plaintiff must show that after purchasing her shares and before selling, the following occurred: (1) 'the truth became known,' and (2) the revelation caused the fraud-induced inflation in the stock's price to be reduced or eliminated." *In re BofI Holding, Inc. Sec. Litig*., 977 F.3d 781, 789 (9th Cir. 2020) (quoting *Dura Pharms., Inc*., 544 U.S. at 347). A plaintiff may prove that "the truth became known" by identifying one or more "corrective disclosures." *Id.* at 790. "A corrective disclosure occurs when 'information correcting the misstatement or omission that is the basis for the action is disseminated to the market.'" *Id.* (quoting 15 U.S.C. § 78u-4(e)(1)); *see also Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198 (9th Cir. 2020) (holding news article with information from FOIA request can be corrective disclosure, but Internet article with publicly available information from whistleblower was not corrective disclosure). The Ninth Circuit offered guidance on what constitutes a corrective disclosure in *In re BofI Holding, Inc. Sec. Litig*., 977 F.3d 781, 790 (9th Cir. 2020), explaining that "a corrective disclosure need not

consist of an admission of fraud by the defendant or a formal finding of fraud by a government agency"; rather, it may "come from any source, including knowledgeable third parties such as whistleblowers, analysts, or investigative reporters." *Id.* A corrective disclosure also "need not reveal the full scope of the defendant's fraud in one fell swoop; the true facts concealed by the defendant's misstatements may be revealed over time through a series of partial disclosures." *Id*. A corrective disclosure "need not precisely mirror the earlier misrepresentation," *id*. (internal quotation marks omitted), as it "is enough if the disclosure reveals new facts that, taken as true, render some aspect of the defendant's prior statements false or misleading." *Id.* Against this backdrop, the Ninth Circuit rejected the district court's conclusion that, "to adequately plead loss causation, the shareholders had to identify an additional disclosure that confirmed the truth of [the] allegations" in the corrective disclosure. *Id.* at 792. Rather, the court noted that "short of an admission by the defendant or a formal finding of fraud—neither of which is required—any corrective disclosure will necessarily take the form of contestable allegations of wrongdoing." *Id.* (citations omitted). Although the "plaintiff must, of course, prove that the defendant's misstatements were false, . . . that can be done through proof other than the corrective disclosure itself." *Id.*

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18.9 Securities—Damages

If you find for the plaintiff [*name*] on the 10b-5 claim, then you must consider and decide the amount of money damages, if any, to be awarded to the plaintiff [*name*]. You may award only actual damages in an amount that will reasonably and fairly compensate the plaintiff [*name*] for the economic loss [he] [she] [*other pronoun*] sustained. Your award must be based on evidence and not upon speculation, guesswork, or conjecture. The plaintiff [*name*] has the burden of proving damages by a preponderance of the evidence.

Comment

Section 10(b) claims for damages are governed by Section 28(a), which limits all claims brought under the Exchange Act to actual damages. *See* 15 U.S.C. § 78bb(a) (providing that no person maintaining a suit for damages under the Exchange Act may recover "a total amount in excess of his actual damages"); *see also Randall v. Loftsgaarden*, 478 U.S. 647, 661-62 (1986).

"The usual measure of damages for securities fraud claims under Rule 10b-5 is out-of-pocket loss; that is, the difference between the value of what the plaintiff gave up and the value of what the plaintiff received. Consequential damages may also be awarded if proved with sufficient certainty. . . . The district court may apply a rescissory measure of damages in appropriate circumstances." *Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1030 (9th Cir. 1999) (citing *DCD Programs v. Leighton*, 90 F.3d 1442, 1449 (9th Cir. 1996)). The Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 336 (2005), highlights the difficulty in framing an instruction premised on a theory that the price on the date of purchase was inflated because of a misrepresentation. *See* Comment to Instruction 18.8 (Securities—Causation). Comparable difficulties could arise when there are several different transaction dates or multiple plaintiffs, or when the lawsuit is brought as a class action. In such cases, computations based on average prices during the applicable trading period might prove necessary.

Because of the above-described complications, expert testimony is often used when calculating damages in 10b-5 actions. *See In re Imperial Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014-15 (C.D. Cal. 2003); *In re Oracle Sec. Litig.,* 829 F. Supp. 1176, 1181 (N.D. Cal. 1993).

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18.10 Securities—Controlling Person Liability

Under the Securities Exchange Act of 1934, a defendant may be liable if during the period that someone else defrauded the plaintiff, the defendant had the authority to control that person or company.

The plaintiff [*name*] claims that the defendant [*name*] is a controlling person and is therefore liable under the securities laws. On this claim, the plaintiff [*name*] has the burden of proving by a preponderance of the evidence that the defendant [*identify the alleged controlling person*] possessed, directly or indirectly, the actual power to direct or cause the direction of the management and policies of [*identify the alleged controlled person*].

Comment

See Instruction 18.1 (Securities—Purpose and Definitions) for the definition of "controlling person."

Section 20(a) of the Securities Exchange Act of 1934 provides that "controlling persons" can be vicariously liable for 10b-5 violations. *See* 15 U.S.C. § 78t(a) (discussing liability of controlling persons); 17 C.F.R. § 230.405 (defining "control"); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990) (en banc) (holding that broker-dealer is "controlling person" within meaning of 1934 Act and could be liable for its stockbroker-employee's conduct, even if broker-dealer and stockbroker contractually agreed that stockbroker would be independent contractor). *See also No. 84 Empl'r-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp*., 320 F.3d 920, 945 (9th Cir. 2003) (discussing traditional indicia of "control").

See Instruction 18.11 (Securities—Good Faith Defense to Controlling Person Liability).

It may be necessary to supplement this instruction with instructions regarding respondent superior liability. *See* Instructions 4.4 (Agent and Principal—Definition); 4.5 (Agent—Scope of Authority Defined); 4.8 (Act of Agent Is Act of Principal—Scope of Authority Not in Issue); 4.9 (Both Principal and Agent Sued—No Issue as to Agency or Authority); 4.10 (Principal Sued but Not Agent—No Issue as to Agency or Authority); 4.11 (Both Principal and Agent Sued—Agency or Authority Denied); and 4.12 (Principal Sued, but Not Agent—Agency or Authority Denied).

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18.11 Securities—Good Faith Defense to Controlling Person Liability

The defendant [*name*] contends that [he] [she] [*other pronoun*] is not liable to the plaintiff [*name*] even if [he] [she] [*other pronoun*] [it] was a controlling person because [he] [she] [*other pronoun*] did not induce the violation that led to the plaintiff [*name*]'s economic injury and [he] [she] [*other pronoun*] acted in good faith. The defendant [*name*] has the burden of proving each of the following two elements by a preponderance of the evidence:

First, the defendant [*name*] did not directly or indirectly induce the violation; and

Second, the defendant [*name*] acted in good faith.

The defendant [*name*] can prove good faith only by establishing that [he] [she] [*other pronoun*] maintained and enforced a reasonable and proper system of supervision and internal control.

If you find that the defendant [*name*] has proved each of these two elements, your verdict should be for the defendant [*name*]. If you find that the defendant [*name*] has failed to prove either of these elements (or both), your verdict should be for the plaintiff [*name*].

Comment

See 15 U.S.C. § 78t(a) (Section 20(a) of the 1934 Act (Liability of Controlling Persons)); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1575-76 (9th Cir. 1990) (en banc) (holding that defendant has burden of establishing good faith).

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