MANUAL OF
MODEL CIVIL JURY INSTRUCTIONS

FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT

Prepared by the
Ninth Circuit
Jury Instructions Committee

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CIVIL INSTRUCTIONS

1. INSTRUCTIONS ON THE TRIAL PROCESS

Instruction

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1.18 Outline of Trial

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: Instructions on the Trial Process (Chapter 1), Instructions on Types of Evidence (Chapter 2), and Instructions Concerning Deliberations (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.

1.0 COVER SHEET

IN THE UNITED STATES DISTRICT COURT
_____ DISTRICT OF _____

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

JURY INSTRUCTIONS

DATED: _____

_____
UNITED STATES [DISTRICT] [MAGISTRATE] JUDGE

1.1A DUTY OF JURY (COURT READS AND PROVIDES WRITTEN 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

Instruction 1.1A 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 1.1C.

1.1B 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

Instruction 1.1B 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.

1.1C 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

Instruction 1.1C 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.

1.2 CLAIMS AND DEFENSES

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

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

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

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

1.3 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.

1.4 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*).

1.5 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.

1.6 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.

1.7 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 1.8 (Evidence for Limited Purpose).

1.8 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. McLennan*, 563 F.2d 943, 947–48 (9th Cir.1977).

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

See also Instructions 1.7 (What is Not Evidence) and 2.9 (Impeachment Evidence—Witness).

1.9 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.

1.10 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.

1.11 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.

1.12 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 or electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, 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 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.

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 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).

State court practice in some jurisdictions does allow discussion.

If the court decides to allow discussion, the third sentence of the fourth paragraph of the instruction should be modified accordingly, and the following language may be included:

You may discuss with fellow jurors the testimony as it is presented, provided that all jurors are present for the discussion. You are to keep an open mind throughout the case until you have fully deliberated.

1.13 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).

1.14 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.

1.15 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).

1.16 QUESTIONS TO WITNESSES BY JURORS

Comment

Whether to allow jurors to ask questions is a subject debated among judges. There are risks involved in allowing jurors to ask questions of witnesses. *See DeBenedetto v. Goodyear Tire & Rubber Co.*, 754 F.2d 512, 517 (4th Cir.1985) (discussing risks of juror questioning). If a judge decides to allow questions, the following instruction and procedures may be helpful.

INSTRUCTION

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning of each witness. You may propose questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you propose any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question with the attorneys to determine if it is legally proper.

There are some proposed questions that I will not permit, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because the question is expected to be answered later in the case. If I do not ask a proposed question, or if I rephrase it, do not speculate as to the reasons. Do not give undue weight to questions you or other jurors propose. You should evaluate the answers to those questions in the same manner you evaluate all of the other evidence.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

PROCEDURES

In the event the judge allows jurors to submit questions for witnesses, the judge may consider may consider taking the following precautions and using the following procedures:

1. The preliminary instructions should describe the court's policy on juror-submitted questions, including an explanation of why some questions may not be asked. All juror-submitted questions should be retained by the

clerk as part of the court record whether or not the questions are asked.

2. At the conclusion of each witness's testimony, if a juror has a written question it is brought to the judge.

3 Outside the presence of the jury, counsel are given the opportunity to make objections to the question or to suggest modifications to the question, by passing the written question between counsel and the court during a side-bar conference or by excusing jurors to the jury room.

4. Counsel or the judge asks the question of the witness.

5. Counsel are permitted to ask appropriate follow-up questions.

6. The written questions are made part of the record.

1.17 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.

1.18 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.

2. INSTRUCTIONS ON TYPES OF EVIDENCE

Instruction

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
2.14 Charts and Summaries Not Received in Evidence
2.15 Charts and Summaries in Evidence
2.16 Evidence in Electronic Format

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'"); NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTION 2.5 (2010) (Judicial Notice).

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 the 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 the 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 the 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 the 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 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).

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).

2.8 FOREIGN LANGUAGE TESTIMONY

You [are about to hear] [have heard] testimony of a witness who [will be testifying] [testified] in the [*specify the 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 the 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 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) (finding 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 1.7 (What Is Not Evidence) with the concluding instructions. *See also* Instruction 1.8 (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 the use of 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 of a Party).

2.13 EXPERT OPINION

You [have heard] [are about to hear] testimony from [*name*] who [testified] [will testify] to opinions and the reasons for [his] [her] opinions. This opinion testimony is allowed, because of the education or experience 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 education and experience, 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, "[t]he purpose of expert testimony is to 'assist the trier of fact to understand the evidence or to determine a fact in issue' by providing opinions on 'scientific, technical, or other specialized knowledge.' " *Wagner v. County of Maricopa*, 701 F.3d 583, 589 (9th Cir.2012) (quoting Fed. R. Evid. 702). 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* Fed. R. Evid. 702 advisory committee's note (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.

2.14 CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not admitted into evidence [may be] [have been] shown to you in order 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 non juror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any non juror 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 non juror 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 Readbacks or Playbacks
3.5 Return of Verdict
3.6 Additional Instructions of Law
3.7 Deadlocked Jury
3.8 Continuing Deliberations After Juror Is Discharged

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 or electronic means, via email, via text messaging, or any Internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, 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) (finding 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).

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 in order 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.

In order to establish apparent agency, the [plaintiff] [defendant] must prove that:

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

2. The [plaintiff] [defendant] relied on this representation or action to [his] [her] [its] detriment; and

3. 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.

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."); *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).

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 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] 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] 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] 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] 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 ____ claim], you must determine the plaintiff's damages. The plaintiff 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 for any injury you find was caused by the defendant. 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,] [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), 11.7A (Age Discrimination—Damages—Back Pay—Mitigation), and 11.7B (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:

1. that the plaintiff failed to use reasonable efforts to mitigate damages; and

2. 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 11.7A (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, 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 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's conduct that harmed the plaintiff 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. 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's conduct [, including whether the conduct that harmed the plaintiff 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 in order to punish the defendant for harm to anyone other than the plaintiff in this case].

[In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.]

[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 damages are not available in every case. For example, punitive damages are not available against municipalities, counties or other governmental entities unless expressly authorized by statute. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-71 (1981). Punitive damages may, however, be available against governmental employees acting in their individual capacities. *See Monell v. New York City Dept. of Soc. Services,* 436 U.S. 658 (1978); *City of Newport,* 453 U.S. at 254. 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, 514-15 (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 claims 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).

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. On the other hand, a 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 defendant's financial condition is offered in support of such damages, a limiting instruction may be appropriate. *See* Instruction 1.8 (Evidence for Limited Purpose) and numbered paragraph (3) in Instruction 1.7 (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."). *See also 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.* at 974. 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).

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

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

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 _____ claim,] the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the defendant was negligent; and

2. the defendant's negligence was a cause of an injury to the plaintiff.

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

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

1. the plaintiff was negligent; and

2. the plaintiff's negligence was a cause of the plaintiff's own injury.

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

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).

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 FELA case, railroad employee need only establish that railroad's negligence played part, no matter how small, in bringing about injury in order to satisfy causation element).

6.5 FELA—PLAINTIFF'S COMPLIANCE WITH DEFENDANT'S REQUEST OR DIRECTIONS

The plaintiff is not 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.

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 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 was negligent and that the plaintiff's negligence was a cause of [his] [her] injury you must then decide to what extent [his] [her] injury was caused by the plaintiff's negligence. This should be fixed as a percentage—for example, 10%, 50%, 90%. The percentage of the plaintiff'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. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff.

Comment

Under FELA, the same standard of causation applies to a plaintiff's comparative negligence as to defendant's negligence. *Norfolk Southern 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. 1A 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
7.1 Seaman Status
7.2 Jones Act Negligence Claim—Elements and Burden of Proof
7.3 Jones Act Negligence Claim—Negligence Defined
7.4 Jones Act Negligence Claim—Causation Defined
7.5 Unseaworthiness Claim—Elements and Burden of Proof
7.6 Unseaworthiness Defined
7.7 Unseaworthiness—Causation Defined
7.8 Jones Act Negligence or Unseaworthiness—Damages—Proof (Comment only)
7.9 Jones Act Negligence or Unseaworthiness—Plaintiff's Negligence—Reduction of Damages
7.10 Jones Act Negligence or Unseaworthiness—Plaintiff's Compliance With Defendant's Request or Directions
7.11 Maintenance and Cure—Elements and Burden of Proof
7.12 Maintenance and Cure—Willful and Arbitrary Failure to Pay

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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" in order 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 seeks recovery against the defendant under the Jones Act for negligence. [[He] [She] 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 was employed as a seaman.

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

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

2. the plaintiff 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'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] to the special hazards and disadvantages that are characteristic of a seaman's work.

Comment

In order 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.

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 has the burden of proving the following elements by a preponderance of the evidence:

1. the plaintiff was a seaman;

2. the defendant was negligent; and

3. the defendant's negligence was a cause of the injury or damage to the plaintiff.

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

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").

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

See Ribitzki v. Canmar Reading & Bates, Ltd. P'ship, 111 F.3d 658, 662 (9th Cir.1997) (holding that "even the slightest negligence" is sufficient to support a Jones Act finding of negligence) (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.

7.5 UNSEAWORTHINESS CLAIM—ELEMENTS AND BURDEN OF PROOF

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

1. the plaintiff was a seaman;

2. the [*name of vessel*] was unseaworthy; and

3. the unseaworthy condition was a cause of an injury or damage to the plaintiff.

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

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. *Id.* at 550; *Ribitzki v. Canmar Reading & Bates, Ltd. P'ship*, 111 F.3d 658, 664 (9th Cir.1997).

See also Comment to Instruction 7.6 (Unseaworthiness Defined).

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. Pacific Far E. Line*, 566 F.2d 65, 67 (9th Cir.1977). *But see Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (noting that vessel owner has no obligation to furnish accident-free ship).

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).

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 unseaworthiness claim by showing condition was "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).

7.9 JONES ACT NEGLIGENCE OR UNSEAWORTHINESS—PLAINTIFF'S NEGLIGENCE—REDUCTION OF DAMAGES

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

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

If you decide that the plaintiff was negligent and that the plaintiff's negligence was a cause of the plaintiff's injury, you must then decide to what extent the injury was caused by the plaintiff's negligence. This should be fixed as a percentage—for example, 10%, 50%, 90%. The percentage of the plaintiff'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. I will reduce the damages that you award by the percentage of negligence that you assign to the plaintiff.

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 (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, 408-09 (1953) ("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* Instruction 7.4, the"featherweight" causation instruction for a Jones Act negligence claim (Jones Act Negligence Claim—Causation Defined) and Instruction 7.7, the "substantial factor" causation instruction for an unseaworthiness claim (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 v. Royal King Fisheries, Inc.*, 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).

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

1. the plaintiff was a seaman;

2. the plaintiff was injured or became ill while in the service of the vessel; and

3. the amount of maintenance and cure to which the plaintiff was entitled.

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

Maintenance is the reasonable cost of food, lodging and transportation to and from a medical facility. The plaintiff 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, but shall not award an amount in excess of that of a seaman living alone in the plaintiff'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's failure to provide [maintenance] [[and] [or]] [cure] worsens the plaintiff's injury, the plaintiff 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 is in the service of the vessel. Neither maintenance nor cure may be reduced because of any negligence on the part of the plaintiff. [A plaintiff may not recover for maintenance [and] [or] cure when the illness or injury results from the plaintiff's own willful misbehavior.]

The plaintiff 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 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's medical condition may be reasonably expected.

There can be no double recovery for the plaintiff. If you find that the plaintiff 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. LLC, 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., Inc. v. Townsend*, 557 U.S. 404, 424 (2009).

7.12 MAINTENANCE AND CURE—WILLFUL AND ARBITRARY FAILURE TO PAY

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

1. the plaintiff was entitled to [maintenance] [and] [cure];

2. the defendant willfully and arbitrarily failed to provide [maintenance] [and] [cure]; and

3. the defendant's failure to provide [maintenance] [and] [cure] resulted in injury to the plaintiff.

If you find the plaintiff has proved each of the elements on which [he] [she] 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.)

8. TAX REFUND ACTIONS

Comment

The Ninth Circuit's model instructions on tax refund actions have been withdrawn.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 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 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
9.12 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
9.18 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 (Deadly and Nondeadly) Force
9.26 Particular Rights—Eighth Amendment—Convicted Prisoner's Claim of Excessive Force
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 (Comment only)
9.30 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim re Conditions of Confinement/Medical Care (Comment only)
9.31 Particular Rights—Fourteenth Amendment—Pretrial Detainee's Claim of Failure to Protect
9.32 Particular Rights—Fourteenth Amendment—Substantive Due Process—Interference with Parent/Child Relationship (Comment only)
9.33 Particular Rights—Fourteenth Amendment—Due Process—Deliberate Fabrication of Evidence
9.34 Qualified Immunity (Comment only)

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 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. "Where 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.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). When necessary, these instructions include right-specific mental states because § 1983 itself "contains no independent state-of-mind requirement" apart from what is necessary to state a violation of the underlying

right. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Particular Rights Instructions			
Type of Claim by Source	Elements		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
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 (Deadly and Nondeadly) Force		9.25
Eighth Amendment	Convicted Prisoner's Claim of Excessive Force		9.26
	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
	Deliberate Fabrication of Evidence	9.33

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 local governing body (*see Waggy v. Spokane Cnty., Wash.*, 594 F.3d 707, 713 (9th Cir.2010)).

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 v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 691 (1978). *But see* Instruction 9.7 (addressing ratification and causation). "[A] municipality cannot be held liable under §1983 on a respondeat superior theory." *Monell*, 436 U.S. at 691. "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, 479-80 (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), 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).

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 five-factor test to determine whether a government entity is a state agency for Eleventh Amendment purposes: (1) whether a money judgment would be satisfied out of state funds; (2) whether the entity performs central governmental functions; (3) whether the entity may sue or be sued in its own name; (4) whether the entity has the authority to

hold property in its own name; and (5) whether the entity has the corporate status of a state agency. *Beentjes v. Placer Cnty. Air Pollution Control Dist.*, 397 F.3d 775, 778 (9th Cir.2005) (citations omitted). The first prong of the test—whether a money judgment would be satisfied out of state funds—is the predominant factor. *Id*.

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. 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 order to be individually liable under § 1983, individual must personally participate in alleged rights deprivation).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.1 SECTION 1983 CLAIM—INTRODUCTORY INSTRUCTION

The plaintiff brings [his] [her] 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

The Committee notes that 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 *Azer v. Connell,* 306 F.3d 930, 935 (9th Cir.2002) (using phrase "under color of law"), *with Nelson v. Campbell*, 541 U.S. 637, 643 (2004), and *Meyers v. Redwood City*, 400 F.3d 765, 770 (9th Cir.2005) (using phrase "under color of state law").

Because recent Ninth Circuit case authority more frequently uses the phrase "under color of state law," rather than "under color of law," the Committee uses the phrase "under color of state law." *See Planned Parenthood Ariz., Inc. v. Betlach*, 727 F.3d 960, 966 (9th Cir.2013) ("Section 1983 creates a federal remedy against anyone who, under color of state law, deprives 'any citizen of the United States … of any rights, privileges, or immunities secured by the Constitution and laws."); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1061 (9th Cir.2013) (using phrase "color of state law"); *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir.2012) (same); *Hall v. City of L.A.*, 697 F.3d 1059, 1068 (9th Cir.2012) (same).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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." *Harper v. City of L.A.*, 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*. This standard of causation "closely resembles the standard 'foreseeability' formulation of proximate cause." *Arnold v. Int'l Bus. Mach. Corp.*, 637 F.2d 1350, 1355 (9th Cir.1981); *see also Stevenson v. Koskey*, 877 F.2d 1435, 1438 (9th Cir.1989) (noting that federal courts turn to common law of torts for causation in civil rights cases).

"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). For example, when deprivation of a protected interest is substantively justified but the procedures were deficient, a plaintiff must show injury from the denial of procedural due process itself and cannot recover damages from the justified deprivation. *Carey v. Piphus*, 435 U.S. 247, 260-64 (1978); *Watson v. City of San Jose*, 800 F.3d 1135, 1141-42 (9th Cir.2015) (expanding types of constitutional tort actions subject to *Carey's* causation analysis and quoting trial court's damages instruction).

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." *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1183 (9th Cir.2007) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978)).

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); *see also Lacey v. Maricopa Cnty.*, 693 F.3d 896, 915-16 (9th Cir.2012) (discussing culpability and intent of supervisors). Supervisors may also be held liable under § 1983 as follows: (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Starr*, 652 F.3d at 1207-08; *see also OSU Student Alliance 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. *Monell v. Dep't. of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *see Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

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 9.10 (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 an affirmative causal link between the municipal policy or practice and the alleged constitutional violation. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 385, 391-92 (1989); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir.1996). 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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.3 SECTION 1983 CLAIM AGAINST DEFENDANT IN INDIVIDUAL CAPACITY—ELEMENTS AND BURDEN OF PROOF

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

1. the defendant acted under color of state law; and

2. the [act[s]] [failure to act] of the defendant deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions.

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 acted under color of state law.]

If you find the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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. If, on the other hand, you find that the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant.

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.

The elements of a § 1983 claim are (1) the action occurred "under color of state law" and (2) the action resulted in the deprivation of a constitutional right or federal statutory right. *Long v. Cnty. of L.A.*, 442 F.3d 1178, 1185 (9th Cir.2006) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)). In order 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." *Harper v. City of L.A.*, 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.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.4 SECTION 1983 CLAIM AGAINST SUPERVISORY DEFENDANT IN INDIVIDUAL CAPACITY—ELEMENTS AND BURDEN OF PROOF

In order to prevail on [his] [her] § 1983 claim against the supervisory defendant, [*name*], the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the supervisory defendant acted under color of state law;

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

3. [the supervisory defendant directed [his] [her] subordinate[s] in the [act[s]] [failure to act] that deprived the plaintiff of these rights;]

or

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

or

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

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

or

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

(b) that deficiency or omission actually caused [his] [her] subordinates to deprive the plaintiff of [his] [her] 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

4. The supervisory defendant's conduct was so closely related to the deprivation of the plaintiff'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 acted under color of state law.]

If you find the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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. If, on the other hand, you find that the plaintiff has failed to prove any one or more of these elements, your verdict should be for the defendant.

Comment

A supervisor can be held liable in his or her individual capacity under § 1983 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). 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.

A supervisor is liable for the acts of his subordinates if the supervisor directed the violations. *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1182 (9th Cir.2007).

In *Larez v. City of Los Angeles*, 946 F.2d 630 (9th Cir.1991), the court 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. Cty. of San Diego*, 708 F.3d 1075, 1086 (9th Cir.2013).

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 depravation 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)).

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 v. Baca*, 652 F.3d 1202, 1207 (9th Cir.2011).

Finally, a plaintiff may state a claim based on conduct by the supervisor "that showed a reckless or callous indifference to the rights of others." *Larez*, 946 F.2d at 646 (quoting *Bordanaro v. McLeod*, 871 F.2d 1151, 1163 (1st Cir.1989)).

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 in order 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) (finding that plaintiff needed to plead and prove that supervisors acted with discriminatory purpose or intent in order 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 in order to hold supervisor liable for his or her own culpable actions).

A plaintiff seeking to establish liability of a supervisory defendant must also demonstrate that the supervisor's conduct was so closely related to the deprivation of the plaintiff's rights as to be the moving force that caused the ultimate injury. *See Oviatt v. Pearce*, 954 F.2d 1470, 1481 (9th Cir.1992). "To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation." *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, at 1096 (9th Cir.2013).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.5 SECTION 1983 CLAIM AGAINST LOCAL GOVERNING BODY DEFENDANTS BASED ON OFFICIAL POLICY, PRACTICE, OR CUSTOM—ELEMENTS AND BURDEN OF PROOF

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

1. [*Name of defendant's official or employee*] acted under color of state law;

2. the [act[s]][failure to act] of *[name of defendant's official or employee*] deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions; and

3. [*Name of defendant's official or employee*] [acted][failed to act] pursuant to an expressly adopted official policy or a longstanding practice or custom of the *defendant [name of local governing body*].

4. The defendant [*name of local governing body*]'s official policy or longstanding practice or custom caused the deprivation of the plaintiff's rights by the [*name of defendant's official or employee]*; that is, the [*name of local governing body]*'s official policy or longstanding practice or custom is so closely related to the deprivation of the plaintiff'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 rule or regulation promulgated, adopted, or ratified by the defendant [*name of local governing body*].

"Longstanding practice or custom" means any permanent, widespread, well-settled practice or custom that constitutes a standard operating procedure of the defendant [*name of local governing body*]. [A longstanding 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 has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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.

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

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 longstanding practice or custom of the defendant. 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 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 New York*, 436 U.S. 658, 691 (1978).

In addition, § 1983 liability of a local governing body may attach when an employee committed a constitutional violation pursuant to a "longstanding practice or custom." *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir.2003). The plaintiff must prove the existence of such a longstanding practice or policy as a matter 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."). To be longstanding, a "custom or practice" must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." *Id.* at 918 (quoting *Monell*, 436 U.S. at 691). The Ninth Circuit has also held that "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. Cnty. of Sacramento*, 652 F.3d 1225, 1236 (9th Cir.2011). However, because the Ninth Circuit noted the language in the instruction submitted by plaintiffs was case-specific, *see id.* at 1235, 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 id*.

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*, 728 F.3d at 1096 (emphasis in original). "To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation." *Id.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.6 SECTION 1983 CLAIM AGAINST LOCAL GOVERNING BODY DEFENDANTS BASED ON ACT OF FINAL POLICYMAKER—ELEMENTS AND BURDEN OF PROOF

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

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

2. the [act[s]] [failure to act] of [*name of final policymaker*]] deprived the plaintiff of [his] [her] particular rights under [the laws of the United States] [the United States Constitution] as explained in later instructions;

3. [*mame of final policymaker*] had final policymaking authority from defendant [*name of local governing body*] concerning these [act[s]] [failure to act]

4. when [*name of final policymaker*] [engaged in these act[s]] [failed to act], [he] [she] was acting as a final policymaker for defendant [*name of local governing body*].

5. the [act[s] [failure to act] of [*name of final policymaker*]] caused the deprivation of the plaintiff's rights; that is, the *[name of final policymaker*]'s [act] or [failure to act] is so closely related to the deprivation of the plaintiff'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'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 the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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. 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.

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. 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—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 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 only 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). Such liability may attach when the official or employee who caused a constitutional violation was acting as a "final policymaker." *Lytle v. Carl*, 382 F.3d 978, 981 (9th Cir.2004). "To hold a local governing body liable for an official's conduct, the 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) (citations omitted).

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); *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. *Fogel v. Collins*, 531 F.3d 824, 834 (9th Cir.2008).

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) (emphasis in original). "To meet this requirement, the plaintiff must show both causation-in-fact and proximate causation." *Id.*

A municipality can be liable if an official policy or custom caused a constitutional violation, even if the constitutional violation occurs only once. *Fogel*, 531 F.3d at 834. In such a case, proof of the incident must include proof that it was caused by an existing, unconstitutional municipal policy that can be attributed to a municipal policy maker. *Oklahoma City v. Tuttle*, 471 U.S. 808, 82324 (1985). A municipality is also liable if a policymaking official delegates his

or her discretionary authority to a subordinate, and the subordinate uses that discretion. *Fogel*, 531 F.3d at 835.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.7 SECTION 1983 CLAIM AGAINST LOCAL GOVERNING BODY DEFENDANTS BASED ON RATIFICATION—ELEMENTS AND BURDEN OF PROOF

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

1. [*name of defendant's employee*] acted under color of state law;

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

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

4. [*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

5. [*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 has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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. 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.

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 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 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). The concept of ratification often causes confusion in light of the causation requirement; because ratification occurs after an allegedly wrongful act, it cannot have caused that underlying act. Nevertheless, in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), a plurality of the Supreme Court recognized the relevance of ratification to what may be chargeable to a municipality in the §1983 context:

> When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality. Similarly, when a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.

Understanding ratification liability is complicated by the frequent reference to ratification in discussions that actually concern the use of a policymaker's after-the-fact conduct as evidence of a pre-existing custom or policy. While such evidentiary use of after-the-fact conduct may be useful in establishing municipal liability based on a custom or policy, that use does not suffice to show ratification. Establishing ratification requires proof of the affirmance of a prior act.

For a discussion of how courts sometimes merge evidentiary use with true ratification, *see* George M. Weaver, *Ratification as an Exception to the § 1983 Causation Requirement: Plaintiff's Opportunity or Illusion?*, 89 Neb. L. Rev. 357 (2010). By way of example, Weaver points to *Larez v. City of L.A.*, 949 F.2d 630, 645 (9th Cir. 1991) (noting that, because statements by police chief made after subordinates were accused of using excessive force might "shed light on the operation, custom, or policy of his department, or on his ratification or condonation of the injurious acts," those statements, "if admitted upon retrial, may, of course, be used as evidence on the issue of his liability and that of the City").

The Ninth Circuit states that ratification liability may attach when a final policymaker ratifies a subordinate's unconstitutional action and the basis for it. *Christie v. Iopa,* 176 F.3d 1231, 1239 (9th Cir.1999) (citing *Praprotnik*, 485 U.S. at 127). This occurs when the official

policymaker involved has adopted and expressly approved of the acts of others who caused the constitutional violation. *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir.1996). There must be evidence that the policymaker "made a deliberate choice to endorse" the subordinate employee's actions. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir.1992).

Ratification generally requires more than acquiescence. *Sheehan v. City & Cnty. of S.F.*, 741 F.3d 1211, 1231 (9th Cir.2014), *rev'd on other grounds*, 135 S. Ct. 1765 (2015). A mere failure to overrule a subordinate's actions, without more, is insufficient to support a § 1983 ratification claim. *Christie*, 176 F.3d at 1239. *See also Clouthier v. Cnty. of Contra Costa,* 591 F.3d 1232, 1253-54 (9th Cir.2010) (holding that failure to discipline employees, without more, was insufficient to establish ratification) (overruled on other grounds in *Castro v. Cnty. of L.A.*, ___ F.3d ___, 2016 WL 4268955, at *6 (9th Cir. Aug. 15, 2016) (en banc) ("We therefore overrule *Clouthier* to the extent that it identified a single deliberate indifference standard for all § 1983 claims and to the extent that it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pretrial detainee's failure-to-protect claim.")); *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1055 (9th Cir.2009) ("A single decision by a municipal policymaker 'may be sufficient to trigger Section 1983 liability under *Monell*, even though the decision is not intended to govern future situations,' but the plaintiff must show that the triggering decision was the product of a 'conscious, affirmative choice' to ratify the conduct in question."); *Lytle v. Carl*, 382 F.3d 978, 987–88 (9th Cir.2004) ("[R]atification requires both knowledge of the alleged constitutional violation, and proof that the policymaker specifically approved of the subordinate's act.").

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].").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.8 SECTION 1983 CLAIM AGAINST LOCAL GOVERNING BODY DEFENDANTS BASED ON POLICY OF FAILURE TO TRAIN—ELEMENTS AND BURDEN OF PROOF

In order to prevail on [his] [her] § 1983 claim against defendant [*name of local governing body*] alleging liability based on a policy of failure to train its [police officers] [employees], the plaintiff must prove each of the following elements by a preponderance of the evidence:

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

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

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

4. the defendant [*name of local governing body*] was deliberately indifferent to the obvious consequences of its failure to train its [police officers] [employees] adequately; and

5. the failure of the defendant [*name of local governing body*] to provide adequate training caused the deprivation of the plaintiff's rights by the [*name of defendant's* [*police officer[s]*] [*employee[s]*]]; that is, the defendant's failure to train is so closely related to the deprivation of the plaintiff'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's [official] [employee] acted under color of state law.]

"Deliberate indifference" is the conscious choice to disregard the consequences of one's acts or omissions. The plaintiff may prove deliberate indifference in this case by showing that the defendant [*name of local governing body*] knew its failure to train adequately made it highly predictable that its [police officer[s]] [employee[s]] would engage in conduct that would deprive persons such as the plaintiff of [his] [her] rights.

If you find that the plaintiff has proved each of these elements, and if you find that the plaintiff has proved all the elements [he] [she] 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. 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.

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. For other bases of *Monell* liability, *see* Instructions 9.5 (Elements and Burden of Proof Against Local Governing Body Defendants—§ 1983 Claim Against Local Governing Body Based on Official Policy, Practice, or Custom), 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).

As noted in the Introductory Comment to this chapter, § 1983 liability of a local governing body lies only 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).

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). "[A] municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference' to the rights of the persons with whom the untrained employees come into contact." *Id.* (citations omitted). The policy of inaction must be a conscious or deliberate choice among various alternatives. *Berry v. Baca*, 379 F.3d 764, 767 (9th Cir.2004). "[P]olicies of omission regarding the supervision of employees … can be 'policies' or 'customs' that create municipal liability … only if the omission 'reflects a deliberate or conscious choice' to countenance the possibility of a constitutional violation." *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1145 (9th Cir.2012) (quoting *City of Canton, Ohio v. Harris*, 498 U.S. 378, 38990 (1989)).

> In order to impose liability based on a policy of deliberate inaction, the "plaintiff must establish: (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and (4) that the policy [was] the 'moving force behind the constitutional violation." *Oviatt*, 954 F.2d at 1474 (quoting *City of Canton*, 489 U.S. at 389–91).

Berry, 379 F.3d at 767.

"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 cause city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers chose to retain that program.").

> [A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice--namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation--that the municipality's indifference led directly to the very consequence that was so predictable. (citations omitted).

Johnson v. Hawe, 388 F.3d 676, 686 (9th Cir.2004). *See also Flores v. City of L.A.*,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. Cnty. of San Diego*, 680 F.3d 1148, 1159 (9th Cir.2012) (holding that proof of single inadequately-trained employee was insufficient; there must be "widespread" practice); *Doughtery v. City of Covina*, 654 F.3d 892, 899 (9th Cir.2011) ("Mere negligence in training or supervision … does not give rise to a *Monell* claim."); *Ting v. United States,* 927 F.2d 1504, 1512 (9th Cir.1991) (holding that plaintiff's showing that better or more training could have averted harm insufficient to show deliberate indifference); *Merritt v. Cnty. of L.A.*, 875 F.2d 765, 76970 (9th Cir.1989) (holding that single incident of errant behavior was insufficient to establish policy of inadequate training); *Redman v. Cnty. of San Diego*, 942 F.2d 1435, 1442 (9th Cir.1991), *abrogated in part on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that deliberate indifference does not require express intent to harm).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.9 PARTICULAR RIGHTS—FIRST AMENDMENT—PUBLIC EMPLOYEES—SPEECH

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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 speech was on a matter of public concern. In order to prove the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff spoke as a private citizen and not as part of [his] [her] official duties as a public employee;

2. the defendant took an adverse employment action against the plaintiff; and

3. the plaintiff'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.

Comment

Use this instruction only in conjunction with the applicable elements instruction, Instructions 9.3–9.8, and when the plaintiff is a public employee. Use Instruction 9.10 (Particular Rights—First Amendment—"Citizen" Plaintiff) when the plaintiff is a private citizen. 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 in order 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.

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,*

Pa. v. Guarnieri, 564 U.S. 379, 383-86 (2011) (applying *Garcetti* public concern test to public employee's First Amendment Petition Clause Claims).

In *Gibson v. Office of Attorney General, State of California*, 561 F.3d 920, 925 (9th Cir.2009), the Ninth Circuit reiterated the "sequential five-step series of questions" to consider when evaluating a public employee's First Amendment retaliation claim:

> (1) [W]hether 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)).

Because this instruction only addresses the first three elements summarized in *Eng* and *Gibson*, the instruction should be modified if there are jury issues involving the fourth or fifth factors stated above.

The "public concern inquiry is purely a question of law," *Gibson*, 561 F.3d at 925 (citing *Eng*, 552 F.3d at 1070), that depends on the "content, form, and context of a given statement, as revealed by the whole record." *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 976-77 (9th Cir.2002).

In *Garcetti*, a prosecutor brought a § 1983 action against his superiors and public employer, alleging that he was retaliated against because of a memorandum he wrote that challenged the veracity of a deputy sheriff's affidavit used to procure a search warrant. The Supreme Court held the prosecutor could not establish a First Amendment violation because he prepared the memorandum as part of his official duties and not as a private citizen: "We hold 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 (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.'" *Id.* at 406. 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*. The *Demers* 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.

Whether the plaintiff spoke as a public employee or a private citizen is a mixed question of fact and law. *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1129 (9th Cir.2008). In particular, "the scope and content of a plaintiff's job responsibilities is a question of fact." *Id.* at 1130; *accord Coomes v. Edmonds Sch. Dist. No. 15*, 816 F.3d 1255, 1260 (9th Cir.2016). In *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir.2013) (en banc), the Ninth Circuit overruled *Huppert v. City of Pittsburg*, 574 F.3d 696 (9th Cir.2009), and found that the district court had improperly relied on a generic job description and failed to conduct the practical, fact-specific inquiry required by *Garcetti*, 547 U.S. at 424. *Dahlia*, 735 F.3d at 1063. The Ninth Circuit also set forth guiding principles for performing the *Garcetti* inquiry in analogous cases. *Id.* at 1073-76; *see*, *e.g.*, *Hagen v. City of Eugene*, 736 F.3d 1251, 1258-60 (9th Cir.2013) (holding that public employee reporting departmental safety concerns pursuant to duty to so report did not speak as private citizen). "Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment." *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *see also Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1104 (9th Cir.2014).

The definition of "adverse employment action" in this instruction is substantially the same as that in Instruction 10.4A.1 (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*. And "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 Cnty*., 556 F.3d 797, 799 (9th Cir.2009). 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); *Sloman v. Tadlock*, 21 F.3d 1465 & n.10 (9th Cir.1994).

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).

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, N.J.*, 136 S. Ct. 1412 (2016) (holding that police officer who was demoted could pursue claim against employer even though employer acted erroneously on belief that employee had participated in political activity).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 [his][her] communications to [his][her] 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 [his][her] 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

See Dahlia v. Rodriguez, 735 F.3d 1060, 1074-76 (9th Cir.2013) (en banc).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.11 PARTICULAR RIGHTS—FIRST AMENDMENT—"CITIZEN" PLAINTIFF

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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]. In order to prove the defendant deprived the plaintiff of this First Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. the plaintiff was engaged in a constitutionally protected activity;

2. the defendant's actions against the plaintiff would chill a person of ordinary firmness from continuing to engage in the protected activity; and

3. the plaintiff's protected activity was a substantial or motivating factor in the defendant's conduct.

[I instruct you that plaintiff'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.

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 in order 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). "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.* (citations omitted).

Thus, in order to demonstrate a First Amendment violation, a citizen plaintiff must provide evidence showing that "by his actions [the defendant] deterred or chilled [the plaintiff's] political speech and such deterrence was a substantial or motivating factor in [the defendant's] conduct." *Id.* (quoting *Mendocino Env'l Ctr. v. Mendocino Cnty*, 14 F.3d 457, 459–60 (9th Cir.1994). 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). A plaintiff need not prove, however, that "his speech was actually inhibited or suppressed." *Mendocino Env'l Ctr.* 192 F.3d at 1288 *see also Ariz. Students' Ass'n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th Cir.2016) ("A plaintiff may bring a Section 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. 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 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. Further, to prevail on such a claim, a plaintiff need only show that the defendant 'intended to interfere' with the plaintiff's First Amendment rights and that it suffered some injury as a result; the plaintiff is not required to demonstrate that its speech was actually suppressed or inhibited." (citations omitted)).

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 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 also Ariz. Students' Ass'n*, 824 F.3d at 867; *O'Brien v. Welty*, 818 F.3d 920, 932 (9th Cir.2016); *Corales v. Bennett*, 567 F.3d 554, 562-68 (9th Cir.2009).

"A speech restriction cannot satisfy the time, place, manner test if the restriction does not contain clear standards." *OSU Student Alliance 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) ("The 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, under certain circumstances, may not be protected under the First Amendment when it is reasonably foreseeable that the speech could reach into, or be sufficiently tied to, the student's school. *C.R. v. Eugene Sch. Dist. 4J*, ___ F.3d ___, No. 13-35856, 2016 WL 4547356 (9th Cir. Sept. 1, 2016).

"Retaliation claims involving government speech warrant a cautious approach by courts. Restricting the ability of government decisionmakers to engage in speech risks interfering with their ability to effectively perform their duties. It also ignores the competing First Amendment rights of the officials themselves. The First Amendment is intended to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.' . . . In accordance with these principles, we have set a high bar when analyzing whether speech by government officials is

sufficiently adverse to give rise to a First Amendment retaliation claim." *Mulligan v. Nichols*, ___ F.3d ___, No. 14-55278, 2016 WL 4501684, at *4 (9th Cir. Aug. 29, 2016).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.12 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEARCH—GENERALLY

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant[s] [*name[s]*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant[s] deprived [him] [her] of [his] [her] 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] [person] [residence] [vehicle] [other]. In order to prove the defendant[s] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. [*Name[s] of applicable defendant[s]*] searched the plaintiff's [person] [residence] [vehicle] [other];

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

3. the search was unreasonable.

[A person acts "intentionally" when the person acts with a conscious objective to engage in particular conduct. Therefore, the plaintiff must prove the defendant intended to search the plaintiff's [person] [residence] [vehicle] [other]. It is not enough if the plaintiff only proves the defendant acted negligently, accidentally or inadvertently in conducting the search. However, the plaintiff does not need to prove 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 an applicable definition of an unreasonable search, such as Instruction 9.12 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search Incident to Arrest) and Instruction 9.14 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Consent).

In *United States v. Thomas*, 726 F.3d 1086, 1092-93 (9th Cir.2013), the Ninth Circuit discussed how the Supreme Court's decision in *United States v. Jones*, 132 S. Ct. 945 (2012), altered the *Katz* reasonable-expectation-of-privacy focus and stated that case law now directs "if 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.'" *Id*. at 1092. In *Jones*, government officials installed a GPS-tracking device to the underside of a vehicle located in a public parking lot, and then utilized the device to monitor the vehicle's movements. The Court held that when "[t]he Government physically occupied private

property for the purpose of obtaining information," a physical intrusion occurred and constituted a search under Fourth Amendment principles. *Jones*, 132 S. Ct. at 949-53.

The Supreme Court has also held that the government's use of a drug dog within the curtilage of a home used "to investigate the home and its immediate surroundings" was a search within the meaning of the Fourth Amendment. *Florida v. Jardines*, 133 S. Ct. 1409, 1414-18 (2013).

The Fourth Amendment's protection against unreasonable searches extends beyond criminal investigations. *Grady v. North Carolina*, 135 S. Ct. 1368 (2015) (per curiam) (holding that state conducts search subject to Fourth Amendment when it attaches tracking device to recidivist sex offender's person without consent after civil proceedings).

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 107172 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). 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) (citations omitted).

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. Cnty. 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 justify the search in the first place." *C.B. v. City of Sonora*, 769 F.3d 1005, 1023 (9th Cir.2014); *see also Ortega v. O'Connor*, 146 F.3d 1149, 1156 (9th Cir.1998) (examining search of private office); *cf. Maryland v. King*, 133 S. Ct. 1958, 1970 (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)).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 was a lawful arrest.] [I instruct you that the arrest of the plaintiff 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 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.

In order to prove the search in this case was unreasonable, the plaintiff 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 9.11 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally). When the search incident to arrest involves a vehicle, refer to Instruction 9.13 (Particular Rights—Fourth Amendment—Unreasonable Search—Exception to Warrant Requirement—Search of Vehicle Incident to Arrest of a Recent Occupant).

It is a well-settled exception to the warrant requirement that a police officer may search incident to a lawful custodial arrest both the arrested person and the area within the person's "immediate control"; *i.e.*, "the area from within which [the person] might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969). The search must be "spatially and temporally incident to the arrest," and, to satisfy the temporal requirement, must be "roughly contemporaneous with the arrest." *United States v. Camou*, 773 F.3d 932, 937 (9th Cir.2014) (holding border patrol agent's search of arrestee's cell phone 80 minutes after

arrest not roughly contemporaneous with arrest). "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'?" *Id*. at 938 (second alteration in original).

The Ninth Circuit has noted that "[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." *United States v. Maddox*, 614 F.3d 1046, 1049 (9th Cir.2010) (finding search of defendant's key chain taken from his person incident to arrest, but tossed back into his vehicle after arrestee was secured in patrol car, invalid under search-incident-to-arrest exception).

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 probable cause to make arrest insufficient to trigger 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).

In *United States v. Robinson*, 414 U.S. 218 (1973), the United States Supreme Court held that an officer may conduct "a full search of the person" incident to the person's lawful custodial arrest. *Id*. at 235. In *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir.1991), the Ninth Circuit held that the "full search authorized by *Robinson* [is] limited to a pat-down and an examination of the arrestee's pockets, and d[oes] not extend to a strip search or bodily intrusion." *Id*. at 1446 (quoting *Giles v. Ackerman*, 746 F.2d 614, 616 (9th Cir.1984)) (internal quotation marks omitted).

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*, 136 S. Ct. 2160, 2184 (2016). The Court held that a breath test incident to arrest is categorically included within the search-incident-to-arrest exception. *Id.* at 2176, 2179-80, 2183. In contrast, a warrantless blood test is never authorized as a search incident to arrest, but may be permissible on a case-by-case basis under the exigent circumstances exception to the warrant requirement. *Missouri v. McNeely*, 133 S. Ct. 1552, 1563 (2013) ("Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances [under the exigent circumstances exception].").

In *Riley v. California*, 134 S. Ct. 2473 (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 2493. However, the

Court also noted that if "law enforcement still has specific concerns about the potential loss of evidence in a particular case … they may be able to rely on exigent circumstances to search the phone [data] immediately." *Id*. at 2487.

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 was a lawful arrest.] [I instruct you that the arrest of the plaintiff 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.

In order to prove the search in this case was unreasonable, the plaintiff 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 9.11 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally).

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 probable cause to make arrest insufficient to trigger exception in absence of actual arrest). The search must be "spatially and temporally incident to the arrest," and, to satisfy the temporal requirement, must be "roughly contemporaneous with the arrest." *United States v. Camou*, 773 F.3d 932, 937 (9th Cir.2014).

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).

In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court held that an officer could 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 the 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 (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."); *see also United States v. Ruckes*, 586 F.3d 713, 717-18 (9th Cir.2009) (applying *Gant*, 556 U.S. at 343-44, and concluding that vehicle search incident to arrest was invalid).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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:

[whether the consenting person was in custody;]

[whether the officers' guns were drawn;]

[whether Miranda warnings were given;]

[whether the consenting person was told [he] [she] had the right to refuse a request to search;]

[whether the consenting person was told a search warrant could be obtained;]

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

In order to prove the search in this case was unreasonable, the plaintiff 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 9.11 (Particular Rights—Fourth Amendment —Unreasonable Search—Generally).

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. Brown*, 563 F.3d 410, 415 (9th Cir.2009) (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 take into account other relevant factors. *Id.*

In *Georgia v. Randolph*, 547 U.S. 103 (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." *Id.* at 106. 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.* The Ninth Circuit has also determined that after police have obtained consent from one party, they do not have an affirmative duty to seek out a co-tenant in order to inquire if there is an objection. *See Brown*, 563 F.3d at 416-17 (finding 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).

The Supreme Court clarified that an occupant who initially objects, but is later removed by police, is *not* physically present for the purposes of *Georgia v. Randolph* when reasonable grounds existed for such removal or when probable cause existed for the arrest of the objecting occupant. *Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014) (upholding warrantless search of apartment when consent later obtained from co-occupant after objecting occupant arrested on suspicion of assaulting co-occupant).

Under certain circumstances, a third party may have actual or apparent authority to give consent to the search of another's property. *United States v. Davis*, 332 F.3d 1163, 1169 (9th Cir.2003); *see United States v. Ruiz*, 428 F.3d 877, 880-81 (9th Cir.2005) (citing *United States v. Dearing*, 9 F.3d 1428, 1429-30 (9th Cir.1993) (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).

In the context of an airport security screening, consent to search can be implied from the circumstances. *United States v. Aukai*, 440 F.3d 1168, 1179 & n.10 (9th Cir.2006).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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] 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.

In order to prove the search in this case was unreasonable, the plaintiff 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 9.11 (Particular Rights—Fourth Amendment—Unreasonable Search—Generally).

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*, 133 S. Ct. 1552, 1558-59 (2013) (discussing the various "circumstances [that] may give rise to an exigency sufficient to justify a warrantless search"); *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).

But the 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) (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 & Cnty. of S.F.*, 598 F.3d 528, 534 (9th Cir.2010) (second alteration in original) (quoting *Hopkins v. Bonvicino*, 573 F.3d 752, 763 (9th Cir.2009) (internal quotation marks omitted). 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)). Officers must use only reasonable force in carrying out the search or seizure. *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1221 (9th Cir.2014), *reversed on other grounds*, 135 S. Ct. 1765 (2015).

The exigency exception may of course be invoked when police are in hot pursuit of a fleeing felon. *Fisher*, 558 F.3d at 1082; *see also United States v. Johnson*, 256 F.3d 895, 907 (9th Cir.2001) (en banc) (per curiam). It should also be noted, however, that exigent circumstances will rarely justify entry without a warrant while in hot pursuit of a fleeing misdemeanant. *See Stanton v. Sims*, 134 S. Ct. 3, 6-7 (2013) (finding officer 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").

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*, 133 S. Ct. at 1563; *see also Hopkins*, 573 F.3d at 769 (9th Cir.2009) (finding officers' warrantless entry into DUI suspect's home lacked probable cause and was not justified under exigent circumstances exception to warrant requirement); *cf.* Instruction 9.12 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 Supreme Court's excessive force standard under 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 (Deadly and Nondeadly) Force.

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 police 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.

In order to prove the search in this case was unreasonable, the plaintiff 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.

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)).

The emergency doctrine recognizes that police function as community caretakers in addition to their roles as criminal investigators and law enforcers. *Espinosa v. City & Cnty. of S.F.*, 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 & Cnty. of S.F.*, 743 F.3d 1211, 1221 (9th Cir.2014) (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 Supreme Court's excessive force standard under 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 (Deadly and Nondeadly) Force.

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.18 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PROPERTY—GENERALLY

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant[s] [*name[s]*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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] property. In order to prove the defendant[s] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. [*name[s] of applicable defendant[s]*] seized the plaintiff's property;

2. in seizing the plaintiff's property, [*names of same person[s]*] acted intentionally; and

3. 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.].]

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).

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Lavan v. City of L.A.*, 693 F.3d 1022, 1027, 1030-33 (9th Cir.2012) (recognizing 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 also Patel v. City of L.A.*, 738 F.3d 1058, 1061-62 (9th Cir.2013) (en banc) (citing *Florida v. Jardines*, 133 S.Ct. 1409, 1418-19 (2013)) (Kagan, J., concurring)) (recognizing hotel's property and privacy interest in guest records "are more than sufficient to trigger Fourth Amendment protection").

"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).

"Section 1983 contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1071-72 & n.12 (9th Cir.2012) (quoting *Daniels v. Williams*, 474 U.S. 327, 330 (1986)). It is well settled that "negligent acts do not incur constitutional liability." *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir.2002). 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).

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. Cnty. 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 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.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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, in order to prove the search in this case was unreasonable, the plaintiff 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 9.17 (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, collects 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 L.A.*, 693 F.3d 1022, 1030-33 (9th Cir.2012) (finding that warrantless seizure of homeless person's abandoned property was properly subjected to Fourth Amendment's reasonableness requirement).

(3) *United States v. Stafford*, 416 F.3d 1068, 1076 (9th Cir.2005) (discussing plain view exception to warrant requirement).

A plaintiff alleging a § 1983 claim based on an unreasonable search in violation of the Fourth Amendment has the burden of proving an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir.1994); *see also 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]"). This instruction applies that same burden of proof to a claim of an unreasonable seizure.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.20 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—GENERALLY

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendants [*name[s]*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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] person. In order to prove the defendant[s] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. [*name[s] of applicable defendant[s]*] seized the plaintiff's person;

2. in seizing the plaintiff's person, [*name[s] of same person[s]*] acted intentionally; and

3. the seizure was unreasonable.

A defendant "seizes" the plaintiff's person when [he] [she] 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] 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] 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 9.20–9.23.

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). A seizure, however, "does not occur simply because a police officer approaches an individual and asks a few questions." *Id*. at 434; *see United States v. Washington*, 490 F.3d 765, 770 (9th Cir.2014). 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). 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); *see also United States v. McClendon*, 713 F.3d 1211, 1215 (9th Cir.2013).

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).

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.

Section 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *OSU Student Alliance 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). 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). 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. Cnty. of Inyo*, 489 U.S. 593, 596-97 (1989) (emphasis in original); *see also 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.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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.

In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that the officer[s] lacked reasonable suspicion to stop [him] [her] 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] [their] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] [her] [them].

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 9.19 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

A police officer may conduct a brief stop for investigatory purposes when the officer has only "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 only 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*, 135 S. Ct 1609, 1612 (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 1615. 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." *Id*.

"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). 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 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*.

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). However, an officer's lack of individualized suspicion does not, standing alone, make the search and seizure automatically unlawful. *See Lyall v. City of L.A.*, 807 F.3d 1178, 1194-95 (9th Cir.2015). 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).

"[A]voidance 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).

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.* at 1185.

> 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 (jury permitted to conclude that detention of plaintiffs for 30-45 minutes for field identification did not transform detention from *Terry* stop into arrest requiring more demanding showing of probable cause).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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] [their] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him] [her] [them].

Comment

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).

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). 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. *Id*. at 878.

"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*. For *Terry* stops, use Instruction 9.20 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Exception to Warrant Requirement—*Terry* Stop).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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.

In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] 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 9.19 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

"A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification." *Lacey v. Maricopa Cnty.,* 693 F.3d 896, 918 (9th Cir.2012) (citation omitted). "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. Cnty. of San Diego*, 697 F.3d 941, 951 (9th Cir.2012).

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); *see also Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1147 (9th Cir.2012).

"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) (quoting *United States v. Gonzales*, 749 F.2d 1329, 1337 (9th Cir.1984)). "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 & Cnty. of S.F.*, 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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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.

In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that [he] [she] 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 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. *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 9.19 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally).

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.

Id. at 98-99; *see also Meredith v. Erath,* 342 F.3d 1057, 1061 (9th Cir.2003).

After *Muehler v. Mena*, 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).

In *Bailey v. United States*, 133 S. Ct. 1031, 1042 (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 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.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.25 PARTICULAR RIGHTS—FOURTH AMENDMENT—UNREASONABLE SEIZURE OF PERSON—EXCESSIVE (DEADLY AND NONDEADLY) 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]] [and] [or] [in attempting to stop a fleeing or escaping suspect]. Therefore, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officer[s] used excessive force when [*insert factual basis of claim*].

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 used excessive force in this case, consider all of the circumstances known to the officer 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 had to determine the type and amount of force that reasonably appeared necessary, and any changing circumstances during that period;

5. the type and amount of force used;

[6. the availability of alternative methods [to take the plaintiff into custody] [to subdue the plaintiff;]]

[7. 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;]

[8. whether it was practical for the officer[s] to give warning of the imminent use of force, and whether such warning was given;]

[9. whether the officer[s] [was] [were] responding to a domestic violence disturbance;]

[10. whether it should have been apparent to the officer[s] that the person [he] [she] [they] used force against was emotionally disturbed;]

[11. whether a reasonable officer would have or should have accurately perceived a mistaken fact;]

[12. 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]

[13. *other factors particular to the case.*]

"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.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8, and in conjunction with Instruction 9.19 (Particular Rights—Fourth Amendment—Unreasonable Seizure of Person—Generally)**.**

In general, all claims of excessive force, whether deadly or not, should be analyzed under the objective reasonableness standard of the Fourth Amendment as applied in *Scott v. Harris*, 550 U.S. 372, 381-85 (2007), *Graham v. Connor*, 490 U.S. 386, 397 (1989), *Tennessee v. Garner*, 471 U.S. 1, 7-12 (1985), and *Acosta v. Hill*, 504 F.3d 1323, 1324 (9th Cir.2007). Although an officer may not use deadly force to apprehend a suspect when the suspect poses no immediate threat to the officer or others, "it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.'" *Wilkinson v. Torres*, 610 F.3d 546, 550 (9th Cir.2010) (quoting *Garner*, 471 U.S. at 11). Whether the use of deadly force is reasonable is highly fact-specific. *Id.* at 551.

> In assessing reasonableness, the court should give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "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." *Id.* (citation omitted). In addition, "[t]he calculus of reasonableness must embody 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." *Id.* at 396-97.

Wilkinson, 610 F.3d at 550.

Moreover, as the Ninth Circuit has noted, the Supreme Court did not limit the reasonableness inquiry to the factors set forth in *Graham*:

> Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, the reasonableness of a seizure must instead be assessed by carefully considering the objective facts and circumstances that confronted the arresting officers. In some cases, for example, the availability of alternative methods of capturing or subduing a suspect may be a factor to consider.

Smith v. City of Hemet, 394 F.3d 689, 701 (9th Cir.2005) (citation and internal quotation marks omitted).

On the other hand, 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).

Other relevant factors may include whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed. *Glenn v. Wash. Cnty.*, 673 F.3d 864, 872 (9th Cir.2011); *see also Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir.2001) ("Even when an emotionally disturbed individual is 'acting out' and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual.")

The "relative culpability" of the parties— *i.e.*, which party created the dangerous situation and which party is more innocent— may also be considered in determining the reasonableness of the force used. *Espinosa v. City & Cnty. of S.F.*, 598 F.3d 528, 537 (9th Cir.2010) (citing *Scott*, 550 U.S. at 384).

Whether the officers are facing or expecting a domestic disturbance is a specific factor relevant to the totality of the circumstances in assessing an excessive force claim. *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.'")

"When an officer's particular use of force is based on a mistake of fact, we ask whether a reasonable officer would have or should have accurately perceived that fact." *Torres v. City of Madera*, 648 F.3d 1119, 1124 (9th Cir.2011) (citing *Jensen v. City of Oxnard*, 145 F.3d 1078,

1086 (9th Cir.1998)) (emphasis in original). "[W]hether the mistake was an honest one is not the concern, only whether it was a reasonable one." *Id*. at 1127 (emphasis in original).

A police officer's attempt to "terminate a dangerous high-speed chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014) ("[I]f officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.")

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.26 PARTICULAR RIGHTS—EIGHTH AMENDMENT—CONVICTED PRISONER'S CLAIM OF EXCESSIVE FORCE

As previously explained, the plaintiff has the burden of proving that the act[s] of the defendant [*name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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." In order to prove the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must prove the following elements by a preponderance of the evidence:

1. the defendant used excessive and unnecessary force under all of the circumstances;

2. the defendant acted maliciously and sadistically for the purpose of causing harm; and

3. the act[s] of the defendant caused harm to the plaintiff.

In determining whether the defendant used excessive force 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;

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; and

6. whether the defendant applied the force in a good faith effort to maintain or restore discipline.

In considering these factors, you 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.

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. When the plaintiff is a pretrial detainee, use 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 (Deadly and Nondeadly) Force).

When the prisoner claims unconstitutional conditions of confinement, including inadequate medical care, use Instruction 9.27 (Particular Rights—Eighth Amendment—Prisoner's Claim re Conditions of Confinement/Medical Care), which sets out the applicable deliberate indifference standard.

The Eighth Amendment prohibits cruel and unusual punishment in penal institutions. *Wood*, 692 F.3d at 1045. "[U]nnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Furnace v. Sullivan*, 705 F.3d 1021, 1027 (9th Cir.2013) (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)).

The Ninth Circuit has identified five factors set forth in *Hudson* to be considered in determining whether the use of force in a penal institution was excessive: "(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." *Furnace*, 705 F.3d at 1028. In *Furnace*, the court also considered whether verbal warnings were given prior to the administration of force. *Id.* at 1029 ("Officers cannot justify force as necessary for gaining inmate compliance when inmates have been given no order with which to comply.").

"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*, 204 F.3d at 1196(quoting *Hudson*, 503 U.S. at 8. Although *de minimis* use of physical force is insufficient to prove an Eighth Amendment violation, *Hudson*, 503 U.S. at 8, 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*, 130 S.Ct. 1175, 1178-79 (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.").

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 (1986)); *see also LeMaire v. Maass*, 12 F.3d 1444, 1452-53 (9th Cir.1993) (finding 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

"greater showing" than deliberate indifference is required "in the context of a prison-wide disturbance or an individual confrontation between an officer and a prisoner," when "corrections officers must act immediately and emphatically to defuse a potentially explosive situation").

"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). In *Norwood*, the Ninth Circuit approved of an instruction that the jury "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." *Id.*; *cf. Chess v. Dovey*, 790 F.3d 961, 974 (9th Cir.2015) (holding that deference generally should not be given in medical care context absent actual security considerations).

The Committee has not formulated an instruction that relates to sexual harassment claimed by an inmate. *See Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir.2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1196-97 (9th Cir.2000).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.27 PARTICULAR RIGHTS—EIGHTH AMENDMENT— CONVICTED PRISONER'S CLAIM RE CONDITIONS OF CONFINEMENT/MEDICAL CARE

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

Under the [Eighth Amendment] [Fourteenth Amendment], a prisoner has the right to be free from "cruel and unusual punishments." This includes the right to [*specify particular constitutional interest*]. In order to prove the defendant deprived the plaintiff of this right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

1. [the plaintiff faced a substantial risk of serious harm] [the plaintiff faced a serious medical need];

2. the defendant was deliberately indifferent to that [risk] [medical need], that is, the defendant knew of it and disregarded it by failing to take reasonable measures to address it; and

3. the [act[s]] [failure to act] of the defendant caused harm to the plaintiff.

"Deliberate indifference" is the conscious choice to disregard the consequences of one's acts or omissions.

[In determining whether the defendant violated the plaintiff's rights as alleged, you should give deference to [jail] [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.]

[When the defendant lacks authority over budgeting decisions, the issue of whether a prison official met [his] [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 defendant or which [he] [she] 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 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 9.24 (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) (Comment only). 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).

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)). This also includes a duty to protect prisoners from violence at the hands of other prisoners. *Id.* at 833 (internal quotation marks and citation omitted); *see, e.g.*, *Cortez v. Skol*, 776 F.3d 1046, 1050-53 (9th Cir.2015) (holding that mother of prisoner who suffered severe brain damage after being attacked by two fellow inmates raised genuine issues on Eighth Amendment § 1983 claim in light of evidence that one prison official 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 *Helling v. McKinney*, 509 U.S. 25 (1993); *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 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).

The Ninth Circuit has 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). 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. Cnty. of L.A.*, ___ F.3d ___, No. 12-56829, 2016 WL 4268955, at *11 (9th Cir. Aug. 15, 2016) (en banc). "This objective standard necessarily applied to municipalities for the practical reason that government entities, unlike individuals, do not themselves have states of mind[.]" *Id*.

In *Estelle v. Gamble*, the Supreme Court held a prison official's deliberate indifference to serious medical needs violates the Eighth Amendment. 429 U.S. at 106. 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 v. Gomez*, 298 F.3d at 904 (citations omitted). In addition, 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 v. Bannister*, 763 F.3d 1060, 1067 (9th Cir.2014). The *Colwell* court, when considering whether there was a serious medical need, relied on the indicators set forth in *McGuckin v. Smith*, 974 F.2d 1050, 1059-60 (9th Cir.1992), *overruled in part on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir.1997) (en banc)). Those indicators are as follows:

> 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 are examples of indications that a prisoner has a "serious" need for medical treatment.

Colwell, 763 F.3d at 1066 (quoting *McGuckin*, 974 F.2d at 1059-60).

In *Norwood v. Vance*, 591 F.3d 1062 (9th Cir.2010), the Ninth Circuit held it was error for the trial court to refuse to instruct a jury to give deference to prison officials' expert judgments when balancing the need for internal order, discipline and security against prisoners' rights and privileges: "Prison officials are entitled to deference whether a prisoner challenges excessive force or conditions of confinement." *Id.* at 1067 (citing *Whitley v. Albers*, 475 U.S. 312, 322 (1986)). In *Norwood*, the court suggested the term "deference" need not be defined in an instruction, but if "the district judge believed the term needed further context or definition, he could have provided it." *Norwood*, 591 F.3d at 1067.

However, a deference instruction should not be given in the ordinary Eighth Amendment medical care case. *See Chess v. Dovey*, 790 F.3d 961, 974 (9th Cir.2015) (holding "that a trial judge may instruct a jury to defer to a policy or practice adopted and implemented by prison officials only when that policy or practice addresses bona fide safety and security concerns, and when there is evidence that the challenged medical decision was made pursuant to that security-based policy or practice").

When a case includes an equal protection claim involving strict scrutiny, a court must be careful in delineating the role of deference. *See Harrington*, 785 F.3d at 1307. In such a case, deference plays a role in assessing whether the government's asserted interest is compelling, but deference is not considered in determining whether the defendant's actions were narrowly tailored to serve that interest. *Id*. at 1308.

The issue of 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 which 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), *cert. denied*, 135 S.Ct. 946 (2015).

The Committee has not formulated an instruction that relates to sexual harassment claimed by an inmate. *See Wood v. Beauclair*, 692 F.3d 1041, 1046 (9th Cir.2012); *Schwenk v. Hartford*, 204 F.3d 1187, 1196-97 (9th Cir.2000).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 [*insert name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] rights under the Fourteenth 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." In order to prove the defendant deprived the plaintiff of this Eighth Amendment right, the plaintiff must prove the following elements by a preponderance of the evidence:

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.

With respect to the third element, the defendant's conduct must be objectively unreasonable.

In considering these factors, you 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.

Comment

See Castro v. Cnty. of L.A., ___ F.3d. ___, No. 12-56829, 2016 WL 4268955 (9th Cir. Aug. 15, 2016) (en banc) (discussing pretrial detainee's claim of failure to protect under the Fourteenth Amendment).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.29 PARTICULAR RIGHTS—FOURTEENTH AMENDMENT— PRETRIAL DETAINEE'S CLAIM OF EXCESSIVE FORCE

Comment

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). More recently, in *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (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.

After the Supreme Court decided *Kingsley*, the Ninth Circuit decided *Castro v. County of Los Angeles*, ___ F.3d ___, No. 12-56829, 2016 WL 4268955 (9th Cir. Aug. 15, 2016) (en banc). In *Castro*, the Ninth Circuit held that Castro, 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 *3. 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 *3-7, *18 (Ikuta, J., dissenting). Analogizing to the Supreme Court's excessive force analysis in *Kingsley*, the Ninth Circuit 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 *7.

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 has 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) (applying Fourth Amendment to assess constitutionality of duration, conditions, or legal justification for prolonged warrantless post-arrest pre-arraignment custody).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.30 PARTICULAR RIGHTS—FOURTEENTH AMENDMENT—PRETRIAL DETAINEE'S CLAIM RE CONDITIONS OF CONFINEMENT/MEDICAL CARE

Comment

In *Castro v. County. of Los Angeles*, ___ F.3d. ___, No. 12-56829, 2016 WL 4268955 (9th Cir. Aug. 15, 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 and to the extent that it required a plaintiff to prove an individual defendant's subjective intent to punish in the context of a pretrial detainee's failure-to-protect claim." *Castro*, at *6. 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). It is unclear, however, the extent to which *Castro* requires modification of Instruction 9.27 (Particular Rights—Eighth Amendment—Convicted Prisoner's Claim re Conditions of Confinement/Medical Care) when applied in the context of a pretrial detainee's similar claim under the Fourteenth Amendment.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.31 PARTICULAR RIGHTS—FOURTEENTH AMENDMENT—PRETRIAL DETAINEE'S CLAIM OF FAILURE TO PROTECT

As previously explained, the plaintiff has the burden of proving that the [act[s]] [failure to act] of the defendant [*insert name*] deprived the plaintiff of particular rights under the United States Constitution. In this case, the plaintiff alleges the defendant deprived [him] [her] of [his] [her] 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. In order to prove the defendant deprived the plaintiff of this right, the plaintiff must prove the following additional elements by a preponderance of the evidence:

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.

With respect to the third element, the defendant's conduct must be objectively unreasonable.

Comment

See Castro v. Cnty. of L.A., ___ F.3d. ___, No. 12-56829, 2016 WL 4268955 (9th Cir. Aug. 15, 2016) (en banc).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.32 PARTICULAR RIGHTS—FOURTEENTH AMENDMENT—SUBSTANTIVE DUE PROCESS—INTERFERENCE WITH PARENT/CHILD RELATIONSHIP

Comment

Parents possess a constitutionally protected liberty interest in the companionship and society of their children. In *Kelson v. City of Springfield,* 767 F.2d 651 (9th Cir.1985), the Ninth Circuit held that the state's interference with such liberty interest without due process of law is cognizable under 42 U.S.C. § 1983. *Id*. at 654 (holding that parents of 14-year-old who committed suicide in school had stated a claim of deprivation of parental rights). This substantive due process right is independently held by the parent—it is not a right to sue on behalf of the decedent or other injured child. *Id.* at 653 n. 2. The Ninth Circuit later clarified that a parent's right implicates both a custodial and companionship interest, either of which, when interfered with by the state, gives rise to a cognizable Fourteenth Amendment due process claim. *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir.1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir.1999); *see*, *e.g.*, *Strandberg v. City of Helena*, 791 F.2d 744, 748 n.1 (9th Cir.1986) (recognizing that while parents of deceased 22-year-old son had no deprivation claim of the right to parent, they had claim for violation of their due process rights in companionship and society of their adult son). Similarly, children, including adult children, may assert a Fourteenth Amendment claim based on the deprivation of their liberty interest arising out of their relationship with their parent. *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 371 (9th Cir.1998). "[S]ubstantive due process claim[s] may be asserted by both the parents and children of a person killed by law enforcement officers." *Id.* However, 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) (adopting *Bell v. City of Milwaukee*, 746 F.2d 1205, 1247 (7th Cir.1984) ("[I]f we were to hold that the federal Constitution entitles the siblings to recover for loss of society and companionship, there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relationships.")).

Substantive due process violations under the Fourteenth Amendment occur only when official conduct "shocks the conscience." *Gantt v. City of L.A.*, 717 F.3d 702, 707 (9th Cir.2013) (citing *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir.2010)). Under the overarching test of whether the official's conduct "shocks the conscience" are two standards: the more demanding "purpose to harm" standard and the lesser "deliberate indifference" standard. *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir.2008) (applying purpose to harm standard when police officer killed suspect during quickly escalating investigation of suspicious vehicle). To determine which of the two standards govern, courts look at the context of the events leading to the deprivation. *See id.* The critical consideration is whether the circumstances are such that actual deliberation by the officer is practical. *Hayes v. Cnty. of San Diego*, 736 F.3d 1223, 1230 (9th Cir.2013). "Where actual deliberation is practical, then an officer's 'deliberate indifference' may suffice to shock the conscience. On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the

conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives." *Wilkinson*, 610 F.3d at 554 (citing *Porter*, 546 F.3d at 1137).

When the alleged violation arises out of "fast paced circumstances presenting competing public safety obligations," the purpose to harm standard applies. *Porter*, 546 F.3d at 1139. Due to the unforeseen circumstances demanding an officer's instant judgment, "even precipitate recklessness fails to inch close enough to harmful purpose" to shock the conscience. *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (finding no substantive due process violation when patrol car rammed and killed 16-year-old suspected offender following high-speed chase); *compare A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 454 (9th Cir.2013) (affirming jury finding that officer acted with purpose to harm by shooting twelve rounds at driver of stolen car), *with Moreland*, 159 F.3d at 373 (holding that officers, who accidentally shot and killed bystander while "responding to the extreme emergency of public gunfire," did not act with purpose to harm). Because the purpose to harm standard is a subjective standard of culpability, an officer violates due process if he uses force with "only an illegitimate purpose in mind," such as bullying a suspect or getting even. *Cal. Highway Patrol*, 712 F.3d at 453.

Conversely, the deliberate indifference standard governs cases when the accused official had "the luxury . . . to make unhurried judgments, [and] the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Lewis*, 523 U.S. at 853. When "extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.* In *Gantt*, the Ninth Circuit approved the following definition of deliberate indifference:

> Deliberate 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 omission for the very purpose of causing harm or with knowledge that harm will result.

717 F.3d at 708 (noting that if the trial court had given only this portion of the instruction, there would be no error). Cases of mistaken detention when officers have time to correct their mistakes and cases when an inmate commits suicide when left without supervision employ the deliberate indifference standard. *See, e.g.*, *Lemire v. Cal. Dep't of Corr. & Rehab.*, 726 F.3d 1062, 1081 (9th Cir.2013) (holding there was triable issue of fact whether officers were deliberately indifferent by leaving mentally ill inmate unsupervised for three-hour period during which inmate committed suicide); *Lolli v. Cnty. of Orange*, 351 F.3d 410, 419-20 (9th Cir.2003) (holding that reasonable jury could find deliberate indifference when officers denied medical attention to diabetic pretrial detainee); *Lee v. City of L.A.*, 250 F.3d 668, 684-86 (9th Cir.2001) (holding plaintiff mother sufficiently pleaded deliberate indifference when son was falsely arrested and extradited to New York).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

9.33 PARTICULAR RIGHTS—FOURTEENTH AMENDMENT—DUE PROCESS—DELIBERATE FABRICATION OF EVIDENCE

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

In order for the plaintiff to prevail on [his][her] claim of deliberate fabrication of evidence, the plaintiff must prove the following elements by a preponderance of the evidence

1. the defendant [*name*] deliberately fabricated evidence that was used to criminally charge the plaintiff;

2. the defendant [*name*] continued [his] [her] investigation of the plaintiff despite the fact that [he] [she] knew that the plaintiff was innocent, or was deliberately indifferent to the plaintiff's innocence, and the results of the investigation were used to criminally charge the plaintiff; or

3. the defendant [*name*] used investigative techniques that were so coercive and abusive that [he][she] knew, or was deliberately indifferent, that those techniques would yield false information that was used to criminally charge the plaintiff.

"Deliberate indifference" is the conscious choice to disregard the consequences of one's acts or omissions.

Comment

Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.9.

In *Devereaux v. Abbey*, the Ninth Circuit stated that in order 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 1070, 1076 (9th Cir.2001) (en banc).

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 L.A.*, 717 F.3d 702, 708 (9th Cir.2013); *Tennison v. City and Cnty. of S.F.*, 570 F.3d 1078, 1089 (9th Cir.2009).

In *Gantt,* the Ninth Circuit approved the following definition of deliberate indifference in situations when the there was "actual deliberation":

> Deliberate 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 omission for the very purpose of causing harm or with knowledge that harm will result.

717 F.3d at 708 (noting that if trial court had given only this portion of instruction, there would be no error).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

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 qualified immunity analysis consists of two steps: (1) whether the facts the plaintiff alleges make out a violation of a constitutional right; and (2) whether that right was clearly established at the time the defendant acted. *Castro v. Cnty. of L.A.*, ___ F.3d ___, No. 12-56829, 2016 WL 4268955, at *3 (9th Cir. Aug. 15, 2016). Whether a right is clearly established turns on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Conner v. Heiman*, 672 F.3d 1126, 1132 (9th Cir.2012) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

Qualified immunity is a question of law, not a question of fact. *Torres v. City of L.A.*, 548 F.3d 1197, 1210 (9th Cir.2008). "Immunity ordinarily should be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Only when "historical facts material to the qualified immunity determination are in dispute" should the district court submit the factual issue to a jury. *Torres*, 548 F.3d at 1211. If the only material dispute concerns what inferences properly may be drawn from the historical facts, a district court should decide the issue of qualified immunity. *Conner*, 672 F.3d at 1131 n.2 ("[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.").

Although a plaintiff need not find "a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *see Hamby v. Hammond*, No. 15-35283, ___F.3d ___ (9th Cir.2016), 2016 WL 1730532 (9th Cir. May 2, 2016).

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*, 548 F.3d at 1210. 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. Cnty. 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); *see also Wilkins v. City of Oakland*, 350 F.3d 949, 955 (9th Cir.2003) (explaining that if determining reasonableness of officer's action depends on disputed issues of fact—*i.e.*, which version of facts is accepted by

jury—this is question of fact best resolved by jury). When a case proceeds to trial, qualified immunity is no longer an "immunity from suit"; rather, it effectively becomes a defense. *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. The issue can then be raised in a Rule 50(a) motion at the close of evidence. *Tortu v. Las Vegas 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."); *see also A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 452 n.2 (9th Cir.2013) (noting that defendant preserved his position on qualified immunity—renewed in Rule 50(b) motion after trial—by bringing Rule 50(a) motion for JMOL before case was submitted to jury). Consistent with this case law, there may be particular cases in which a special verdict on a discrete fact is warranted in order to resolve a qualified immunity claim.

For a discussion of when a law enforcement officer is entitled to rely on the judgment of a government agency for purposes of the second prong of the qualified immunity analysis, *see Sjurset v. Button*, 810 F.3d 609 (9th Cir.2015).

Qualified immunity analysis is irrelevant to the issue of liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 691 (1978).

10. CIVIL RIGHTS—TITLE VII—EMPLOYMENT DISCRIMINATION; HARASSMENT; RETALIATION

Instruction

Introductory Comment
10.1A Civil Rights—Title VII—Disparate Treatment—When Evidence Supports "Sole Reason" or "Motivating Factor"
10.1B Civil Rights—Title VII—Disparate Treatment—"Sole Reason"—Elements and Burden of Proof
10.1C Civil Rights—Title VII—Disparate Treatment—"Motivating Factor"—Elements and Burden of Proof
10.2 Civil Rights—Title VII—Hostile Work Environment—Harassment
10.2A Civil Rights—Title VII—Hostile Work Environment—Harassment Because of Protected Characteristics—Elements
10.2B Civil Rights—Title VII—Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense
10.2C Civil Rights—Title VII—Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence
10.3 Civil Rights—Title VII—Retaliation—Elements and Burden of Proof
10.4A Civil Rights—Title VII—"Adverse Employment Action" Defined
10.4A.1 Civil Rights—Title VII—"Adverse Employment Action" in Retaliation Cases.
10.4A.2 Civil Rights—Title VII—"Adverse Employment Action" in Disparate Treatment Cases
10.4B Civil Rights—Title VII—"Tangible Employment Action" Defined
10.4C Civil Rights—Title VII—"Constructive Discharge" Defined
10.5A Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification
10.5B Civil Rights—Title VII—Defense—Bona Fide Seniority System
10.5C Civil Rights—Title VII—Defense—After-Acquired Evidence

Introductory Comment

Employment discrimination law under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*., and 42 U.S.C. § 1981a is complex and evolving.

Prior to the 1991 amendments to the Civil Rights Act, jury trials were not available in Title VII cases. The Civil Rights Act of 1991 now permits Title VII cases to be tried by jury. 42 U.S.C. § 1981a(c). The plaintiff may recover on a showing that the alleged discriminatory employment practice was based on an individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). The plaintiff may prevail by showing that the discrimination was "a motivating factor" in the employment decision even though other factors also motivated the decision. *Washington v. Garrett*, 10 F.3d 1421, 1433 n.15 (9th Cir.1993); *see also Costa v.*

Desert Palace, Inc., 299 F.3d 838, 853-59 (9th Cir.2002) (en banc), *aff'd,* 539 U.S. 90 (2003) ("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.'"); *see also E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (explaining that phrase "because of" "typically imports, at a minimum, the traditional standard of but-for causation," but Title VII relaxes this standard "to prohibit even making a protected characteristic a 'motivating factor' in an employment decision"). *See* Instruction 10.1A (Disparate Treatment—When Evidence Supports "Sole Reason" or "Motivating Factor"). In retaliation claims, however, the correct standard in determining causation is the "but-for" standard and not the "motivating factor" standard. *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 133 S. Ct. 2517 (2013).

Prior to 1991, Title VII provided only equitable remedies. *See* 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. 42 U.S.C. § 1981a(a)(1). Title VII plaintiffs may now 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). However, recovery of compensatory and punitive damages under Title VII is limited by the statutory caps provided in 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 caps. 42 U.S.C. § 1981a(b)(2). The Supreme Court has extended this rationale to exclude front pay from the statutory caps. *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)). While 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 caps because it is an equitable remedy suggests that there is similarly no entitlement to a jury trial on front pay. *See Pollard*, 532 U.S. at 848. The court, however, may consider submitting questions of front and back pay to the jury for advisory findings pursuant to Fed. R. Civ. P. 39(c). If advisory findings are sought, the court should recognize on the record that it is not bound by them, and make a record of independent findings pursuant to Fed. R. Civ. P. 52(a). *See* Chapter 5 ("Damages") and Comments to Instructions 5.2 (Measures of Types of Damages) and 5.5 (Punitive Damages) discussing the special damage rules that apply to Title VII cases.

A plaintiff's remedies may be limited in so-called "mixed motive cases" when the plaintiff establishes liability by proving that a protected characteristic was a "motivating factor" in an employment action. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B). In such cases, if the employer can prove that it would have made the same employment decision for lawful reasons, the plaintiff's relief is limited to declaratory relief, attorneys' fees and costs. *See* 42 U.S.C. § 2000e-5(g)(2)(B); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 760 (9th Cir.1996).

No *McDonnell Douglas* burden-shifting instruction should be given in Title VII cases. *Costa*, 299 F.3d at 855 ("it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury"). *See also Sanghvi v. City of Claremont*, 328 F.3d 532, 540 (9th Cir.2003) ("it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case"). Cases discussing pretext and burden shifting arise in the summary judgment and directed verdict context. *See*, *e.g.*, *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.1987).

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. Subchapter 10.1 sets forth the instructions that pertain to a claim of disparate treatment (intentional discrimination). Subchapter 10.2 sets forth the instructions that pertain to a claim of harassment or hostile work environment. Subchapter 10.3 sets forth an instruction relating 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 Subchapters 10.4 and 10.5, respectively.

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 subchapter for applicable jury instructions. The basic instructions set forth in Subchapters 10.1 and 10.2 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 in Subchapters 10.1 and 10.2 can be adjusted to reflect the protected trait at issue in the particular case.

No instructions have been provided for a claim of disparate impact under Title VII, although such an instruction has been provided for a disparate impact claim for age discrimination under the ADEA. *See* Instruction 11.4. For a detailed discussion of a disparate impact claim arising under the Fair Housing Act, *see Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (relying on cases interpreting Title VII and the ADEA).

In some cases when the employer is a public entity, the plaintiff also has the option of suing under 42 U.S.C. § 1983. However, the general elements of such a claim are the same as under Title VII. Accordingly, in addition to the essential elements of a 42 U.S.C. § 1983 claim, the court may wish to refer to the instructions in Subchapters 10.1 and 10.2 whenever the § 1983 claim is based on disparate treatment or harassment, respectively.

10.1A CIVIL RIGHTS—TITLE VII—DISPARATE TREATMENT—WHEN EVIDENCE SUPPORTS "SOLE REASON" OR "MOTIVATING FACTOR"

The plaintiff has brought a claim of employment discrimination against the defendant. The plaintiff claims that [his] [her] [[race] [color] [religion] [sex] [national origin]] was either the sole reason or a motivating factor for the defendant's decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff. The defendant denies that the plaintiff's [race] [color] [religion] [sex] [national origin] was either the sole reason or a motivating factor for the defendant's decision to [discharge] [not hire] [not promote] [demote] [*state other adverse action*] the plaintiff [and further claims the decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] the plaintiff was based on [a] lawful reason[s]].

Comment

Use this instruction and Instructions 10.1B (Disparate Treatment—"Sole Reason"—Elements and Burden of Proof) and 10.1C (Disparate Treatment—"Motivating Factor"—Elements and Burden of Proof) whenever the Title VII claim is based on disparate treatment.

For a definition of "adverse employment action" in disparate treatment cases, *see* Instruction 10.4A.2.

In *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856-57 (9th Cir.2002) (en banc), *aff'd,* 539 U.S. 90 (2003), the Ninth Circuit clarified the role of jury instructions on causation in Title VII cases. The court may provide either a "single motive" or "mixed motive" instruction. *Costa* explained that "mixed" and "single" motives are not two "fundamentally different" theories of liability. *Id.* 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.*; *see also* 42 U.S.C. § 2000e-3(a) (prohibiting discrimination "because of" protected activity). The choice of instruction will depend on the evidence offered at trial.

Thus, "[a]fter hearing both parties' evidence, the district court must decide what legal conclusions the evidence could reasonably support and instruct the jury accordingly." *Costa*, 299 F.3d 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. . . .

Id. at 856-57. A motivating factor is a factor that "played a part in the employment decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality opinion).

However, if the plaintiff prevails when the jury is given a mixed motive instruction, the defendant may be afforded an opportunity to prove "by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account." *Costa,* 299 F.3d at 848; *cf. Galdamez v. Potter*, 415 F.3d 1015, 1021 (9th Cir.2005) (holding that "same decision" instruction need only be given if requested by employer and supported by evidence at trial). If the defendant proves that it would have made the same decision in the absence of a discriminatory motive, the Civil Rights Act of 1991 limits the plaintiff's remedies to declaratory or injunctive relief, as well as attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B) (modifying *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). *See also Washington v. Garrett*, 10 F.3d 1421, 1432 n.15 (9th Cir.1993) (discussing development of "same decision" defense from *Price Waterhouse* through 1991 Act).

The judge should consider providing the jury with the following special verdict form to determine the jury's findings on the question of sole or mixed motive.

Special Verdict

1. Has the plaintiff proved by a preponderance of the evidence that the plaintiff's [race] [color] [religion] [sex] [national origin] was the sole reason for the defendant's decision to [*state adverse action*]?

_____ _____
Yes No

If the answer to Question No. 1 is "yes," proceed to Question No. 5. If the answer to Question No. 1 is "no," proceed to Question No. 2.

2. Has the plaintiff proved 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 [*state adverse action*]?

_____ _____
Yes No

If the answer to Question No. 2 is "no," do not answer any further questions on [*the plaintiff's claim of disparate treatment*]. If the answer to Question No. 2 is "yes," proceed to Question No.

[*if same decision affirmative defense applies:* 3] [*if same decision affirmative defense does not apply:* 5]

[*If "same decision" affirmative defense applies, add Question 3, and if appropriate, Question 4:]*

3. Has the defendant proved by a preponderance of the evidence that the defendant's decision to [*state adverse action*] was also motivated by a lawful reason?

_____ _____
Yes No

If your answer to Question No. 3 is "no," proceed to Question No. 5. If your answer to Question No. 3 is "yes," proceed to Question No. 4.

4. Has the defendant proved, 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. 4 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. 4 is "no", proceed to Question 5.

5. *[The judge should draft further special verdict questions to cover damages, including punitive damages if appropriate.]*

DATED: _____ _____
PRESIDING JUROR

10.1B CIVIL RIGHTS—TITLE VII—DISPARATE TREATMENT—"SOLE REASON"—ELEMENTS AND BURDEN OF PROOF

As to the plaintiff's claim that [his] [her] [[race] [color] [religion] [sex] [national origin]] was the sole reason for the defendant's decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] [him] [her], the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant; and

2. the plaintiff was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] solely because of the plaintiff's [race] [color] [religion] [sex] [national origin].

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

Comment

See Comment to Instruction 10.1A (Disparate Treatment—When Evidence Supports "Sole Reason" or "Motivating Factor")

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

10.1C CIVIL RIGHTS—TITLE VII—DISPARATE TREATMENT—"MOTIVATING FACTOR"—ELEMENTS AND BURDEN OF PROOF

As to the plaintiff's claim that [his] [her] [[race] [color] [religion] [sex] [national origin]] was a motivating factor for the defendant's decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] [him] [her], the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was [discharged] [not hired] [not promoted] [demoted] [*state other adverse action*] by the defendant; and

2. 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.

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

[*Or, if "same decision" affirmative defense applies, add the following, and omit the bracketed paragraph above*:]

[If you find that the plaintiff has failed to prove either of these elements, your verdict should be for the defendant. If the plaintiff has proved both of these elements, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason. If, however, the defendant proves by a preponderance of the evidence that the defendant would have made the same decision even if the plaintiff's [race] [color] [religion] [sex] [national origin] had played no role in the employment decision, your verdict should be for the defendant.]

Comment

See Comment to Instruction 10.1A (Disparate Treatment—When Evidence Supports "Sole Reason" or "Motivating Factor").

When an affirmative defense is asserted, this instruction should be accompanied by the appropriate affirmative defense instruction.

10.2 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 Indus. 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 10.2B (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 10.2C (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 when it ratifies or condones the conduct by failing to investigate and remedy it after learning of it. *See Galdamez v. Potter*, 415 F.3d 1015, 1022 (9th Cir.2005). Title VII prohibits discrimination against any individual and makes no distinction between managers and other employees; both are entitled to its protection. *See id.*

10.2A CIVIL RIGHTS—TITLE VII—HOSTILE WORK ENVIRONMENT—HARASSMENT BECAUSE OF PROTECTED CHARACTERISTICS—ELEMENTS

The plaintiff seeks damages against the defendant for a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment while employed by the defendant. In order to establish a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff 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*];

2. the conduct was unwelcome;

3. the conduct was sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create a [racially] [sexually] [*other Title VII protected characteristic*] abusive or hostile work environment;

4. the plaintiff perceived the working environment to be abusive or hostile; and

5. a reasonable [woman] [man] in the plaintiff'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 10.2B (Hostile Work Environment Caused by Supervisor—Claim Based on Vicarious Liability—Tangible Employment Action—Affirmative Defense); 10.2C (Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based On Negligence); and, if necessary, 10.4B ("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.

10.2B 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 claims that [he] [she] was subjected to a [racially] [sexually] [*other Title VII protected characteristic*] hostile work environment by _____, and that _____ was [his] [her] supervisor empowered by _____ to take tangible employment actions against the plaintiff.

The defendant denies the plaintiff's claim. The plaintiff must prove [his] [her] claim by a preponderance of the evidence.

[***If Ellerth/Faragher affirmative defense applies, add the following***:]

In addition to denying the plaintiff's claim, the defendant has asserted an affirmative defense. Before you consider this affirmative defense, you must first decide whether the plaintiff has proved by a preponderance of the evidence that [he] [she] suffered a tangible employment action as a result of harassment by the supervisor.

If you find that the plaintiff has proved that [he] [she] suffered a tangible employment action as a result of harassment by the supervisor, you must not consider the affirmative defense.

If the plaintiff has not proved that [he] [she] suffered a tangible employment action, then you must decide whether the defendant has proved by a preponderance of the evidence each of the following elements:

1. the defendant exercised reasonable care to prevent and promptly correct the [racially] [sexually] [*other Title VII protected characteristic*] harassing behavior, and

2. the plaintiff 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 proves these elements, the plaintiff is not entitled to prevail on this claim.

Comment

See Introductory Comment to this chapter. This instruction should be given in conjunction with Instruction 10.2A (Hostile Work Environment—Harassment Because of Protected Characteristics—Elements) and, if applicable, Instruction 10.4B (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,* 133 S. Ct. 2434 (2013), *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998), *Burlington Indus., 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.*, 133 S. Ct. 2434, 2439 (2013). For vicarious liability to attach the supervisor "must be empowered by the employer to take tangible employment actions against the plaintiff." *Id*. 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 10.2C (Hostile Work Environment Caused by Non-Immediate Supervisor or by Co-Worker—Claim Based on Negligence).

10.2C CIVIL RIGHTS—TITLE VII—HOSTILE WORK ENVIRONMENT CAUSED BY NON-IMMEDIATE SUPERVISOR OR BY CO-WORKER—CLAIM BASED ON NEGLIGENCE

The plaintiff seeks damages from the defendant for a hostile work environment caused by [sexual] [racial] [*other Title VII protected characteristic*] harassment. The plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the plaintiff was subjected to a [sexually] [racially] [*other Title VII protected characteristic*] hostile work environment by a [non-immediate supervisor] [co-worker]; and

2. the defendant or a member of the defendant'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 has proved both of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

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 10.2A (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). "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.

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.

10.3 CIVIL RIGHTS—TITLE VII—RETALIATION—ELEMENTS AND BURDEN OF PROOF

The plaintiff seeks damages against the defendant for retaliation. The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiff engaged in or was engaging in an activity protected under federal law, that is [*activity*];

2. the employer subjected the plaintiff to an adverse employment action, that is [*adverse employment action*]; and

3. the plaintiff was subjected to the adverse employment action because of [[his] [her]] [*participation in protected activity*].

A plaintiff is "subjected to an adverse employment action" because of [[his] [her]] [*participation in protected activity*] if the adverse employment action would not have occurred but for that participation.

If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

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).

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 10.4A.1.

In order 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 Silver v. KCA, Inc.*, 586 F.2d 138, 140-42 (9th Cir.1978) (holding that employee's opposition to a racially discriminatory act of a co-employee cannot be the basis for a retaliation action); *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 the warehouse personnel manager, on facts presented, constituted objections to discriminatory actions of the employer).

Only reasonable opposition to the employment practice is protected by Title VII. *See, e.g., Wrighten v. Metro. Hosps., Inc.*, 726 F.2d 1346, 1354-56 (9th Cir.1984); *Crown Zellerbach*, 720 F.2d at 1015.

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*, 133 S. Ct. 2517, 2534 (2013) (rejecting motivating factor test in retaliation claim).

10.4A 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).

10.4A.1 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.*, *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir.2013) (en banc) (involving 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) (involving denial of transfer); *Little v. Windermere Relocation, Inc.,* 301 F.3d 958, 970 (9th Cir.2002) (involving cut in monthly base salary); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 500-01, 506 (9th Cir.2000) (involving 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) (involving negative job reference); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 505 (9th Cir.1989) (involving layoff); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir.1987) (involving transfer of job duties and "undeserved" performance ratings); *Ruggles v. Cal. Poly. State Univ.*, 797 F.2d 782, 785 (9th Cir.1986) (involving failure to hire); *E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012 (9th Cir.1983) (involving 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) (involving "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) (involving ostracism by co-workers); *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1238-39 (9th Cir.1999) (involving refusal to hold job open beyond period dictated by company's leave policy), *amended by* 201 F.3d 1211; *Nunez v. City of L.A.*, 147 F.3d 867, 875 (9th

Cir.1998) (involving "badmouthing" of employee); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 919 (9th Cir.1996) (involving transfer with no effect on salary).

10.4A.2 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 10.4A ("Adverse Employment Action" Defined) and Comment to Instruction 10.4A.1 **(**"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) (finding 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 the 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 [the plaintiff's] employment").

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 10.4B ("Tangible Employment Action" Defined).

10.4B 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 10.2B (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.*, 133 S. Ct. 2434, 2443 (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.*

10.4C 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 a 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)).

10.5A CIVIL RIGHTS—TITLE VII—DEFENSE—BONA FIDE OCCUPATIONAL QUALIFICATION

The defendant contends that [religion] [sex] [national origin] is part of a bona fide occupational qualification. The defendant has the burden of proving both of the following elements by a preponderance of the evidence:

1. that the occupational qualification is reasonably necessary to the normal operation of the defendant's business or enterprise; and

2. [that the defendant 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 has proved [his] [her] claim[s], your verdict should be for the plaintiff, unless you find that the defendant has proved this defense, in which event your verdict should be for the defendant.

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) (finding 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).

10.5B CIVIL RIGHTS—TITLE VII—DEFENSE—BONA FIDE SENIORITY SYSTEM

The defendant contends that the treatment of the plaintiff was based on a bona fide seniority system. The defendant has the burden of proving both of the following elements by a preponderance of the evidence:

1. the seniority system had legitimate goals and was not designed to discriminate on the basis of [race] [color] [religion] [sex] [national origin]; and

2. 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 has proved [his] [her] claim[s], your verdict should be for the plaintiff, unless you find that the defendant has proved this defense, in which event your verdict should be for the defendant.

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); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1046 n.7 (7th Cir.1996) ("A 'bona fide' seniority system is one that was created for legitimate purposes, rather than for the purpose of discrimination."). 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.").

10.5C CIVIL RIGHTS—TITLE VII—DEFENSE—AFTER-ACQUIRED EVIDENCE

The defendant contends that the defendant would have made the same decision to [discharge] [not hire] [not promote] [demote] the plaintiff because [*describe the after-discovered misconduct*]. If the defendant proves by a preponderance of the evidence that the defendant could have made the same decision and [would have discharged] [would not have hired] [would not have promoted] [would have demoted] the plaintiff 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 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 10.1C (Disparate Treatment—"Motivating Factor"—Elements and Burden of Proof). 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 10.1C, 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 as set forth in the Comment to Instruction 10.1A (Disparate Treatment—When Evidence Supports "Sole Reason" or "Motivating Factor"). 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 as set forth in the above instruction.

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 Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1157 (9th Cir.2001).

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)
11.6A Age Discrimination—Defenses—Bona Fide Occupational Qualification (Comment only)
11.6B Age Discrimination—Defenses—Bona Fide Seniority System
11.6C Age Discrimination—Defenses—After-Acquired Evidence (Comment only)
11.6D Age Discrimination—Defenses—Bona Fide Employee Benefit Plan
11.6E Age Discrimination—Defenses—Reasonable Factor Other Than Age
11.7 Age Discrimination—Damages (Comment only)
11.7A Age Discrimination—Damages—Back Pay—Mitigation
11.7B Age Discrimination—Damages—Willful Discrimination—Liquidated Damages

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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.

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); 11.6A (Age Discrimination—Defenses—Bona Fide Occupational Qualification); 11.6B (Age Discrimination—Defenses—Bona Fide Seniority System); and 11.6C (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 Financial 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 . . . ."); *O'Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 763 (9th Cir.1996) ("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, in order 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 11.6D (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 11.6B (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 11.6E (Age Discrimination—Defenses—Reasonable Factor Other than Age).

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 11.7A (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 Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1318 (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 11.7A (Age Discrimination—Damages—Back Pay—Mitigation), and 11.7B (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).

11.1 AGE DISCRIMINATION—DISPARATE TREATMENT—ELEMENTS AND BURDEN OF PROOF

The plaintiff has brought a claim of employment discrimination against the defendant. The plaintiff asserts the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age. The defendant denies that the plaintiff was [discharged] [specify other adverse action] because of [his] [her] age [[and further asserts the decision to [discharge] [*specify other adverse action*] the plaintiff was based on [a] lawful reason[s]].

In order to prevail on this claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the defendant [discharged] [*specify other adverse action*] the plaintiff;

2. the plaintiff was 40 years of age or older at the time [he] [she] was [discharged] [*specify other adverse action*]; and

3. the defendant [discharged] [*specify other adverse action*] the plaintiff because of [his] [her] age, that is, the defendant would not have [discharged] [*specify other adverse action*] the plaintiff but for [his] [her] age.

If you find that the plaintiff has proved all three of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

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*, 133 S. Ct. 2517, 2527 (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).

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) ("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 10.2, 10.2A, 10.2B, and 10.2C) 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 10.3 (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 seeks damages based on age discrimination in violation of federal law. The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiff was 40 years of age or older at the time the plaintiff was [[discharged] [not hired] [not promoted] [demoted] [*state other adverse action*]];

2. the defendant 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

3. the defendant's [test] [requirement] [practice] [selection criterion] resulted in the plaintiff being [[discharged] [not hired] [not promoted] [demoted] [*state other adverse action*]].

If you find that the plaintiff has proved all of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove all of these elements, your verdict should be for the defendant.

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). 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 a detailed discussion of a disparate impact claim arising under the Fair Housing Act, *see Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015) (relying on cases interpreting Title VII and the ADEA).

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." *Smith*, 544 U.S. 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.

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 10.4A.1 ("Adverse Employment Action" in Retaliation Cases), 10.4A.2 ("Adverse Employment Action" in Disparate Treatment Cases), 10.4B ("Tangible Employment Action" Defined), and 10.4C ("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 11.6A.

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 11.6B.

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 11.6C.

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 11.6D.

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 11.6E.

11.6A 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 10.5A) with appropriate modification. *See also* Comment to Instruction 10.5A (Civil Rights—Title VII—Defense—Bona Fide Occupational Qualification).

11.6B AGE DISCRIMINATION—DEFENSES–BONA FIDE SENIORITY SYSTEM

The defendant contends that its treatment of the plaintiff was based on a bona fide seniority system. The defendant has the burden of proving each of the following elements by a preponderance of the evidence:

1. the seniority system had legitimate goals and was not designed to discriminate on the basis of age;

2. 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]

[3. the seniority system did not place the plaintiff in a position in which a reasonable person in that position would believe that [he] [she] had no choice but to retire.]

If you find that the plaintiff has proved [his] [her] 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, unless you find that the defendant has proved this defense, in which event your verdict should be for the defendant.

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 10.5B (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.").

11.6C 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 10.5C (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 10.5C.

11.6D AGE DISCRIMINATION—DEFENSES—BONA FIDE EMPLOYEE BENEFIT PLAN

The defendant contends that any age-related disparate treatment afforded to the plaintiff resulted from the plaintiff's participation in a bona fide employee benefit plan. "Disparate" means "different." The defendant has the burden of proving each of the following elements by a preponderance of the evidence:

1. [*describe the alleged discriminatory action*] occurred as part of the defendant's policy of providing its workers with nonwage benefits under an employee benefit plan;

2. the benefit plan was bona fide, that is, it existed and provided for and paid benefits to employees;

3. the defendant was actually following the plan at the time it is alleged to [*describe the alleged discriminatory action*]; [and]

[4. the defendant's employee benefit plan did not place the plaintiff in a position where a reasonable person in that position would believe that [he] [she] had no choice but to retire; and]

[4] [5] [*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 has proved [his] [her] claim[s], your verdict should be for the plaintiff, unless you find that the defendant has proved all [four] [five] elements of this defense, in which event your verdict should be for the defendant.

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. 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).

11.6E AGE DISCRIMINATION—DEFENSES—REASONABLE FACTOR OTHER THAN AGE

The defendant contends that its [test] [requirement] [practice] [selection criterion] is based on a reasonable factor other than the plaintiff's age. The defendant has the burden of proving the following elements by a preponderance of the evidence:

1. the [test] [requirement] [practice] [selection criterion] is based on a factor other than the age of [the plaintiff] [those similarly situated];

2. [*insert justification for factor*] is a legitimate interest of the defendant's business; and

3. the [test] [requirement] [practice] [selection criterion] is reasonably related to achieving [*insert justification for factor*].

If you find that the plaintiff has proved [his] [her] claim[s], your verdict should be for the plaintiff, unless you find that the defendant has proved this defense, in which event your verdict should be for the defendant.

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 a 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 a “reasonable factor other than age” when it “respond[s] to the [employer’s] legitimate goal”).

11.7 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).

11.7A AGE DISCRIMINATION—DAMAGES—BACK PAY—MITIGATION

If you find for the plaintiff [on the plaintiff's ADEA claim], you must determine the plaintiff'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. 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 [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement]]. The plaintiff 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 has a duty to undertake reasonable measures to minimize [his] [her] damages and the defendant is not required to compensate the plaintiff for avoidable damages. Thus, your award of back pay should be reduced by the amount of damages that the plaintiff actually avoided, or could have avoided, if [he] [she] had made reasonable efforts. The defendant 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 proved that the plaintiff received from other employment from the date the defendant [discharged] [failed to hire] [failed to promote] [demoted] [*state other adverse employment action*] the plaintiff to the [date of trial] [date the plaintiff [declined] [accepted] reinstatement].

[b. You must deduct any severance pay [and pension benefits] that the defendant proved the plaintiff received after the discharge.]

[b.] [c.] If the defendant proves by a preponderance of the evidence either:

(i) that the plaintiff unjustifiably failed to take a new job of like kind, status, and pay which was available to plaintiff, or

(ii) that the plaintiff 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 could have obtained such new job [or should have obtained from such new job, had [he] [she] made

reasonable efforts to find such new job] to the [date of trial] [date the plaintiff [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 for the loss of future [wages] [pay] [and employee benefits] that have been caused by the defendant's discriminatory act. You should award front pay to the plaintiff to compensate for these losses. The plaintiff 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 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 to obtain such a job if [he] [she] makes a reasonable effort. The defendant 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.

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"); *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'" in order 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 the 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. *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 11.7B (Age Discrimination—Damages—Willful Discrimination—Liquidated Damages).

11.7B AGE DISCRIMINATION—DAMAGES—WILLFUL DISCRIMINATION—LIQUIDATED DAMAGES

If you find that the plaintiff is entitled to recover back pay, you must also determine if the defendant's conduct was willful. The plaintiff 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 L.A.*, 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—Elements
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12.11 ADA—Defenses—Direct Threat
12.12 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), *cert. denied*, 135 S. Ct. 1500 (2015). The jury instructions in this chapter are consistent with the ADAA. Accordingly, if a trial involves misconduct that occurred before January 1, 2009, the court must modify the instructions to reflect prior legal standards. The ADAA 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. *Id.* § 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 are intended to cover employment claims under the ADA. The instructions cover both a claim of discrimination based on disability and a claim based on retaliation for opposing unlawful discrimination or participating in an investigation or proceeding under the ADA. "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 question of how § 12112(b)(6) applies to disparate impact claim).

In *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002), the Supreme Court sanctioned expansion of the business necessity defense based on EEOC regulations. The issue in *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 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 the "direct threat" affirmative defense factors as set forth in the EEOC regulations to an analysis of qualification standards).

A plaintiff's remedies in employment actions under the ADA are the same remedies available under Title VII governing employment discrimination. 42 U.S.C. § 12117(a). *See* the Introductory Comment to Chapter 10 ("Civil Rights—Title VI—Employment Discrimination; Harassment; Retaliation") for a summary of available remedies under Title VII.

The committee recommends that Chapter 10 be consulted when there arises a need 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.

12.1 ADA EMPLOYMENT ACTIONS—ELEMENTS

As to the plaintiff's claim that [his] [her] disability was the reason for the defendant's decision to [[discharge] [not hire] [not promote] [demote] [*state other adverse action*]] [him] [her], the plaintiff has the burden of proving the following evidence by a preponderance of the evidence:

1. the plaintiff has a disability as that term is defined later in these instructions;

2. the plaintiff was a qualified individual as that term is defined later in these instructions; and

3. the plaintiff was [[discharged] [not hired] [not promoted] [demoted] [*state other adverse action*]] because of the plaintiff's disability.

If you find that plaintiff has proved all of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

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 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 with the meaning of the ADA. *Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir.1996) (holding that while alcoholism is "disability" under ADA, employee's arrest for criminal assault while intoxicated was nondiscriminatory reason for termination).

In *Raytheon v. Hernandez*, 540 U.S. 44 (2003), the Supreme Court addressed an employer 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). In *Head v. Glacier Northwest, Inc.*, 413 F.3d 1053 (9th Cir.2005), the Ninth Circuit relied on Title VII precedent to establish a "motivating factor" standard for causation under the ADA. *Id.* at 1065-66. However, more recently, the Supreme Court addressed the causation

standard applicable to Age Discrimination in Employment Act (ADEA) claims in *Gross v. FBL Financial Servs.*, 557 U.S. 167 (2009). The ADEA prohibits an employer from discriminating against any individual "because of such individual's age." 29 U.S.C. § 623(a)(1). The Supreme Court declined to apply Title VII's motivating factor test. The Court noted that 1991 amendments to Title VII, but not to the ADEA, provided that discrimination is established when a plaintiff shows the protected status was "a motivating factor" for the adverse employment action. Therefore, 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.

As with the ADEA, the 1991 "motivating factor" amendments to Title VII were not made to the ADA. The Ninth Circuit has not addressed the impact of *Gross* on the ADA. Two other circuits have concluded that the motivating factor test does not apply after *Gross*. *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 318 (6th Cir.2012); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 961-62 (7th Cir.2010).

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*, 133 S. Ct. 2517, 2534 (2013). The Court found 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*. 133 S. Ct. at 2528; *see also Burrage v. United States*, 134 S. Ct. 881, 887-889 (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).

12.2 ADA—PHYSICAL OR MENTAL IMPAIRMENT

As you have been instructed, 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]].

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

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).

Major life activites 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).

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 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 substantially limits brain function, cancer substantially

limits normal cell growth, diabetes substantially limits endocrine function, and HIV 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 FMLA and Washington Law Against Discrimination by plaintiff terminated after engaging in profanity-laced outburst allegedly caused by bipolar disorder, Ninth Circuit held it was error to refuse instruction stating that conduct resulting from disability is part of disability and not 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. *Id.* at 944 (analyzing case brought under Oregon disability law and interpreting consistently with ADA). *See,* as to the defenses of business necessity and direct threat, respectively, Instruction 12.10 (ADA—Defenses—Business Necessity) and Instruction 12.11 (ADA—Defenses—Direct Threat).

12.3 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] 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 in order to be considered substantially limiting. Factors 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) (holding that ADAA relaxed standard for determining whether 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.

12.4 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] 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 in order to be considered substantially limiting.

Difficulty getting along with others is not enough. A plaintiff must show that [his] [her] 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 language of the 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).

12.5 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, 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 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, for example, if law firm requires incoming lawyers to have graduated from accredited law school and passed bar examination, law firm need not provide accommodation to disabled individual who does not meet 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 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 is affected by 42 U.S.C. § 12112(b)(6), governing selection criteria that tends to screen out individuals with disability). *See also Mayo v. PCC Structurals, Inc.*, 795 F.3d 941, 944 (9th Cir.2015) (holding that under Oregon disability law, interpreted consistently with ADA, employee who makes serious and credible threats to kill coworkers is not qualified individual regardless of whether threats stem from mental illness; ADA regulations do not require employer to analyze separately whether employee poses direct threat to health or safety of others in workplace under 42 U.S.C. § 12113).

"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).

12.6 ADA—ABILITY TO PERFORM ESSENTIAL FUNCTIONS—FACTORS

An essential function of an employment position means the fundamental job duties of the employment position 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] 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 that hold similar positions].

Comment

The second paragraph is based upon 42 U.S.C. § 12111(8). The term "marginal functions" in the first paragraph and the factors in the third paragraph are set forth in 29 C.F.R. § 1630.2(n) (1999). *See Dark v. Curry Cnty.*, 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).

"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 an employer had no duty to accommodate a deputy marshal when it was undisputed 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 particular 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)."

12.7 ADA—REASONABLE ACCOMMODATION

To establish the defendant's duty to provide a reasonable accommodation, the plaintiff must prove, by a preponderance of the evidence, both of the following elements:

[1. the plaintiff requested of the defendant an accommodation due to a disability.]

or

[1. the defendant knew, or had reason to know that:
(a) the plaintiff has a disability;
(b) the plaintiff was experiencing workplace problems because of the disability; and
(c) the disability prevented the plaintiff from requesting a reasonable accommodation.]

and

2. the defendant could have made a reasonable accommodation that would have enabled the plaintiff 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 [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 subject 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

The bracketed language as to special circumstances at the end of the instruction has been added as a result of language in *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 interactive process is mandatory, not permissive, duty of employer and employer has duty to initiate interactive process in some circumstances), *vacated on other grounds*, 535 U.S. 391 (2002).

In *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Supreme Court dealt with the question of how a requested accommodation (reassignment from the position of cargo handler to that of mailroom worker) should be reconciled when the request conflicts with a seniority system. The Supreme Court recognized that while ordinarily a proposed accommodation that would otherwise be reasonable becomes unreasonable when in conflict with a seniority system, an employee should have an opportunity to establish any special circumstances that may constitute an exception to the general rule. *See also Willis v. Pacific Maritime Ass'n.*, 236 F.3d 1160 (9th Cir.2001), *amended by* 244 F.3d 675, 679 (9th Cir.2001) (holding that employee's proposed accommodation was per se unreasonable because it directly conflicted with bona fide senority system established under collective bargaining agreement).

In *PGA Tour v. Martin*, 532 U.S. 661 (2001), the Supreme Court ruled that 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." *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243,

1247 (9th Cir.1999). 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)." *Dark v. Curry Cnty.*, 451 F.3d 1078, 1090 (9th Cir.2006). In those jobs for which performance requires attendance at the job, "irregular attendance compromises essential job functions." *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233, 1237-40 (9th Cir.2012) (holding that accommodation that would allow neo-natal intensive care unit nurse to miss work whenever she felt she needed to and for so long as she felt she needed was unreasonable).

The Ninth Circuit, in *Josephs v. Pacific Bell*, 443 F.3d 1050, 1060 (9th Cir.2006), joined several other circuits in expressly recognizing 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).

12.8 ADA—UNDUE HARDSHIP

A defendant is not required to provide an accommodation that will impose an undue hardship on the operation of the defendant's business.

The term undue hardship means an action requiring significant difficulty or expense. It takes into account 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 to be considered 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

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).

12.9 ADA—RETALIATION

It is unlawful for a person or entity to discriminate against any individual because that individual has opposed any act or practice that he or she reasonably believes to be unlawful under the ADA or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the ADA.

Disability is not an element of a retaliation action under the ADA.

For the plaintiff to establish retaliation in violation of the ADA, the plaintiff must prove the following elements by a preponderance of evidence:

1. the plaintiff [engaged] [was engaging] in conduct protected under the ADA;

2. the plaintiff was subjected to an adverse employment action at the time, or after, the protected conduct occurred;

3. the defendant [*specify adverse action*] the plaintiff because of [his] [her] conduct protected under the ADA.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

The Ninth Circuit applies the Title VII framework for retaliation claims. *Barnett v. U. S. Air, Inc.*, 228 F.3d 1105, 1121 (9th Cir.2000) (en banc) (adopting test and stating elements), *vacated on other grounds*, 535 U.S. 391 (2002). *See* Instruction 10.4A.2 (Civil Rights—Title VII—"Adverse Employment Action" in Disparate Treatment Cases). *See also Burlington No. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (holding that under anti-retaliation provision of Title VII, plaintiff must show that reasonable employee would have found challenged action materially adverse, which in this context means it might have "dissuaded a reasonable worker from making or supporting a charge of discrimination.")

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 Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013). The Court found that the "because" language in the anti-retaliation provision (42 U.S.C. § 2000e-3(a)) lacked any meaningful textual difference from the analogous statutory provision in the ADEA at issue in *Gross v. FBL Financial Services*, 557 U.S. 167, 180 (2009). *Nassar*, 133 S. Ct. at 2528. The Ninth Circuit has applied *Nassar* to ADA retaliation claims. *T.B. v. San Diego Unified Sch. Dist.*, 795 F.3d 1067, 1088 (9th Cir.2015).

Plaintiff's reasonable belief that the action opposed is unlawful is sufficient to allow a retaliation claim. *See Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir.1994) (involving Title VII claim).

See 29 C.F.R. § 1630.12(a) (1999) (explaining retaliation and coercions); 42 U.S.C. § 12203(a) (defining retaliation).

Because 42 U.S.C. § 12203(a) applies to "any individual," the plaintiff need not prove disability within the meaning of the ADA to sustain a retaliation claim under the ADA. *Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 827-28 (9th Cir.2009). The "ministerial exception" precludes application of § 12203(a) to the employment relationship between a religious institution and its ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705 (2012).

12.10 ADA—DEFENSES—BUSINESS NECESSITY

Business necessity is a defense to a claim of discrimination under the ADA.

If you find that the defendant's application of standards, criteria, or policies have [the effect of screening out or otherwise denying a job or benefit to individuals with plaintiff's disability] [a disparate impact on individuals with plaintiff's disability], the defendant must prove, by a preponderance of the evidence, that the standard, criterion, or policy:

1. is uniformly applied;

2. is job-related;

3. is consistent with business necessity; and

4. cannot be met by a person with plaintiff's disability even with a reasonable accommodation.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendant has proved this affirmative defense, in which event your verdict should be for the defendant.

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 (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).

12.11 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]] 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]] that could not be eliminated by a reasonable accommodation.

Factors that may be considered in determining whether an individual poses a direct threat to the health and safety of [[others] [himself] [herself]] 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 has the burden of proof has been proved, your verdict should be for the plaintiff, unless you also find that the defendant has proved this affirmative defense, in which event your verdict should be for the defendant.

Comment

See 42 U.S.C. §§ 12111(3) (defining direct threat), 12113(b) (providing that qualification standard can include condition that a person not pose direct threat); *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987) (addressing claim under Rehabilitation Act and providing criteria for what is considered 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; *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 does apply 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 availability of "direct threat" defense when toxins at oil refinery would exacerbate plaintiff's liver condition).

12.12 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 persons alleging employment discrimination on basis of disability).

See 42 U.S.C. § 1981a(2) (providing for recovery of compensatory and punitive damages against defendant who violates § 102(b)(5) of ADA (42 U.S.C. § 12112(b)(5)) by failing to make reasonable accommodation). Punitive damages are not available against a public entity in suits brought under 42 U.S.C. § 12132. *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

See 42 U.S.C. § 1981a(b)(3) (limiting amount of damages recoverable, based on defendant's employee base).

See 42 U.S.C. § 1981a(c)(2) (requiring that limits on damages not be disclosed to jury. Limits do not apply to back pay or front pay, which is awarded under 42 U.S.C. § 2000e–5(g)(1), not 42 U.S.C. § 1981a). *See also Pollard v. E.I. du Pont de Nemours & Company*, 532 U.S. 843 (2001).

There is a significant question whether back pay and front pay are questions for the jury or the court.

See also the Introductory Comment to Chapter 10 ("Civil Rights—Title V—Employment Discrimination; Harassment; Retaliation") and the Introductory Comment to this chapter.

13. LABOR (INCLUDING FAIR REPRESENTATION)

Instruction

13.1 Employee Claim Against Union And/or Employer—Labor Management Relations Act (LMRA) § 301
13.2 LMRA § 301—Damages

13.1 EMPLOYEE CLAIM AGAINST UNION AND/OR EMPLOYER—LABOR MANAGEMENT RELATIONS ACT (LMRA) § 301 (29 U.S.C. § 185)

In order to prevail, the plaintiff must prove each of the following by a preponderance of the evidence:

1. that the plaintiff was discharged from employment by the employer;

2. that such discharge was without "just cause"; and

3. that the union breached its duty to fairly represent the plaintiff's interests under the collective bargaining agreement.

The plaintiff must prove all three of the above whether [he] [she] is suing the union, the employer, or both. In this case, the plaintiff is suing [[the union] [the employer] [both the union and the employer]].

If you find that the plaintiff has proved each of the elements on which the plaintiff has the burden of proof, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

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 where 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 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. *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (explaining that most collective bargaining agreements accord finality to grievance procedures established by 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. *Id.* at 563; *see also Hines v. Anchor Motor Freight*, 424 U.S. 554, 564 (1976) (holding that union is always subject to complete good faith and honesty of purpose in exercise of discretion); *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

A union is not liable for merely negligent conduct. *See U.S. Steelworkers of Am. v. Rawson*, 495 U.S. 362, 372-73 (1990); *Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir.2000). Breach of the duty of fair representation occurs only when a union's conduct is arbitrary, discriminatory, or in bad faith. *See id.* For example, "[a] union breaches its [duty of fair representation] if it ignores a meritorious grievance or processes it in a perfunctory manner." *Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir.1995) (citing *Vaca*, 386 U.S. at 191).

A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be 'irrational.'" *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). *See also Conkle*, 73 F.3d at 915-16 (holding that union's decision is arbitrary if it lacks rational basis); *Johnson v. U.S. Postal Serv.*, 756 F.2d 1461, 1465 (9th Cir.1985) (holding that reckless disregard may constitute arbitrary conduct); *Tenorio v. NLRB*, 680 F.2d 598, 601 (9th Cir.1982) (defining arbitrary as "egregious disregard for the right of union members").

To establish that a union acted in "bad faith," a plaintiff must provide "substantial evidence of fraud, deceitful action, or dishonest conduct," *Humphrey v. Moore,* 375 U.S. 335, 348 (1964), or evidence that the union was motivated by personal animus toward the plaintiff. *See Conkle*, 73 F.3d at 916 (including personal animus as basis for finding of bad faith).

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.

[*Here 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.").

Where a union affirmatively causes the employer to breach the collective bargaining agreement, or where 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 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. *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir.1983) (holding that attorneys' fees are in fact compensatory damages for breach of duty to represent). 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).

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 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?

_____ _____
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

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, 2015), 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*).

15. TRADEMARK

Instruction

15.0 Preliminary Instruction—Trademark
15.1 Definition—Trademark
15.2 Definition—Trade Dress
15.3 Definition—Trade Name/Commercial Name
15.4 Trademark Liability—Theories and Policies
15.5 Infringement—Elements and Burden of Proof—Trademark
15.6 Infringement—Elements and Burden of Proof—Trade Dress
15.7 Infringement—Elements—Presumed Validity and Ownership—Registered Trademark
15.8 Infringement—Elements—Validity—Unregistered Marks
15.9 Infringement—Elements—Validity—Unregistered Marks—Distinctiveness
15.10 Infringement—Elements—Validity—Distinctiveness—Secondary Meaning
15.11 Infringement—Elements—Validity—Trade Dress—Non–Functionality Requirement
15.12 Infringement—Elements—Ownership—Generally
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15.13 Trademark Ownership—Assignee
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15.15 Trademark Ownership—Merchant or Distributor
15.16 Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test
15.17 Infringement—Likelihood of Confusion—Factor—Strength [Distinctiveness] of Trademark
15.18 Derivative Liability—Inducing Infringement
15.19 Derivative Liability—Contributory Infringement
15.20 Defenses—Abandonment—Affirmative Defense—Defendant's Burden of Proof
15.21 Defenses—Continuous Prior Use Within Remote Geographic Area—Affirmative Defense
15.22 Defenses—"Classic" Fair Use
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15.24 Trademark Damages—Actual or Statutory Notice
15.25 Trademark Damages—Plaintiff's Actual Damages
15.25A Trademark Damages—Plaintiff's Statutory Damages
15.26 Trademark Damages—Defendant's Profits
15.27 Trademark Damages—Intentional Infringement (withdrawn)
15.28 Trademark Dilution
15.29 Anti-Cybersquatting

15.0 PRELIMINARY INSTRUCTION—TRADEMARK

The plaintiff, [*name of plaintiff*], seeks damages against the defendant, [*name of defendant*], for [trademark infringement] [unfair competition]. The defendant 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 of plaintiff*], contends that the defendant, [*name of defendant*], has infringed the plaintiff's trademark. The plaintiff has the burden of proving by a preponderance of the evidence that the plaintiff is the owner of a valid trademark and that the defendant 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's trademark.

[THE DEFENDANT'S BURDEN OF PROOF]

[The defendant contends that [the [registered] trademark is invalid] [,] [the trademark has been abandoned] [or] [*insert other affirmative defense*]. The defendant 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*].]

[_____ is a person as that term is used in these instructions.]

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,” or “collective mark" or “certification mark” may be substituted.

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 corporation is a person. *See* Instruction 4.2 (Liability of Corporations–Scope of Authority Not In Issue).

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.

Additional useful references include: (1) American Bar Association, Section of Litigation, *Model Jury Instructions: Copyright, Trademark and Trade Dress Litigation*, Chapter Two, “Trademark” (2008); and (2) American Bar Association, Section of Litigation, *Model Jury Instructions: Business Torts Litigation*, Chapter Four, “Confusion of Source” (4th ed. 2005).

15.1 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].

[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. New America Pub., Inc.*, 971 F.2d 302, 306 (9th Cir.1992). For instructions on other trade devices protected by trademark law, *see* Instruction 15.2 (Definition—Trade Dress) and Instruction 15.3 (Definition—Trade Name/Commercial Name).

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 Communications Inc. v. West Coast Entertainment 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 Products 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:

<u>Service Mark Cases</u>

When a service mark is at issue, 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 . . . ." *American Int'l Group v. American 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.]

15.2 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 or service to the market, its manner of display.

A person who uses the trade dress of another may be liable for damages.

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 15.11 (Infringement–Elements–Validity–Trade Dress–Non-Functionality Requirement). *See also* Instruction 15.6 (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 Brothers, 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. Marketing 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, TRADEMARKS AND UNFAIR COMPETITION § 8:1 (4th ed. 2015).

Depending on the particular good or service to which the trade dress at issues applies, the instruction should be modified as indicated below:

<u>Product Packaging Cases</u>

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. v. Taco Cabana, Inc.*, 505 U.S. 763, 764-65 (1992) (noting that trade dress may include "even particular sales techniques."); *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 841-42 (9th Cir.1987). 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. v. Two Pesos, Inc., 932 F.2d 1113 (5th Cir.1991), *aff'd*, 505 U.S. 763 (1992); *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1258-59 (9th Cir.2001) (providing definition of trade dress).

15.3 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.

[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 trademark is 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 Services, 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).

15.4 TRADEMARK LIABILITY—THEORIES AND POLICIES (15 U.S.C. §§ 1114(1), 1125(a))

The 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 my instructions, I will identify types of facts you are to consider in deciding if the defendant is liable to the plaintiff for violating the 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] [;] [and]

[5. false advertising, by making a false statement that was material and that tended to deceive consumers, injuring the plaintiff in the market].

Comment

"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 Productions*, 353 F.3d 792, 806-07 (9th Cir.2003) ("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 West Corp. v. NYM Co. of California, Inc.*, 595 F.2d 1194, 1201 (9th Cir.1997).

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").

15.5 INFRINGEMENT—ELEMENTS AND BURDEN OF PROOF—TRADEMARK (15 U.S.C. § 1114(1))

On the plaintiff's claim for trademark infringement, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. [*describe the plaintiff's symbol or term*] is a valid, protectable trademark;

2. the plaintiff owns [*describe the plaintiff's symbol or term*] as a trademark; and

3. the defendant 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 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 has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

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. 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 Systems Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir.2015). The second bracketed phrase in the third numbered element 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 third numbered element may be modified to make reference to 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).

Consult the following instructions in order to explain the elements identified by this instruction: Instruction 15.7 (Infringement—Elements–Presumed Validity and Ownership–

Registered Trademark) Instruction 15.12 (Infringement—Elements–Ownership–Generally); Instruction 15.16 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test).

The statute requires that the mark be either (1) used in commerce or (2) placed on goods intended to be used in commerce. 15 U.S.C. § 1114(1). Because the "commerce" requirement is jurisdictional, that element need not go to the jury.

"It is not necessary for plaintiff in a trademark or unfair competition case to prove any past or present actual damages since one of the major benefits of injunctive relief is

that it can be obtained prior to actual damage so as to prevent that damage from occurring." 5 THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 30:2 (4th ed. 2015).

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 Communications, Inc., v. West Coast Entertainment 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).

15.6 INFRINGEMENT—ELEMENTS AND BURDEN OF PROOF—TRADE DRESS (15 U.S.C. § 1125(a)(1))

On the plaintiff's claim for trade dress infringement, the plaintiff has the burden of proving by a preponderance of the evidence each of the following elements:

1. [*describe the plaintiff's trade dress*] is distinctive;

2. the plaintiff owns [*describe the plaintiff's trade dress*] as trade dress;

3. the [*describe the plaintiff's trade dress*] is nonfunctional; and

4. the defendant used [*describe trade dress used by the defendant*] [trade dress similar to *[describe the plaintiff's trade dress]*] without the consent of the plaintiff 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 has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

To provide the jury further guidance on the first element of this instruction (distinctiveness), use Instruction 15.8 (Infringement—Elements—Validity–Unregistered Marks), Instruction 15.9 (Infringement–Elements—Validity—Unregistered Marks—Distinctiveness) (*see* the Comment to that instruction on Modifications for Trade Dress cases), and 15.10 (Infringement—Elements—Validity–Distinctiveness—Secondary Meaning). If the trade dress is registered, use Instruction 15.7 (Infringement—Elements—Presumed Validity and Ownership—Registered Trademark). For an instruction providing guidance on the third element of this instruction, *see* Instruction 15.11 (Infringement—Elements—Validity—Trade Dress—Non–Functionality Requirement). For an instruction covering the fourth element of this instruction, *see* Instruction 15.16 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test).

Mattel, Inc. v. Walking Mountain Productions, 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. South 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").

"It is not necessary for plaintiff in a trademark or unfair competition case to prove any past or present actual damages since one of the major benefits of injunctive relief is that it can be obtained prior to actual damage so as to prevent that damage from occurring." 5 THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 30:2 (4th ed. 2015).

15.7 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., 15.5*] that requires the plaintiff 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 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 submitted evidence to dispute these recitals. The defendant 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 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]]. However, if the defendant 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., 15.5*].

Comment

This instruction is for use when the plaintiff relies on registration of the mark to show two elements of the plaintiff's burden: ownership and validity. *See* Instruction 15.5 (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 to the instruction should be made as indicated in the supplementary section of these comments, below. Under the Lanham Act, the evidentiary effect of registration varies depending upon how long the mark has been registered and whether the defendant disputes that registration. The instruction refers to the court's instruction to the jury that sets out the elements of infringement, Instruction 15.5 (Infringement–Elements and Burden of Proof–Trademark). The number that the court assigned to that instruction should be inserted in the first and last paragraphs of this instruction. 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 Work Ltd. v. RMC Intern., Ltd.,* 96 F.3d 1217, 1219-20 (9th Cir.1996) (noting that registrant is granted a 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 Enterprises, Inc.*, 644 F.2d 769, 775-76 (9th Cir.1981) (noting that presumption of validity of a registered mark must be overcome by a 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).

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 "incontestible" 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 incontestible, subject to certain defenses. *Brookfield Communications Inc. v. West Coast Entertainment 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 Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352,1354-55 (9th Cir.1985) (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., 15.5*].]

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 15.13 (Trademark Ownership—Assignee), 15.14 (Trademark Ownership—Licensee); 15.15 (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). The "validity and legal protectability, as well as [registrant's] ownership therein, are all conclusively presumed," when a mark's registration becomes incontestable, subject to certain defenses. *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1046-47 n.10 (9th Cir.1999). 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, TRADEMARKS AND UNFAIR COMPETITION § 32:147 (4th ed. 2015). 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, TRADEMARKS AND UNFAIR COMPETITION

§ 32:149 (4th ed. 2015).

Incontestability Exceptions and Defenses: If one of the exceptions to incontestible 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, TRADEMARKS AND UNFAIR COMPETITION § 32:153 (4th ed. 2015). 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.

Many of the "exceptions are a 'restatement' or 'partial codification' of traditional common law defenses to an unregistered mark." MCCARTHY, § 32:149. Accordingly, in many instances the jury can be instructed simply to find for defendant on the infringement claim if the exception to incontestability is found by a preponderance of the evidence.

Contestable Marks: 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. *See* 15 U.S.C. §§ 1057(b) & 1115(a). *See also Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352,1354-55 (9th Cir.1985) (noting that registration constitutes prima facie evidence). 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. v. J. Young Enterprises, Inc.*, 644 F.2d 769, 775 (9th Cir.1981). *See also 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

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 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 subsequent to 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 is able to 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 Incontestible 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., 15.5*], 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 subsequent to 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.

15.8 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., 15.5*] 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., 15.10*].

Comment

This instruction refers to the court's instruction to the jury that sets out the elements of infringement, e.g., an instruction similar to Instruction 15.5 (Infringement—Elements and Burden of Proof—Trademark) and distinctiveness and secondary meaning, e.g., an instruction similar to Instruction 15.10 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). The number that the court assigned to that instruction should be inserted in the first and last paragraphs of this instruction.

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).

See also Instruction 15.10 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning).

15.9 INFRINGEMENT—ELEMENTS—VALIDITY—UNREGISTERED MARK—DISTINCTIVENESS

Strength as a Likelihood of Confusion Factor

How [distinctively] [strongly] a trademark indicates that a good comes from a [particular] [specific] source [even if unknown] is an important factor to consider in [[assessing its validity] [and] [Instruction *insert number of instruction regarding Skeekcraft Test, e.g., 15.16* for determining whether the trademark used by the defendant creates for consumers a likelihood of confusion with the plaintiff's trademark].]

The plaintiff asserts [*insert claimed trademark*] is a valid and protectable trademark for its [*insert goods used in connection with the trademark*]. [The plaintiff contends that the defendant's use of [those] [similar] words in connection with the defendant's [*insert the defendant's product or service or business*] [[infringes plaintiff's trademark] [and] [is likely to cause confusion about the [origin of goods] [business] associated with that trademark.]]
In order to determine if the plaintiff 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. For deciding trademark protectability you must consider whether a trademark is inherently distinctive. Trademarks are grouped into four categories according to their relative [strength] [distinctiveness]. These four categories are, in order of strength or distinctiveness: arbitrary (which is inherently distinctive), suggestive (which also is 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., 15.10*] and generic names (which are entitled to no protection).

Arbitrary Trademarks. The first category of "inherently distinctive" trademarks is arbitrary trademarks. They are considered strong marks and are clearly protectable. They involve the arbitrary, fanciful or fictitious use of a word to designate the source of a [product] [service]. Such a trademark is a word that in no way describes or has any relevance to the particular [product] [service] it is meant to identify. It may be a common word used in an unfamiliar way. It may be a newly created (coined) word or parts of common words which are applied in a fanciful,

fictitious or unfamiliar way, solely as a trademark.

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 or fanciful 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.

Suggestive Trademarks. The next category is suggestive trademarks. These trademarks are also inherently distinctive but are considered weaker than arbitrary trademarks. Unlike arbitrary trademarks, [which are in no way related to what the [product] [service] is or its components, quality, or characteristics,] suggestive trademarks imply some characteristic or quality of the [product] [service] 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] [service] 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 third category is descriptive trademarks. These trademarks directly identify or describe some aspect, characteristic, or quality of the [product] [service] 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] [service] comes from, or the name of the person who makes or sells the [product] [service]. 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 CranApple) 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 fourth category is entitled to no protection at all. They are called generic names and they refer to a general name of the [product] [service], as opposed to the plaintiff’s brand for that [product] [service]. Generic names are part of our common language that we need to identify all such similar [products] [services]. A generic name is a name for the [product] [service] on which it appears.

If the primary significance of the alleged mark is to name the type of [product] [service] rather than the [manufacturer] [provider], 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] [service] rather than the [manufacturer] [provider], 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 to be 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 on the charge of infringement in Instruction [*insert number of instruction regarding Trademark Elements and Burden of Proof, e.g., 15.5*].

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., 15.10*].
.

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 15.10 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning). This instruction sets out the general standard for assessing the strength of a trademark. It may require appropriate 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 mark, collective mark, etc., in lieu of the word trademark in this instruction. In the first paragraph, this instruction refers to the court's instruction to the jury that sets out the factors of the *Sleekcraft* test for likelihood of confusion, Instruction 15.16 (Infringement—Likelihood of Confusion—Factors—*Sleekcraft* Test). The number that the court assigned to that instruction

should be inserted in the first paragraph of this instruction. Similarly, in the fourth and in the last paragraph of the instruction, reference is made to an instruction concerning secondary meaning, e.g., Instruction 15.10. In the next to the last paragraph of this instruction, reference is made to an instruction concerning the elements of infringement, e.g., Instruction 15.5 (Infringement—Elements and Burden of Proof—Trademark).

While the elements of mark distinctiveness are the same in determining mark validity or likelihood of confusion, use Instruction 15.17 (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 (15.9) 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."); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 328 F.3d 1061, 1067 (9th Cir.2003) ("Trademarks are generally divided into four categories: (1) generic; (2) descriptive; (3) suggestive; and (4) arbitrary or fanciful. The latter two categories are deemed inherently distinctive and are automatically entitled to protection"), *judgment vacated on other grounds*, 543 U.S. 111 (2004)

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 Company*, 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 America Inc.*, 287 F.3d 866, 873–74 (9th Cir.2002) (noting that descriptive trade name 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. America 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 (9th Cir.2002)] at 1142 n.3. 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. v. Lasting Impression I, Inc.*, 328 F.3d 1061, 1071 (9th Cir.2003) (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), *judgment vacated on other grounds*, 543 U.S. 111 (2004).

Supplemental Instructions

Trade Dress Adjustments

In trade dress cases, the Supreme Court suggested the appropriateness of the arbitrary - suggestive- descriptive - generic spectrum for word trademarks, as used in this instruction. *See Wal-Mart Stores, Inc., v. Samara Brothers, Inc.*, 529 U.S. 205, 212-13 (2000). Such a test might be appropriate for trade dress that is product packaging as well. The same is not true for trade dress that consists of product design or configuration. The court indicated that application of such a spectrum is "problematic" if not erroneous. *Id.*

Accordingly, if a case involves aspects of a product that is physically and functionally inseparable from the product as a whole, that is, consists of a product design or configuration, no instruction on inherent distinctiveness is appropriate. Rather, the jury should be instructed on secondary meaning. *See Wal-Mart Stores,* 529 U.S. at 212-13. Similarly, if the court faces a trade dress case in which it was ambiguous whether the dispute involves product packaging or product design, the court should require a showing of secondary meaning. *Wal-Mart Stores,* 529 U.S. at 215 ("[C]ourts should err on the side of caution and classify ambiguous trade dress as product design, thereby requiring secondary meaning.") *See* Instruction 15.10 (Infringement—Elements—Validity—Distinctiveness—Secondary Meaning).

In cases involving product packaging, the differences between use of a word as opposed to use of various symbols or devices will probably require modification of this spectrum of marks instruction (Instruction 15.9). In lieu of modifying the spectrum of mark instruction, the court might consider the propriety of giving an instruction using the test in *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342, 1344-46 (C.C.P.A. 1977). While the Ninth Circuit has not specifically addressed use of *Seabrook*, it has generally suggested that inherently distinctive trade dress involves the overall impression that is arbitrary or uncommon.

The Ninth Circuit has required, without delineating specific factors that should be considered, that an inherently distinctive symbol or device identify the particular source of the product and distinguish it from other products. *See International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 824 (9th Cir.1993); *Fuddruckers, Inc. v. Doc's B.R. Others, Inc.*, 826 F.2d 837, 844 (9th Cir.1987) (involving restaurant design). Some district courts have suggested the *Seabrook* test may be appropriate for certain types of trade dress. *See, e.g., Continental Laboratory Products, Inc. v. Medax International, Inc.*, 114 F. Supp.2d 992, 999 n. 6 (S.D. Cal. 2000).

This instruction can be modified for trade dress cases involving packaging or other non-word symbols or designs 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.

After the first four paragraphs and before the paragraph under the heading "Spectrum of Marks," 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.

The various paragraphs under the heading "Spectrum of Marks" will need to be adjusted so that they describe the arbitrary, suggestive, descriptive or generic use of a symbol or device, rather than of a word. For instance, if an example of apple-flavored candy were the product, the modification involving the trade dress for that product would indicate that the trade dress would be:

> **Generic,** if sold in red, plastic wrappers so that they looked like small round balls. Because they share a shape and color that many other candies have, the maker of the round apple flavored candy would not be able to get trade dress protection for this packaging. The red plastic wrapping on the small, round candy does not distinctively indicate any particular maker of candy, whatever its flavor.
>
> **Descriptive**, if the producer sold the candy in a small plastic apple-shaped container. The packaging describes a characteristic of the product - it tastes like apple. This trade dress can only be protected if it acquires secondary meaning (e.g., while it does not "immediately" indicate the source of the candy, with time there may be proof that the small plastic apple container became known to children as the product of this particular maker of this apple flavored candy).
>
> **Suggestive**, if the producer were to sell the candy in a box shaped like a school text book. The text book appearance of the box connotes a characteristic of the product, allowing the consumer to infer something about the product from the trade dress. Here, the book packaging suggesting the idea of children bringing an apple to school to share with their favorite teacher, and that perhaps they can bring the candy in lieu of the apple. This can suggest to the consumer that the candies have an apple flavor.
>
> **Arbitrary,** if the candy were sold in a box shaped like a television, with a screen in which you could see the small, apple flavored candy. It would also be arbitrary if packaged in a container of some fanciful, new and previously unknown shape. It is totally unrelated to the apple flavored candy, whether using the shape of the television that has no relation to an apple flavored candy, or fanciful, previously unknown shape.

15.10 INFRINGEMENT—ELEMENTS—VALIDITY—DISTINCTIVENESS—SECONDARY MEANING

If you determined in Instruction [*insert number of instruction e.g. 15.9]* that [*identify plaintiff's claimed trademark*] is descriptive, you must consider the recognition that the mark has among prospective consumers in order 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, in order 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] [service] 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] [service];

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 particular 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 has the burden of proving that the [*identify plaintiff's trademark*] has acquired a secondary meaning.] [The defendant has the burden of proving that the [*identify plaintiff's trademark*] lacks a secondary meaning.]

The mere fact that the plaintiff is using [*describe symbol or term*], or that the plaintiff began using it before the defendant, 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) (finding that plaintiff's unregistered mark was descriptive and lacked secondary meaning, and therefore, was invalid). *See also Filipino Yellow Pages. v. Asian Journal Publications*, 198 F.3d 1143, 1151–52 (9th Cir.1999).

Failure to list actual confusion as one of the factors the jury should have considered in determining whether the plaintiff had established secondary meaning was not harmless error. *See Adray v. Adry-Mart, Inc.*, 76 F.3d 984, 987 (9th Cir.1995). *See also Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 822-23 (9th Cir.1996) (using in a trade name dispute four factors cited in this instruction, not including the actual confusion factor).

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. *See Maljack Productions 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)). "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).

If the court considers it useful to give the jury an example of how a descriptive word acquires a secondary meaning, the following text might 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" is often referred to as "acquired meaning." *See Wal–Mart Stores, Inc. v. Samara Brothers, Inc*., 529 U.S. 205, 211, n.* (2000). 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.*

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. v. Japan Telecom America Inc*., 287 F.3d 866, 873 (9th Cir.2002) (citations omitted). 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). The burden is then on the defendant to prove that secondary meaning has not attached if the defendant wishes to argue that the plaintiff's mark was weak (e.g., was descriptive) and not entitled to trademark protection. *Id.*

15.11 INFRINGEMENT—ELEMENTS—VALIDITY—TRADE DRESS—NON-FUNCTIONALITY REQUIREMENT

A product feature is functional if it is essential to the product's use or purpose, or if it affects the product's cost or quality. It is non-functional if its shape or form makes no contribution to the product's function or operation. If the feature is part of the actual benefit that consumers wish to purchase when they buy the product, the feature is functional. However, if the feature serves no purpose other than as an assurance that a particular entity made, sponsored or endorsed the product, it is non-functional.

To determine whether a product's particular shape or form is functional, you should consider whether the design as a whole is functional, that is whether the whole collection of elements making up the design or form are essential to the product's use or purpose.
You should assess the following factors in deciding if the product feature is functional or non-functional:

1. The Design's Utilitarian Advantage. In considering this factor, you may examine whether the particular design or product feature yield a utilitarian advantage over how the product might be without that particular design or product feature. If there is a utilitarian advantage from having the particular design or feature, this would weigh in favor of finding the design or feature is functional; if it seems merely ornamental, incidental, or arbitrary it is more likely to be nonfunctional.

2. Availability of Alternate Designs. In considering this factor, you may examine whether an alternate design could have been used, so that competition in the market for that type of product would not be hindered by allowing only one person to exclusively use the particular design or configuration. For this to be answered in the affirmative, the alternatives must be more than merely theoretical or speculative. They must be commercially feasible. The unavailability of a sufficient number of alternate designs weighs in favor of finding the design or feature is functional.

3. Advertising Utilitarian Advantage in the Design. In considering this factor, you may examine whether the particular design or configuration has been touted in any advertising as a utilitarian advantage, explicitly or implicitly. If a seller advertises the utilitarian advantages of a particular feature or design, this weighs in favor of finding that design or feature is functional.

4. The Design's Method of Manufacture. In considering this factor, you may examine whether the particular design or feature result from a relatively simple or inexpensive method of manufacture. If the design or feature is a result of a particularly economical production method, this weighs in favor of finding the design or feature is functional; if the feature is essential to the use or purpose of the device or affects its cost or quality, it is more likely functional.

[The plaintiff has the burden of proving non-functionality by a preponderance of the evidence [in order to show that the trade dress is valid and protected from infringement].]

Comment

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 International 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. South 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 Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 850 n. 10 (1982)).

In the Ninth Circuit, the plaintiff bears the burden of proving nonfunctionality. *See Sega Enterprises 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. v. Ives Lab.*, 456 U.S. 844, 850 n.10 (1982) ("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 *International Order 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. v.*

Marketing Displays, Inc. 532 U.S. 23, 29–30 (2001) (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 together in a nonfunctional way to avoid finding of functionality. *HWE, Inc. v. JB Research, 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. v. Kinedyne Corp.*, 296 F.3d 778, 782-83 (9th Cir.2002).

15.12 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 being the first to use it in the marketplace or by 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's [*describe trademark*] to be valid [that is, [inherently distinctive]] you must consider whether the plaintiff used the [*describe trademark*] as a trademark for plaintiff's [*identify the plaintiff's product*] before the defendant began to use the [*describe trademark*] to market its [*identify the defendant's product*] in the area where the plaintiff 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 has not shown by a preponderance of the evidence that the plaintiff used [*describe trademark*] before the defendant's use of [*describe trademark*], then you cannot conclude that the plaintiff 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., 15.7*].]

Comment

Sometimes it is necessary for the court to place before the jury the issue of mark ownership. When the jury is to determine the ownership of a mark between manufacturer and distributor, *see Sengoku Works Ltd. v. RMC Int'l Ltd*., 96 F.3d 1217, 1219 (9th Cir.1996) (reviewing jury instructions and factors for determining such mark ownership). *See* Comment following Instruction 15.15 (Trademark Ownership—Merchant or Distributor). *See also* Instruction 15.14 (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 this is a genuine issue of material fact in a case. *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 trademark law, the standard test of ownership is priority of use. *See Sengoku Works, Ltd.*, 96 F.3d at 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.*

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 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*].

15.12A INFRINGEMENT—ELEMENTS—OWNERSHIP—PRIORITY THROUGH TACKING

[Plaintiff] [Defendant] asserts that [his] [her] [its] mark has priority through the doctrine of "tacking." Tacking allows a party to claim priority in a mark based on the first use date of a similar but technically distinct mark when the previously used mark is the legal equivalent of the mark in question or indistinguishable therefrom, such that consumers consider both as the same mark. The marks must create the same, continuing commercial impression, and the later mark should not materially differ from or alter the character of the mark attempted to be tacked.

Comment

The Ninth Circuit approved a similar instruction in *Hana Financial, Inc. v. Hana Bank*, 735 F.3d 1158, 1166 (9th Cir.2013), *aff'd*, 135 S. Ct. 907 (2015). The standard for tacking is exceedingly strict and applies only in "exceptionally narrow" circumstances. *Id.* A trademark user may tack the date of the user's first use of an earlier mark onto a subsequent mark only when "'the two marks are so similar that consumers generally would regard them as essentially the same.'" *Id.* (quoting *Brookfield Commc'ns, Inc. v. W. Coast Entm't 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, TRADEMARKS AND UNFAIR COMPETITION §§ 17:26–28 (4th ed. 2015).

15.13 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 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 America, 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, TRADEMARKS AND UNFAIR COMPETITION § 18:2 (4th ed. 2015).

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*, at § 18:11.

15.14 TRADEMARK OWNERSHIP—LICENSEE

The owner of a trademark may 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 license agreement may include the right to exclude others from using the trademark. A licensee may enforce this right to exclude others in an action for [infringement] [or] [*insert applicable form of unfair competition from 15 U.S.C. § 1125(a)*].

[The plaintiff is a licensee.]

Comment

Although 15 U.S.C. § 1060 requires that assignments be written, a license can be oral.

In licensing trademark rights, the owner may include the right to sue for trademark infringement. The licensee's right to sue originates from the license and is governed by the terms of the licensing agreement. *See DEP Corp. v. Interstate Cigar Co.*, 622 F.2d 621, 623 (2d Cir.1980) (holding that because plaintiff was not owner of trademark, it lacked standing to sue under Lanham Act; any interests plaintiff had in were governed by terms of licensing agreement). *See also Quabaug Rubber Co. v. Fabiano Shoe Co.*, 567 F.2d 154, 157 (1st Cir.1977) (holding that license granted licensee "the right to enforce the licensed trademark rights against infringers in the United States").

15.15 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 case between foreign manufacturer and former exclusive American distributor who had incontestably registered mark in U.S., one issue to consider as to ownership of mark was whether parties had entered into contract that disposed of rights in mark, and that issue was properly determined by jury).

The presumption that in the absence of an agreement the manufacturer is presumed to own the trademark can be rebutted. The following factors may be considered:

(1) which party invented and first affixed the mark on to the product;

(2) which party's name appeared with the trademark;

(3) which party maintained the quality and uniformity of the product;

(4) which party does the public identify with the product and make complaints to; and

(5) which party possesses the good will associated with the product.

See Sengoku Works Ltd, 96 F.3d at 1220-21 and *Premier Dental Products v. Darby Dental Supply Co*., 794 F.2d 850, 853-54 (3d Cir.1986).

15.16 INFRINGEMENT—LIKELIHOOD OF CONFUSION—FACTORS—*SLEEKCRAFT* TEST (15 U.S.C. §§ 1114(1) and 1125(a))

You must consider whether the defendant's use of the trademark is likely to cause confusion about the source of the plaintiff's or the defendant's goods.

I will suggest some factors you should consider in deciding this. The presence or absence of any particular factor that I suggest should not necessarily resolve whether there was a likelihood of confusion, because you must consider all relevant evidence in determining this. As you consider the likelihood of confusion you should examine the following:

1. Strength or Weakness of the Plaintiff's Mark. The more the consuming public recognizes the plaintiff's trademark as an indication of origin of the plaintiff's goods, 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. Defendant's Use of the Mark. If the defendant and 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 Plaintiff's and 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 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 use by the defendant 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. Defendant's Intent. Knowing use by 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 plaintiff's trademark to identify similar goods may indicate a likelihood of confusion.

6. Marketing/Advertising Channels. If the plaintiff's and defendant's [goods] [services] 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 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. <u>*Any other factors that bear on likelihood of confusion*</u>.]

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), that is covered in this instruction. *See Multi Time Machine, Inc. v. Amazon.com, Inc.*, 792 F.3d 1070, 1074 (9th Cir.2015) (applying "eight non-exhaustive factors, known as the *Sleekcraft* factors, to determine whether a trademark use gives rise to a likelihood of confusion"); *Dr. Seuss Enters., L.P. v. Penguin Books*, 109 F.3d 1394, 1404 n.13 (9th Cir.1997) (noting that Ninth Circuit uses eight-factor *Sleekcraft* test covered in paragraphs 1-8 of this instruction "simply to be over-inclusive"); *see also Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt*., 618 F.3d 1025, 1030-31 (9th Cir.2010) (applying *Sleekcraft* test).

The committee recommends that the judge instruct only on the factors that are relevant in the particular case presented to the jury. *See Brookfield Commc'ns. Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1054 (9th Cir.1999) ("it 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 variations may often be quite important"); *Metro Pub., Ltd. v. San Jose Mercury News*, 987 F.2d 637, 640 (9th Cir.1993) ("Because each factor [of eight-factor *Sleekcraft* test] is not necessarily relevant to every case, this list functions as a guide

and is 'neither exhaustive nor exclusive.'") (citations omitted). *See generally Thane Intern., Inc. v. Trek Bicycle Corp.*, 305 F.3d 894, 901 (9th Cir.2002) ("Unless properly used, this long list of [likelihood of confusion] factors has the potential to befuddle the inquiry. The list of factors is not a score-card–whether a party 'wins' a majority of the factors is not the point. Nor should '[t]he factors ... be rigidly weighed; we do not count beans.' *Dreamwerks Prod. Group v. SKG Studio*, 142 F.3d 1127, 1129 (9th Cir.1998). 'Some factors are much more helpful than others, and the relative importance of each individual factor will be case specific.... [I]t is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the factors.' *Brookfield Communications [v. West Coast Entertainment*], 174 F.3d [1036] at 1054 [(9th Cir.1999)].").

A jury should be warned not to focus on any one factor and to consider all relevant evidence in assessing likelihood of confusion, by use of the second paragraph in this instruction. *See Kendall-Jackson Winery 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).

In cases involving claims of trademark infringement on the Internet, 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 Internet as a marketing channel, otherwise known as the "Internet Troika," are of greater importance. *Internet Specialties West, 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").

Although the Ninth Circuit has also applied other than an eight-factor test, such tests were not intended to negate any of the *Sleekcraft* factors. *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1290-91 (9th Cir.1992) (noting that *Sleekcraft's* "list of factors, while perhaps exhausting, is neither exhaustive nor exclusive. Rather, the factors are intended to guide the court in assessing the basic question of likelihood of confusion. The presence or absence of a particular factor does not necessarily drive the determination of a likelihood of confusion." (footnote and citation omitted)); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 328 F.3d 1061, 1073 (9th Cir.2003) (enumerating the eight factors covered by this instruction), *judgment vacated on other grounds*, 543 U.S. 111 (2004). The Ninth Circuit has observed that "the contents of these tests are interchangeable." *Ocean Garden, Inc. v. Marktrade Co., Inc.*, 953 F.2d 500, 506 n.2 (9th Cir.1991).

"The Ninth Circuit enumerated likelihood of confusion tests as helpful guidelines to the district courts. These tests were not meant to be requirements or hoops that a district court need jump through to make the determination . . . . [W]e have identified a non-exclusive series of factors that are helpful in making the ultimate factual determination of likelihood of confusion." *Eclipse Associates Ltd. v. Data General Corp.*, 894 F.2d 1114, 1117–18 (9th Cir.1990). *See Brookfield Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1054 (9th Cir.1999) ("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.”). Because these lists are “neither exhaustive nor exclusive,” *Gallo*, 967 F.2d at 1290, a ninth factor has been included.

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 Solutions, 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.* (citing 15 U.S.C. § 1116(d)(1)(B)(I)).

15.17 INFRINGEMENT—LIKELIHOOD OF CONFUSION—FACTOR—STRENGTH OF TRADEMARK

Strength as a Factor for Evaluating Likelihood of Confusion

How strongly the plaintiff'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 is likely to create confusion with the plaintiff's mark.

The plaintiff asserts that [insert trademark] is a trademark for its [goods or services]. The plaintiff contends that the defendant's use of [insert defendant's mark] in connection with the defendant's [insert the defendant's product or service] infringes plaintiff's trademark because it is likely to cause confusion.

The Strength of Marks

The more distinctive and strong a trademark law is, the greater the scope of protection the law provides. The law measures trademark strength by considering two prongs:

1. Commercial Strength: This is the amount of marketplace recognition of the mark; and
2. Conceptual Strength: This is the placement of the mark on the spectrum of marks.

Commercial Strength: What is "commercial strength?" Not all marks are equally well known. Trademark strength is somewhat like the renown of people. Only a few very famous people are widely known and recognized around the world. Most people are known and recognized only by a small circle of family and friends.

Some trademarks are relatively "strong," in the sense they are widely known and recognized. A few trademarks are in the clearly "famous" category. These "famous" marks are those like "Apple" for computers and mobile phones, "Google" for a search engine, "Coca-Cola" for beverages and "Toyota" for vehicles. Some trademarks may be strong and well known only in a certain market niche such as mountain climbing gear, plumbing supplies, or commercial airplane electronics equipment, but relatively weak outside that field.

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 people's minds by becoming known as an indication of source of goods or services. The law calls this "secondary meaning." [See Instruction 15.10 on 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: coined, arbitrary and suggestive. Descriptive word marks are regarded as not being inherently distinctive and require a secondary meaning to become a valid trademark.

Coined and arbitrary words are regarded as being relatively strong marks. A coined word mark is a word created solely to serve as a trademark. For example, "Clorox" for cleaning products and "Exxon" for gasoline are coined marks.

Arbitrary marks are words that in no way describe or suggest the nature of the goods or services it is used with. 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 and is said to be conceptually strong as a mark. Suggestive word marks are regarded as not being as conceptually strong as coined or arbitrary 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.

For example, when "apple" is used in the a 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 "CranApple" to designate a cranberry-apple juice. It directly describes one of ingredients of the juice.

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 15.9 (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" in this instruction. 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* 3 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11:83 (4th ed. 2015); *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1207 (9th Cir.2000) ("This 'strength' of the trademark is evaluated in terms of its conceptual strength and commercial strength."); *One Industries, LLC v. Jim O'Neal*

Distributing, Inc., 578 F.3d 1154, 1164, (9th Cir.2009) (noting that after placing mark on spectrum of distinctiveness, "The second step is to determine the strength of this mark in the marketplace"); *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Management, Inc.*, 618 F.3d 1025, 1032, (9th Cir.2010) ("A mark's strength is evaluated conceptually and commercially"); *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 508, (9th Cir.2011) (noting that strength is determined by two-part test of conceptual and commercial strength); *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.")

This instruction supplements Instruction 15.16 (Infringement-Elements-Likelihood of Confusion-Factors-Sleekcraft Test) by explaining how one *Sleekcraft* factor–strength of mark–is determined. This instruction describes the traditional spectrum of marks. *See, e.g., Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. at 768 ("Marks are often classified in categories of generally increasing distinctiveness; following the classical formulation . . . [T]hey may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful."); *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 oncontinuum of marks from "generic," afforded no protection; through "descriptive" or "suggestive," given moderate protection; to "arbitrary" or "fanciful" awarded maximum protection).

The examples of the multiple uses of the word "apple" given in this instruction when used on a variety of different products are from 3 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 11:71 (4th ed. 2015). Some of these examples are quoted with approval in *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc.*, 973 F.2d 1033, 1041 (2d Cir.1992).

15.18 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 has the burden of proving each of the following by a preponderance of the evidence:

1. [*Name of direct infringer*] infringed the plaintiff's trademark;

2. the defendant intentionally induced [*name of direct infringer*] to infringe plaintiff's trademark; and

3. the plaintiff was damaged by the infringement.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

Regarding liability for inducing another to infringe a trademark, *see Inwood Lab. v. Ives Lab.*, 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 Solutions, 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"); *Sealy, Inc. v. Easy Living, Inc.,* 743 F.2d 1378, 1382 (9th Cir.1984) ("[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").

15.19 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 to infringe the plaintiff's trademark.

The plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. the defendant [sold] [supplied] [goods] [services] to [*name of direct infringer*];

2. [*name of direct infringer*] used the [goods] [services] the defendant [sold] [supplied] to infringe the plaintiff's trademark;

3. the defendant knew or had reason to know [*name of direct infringer*] [would use the goods to infringe the plaintiff's trademark] [was infringing the plaintiff's trademark and continued to supply its services]; [and]

[4. the defendant 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]

4. [5.] the plaintiff was damaged by the infringement.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

See Comment following Instruction 15.18 (Derivative Liability—Inducing Infringement). *See* 4 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 25.17 (4th ed. 2015) (discussing contributory infringement).

Regarding the elements of contributory infringement, *see Lockheed Martin Corp. v. Network Solutions, 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 Laboratories v. Ives Laboratories, Inc.,* 456 U.S. 844 (1982), involved relationship between manufacturers and retailers, its analysis is equally applicable to relationship between franchisor and franchisees).

When a defendant provides servers or other Internet 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 Solutions, Inc.*, 658 F.3d 936, 942 (9th Cir.2011) (brackets in original) (citation omitted). 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."). Also, statutory damages may be awarded against contributory infringers. *Id.* at 944-45.

15.20 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 contends that the trademark has become unenforceable because the [owner] [assignee] [licensee] abandoned it. The defendant 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]:

1. discontinues its [good faith] use in the ordinary course of trade, intending not to resume using it;

2. [acts] [or] [fails to act] so that the trademark's [primary significance] [primary meaning] [principal significance] [principal meaning] to prospective consumers has become the [product] [service] itself and not the [[producer of the product] [provider of the service]]; or

3. fails to exercise adequate quality control over the [goods] [services] 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, TRADEMARKS AND UNFAIR COMPETITION § 17:18 (4th ed. 2015). *Electro Source, LLC v. Brandess-Kalt-Aetna Group, 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. General 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 Exploration 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 (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); *Prudential Ins. Co. v. Gibraltar Financial Corp.*, 694 F.2d 1150, 1156 (9th Cir.1982) (characterizing abandonment as "in the nature of a forfeiture" which "must be strictly proved" and noting that such forfeiture required demonstration by "a high burden of proof"); *see also 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"). Scholars note that except for the Federal Circuit, "all" courts follow a clear and convincing standard of proof of abandonment. *See* 3 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 17:18 (4th ed. 2015); *see also* Fletcher, Anthony L. and David J. Kera, *Annual Review*, 85 TRADEMARK REP. 607, 724-25 (1995).

15.21 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 contends that defendant has the right to use the trademark within the [specify geographic region] area.

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

1. the [defendant] [defendant's assignor] [defendant's licensor] continuously used the trademark, without interruption, in [*geographic region where defendant claims prior use*];

2. the [defendant] [defendant's assignor] [defendant's licensor] began using the trademark without knowledge of the plaintiff's prior use elsewhere; and

3. the defendant used the trademark before the plaintiff [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, TRADEMARKS AND UNFAIR COMPETITION § 26:44 (4th ed. 2015).

"Continuous" means lack of interruption. *See Casual Corner Associates, Inc. v. Casual Stores of Nevada, 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 plaintiff's registration. *Consolidated Freightways Corp. v. Consolidated Forwarding, Inc.*, 156 U.S.P.Q. 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 market place 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 Communications Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1054-55 (9th Cir.1999) (approving tacking of one use of a trademark with another use).

15.22 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 contends that it fairly used the trademark to describe the defendant's [product] [service]. The defendant has the burden of proving its fair use of the mark by a preponderance of the evidence.

The defendant makes fair use of a trademark when the defendant:

1. used the mark [other than as a trademark] [other than to distinguish the defendant's goods from the plaintiff's and to indicate the source of the defendant's goods];

2. used the mark fairly and in good faith; and

3. used the mark only to describe the defendant's goods or services [or their geographic location] as those of the defendant's [and not at all to describe the plaintiff'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.") (citation omitted) (emphasis as in original). *See* Instruction 15.23 (Defenses—Nominative Fair Use).

Although earlier versions of this instruction applied a "clear and convincing" standard to proof of fair use, the committee has not found any authority specifying the standard of proof for this issue. *See* Holbrook & Harris, eds., *Model Jury Instructions: Copyright, Trademark, And Trade Dress Litigation* 246 (2008) ("The case law dealing with the fair use defense does not

address the burden of proof requirement."). Accordingly, this instruction and Instruction 15.23 have been revised to reflect the standard generally applied in civil cases - a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'") (citations omitted); *United States v. F/V Repulse*, 688 F.2d 1283, 1284 (9th Cir.1982) ("The preponderance of the evidence standard applies in civil cases… The few exceptions are very limited and include only those cases involving fraud or possible loss of individual liberty, citizenship, or parental rights. 'The interests at stake in those cases are deemed to be more substantial than the mere loss of money …'") (citations omitted); *Cf.* Comment to Instruction 15.20 (Defenses—Abandonment—Affirmative Defense—Defendant's Burden of Proof).

The elements of the classic fair use defense set out in this instruction are drawn from: *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150-51 (9th Cir.2002) (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.'") (citations omitted); *Horphag Research 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 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) (citations and footnote omitted)).

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, 1152 (footnote omitted) (emphasis as in original).

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 (9th Cir.2005) (citing *KP Permanent Make-Up v. Lasting Impression I, Inc.*, 543 U.S. 111, 118, 121 (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 freestanding need to show confusion unlikely"; determining that it follows (contrary to Court of Appeals's 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 Productions*, 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.") (footnotes 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 Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d at 810 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 15.11 (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 v. MCA Records, Inc.*, 296 F.3d 894, 902 (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 the title of an artistic work infringes). Parody may also be characterized as a form of fair use because such use is non-commercial. *See Mattel, Inc. v. Walking Mountain Productions*, 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 America Pub., Inc.*, 971 F.2d 302, 309 (9th Cir.1992).

15.23 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 goods or services.

The defendant 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's product or service, even if the defendant's ultimate goal was to describe its own product. The defendant has the burden of proving its nominative fair use of the mark by a preponderance of the evidence.

A defendant makes [nominative] fair use of a trademark when the defendant:

1. Uses the mark in connection with the plaintiff's [product] [service], which was not readily identifiable without use of that [trademark] [mark];

2. Used only so much of the [trademark] [mark] as was reasonably necessary to identify the [product] [service] in question; and

3. Did not do anything in connection with the trademark that would suggest sponsorship or endorsement of the defendant's product or service by the plaintiff. [A product is not readily identifiable without use of the trademark when there are no equally informative words describing the product.]

[A product cannot be effectively 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 than is necessary to identify the product.]

[You may consider whether the defendant did anything that would, in conjunction with the trademark suggest sponsorship or endorsement by the plaintiff. 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, or mislead, or capitalize on consumer confusion, or when the defendant appropriates the cachet of the plaintiff's product for the defendant's. A defendant's use of the plaintiff's trademark to describe the plaintiff's product may not necessarily suggest plaintiff's sponsorship or endorsement, even if the defendant's ultimate goal is to describe the defendant's own product.]

[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.") (citation omitted) (emphasis as in original). *See* Instruction 15.22 (Defenses—"Classic" Fair Use).

Although earlier versions of this instruction applied a "clear and convincing" standard to proof of fair use, the committee has not found any authority specifying the standard of proof for this issue. *See* Holbrook & Harris, eds., *Model Jury Instructions: Copyright, Trademark, And Trade Dress Litigation* 246 (2008) ("The case law dealing with the fair use defense does not address the burden of proof requirement."). Accordingly, this instruction and Instruction 15.22 have been revised to reflect the standard generally applied in civil cases - a preponderance of the evidence. *See Grogan v. Garner*, 498 U.S. 279, 286 (1991) ("Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, we presume that this standard is applicable in civil actions between private litigants unless 'particularly important individual interests or rights are at stake.'") (citations omitted); *United States v. F/V Repulse*, 688 F.2d 1283, 1284 (9th Cir.1982) ("The preponderance of the evidence standard applies in civil cases . . . The few exceptions are very limited and include only those cases involving fraud or possible loss of individual liberty, citizenship, or parental rights. 'The interests at stake in those cases are deemed to be more substantial than the mere loss of money . . . '") (citations omitted); *Cf.* Comment to Instruction 15.20 (Defenses—Abandonment —Affirmative Defense—Defendant's Burden of Proof).

The elements of the nominative fair use defense set out in this instruction are described in *Adobe Systems Inc. v. Christenson*, 809 F.3d 1071, 1081 (9th Cir.2015).

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 Research Ltd. v. Pellegrini,* 337 F.3d 1036, 1041 (9th Cir.2003) (finding nominative fair use defense unavailable to defendant who failed to show that defendant's use of plaintiff's trademark did not suggest sponsorship or endorsement by trademark holder of defendant's product) (citing *New Kids on the Block*, 971 F.2d at 306 (9th Cir.1992)); *see 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.") (footnote 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 15.22 (Defenses—"Classic" Fair Use).

15.24 TRADEMARK DAMAGES—ACTUAL OR STATUTORY NOTICE (15 U.S.C. § 1111)

In order for plaintiff to recover damages, the plaintiff has the burden of proving by a preponderance of the evidence that defendant had [either statutory or] actual notice that the plaintiff's the 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

Although elements of a claim in trademark may overlap with a claim in copyright, the acts do not preempt each other. *See Polar Bear Productions, 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 America, Inc. v. Dragon Pacific International*, 40 F.3d 1007, 1011 (9th Cir.1994) (upholding award for statutory damages under Copyright Act and actual damages under trademark statute).

15.25 TRADEMARK DAMAGES—PLAINTIFF'S ACTUAL DAMAGES (15 U.S.C. § 1117(a))

If you find for the plaintiff on the plaintiff's [infringement] [unfair competition] claim [and find that the defendant had statutory notice or actual notice of the plaintiff's registered trademark], you must determine the plaintiff's actual damages.

The plaintiff has the burden of proving actual damages by a preponderance of the evidence. Damages means the amount of money which will reasonably and fairly compensate the plaintiff for any [injury] [and] [or] [property damage] you find was caused by the defendant's infringement of the plaintiff's registered trademark.

You should consider the following:

1. [The [injury to] [loss of] the plaintiff's reputation][;]

2. [The [injury to] [loss of] 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 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's mark at the time of the infringement by the defendant.

Comment

The plaintiff must prove both the fact and the amount of damages. *See Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 621 (9th Cir.1993); *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1407 (9th Cir.1993).

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. *See Lindy Pen Co*, 982 F.2d at 1407 (holding that when proof of actual damage is difficult, court may base damage award on defendant's profits, on theory of unjust enrichment). 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 those of faster 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, TRADEMARKS AND UNFAIR COMPETITION § 30:72 (4th ed. 2015). *See also* 1a JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE § 8.08(2) (1996) (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.

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).

15.25A TRADEMARK DAMAGES—PLAINTIFF'S STATUTORY DAMAGES (15 U.S.C. § 1117(c) and (d))

Comment

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 Solutions, Inc.*, 658 F.3d 936, 944-45 (9th Cir.2011).

15.26 TRADEMARK DAMAGES—DEFENDANT'S PROFITS (15 U.S.C. § 1117(a))

In addition to actual damages, the plaintiff is entitled to any profits earned by the defendant that are attributable to the infringement, which the plaintiff 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 of defendant's receipts from using the trademark in the sale of a [product]. The plaintiff has the burden of proving a defendant's gross revenue by a preponderance of the evidence.

Expenses are all [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, 1004-05 (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").

"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 America, Inc. v. Dragon Pacific Int'l*, 40 F.3d 1007, 1010 (9th Cir.1994).

Regarding establishing and calculating defendant's profits, *see Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1405-1408 (9th Cir.1993) ("The intent of the infringer is relevant evidence on the issue of awarding profits and damages and the amount;" determining that in order to

establish damages under the lost profits method, plaintiff must make prima facie showing of reasonably forecast profits.); *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)). *See also American 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); *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132, 1135 (9th Cir.1986) (awarding receipts from sales pursuant to 15 U.S.C. § 1117(a)); 5 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 30.65 (4th ed. 2015) (discussing computation of defendant's profits from infringing sales).

Plaintiff has the burden of proof as to damages. *See Rolex Watch, U.S.A., Inc., v. Michel Co.*, 179 F.3d 704, 712 (9th Cir.1999) (holding that plaintiff carries burden to show with "reasonable certainty" defendant's gross sales from infringing activity); *Lindy Pen Co.,* 982 F.2d at 1405-1408; *Nintendo of America,* 40 F.3d at 1012 (holding that when infringing and noninfringing elements of work cannot be readily separated, all of defendant's profits should be awarded to plaintiff).

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, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1077 (9th Cir.2015) ("district court should award actual, proven profits unless the defendant infringer gained more from the infringement than the defendant's profits reflect"). In addition, the court "ought to tread lightly . . . because granting an increase could easily transfigure an otherwise acceptable compensatory award into an impermissible punitive measure." *Id.*

The Ninth Circuit has not addressed, and other circuits are divided on, whether willfulness remained a prerequisite to disgorgement of a defendant's profits as a result of the Trademark Amendments Act of 1999, Pub. L. 106-43, § 3(b), 113 Stat. 218, 219 (codified in relevant part at 15 U.S.C. § 1117). However, even prior to the 1999 Amendments, the Ninth Circuit suggested that willfulness was not always a requirement for the award of profits. *See Adray v. Adry-Mart*, Inc., 76 F.3d 984, 988 (9th Cir.1995) ("An instruction that willful infringement is a prerequisite to an award of defendant's profits may be an error in some circumstances ([such] as when plaintiff seeks the defendant's profits as a measure of [plaintiff's] own damage [citation omitted])").

The defendant may also raise a defense that the purchasers bought goods bearing the infringing mark for reasons other than the appeal of the mark, and that the infringement had no cash value in sales made by the defendant. *Id.* If such a defense is raised, an appropriate instruction should be drafted.

An award of speculative damages is inappropriate. *See McClaran v. Plastic Industries, Inc.*, 97 F.3d 347, 361-62 (9th Cir.1996) (holding that jury's finding of lost profits, based on theory that designer would have entered market but for infringement, was too speculative when no one had in fact profited from designed products).

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).

15.27 TRADEMARK DAMAGES—INTENTIONAL INFRINGEMENT (15 U.S.C. § 1117(b))

Comment

This instruction has been withdrawn.

15.28 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. 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.

15.29 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' when 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 Intern., 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.

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 (2014). The instructions can be accessed at:

http://www.cand.uscourts.gov/filelibrary/5/patentmodfinal6.20.14.pdf

Other sources of patent jury instructions that may be helpful include:

AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, MODERN JURY INSTRUCTIONS: PATENT LITIGATION (A.B.A., Chicago, Ill., 2005).

FEDERAL CIRCUIT BAR ASSOCIATION, MODEL PATENT JURY INSTRUCTIONS (2016). The instructions can be accessed at:

https://fedcirbar.org/IntegralSource/Model-Patent-Jury-Instructions

KEVIN F. O'MALLEY, ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS ch. 158 Patent Infringement (6th ed.) (Thomson West 2006).

LEONARD B. SAND, MODERN FEDERAL JURY INSTRUCTIONS ch. 86 Patents (Matthew Bender, 2014).

UNITED STATES DISTRICT COURT, DISTRICT OF DELAWARE, UNIFORM JURY INSTRUCTIONS FOR PATENT CASES (1993). The instructions can be accessed at the following web site (click on forms):

http://www.ded.uscourts.gov/JuryMain.htm

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17. COPYRIGHT

Instruction

17.0 Preliminary Instruction—Copyright

17.1 Copyright—Defined

17.2 Copyright—Subject Matter—Generally (17 U.S.C. § 102)

17.3 Copyright—Subject Matter—Ideas and Expression (17 U.S.C. § 102(b))

17.4 Copyright Infringement—Elements—Ownership and Copying (17 U.S.C. § 501(a)-(b))

17.5 Copyright Infringement—Ownership of Valid Copyright—Definition (17 U.S.C. §§ 201-205)

17.6 Copyright Interests—Copyright Registration Certificate (17 U.S.C. § 410(c))

17.7 Copyright Interests—Authorship (17 U.S.C. § 201(a))

17.8 Copyright Interests—Joint Authors (17 U.S.C. §§ 101, 201(a))

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17.11 Copyright Interests—Assignee (17 U.S.C. § 201(d)(1))

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17.13 Copyright Infringement—Originality

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17.15 Compilation (17 U.S.C. § 101)

17.16 Copying—Access and Substantial Similarity

17.17 Copyright Infringement—Copying—Access Defined

17.18 Substantial Similarity—Extrinsic Test; Intrinsic Test

17.19 Derivative Liability—Vicarious Infringement—Elements and Burden of Proof

17.20 Derivative Liability—Contributory Infringement—Elements and Burden of Proof

17.21 Copyright—Affirmative Defense—Fair Use (17 U.S.C. § 107)

17.22 Copyright—Affirmative Defense—Abandonment

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17.26 Copyright—Affirmative Defense—Service Provider of Network Communications Services Defined

17.27 Copyright—Affirmative Defense—Limitation on Liability for Transitory Digital Network Communications (17 U.S.C. § 512(a))

17.28 Copyright—Affirmative Defense—Limitation on Liability for System Caching

17.29 Copyright—Affirmative Defense—Limitation on Liability for Information Residing on Systems or Networks at Direction of Users

17.30 Copyright—Affirmative Defense—Limitation on Liability for Information Location Tools

17.31 Copyright—Damages (17 U.S.C. § 504)

17.32 Copyright—Damages—Actual Damages (17 U.S.C. § 504(b))

17.33 Copyright—Damages—Defendant's Profits (17 U.S.C. § 504(b))

17.34 Copyright—Damages—Statutory Damages (17 U.S.C. § 504(c))

17.35 Copyright—Damages—Innocent Infringement (17 U.S.C. § 504(c)(2))

17.36 Copyright—Damages—Willful Infringement (17 U.S.C. § 504(c)(2))

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.0 PRELIMINARY INSTRUCTION—COPYRIGHT

The plaintiff, [*name of plaintiff*], claims ownership of a copyright and seeks damages against the defendant, [*name of defendant*], for copyright infringement. The defendant denies infringing the copyright [and] [contends that the copyright is invalid] [asserts an affirmative defense, e.g., that it made a fair use of the work]. 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 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 and that the defendant copied original expression from the copyrighted work. 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.

[The plaintiff must also prove that the defendant's use of the copyrighted work was substantial. In determining whether the defendant's use of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.]

PROOF OF COPYING

To prove that the defendant copied the plaintiff's work, the plaintiff may show 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.

LIABILITY FOR INFRINGEMENT

One who [reproduces] [publicly distributes] [publicly performs] [publicly displays] [prepares derivative works from] a copyrighted work without authority from the copyright owner during the term of the copyright infringes the copyright.

[Copyright may also be infringed 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 independently created the challenged work] [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 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, *et seq.*

"For 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). A use is considered de minimis "if it is so meager and fragmentary that the average audience would not recognize the appropriation." *Id*. at 1193 (quoting *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir.1986)).

Copying might also be considered de minimis when the use of the work is so fleeting or trivial that it is a trifle with which the law should not be concerned. Sometimes even copying the entire work or much of the work can be de minimis under this definition. *Compare Ringgold v. Black Entertainment Television*, 126 F.3d 70 (2d Cir.1997) (use of poster in background was not de minimis) *with Gottlieb Dev., LLC v. Paramount Pictures*, 590 F. Supp. 2d 625 (S.D. N.Y. 2008) (movie producer's use of distributor's pinball machine was de minimis and did not result in copyright infringement when scene in question lasted only three and a half minutes, machine appeared in scene sporadically, for no more than a few seconds at a time, machine was always in background, machine never appeared by itself or in close-up, machine played no role in plot, and designs on backglass and playfield of machine were never fully visible and were either out of focus or obscured); *see also Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839-40 (9th Cir.2007) (stating that "[t]he ancient maxims of *de minimis non curat lex and lex non curat de minimis* teach that the law cares not about trifles"). In *VMG Salsoul, LLC v. Ciccone*, 824 F.3d 871, 886-87 (9th Cir.2016), the Ninth Circuit held that the de minimis exception applies to copyrighted sound recordings, just as it always has been held to apply to compositions. The Ninth Circuit acknowledged, however, that its ruling on this question creates a circuit split by disagreeing with the Sixth Circuit's contrary holding. *Id*.

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 17.0 are representative, and other uses may be 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") (quotation omitted).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.1 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 digitial transmission, *see* 17 U.S.C. § 101.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.2 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). For additional definitions of terms used in this instruction, *see* 17 U.S.C. §§ 101 (defining numerous terms used here).

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*.

For additional definitions of terms used in this instruction, *see* 17 U.S.C. §§ 101 (defining numerous terms used here).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.3 COPYRIGHT—SUBJECT MATTER—IDEAS AND EXPRESSION (17 U.S.C. § 102(b))

Copyright law allows the author of an original work to stop others from copying the original expression in the author's work. Only the particular expression of an idea can be copyrighted and protected. Copyright law does not give the author the right to prevent others from copying or using the underlying ideas contained in the work, such as any procedures, processes, systems, methods of operation, concepts, principles or discoveries. [In order to protect any ideas in the work from being copied, the author must secure some other form of legal protection because ideas cannot be copyrighted.]

Comment

Copyright law does not protect facts and ideas within a work. *SOFA Entm't, Inc. v. Dodger Prods., Inc.*, 709 F.3d 1273, 1279 (9th Cir.2013). The Ninth Circuit has explained that "[t]he real task in a copyright infringement action . . . is to determine whether there has been copying of the expression of an idea rather than just the idea itself. . . . Only . . . expression may be protected and only it may be infringed." *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1163 (9th Cir.1977) (implying that idea-expression dichotomy is issue of fact for jury); *see generally Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (explaining idea-expression dichotomy of copyright law). Instructing the jury on substantial similarity can cover this aspect of copyright infringement.

If the plaintiff is not the author of the work, this instruction can be modified by substituting the word "owner," "assignee," or "licensee" in the place of the word "author," as is appropriate to the facts of the case.

Supplemental Instruction

This instruction can be converted for use as an instruction on a merger defense. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1082 (9th Cir.2000) (explaining that merger is a defense in the Ninth Circuit, rather than an issue of copyrightability, as in other circuits). Under the doctrine of merger, if the idea and the expression of that idea merge, the expression will only be protected by copyright law if the alleged copying of that expression is "nearly identical." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1444 (9th Cir.1994). The merger doctrine "will not protect a copyrighted work from infringement if the idea underlying the copyrighted work can be expressed in only one way, lest there be a monopoly on the underlying

idea." *Ets-Hokin*, 225 F.3d at 1082; *see also CDN, Inc. v. Kapes*, 197 F.3d 1256, 1261 (9th Cir.1999).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.4 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's copyright infringement claim, the plaintiff has the burden of proving by a preponderance of the evidence that:

1. the plaintiff is the owner of a valid copyright; and

2. the defendant copied original expression from the copyrighted work.

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

Comment

The elements in this instruction are explained in Instructions 17.5 (Copyright Infringement—Ownership of Valid Copyright—Definition), 17.13 (Copyright Infringement—Originality), and 17.16 (Copying—Access and Substantial Similarity). 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 (1991). *See id.* at 361 ("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).

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 (9th Cir.2012).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.5 COPYRIGHT INFRINGEMENT—OWNERSHIP OF VALID COPYRIGHT—DEFINITION

(17 U.S.C. §§ 201–205)

The plaintiff is the owner of a valid copyright in [*identify work[s] allegedly infringed*] if the plaintiff proves by a preponderance of the evidence that:

1. the plaintiff's work is original; and

2 the plaintiff [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))).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.6 COPYRIGHT INFRINGEMENT— COPYRIGHT REGISTRATION CERTIFICATE (17 U.S.C. § 410(c)

A copyright owner may obtain a certificate of registration from the Copyright Office.

[*When defendant does not present evidence regarding validity or ownership of copyright*]

The evidence in this case includes Exhibit ___, a certificate of copyright registration from the Copyright Office. You are instructed that the certificate is sufficient to establish that there is a valid copyright in [*identify the work in question*].]

[*When defendant presents evidence regarding validity or ownership of copyright*]

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's work, you may consider this certificate as evidence of the facts stated in the certificate.] From this certificate you may, but need not, conclude that: [*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

This instruction should be given if the plaintiff submits a copyright registration certificate made before or within five years of first publication. *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.") "For a definition of publication, see 17 U.S.C. § 101.

A copyright registration certificate can shift the burden of proof concerning plaintiff's ownership of a valid copyright. *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir.2011). "For instance, if 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)).

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))).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.7 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 in order 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 17.8 (Copyright Interests—Joint Authors), 17.9 (Copyright Interests—Authors of Collective Works), and 17.10 (Copyright Interests—Work Made for Hire). For the requirement of an "original" work, *see* Instruction 17.13 (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.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.8 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] [or] [her] 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] [or] [her] 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"); *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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.9 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 the Second Circuit's conclusion that copyright notice on a collective work is sufficient to obtain a valid copyright on behalf of the author of a contributed work when the publication rights are limited and when there are no facts to suggest that the author intended to donate its

work to the 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*, 132 S. Ct. 873, 904 (2012) (noting that in 1989 United States adopted Berne Convention and abolished copyright notice requirement).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.10 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 the 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).

Supplemental Instruction: Employment Status

If the issue of the employment status of the work's creator will be decided by the jury, the Supreme Court has suggested an eleven-factor test focusing on whether the creator of a work was an employee or an independent contractor under common-law agency principles. *See Cmty. for Creative Non-Violence,* 490 U.S. at 751-52. No single factor is determinative. *Id*. at 752. The following instruction may assist the determination of the employment status of the person creating the work at issue:

Factors Regarding Work for Hire

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.

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).

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.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.11 COPYRIGHT INTERESTS—ASSIGNEE
(17 U.S.C. § 201(d)(1))

[In this case, the [plaintiff] [defendant] does not claim to be the [author] [creator] [initial owner] of the copyright at issue. Instead, the [plaintiff] [defendant] claims that it received the copyright by virtue of assignment from the work's [author] [creator] [initial owner] so that the [plaintiff] [defendant] 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)

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 17.1 (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.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.12 COPYRIGHT INTERESTS—EXCLUSIVE LICENSEE (17 U.S.C. § 201(d)(2))

[In this case, the [plaintiff] [defendant] does not claim to be the [author] [creator] [initial owner] of the copyright at issue. Instead, the [plaintiff] [defendant] claims the copyright by virtue of an exclusive license from the work's [author] [creator] [initial owner] and that the [plaintiff] [defendant] 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).

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). "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.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.13 COPYRIGHT INFRINGEMENT—ORIGINALITY

An original work may include or incorporate elements taken from [prior works] [works from the public domain] [works owned by others, with the owner's permission]. The original part[s] of the plaintiff's work [is] [are] the part[s] created:

1. independently by the [work's] author, that is, the author did not copy it from another work; and

2. by use of at least some minimal creativity.

[In copyright law, the "original" part of a work need not be new or novel.]

Comment

The test in this instruction was set forth in *Urantia Foundation v. Maaherra,* 114 F.3d 955, 958-59 (9th Cir.1997) (holding that selection and arrangement of "greater being's" revelations was not so mechanical as to lack originality). *See also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc*., 499 U.S. 340, 345 (1991) ("Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity."). Originality is often a fact question for the jury. *See N. Coast Indus. v. Jason Maxwell, Inc*., 972 F.2d 1031, 1034 (9th Cir.1992) (holding that whether placement of geometric shapes was original was question for jury); *see also Swirsky v. Carey,* 376 F.3d 841, 851 (9th Cir.2004) (holding that whether musical composition was original was to be determined by trier of fact).

For copyright purposes, the required level of originality is "minimal," and "sweat of the brow" in creation is "wholly irrelevant." *CDN, Inc. v. Kapes,* 197 F.3d 1256, 1259-61 (9th Cir.1999). The circuit has recognized "originality" in a variety of works, including in: a price list that reflected selection and weighing of price date, *see id*.; a musical composition with the same pitch and sequence as another work, but with a nonidentical meter, tempo or key, *see Swirsky,* 376 F.3d at 851; and a picture, based on its subject, posture, background, lighting, or perspective, *see United States v. Hamilton*, 583 F.2d 448, 452 (9th Cir.1978).

When a work embodies the minimum of creativity necessary for copyright, it is said to have "thin" copyright protection. *See, e.g., Satava v. Lowry*, 323 F.3d 805, 810-12 (9th Cir.2003). A thin copyright would only protect against "virtually identical copying." *Id.*; *see*

also Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904, 915 (9th Cir.2010) (noting "thin" copyright protection for "expression of an attractive young, female fashion doll with exaggerated proportions"); *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1442 (9th Cir.1994) (holding that "thin" copyright in graphical user interface protected against only "virtually identical copying").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.14 COPYRIGHT INTERESTS—DERIVATIVE WORK
(17 U.S.C. §§ 101, 106(2))

A copyright owner is entitled to exclude others from creating derivative works based on the owner's copyrighted work. The term derivative work refers to a work based on one or more pre-existing works, such as a [translation] [musical arrangement] [dramatization] [fictionalization] [motion picture version] [sound recording] [art reproduction] [abridgement] [condensation] [, or any other form in which the pre-existing work is recast, transformed, or adapted]. Accordingly, the owner of a copyrighted work is entitled to exclude others from recasting, transforming, or adapting the copyrighted work without the owner's permission.

If the copyright owner exercises the right to create a derivative work based on the copyrighted work, this derivative work may also be copyrighted. Only what was newly created, such as editorial revisions, annotations, elaborations, or other modifications to the pre-existing work is considered to be the derivative work.

If the copyright owner allows others to create a derivative work based on the copyrighted work, the copyright owner of the pre-existing work retains a copyright in that derivative work with respect to all of the elements from the pre-existing work that were used in the derivative work. The author of the derivative work is entitled to copyright protection only for original contributions made by that author that are more than trivial. If the derivative work incorporates [pre-existing work by others] [work in the public domain], the derivative author's protection is [limited to elements added by the derivative author to the [pre-existing work of others] [public domain work]] [, or] [limited to the manner in which the derivative author combined the [pre-existing elements by other persons] [pre-existing elements in the public domain work] into the derivative work].

[The author of the derivative work may enforce the right to exclude others from the original elements added by the author in an action for copyright infringement.]

[The copyright owner of the pre-existing work may enforce the right to exclude others in an action for copyright infringement to the extent that the material copied derived from the pre-existing work.]

Comment

In the case of a recorded performance (i.e. a sound recording) of a musical work, the sound recording constitutes a derivative work of the musical work. *Mills Music, Inc. V. Snyder*, 469 U.S. 153 (1985).

In addition to the criteria set out in this instruction, in order for a sound recording to qualify as a derivative work, the actual sounds fixed in the recording must be "rearranged, remixed, or otherwise altered in sequence or quality." 17 U.S.C. § 114(b). If a sound recording is at issue, the instruction should be adjusted to account for the § 114(b) factors.

"When a copyright owner authorizes a third party to prepare a derivative work, the owner of the underlying work retains a copyright in that derivative work with respect to all of the elements that the derivative creator drew from the underlying work and employed in the derivative work." *DC Comics v. Towle*, 802 F.3d 1012, 1023 (9th Cir.2015). The copyright owner of the underlying work "is entitled to sue a third party who makes an unauthorized copy of an authorized derivative work to the extent that the material copied derived from the underlying work." *Id*. at 1024.

"The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work . . . [and] . . . is independent of . . . any copyright protection in the preexisting material." 17 U.S.C. § 103(b); *see also Stewart v. Abend*, 495 U.S. 207, 223 (1990) (holding that aspects of derivative work added by derivative author are that author's property and elements drawn from pre-existing work remain property of owner of pre-existing work); *U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1016 (9th Cir.2012) ("[A] derivative work may be independently copyrightable, but the scope of this copyright is limited."); *Batjac Prods. Inc. v. Goodtimes Home Video*, 160 F.3d 1223, 1234-35 (9th Cir.1998) (holding that under 17 U.S.C. § 103(b), as under 1909 Act, copyrighted underlying work remains copyrighted even if derivative work based on it enters public domain).

A derivative work is saved from being an infringing work "only because the borrowed or copied material [in the derivative work] was taken with the consent of the copyright owner of the prior work, or because the prior work has entered the public domain." *United States v. Taxe*, 540 F.2d 961, 965 n.2 (9th Cir.1976); *see also U.S. Auto Parts*, 692 F.3d at 1016 ("[I]f a third party uses preexisting work in violation of the Copyright Act, the resulting derivative work is not entitled to copyright protection." (citation omitted)).

"In order to be copyrightable, (1) 'the original aspects of a derivative work must be more than trivial' and (2) 'the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.'" *Id*. at 1016 (quoting *Durham Indus. v. Tomy Corp*., 630 F.2d 905, 909 (2d Cir.1980)).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.15 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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.16 COPYING—ACCESS AND SUBSTANTIAL SIMILARITY

Instruction [*insert cross reference to the pertinent instruction, e.g., Instruction 17.4*] states that the plaintiff has the burden of proving that the defendant copied original elements from the plaintiff's copyrighted work. The plaintiff may show the defendant copied from the work by proving by a preponderance of the evidence that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and original elements of the plaintiff's work.

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 17.13 (Copyright Infringement—Originality), 17.17 (Copyright Infringement—Copying—Access Defined), and 17.18 (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)).

Supplemental Instruction

For guidance in modifying the instruction so that the jury may consider evidence of a "striking similarity" between works to infer access, *see Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 485 (9th Cir.2000) ("[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.'" (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)).

If the plaintiff shows that the defendant had access to the plaintiff's work and that there is a substantial similarity between the infringed and infringing works, a presumption of copying arises shifting the burden to the defendant to rebut the presumption or to show that the alleged infringing work was independently created. *Three Boys Music*, 212 F.3d at 486 ("By establishing reasonable access and substantial similarity, a copyright plaintiff creates a presumption of copying. The burden shifts to the defendant to rebut that presumption through proof of independent creation." (citing *Granite Music Corp. v. United Artists Corp.*, 532 F.2d 718, 721 (9th Cir.1976))); *see also 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)).

In the Ninth Circuit, the access and substantial similarity elements of infringement are "inextricably linked" by an inverse ratio rule. *Benay v. Warner Bros. Entm't, Inc.*, 607 F.3d 620, 625 (9th Cir.2010) ("Under the 'inverse ratio' rule, if a defendant had access to a copyrighted work, the plaintiff may show infringement based on a lesser degree of similarity between the copyrighted work and the allegedly infringing work."); *see also Three Boys Music Corp.*, 212 F.3d at 486 (stating that rule "requires a lesser showing of substantial similarity if there is a strong showing of access" but noting that "[w]e have never held…the inverse … [that] a weak showing of access requires a stronger showing of substantial similarity."); *Swirsky v. Carey*, 376 F.3d 841, 844-45 (9th Cir.2004) (holding that when high degree of access is shown, lower standard of proof of substantial similarity is required and noting that this burden is carried by plaintiff); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1178 (9th Cir.2003) (stating that under "inverse ratio rule," court requires lower standard of proof of substantial similarity when high degree of access is shown and "a prominent factor" in using inverse ratio analysis is "concession of access by the defendant to the plaintiff's copyrighted work").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.17 COPYRIGHT INFRINGEMENT—COPYING—ACCESS DEFINED

[As part of its burden in Instruction [*insert cross reference to the pertinent instruction e.g., Instruction 17.4*], the plaintiff must prove by a preponderance of the evidence that [the defendant] [whoever created the work owned by the defendant] had access to the plaintiff's work.] You may find that the defendant had access to the plaintiff's work if [the defendant] [whoever created the work owned by the defendant] had a reasonable opportunity to [view] [read] [hear] [copy] the plaintiff's work before the defendant'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 Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir.2009) (requiring "a reasonable possibility, not merely a bare possibility").

Supplemental Instruction

Depending on the evidence at trial of the defendant's access to the allegedly infringed work, the court may instruct the jury about factors that show such access, by adding the following after the last paragraph of this 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].

Regarding the evidence necessary to demonstrate access, *see Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482-84 (9th Cir.2000) (holding that reasonable opportunity is more than a "bare possibility," such as one based on mere speculation or conjecture; 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; often widespread dissemination approach is coupled with theory of "subconscious copying" (citing 4 Nimmer & D. Nimmer, NIMMER ON COPYRIGHT, § 13.02[A] (1999)); *Art Attacks Ink, LLC*, 581 F.3d at 1143-45 (finding 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) (finding access shown by dealings between parties and third party on chain of events theory relating to same subject matter). When the subject matter of dealings between parties and the third party differs, the chain is broken and access is not shown. *See Gable v. Nat'l Broad. Co.*, 727 F. Supp. 2d 815, 828 (C.D. Cal. 2010) (citing *Meta-Film Assocs. v. MCA*, 586 F. Supp. 1346, 1355 (C.D. Cal. 1984)).

As to the plaintiff demonstrating that there is a "striking similarity" between works to support an inference of access, *see Three Boys Music.,* 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"); *see also Loomis v. Cornish*, ___ F.3d ___, No. 13-57093, 2016 WL 4578363 (9th Cir. Sept. 2, 2016) ("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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.18 SUBSTANTIAL SIMILARITY—EXTRINSIC TEST; INTRINSIC TEST

Comment

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) (involving literary or dramatic works); *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 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: *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 v. Diamond*, 388 F.3d 1189, 1196 (9th Cir.2003) (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).

Computer Programs and Similar Technologies: *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1445 (9th Cir.1994) (involving audiovisual and literary component of computer program); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1477 (9th Cir.1992) ("computer programs are subject to a *Shawtype analytic dissection of various standard components*, e.g., screens, menus, and keystrokes"); *Data E. USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 210 (9th Cir.1988) (involving home-computer karate game); *Frybarger v. Int'l Bus. Mach. Corp.*, 812 F.2d 525, 529–30 (9th Cir.1987) (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": *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841, 848-52 (9th Cir.2012) (involving floral-pattern-printed fabric); *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 Inc. v. Phoenix Control Sys.*, 886 F.2d 1173, 1176 n.4 (9th Cir.1989) (involving computer software); *Data E. USA, Inc.*, 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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.19 SECONDARY LIABILITY—VICARIOUS INFRINGEMENT—ELEMENTS AND BURDEN OF PROOF

If you find that [*name of direct infringer*] infringed the plaintiff's copyright in [*name of allegedly infringed work*], you must determine whether [*name of alleged vicarious infringer*] vicariously infringed that copyright. The plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the defendant directly benefitted financially from the infringing activity of [*name of direct infringer*];

2. the defendant had the right and ability to [supervise] [control] the infringing activity of [*name of direct infringer*][; and]

[3. the defendant failed to exercise that right and ability.]

If you find that the plaintiff has proved each of these elements, your verdict should be for the plaintiff if you also find that [*name of direct infringer*] infringed plaintiff's copyright. If, on the other hand, the plaintiff 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); *Fonovisa, Inc. v. Cherry Auction,*

Inc., 76 F.3d 259, 262-63 (9th Cir.1996) (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). 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 . . . ."). The ability to exert an "indirect effect on the infringing activity" is not enough. *Id.*

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.20 DERIVATIVE LIABILITY—CONTRIBUTORY INFRINGEMENT—ELEMENTS AND BURDEN OF PROOF

A defendant may be liable for copyright infringement engaged in by another if [he] [she] [it] 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's copyright in [*allegedly infringed work*], you must determine whether [*name of alleged contributory infringer*] contributorily infringed that copyright. The plaintiff has the the burden of proving both of the following elements by a preponderance of the evidence:

1. the defendant knew or had reason to known of the infringing activity of [*name of direct infringer*]; and

2. the defendant intentionally [induced] [materially contributed to] [*name of direct infringer's*] infringing activity.

If you find that [*name of direct infringer*] infringed the plaintiff's copyright and you also find that the plaintiff has proved both of these elements, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either or both of these elements, your verdict should be for the defendant.

Comment

The above instruction is based on *Fonovisa, Inc. v. Cherry Auction, Inc*. 76 F.3d 259, 261-63 (9th Cir.1996), and *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir.2004).

In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), the Supreme Court held that one who distributes a device with the object of promoting its use to infringe a copyright may be liable for the resulting acts of infringement by third parties, even if the device is capable of substantial noninfringing use. *Id.* at 2780. The Court characterized this as the inducement rule. *Id.* This rule was refined and formalized into four elements in *Columbia Pictures Industries, Inc. v. Fung,* 710 F.3d 1020 (9th Cir.2013). *See id.* at 1032 (listing these "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"); *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").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.21 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 if it would advance the public interest. 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.

Defendant contends that defendant made fair use of the copyrighted work for the purpose of [criticism] [comment] [news reporting] [teaching] [scholarship] [research] [*other purpose alleged*]. The defendant 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 has proved by a preponderance of the evidence that the defendant made a fair use of the plaintiff's work, your verdict should be for the defendant.

Comment

Fair use is generally an affirmative defense. *See e.g. Fox Broad. Co. v. Dish Network L.L.C.*, 723 F.3d 1067, 1074 (9th Cir.2013). However, in Digital Millenium Copyright Act "takedown" cases, fair use is "treated differently than traditional affirmative defenses." *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1152-53 (9th Cir.2016) (noting that in DMCA cases, copyright holder must have good faith belief that allegedly infringing use was not fair use before sending "takedown" notice). *See* Instruction 17.28 (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 first paragraph of this instruction describing the effect of a fair use finding is drawn from *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1336 (9th Cir.1995) (holding that fair use permits use of copyrighted material in reasonable manner without consent of copyright owner). The fifth numbered paragraph of this instruction reflects the fact that the elements set forth in the statutory test of fair use in 17 U.S.C. § 107 are by no means 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."); *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*, 510 U.S. at 585 n.18 (considering defendant's state of mind/good faith as factor).

For an analysis of the fair use factors, *see Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560-69 (1985). The instruction provided here is a basic instruction that could be supplemented by the court to suggest how the presence or absence of any particular factor may tend to support or detract from a finding of fair use. Similarly, the court may find it appropriate to supplement this instruction to suggest to the jury how to weigh the factors. *See Dr. Seuss Enters.*, 109 F.3d at 1399 ("Congress viewed these four criteria as guidelines for 'balancing the equities,' not as 'definitive or determinative' tests." (citation omitted)).

The Ninth Circuit has considered numerous cases involving application of the fair use factors. The following citations identify cases that might be consulted concerning facts helpful to assessing whether a particular fair use factor exists:

1. Purpose and Character of the Defendant's Use, including whether such use is of a commercial nature or is for nonprofit educational purposes: *Campbell*, 510 U.S. at 579-80, 583, 588 (explaining that the purpose of this element is to investigate the commercial nature of the use, whether the use was transformative, whether the use tended to supplant or supersede the infringed work, and whether the use parodied or "conjure[d] up" the infringed work); *Seltzer*, 725 F.3d at 1176-77 (finding 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); *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); *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."); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir.2001) (stating that commercial use does not require direct financial benefit and that "commercial use weighs against a finding of fair use but is not conclusive"); *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 606-07 (9th Cir.2000) (finding that computer virtual game station was fair use of reverse-engineered television game console because it was transformative and done to produce compatible product); *L.A. News Serv. v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir.1997) (examining whether unauthorized use of news report by defendant news station competed with infringed work).

2. Nature of Copyrighted Work: 17 U.S.C. § 107 ("The fact that a work is unpublished shall not itself bar a finding of fair use."); *Campbell*, 510 U.S. at 586 (considering whether work is factual or creative in nature and whether it was published); *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); *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"); *L.A. News Serv.*, 108 F.3d at 1122 (reasoning that fair use finding is strongly favored when infringed work is informational, factual and news); *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1524 (9th Cir.1992) (examining fictitious or functional nature of work and "idea/expression distinction" with regard to utilitarian articles); *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 970 (9th Cir.1992) (recognizing that audiovisual displays created by device that can alter features of copyrighted video game are not derivative in nature because "technology often advances by improvement rather than replacement").

3. Amount and Substantiality of Portion of Infringed Work Used by Infringing Work in Relation to the Copyrighted Work as a Whole: *Campbell*, 510 U.S. at 586-88 (explaining importance of quantity of materials used, as well as their quality and importance); *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); *Connectix Corp.*, 203 F.3d at 606-07 (considering whether use occurs in reverse engineering of copyrighted work to gain access to unprotected functional elements of software); *Dr. Seuss Enters.*, 109 F.3d at 1402 (expressing that focus of this factor is question of substantial similarity and whether use was "reasonable in relation to the purpose of the copying" rather than whether use was fair).

4. Effect of Use of Infringing Work on the Potential Market for or Value of the Copyrighted Work: *Campbell*, 510 U.S. at 590-91, n.21 (assessing harm use can cause to plaintiff's market and market effect if others also infringe through such use; considering if use displaces or substitutes for original work; examining effect of use on derivative market for protected work; noting that "the importance of this [fourth] factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors"); *Harper & Row, Publishers*, 471 U.S. at 566 (noting that effect of defendant's infringing work on market for or value of plaintiff's work is most important of fair use factors); *SOFA Entm't, 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 copyright owner's present intent not to publish copyrighted work); *Bleem*, 214 F.3d at 1026-27 (noting that effect on market "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 Enters.*, 109 F.3d at 1403 (balancing public benefit that will result from defendant's use against personal gain 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: *Campbell*, 510 U.S. at 585 n.18 (considering defendant's state of mind and explaining that permission is not necessary if use is fair); *Harper & Row, Publishers*, 471 U.S. at 562 (stating fair use presupposes good faith and fair dealing); *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)).

The Ninth Circuit has considered a number of cases involving copying of computer software. In all cases, the trial courts appropriately made use of the four-factor test for fair use. *See, e.g.*, *Connectix Corp.*, 203 F.3d at 608; *Triad Sys. Corp.*, 64 F.3d at 1336-37.

Parody often presents difficulties because the success of its imitative character depends on its ability to "conjure up" the original work that it parodies. This may create an issue of fair use. *See, e.g.*, *Campbell*, 510 U.S. at 588-89 (explaining importance of context when evaluating parodies and how parodies usually serve different market functions than original); *Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 803 (9th Cir.2003); *Dr. Seuss Enters.*, 109 F.3d at 1399-1401.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.22 COPYRIGHT—AFFIRMATIVE DEFENSE—ABANDONMENT

The defendant contends that a copyright does not exist in the plaintiff's work because the plaintiff abandoned the copyright. The plaintiff cannot claim ownership of the copyright if it was abandoned. In order to show abandonment, the defendant has the burden of proving each of the following by a preponderance of the evidence:

1. the plaintiff intended to surrender [ownership] rights in the work; and

2. an act by the plaintiff 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 has abandoned the copyright.

If you find that the plaintiff has proved [his] [her] [its] 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, unless you find that the defendant has proved each of the elements of this affirmative defense, in which case your verdict should be for the defendant.

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 bracketed portion of the penultimate paragraph pertaining to publication without copyright notice should be used if the copyright infringement action is brought under the 1909 Copyright Act.

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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.23 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. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1115 (9th Cir.2010). It does not apply when there is no allegation of copyright infringement. *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1090 (9th Cir.2005). Copyright misuse precludes enforcement of a copyright during the period of misuse, but it does not invalidate the copyright. *Practice Mgmt.*, 121 F.3d at 520 n.9.

Copyright misuse "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 Records v. Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir.2001)); *see also Practice Mgmt.*, 121 F.3d at 520-21 (finding misuse when copyright holder's license agreement required licensee to use its copyrighted coding system to exclusion of other competing coding systems because it gave copyright holder a "substantial and unfair advantage over its competitors").

The contours of this defense are still being defined because courts do not need to address the issue when there is an unsuccessful claim for copyright infringement. *See MDY Indus., LLC v. Blizzard Entm't, 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 district court did not decide copyright misuse because it found no infringement); *Sony Comput. Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 608 (9th Cir.2000) (declining to consider copyright misuse issue when likelihood of success on merits insufficiently established injunctive relief on copyright infringement claim).

In *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772 (5th Cir.1999), the Fifth Circuit affirmed a jury decision that a copyright holder had engaged in copyright misuse by stating, "A reasonable juror could conclude, based on the licensing agreement, that 'DSC has used its copyrights to indirectly gain commercial control over products DSC does not have copyrighted,' namely, its microprocessor cards." *Id.* at 793.

There is a useful discussion of this affirmative defense in a concurring opinion in *Omega S.A. v. Costco Wholesale Group*, 776 F.3d 692, 699-706 (9th Cir.2015) (Wardlaw, J., concurring), that affirmed on other grounds a lower court decision that included a copyright misuse finding. However, the Ninth Circuit has not yet decided whether the equitable defense of copyright misuse should be submitted to the jury or is an issue for the court to decide.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.24 COPYRIGHT—AFFIRMATIVE DEFENSE—IMPLIED LICENSE

The defendant contends that [he] [she] [it] is not liable for copyright infringement because the plaintiff granted [him] [her] [it] an implied license in the plaintiff's copyrighted work. The plaintiff cannot claim copyright infringement against a defendant who [copies] [distributes] [uses] [modifies] [retains] the plaintiff's copyrighted work if the plaintiff granted the defendant an implied license to [copy] [distribute] [use] [modify] [retain] the work.

In order to show the existence of an implied license, the defendant has the burden of proving that:

1. the defendant requested that the plaintiff create a work;

2. the plaintiff made that particular work and delivered it to the defendant; and

3. the plaintiff intended that the defendant [copy] [distribute] [use] [modify] [retain] the plaintiff's work.

If you find that the defendant has proved by a preponderance of the evidence that the plaintiff granted [him] [her] [it] an implied license to [copy] [distribute] [use] [modify] [retain] the copyrighted work, your verdict should be for the defendant [on that portion of the plaintiff's copyright infringement claim].

Comment

The above instruction is based on *Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 558-59 (9th Cir.1990) and *Asset Marketing Systems, Inc.*, 542 F.3d 748, 754-57 (9th Cir.2008) (setting forth this test in this form). *See also U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1019-20 (9th Cir.2012) (applying this test to reverse grant of summary judgment because reasonable jury could find implied license).

Implied license is an affirmative defense to copyright infringement. *Asset Mktg.*, 542 F.3d at 754. 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 plaintiff's work may be implied. *See U.S. Auto Parts*, 692 F.3d at 1019-20 (discussing existence of implied license in context of employment relationship); *Asset Mktg.*, 542 F.3d at

750, 754-55 (involving independent contractor relationship); *Oddo v. Ries*, 743 F.2d 630, 634 (9th Cir.1984) (involving partnership relationship). A license is often implied when "without such a license, [the plaintiff's compensated] contribution…would have been of minimal value." *Id*.

An implied license may be implied by conduct. *See Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir.2001). It may be unlimited in scope or restricted to certain specific rights. *Compare Asset Mktg.*, 542 F.3d at 757 (finding 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 manuscript and 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. *Id.* at 634 & n.6. Limitations on the scope of an implied license may be strictly construed. *See id.* at 634 (finding that implied license to use copyrighted work in a manuscript does not imply "the right to use the [copyrighted work] in any work other than the manuscript itself"); *cf. Asset Mktg*, 542 F.3d at 757 (finding plaintiff granted defendant "unlimited" implied license "to retain, use, and modify" work when plaintiff previously evinced no intent to limit the scope of defendant's use).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.25 COPYRIGHT—AFFIRMATIVE DEFENSE—FIRST SALE (17 U.S.C. § 109(a))

The defendant contends that [he] [she] [it] is not liable for copyright infringement for [reselling] [redistributing] a particular copy of the plaintiff's copyrighted work because the plaintiff sold or otherwise transferred ownership of that copy. The plaintiff may not claim copyright infringement for subsequent distributions of that particular copy. [The defendant may invoke this ["first sale"] defense only if [he] [she] [it] is an owner of a particular copy of the plaintiff's copyrighted work, and not a licensee.]

If you find that the defendant was an owner of the particular copy of the plaintiff's copyrighted work and that the plaintiff sold or otherwise transferred ownership of that particular copy, your verdict should be for the defendant on plaintiff'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; *see also Kirtsaeng v. John Wiley & Sons*, 133 S. Ct. 1351, 1358 (2013); *Omega S.A. v. Costco Wholesale Corp.*, 776 F.3d 692 (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 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 musical recordings); *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1155 (9th Cir.2011) (involving computer software); *Vernor*, 621 F.3d at 1111 (involving computer software); and *United States v. Wise*, 550 F.2d 1180, 1183 (9th Cir.1977) (involving motion picture). The Ninth Circuit has yet to decide which party bears the burden of proving the first sale or lack of sale in a civil case. *Vernor*, 621 F.3d at 1107 n.7.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.26 COPYRIGHT—AFFIRMATIVE DEFENSE— SERVICE PROVIDER OF NETWORK COMMUNICATIONS SERVICES DEFINED (17 U.S.C. § 512(i), (k))

The defendant qualifies as a service provider of network communication services if the defendant:

1. 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;

2. adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers; and

3. 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). This limitation applies whether the nonconduit functions are "automatic or humanly controlled." *Id.* at 1042.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.27 COPYRIGHT—AFFIRMATIVE DEFENSE—LIMITATION ON LIABILITY FOR TRANSITORY DIGITAL NETWORK COMMUNICATIONS (17 U.S.C. § 512(a))

The defendant contends that the defendant 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 has the burden of proving this defense by a preponderance of the evidence.

The activity occurred over transitory digital communications if:

1. the defendant did not initiate or direct the transmission of the material;

2. the transmission, routing, provision of connections, or storage of the copyrighted material was carried out through an automatic technical process, and the defendant did not select the material;

3. the defendant did not select the recipients of the material except as an automatic response to a request;

4. the defendant did not make the material accessible to anyone other than to anticipated recipients;

5. the defendant did not keep the copyrighted material for longer than reasonably necessary for the transmission, routing, or provision of connections; and

6. the defendant transmitted the material through the system or network without modifying the content.

If you find that the defendant has proved all of these elements, 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.

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), (i) and (k). The DMCA safe harbor provisions are affirmative defenses to copyright infringement. *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 Capital Partners LLC*, 718 F.3d 1006, 1021 (9th Cir.2013). 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 particular defense can be used by a service provider of network communication services, which "merely acts as a conduit for infringing material." *Id.* at 1041.

For a definition of a service provider of network communication services, *see* Instruction 17.26 (Copyright—Service Provider of Network Communications Services Defined).

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). However, the notification system does not have to be perfect. *Id.* at 1110 (finding 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.

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 reasonably necessary for transmission. *Ellison*, 357 F.3d at 1081.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.28 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 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 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 is eligible to use the defense of system caching if the defendant:

1. is a service provider of network communication services, online services, or network access;

2. adopted, reasonably implemented, and informed users of a policy to terminate users who are repeat copyright infringers;

3. accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works; and

4. 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:

1. the material was made available online by a person other than the defendant;

2. the material was not transmitted to, from, or at the request of the defendant;

3. the storage of the copyrighted material occurred through an automatic technical process;

4. the system caching did not modify the content of the material;

5. the defendant 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 meant to prevent or unreasonably impair system caching;

6. the defendant did not interfere with the ability for the material to return to the original provider of the information;

7. if access to the material was limited by a condition, the defendant did not allow access to the material unless the requester satisfied that condition; and

8. the defendant expeditiously removed or disabled access to the infringing material or activity upon valid notification of claimed infringement.

If you find that the defendant has proved each of these elements, 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.

[*Additional instruction to be given if the defendant received notice of claimed infringement*]

A valid notification of claimed infringement must include:

1. a physical or electronic signature of a person authorized to act on behalf of the copyright owner;

2. identification of the infringed copyrighted work or a representative list of infringed copyrighted works if there are multiple infringed works;

3. identification of the infringing material or activity, and reasonably sufficient information to permit the defendant to locate the material;

4. information reasonably sufficient to permit the defendant to contact the complaining party;

5. a statement that the complaining party has a good faith belief that the material infringed a copyright;

6. 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

7. 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 expeditiously to remove or disable access to infringing material or activity if the notice of claimed infringement is invalid.

Comment

This instruction is based on 17 U.S.C. § 512 (b), (c)(3), (i) and (k).

For a definition of a service provider of network communication services, *see* Instruction 17.26 (Copyright—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).

Valid Notification of Claimed Infringement: 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 Capital Partners LLC*, 718 F.3d 1006, 1025 (9th Cir.2013). A valid notification is a single written communication that substantially meets all of these requirements, not just some of them. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir.2007) (finding 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, 1073 (9th Cir.2013) (holding that simple 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.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.29 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 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 has the burden of proving each element of this defense by a preponderance of the evidence.

The defendant is eligible to use this defense if the defendant:

1. is a service provider of network communication services, online services or network access;

2. adopted, reasonably implemented and informed users of a policy to terminate users who are repeat copyright infringers;

3. accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works;

4. 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

5. 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:

1. lacked actual knowledge that the material or activity on the system or network was infringing;

2. 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

3. 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 the defendant has proved all of these elements, 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.

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 17.26 (Copyright—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 17.28 (Copyright—Affirmative Defense—Limitation on Liability for System Caching).

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 (9th Cir.2013) (finding 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 are used for copyright infringement is insufficient. *UMG Recordings, Inc. v. Shelter Capital Partners*, LLC, 718 F.3d 1006, 1022 (9th Cir.2013). Notifications about copyright infringement from a party who is not the copyright holder or an agent of the copyright holder does not provide actual knowledge of infringement. *Id.* at 1025.

Awareness of Facts or Circumstances from which Specific Infringing Activity Is Apparent: A fact or circumstance from which infringing activity is apparent must be about a specific instance of copyright infringement. *Id.* at 1022-23 (finding that news reports discussing general problem of copyright infringement on website and CEO's acknowledgment of this general problem were not enough to be "red flag"). 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 1043-46 (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 ("hosting a category of copyrightable material" with knowledge that "services could be used to share infringing material" is not automatically 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: The requirement that the service provider not have 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(d). 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. "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.* (citing *Viacom Internat'l v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir.2012)).

The relevant inquiry 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 (finding that fees for webhosting not direct financial benefit).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.30 COPYRIGHT—AFFIRMATIVE DEFENSE—LIMITATION ON LIABILITY FOR INFORMATION LOCATION TOOLS (17 U.S.C. § 512(d))

The defendant 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 to refer or link users to infringing material or activity. The defendant has the burden of proving this defense by a preponderance of the evidence.

The defendant is eligible to use this defense if the defendant:

1. is a service provider of network communication services, online services or network access;

2. adopted, reasonably implemented and informed users of a policy to terminate users who are repeat copyright infringers;

3. accommodated and did not interfere with standard technical measures used to identify or protect copyrighted works;

4. 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

5. is facing liability for copyright infringement for providing information location tools or services.

The defense applies if the defendant:

1. lacked actual knowledge that the material or activity was infringing;

2. 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

3. 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)(3), (i) and (k).

For a definition of a service provider of network communication services, *see* Instruction 17.26 (Copyright—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 17.28 (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 17.29 (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) (disallowing use of defense when defendant provided users with hyperlink to infringing material but also engaged in other infringing activity).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.31 COPYRIGHT—DAMAGES
(17 U.S.C. § 504)

If you find for the plaintiff on the plaintiff's copyright infringement claim, you must determine the plaintiff'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), 17.32 (Copyright—Damages—Actual Damages), and 17.33 (Copyright—Damages—Defendant's Profits).

Under 17 U.S.C. § 504(c)(1) the plaintiff may "elect, *at any time* before final judgment is rendered" whether to seek actual or statutory damages. 17 U.S.C. § 504(c)(1); *see also Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir.2008); *L.A. News Serv. v. Reuters Television Int'l*, 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); *see also* Instruction 17.33 (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).

Section 504(b) provides that the copyright owner is entitled to recover the actual damages suffered by him or her 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. 17 U.S.C. § 504(b); *see also 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).

When injury is shown, but neither profits nor damages can be proved, statutory damages 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). When the copyright owner fails to register its copyright before the infringement, it can recover only actual damages and profits and cannot seek statutory damages. *See Derek Andrew*, 528 F.3d at 699; *Polar Bear Prods.*, 384 F.3d at 707 n.5.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.32 COPYRIGHT—DAMAGES—ACTUAL DAMAGES (17 U.S.C. § 504(b))

The copyright owner is entitled to recover the actual damages suffered as a result of the infringement. Actual damages means 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. The reduction of the fair market value of the copyrighted work is 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. That amount also could be represented by the lost license fees the plaintiff would have received for the defendant's unauthorized use of the plaintiff's work.

Comment

Add applicable paragraphs from Instruction 17.32 (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 v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 787 (9th Cir.2006). The circuit has noted that "[a]ctual damages are usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer." *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir.2004) (internal quotation marks omitted); *see also id.* at 709 ("[I]t is not improper for a jury to consider *either* a hypothetical lost license fee *or* the value of the infringing use to the infringer to determine actual damages, provided the amount is not based on 'undue speculation.'" (emphasis added) (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir.2003))). "[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 as the diminution in value of the copyright) are mutually exclusive or additive, nor the danger of double recovery if both measures are presented to the jury.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.33 COPYRIGHT—DAMAGES—DEFENDANT'S PROFITS (17 U.S.C. § 504(b))

In addition to actual damages, the copyright owner 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's profits only if you find that the plaintiff showed a causal [relationship] [nexus] between the infringement and the [profits generated indirectly from the infringement] [defendant's gross revenue].

The defendant's profit is determined by [deducting] [subtracting] all expenses from the defendant's gross revenue.

The defendant's gross revenue is all of the defendant's receipts from the [use] [sale] of a [[product] [work]] [[containing or using the copyrighted work] [associated with the infringement]]. The plaintiff has the burden of proving the defendant'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 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 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).

"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 a 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 (omission and alteration in original) (quoting *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir.2002)) (holding that plaintiff seeking to recover indirect profits must "formulate the initial evidence of gross revenue duly apportioned to relate to the infringement"); *see also Mackie*, 296 F.3d at 916 (holding that artist could not recover indirect profits unless he demonstrated with "non-speculative evidence" causal link between infringement and subsequent indirect profits, such as how many individuals subscribed to symphony because artist's work appeared on one page of 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. 17 U.S.C. § 504(b); *see also Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir.2000). 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; *see also id.* at 711 (noting that Ninth Circuit definition, like that in other circuits, applies "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).

For cases providing examples of the calculation of profits, *see Polar Bear Prods.*, 384 F.3d at 712-16 (upholding award of profits based on expert testimony of certain sales figures but rejecting award for enhanced brand prestige); *Frank Music Corp.*, 772 F.2d at 519 (discussing calculation and proof of profits attributable to infringement and holding that indirect profits are recoverable if ascertainable; e.g., plaintiff could claim profits resulting from hotel and gambling operations resulting from infringing stage show); *Cream Records*, 754 F.2d at 828-29 (awarding profits from defendant's sale of beverage following defendant's use of plaintiff's song in commercial); and *May v. Watt*, 822 F.2d 896, 901 (9th Cir.1987) (involving increase in value of condominium through use of infringed architectural plans); *Lucky Break Wishbone Corp. v. Sears Roebuck & Co.*, 373 F. App'x 752, 757-58 (9th Cir.2010) (applying presumption, in unpublished disposition, that jury "fulfilled its duty to apportion profits" although the jury failed to apportion profits explicitly).

For cases providing examples of the deductions from defendant's gross revenue, *see Frank Music Corp.*, 886 F.2d at 1548 (deducting direct costs of production from 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 infringer can demonstrate that it actually assisted production, distribution or sale of infringing product); *Three Boys Music*, 212 F.3d at 487 (adopting 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 "concrete financial impact").

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.34 COPYRIGHT—DAMAGES—STATUTORY DAMAGES (17 U.S.C. § 504(c))

If you find for the plaintiff on the plaintiff's copyright infringement claim, you must determine the plaintiff's damages. The plaintiff seeks a statutory damage award, established by Congress for [[the work infringed] [each work infringed]]. Its purpose is to penalize the infringer and deter future violations of the copyright laws.

The amount you may award as statutory damages is not 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 17.34 (Innocent Infringement), Instruction 17.35 (Willful Infringement)]* will tell you [what constitutes innocent infringement] [and] [what constitutes willful infringement]].

Comment

The jury should be provided with a special interrogatory form in order 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 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).

There is wide discretion in determining the amount of statutory damages, constrained only by the specified statutory maximum and minimum. *See Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir.2009); *L.A. News Serv. v. Reuters Television Int'l*, 149 F.3d 987, 996 (9th Cir.1998); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir.1984) (noting that trier of fact must be guided by "what is just in the particular case, considering the

nature of the copyright, the circumstances of the infringement and the like," restrained only by qualification that amount be within prescribed maximum or minimum).

Because statutory damages serve both compensatory and punitive purposes, plaintiff can recover statutory damages whether or not there is adequate evidence of the actual damage suffered by plaintiff or the profits reaped by the defendant. *See L.A. News Serv.*, 149 F.3d at 996; *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir.1990); *Harris*, 734 F.2d at 1335. "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.*, 334 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 (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 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.

The plaintiff has the right to make an election before final judgment to recover statutory damages instead of actual damages and defendant's profits. 17 U.S.C. § 504(c)(1). If the plaintiff is unable to meet its burden of proving actual damages, it may still seek statutory damages. *See L.A. News Serv.*, 149 F.3d at 995 & n.8. However, the converse is not true. Once the copyright owner elects to recover statutory damages, the owner may not recover actual damages as well. *See Nintendo of America, Inc. v. Dragon Pac. Int'l.*, 40 F.3d 1007, 1010 (9th Cir.1994). Apportionment of damages to reflect profits other than those derived from the infringement is not available when the plaintiff elects statutory damages. *See id*. at 1012.

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. *See Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 946 (9th Cir.2011) (citing *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir.1997). 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 id.* 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).

The proper test for assessing what is a separate work when the infringement involves episodes of a broadcast series focuses on whether each episode has an independent economic value and is, in itself, viable. *Columbia Pictures Television*, 106 F.3d at 295-96.

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.35 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:

1. the defendant was not aware that [his] [her] [its] acts constituted infringement of the copyright; and

2. the defendant had no reason to believe that [his] [her] [its] 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 defendant's infringement was innocent is a factual determination. *See L.A. News Serv. v. Reuters Television Int'l*, 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).

This chapter is being reviewed in light of comments solicited by the Committee from the public.

17.36 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:

1. the defendant engaged in acts that infringed the copyright; and

2. the defendant knew that those acts infringed the copyright, or the defendant 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).

The Comment to this Instruction in the 2007 edition described a revision of an earlier instruction on willful infringement. The 2007 edition revised the earlier instruction to reflect Ninth Circuit precedents stating that willful infringement required defendant's "knowledge that the defendants' conduct constituted an act of infringement." *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 & n.3 (9th Cir.1990); *see also Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 293 (9th Cir.1997) ("Willful" means acting "with knowledge that [one's] conduct constitutes copyright infringement."), *rev'd on other grounds sub nom. Feltner v. Columbia Pictures Television, Inc.,* 523 U.S. 340 (1998). Since at least 2008, however, the Ninth Circuit has recognized that "a finding of 'willfulness' in this context can be based on either 'intentional' behavior, or merely 'reckless' behavior." *In re Barboza*, 545 F.3d 702, 707 (9th Cir.2008); *see also Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 674 (9th Cir.2012) ("[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 *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 944 (9th Cir.2011))). This instruction reflects that change.

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.*, 909 F.2d at 1336 (holding that defendant who ignored revocation of its license to copyrighted work, and continued to use work after revocation,

willfully infringed that work); *see also Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228 (9th Cir.2012) ("Continued use of a work even after one has been notified of his or her alleged infringement does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing.").

Generally, deductions of defendant's expenses are denied where the defendant's infringement is willful or deliberate. *See Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1331-32 (9th Cir.1984). Apparently, a finding of willfulness can also be made in connection with an assessment of defendant's profits, even though reference to willful infringement is made only in connection with statutory damages. *See, e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487-88 (9th Cir.2000) (noting, in 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).

18. SECURITIES EXCHANGE ACT

Instruction

Introductory Comment
18.0 Securities—Definition of Recurring Terms
18.1 Securities—Rule 10b-5 Claim
18.2 Securities—Misrepresentations or Omissions—Materiality
18.3 Securities—Forward-Looking Statements
18.4 Securities—Knowingly
18.5 Securities—Justifiable Reliance Generally
18.6 Securities—Justifiable Reliance—Fraud-on-the-Market Case
18.7 Securities—Causation
18.8 Securities—Damages
18.9 Securities—Controlling Person Liability
18.10 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 . . . (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.

Prior 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") in order to run up commissions. The Committee has not included 1933 Act instructions or churning instructions in this edition, 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.

18.0 SECURITIES—DEFINITION OF RECURRING TERMS

Congress has enacted securities laws designed 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 is 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 in essence 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 had 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 can also 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 policy-making of the enterprise. A broker or a dealer may be a controlling person.]

["In connection with" means that there was some nexus or relationship 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

As to "controlling person," *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), for a discussion of controlling person liability.

As to "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). The defendant need not, however, have actually participated in any securities transaction so long as the 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 found to be "touching" the securities transaction).

As to "instrumentality of interstate commerce," it is not necessary that interstate mailings, telephone calls, or other 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).

As to "omission," 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").

A duty of disclosure may also 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 financer of leveraged buyout of corporation did not have duty to disclose material information regarding corporation to investors in 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).

Statements of opinion may be actionable if the opinion (1) amounts to an untrue statement of material fact or (2) is misleading due to the omission of a material fact. *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 135 S. Ct. 1318, 1326-30 (2015). In *Omnicare*, pension funds brought suit after purchasing stock from a pharmaceutical services company, alleging that the registration statement contained opinions of legal compliance that were materially false and misleading. 135 S. Ct. at 1324. The Supreme Court held that a speaker may be liable in the securities context for making certain statements of opinion. *Id*. Generally, 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. *Id*. at 1326–27. Additionally, an opinion may be actionable if the speaker omits material facts necessary to make the opinion not misleading: 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 1328-30.

18.1 SECURITIES—RULE 10b-5 CLAIM

The plaintiff alleges that the defendant defrauded [him] [her] [it] by [*describe the plaintiff's "10b-5" claim*]. This is referred to as "the plaintiff's 10b-5 claim."

On this claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. 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] in connection with the [purchase] [sale] of securities;

2. The defendant acted knowingly;

3. The defendant [used] [caused the use of] [an instrumentality of interstate commerce, such as mail or telephone] [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;

4. The plaintiff justifiably relied on [the defendant's untrue statement of a material fact] [the defendant's omission to state a necessary material fact] in [buying] [selling] securities; and

5. The defendant's [misrepresentation] [omission] caused the plaintiff to suffer damages.

If you find that the plaintiff has proved each of the above elements, your verdict should be for the plaintiff. If, on the other hand, you find that the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

Comment

See Lloyd v. CVB Financial Corporation, 811 F.3d 1200, 1206 (9th Cir.2016) (listing elements of claim).

See Instruction 18.0 (Securities—Definition of Recurring Terms) 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 15 U.S.C. § 78j(b) (unlawful to use deceptive device in connection with purchase or sale of security) and 17 C.F.R. § 240.10b-5 (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). *Gray v. First Winthrop Corp.*, 82 F.3d 877, 884 (9th Cir.1996), confirms 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). The plaintiff must show that the defendant had control over the statement; a defendant's significant involvement in the preparation of a prospectus containing untrue or misleading statements is not enough to show that the defendant "made" the statements. *Id*.

Previously, 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.

18.2 SECURITIES—MISREPRESENTATIONS OR OMISSIONS—MATERIALITY

The plaintiff must prove by a preponderance of the evidence that the defendant'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] [it] as having significantly altered the total mix of information [he] [she] [it] 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).

In discussing materiality, the Ninth Circuit has applied *TSC Industries* and *Basic Inc.* in various formulations. *See, e.g.*, *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).

18.3 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 statements of opinion.

Predictions, projections and other forward-looking statements, even if ultimately proven incorrect, are generally not statements of fact, but instead opinions about what may or may not occur in the future.

Predictions, projections and other forward-looking statements 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 statements were made, (1) the defendant did not actually believe the statements, (2) there was no reasonable basis for the defendant to believe the statements, or (3) the defendant was aware of undisclosed facts tending to seriously undermine the accuracy of the statements.

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 numerous 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 statements of opinion or statements accompanied by cautionary language are actionable under Rule 10b-5. *See, e.g.*, *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 "bespeaks caution" doctrine).

The term "forward-looking statements" refers generally to management projections of future economic performance, such as sales, revenue 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)).

As to forward-looking statements not subject to 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.

Forward-looking statements that are not affirmatively exempted from the safe harbor's coverage under 15 U.S.C. § 78u-5(c), are afforded safe harbor protection "in either of two circumstances: if they were identified as forward-looking statements and accompanied by meaningful cautionary language, . . . or if the investors fail to prove the projections were made with *actual* knowledge that they were materially false or misleading." *In re Cutera*, 610 F.3d at 1111-12 (9th Cir.2010). These two types of forward-looking statements are independent grounds for protection under the safe harbor. *See id.* at 1112-13 (holding that the safe harbor rule should be read disjunctively).

As to 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(1)(A)(I); *see also id.* § 78u-5(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).

As to the second category, the PSLRA provides a safe harbor for forward-looking statements that the speaker actually 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.

18.4 SECURITIES—KNOWINGLY

[A defendant acts knowingly when [he] [she] [it] 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] [it] 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.]

["Reckless" means 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 found 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.

The Ninth Circuit defined "recklessness" in the context of Section 10(b) and Rule 10b–5 in *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir.1990) (en banc), and *In re Software Toolworks Inc.*, 50 F.3d 615, 626 (9th Cir.1994). Recklessness satisfies the scienter requirement, except as to forward-looking statements under the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-5, for which actual knowledge that the statement was false or misleading is required. *See* Comment to Instruction 18.3 (Securities—Forward-Looking Statements).

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 Costa Brava Partnership III v. ChinaCast Education Corp*., ___ F.3d ___, No. 13-10561, 2015 WL 6405680 (9th Cir. Oct. 23, 2015).

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).

18.5 SECURITIES—JUSTIFIABLE RELIANCE GENERALLY

The plaintiff must prove by a preponderance of the evidence that [he] [she] [it] 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] [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 18.6 (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 found 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 material omissions. *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 case resolved on summary judgment). Accordingly, at trial, the court will have to resolve whether the presumption is applicable in light of the evidence.

To provide guidance to jurors required to determine whether the plaintiff's reliance was justifiable, the judge may consider adding the following language 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 cases citing listing the factors, *see, for example*, *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 warned the plaintiff adequately of the attendant risks in the transaction, the defendant's disclosures must have been precise and must have related directly to that which the plaintiff claims was misleading. *See In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414-15 (9th Cir.1994).

18.6 SECURITIES—JUSTIFIABLE RELIANCE—FRAUD-ON-THE-MARKET CASE

The plaintiff does not have to prove that [he] [she] [it] justifiably relied on the alleged misrepresentation or omission in deciding to [purchase] [sell] the [security] [securities] in question if [he] [she] [it] 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 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 has proved that [he] [she] [it] relied on the defendant's statements.

If, however, the defendant proves by a preponderance of the evidence that (1) the plaintiff 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 has rebutted any presumption that the plaintiff relied on the market. In that event, the plaintiff must then prove that [he] [she] [it] 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.*, 134 S. Ct. 2398, 2409 (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). *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) (in a fraud-on-the-market case, the plaintiff need not show actual reliance on any misrepresentation or omission; instead the plaintiff must show reliance on the integrity of the price established by the market, which was in turn influenced by the misleading information or the 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) (presumption can be rebutted by showing that information tending to refute the misrepresentation had entered market through other channels). But even if some information was "out there," 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 18.5 (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.*, 134 S. Ct. 2398, 2406 (2014)). "[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. While 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 pled 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.*

18.7 SECURITIES—CAUSATION

The plaintiff must prove by a preponderance of the evidence that the alleged material misrepresentations or omissions were the cause of [his] [her] [its] economic injury. To establish causation, the plaintiff must prove that the alleged misrepresentation[s] or omission[s] played a substantial part in causing the injury or loss the plaintiff suffered. The plaintiff 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*, 544 U.S. 336, 342 (2005). 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 found 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.

The Ninth Circuit has recently 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.2005), 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").

18.8 SECURITIES—DAMAGES

If you find for the plaintiff on the 10b-5 claim, then you must consider and decide the amount of money damages to be awarded to the plaintiff. You may award only actual damages in that amount which will reasonably and fairly compensate the plaintiff for the economic loss [he] [she] [it] sustained. Your award must be based on evidence and not upon speculation, guesswork or conjecture. The plaintiff 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 18.7 (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 proffered in 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).

18.9 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 claims that the defendant is a controlling person and is therefore liable under the securities laws. On this claim, the plaintiff has the burden of proving by a preponderance of the evidence that the defendant [*controlling person*] possessed, directly or indirectly, the actual power to direct or cause the direction of the management and policies of [*controlled person*].

Comment

See Instruction 18.0 (Securities—Definition of Recurring Terms) for 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 18.9 (Securities—Good Faith Defense to Controlling Person Liability).

It may be necessary to supplement this instruction with instructions regarding respondeat 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 an 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); 4.10 (Both Principal and Agent Sued—Agency or Authority Denied); and 4.12 (Principal Sued, but Not Agent—Agency or Authority Denied).

18.10 SECURITIES—GOOD FAITH DEFENSE TO CONTROLLING PERSON LIABILITY

The defendant [*insert name*] contends that [he] [she] [it] is not liable to the plaintiff even if [he] [she] [it] was a controlling person because [he] [she] [it] did not induce the violation that led to the plaintiff's economic injury and [he] [she] [it] acted in good faith. The defendant has the burden of proving both of the following elements by a preponderance of the evidence:

1. the defendant did not directly or indirectly induce the violation; and

2. the defendant acted in good faith.

If you find that the defendant has proved both of these elements, your verdict should be for the defendant. The defendant can prove good faith only by establishing that [he] [she] [it] maintained and enforced a reasonable and proper system of supervision and internal control. If you find that the defendant has failed to prove either or both of these elements, your verdict should be for the plaintiff.

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).

19. 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 Coop. 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).

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 Numours & Co.*, 431 F.3d 353, 361 (9th Cir.2005).

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 cooperative's records did not participate in "operation or management" of cooperative's affairs by failing to inform cooperative's board of directors that cooperative was arguably insolvent). In determining whether the conduct element has been satisfied, relevant questions include whether the defendant "occupies a position in the chain of command," "knowingly implements [the enterprise's] decisions," or is "indispensable to achieving the enterprise's goal." *Walter v. Drayson*, 538 F.3d 1244, 1248-49 (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 RICO enterprise). However, "the inability of a corporation to operate except through its officers is not an impediment to § 1962(c) suits." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir.1992) (holding that individual officers of corporation could be named as defendants even though corporation was alleged to be enterprise and could not act without its officers); *see United States v. Benny*, 786 F.2d 1410, 1416 (9th Cir.1986) (stating that corporate form is "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 DuPont*, 431 F.3d at 361 (finding associated-in-fact enterprise could be formed between defendant corporation, law firms employed by it and expert witnesses retained by 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 (finding that plaintiffs had sufficiently alleged associated-in-fact enterprise between defendant software manufacturer and co-defendant retailer wherein defendants established cross-marketing scheme for transferring plaintiffs' personal information from retailer to manufacturer in order to allow manufacturer to improperly charge plaintiffs for services); *see also Boyle*, 556 U.S. at 945–46 ("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.2015). A RICO enterprise is not defeated even when some of the enterprise's participants lack detailed knowledge of all of 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.* 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) (finding alleged predicate acts to be related when all were directed toward inducing plaintiff to enter into 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) (finding 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, fact that both sets implicated same participants 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 the pattern of activity must extend to establish closed-ended continuity, though 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 "hard and fast rule" that to establish closed-ended continuity, pattern of activity must extend more than 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) (finding open-ended continuity based on two filings of false annual trading reports for phantom commodity trading company and no evidence that defendant would have stopped filing false annual reports if company had continued to do business); *Medallion*, 833 F.2d at 1364 (finding continuity requirement not satisfied because fraud engaged in 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*, 473 U.S. at 495 ("'[R]acketeering 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).

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*, 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"). 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*.

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). 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 (2013), Instructions 7.1 et seq.

These instructions may be accessed at:

http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCivilPatternJuryInstruction.pdf