

Judicial Council Of California Criminal Jury Instruction 938  
Judicial Council Of California Criminal Jury Instructions November 2019 Update  
By the Judicial Council of California Advisory Committee on Criminal Jury Instructions  
Assaultive and **Battery** Crimes

E. **Battery**

(ii) **Sexual Battery**

938 **Sexual Battery**: Misdemeanor (Pen. Code, § 243.4(e)(1))

The defendant is charged [in Count \_\_\_\_] with **sexual battery** [in violation of [Penal Code section 243.4\(e\)\(1\)](#)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant touched an intimate part of \_\_\_\_\_ <*insert name of complaining witness*>;
2. The touching was done against \_\_\_\_\_'s <*insert name of complaining witness*> will;

AND

3. The touching was done for the specific purpose of **sexual** arousal, **sexual** gratification, or **sexual** abuse.

An *intimate part* is a female's breast or the anus, groin, **sexual** organ, or buttocks of anyone.

*Touching*, as used here, means making physical contact with another person. *Touching* includes contact made through the clothing.

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

<*Defense: Reasonable Belief in Consent*>

[The defendant is not guilty of **sexual battery** if (he/she) actually and reasonably believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

*New January 2006, Revised February 2016, September 2017*

### BENCH NOTES *Instructional Duty*

The court has a sua sponte duty to give an instruction defining the elements of the crime.

The court has a sua sponte duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See [People v. Andrews \(2015\) 234 Cal.App.4th 590, 602 \[184 Cal.Rptr.3d 183\]](#); following [People v. Williams \(1992\) 4 Cal.4th 354, 362 \[14 Cal.Rptr.2d 441, 841 P.2d 961\]](#); [People v. Mayberry \(1975\) 15 Cal.3d 143, 153–158 \[125 Cal.Rptr. 745, 542 P.2d 1337\]](#).)

Give the bracketed definition of “against a person's will” on request.

### AUTHORITY

- Elements. [Pen. Code, § 243.4\(e\)\(1\)](#).
- Touches Defined. [Pen. Code, § 243.4\(e\)\(2\)](#).
- Intimate Part Defined. [Pen. Code, § 243.4\(g\)\(1\)](#).
- Consent Defined. [Pen. Code, §§ 261.6, 261.7](#).
- Specific-Intent Crime. [People v. Chavez \(2000\) 84 Cal.App.4th 25, 29 \[100 Cal.Rptr.2d 680\]](#).
- Defendant Must Touch Intimate Part of Victim. [People v. Elam \(2001\) 91 Cal.App.4th 298, 309–310 \[110 Cal.Rptr.2d 185\]](#). Defendant Need Not Touch Skin. [People v. Dayan \(1995\) 34 Cal.App.4th 707, 716 \[40 Cal.Rptr.2d 391\]](#).

## LESSER INCLUDED OFFENSES

- Misdemeanor **sexual battery** is not a lesser included offense of **sexual battery** by misrepresentation of professional purpose under the statutory elements test. [People v. Robinson \(2016\) 63 Cal.4th 200, 210-213 \[202 Cal.Rptr.3d 485, 370 P.3d 1043\]](#).
- Attempted **sexual battery** is not a lesser included offense of **sexual battery** by fraudulent representation. [People v. Babaali \(2009\) 171 Cal.App.4th 982, 1000 \[90 Cal.Rptr.3d 278\]](#).

## COMMENTARY

In a case addressing the meaning of for the “purpose of ... **sexual** abuse” in the context of [Penal Code section 289](#), one court has stated that “when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes **sexual** abuse, even though the perpetrator may not necessarily achieve any **sexual** arousal or gratification whatsoever.” ([People v. White \(1986\) 179 Cal.App.3d 193, 205 \[224 Cal.Rptr. 467\]](#).) If the court concludes that this reasoning applies to the crime of **sexual battery** and a party requests a definition of “**sexual** abuse,” the following language may be used:

**Sexual** abuse means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any **sexual** arousal or **sexual** gratification.

## SECONDARY SOURCES

[1 Witkin & Epstein, California Criminal Law \(4th ed. 2012\) Crimes Against the Person, § 26.](#)

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[2] (Matthew Bender).

## WEST'S EDITORIAL REFERENCES

Related References:•

See [CALJIC 16.145](#)

Secondary References:•

Levenson and Ricciardulli, Expert Series: California Criminal Law § 6:9  
(2010–2011 ed.)

Research References:•

West's Key Number Digest, [Assault and Battery](#) 48, 59, 100

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[C.J.S., Assault § 76](#)

Westlaw Databases:•

[California State Criminal Jury Instruction Filings \(CA-CRJIF\)](#)

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[California State Criminal Trial Court Filings and Jury Instruction Filings  
\(CA-CRFILING-JIF\)](#)

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[California State and Federal Criminal Jury Instruction Filings \(CA-CRJIF-  
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