

DEFAMATION

- 1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)
- 1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)
- 1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)
- 1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)
- 1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)
- 1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)
- 1706. Definition of Statement
- 1707. Fact Versus Opinion
- 1708. Coerced Self-Publication
- 1709. Retraction: News Publication or Broadcast (Civ. Code, § 48a)
- 1710–1719. Reserved for Future Use
- 1720. Affirmative Defense—Truth
- 1721. Affirmative Defense—Consent
- 1722. Affirmative Defense—Statute of Limitations—Defamation
- 1723. Common Interest Privilege—Malice (Civ. Code, § 47(c))
- 1724. Fair and True Reporting Privilege (Civ. Code, § 47(d))
- 1725–1729. Reserved for Future Use
- 1730. Slander of Title—Essential Factual Elements
- 1731. Trade Libel—Essential Factual Elements
- 1732–1799. Reserved for Future Use
- VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure)
- VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure)
- VF-1702. Defamation per se (Private Figure—Matter of Public Concern)
- VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)
- VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)
- VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)
- VF-1706–VF-1719. Reserved for Future Use
- VF-1720. Slander of Title
- VF-1721. Trade Libel

DEFAMATION

VF-1722–VF-1799. Reserved for Future Use

Table A. Defamation Per Se

Table B. Defamation Per Quod

1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by making** **[one or more of]** **the following statement(s):** *[list all claimed per se defamatory statements]*. **To establish this claim, *[name of plaintiff]* must prove that all of the following are more likely true than not true:**

Liability

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

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

Actual Damages

If *[name of plaintiff]* has proved all of the above, then *[he/she/nonbinary pronoun]* is entitled to recover *[his/her/nonbinary pronoun]* actual damages if *[he/she/nonbinary pronoun]* proves that *[name of defendant]*’s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to *[name of plaintiff]*’s property, business, trade, profession, or occupation;**
- b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory statements;**
- c. Harm to *[name of plaintiff]*’s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Assumed Damages

Even if *[name of plaintiff]* has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that *[he/she/nonbinary pronoun]* has suffered this harm. Without presenting evidence of damage, *[name of plaintiff]* is entitled to receive compensation for this assumed harm in whatever sum

you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud. [For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.

- Slander Defined. Civil Code section 46.
- “Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage.” (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)
- “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. ‘In general, . . . a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.’ The defamatory statement must specifically refer to, or be ‘“of [or] concerning,”’ the plaintiff.” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259 [217 Cal.Rptr.3d 234], internal citations omitted.)
- “ ‘A statement is defamatory when it tends “directly to injure [a person] in respect to [that person’s] office, profession, trade or business, either by imputing to [the person] general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to [the person’s] office, profession, trade, or business that has a natural tendency to lessen its profits.” ’ ” (*Issa v. Applegate* (2019) 31 Cal.App.5th 689, 702 [242 Cal.Rptr.3d 809], internal citation omitted.)
- “In a case in which a plaintiff seeks to maintain an action for defamation by implication, the plaintiff must demonstrate that (1) his or her interpretation of the statement is reasonable; (2) the implication or implications to be drawn convey defamatory facts, not opinions; (3) the challenged implications are not ‘ “substantially true” ’; and (4) the identified reasonable implications could also be reasonably deemed defamatory.” (*Issa, supra*, 31 Cal.App.5th at p. 707.)
- “ ‘If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence . . . , that the libelous statement was made with “ ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” ’ ‘The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore “invite attention and comment.” ’ ” (*Jackson, supra*, 10 Cal.App.5th at p. 1259, footnotes and internal citations omitted.)
- “[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action.” (*Grenier, supra*, 234 Cal.App.4th at p. 486.)
- “ ‘ “If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject’s reputation in any of the enumerated respects, then there is no libel at all. If such a reader would

perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod,” requiring pleading and proof of special damages.’ ” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351–352 [192 Cal.Rptr.3d 511].)

- “A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander.” (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)
- “With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not defamatory.” (*The Nethercutt Collection*, *supra*, 172 Cal.App.4th at pp. 368–369.)
- “[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury ‘also may award plaintiff presumed general damages.’ Presumed damages ‘are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.’ [¶] . . . [¶] . . . [T]he instant instruction, which limits damages to ‘those damages that necessarily result from the publication of defamatory matter,’ constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, ‘if obeyed, did not allow the jurors to “enter the realm of speculation” regarding future suffering.’ ” (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- “In defamation actions generally, factual truth is a defense which it is the defendant’s burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, ‘must be provable as false before there can be liability under state defamation law.’ ” (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)
- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- “Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the ‘public’ at large; communication to a single individual is sufficient.” (*Smith, supra*, 72 Cal.App.4th at p. 645, internal citations omitted.)
- “[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor.” (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)
- “At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations.” (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d 696], internal citations omitted.)
- The general rule is that “a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant.” There is an exception to this rule. [When it is foreseeable that the plaintiff] “ ‘will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.’ ” (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)
- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader’s Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)
- “To qualify as a limited purpose public figure, a plaintiff ‘must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.’ ” (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy*

Newspapers (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- “Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff’s participation in the public controversy.” (*Grenier, supra*, 234 Cal.App.4th at p. 484, internal citations omitted.)
- “The First Amendment limits California’s libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with ‘knowledge that it was false or with reckless disregard of whether it was false or not.’ Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author ‘in fact entertained serious doubts as to the truth of his publication,’ or acted with a ‘high degree of awareness of . . . probable falsity.’ ” (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)
- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- “California . . . permits defamation liability so long as it is consistent with the requirements of the United States Constitution.” (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.” (*Masson, supra*, 501 U.S. at pp. 510–511, internal citations omitted.)
- Actual malice “does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth.” (*Jackson, supra*, 68 Cal.App.4th at p. 35.)

- “The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt.” (*Melaleuca, Inc.*, *supra*, 66 Cal.App.4th at p. 1365.)
- To show reckless disregard, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.” (*St. Amant, supra*, 390 U.S. at p. 731.)
- “ ‘A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] ‘A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.’ ” (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)
- “ ‘ “[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant’s recklessness or of his knowledge of falsity.” [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]’ ” (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader’s Digest Assn.*, *supra*, 37 Cal.3d at pp. 257–258, footnote omitted.)
- “An entity other than a natural person may be libeled.” (*Live Oak Publishing Co.*, *supra*, 234 Cal.App.3d at p. 1283.)
- “A political challenger must be afforded leeway to characterize the conduct of his opponent, even if such characterization takes the most negative perspective, in order to ensure ‘uninhibited, robust, and wide-open’ debate on public issues. Again, ‘[h]yperbole, distortion, invective, and tirades’ are ‘a part of American politics,’ and while providing protection for such speech may allow ‘candidates and their supporters to express . . . the most vile sentiments,’ it is nevertheless necessary in order to ensure the ‘opportunity to criticize and comment upon government and the issues of the day.’ ” (*Issa, supra*, 31 Cal.App.5th at p. 709, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 705–718
Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E,

Employment Torts And Related Claims—Defamation, ¶¶ 5:472, 5:577 (The Rutter Group)

4 Levy et al., *California Torts*, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 *California Forms of Pleading and Practice*, Ch. 340, *Libel and Slander*, §§ 340.10 et seq. (Matthew Bender)

14 *California Points and Authorities*, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1701. Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by making** **[one or more of]** **the following statement(s):** *[list all claimed per quod defamatory statements]*.

Liability

To establish this claim, *[name of plaintiff]* **must prove that all of the following are more likely true than not true:**

1. That *[name of defendant]* **made** **[one or more of]** **the statement(s) to** **[a person/persons]** **other than** *[name of plaintiff]*;
2. That **[this person/these people]** **reasonably understood that the statement(s)** **[was/were]** **about** *[name of plaintiff]*;
3. That **because of the facts and circumstances known to the** **[listener(s)/reader(s)] of the statement(s),** **[it/they]** **tended to injure** *[name of plaintiff]* **in** **[his/her/nonbinary pronoun]** **occupation** **[or to expose** *[him/her/nonbinary pronoun]* **to hatred, contempt, ridicule, or shame]** **[or to discourage others from associating or dealing with** *[him/her/nonbinary pronoun]*];
4. That **the statement(s)** **[was/were]** **false;**
5. That *[name of plaintiff]* **suffered harm to** **[his/her/nonbinary pronoun]** **property, business, profession, or occupation** **[including money spent as a result of the statement(s)];** **and**
6. That **the statement(s)** **[was/were]** **a substantial factor in causing** *[name of plaintiff]*'s **harm.**

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

Actual Damages

If *[name of plaintiff]* **has proved all of the above, then** *[he/she/nonbinary pronoun]* **is entitled to recover if** *[he/she/nonbinary pronoun]* **proves it is more likely true than not true that** *[name of defendant]*'s **wrongful conduct was a substantial factor in causing any of the following actual damages:**

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

c. Harm to [name of plaintiff]’s reputation; or

d. Shame, mortification, or hurt feelings.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

See also the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.

- Slander Defined. Civil Code section 46.
- Special Damages. Civil Code section 48a(4)(b).
- “The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage.” (*Wong v. Jing* (2011) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)
- “ ‘ “If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject’s reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then . . . there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then . . . the libel cannot be libel per se but will be libel per quod,” requiring pleading and proof of special damages.’ ” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351–352 [192 Cal.Rptr.3d 511].)
- “If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73], internal citation omitted.)
- “The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. However, . . . , some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. ‘In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion’ ” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)
- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7.)
- “A libel ‘per quod,’ . . . requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “ ‘The purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader.’ ‘In the libel

context, “inducement” and “innuendo” are terms of art: “[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the ‘innuendo,’ . . .); (2) support that interpretation by alleging *facts* showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the ‘inducement’).” [Citation.] “The office of an innuendo is to declare what the words *meant* to those to whom they were published.” “In order to plead . . . ambiguous language into an actionable libel . . . it is incumbent upon the plaintiff also to plead an inducement, that is to say, circumstances which would indicate that the words *were understood* in a defamatory sense *showing that the situation or opinion of the readers was such that they derived a defamatory meaning* from them. [Citation.]” ’ ’ (*Bartholomew v. YouTube, LLC*. (2017) 17 Cal.App.5th 1217, 1227 [225 Cal.Rptr.3d 917], original italics, internal citations omitted.)

- “For libel *per quod*, which [plaintiff] herself emphasizes is the cause of action at issue here, it is ‘necessary that the words should have been published concerning the plaintiff and should have been understood by at least one third person to have concerned him [or her]. [Citations.] “Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff [citations]. If the words used really contain no reflection upon any particular individual, no averment can make them defamatory. It is not necessary that plaintiff should be mentioned by name if the words used in describing the person meant, can be shown to have referred to him and to have been so understood [citation].” [Citation.]’ ‘ “It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. [Citation.]” ’ ’ (*Bartholomew, supra*, 17 Cal.App.5th at p. 1231, internal citation omitted.)
- “A slander that falls within the first four subdivisions of Civil Code section 46 is slander *per se* and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander *per quod*, and special damages are required for there to be any recovery for that slander.” (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 705–718

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.10–340.75 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by making** **[one or more of]** **the following statement(s):** *[list all claimed per se defamatory statement(s)]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

Liability

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

Actual Damages

If *[name of plaintiff]* **has proved all of the above, then** *[he/she/nonbinary pronoun]* **is entitled to recover** *[his/her/nonbinary pronoun]* **actual damages if** *[he/she/nonbinary pronoun]* **proves that** *[name of defendant]*'s **wrongful conduct was a substantial factor in causing any of the following:**

- a. **Harm to** *[name of plaintiff]*'s **property, business, trade, profession, or occupation;**
- b. **Expenses** *[name of plaintiff]* **had to pay as a result of the defamatory statements;**
- c. **Harm to** *[name of plaintiff]*'s **reputation; or**
- d. **Shame, mortification, or hurt feelings.**

Assumed Damages

If *[name of plaintiff]* **has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that** *[name of defendant]* **knew the statement(s)** **[was/were]** **false or that** *[he/she/nonbinary pronoun]* **had serious doubts about the truth of the statement(s), then the law assumes that** *[name of plaintiff]*'s **reputation has been harmed and that** *[he/she/nonbinary pronoun]* **has suffered shame, mortification, or hurt feelings. Without**

presenting evidence of damage, [name of plaintiff] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of defendant] if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she/nonbinary pronoun] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, October 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure—Matter of Public Concern)*, should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b);

Argentieri v. Zuckerberg (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

Sources and Authority

- “Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)
- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- “Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 348–349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- “[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.’ ” (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831].)
- “[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury ‘also may award plaintiff presumed general damages.’ Presumed damages ‘are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.’ [¶¶] . . . [T]he instant instruction, which limits damages to ‘those damages that necessarily result from the

publication of defamatory matter,’ constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, ‘if obeyed, did not allow the jurors to “enter the realm of speculation” regarding future suffering.’ ” (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- The jury should be instructed that the defendant’s negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- “When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation.” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.” (*Gertz, supra*, 418 U.S. at p. 350.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- “A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages. This malice must be established by ‘clear and convincing proof.’ ” (*Brown, supra*, 48 Cal.3d at p. 747, internal citations omitted.)
- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra*, 221 Cal.App.3d at p. 1022.)
- “To prove actual malice . . . a plaintiff must ‘demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.’ ” (*Khawar, supra*, 19 Cal.4th at p. 275, internal citation omitted.)
- “Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence” (*Khawar, supra*, 19 Cal.4th at p. 279.)
- “The inquiry into the protected status of speech is one of law, not fact.” (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)

- “For the *New York Times* standard to be met, ‘the publisher must come close to willfully blinding itself to the falsity of its utterance.’ ” (*Brown, supra*, 48 Cal.3d at p. 747, internal citation omitted.)
- “ ‘While such speech is not totally unprotected by the First Amendment, its protections are less stringent’ [than that applying to speech on matters of public concern].” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 719–721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13, 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40, 142.87 et seq. (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by making** **[one or more of]** **the following statement(s):** *[insert all claimed per quod defamatory statements]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

Liability

- 1. That *[name of defendant]* made [one or more of] the statement(s) to [a person/persons] other than *[name of plaintiff]*;**
- 2. That [this person/these people] reasonably understood that the statement(s) [was/were] about *[name of plaintiff]*;**
- 3. That because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure *[name of plaintiff]* in [his/her/nonbinary pronoun] occupation [or to expose [him/her/nonbinary pronoun] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her/nonbinary pronoun]];**
- 4. That the statement(s) [was/were] false;**
- 5. That *[name of defendant]* failed to use reasonable care to determine the truth or falsity of the statement(s);**
- 6. That *[name of plaintiff]* suffered harm to [his/her/nonbinary pronoun] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
- 7. That the statements [was/were] a substantial factor in causing *[name of plaintiff]*'s harm.**

Actual Damages

If *[name of plaintiff]* has proved all of the above, then [he/she/nonbinary pronoun] is entitled to recover if [he/she/nonbinary pronoun] proves that *[name of defendant]*'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- a. Harm to *[name of plaintiff]*'s property, business, trade, profession, or occupation;**
- b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory statements;**
- c. Harm to *[name of plaintiff]*'s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Punitive Damages

[Name of plaintiff] **may also recover damages to punish** [name of defendant] **if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she/nonbinary pronoun] acted with malice, oppression, or fraud.**

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).

- “Libel is recognized as either being per se (on its face), or per quod (literally meaning, ‘whereby’), and each requires a different standard of pleading.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- “If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 5, internal citation omitted.)
- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7, footnote omitted.)
- “A libel ‘per quod’ . . . requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “In the libel context, ‘inducement’ and ‘innuendo’ are terms of art: ‘[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the “innuendo,” . . .); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the “inducement”).’ ” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- “A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof.” (*Selleck v. Globe Int’l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- “The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- “‘[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.’ ” (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

- If the language is not defamatory on its face, there is no distinction between libel and slander: “In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 719–721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.11, 340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)

[Name of plaintiff] claims that [name of defendant] harmed [him/her/nonbinary pronoun] by making [one or more of] the following statement(s): [list all claimed per se defamatory statement(s)]. To establish this claim, [name of plaintiff] must prove all of the following:

Liability

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

Actual Damages

If [name of plaintiff] has proved all of the above, then [he/she/nonbinary pronoun] is entitled to recover [his/her/nonbinary pronoun] actual damages if [he/she/nonbinary pronoun] proves that [name of defendant]’s wrongful conduct was a substantial factor in causing any of the following:

- a. Harm to [name of plaintiff]’s property, business, trade, profession, or occupation;**
- b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements;**
- c. Harm to [name of plaintiff]’s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [name of plaintiff] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law assumes that [he/she/nonbinary pronoun] has suffered this harm. Without presenting evidence of damage, [name of plaintiff] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.

Punitive Damages

[Name of plaintiff] may also recover damages to punish [name of

defendant] if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*, may be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- “Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado*

(1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- “The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- The jury should be instructed that the defendant’s negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- “A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice . . . to recover presumed or punitive damages.” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest.” (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- “Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the ‘public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.’ ” (*Stolz, supra*, 30 Cal.App.4th at p. 202, internal citations omitted.)
- “Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. ‘While such speech is not totally unprotected by the First Amendment, its protections are less stringent’ [than that applying to speech on matters of public concern].” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)
- “We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.” (*Dun & Bradstreet, Inc., supra*, 472 U.S. at p. 763.)
- “When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.” (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)
- “[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that

defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury ‘also may award plaintiff presumed general damages.’ Presumed damages ‘are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.’ [¶¶] . . . [T]he instant instruction, which limits damages to ‘those damages that necessarily result from the publication of defamatory matter,’ constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, ‘if obeyed, did not allow the jurors to “enter the realm of speculation” regarding future suffering.’ ” (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations omitted.)

- “In defamation actions generally, factual truth is a defense which it is the defendant’s burden to prove. In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the plaintiff.” (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by making** *[one or more of]* **the following statement(s):** *[insert all claimed per quod defamatory statements]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

Liability

- 1. That *[name of defendant]* made *[one or more of]* the statement(s) to *[a person/persons]* other than *[name of plaintiff]*;**
- 2. That *[this person/these people]* reasonably understood that the statement(s) *[was/were]* about *[name of plaintiff]*;**
- 3. That because of the facts and circumstances known to the *[listener(s)/reader(s)]* of the statement(s), *[it/they]* tended to injure *[name of plaintiff]* in *[his/her/nonbinary pronoun]* occupation *[or to expose *[him/her/nonbinary pronoun]* to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with *[him/her/nonbinary pronoun]]*;***
- 4. That *[name of defendant]* failed to use reasonable care to determine the truth or falsity of the statement(s);**
- 5. That *[name of plaintiff]* suffered harm to *[his/her/nonbinary pronoun]* property, business, profession, or occupation *[including money spent as a result of the statement(s)]*; and**
- 6. That the statement(s) *[was/were]* a substantial factor in causing *[name of plaintiff]*'s harm.**

Actual Damages

If *[name of plaintiff]* has proved all of the above, then *[he/she/nonbinary pronoun]* is entitled to recover if *[he/she/nonbinary pronoun]* proves that *[name of defendant]*'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- a. Harm to *[name of plaintiff]*'s property, business, trade, profession, or occupation;**
- b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory statements;**
- c. Harm to *[name of plaintiff]*'s reputation; or**
- d. Shame, mortification, or hurt feelings.**

Punitive Damages

[Name of plaintiff]* may also recover damages to punish *[name of

defendant] if [he/she/nonbinary pronoun] proves by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud. [For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

An additional element of a defamation claim is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the “unprivileged” element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- “Libel is recognized as either being per se (on its face), or per quod (literally meaning, ‘whereby’), and each requires a different standard of pleading.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- “If [a] defamatory meaning would appear only to readers who might be able to

recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and which are not matters of common knowledge rationally attributable to all reasonable persons, then the libel cannot be libel per se but will be libel per quod.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 5, internal citation omitted.)

- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7, footnote omitted.)
- “A libel ‘per quod’ . . . requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “In the libel context, ‘inducement’ and ‘innuendo’ are terms of art: ‘[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the “innuendo,” . . .); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the “inducement”).’ ” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- “A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof.” (*Selleck v. Globe Int’l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- “The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- If the language is not defamatory on its face, there is no distinction between libel and slander: “In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654, 721

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, §§ 340.12–340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20–142.32 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1706. Definition of Statement

The word “statement” in these instructions refers to any form of communication or representation, including spoken or written words [or] pictures [or] [*insert audible or visual representations*].

New September 2003

Directions for Use

This instruction may be necessary in every case, but could be useful in cases where defamatory material is not written or verbal.

Sources and Authority

- Libel. Civil Code section 45.
- Slander. Civil Code section 46.

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 623–654

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.02 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.21 (Matthew Bender)

California Civil Practice: Torts § 21:2 (Thomson Reuters)

1707. Fact Versus Opinion

For [name of plaintiff] to recover, [name of defendant]’s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is one that can be proved to be true or false. In some circumstances, [name of plaintiff] may recover if a statement phrased as an opinion implies that a false statement of fact is true.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [name of defendant] was implying that a false statement of fact is true.

New September 2003; Revised June 2013

Directions for Use

Give this instruction only if the court concludes that a statement could reasonably be construed as implying a false assertion of fact. (See *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891].)

Sources and Authority

- “ ‘Because [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]’ That does not mean that statements of opinion enjoy blanket protection. On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. The ‘crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]’ ‘Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]’ ” (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–696 [142 Cal.Rptr.3d 40], internal citations omitted.)
- “ ‘In determining whether a statement is libelous we look to what is explicitly stated as well as what insinuation and implication can be reasonably drawn from the communication.’ “ ‘[I]f the defendant juxtaposes [a] series of facts so as to imply a defamatory connection between them, or [otherwise] creates a defamatory implication . . . he may be held responsible for the defamatory implication, . . . even though the particular facts are correct.’ ” The ‘pertinent question’ is whether a ‘reasonable fact finder’ could conclude that the statements ‘as a whole, or any of its parts, directly made or sufficiently implied a false assertion of defamatory fact that tended to injure’ plaintiff’s reputation.” (*Issa v.*

Applegate (2019) 31 Cal.App.5th 689, 703 [242 Cal.Rptr.3d 809], internal citations omitted.)

- “In defining libel and slander, Civil Code sections 45 and 46 both refer to a ‘false . . . publication . . .’ This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)
- “Thus, ‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expressions[s] of . . . contempt,’ and language used ‘in a loose, figurative sense’ have all been accorded constitutional protection.” (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)
- “Deprecatory statements regarding the merits of litigation are “nothing more than ‘the predictable opinion’ of one side to the lawsuit” and cannot be the basis for a defamation claim.” (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 [162 Cal.Rptr.3d 831].)
- “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)
- “[W]hen a communication identifies non-defamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a ‘pure type of expression of opinion’ occurs ‘when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.’ Actionable statements of opinion are ‘the mixed type, [where] an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant [but] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion.’ ” (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1314 [206 Cal.Rptr.3d 60], internal citation omitted.)
- “Even if an opinion can be understood as implying facts capable of being proved true or false, however, it is not actionable if it also discloses the underlying factual bases for the opinion and those statements are true.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 100 [201 Cal.Rptr.3d 782].)
- “California courts have developed a ‘totality of the circumstances’ test to determine whether an alleged defamatory statement is one of fact or of opinion. First, the language of the statement is examined. For words to be defamatory,

they must be understood in a defamatory sense. Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion.” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].)

- “The court must put itself in the place of an average reader and decide the natural and probable effect of the statement.” (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)
- “[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. ‘In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion’ ” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)
- “Use of ‘hyperbolic, informal’ ‘“crude, [or] ungrammatical” language, satirical tone, [or] vituperative, “juvenile name-calling” ’ provide support for the conclusion that offensive comments were nonactionable opinion. Similarly, overly vague statements, and ‘“generalized” comments . . . “lack[ing] any specificity as to the time or place of” alleged conduct may be a “further signal to the reader there is no factual basis for the accusations.” ’ On the other hand, if a statement is ‘factually specific,’ ‘earnest,’ or ‘serious’ in tone, or the speaker ‘represents himself as “unbiased,” ’ ‘“having specialized” ’ or ‘“first-hand experience,” ’ or ‘“hav[ing] personally witnessed . . . abhorrent behavior” ’, this may signal the opposite, rendering the statement actionable.” (*ZL Technologies, Inc. v. Does 1–7* (2017) 13 Cal.App.5th 603, 624 [220 Cal.Rptr.3d 569], internal citations omitted.)
- “Whether a challenged statement ‘declares or implies a provable false assertion of fact is a question of law for the court to decide . . . , unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.’ ” (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1261 [119 Cal.Rptr.3d 127].)
- “We next turn to the broader context of his statements—posting on an Internet site under an assumed user name. [Defendant] contends Internet fora are notorious as ‘places where readers expect to see strongly worded opinions rather than objective facts,’ and that ‘anonymous, or pseudonymous,’ opinions should be ‘“discount[ed] . . . accordingly.” ’ However, the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law.” (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 429 [160 Cal.Rptr.3d 423], internal citation omitted.)
- “Rather, a defendant’s anonymity, the name of the Internet forum, the nature, language, tone, and complete content of the remarks all are relevant.” (*ZL Technologies, Inc., supra*, 13 Cal.App.5th at p. 625.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 643–646

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05–45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.16 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.86 (Matthew Bender)

California Civil Practice: Torts §§ 21:20–21:21 (Thomson Reuters)

1708. Coerced Self-Publication

[Name of plaintiff] claims that [name of defendant] is responsible for [his/her/nonbinary pronoun] harm even though [name of defendant] did not communicate the statement(s) to anyone other than [name of plaintiff]. To succeed, [name of plaintiff] must prove all of the following:

- 1. That [name of defendant] made the statement(s) to [name of plaintiff];**
- 2. That [name of plaintiff] was under strong pressure to communicate [name of defendant]’s statement(s) to another person; and**
- 3. That when [name of defendant] made the statements, [he/she/nonbinary pronoun] should have known that [name of plaintiff] would be under strong pressure to communicate them to another person.**

If [name of plaintiff] has proved all of the above, then you must find that [name of defendant] was responsible for the communication of the statement(s).

New September 2003

Sources and Authority

- The general rule is that “[a] plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant.” The exception to the rule occurs “when it [is] foreseeable that the defendant’s act would result in plaintiff’s publication to a third person.” (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198].)
- [A] “self-publication of the alleged defamatory statement may be imputed to the originator of the statement if ‘the person defamed is operating under a strong compulsion to republish the defamatory statement and the circumstances which create the strong compulsion are known to the originator of the defamatory statement at the time he communicates it to the person defamed.’ ” (*Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 373 [34 Cal.Rptr.2d 438], quoting *McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 797–798 [168 Cal.Rptr. 89].)
- “This exception has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them.” (*Live Oak Publishing Co.*, *supra*, 234 Cal.App.3d at p. 1285.)
- To determine if the coercion exception applies, the test is “whether ‘because of some necessity he was under to communicate the matter to others, it was

reasonably to be anticipated that he would do so.’ ” (*Live Oak Publishing Co.*, *supra*, 234 Cal.App.3d at p. 1285.)

- “[W]hile compelled self-published defamation per se technically eliminates the need for publication by the defendant to a third party, a plaintiff cannot manufacture the defamation claim by simply publishing statements to a third party because the plaintiff must disclose contents of the employer’s statement to a third party *after* reading or being informed of the contents. The originator of the statement is liable for the foreseeable repetition because of the causal link between the originator and the presumed damage to the plaintiff’s reputation, but the publication must be foreseeable. The presumed injury is no less damaging because the plaintiff was compelled to make the statement instead of the employer making it directly to the third party.” (*Tilkey v. Allstate Ins. Co.* (2020) 56 Cal.App.5th 521, 542 [270 Cal.Rptr.3d 559], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 633, 722

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.22 (Matthew Bender)

California Civil Practice: Torts § 21:15 (Thomson Reuters)

1709. Retraction: News Publication or Broadcast (Civ. Code, § 48a)

Because *[name of defendant]* is a *[[daily/weekly]* news publication/broadcaster], *[name of plaintiff]* may recover only the following:

- (a) Damages to property, business, trade, profession, or occupation; and
- (b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if *[name of plaintiff]* proves both of the following:

1. That *[name of plaintiff]* demanded a correction of the statement within 20 days of discovering the statement; and
2. That *[name of defendant]* did not publish an adequate correction;
[or]

That *[name of defendant]*'s correction was not substantially as conspicuous as the original [publication/broadcast];

[or]

That *[name of defendant]*'s correction was not [published/broadcast] within three weeks of *[name of plaintiff]*'s demand.

New September 2003; Revised June 2016, May 2017; Renumbered from CACI No. 1722 November 2017

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

The statute is limited to actions "for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast." (Civ. Code, § 48a(a).) However, a "radio broadcast" includes television. (Civ. Code, § 48.5(4) [the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting]; *Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 210, 166 Cal.Rptr.3d 80].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
 - "Under California law, a newspaper gains immunity from liability for all but
- 1062

‘special damages’ when it prints a retraction satisfying the requirements of section 48a.” (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660–661 [256 Cal.Rptr. 310].)

- “An equivocal or incomplete retraction obviously serves no purpose even if it is published in ‘substantially as conspicuous a manner . . . as were the statements claimed to be libelous.’ ” (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 735–744

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

1710–1719. Reserved for Future Use

1720. Affirmative Defense—Truth

[Name of defendant] is not responsible for [name of plaintiff]’s harm, if any, if [name of defendant] proves that [his/her/nonbinary pronoun/its] statement(s) about [name of plaintiff] [was/were] true. [Name of defendant] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.

New September 2003; Revised October 2008, May 2017

Directions for Use

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff. (*Sonoma Media Investments, LLC v. Superior Court* (2019) 34 Cal.App.5th 24, 37 [247 Cal.Rptr.3d 5].)

Sources and Authority

- “Truth, of course, is an absolute defense to any libel action.” (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581–582 [51 Cal.Rptr.2d 891].)
- “California law permits the defense of substantial truth and would absolve a defendant even if she cannot ‘justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.’ ‘Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’ ” (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [162 Cal.Rptr.3d 831], internal citation omitted.)
- “Put another way, the statement is not considered false unless it ‘would have a different effect on the mind of the reader from that which the pleaded truth would have produced.’ ” (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1262–1263 [217 Cal.Rptr.3d 234].)
- “In defamation actions generally, factual truth is a defense which it is the defendant’s burden to prove. [¶] In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the *plaintiff*. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, ‘must be provable as false before there can be liability under state defamation law.’ ” (*Eisenberg v. Alameda Newspapers*, (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 655–659, 720

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.39 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:19, 21:52 (Thomson Reuters)

1721. Affirmative Defense—Consent

[Name of defendant] is not responsible for [name of plaintiff]’s harm, if any, if [he/she/nonbinary pronoun] proves that [name of plaintiff] consented, by words or conduct, to [name of defendant]’s communication of the statement(s) to others. In deciding whether [name of plaintiff] consented to the communication, you should consider the circumstances surrounding the words or conduct.

New September 2003; Revised October 2008

Sources and Authority

- Restatement Second of Torts, section 583, provides, in part: “[T]he consent of another to the publication of defamatory matter concerning him is a complete defense to his action for defamation.”
- “One of the oldest and most widely recognized defenses to the publication of defamatory matter is the doctrine of consent, which has been classified as a form of absolute privilege.” (*Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 498 [153 Cal.Rptr. 499].)
- “One of the primary purposes of the doctrine of consent in defamation law is to prevent a party from inviting or inducing indiscretion and thereby laying the foundation of a lawsuit for his own pecuniary gain.” (*Royer, supra*, 90 Cal.App.3d at p. 499.)
- This rule applies when the plaintiff asks the defendant to repeat the statement to others and when the plaintiff himself repeats the statements to others. (*Royer, supra*, 90 Cal.App.3d at p. 498 [but see CACI No. 1708, *Coerced Self-Publication*].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 694

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.68 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.54 (Matthew Bender)

California Civil Practice: Torts § 21:28 (Thomson Reuters)

1722. Affirmative Defense—Statute of Limitations—Defamation

[Name of defendant] contends that [name of plaintiff]’s lawsuit was not filed within the time set by law. To succeed on this defense, [name of defendant] must prove that [he/she/nonbinary pronoun/it] first communicated the alleged defamatory statement to a person other than [name of plaintiff] before [insert date one year before date of filing]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]

[If, however, [name of plaintiff] proves that on [insert date one year before date of filing] [he/she/nonbinary pronoun/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]

New April 2009; Renumbered from CACI No. 1724 November 2017

Directions for Use

This instruction is for use if the defendant claims that the plaintiff’s action was not filed within the applicable one-year limitation period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004].) Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- One-Year Statute of Limitations. Code of Civil Procedure section 340.
- “In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. . . . [A] cause of action for defamation accrues at the time the defamatory statement is ‘published’ (using the

term ‘published’ in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues) when the book or newspaper is first generally distributed to the public.” (*Shively, supra*, 31 Cal.4th at pp. 1246–1247, internal citations omitted.)

- “This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired.” (*Shively, supra*, 31 Cal.4th at pp. 1248–1249.)
- “[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book . . . on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published.” (*Shively, supra*, 31 Cal.4th at p. 1251.)
- “The single-publication rule as described in our opinion in *Shively* and as codified in Civil Code section 3425.3 applies without limitation to all publications.” (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 893.)
- “[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution.” (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 890.)

- “ ‘. . . [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,’ stating that ‘although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, “in an inherently secretive manner,” the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]’ ” (*Hebrew Academy of San Francisco, supra*, 42 Cal.4th at p. 894, original italics, internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *Filing Suit: Time Bars and Pleading Concerns*, ¶ 5:176.10 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.21 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.290 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.56 (Matthew Bender)

1723. Common Interest Privilege—Malice (Civ. Code, § 47(c))

[Name of plaintiff] cannot recover damages from [name of defendant], even if the statement(s) [was/were] false, unless [name of plaintiff] also proves either:

1. That in making the statement(s), [name of defendant] acted with hatred or ill will toward [him/her/nonbinary pronoun], showing [name of defendant]’s willingness to vex, annoy, or injure [him/her/nonbinary pronoun]; or
2. That [name of defendant] had no reasonable grounds for believing the truth of the statement(s).

New September 2003; Revised June 2014

Directions for Use

This instruction involves what is referred to as the “common interest” privilege of Civil Code section 47(c). This statute grants a privilege against defamation to communications made without malice on subjects of mutual interest. The defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].)

Sources and Authority

- Common-Interest Privilege: Civil Code section 47(c).
- Malice Not Inferred: Civil Code section 48.
- “So, defendants contended, any publication was protected by the common interest privilege in Civil Code section 47, subdivision (c), which extends a privilege to statements made ‘without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.’ ” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 353 [192 Cal.Rptr.3d 511].)
- “Civil Code section 47 ‘extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests. [Citation.] This privilege is “recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest.” [Citation.] The “interest” must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest. [Citation.] Rather, it is restricted to ‘proprietary or narrow private interests.’ ” (*Hui v.*

Sturbaum (2014) 222 Cal.App.4th 1109, 1118–1119 [166 Cal.Rptr.3d 569].)

- “This definition is not exclusive, however, and the cases have taken an ‘eclectic approach’ toward interpreting the statute.” (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 617 [225 Cal.Rptr.3d 711].)
- “Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons.” (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 949 [227 Cal.Rptr.3d 286].)
- “ ‘Ordinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church’s interest.’ This reasoning applies by analogy to communications between parents of parochial school children and church authorities overseeing the school on subjects relating to the school.” (*Hicks v. Richard* (2019) 39 Cal.App.5th 1167, 1177 [252 Cal.Rptr.3d 578].)
- “For the purposes of section 47’s qualified privilege, ‘malice’ means that the defendant (1) ‘ “was motivated by hatred or ill will towards the plaintiff,” ’ or (2) ‘ “lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.” ’ ” (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337 [220 Cal.Rptr.3d 408].)
- “The malice required to defeat the common interest privilege is actual malice.” (*Hicks, supra*, 39 Cal.App.5th at p. 1178.)
- “[M]alice [as used in Civil Code section 47(c)] has been defined as ‘a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.’ ” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406], internal citation omitted.)
- “[M]alice focuses upon the defendant’s state of mind, not his [or her] conduct.” (*Cornell, supra*, 18 Cal.App.5th at p. 951.)
- “[M]alice may not be inferred from the mere fact of the communication.” (*Barker, supra*, 240 Cal.App.4th at p. 354.)
- “For purposes of establishing a triable issue of malice, ‘the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth.’ A triable issue of malice would exist if [defendant] made a statement in reckless disregard of Employee’s rights that [defendant] either did not believe to be true (i.e., he actually knew better) or unreasonably believed to be true (i.e., he should have known better). In either case, a fact finder would have to ascertain what [defendant] subjectively knew and believed about the topic at the time he spoke.” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [152 Cal.Rptr.3d 154], internal citation omitted.)
- “[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo.” (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)

- “[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. . . . [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible.” (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 92, 655, 690–704

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-E, *Employment Torts And Related Claims—Defamation*, ¶ 5:471 et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.66 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.53 (Matthew Bender)

California Civil Practice: Torts §§ 21:40–21:41 (Thomson Reuters)

1724. Fair and True Reporting Privilege (Civ. Code, § 47(d))

[Name of plaintiff] cannot recover damages from [name of defendant] if [name of defendant] proves all of the following:

1. **That** [name of defendant]’s statement(s) [was/were] [reported in/communicated to] [specify public journal in which statement(s) appeared];
2. **The [report/communication] was of** [select the applicable statutory context]
[a judicial, legislative, or other public official proceeding;]
[something said in the course of a judicial, legislative, or other public official proceeding;]
[a verified charge or complaint made by any person to a public official on which a warrant was issued;]
and
3. **The [report/communication] was both fair and true.**

New November 2017

Directions for Use

This instruction involves what is referred to as the “fair and true reporting privilege” of Civil Code section 47(d). This statute grants an absolute privilege against defamation for a fair and true report in, or a communication to, a public journal, of a judicial, legislative, or other public official proceeding; or for anything said in the course of the proceeding; or for a verified charge or complaint made by any person to a public official, on which complaint a warrant has been issued.

An element of defamation is that the alleged defamatory statement is “unprivileged.” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) That would seem to suggest that the plaintiff must prove that a privilege does not apply. Nevertheless, courts have held that it is the defendant’s burden to prove that the statement is within the scope of the privilege, including that it was fair and true. (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 396 [158 Cal.Rptr.3d 332], disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11 [205 Cal.Rptr.3d 475, 376 P.3d 604].)

Sources and Authority

- Fair and True Reporting Privilege. Civil Code section 47(d).
- “Under section 47, subdivision (d), the fair and true reporting privilege protects a ‘fair and true report in, or a communication to, a public journal, of . . . a judicial . . . proceeding, or . . . anything said in the course thereof.’ It too is an

absolute privilege—that is, it applies regardless of the defendants’ motive for making the report—and forecloses a plaintiff from showing a probability of prevailing on the merits.” (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 787 [214 Cal.Rptr.3d 358].)

- “The purpose of this privilege is to ensure the public interest is served by the dissemination of information about events occurring in official proceedings and with respect to verified charges or complaints resulting in the issuance of a warrant.” (*Burrill, supra*, 217 Cal.App.4th at p. 397.)
- “Prior to 1997 subdivision (d) applied only to a fair and true report *in a* public journal. Senate Bill No. 1540 (1995–1996 Reg. Sess.), sponsored by the California Newspapers Publishers Association, amended the provision, effective January 1, 1997, to add ‘or a communication to,’ so the privilege would extend, as it does now, to both a fair and true report in and a communication to a public journal concerning judicial, legislative or other public proceedings.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782], original italics.)
- “The privilege applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceedings.” (*Burrill, supra*, 217 Cal.App.4th at p. 398.)
- “The defendant is entitled to a certain degree of ‘“flexibility/literary license”’ in this regard, such that the privilege will apply even if there is a slight inaccuracy in details—one that does not lead the reader to be affected differently by the report than he or she would be by the actual truth.” (*Argentieri, supra*, 8 Cal.App.5th at pp. 787–788.)
- “[Plaintiff] further contends it was for a jury, not the trial court, to decide whether [defendant]’s Statement was a fair and true report. Courts have stated that the fairness and truth of a report is an issue of fact for the jury, *if* there is any material factual dispute on the issue.” (*Argentieri, supra*, 8 Cal.App.5th at p. 791, original italics.)
- “[W]hether or not a privileged occasion exists is for the court to decide, while the effect produced by the particular words used in an article [or broadcast] and the fairness of the report is a question of fact for the jury [citation].’ [T]he publication is to be measured by the natural and probable effect it would have on the mind of the average reader [citations]. The standard of interpretation to be used in testing alleged defamatory language is how those in the community where the matter was published would reasonably understand it [citation]. In determining whether the report was fair and true, the article [or broadcast] must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place. The report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer [citation].’ ” (*Burrill, supra*, 217 Cal.App.4th at p. 398, internal citation omitted.)
- “At the very least, the difference between these accusations presents a question

of fact with respect to whether the average listener would understand the broadcast to capture the gist or sting of the citizen's complaint, or whether the charge made in the broadcast would affect the listener differently than that made in the citizen's complaint." (*Burrill, supra*, 217 Cal.App.4th at p. 398.)

- "In evaluating the effect a publication has on the average reader, the challenged language must be viewed in context to determine whether, applying a 'totality of the circumstances' test, it is reasonably susceptible to the defamatory meaning alleged by the plaintiff: ' "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." [Citation.] "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." ' (*J-M Manufacturing Co., Inc., supra*, 247 Cal.App.4th at p. 97, internal citations omitted.)
- "[Defendant] bears the burden of proving the privilege applies." (*Burrill, supra*, 217 Cal.App.4th at p. 396.)
- " 'A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action. (See Comment c). It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that, in the normal progress of the proceeding, a final decision will be rendered.' " (*Burrill, supra*, at p. 397, quoting Restatement 2d of Torts, § 611, comment e.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 691

4 Levy et al., California Torts, Ch. 45, *Intentional Torts and Other Theories of Recovery*, § 45.11 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.64 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander*, § 142.51 (Matthew Bender)

1725–1729. Reserved for Future Use

1730. Slander of Title—Essential Factual Elements

[Name of plaintiff] **claims that** *[name of defendant]* **harmed** *[him/her/nonbinary pronoun]* **by** *[making a statement/taking an action]* **that cast doubts about** *[name of plaintiff]*'s ownership of *[describe real or personal property, e.g., the residence located at [address]]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

1. **That *[name of defendant]* *[made a statement/[specify other act, e.g., recorded a deed]]* that cast doubts about *[name of plaintiff]*'s ownership of the property;**
2. **That the *[statement was made to a person other than *[name of plaintiff]*/[specify other publication, e.g., deed became a public record]]*;**
3. **That *[the statement was untrue and]* *[name of plaintiff]* did in fact own the property;**
4. **That *[name of defendant]* *[knew that/acted with reckless disregard of the truth or falsity as to whether]* *[name of plaintiff]* owned the property;**
5. **That *[name of defendant]* knew or should have recognized that someone else might act in reliance on the *[statement/e.g., deed]*, causing *[name of plaintiff]* financial loss;**
6. **That *[name of plaintiff]* did in fact suffer immediate and direct financial harm *[because someone else acted in reliance on the [statement/e.g., deed]/ [or] by incurring legal expenses necessary to remove the doubt cast by the [statement/e.g., deed] and to clear title]*;**
7. **That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.**

New December 2012; Revised May 2018, November 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336 [220 Cal.Rptr.3d 408].) If this element presents an issue

for the jury, an instruction on it must be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is alleged, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]) or from accusations made without foundation (element 4). (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- “[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood.” (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)
- “The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a ‘misleading statement that (1) specifically refers to the plaintiff’s product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.’ ” (*Finch Aerospace Corp., supra*, 8 Cal.App.5th at p. 1253.)
- “ ‘Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.’ ‘However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had

for the depreciation in the market value of the property.’ ” (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- “Slander of title ‘occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]’ The false statement must be ‘ “maliciously made with the intent to defame.” ’ ” (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)
- “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)
- “One who, without a privilege to do so, publishes matter which is untrue and disparaging to another’s property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.” (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)
- “Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss.” (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)
- “In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property.” (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)
- “While it is true that an essential element of a cause of action for slander of title is that the plaintiff suffered pecuniary damage as a result of the disparagement of title, the law is equally clear that the expense of legal proceedings necessary to remove the doubt cast by the disparagement and to clear title is a recognized form of pecuniary damage in such cases.” (*Sumner Hill Homeowners’ Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1032 [141 Cal.Rptr.3d 109], internal citations omitted; see Rest.2d Torts, § 633, subd. (1)(b).)
- “Although attorney fees and litigation expenses reasonably necessary to remove

the memorandum from the record were recoverable, those incurred merely in pursuit of damages against . . . defendants were not.” (*Seeley v. Seymour* (1987) 190 Cal.App.3d 844, 865–866 [237 Cal.Rptr. 282].)

- “Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code.” (*Albertson, supra*, 46 Cal.2d at pp. 378–379, internal citations omitted.)
- “[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given.” (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)
- “The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege.” (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)
- “The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury’s determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal’s conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c).” (*Lundquist, supra*, 7 Cal.4th at pp. 1202–1203, internal citations omitted.)
- “Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: ‘A recorded lis

pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.’ Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit.” (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- “[T]he property owner may recover for the impairment of the vendibility ‘of his property’ without showing that the loss was caused by prevention of a particular sale. ‘The most usual manner in which a third person’s reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.’ ” (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts §§ 747, 1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[Name of plaintiff] **claims that** [name of defendant] **harmed** [him/her/nonbinary pronoun] **by making a statement that disparaged** [name of plaintiff]’s [specify product]. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That [name of defendant] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [name of plaintiff]’s [product/service];**
2. **That the statement was made to a person other than [name of plaintiff];**
3. **That the statement was untrue;**
4. **That [name of defendant] [knew that the statement was untrue/ acted with reckless disregard of the truth or falsity of the statement];**
5. **That [name of defendant] knew or should have recognized that someone else might act in reliance on the statement, causing [name of plaintiff] financial loss;**
6. **That [name of plaintiff] suffered direct financial harm because someone else acted in reliance on the statement; and**
7. **That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.**

New December 2013; Revised June 2015, May 2018

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California’s appellate courts (see *Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548), perhaps because of the difficulty in proving damages. (See *Erlich, supra*, 224 Cal.App.2d at pp. 73–74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant’s words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A “reasonable implication” means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts,

which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360–1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) If a privilege is claimed, additional instructions will be necessary to frame the privilege.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the “unprivileged” element of this basic claim.

If the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700–1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- “Trade libel is the publication of matter disparaging the quality of another’s property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses ‘all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.’ [Citation.] [¶] To constitute trade libel, a statement must be false.” (*City of Costa Mesa v. D’Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)
- “To constitute trade libel the statement must be made with actual malice, that is, with knowledge it was false or with reckless disregard for whether it was true or false.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782].)
- “The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods.” (*Shores v.*

Chip Steak Co. (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- “[A]n action for ‘slander of title’ . . . is a form of action somewhat related to trade libel . . .” (*Erlich, supra*, 224 Cal.App.2d at p. 74.)
- “Confusion surrounds the tort of ‘commercial disparagement’ because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as ‘commercial disparagement,’ ‘injurious falsehood,’ ‘product disparagement,’ ‘trade libel,’ ‘disparagement of property,’ and ‘slander of goods.’ These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 289.)
- “The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: ‘One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P](b) *he knows that the statement is false or acts in reckless disregard of its truth or falsity.*’ [¶] Section 626 of Restatement Second of Torts in turn states: ‘The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another’s land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other’s interests in the property.’ ” (*Melaleuca, Inc., supra*, 66 Cal.App.4th at pp. 1360–1361, original italics.)
- “According to section 629 of the Restatement Second of Torts (1977), ‘[a] statement is disparaging if it is understood to cast doubt upon the quality of another’s land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient’s understanding of it as casting the doubt was reasonable.’ ” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 288.)
- “What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff’s business or product, derogating that business or product and thereby causing that plaintiff special damages.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 294, original italics.)
- “The Restatement [2d Torts] view is that, like slander of title, what is commonly called ‘trade libel’ is a particular form of the tort of injurious falsehood and need not be in writing.” (*Polygram Records, Inc., supra*, 170 Cal.App.3d at p. 548.)
- “While . . . general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: ‘Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff’s title to his property, or its

quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' ” (*Erlich, supra*, 224 Cal.App. 2d at pp. 73–74.)

- “Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant’s business, the ‘limitations that define the First Amendment’s zone of protection’ are applicable. ‘[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property’ ” (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, internal citation omitted.)
- “If respondents’ statements about appellant are opinions, the cause of action for trade libel must of course fail. ‘Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.’ Statements of fact can be true or false, but an opinion—‘a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge’—is the result of a mental process and not capable of proof in terms of truth or falsity.” (*Hofmann Co., supra*, 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)
- “[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood.” (*Nichols, supra*, 169 Cal.App.3d at p. 773.)
- “Disparagement by ‘reasonable implication’ requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A ‘reasonable implication’ in this context means a clear or necessary inference.” (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 747–750

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1732–1799. Reserved for Future Use

VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]**

_____ **Yes** _____ **No**

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ **Yes** _____ **No**

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

- 3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"]?**

_____ **Yes** _____ **No**

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

- 4. Was the statement false?**

_____ **Yes** _____ **No**

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

- 5. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] knew the statement was false or had serious doubts about the truth of the statement?**

_____ **Yes** _____ **No**

If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

6. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [name of plaintiff]'s actual damages for:

- [a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation? \$ _____]
- [b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements? \$ _____]
- [c. Harm to [name of plaintiff]'s reputation? \$ _____]
- [d. Shame, mortification, or hurt feelings? \$ _____]

[If [name of plaintiff] has not proved any actual damages for either c or d, then answer question 8. If [name of plaintiff] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [name of plaintiff] for the assumed harm to [his/her/nonbinary pronoun] reputation, and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

\$ _____

PUNITIVE DAMAGES

9. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against [name of defendant]?

\$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

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

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per quod defamatory statement.]**

_____ **Yes** _____ **No**

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ **Yes** _____ **No**

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

- 3. Was the statement false?**

_____ **Yes** _____ **No**

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

- 4. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] knew the statement was false or had serious doubts about the truth of the statement?**

_____ **Yes** _____ **No**

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

- 5. Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [name of plaintiff] in [his/her/nonbinary pronoun] occupation?**

_____ **Yes** _____ **No**

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

6. Did *[name of plaintiff]* suffer Harm to *[his/her/nonbinary pronoun]* property, business, profession, or occupation *[including money spent as a result of the statement]*?

_____ Yes _____ No

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

ACTUAL DAMAGES

7. Was *[name of defendant]*'s conduct a substantial factor in causing *[name of plaintiff]* actual harm?

_____ Yes _____ No

If your answer to question 7 is yes, then answer questions 8. If you answered no, skip question 8 and answer question 9.

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

[\$ _____]

PUNITIVE DAMAGES

9. Did *[name of plaintiff]* prove by clear and convincing evidence that *[name of defendant]* acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What is your award of punitive damages, if any, against *[name of defendant]*?

\$ _____

Signed: _____
Presiding Juror

Dated: _____

After *[this verdict form has/all verdict forms have]* been signed, notify the *[clerk/bailiff/court attendant]*.

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1701, *Defamation per quod—Essential*
1090

Factual Elements (Public Officer/Figure and Limited Public Figure).

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

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1702. Defamation per se (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]**

_____ **Yes** _____ **No**

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ **Yes** _____ **No**

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

- 3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., “[name of plaintiff] had committed a crime”]?**

_____ **Yes** _____ **No**

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

- 4. Was the statement false?**

_____ **Yes** _____ **No**

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

- 5. Did [name of defendant] fail to use reasonable care to determine the truth or falsity of the statement?**

_____ **Yes** _____ **No**

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

ACTUAL DAMAGES

6. Was *[name of defendant]*'s conduct a substantial factor in causing *[name of plaintiff]* actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are *[name of plaintiff]*'s actual damages for:

- [a. Harm to *[name of plaintiff]*'s property, business, trade, profession, or occupation? \$_____]
- [b. Expenses *[name of plaintiff]* had to pay as a result of the defamatory statements? \$_____]
- [c. Harm to *[name of plaintiff]*'s reputation? \$_____]
- [d. Shame, mortification, or hurt feelings? \$_____]

[If *[name of plaintiff]* has not proved any actual damages for either c or d, answer question 8. If *[name of plaintiff]* has proved actual damages for both c and d, skip questions 8 and 9 and answer question 10.]

ASSUMED DAMAGES

8. Did *[name of plaintiff]* prove by clear and convincing evidence that *[name of defendant]* knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

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

9. What are the damages you award *[name of plaintiff]* for the assumed harm to *[his/her/nonbinary pronoun]* reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

\$ _____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did *[name of plaintiff]* prove by clear and convincing evidence that *[name of defendant]* knew the statement was false or had serious doubts about the truth of the statement?

_____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 11. Did [name of plaintiff] prove by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?**

_____ Yes _____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

- 12. What amount, if any, do you award as punitive damages against [name of defendant]?**

\$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)*.

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

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 12 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per quod defamatory statement.]**

_____ **Yes** _____ **No**

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ **Yes** _____ **No**

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

- 3. Was the statement false?**

_____ **Yes** _____ **No**

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

- 4. Did [name of defendant] fail to use reasonable care to determine the truth or falsity of the statement?**

_____ **Yes** _____ **No**

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

- 5. Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [name of plaintiff] in [his/her/nonbinary pronoun] occupation?**

_____ **Yes** _____ **No**

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

6. Did [*name of plaintiff*] suffer Harm to [*his/her/nonbinary pronoun*] property, business, profession, or occupation [*including money spent as a result of the statement*]?
 _____ Yes _____ No

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

7. Was the statement a substantial factor in causing [*name of plaintiff*]'s harm?
 _____ Yes _____ No

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

ACTUAL DAMAGES

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

[\$ _____]

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?
 _____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
 _____ Yes _____ No

If your answer to question 10 is yes, then answer question 11. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

11. What amount, if any, do you award as punitive damages against [*name of defendant*]?
 \$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)*.

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

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per se defamatory statement.]**

_____ **Yes** _____ **No**

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ **Yes** _____ **No**

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

- 3. Did [this person/these people] reasonably understand the statement to mean that [insert ground(s) for defamation per se, e.g., “[name of plaintiff] had committed a crime”]?**

_____ **Yes** _____ **No**

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

- 4. Was the statement substantially true?**

_____ **Yes** _____ **No**

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

- 5. Did [name of defendant] fail to use reasonable care to determine the truth or falsity of the statement?**

_____ **Yes** _____ **No**

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

ACTUAL DAMAGES

6. Was [name of defendant]'s conduct a substantial factor in causing [name of plaintiff] actual harm?

_____ Yes _____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [name of plaintiff]'s actual damages for:

- [a. Harm to [name of plaintiff]'s property, business, trade, profession, or occupation? \$_____]
- [b. Expenses [name of plaintiff] had to pay as a result of the defamatory statements? \$_____]
- [c. Harm to [name of plaintiff]'s reputation? \$_____]
- [d. Shame, mortification, or hurt feelings? \$_____]

TOTAL \$ _____

[If [name of plaintiff] has not proved any actual damages for either c or d, then answer question 8. If [name of plaintiff] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [name of plaintiff] for the assumed harm to [his/her/nonbinary pronoun] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

\$ _____

Regardless of your answer to question 8, answer question 9.

PUNITIVE DAMAGES

9. Has [name of plaintiff] proved by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

If your answer to question 9 is yes, then answer question 10. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

10. What amount, if any, do you award as punitive damages against [name of defendant]?

\$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)*, and CACI No. 1720, *Affirmative Defense—Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

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

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements will need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual

findings that are required in order to calculate the amount of prejudgment interest.

VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

- 1. Did [name of defendant] make the following statement to [a person/persons] other than [name of plaintiff]? [Insert claimed per quod defamatory statement.]**

_____ Yes _____ No

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

- 2. Did the [person/people] to whom the statement was made reasonably understand that the statement was about [name of plaintiff]?**

_____ Yes _____ No

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

- 3. Did [name of defendant] fail to use reasonable care to determine the truth or falsity of the statement?**

_____ Yes _____ No

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

- 4. Did the statement tend to injure [name of plaintiff] in [his/her/nonbinary pronoun] occupation?**

_____ Yes _____ No

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

- 5. Did [name of plaintiff] suffer Harm to [his/her/nonbinary pronoun] property, business, profession, or occupation [including money spent as a result of the statement]?**

_____ Yes _____ No

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

6. Was the statement a substantial factor in causing [name of plaintiff]'s harm?

_____ Yes _____ No

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

ACTUAL DAMAGES

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

- [a. Past economic loss, including harm to [name of plaintiff]'s property, business, trade, profession, or occupation, and expenses [name of plaintiff] had to pay as a result of the defamatory statements

\$ _____]

- [b. Future economic loss, including harm to [name of plaintiff]'s property, business, trade, profession, or occupation, and expenses [name of plaintiff] will have to pay as a result of the defamatory statements

\$ _____]

- [c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [name of plaintiff]'s reputation

\$ _____]

- [d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [name of plaintiff]'s reputation

\$ _____]

TOTAL \$ _____

If [name of plaintiff] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [name of plaintiff] proved by clear and convincing evidence that [name of defendant] acted with malice, oppression, or fraud?

_____ Yes _____ No

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

9. What amount, if any, do you award as punitive damages against [name of defendant]?

\$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New September 2003; Revised December 2005, December 2010, December 2016, May 2017, May 2024

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)*.

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

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements will need to be found as to each statement.

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1705, *Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)*, depending on which ground is applicable in the case.

If the affirmative defense of truth is at issue (see CACI No. 1720, *Affirmative Defense—Truth*), include question 4 from VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*. Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Omit question 9 if the issue of punitive damages has been bifurcated.

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

3920, *Damages on Multiple Legal Theories*.

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1706–VF-1719. Reserved for Future Use

VF-1720. Slander of Title

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* **[make a statement/[specify other act, e.g., record a deed] that cast doubts about *[name of plaintiff]*'s ownership of the property?**

_____ Yes _____ No

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

2. **[Was the statement made to a person other than *[name of plaintiff]*/[Specify other publication, e.g., Did the deed become a public record]]?**

_____ Yes _____ No

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

3. Did *[name of plaintiff]* **in fact own the property?**

_____ Yes _____ No

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

4. Did *[name of defendant]* **[know that/act with reckless disregard of the truth or falsity as to whether] *[name of plaintiff]* owned the property?**

_____ Yes _____ No

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

5. Did *[name of defendant]* **know or should [he/she/nonbinary pronoun] have recognized that someone else might act in reliance on the [statement/e.g., deed], causing *[name of plaintiff]* financial loss?**

_____ Yes _____ No

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

6. Did [*name of plaintiff*] in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/*e.g., deed*]?
 _____ Yes _____ No

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

7. Was [*name of defendant*]'s conduct a substantial factor in causing [*name of plaintiff*]'s harm?
 _____ Yes _____ No

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

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

[a. Past economic loss: \$_____]

[b. Future economic loss: \$_____]

TOTAL \$_____

Signed: _____
 Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1730, *Slander of Title—Essential Factual Elements*.

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

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by words, select the first option in question 2. If the slander is by means other than words, specify the means in question 1 and how it became known to others in question 2.

If specificity is not required, users do not have to itemize all the damages listed in

question 8 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1721. Trade Libel

We answer the questions submitted to us as follows:

1. Did *[name of defendant]* make a statement that *[would be clearly or necessarily understood to have]* disparaged the quality of *[name of plaintiff]*'s *[product/service]*?

_____ Yes _____ No

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

2. Was the statement made to a person other than *[name of plaintiff]*?

_____ Yes _____ No

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

3. Was the statement untrue?

_____ Yes _____ No

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

4. Did *[name of defendant]* *[know that the statement was untrue/act with reckless disregard of the truth or falsity of the statement]*?

_____ Yes _____ No

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

5. Did *[name of defendant]* know or should *[he/she/nonbinary pronoun]* have recognized that someone else might act in reliance on the statement, causing *[name of plaintiff]* financial loss?

_____ Yes _____ No

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

6. Did *[name of plaintiff]* suffer direct financial harm because someone else acted in reliance on the statement?

_____ Yes _____ No

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

- 7. Was [name of defendant]’s conduct a substantial factor in causing [name of plaintiff]’s harm?**

_____ Yes _____ No

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

- 8. What are [name of plaintiff]’s damages?**

[a. Past economic loss \$_____]

[b. Future economic loss \$_____]

TOTAL \$_____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant].

New December 2015; Revised December 2016, May 2024

Directions for Use

This verdict form is based on CACI No. 1731, *Trade Libel—Essential Factual Elements*.

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

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

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

If the jury is given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat’l Bank* (1978) 21 Cal.3d 801,

814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

VF-1722–VF-1799. Reserved for Future Use

Table A
Defamation Per Se

	Public Figure				Private Figure			
	Cause of Action	Assumed by Law	Actual	Punitive Damages	Cause of Action	Assumed by Law	Actual	Punitive Damages
Public Issue	<i>New York Times</i> Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	<i>New York Times</i> Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	No
Private Issue	<i>New York Times</i> Malice	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	<i>New York Times</i> Malice	—	—	—
	Negligence	—	—	—	Negligence	Yes	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294

Information provided by Judge Michael B. Orfield (Ret.), Superior Court of California, County of San Diego

Table A. Defamation Per Se

Table B
Defamation Per Quod

	Public Figure				Private Figure			
	Cause of Action	Assumed by Law	Actual	Punitive Damages	Cause of Action	Assumed by Law	Actual	Punitive Damages
Public Issue	<i>New York Times</i> Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	<i>New York Times</i> Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	No
Private Issue	<i>New York Times</i> Malice	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294	<i>New York Times</i> Malice	—	—	—
	Negligence	—	—	—	Negligence	No	Yes, if shown by a preponderance of the evidence	Yes, if shown by Civil Code, § 3294

Information provided by Judge Michael B. Orfield (Ret.), Superior Court of California, County of San Diego

Table B. Defamation Per Quod