LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

September 2, 2020

Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Eric Long
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 20-02

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 20-02) and appreciates the opportunity to submit these comments.

1. CACI No. 418. Presumption of Negligence Per Se

Agree.

2. CACI No. 430. Causation: Substantial Factor

Agree.

3. CACI No. 435. Causation for Asbestos-Related Cancer Claims

Agree.

4. CACI No. 440. Negligent Use of Nondeadly Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements.

(a) Penal Code § 835a, subdivision (b) authorizes a law enforcement officer who has reasonable cause to believe a person has committed a public offense to use reasonable force "to

effect the arrest, to prevent escape, or to overcome resistance." The statute does not authorize reasonable force for any other conduct or purpose. We would modify the first paragraph of this instruction to more closely track the statute and eliminate the references to other conduct not expressly authorized by the statute:

"A law enforcement officer may use reasonable force to [arrest/~~detain/~~overcome resistance by/prevent escape of~~/*specify other conduct relating to seizure*~~] a person when the officer has reasonable cause to believe that the person has committed or is committing a crime. However, the officer may use only that degree of force necessary to accomplish the [arrest/~~detention/~~overcome resistance by/prevent escape of~~/*specify other conduct relating to seizure*~~].

(b) In the second paragraph of the instruction, the phrase "[*name of defendant*] was negligent in using unreasonable force" is redundant. We recommend retaining the current language, "[*name of defendant*] used unreasonable force," without change. We would also modify the following language for the reasons stated in (a) above:

"[arrest/~~detain/~~prevent escape/overcome resistance~~/*specify other conduct*~~]"

(c) The third paragraph of the instruction includes the bracketed language "[arrest/detention/*specify other conduct*]." We would either strike this language as unnecessary or modify this language by striking "*specify other conduct*" for the reasons stated above in (a).

(d) The Directions for Use states that additional factors may be added as appropriate, citing *Glenn v. Washington County* (9th Cir. 2011) 673 F.3d 864, 872. We believe other factors noted in *Glenn* and suggested by Penal Code section 835a, subdivisions (a)(2) (use of "other available resources and techniques"), (c)(1)(B) (giving proper warnings), and (a)(5) (mental health concerns) are often relevant and should be added as optional factors, as in CACI No. 441 (as to (e) and (f)). Although subdivisions (a)(2) and (c)(1)(B) relate to deadly force, the factors cited are relevant to the reasonableness of nondeadly force as well:

"[(e) Whether [*name of defendant*] used other available resources and techniques as [an] alternative to the force used, if it was reasonably safe and feasible to do so[; and/.]

"[(f) Whether [*name of defendant*] made reasonable efforts to identify [himself/herself/nonbinary pronoun] as a peace officer [and, if possible, to give warning that deadly force would be used].]

"[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"

(e) We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).

(f) We recommend using the term "law enforcement officer" consistently throughout this instruction, rather than sometimes using "law enforcement officer" and at other times using "peace officer." We believe consistent use of the same term will facilitate understanding and avoid confusion, and we believe the term "law enforcement officer" is more neutral than the term "peace officer." Although it is beyond the scope of this invitation to comment, we recommend consistent use of the term "law enforcement officer" rather than "peace officer" throughout the CACI instructions.

(g) We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue:

"The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"

5. CACI No. 441. Negligent Use of Deadly Force by Peace Officer—Essential Factual Elements

(a) We would modify the following bracketed language in the first paragraph of the instruction as shown for the reasons stated in item 4(a) above:

"[arrest/~~detain/~~overcome resistance to/prevent escape of~~/*specify other conduct*~~]"

(b) We recommend that the brackets be removed from the paragraph stating "[Deadly force is force that . . . ." We believe this portion of the instruction should be given whenever deadly force is at issue, which is the only time CACI No. 441 will be given. Corresponding language in the fourth paragraph of the Directions for Use should be revised accordingly.

(c) We believe another factor noted in *Glenn v. Washington County*, *supra*, 673 F.3d at page 872, and suggested by Penal Code section 835a, subdivision (a)(5) is often relevant and should be added as an optional factor:

"[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"

(d) We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).

(e) For the reasons explained in item 4(f) above, we recommend that the term "peace officer" be replaced throughout the instruction with "law enforcement officer."

(f) We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not

justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue:

"The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"

6. CACI No. 1305. Battery by Peace Officer—Essential Factual Elements

(a) The Directions for Use state that this instruction may require modifications if deadly force was used. We believe the instruction definitely will require modifications if deadly force was used and, for greater clarity, suggest that a separate instruction be drafted for battery by a law enforcement officer involving deadly force. The new instruction should incorporate content from CACI No. 441. If a new instruction for use in deadly force cases is drafted (for example, "*Battery by Law Enforcement Officer—Use of Deadly Force—Essential Factual Elements*"), the current No. 1305 should be retitled *Battery by Law Enforcement Officer —Use of Non-deadly Force—Essential Factual Elements.*"

(b) We believe "the totality of the circumstances" is the touchstone and that language should be included in this instruction. (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 513 ["The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law"].) In the paragraph preceding the factors, we suggest:

"In deciding whether [name of defendant] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [insert type of peace officer] in [name of defendant]'s position under the same or similar circumstances. You should consider~~,~~ the totality of the circumstances known to or perceived by the officer at the time. ~~a~~Among the ~~other~~ factors~~,~~ you should consider are the following:"

(c) We believe another factor noted in *Glenn v. Washington County, supra,* 673 F.3d at page 872, and suggested by Penal Code section 835a, subdivision (a)(5) is often relevant and should be added as an optional factor:

"[(g) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed.]"

(d) We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity). See Penal Code section 835a, subdivision (a)(2) and (a)(4).

(e) The proposed new optional language in the final paragraph of the instruction introduces a double negative that may be confusing to the jury. We would omit this language.

(f) Consistent with our suggestion to create a separate instruction for battery involving deadly force, we would delete the first paragraph in the Directions for Use, starting, "Include the first bracketed sentence . . . ," and replace it with:

"For battery cases involved the use of deadly force by a law enforcement officer, use CACI No. 1305B, *Battery by Police Officer—Use of Deadly Force—Essential Factual Elements*.

(g) We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue:

"The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"

7. CACI No. 1814. Damages for Investigating Violations of Comprehensive Computer Data and Access Fraud Act (Pen. Code, § 502(e)(1))

Penal Code section 502, subdivision (c) prohibits, without permission, certain conduct relating to computer data and computer systems. Some of the prohibited conduct clearly involves accessing a computer system; several of the prohibited acts in subdivision (c) are described using the word "accesses." Other acts are described without using the word "accesses." Those acts may or may not involve accessing computer data or a computer system. For example, it is not clear that a person who "Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network" must access the computer data or computer system to do so. Because the prohibited conduct may not involve accessing computer data or a computer system, we would modify the bracketed language in the instruction:

"[*specify wrongful conduct under section 502(c)* ~~*that led to accessing the plaintiff's computer system, computer network, or computer program*~~]"

8. CACI No. 2204. Negligent Interference With Prospective Economic Relations

(a) In the Sources and Authority, we recommend changing the short cite to the full cite for *J'aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 804, because the case was not cited earlier.

(b) We recommend adding to the Sources and Authority the new California Supreme Court case on intentional interference with contract, *Ixchel Pharma, LLC v. Biogen, Inc.* (Aug. 3, 2020) No. S256927, 2020 WL 4432623. We propose the following new bullet:

"The purpose of the independent wrongfulness requirement in economic interference torts is to 'balance between providing a remedy for predatory economic behavior and keeping

legitimate business competition outside litigative bounds.' " (*Ixchel Pharma, LLC v. Biogen, Inc*., No. S256927, 2020 WL 4432623, at *7 (Cal. Aug. 3, 2020).) "The same balance of interests does not apply to prospective economic relationships. Such relationships are only 'probable' [citation], and harms resulting from a breach of such relationships are 'speculative' [citation]. Neither party to such a relationship has a legal claim to continued relations with the other. Because the expectation of future relations is weaker and the interest in maintaining open competition is stronger, 'the law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties.' [Ciation.] In circumstances where parties have no legal assurance of future relations, 'the rewards and risks of competition are dominant.' " (*Id*., at *8.)

9. CACI No. 2210. Affirmative Defense ─ Privilege to Protect Own Economic Interest

Agree.

10. CACI No. 2511. Adverse Action Made by Decision Maker Without Animus (Cat's Paw)

Agree.

11. CACI No. 3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

(a) We believe the proposed references to the Fourth Amendment would not be helpful to jurors and would not assist them in their task, so we would delete those references from the instruction.

(b) We believe other factors supported by the cited authorities (*Glenn v. Washington County, supra*, 673 F.3d at p. 872) and frequently at issue should also be added:

"(f) The availability of less intrusive alternatives to the force employed;

"(g) Whether proper warnings were given;

"[(h) Whether it should have been apparent to the officers that the person they used force against was emotionally disturbed;]"

(c) We suggest that the Advisory Committee also consider adding to this instruction factor (d) from CACI No. 3020 (amount of time) and factor (e) from CACI No. 3042 (efforts to temper severity).

(d) We believe the "seriousness" of the crime ordinarily refers to the threat of violence, but could be misconstrued to refer to the gravity of a nonviolent offense that may not justify the use of force. We suggest adding the following language to the Directions for Use to highlight this issue:

"The language 'seriousness of the crime' may be modified if there is a dispute as to whether the crime involved a threat of violence. (See *Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1257-1258.)"

12. CACI No. 3801. Implied Contractual Indemnity

Agree.

13. CACI No. 3903C. Past and Future Lost Earnings (Economic Damage)

Agree.

14. CACI No. 3903D. Lost Earning Capacity (Economic Damage)

Agree.

15. CACI No. 3906. Lost Earnings and Lost Earning Capacity—Jurors Not to Reduce Damages on Basis of Race, Ethnicity, or Gender (Economic Damages)

Agree.

16. CACI No. 4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements

We agree with all the proposed changes. We note that the definition of "nuisance" in the last paragraph is written in the present tense, which we support. For consistency (and clarity) we recommend that the nuisance definitions in CACI Nos. 2020 and 2021 also be changed to the present tense.

17. CACI No. 4320. Affirmative Defense—Implied Warranty of Habitability

We recommend adding a citation after the second sentence in the final paragraph of the Directions for Use to support the statement that the law remains unsettled, and a citation to Civil Code section 1941.3, subdivision (b), which qualifies that statement. Section 1941.3, subdivision (b) states that actual notice is required in the specified circumstances:

"The law on a landlord's notice in the unlawful detainer context, however, remains unsettled. (*Knight*, *supra*, 29 Cal.3d at p. 55, fn. 6; see Civ. Code, § 1941.3, subd. (b).)"

18. CACI No. 4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

(a) *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, cited in the Sources and Authorities, indicates that supervising construction is simply a form of contractor services. Accordingly, we believe "performing services" in the first paragraph of the instruction is sufficient, and we would not add "supervising construction" as an alternative.

(b) In the new bullet quoting *Vallejo Development*, we recommend also adding the following quote from page 941 of the opinion: "Section 7026 plainly states that both the person who provides construction services himself and one who does so 'through others' qualifies as a 'contractor.' The California courts have also long held that those who enter into construction contracts must be licensed, even when they themselves do not do the actual work under the contract."

Sincerely,

Reuben A. Ginsburg
Chair, Jury Instructions Committee of the
California Lawyers Association's
Litigation Section

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