THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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

Ms. Geraldine Dungo
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitations to Comment—CACI 12-01

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed new and revised civil jury instructions and verdict forms (CACI 12-01), and appreciates the opportunity to submit these comments.

1. CACI No. 306A. Unformalized Agreements.

Although the proposed revision is limited to renumbering, the committee suggests that other changes be considered.

a. The first sentence of the instruction refers to an agreement that "was never written and signed." Such an agreement may be (1) unwritten and unsigned or (2) written but unsigned. The committee believes that the second enumerated paragraph of the instruction should encompass both of these situations. That paragraph begins, "That the parties agreed to be bound without a written agreement." This language encompasses the situation where the agreement was unwritten and unsigned, but does not encompass the situation where the agreement was written but unsigned.

Because a signed agreement typically must be in writing, the committee believes that "without a signed agreement" would encompass both the situation where the agreement was unwritten and unsigned and the situation where the agreement was written but unsigned. We therefore suggest modifying the second enumerated paragraph of the instruction as follows (additions underscored, deletions shown by strikethrough):

"2. That the parties agreed to be bound without a ~~written~~ signed agreement" [or before a written agreement was prepared].

b. The Directions for Use do not alert the user to the need to consider whether to use the bracketed text in the instruction. The committee suggests adding such language as follows:

"Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention. Adapt this instruction as necessary with the bracketed optional text to fit the circumstances of the particular case and to avoid jury confusion in applying the rule."

2. CACI No. 306B. Agreement Formalized by Electronic Means.

The committee agrees with the proposal with the following suggested revisions:

a. The committee believes that the first sentence of the instruction should refer to a "valid contract ~~because~~ in which some or all of the required terms were supplied by" electronic means. We believe that "because" may suggest a causation requirement that seems inappropriate in this instruction and is potentially distracting in this context. We also believe that the definition of "automated transaction" in Civil Code section 1633.2(b) as a transaction that takes place "in whole or in part" by electronic means indicates that a contract formed by an automated transaction may have some or all of the required terms supplied by electronic means. We believe that the instruction should expressly encompass the situation where electronic means supplied only some of the required terms, as we have suggested.

b. The second sentence of the proposed new instruction refers to the parties' "opportunity to keep copies of the contract documents." Civil Code section 1633.8, subdivision (a) refers to "an electronic record capable of retention by the recipient at the time of receipt." The committee believes that "copies of contract documents" could be construed to refer to paper copies, as distinguished from electronic records. We suggest that this language be modified to more closely follow the statutory language.

c. Civil Code section 1633.8, subdivision (a) seems to state that the electronic record must be capable of retention by the recipient only if "a law requires a person to provide, send, or deliver information in writing." The proposed new instruction, in contrast, seems to require that "the parties had the opportunity to keep copies of the contract documents" in all circumstances involving a contract formed by electronic means, even if the law does not specifically require the provision of information in writing. The committee suggests that the instruction be modified to conform with the statute in this regard.

d. The committee suggests that the following language be added at the end of the first paragraph of the instruction. Civil Code section 1633.5(b) and the second paragraph of the Directions for Use refer to this, but the instruction does not:

"You must determine whether the parties agreed to do so in this case from the context and surrounding circumstances, including the conduct of the parties."

e. The second paragraph of the instruction seems to state that a contract may be signed using an electronic signature only if the parties specifically so agreed, apart from the more general agreement to enter into a contract by electronic means, which is referenced in the first paragraph. The Sources and Authority cite no authority for the specific requirement that the parties must have agreed to use an electronic signature. The committee suggests that appropriate authority should be cited in the Sources and Authority or, alternatively, the instruction should modified in this regard.

f. The second paragraph of the instruction states that the plaintiff must prove that the defendant "intended to sign the contract using an electronic signature." The committee believes that this language should be tailored to the particular circumstances of each case as follows for greater clarity:

". . . [*name of defendant*] intended by the [*specify the electronic act or event that plaintiff contends was an electronic signature*] to sign the contract ~~using an electronic signature~~."

g. The committee believes that it would be helpful to revise the Directions for Use as follows:

"This instruction is for use if the plaintiff is relying on the Uniform Electronic Transactions Act (UETA, Civ. Code § 1633.1 et seq.) to prove contract formation. "Do not use this instruction where the transactions in issue are excluded under Civil Code section 1633.3(b) or (c) and the UETA is not made applicable under Civil Code section 1633.3(d) or (f)."

"The first paragraph of the instruction asserts that a party contends that electronic communications ~~means~~ were used to supply some or all of the essential elements of the contract. Give the second paragraph also if a party contends that an electronic signature was used.

"~~The most likely~~ This instruction deals only with the most basic jury issues presented by Civil Code section 1633.5(b), ~~is~~ whether the parties agreed to rely on electronic records and signatures to ~~finalize~~ enter into their agreement and whether an electronic signature was actually made and delivered. ~~Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. (See Civ. Code, § 1633.5(b).)~~ Separate instructions will be necessary where the case presents for jury resolution fact issues raised by other provisions of the UETA.

"Although ~~T~~the UETA does not specify any particular transmissions that meet the definition of 'electronic record,' such as e-mail or fax~~.~~ (~~S~~see Civ. Code, § 1633.2(g)~~.~~), the broad definition of 'electronic' in the statute (*id.*, § 1633.2(e)) leaves no doubt that commonly used electronic transmission devices such as ~~Nevertheless, there would seem to be little doubt that~~ e-mail and fax meet the definition. ~~The parties will probably stipulate accordingly, or~~ In the absence of a stipulation on this point, the court may find that the particular transmission at issue meets the definition as a matter of law."

Note that the third paragraph above refers to the issue whether the parties agreed to rely on electronic signatures. If the Advisory Committee determines that the law does not require such an agreement and modifies the instruction accordingly, this language in the Directions for Use should be modified.

h. The committee suggests that consideration be given to drafting additional instructions under the UETA. We would be pleased to offer our assistance in this regard.

3. CACI No. 409. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches.

Agree.

4. VF-404. Liability of Instructors, Trainers, or Coaches.

The committee agrees with the proposal with the following suggested revisions:

a. The committee suggests that the proposed new language in the final paragraph of item 2 in the verdict form, "either option for" and "to both options," be made optional by placing that language in brackets because one or both of the questions in item 2 may be given.

b. It appears that the proposed new paragraph in item 2 should end with a question mark rather than a semicolon.

5. CACI No. 2421. Breach of Employment Contract—Specified Term—Good Cause Defense.

The committee agrees with the proposal with the following suggested revisions:

a. Although the proposed revisions do not modify the instruction itself, the committee suggests that "continually" in the second option be changed to "habitually" to more closely follow Labor Code section 2924, which refers to "habitual neglect." The committee believes that habitual neglect is not necessarily continual.

b. In the second sentence of the first paragraph of the Directions for Use, the committee suggests retaining "employment contract for a specified term" for greater clarity, even with the additional proposed language in the first sentence.

c. The committee disagrees with the proposed revisions to the second paragraph of the Directions for Use and would retain the current language. We believe that the cited opinions do not directly address whether parties may contractually modify the statutory grounds to terminate an employment contract for good cause and should not be cited as authority on this point.

d. The committee disagrees with the proposed revisions to the third paragraph of the Directions for Use. Statutes enacted after the enactment of Labor Code section 2924 may protect

an employee who is absent from work because of a disability or on medical or family leave. A plaintiff's continued incapacity may be excused in those circumstances to the extent that another statute affords protection to the plaintiff, but questions may arise as to whether those protections cover the entire period of incapacity. We believe that in such cases it may be appropriate to modify the third element rather than delete it entirely. We therefore suggest the following changes to the current third option:

"Modification or deletion of the third ~~element~~ option may be necessary if the plaintiff's ~~has a~~ statutory right to be absent ~~for~~ from work (for example, for family ~~and~~ or medical leave) or disability-related rights (for example, for accommodation) are at issue."

e. The committee believes that the quotation from *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 38-39, in the fourth bullet point in the Sources and Authority is too lengthy and should be limited to the first three lines and end after the words "breached the contract."

f. The committee agrees with the revision of the seventh bullet point, but notes that the internal quotation marks in the new language should be single rather than double.

g. The committee believes that the Sources and Authority ordinarily should be limited to primary sources and that the quotation from the Rutter Group (which is also cited in Secondary Sources) in the ninth bullet point should be deleted.

6. CACI No. 2500. Disparate Treatment—Essential Factual Elements.

The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's alleged acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the third element of the instruction.

7. CACI No. 2505. Retaliation.

Agree.

8. CACI No. 2509. "Adverse Employment Action" Explained.

The committee agrees with the proposal to create a separate instruction explaining the meaning of "adverse employment action" and agrees with the second paragraph of the instruction. We believe that the first paragraph, however, is unnecessary and potentially misleading and therefore would delete it.

Other instructions state the essential elements of the particular cause of action, including for example that the plaintiff's protected status or protected activity "was a motivating reason" for the adverse employment action (CACI Nos. 2500, 2505). So there is no need for this instruction defining "adverse employment action" to restate in different words the element of causation. Moreover, the statement in this instruction that the plaintiff was subjected to an

adverse employment action "because of" the defendant's discriminatory or retaliatory acts may suggest a different standard from the statement that the plaintiff's protected status or protected activity "was a motivating reason" for the adverse employment action, resulting in jury confusion.

9. CACI No. 2510. "Constructive Discharge" Explained.

a. The committee agrees with the proposal to create a separate instruction explaining the meaning of "constructive discharge." For the reasons stated above with respect to CACI No. 2509, however, we believe that the first sentence of the instruction is unnecessary and potentially misleading and therefore would delete it.

b. The committee believes that the essence of a "constructive discharge" is that the plaintiff was forced to resign. We believe that this concept should be stated more clearly and more prominently in the instruction. We also believe that the purpose of this instruction is to define "constructive discharge," rather than to state the essential elements of a cause of action or what the plaintiff must prove, and therefore would avoid language referring to what the plaintiff "must prove." We suggest modifying the second sentence of the instruction as follows:

"~~To establish constructive discharge, [*Name of plaintiff*] must prove that~~ A constructive discharge has occurred if [*name of defendant*] [through [*name of defendant*]'s officers, directors, managing agents, or supervisory employees] intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in [*name of plaintiff*]'s position would have had no reasonable alternative except to resign."

c. The Directions for Use refer to the employee's allegation that "he or she had no alternative other than to leave the employment." The instruction and the cases, however, use the language "no reasonable alternative." We believe that the word "reasonable" should not be omitted and suggest modifying this language as follows: "he or she had no reasonable alternative other than to leave the employment."

10. CACI No. 2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements.

The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's alleged acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the fifth element of the instruction.

11. CACI No. 2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements.

a. The committee believes that whether the plaintiff or the defendant has the burden of proof regarding the plaintiff's ability to perform the essential functions of the job with reasonable accommodation for purposes of a failure to accommodate claim is still an open question, with conflicting opinions by the Courts of Appeal. We believe that *Cuiellette v. City of*

Los Angeles (2011) 194 Cal.App.4th 756 did not hold on point and provides at best very weak authority for the proposition that the plaintiff bears the burden of proof on this issue. We would reject the proposed revisions to sixth paragraph of the Directions for Use and leave the current language unchanged.

b. The committee agrees with the proposed revisions to the seventh paragraph of the Directions for Use, but suggests modifying the first sentence of that paragraph as follows:

"~~There may still be an unresolved issue if~~ A similar question on the burden of proof arises when the employee claims that the employer failed to provide . . . ."

12. CACI No. 2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements.

The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's alleged acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the seventh element of the instruction.

13. CACI No. 2570. Age Discrimination—Disparate Treatment—Essential Factual Elements.

The committee agrees with the proposal, except that we believe that the first line of the new paragraph in the Directions for Use should refer to "whether the employer's alleged acts constituted an adverse employment action." This is because whether those acts occurred at all may be a question of fact for the jury under the third element of the instruction.

14. CACI No. 3230. Continued Reasonable Use Permitted.

The Committee agrees with the proposal with the exception of the quoted language from *Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878 in the Sources and Authority. We believe that after noting the conflicting authority in the Directions for Use and stating that the instruction assumes that *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 is correct, the Sources and Authority should cite only authorities supporting the instruction. We therefore would delete the quotations from *Ibrahim* in the second and third bullet points in the Sources and Authority.

15. CACI No. 3231. Continuation of Express Warranty During Repairs.

Agree.

16. CACI No. 5013. Deadlocked Jury Admonition.

Agree.

DISCLAIMER

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Very truly yours,

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