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: Invitation to Comment—CACI 13-01

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 13-01) and appreciates the opportunity to submit these comments.

1. CACI No. 303. Breach of Contract—Essential Factual Elements

The committee agrees that element 2 of the instruction should be optional, but believes that the explanation added to the Directions for Use goes beyond what is needed for purposes of this instruction. We question whether such an explicit two-part requirement and explanation of the court's role in interpreting the contract belong in the Directions for Use for this instruction. We believe that the relationship between materiality and dependent obligations is beyond the scope of this instruction. We also believe that the discussion of the court's role in contract interpretation when extrinsic evidence is considered does not conform to more modern authorities stating that contract interpretation is solely a question of law for the court to decide unless the interpretation turns on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; see Sources and Authority for CACI No. 314, *Interpretation—Disputed Term*.)

We suggest replacing the new second paragraph of the Directions for Use with the following:

"Element 2 is needed if there is an issue of performance of the plaintiff's obligations under the contract. The plaintiff's breach must be material to excuse the defendant's performance. Whether a breach is material is generally a question of fact. (*Brown v. Grimes*

(2011) 192 Cal.App.4th 265, 277-278.) Element 2 addresses this requirement by instructing the jury that the plaintiff must have done the significant things required by the contract. A question may also arise as to whether the defendant's obligation is dependent on performance of the plaintiff's obligation. (See *Brown*, *supra,* at p. 279.)"

2. CACI No. 359. Present Cash Value of Future Damages

Agree.

3. CACI No. 361. Plaintiff May Not Recover Duplicate Contract and Tort Damages

Agree.

4. VF-300. Breach of Contract

Agree.

5. CACI No. 462. Strict Liability for Injury Caused by Domestic Animal with Dangerous Propensities—Essential Factual Elements

a. The committee recommends that the proposed first paragraph of the Directions for Use be modified to more clearly state that a separate instruction covers injuries caused by animals that are inherently dangerous. We would also delete the citation to *Baugh v. Beatty* (1949) 91 Cal.App.2d 786, which is cited in the Sources and Authorities for CACI No. 463, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*, and need not be cited here. Accordingly, we would revise the first paragraph of the Directions for Use as follows:

"Give this instruction to impose strict liability on an animal owner if the owner knew or should have known that the animal had a dangerous propensity. (See *Thomas v. Stenberg* (2012) 206 Cal.App.4th 654, 665 [142 Cal.Rptr.3d 24].) ~~There is also~~ For an instruction to be used to impose strict liability for injuries caused by animals of a type that are inherently dangerous without the need to show the owner's knowledge or constructive knowledge of dangerousness, ~~. (Baugh v. Beatty (1949) 91 Cal.App.2d 786, 791–792 [205 P.2d 671]; see~~ CACI No. 461, *Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements*.~~)~~"

b. The quotation from *Mann v. Stanley* (1954) 141 Cal.App.2d 438, 441, added in the last bullet point in the Sources and Authority states that the owner must have actual knowledge of the animal's dangerousness. But this seems inconsistent with the rule stated in the instruction and in the cases cited in the first, second, and seventh bullet points that actual or constructive knowledge is needed. So we would delete the final bullet point.

c. The committee suggests that consideration be given to changing the term "wild" in CACI No. 461, and in the title to that instruction, to "inherently dangerous," consistent with the language used in the reference to CACI No. 461 in the Directions for Use for this instruction. We believe that "inherently dangerous" more accurately describes the basis for liability.

6. CACI No. 503A. Psychotherapist's Duty to Protect Intended Victim from Patient's Threat

a. The language "reasonable efforts to protect the victim by communicating the threat to the victim and to a law enforcement agency" in the revised Directions for Use differs somewhat from the statutory language "reasonable efforts to communicate the treat" (Civ. Code, § 43.92, subdivision (b)) and may suggest a different meaning. The revised language may suggest a requirement that the therapist must have actually communicated the threat as distinguished from making reasonable efforts to do so. Also, we believe that "by having made reasonable efforts" could be stated more clearly and directly as "because the therapist made." Accordingly, we suggest the following modifications to the final sentence of the first paragraph of the Directions for Use:

"First read CACI No. 503B, *Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement*, if the therapist asserts that he or she is immune from liability under Civil Code section 43.92(b) ~~by having~~ because the therapist made reasonable efforts to ~~protect the victim by~~ communicate~~ing~~ the threat to the victim and to a law enforcement agency."

b. The first sentence of the Directions for Use states that the instruction should be used in an action against a psychotherapist for professional negligence "for failure to protect a victim from a patient's act of violence after the patient made a threat to the therapist against the victim." We believe that this could be more clearly stated ". . . after the patient communicated to the therapist a threat against the victim."

7. CACI No. 503B. Affirmative Defense—Psychotherapist's Communication of Threat to Victim and Law Enforcement

Agree.

8. CACI No. 1511. Wrongful Use of Civil Proceedings—Affirmative Defense—Attorney's Reliance on Information Provided by Client

a. The second sentence in the second paragraph of the instruction begins, "To establish this claim . . . ." The committee believes that the word "claim" in this context ordinarily is used in other instructions to refer to the plaintiff's claim. The affirmative defense instructions typically state, "To succeed . . . ." For consistency and to avoid any confusion between the plaintiff's claim and an affirmative defense, we would modify this sentence to state "To succeed . . . ." We also suggest that consideration be given to using more explicit language such as "To establish this defense . . ." here and in other affirmative defense instructions.

b. Whether undisputed facts establish probable cause to sue is a question of law for the court to decide, as stated in the Directions for Use. We believe that this instruction should be given only if the court determines that the information that the attorney purportedly relied on would establish probable cause. The Directions for Use do not clearly articulate this point. The

jury should decide only whether the client provided the information to the attorney (element 1) and whether the attorney actually relied on that information unaware of its inaccuracy (elements 2 &3). The Directions for Use state that the jury decides "what information was communicated to the attorney that established apparent probably cause," but should state that the jury decides whether the information was communicated to the attorney. We would modify paragraph 1 of the Directions for Use as follows:

"Give this instruction if an attorney defendant alleges that he or she relied on information provided by the client to establish probable cause and the court determines that the attorney's reliance on the information, if proved, would establish probable cause. ~~The presence or absence of probable cause on undisputed facts is a question of law for the court. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P. 2d 498]; CACI No. 1501, *Wrongful Use of Civil Proceedings*.)~~ The questions here for the jury to resolve are ~~what~~ whether the specified information was communicated to the attorney ~~that established apparent probable cause~~, and whether the attorney knew that the information was inaccurate."

c. We believe that the sentence beginning, "The sentence or absence of probable cause . . ." and the citation to *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881, that we have deleted above should be moved to the Sources and Authorities.

9. CACI No. 1530. Apportionment of Attorney Fees and Costs Between Proper and Improper Claims

The committee agrees with the proposal but notes that the hyphen in the title apparently does not belong.

10. CACI No. 1707. Fact v. Opinion

a. This instruction is for use where a statement of opinion may imply a false assertion of fact. The instruction should make it clear that such a finding supports liability for defamation. The committee does not believe that adequately comes through.

After stating the rule that for the plaintiff "to recover" the defendant's statement must be a statement of fact, the instruction states that "an opinion may be defamatory." But it may not be clear to the jury that a "defamatory" opinion is an exception to the rule that only a statement of fact supports liability.

Other instructions stating the essential factual elements of defamation avoid using the term "defamation" or "defamatory." Jurors may hear the term "defamatory" for the first time in this instruction. For example, *CACI No. 1700, Defamation Per Se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure),* states in relevant part:

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

We believe that use of the term "defamatory" for the first time in this instruction without previously being instructed on "defamation" could confuse the jury. This problem could be solved either by deleting the term "defamatory" here or by introducing the term "defamation" earlier in other instructions. We would prefer the latter and suggest substituting the words "committed a defamation" for "harmed [him/her]" in each of the instructions stating the essential factual elements of defamation (CACI Nos. 1700-1705). For example, in CACI No. 1700:

"[Name of plaintiff] claims that [name of defendant] ~~harmed [him/her]~~ committed a defamation by making [one or more of] the following statement(s): [list all claimed per se defamatory statements]. To establish this claim . . . ."

We also suggest modifying the first paragraph of this instruction (CACI No. 1707) and using the term "defamation" rather than "defamatory" for greater clarity, as shown below.

b. We believe that rather than refer to "this issue" in the second paragraph of this instruction, the instruction should identify the issue. We also believe that "implying a false statement of fact" is clearer than "implying a false statement of facts is true." These proposed modifications, those discussed above, and other modifications for greater clarity are shown here:

"For [*name of plaintiff*] to recover damages for defamation, [*name of defendant*]'s statement(s) must have been [a] statement(s) of fact~~, not~~ rather than a statement of opinion. A statement of fact is one that can be proved to be true or false. ~~In some circumstances, an~~ A statement of opinion may be ~~defamatory~~ defamation, however, if ~~the opinion~~ it implies ~~that~~ a false statement of fact~~s is true~~.

"In deciding ~~this issue~~ whether [*name of defendant*] made a statement of opinion that implied a false statement of fact, 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~~s is true~~."

11. CACI No. 2000. Trespass

a. The committee does not agree with the proposed deletion of "recklessly, or negligently" in element 2 of the instruction. We believe that to require an intentional entry in all cases would misstate the law.

The authorities clearly state that an entry onto the plaintiff's property need not be intentional to constitute a trespass. Instead, an entry resulting from the defendant's reckless or negligent conduct (or ultrahazardous activity) constitutes a trespass and satisfies this element. (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 ["liability for trespass may be imposed only if the trespass was intentional, reckless, negligent, or the result of ultrahazardous activity"]; *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 ["Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extrahazardous activity"]; *Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 644 ["there is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity"]; see *Wilson v. Interlake Steel Co.* (1982) 32 Cal.3d 229, 233 ["liability

for trespass will not be imposed unless the trespass was intentional, the result of recklessness, negligence, or the result of an extra hazardous activity"].) The proposed new first paragraph in the Directions for Use quotes *Staples* on this point (the opening quote marks are missing, and the quotation includes a comma and a hyphen that are not present in the original), but then states that "intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred," and that "[t]herefore, no negligence or recklessness need be shown. Nor is intent to damage necessary." We believe that this is faulty reasoning.

This new language seems to state that since the only intent required is an intent to be present on (or enter) the property, the plaintiff need not prove that the defendant was reckless or negligent. We believe that if the plaintiff proves an intentional entry, there is no need to prove that the entry was reckless or negligent, but the plaintiff need not prove an intentional entry because a reckless or negligent entry is sufficient. We believe that element 2 should state that the entry must be intentional, reckless, or negligent, not that the entry must be intentional.

An example of reckless or negligent conduct that we believe would constitute a trespass without an intent to enter the property (as intent is defined in CACI No. 2004, *"Intentional Entry" Explained*) is where a drunk driver crashes into a house. The driver did not intend to enter the property and was not substantially certain to do so, but entered the property as a result of his or her reckless or negligent conduct. But under the proposed revision, such conduct would not constitute a trespass.

We therefore would reject the proposed revisions to element 2 of the instruction, but would modify element 2 for greater clarity. The words "recklessly, or negligently" in the current instruction may suggest to some a mistaken belief in a right to enter. We would revise both options in element 2 to state more clearly what it means to recklessly or negligently enter the property. Also, in many cases the facts may not support a finding that the defendant entered the property recklessly or negligently (i.e., the defendant either entered the property intentionally or not at all), so recklessly or negligently could be made optional to simplify the instruction. We would modify element 2 as follows:

"2. That [*name of defendant*] [intentionally~~, recklessly, or negligently~~ entered [*name of plaintiff*]'s property [or, although not intending to enter the property, did so as a result of a reckless or negligent act];] [or]

[intentionally~~, recklessly, or negligently~~ caused [another person [*insert name of thing*]] to enter [*name of plaintiff*]'s property [or, although not intending to cause [another person [*insert name of thing*]] to enter the property, did so as a result of a reckless or negligent act;

b. We believe that the new first paragraph in the Directions for Use is confusing and inaccurate, as stated above. Consistent with our proposed modifications above, we suggest deleting it and replacing it with the following:

"Read the bracketed language in the first optional paragraph in element 2 only if the evidence could support a finding that the defendant's entry on the property resulted from a reckless or negligent act."

c. Consistent with the foregoing, we suggest deleting the word "Further" at the beginning of the new second paragraph in the Directions for Use.

d. Other instructions listing the essential factual elements include "Essential Factual Elements" in the title. We believe that the title to this instruction should be modified to include those same words.

12. CACI No. 2002. Trespass to Timber.

a. The committee believes that element 2 of the instruction should encompass not only intentional entry but also reckless or negligent entry, for the reasons stated in our comments to CACI No. 2000. We therefore do not agree with the proposed revisions to element 2.

b. The new optional paragraph at the end of the instruction states, "In considering the diminished value of an injured tree, you may take into account lost aesthetics and functionality." A new final paragraph in the Directions for Use states, "Include the last paragraph if the plaintiff alleges lost aesthetics and functionality."

This instruction states the essential factual elements of a cause of action for trespass to timber. Element 4 is that the plaintiff "was harmed."

We believe that the significance of lost aesthetics and functionality for purposes of this instruction is that such a loss can satisfy the element of harm. So we believe that the new paragraph at the end of the instruction should refer to "harm" rather than "diminished value." The term "diminished value" seems to suggest the amount of damages (which is not otherwise discussed in this instruction) rather than the fact of harm. We would modify this paragraph as follows:

"In considering ~~the diminished value of an injured tree~~ whether [*name of plaintiff*] was harmed, you may take into account the lost aesthetics and functionality of an injured tree."

We also believe that a corresponding change should be made in the last paragraph of the Directions for Use as follows:

"Include the last paragraph if the plaintiff ~~alleges~~ claims harm based on lost aesthetics and functionality."

c. We would delete the new second paragraph in the Directions for Use for the same reasons that we would delete similar language in the new first paragraph in the Directions for Use for CACI No. 2000, discussed above.

d. Consistent with the foregoing, we suggest deleting the word "Further" at the beginning of the new third paragraph in the Directions for Use.

e. Because this instruction states the essential factual elements of a claim for trespass to timber, we believe that the title should include the words "Essential Factual Elements." And the words "Revised June 2013" should be added after the instruction.

13. CACI No. 2004. "Intentional Entry" Explained

Agree.

14. VF-2000. Trespass

The committee believes that question 2 of the verdict form should encompass not only intentional entry but also reckless or negligent entry, for the reasons stated in our comments to CACI No. 2000. We therefore do not agree with the proposed revisions to question 2.

15. VF-2001. Trespass—Affirmative Defense—Necessity

The committee believes that question 2 of the verdict form should encompass not only intentional entry but also reckless or negligent entry, for the reasons stated in our comments to CACI No. 2000. We therefore do not agree with the proposed revisions to question 2.

16. VF-2003. Trespass to Timber (Civ. Code, § 3346)

The committee believes that question 2 of the verdict form should encompass not only intentional entry but also reckless or negligent entry, for the reasons stated above. We therefore do not agree with the proposed revisions to question 2.

17. VF-2004. Trespass to Timber—Willful and Malicious Conduct (Civ. Code, § 3346; Code Civ. Proc., § 733)

The committee believes that question 2 of the verdict form should encompass not only intentional entry but also reckless or negligent entry, for the reasons stated in our comments to CACI No. 2000. We therefore do not agree with the proposed revisions to question 2.

18. CACI No. 2202. Intentional Interference with Prospective Economic Relations—Essential Factual Elements

Agree.

19. CACI No. 2205. Intentional Interference with Expected Inheritance—Essential Factual Elements

a. *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, on which this new instruction is based, stated that this tort remedy is available only if there is no adequate remedy under probate law, as noted in the Sources and Authority. We believe that this important point should be stated in the Directions for Use as well. We would modify the Directions for Use by adding the following as a separate paragraph after the first paragraph:

"This tort is available only if the court determines that the plaintiff has no adequate remedy under probate law. (*Beckwith*, *supra*, 205 Cal.App.4th at p. 1056.)"

b. The quotation from *Beckwith* in the third bullet point in the Sources and Authority appears on page 1056 of the opinion rather than page 1052.

20. VF-2202. Intentional Interference with Prospective Economic Relations

Agree.

21. CACI No. 2430. Wrongful Discharge/Demotion in Violation of Public Policy—Essential Factual Elements

Agree.

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

The committee agrees with the proposal, but suggests that consideration be given to adding optional language to element 4 for use in circumstances where the plaintiff was only perceived to be a member of the protected class or associated with such a member and modifying the new paragraph in the Directions for Use accordingly as set forth in our comments to CACI No. 2521A below.

23. CACI No. 2521A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant

The committee believes that the optional language in element 2 may be useful to counsel and the court and should not be deleted. Instead, we would modify the new second paragraph in the Directions for Use as follows:

"~~Modify~~ Use the bracketed language in element 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)"

24. CACI No. 2521B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant

Agree.

25. CACI No. 2522A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant

The committee's comments here are the same as for CACI No. 2521A above.

26. CACI No. 2522B. Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant

Agree.

27. CACI No. 2527. Failure to Prevent Harassment, Discrimination or Retaliation—Essential Factual Elements—Employer or Entity Defendant

a. The committee believes that when a jury is instructed on a claim for failure to prevent harassment, discrimination, or retaliation the jury ordinarily will also be instructed on the underlying claim for harassment, discrimination, or retaliation. The committee believes that this instruction is unnecessarily cumbersome in the way that it incorporates the requirements for the underlying harassment, discrimination, or retaliation. We believe that a better approach would be to expressly require a finding of harassment, discrimination, or retaliation pursuant to other instructions as an element of this instruction. We would delete the third element and modify the second element as follows:

"That [*name of plaintiff*] was subjected to [harassment/discrimination/retaliation] ~~in the workplace~~ pursuant to the instructions previously given;"

b. The committee agrees with the other proposed revisions to this instruction.

28. CACI No. 2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship

The committee suggests that the Sources and Authority should cite California authority following the United States Supreme Court opinion quoted in the final bullet point (*Trans World Airlines v. Hardison* (1977) 432 U.S. 63) rather than only cite the federal case.

29. VF-2500. Disparate Treatment

The committee agrees with the proposal, but suggests that consideration be given to adding optional language to question 4 for use in circumstances where the plaintiff was only perceived to be a member of the protected class or associated with such a member and modifying the new paragraph in the Directions for Use accordingly as set forth in our comments to VF-2506A below.

30. VF-2501. Disparate Treatment—Affirmative Defense—Bona Fide Occupational Qualification

The committee's comments here are the same as for VF-2500 above.

31. VF-2506A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Employer or Entity Defendant (Gov. Code, § 12940(j))

The committee believes that the optional language in question 2 may be useful to counsel and the court and should not be deleted. Instead, we would modify the new paragraph in the Directions for Use as follows:

"~~Modify~~ Use the bracketed language in question 2 if the plaintiff was not actually a member of the protected class, but alleges harassment because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)"

32. VF-2506B. Hostile Work Environment Harassment—Conduct Directed at Others—Employer or Entity Defendant (Gov. Code, § 12940(j))

Agree.

33. VF-2507A. Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant (Gov. Code, § 12940(j))

The committee's comments here are the same as for VF-2506A above.

34. VF-2507B. Hostile Work Environment Harassment—Conduct Directed at Others—Individual Defendant (Gov. Code, § 12940(j))

Agree.

35. VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

Use of this verdict form together with a verdict form on the underlying harassment, discrimination, or retaliation would result in many duplicative questions. We realize that the Directions for Use state that verdict forms for multiple causes of action can be combined into one form, which would avoid some duplication. But we believe that considerable duplication between this verdict form and the verdict form for the underlying conduct is almost certain to occur. We therefore would modify this verdict form by deleting questions 1 through 4 and adding directions at the beginning of this verdict form stating, for example:

"If you found [*refer to required finding of harassment/discrimination/retaliation in other verdict form*], then answer question 1. If you did not find [*refer to required finding of harassment/discrimination/retaliation in other verdict form*], stop here, answer no further questions, and have the presiding juror sign and date this form."

36. CACI No. 2923. Borrowed Servant/Dual Employee

Agree.

37. CACI No. 3005. Supervisor Liability for Acts of Subordinates (42 U.S.C. § 1983)

The committee believes that element 3 does not encompass discriminatory purpose and that an optional new element 4 should be added to the instruction for use if discriminatory purpose is required. We would add language to the Directions for Use explaining when the new optional element 4 should be used and would delete the third sentence in the second paragraph of the Directions for Use, which seems inaccurate.

38. CACI No. 3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

The committee agrees with the revisions to the fourth paragraph of the Directions for Use, but suggests that the citation to Civil Code section 52 in line 6 should be to section 52(a), where the specific provision is found. We also note that a stray period appears near the beginning of line 6.

39. CACI No. 3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

Agree.

40. CACI No. 3062. Gender Price Discrimination—Essential Factual Elements (Civ. Code, § 51.6)

Agree.

41. CACI No. 3067. Unruh Civil Rights Act—Damages (Civ. Code, §§ 51, 52(a))

The committee agrees with the revisions to the first paragraph of the Directions for Use, but suggests that the citation to Civil Code section 52 in line 8 should be to section 52(a), where the specific provision is found. We also note that a stray period appears in line 7.

42. VF-3030. Unruh Civil Rights Act (Civ. Code, §§ 51, 52(a))

The committee finds the revised fifth paragraph of the Directions for Use to be cumbersome and suggests replacing that paragraph with the following for greater clarity:

"A successful plaintiff may recover a maximum of three times the amount of actual damages, but no less than $4,000. (Civ. Code, § 52(a).) The judge should increase or reduce the jury's award as necessary to stay within these limits."

43. VF-3031. Discrimination in Business Dealings

The committee would replace the fourth paragraph of the Directions for Use with the same language set forth above in our comments to VF-3030 for the same reasons.

44. VF-3032. Gender Price Discrimination

The committee would replace the third paragraph of the Directions for Use with the same language set forth above in our comments to VF-3030 for the same reasons.

45. CACI No. 3706. Special Employment—General Employer and/or Special Employer Denies Responsibility

Agree.

46. CACI No. 3903O. Injury to Pet (Economic Damages)

a. This new instruction sets forth treatment costs, instead of the diminution in market value, as the measure of damages for harm to a pet. The Committee believes that the statement in the Directions for Use that "pets generally have no value to anyone except the owner" is overbroad. Many pets have a market value, although they may have a unique value to their owners. A plaintiff should not be precluded from recovering the diminution in value if it exceeds treatment costs.

As written, this instruction seems appropriate only if the plaintiff seeks to recover treatment costs in lieu of the diminution in value. Yet the title and he Directions for Use seem to suggest that the instruction is appropriate whenever the plaintiff seeks to recover economic damages for injury to a pet. The cases cited in the Sources and Authority hold not that treatment costs is the only measure of damage, but that a plaintiff is not limited to the diminution in value and may recover reasonable treatment costs if the market value of the pet is minimal. (*Martinez v. Robledo* (2012) 210 Cal.App.4th 384, 386; *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1558.)

Accordingly, we suggest that the first paragraph of the Directions for Use be modified as follows:

"Give this instruction for injury to a pet <u>if the plaintiff seeks to recover treatment costs instead of the diminution in market value</u>. Pets are not ~~longer~~ <u>necessarily</u> treated as property with regard to damages. The general standard for damages to personal property based on market value (see CACI No. 3903J, *Damage to Personal Property (Economic Damage))* ~~is~~ <u>may be</u> inappropriate ~~because pets generally have no value to anyone except~~ <u>if the pet has a unique value to</u> the owner. Therefore, recovery of reasonable medical expenses is allowed <u>in those circumstances</u>. The rule applies regardless of the tortious cause of injury, including what may be referred to as veterinary malpractice. (See *Martinez v. Robledo* (2012) 210 Cal.App.4th 384 [147 Cal.Rptr.3d 921].) If the plaintiff seeks to recover the diminution in value instead of treatment costs, use CACI No. 3903J, which can be modified as appropriate."

b. We suggest that the title be modified to "Injury to Pet (Economic Damages—Treatment Costs)" or a similar title to indicate that treatment costs is not necessarily the exclusive measure of damages.

c. The Sources and Authorities include this quote from *Martinez*: "There can be little doubt that most pets have minimal to no market value, particularly elderly pets. . . . [W]hile people typically place substantial value on their own animal companions, as evidenced by the large sums of money spent on food, medical care, toys, boarding and grooming, etc., there is generally no market for other people's pets."

Martinez involved a rather ordinary dog. This statement may not be true for fancy dogs, fancy cats, horses, and other valuable pets and does not seem helpful. We would delete this quote.

47. CACI No. 3904A. Present Cash Value

Agree.

48. CACI No. 4108. Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements

a. The committee notes that the duty on which this instruction is based is a statutory duty and not a fiduciary duty. We therefore question whether this instruction belongs in the fiduciary duty series. We suggest that consideration be given to moving this instruction to the professional negligence series, which may be a better fit.

b. The duties under Civil Code section 2079 apply to a real estate broker or salesperson. We suggest that the term "agent" or "salesperson" be added to the title of the instruction, the first line of the instruction, and the first line of the Directions for Use where only "real estate broker" appears.

c. Civil Code section 2079 states that the duty is owed only to a prospective purchaser. We believe that a new first element should be added stating that the plaintiff was a prospective purchaser. Although this may be undisputed in cases where the plaintiff later purchased the property, whether the plaintiff was a prospective purchaser may be disputed in other cases if the plaintiff did not follow through with the purchase but allegedly suffered damages as a result of the nondisclosure.

d. We believe that the seller's broker or agent, who represents the seller in selling the property, should be described in element 2 as acting on behalf of the seller for purposes of "e.g., 'selling a residential property' " rather than "e.g., 'purchasing a residential property.' "

e. We believe that it would be helpful to add to Sources and Authority a quotation from Civil Code section 2079.2 on the standard of care and a citation to *Coldwell Banker Residential Brokerage Co., Inc. v. Superior Court* (2004) 117 Cal.App.4th 158, 165, on the scope of the statutory of duty. We also suggest adding to the Secondary Sources Miller & Starr, California Real Estate 3d, § 1:41, Duty of Seller of Real Property to Disclose.

49. CACI No. 4200. Actual Intent to Defraud a Creditor—Essential Factual Elements

Agree.

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

Agree.

51. CACI No. 4328. Affirmative Defense—Tenant Was a Victim of Domestic Violence, Sexual Assault, or Stalking, or Elder/Dependent Adult Abuse

Agree.

52. VF-4300. Termination Due to Failure to Pay Rent

a. The committee believes that the language "fail to make at least one rental payment" in question 1 of this verdict form could be misconstrued to mean that the unpaid amount must be no less than one month's rent. We suggest modifying question 1 as follows:

"Did [*name of defendant*] fail to ~~make at least one rental payment to [*name of plaintiff*] as required by~~ pay the amount due under the [lease/rental agreement/sublease]?"

b. The committee agrees with the other proposed revisions to this verdict form.

53. VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability

a. Question 1 of this verdict is revised in the same manner as question 1 of VF-4300. We would modify question 1 as stated in our comments to VF-4300.

b. The committee agrees with the other proposed revisions to this verdict form.

54. VF-4302. Termination Due to Violation of Terms of Lease/Agreement

a. The committee believes that if question 4 is deleted as proposed, new question 4 will not relate to the notice requirements set forth in CACI No. 4305. We therefore would modify the third sentence in the first paragraph of the Directions to Use to begin "Question 3" rather than "Questions 3 and 4."

b. The committee agrees with the other proposed revisions to this verdict form.

55. CACI No. 5009. Predeliberation Instructions

Agree.

56. CACI No. 5090. Final Instruction on Discharge of Jury

The committee agrees that such a final instruction is appropriate, but is concerned that some of the language in the third and fourth paragraphs could discourage jurors from speaking freely with counsel after the trial. We suggest modifying these paragraphs as follows to avoid chilling such consensual contact and for greater clarity and brevity:

"You now have the absolute right to discuss or not discuss your deliberations and verdict with anyone[, including members of the media]. It is not inappropriate for the parties, their attorneys or representatives to ask you to discuss the case, but any such discussion requires your consent ~~may only occur with your consent and only if the discussion is at a reasonable time and place. You should immediately report any unreasonable contact to the court.~~

"~~If you choose to discuss the case with anyone, feel free to discuss it from your own perspective, but be respectful of the other jurors and their views and feelings. Whatever you do say, you should be prepared to repeat under oath at a later time if that becomes necessary.~~

"Thank you for your time and your service; you are discharged."

DISCLAIMER

This position is only that of the Jury Instructions Committee of the State Bar of California's Litigation Section. This position has not been adopted by the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Jury Instructions Committee and in the Litigation Section is voluntary, and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.

Very truly yours,

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