



THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

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

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

re: Invitation to Comment—CACI 14-01

Dear Mr. Greenlee:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 14-01) and appreciates the opportunity to submit these comments.

1. Request for Specific Comments

The committee believes that continuing to set forth statutory language verbatim in the CACI Sources and Authority would be preferable to providing only a brief description with a link. We believe that the convenience to the court and counsel of having the statutory language in print together with the instructions while discussing the instructions is substantial and justifies the effort required to revise the affected pages when statutes are amended. We therefore oppose the proposal to remove the statutory language.

2. CACI No. 325. Breach of Implied Covenant of Good Faith and Fair Dealing— Essential Factual Elements

a. Element 2 of this instruction includes two alternatives, only the second of which is optional. The same two alternatives appear in the corresponding verdict form (VF-304), but in the verdict form both alternatives are optional. We believe that element 2 in its entirety should be bracketed and optional, as in the verdict form. The verdict form and the instruction on which it is based should be consistent as to which elements and which parts of each element are optional. The Directions for Use of the verdict form explain the circumstances in which optional question 2 should be given. We believe that similar language should be added to the Directions for Use for this instruction explaining when to give optional element 2.

b. The committee believes that the language “a mere contract breach” in the first sentence of the new second paragraph of the Directions for Use, which appears in *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395, refers to a breach of an express contract provision. The second sentence in the same paragraph in fact refers to “breach of the express contract provisions.” We would replace “a mere contract breach” in the first sentence with “a breach of an express contract provision” for greater clarity, as shown below. A breach of the implied covenant is a breach of contract (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885), so “a mere contract breach” is not as clear as it could be.

c. We believe that the parenthetical description of *Digerati* in the second sentence of the same paragraph should be clarified. The point of that opinion was not that the gravamen of a claim for breach of the implied covenant necessarily differs from that of a claim for breach of an express contract provision, but that the gravamen of the two claims in that case differed. We would clarify this by modifying the second sentence as shown below.

“If a claim for breach of the implied covenant does nothing more than allege a ~~mere contract breach~~ breach of an express contract provision and, relying on the same alleged acts, simply seeks the same damages or other relief already claimed in a contract cause of action, it may be disregarded as superfluous as no additional claim is actually stated. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [272 Cal.Rptr. 387].) The harm alleged in element 5 may produce damages that are different from those claimed for breach of the express contract provisions. (See *Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 885 [123 Cal.Rptr.3d 736] [noting that the gravamen of the two claims restsed on different facts and different harm].)”

3. VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

a. The committee believes that question 4 is essential and should not be bracketed as optional. The Directions for Use do not state that question 4 is optional. The brackets around question 4 appear to be unintended and should be deleted.

b. It seems that the bracketed words “[to both options]” in the directions below question 4 do not belong, because there are no options in question 4, and should be deleted.

4. CACI No. 433. Affirmative Defense—Causation: Intentional Tort/Criminal Act as Superseding Cause

a. The proposed revision to element 1 requires a description of the alleged act. But describing the alleged act is likely to be a contentious issue, so requiring such a description may cause more problems than it solves. We would prefer to refer to the alleged act as an “[intentional/criminal]” act or conduct, as in the current instruction. Moreover, the proposed revision also moves element 1 further from what we believe the core of this element should be, which is whether a third party committed an intentional or criminal act. The proposed revision seems to omit this requirement. We would modify element 1 to state, “That [*name of third party*] committed [a/an] [intentional/criminal] act.”

b. We suggest adding language to the Directions for Use stating that the parties can modify the instruction by describing the alleged act more particularly if desired.

c. We note that this instruction does not state that the act of a third party must have been a cause of injury. We suggest adding language to the Directions for Use stating that if the parties dispute whether the third party act was a cause of injury, the instruction should be modified to state this requirement.

5. VF-402. Negligence—Fault of Plaintiff and Others at Issue

a. The committee believes that “as to” is not familiar phrasing for most jurors and may give them pause. We prefer the current language “in any part of” to the proposed “as to any defendant [or person] in.” We would modify the current language to “to any part of” as shown below.

b. The committee believes that asking the jury repeatedly to jump forward to question 8 to fill in zeros and then back to the prior questions complicates the verdict form and the jurors’ task unnecessarily. We would eliminate this language throughout the verdict form and instead add language to question 8 as shown below. This change also makes it unnecessary to say anything after questions 5 and 7 other than to answer the next question, so we would make these changes as well.

c. If the jury answers no for any defendant in question 1, the jury will not answer question 2 for that defendant. So the condition stated after question 2 “If you answered no as to all defendants in question 2” will not be satisfied. The same is true with respect to similar language in question 7. The jury will answer question 7 only for those defendants for whom the answer was yes in question 6. We would modify the quoted language in questions 2 and 7, and in question 6 (for consistency) as shown below to avoid this problem.

d. We would insert “skip question 5 and” before “answer question 6” after question 4, as shown below.

e. We would retain rather than delete the language “If superseding cause is an issue, insert a question on that issue after Question 5” in the Directions for Use. Particularly in light of the fact that CACI includes instructions on superseding cause, we would consider it appropriate to modify this verdict form to cover that issue and believe that this language is helpful.

f. The result of these proposed changes is a significantly shorter verdict form with fewer directions and no need for the jury to jump forward to question 8 and then back again. These changes to the verdict form and other changes for consistency and greater clarity are shown here in a clean version followed by a version showing changes:

REVISED VF-402 CLEAN

1. Was [name of first defendant] negligent?

Yes No

Was [name of second defendant] negligent?

Yes No

[Repeat as necessary for other defendants.]

If you answered yes to any part of question 1, then answer question 2 for that defendant. If you did not answer yes to any part of question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. For each defendant that received a “yes” answer in question 1, answer the following:

Was [name of first defendant]’s negligence a substantial factor in causing harm to [name of plaintiff]?

Yes No

Was [name of second defendant]’s negligence a substantial factor in causing harm to [name of plaintiff]?

Yes No

[Repeat as necessary for other defendants.]

If you answered yes to any part of question 2, then answer question 3. If you did not answer yes to any part of question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. What are [name of plaintiff]’s total damages? Do not reduce the damages based on the fault, if any, of [name of plaintiff] or others.

[Lists omitted.]

If [name of plaintiff] has proved any damages, then answer question 4. If [name of plaintiff] has not proved any damages, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff] negligent?

Yes No

If you answered yes to question 4, then answer question 5. If you answered no, skip question 5 and answer question 6.

5. Was [name of plaintiff]’s negligence a substantial factor in causing [his/her] harm?

Answer question 6.

6. Was [name/description of first nonparty] negligent?

Yes No

Was [name/description of second nonparty] negligent?

Yes No

If you answered yes to any part of question 6, then answer question 7 for that person. If you did not answer yes to any part of question 6, skip question 7 and answer question 8.

7. For each person who received a “yes” answer in question 6, answer the following:
Was [name/description of first nonparty]’s negligence a substantial factor in causing harm to [name of plaintiff]?
___ Yes ___ No
Was [name/description of second nonparty]’s negligence a substantial factor in causing harm to [name of plaintiff]?
___ Yes ___ No
[Repeat as necessary for other nonparties.]
Answer question 8.

8. What percentage of responsibility for [name of plaintiff]’s harm do you assign to the following? Write a percentage only for those who received “yes” answers in questions 2, 5, or 7. Write the number zero for anyone else in this list.
[List omitted.]

CHANGES MARKED

1. Was [name of first defendant] negligent?
___ Yes ___ No
Was [name of second defendant] negligent?
___ Yes ___ No
[Repeat as necessary for other defendants.]
If you answered yes as to ~~any defendant in~~ to any part of question 1, then answer question 2 for that defendant. ~~If you answered no as to any defendant in question 1, insert the number zero next to that defendant’s name in question 8. If you answered no as to all defendants in~~ If you did not answer yes to any part of question 1, stop here, answer no further questions, and have the presiding juror sign and date this form.
2. For each defendant that received a “yes” answer in question 1, answer the following:
Was [name of first defendant]’s negligence a substantial factor in causing harm to [name of plaintiff]?
___ Yes ___ No
Was [name of second defendant]’s negligence a substantial factor in causing harm to [name of plaintiff]?
___ Yes ___ No
[Repeat as necessary for other defendants.]
If you answered yes as to ~~any defendant in~~ to any part of question 2, then answer question 3. ~~If you answered no as to any defendant in question 2, insert the number zero next to that defendant’s name in question 8. If you answered no as to all defendants in~~ If you did not answer yes to any part of question 2, stop here, answer no further questions, and have the presiding juror sign and date this form.
3. What are [name of plaintiff]’s total damages? Do not reduce the damages based on the fault, if any, of [name of plaintiff] or others.
[Lists omitted.]

If [name of plaintiff] has proved any damages, then answer question 4. If [name of plaintiff] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Was [name of plaintiff] negligent?
 Yes No

~~If your answer to question 4 is yes you answered yes to question 4, then answer question 5. If you answered no, insert the number zero next to [name of plaintiff]'s name and skip question 5 and answer question 6.~~

5. Was [name of plaintiff]'s negligence a substantial factor in causing [his/her] harm?
~~———— If your answer to question 5 is yes, then answer question 6. If you answered no, insert the number zero next to [name of plaintiff]'s name in question 8 and answer question 6.~~
Answer question 6.

6. Was [name/description of first nonparty] negligent?
 Yes No
Was [name/description of second nonparty] negligent?
 Yes No

~~If you answered yes as to any person in to any part of question 6, then answer question 7 for that person. If you answered no as to any person in question 6, insert the number zero next to that person's name in question 8. If you answered no as to all persons in~~ If you did not answer yes to any part of question 6, skip question 7 and answer question 8.

7. For each person who received a “yes” answer in question 6, answer the following:
Was [name/description of first nonparty]'s negligence a substantial factor in causing harm to [name of plaintiff]?
 Yes No
Was [name/description of second nonparty]'s negligence a substantial factor in causing harm to [name of plaintiff]?
 Yes No

~~———— [Repeat as necessary for other nonparties.]
If you answered yes as to any person in question 7, then answer question 8. If you answered no as to any person in question 7, then insert the number zero next to that person's name in question 8 and answer question 8.~~
Answer question 8.

8. What percentage of responsibility for [name of plaintiff]'s harm do you assign to the following? ~~Insert~~ Write a percentage only for those who received “yes” answers in questions 2, 5, or 7. Write the number zero for anyone else in this list.
[List omitted.]

6. CACI No. 1620. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements

The committee agrees with the proposed revisions, but notes that the cross-references to CACI Nos. 1621, 1622, and 1623 (which is mistakenly referred to as 1723) in the fifth paragraph of the Directions for Use do not accurately state the revised titles of those instructions and should be corrected.

7. CACI No. 1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

The committee agrees with the proposed revisions, but notes that the cross-references to CACI Nos. 1620, 1622, and 1623 in the second paragraph of the Directions for Use do not accurately state the revised titles of those instructions and should be corrected.

8. CACI No. 1622. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

The committee agrees with the proposed revisions, but notes that the cross-reference to CACI No. 1623 in the fourth paragraph of the Directions for Use does not accurately state the revised title of that instruction and should be corrected.

9. CACI No. 1623. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements

a. The committee agrees with the proposed revisions, but notes that the cross-reference to CACI No. 1622 in the fourth paragraph of the Directions for Use does not accurately state the revised title of that instruction and should be corrected.

b. The Sources and Authority cite no authority for element 4, which states that reliable medical or scientific opinion confirms that the plaintiff’s risk of developing the disease was significantly increased and is a significant risk. We believe that authority should be cited for this point.

10. VF-1603. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim

Agree.

11. VF-1604. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander

Agree.

12. VF-1605. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS

The committee agrees with the proposed revisions, but notes that the cross-reference to CACI No. 1622 in the Directions for Use omits the words “Essential Factual Elements” in the title of that instruction and should be corrected.

13. VF-1606. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct

The committee agrees with the proposed revisions, but notes that the cross-reference to CACI No. 1623 in the Directions for Use omits the words “Essential Factual Elements” in the title of that instruction and should be corrected.

14. CACI No. 1723. Qualified Privilege—Malice (Civ. Code, § 47(c))

a. The committee believes that enumerating the two alternative showings to establish malice is an improvement, but we would modify the description of the second alternative. Rather than use and then define the term “reckless disregard,” we believe that the instruction would be better understood by jurors if it explained the requirement without using that term, as shown below.

b. We believe that the words “Under the circumstances of this case” add nothing to this instruction and probably have no significance to jurors. We would delete these words as shown below.

~~“Under the circumstances of this case, Even if the statement(s) [was/were] false, [name of plaintiff] cannot recover damages from [name of defendant], even if the statement(s) [was/were] false, unless [he/she] also proves either:~~

1. That [name of defendant] acted with hatred or ill will toward [him/her]; or
2. That [name of defendant] acted in reckless disregard of [name of plaintiff]’s rights. ~~“Reckless disregard” means that [name of defendant] had no reasonable grounds for believing the truth of the statement(s).”~~

15. CACI No. 1901. Concealment

a. The committee agrees that element 4 should be revised to explain what reliance means in the concealment context. But we believe that the proposed revision may be difficult for the jury to understand, particularly with respect to what it means that the plaintiff “reasonably would have behaved differently.” We suggest revising this language to refer to how “a reasonable person” in the plaintiff’s position would have behaved if the concealed facts had been disclosed, taking into account the plaintiff’s intelligence, knowledge, education, and experience (see CACI 1908, Reasonable Reliance).

b. No authority is cited in the Sources and Authority for the requirement that the plaintiff reasonably would have behaved differently. *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093, and *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248, quoted in the Sources and Authority, state the reliance requirement without the word “reasonably.” We suggest that either (1) authority for a reasonableness requirement in the concealment context be added to the Sources and Authority; (2) authority requiring reasonable reliance in fraud cases generally be added to the Sources and Authority, if you would rely on such authority; or (3) the word “reasonably” be deleted if there is no authority for such a requirement.

16. VF-1900. Intentional Misrepresentation

Agree.

17. VF-1901. Concealment

The committee agrees with the proposed revisions, but we would delete the word “reasonably” in question 3 absent authority for a reasonableness requirement with respect to concealment, as discussed above.

18. VF-1902. False Promise

Agree.

19. VF-1903. Negligent Misrepresentation

Agree.

20. CACI No. 2303. Affirmative Defense—Insurance Policy Exclusions

The proposed new final sentence in the instruction requires a description of the factual dispute. We believe that it is likely that counsel will dispute how to describe the factual dispute, which can create not only more disputes in the trial court but also issues for appeal. We would make this new sentence optional and add language to the Directions for Use stating that counsel may describe the factual dispute in this instruction if desired.

21. CACI No. 2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

a. The committee agrees with the proposed revisions to the penultimate paragraph of the instruction, except that we would retain the language “, not [his/her] job title” at the end of the first sentence. We believe that this sentence conveys an important point more effectively with this language than without it.

b. We believe that the final paragraph of the instruction will not be helpful in every case and should be made optional. Such an instruction will be helpful only in cases where the plaintiff was engaged in work arguably serving more than one purpose at the same time. The

jury need not grapple with this issue in every case. We would modify this paragraph as follows for greater clarity:

“[Each of *[name of plaintiff]*’s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she] undertook ~~it at that time~~ the activity. ~~Time spent on a~~An activity is either exempt or nonexempt; not both.]”

c. We would add language to the Directions for Use explaining when to use the optional final paragraph of the instruction, such as:

“Include the last optional paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt depending on its primary purpose.”

d. We would add language to the Directions for Use stating that the instruction can be modified to provide examples of typically exempt and nonexempt activities relevant to the work at issue, as in the instructions given in *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808-809.

22. CACI No. 2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

Same comments as CACI No. 2720, above.

23. CACI No. 3041. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care

Agree.

24. VF-3022. Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Medical Care

Agree.

25. CACI No. 3100. Financial Abuse—Essential Factual Elements

Agree.

26. CACI No. 3117. Financial Abuse—“Undue Influence” Explained

Agree.

27. CACI No. 3723. Substantial Deviation.

Agree.

28. CACI No. 3724. Going-and-Coming Rule—Business-Errand Exception

Agree.

29. CACI No. 3725. Going-and-Coming Rule—Vehicle-Use Exception

The committee believes that adding the sentence “The employer’s requirement may be either express or implied” creates more problems than it solves. We believe that an instruction on this point ordinarily is unnecessary because the jury will understand that whether an employer “requires” an employee to drive to work so as to have a vehicle available for business use encompasses both express and implied requirements, even if the jury is not familiar with those two terms. That some jurors will be unfamiliar with those terms is a distinct possibility. We believe that the quotation from *Lobo v. Tomco* (2010) 182 Cal.App.4th 297, 301, in the Sources and Authority is enough to alert counsel to the issue and the need to modify the instruction if desired.

30. CACI No. 5002. Evidence

Agree.

31. CACI No. 5021. Electronic Evidence

The committee agrees with this proposed new instruction, but would insert the words “that have been admitted in evidence” after “Some exhibits” at the beginning of the instruction to make it clear that the instruction applies to electronic exhibits admitted in evidence, as distinguished from other materials that might have been displayed electronically.

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Very truly yours,

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