THE STATE BAR OF CALIFORNIA

– LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

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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 14-02

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 14-02) and appreciates the opportunity to submit these comments.

1. CACI No. 314. Interpretation—Disputed Words

Agree.

2. CACI No. 315. Interpretation—Meaning of Ordinary Words

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

3. CACI No. 316. Interpretation—Meaning of Technical Words

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

4. CACI No. 317. Interpretation—Construction of Contract as a Whole

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

5. CACI No. 318. Interpretation—Construction by Conduct

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

6. CACI No. 319. Interpretation—Reasonable Time

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

7. CACI No. 320. Interpretation—Construction Against Drafter

Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.

8. CACI No. 422. Providing Alcoholic Beverages to Obviously Intoxicated Minors

Agree.

9. CACI No. 456. Defendant Estopped From Asserting Statute of Limitations Defense

a. Agree, but we suggest modifying the second sentence in the Directions for Use to refer to "advisory findings" rather than an "advisory jury." We believe that the jury making such findings typically will be the same jury making other, binding findings in the case, rather than a jury empanelled solely for advisory findings. We suggest modifying the second sentence in the Directions for Use as follows:

"This instruction is for use if the court ~~empanels an advisory jury to make preliminary factual~~ submits the matter to the jury for advisory findings."

b. We also suggest modifying the second bullet point in the Sources and Authority by adding the following quotation from *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745:

" '[A] jury may be used for advisory verdicts as to questions of fact [in equitable actions]'."

10. CACI No. 457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

Same comments as for CACI No. 456 above.

11. VF-406. Negligence—Providing Alcoholic Beverages to Obviously Intoxicated Minor

Agree.

12. CACI No. 1010. Affirmative Defense—Recreation Immunity—Exceptions

a. We believe that the current language in the introductory paragraph "unless [*name of plaintiff*] proves . . ." is clearer than "However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves . . . ."

b. We also believe that the language "[*Choose one of the following three options*]" should be deleted from the instruction. We believe that the jury should be instructed on all exceptions at issue and should not be limited to only one exception. Moreover, we believe that such directions for use belong in the Directions for Use. We suggest deleting this quoted language and adding a statement to the Directions for Use that only those exceptions that are at issue should be read.

Accordingly, we suggest that the instruction be modified as follows:

[*Name of defendant*] is not responsible for [*name of plaintiff*]'s harm if [~~he/she~~ *name of defendant*] proves that [*name of plaintiff*]'s harm resulted from [~~his/her~~ *name of plaintiff*]'s entry on or use of [*name of defendant*]'s property for a recreational purpose~~. However, [name of defendant] is still responsible for [name of plaintiff's harm if [name of plaintiff] proves that~~, unless [*name of plaintiff*] proves

~~[*Choose one of the following three options:*]~~

[that [*name of defendant*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property]

[or]

[that a charge or fee was paid to [*name of defendant*] to use the property]

[or]

[that [*name of defendant*] expressly invited [*name of plaintiff*] to use the property for the recreational purpose].~~]~~"

13. VF-1001. Premises Liability—Affirmative Defense—Recreation Immunity

Agree, but we believe that the words "skip the next three questions and answer question 6" after question 4 should be changed to "skip the next question" in light of the deletion of current questions 6 and 7.

14. CACI No. 1123. Affirmative Defense—Design Immunity

a. We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by the plan or design if defendant proves certain facts. We believe that describing this as defendant's "claim" and then

stating "In order to prove this claim, . . . " may complicate matters unnecessarily. We also find the language "harm caused to [*name of plaintiff*] based on the plan or design" cumbersome and would prefer to state more directly "harm to [*name of plaintiff*] caused by the plan or design." We note that the words "caused by the plan or design" appear in the statute (Govt. Code, § 830.6).

b. We would add the word "and" after the second element to emphasize that both elements must be proven.

Accordingly, we suggest that the instruction be modified as follows:

"[*Name of defendant*] ~~claims that it~~ is not responsible for any harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ caused by the plan or design of the [*insert type of property, e.g., "highway"*]. ~~In order to prove this claim,~~ if [*name of defendant*] ~~must~~ proves both of the following elements:

"1. That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [*legislative body of the public entity, e.g., city council*]/[*other body or employee, e.g., city civil engineer*]] exercising discretionary authority to approve the plan or design; and

"2. That the plan or design of the [e.g., highway] was a substantial factor in causing harm to [*name of plaintiff*]."

We also note that the citation at the end of the Directions for Use should state "*Cornette*, *supra*, at pp. 66-67" rather than "*Id.* at pp. 66-67" because of the intervening citation.

15. CACI No. 1124. Loss of Design Immunity (*Cornette*)

a. This instruction states an exception to an affirmative defense, which comes into play only if the defendant establishes the affirmative defense. The Directions for Use currently state that the instruction should be given "if the public entity defendant is entitled to design immunity unless the changed–conditions exception can be established." In other words, the current instruction assumes that design immunity is established in the first instance.

The introductory paragraph for the revised instruction seems to require plaintiff to prove the three elements stated in order to establish defendant's liability for harm caused by the plan or design, even if defendant fails to establish design immunity, i.e., by failing to prove discretionary approval of the plan or design before construction (element 1 of design immunity). This is appropriate if design immunity is established, as assumed in the current instruction. But plaintiff need not prove the three elements for loss of design immunity if defendant fails to establish design immunity in the first place.

We suggest that the introductory paragraph be modified as follows:

"Even if [*name of defendant*] proves both of these elements, [~~N~~*name of defendant*] is ~~not~~ responsible for any harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ caused by the plan or design of the [*insert type of property, e.g., "highway"*] ~~unless~~ if [*name of plaintiff*] proves the following:"

b. Consistent with the proposed modifications stated above, we suggest that language be added to the Directions for Use stating that this instruction should be given immediately following CACI No. 1123 (because of the reference to "these elements") and should be modified if the elements of design immunity are established and CACI No. 1123 is not given.

16. CACI No. 1244. Affirmative Defense—Sophisticated User

a. We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by a failure to warn in certain circumstances. We believe that describing this as defendant's "claim" and then stating "In order to prove this claim, . . . " may complicate matters unnecessarily.

We suggest that the Advisory Committee consider two alternative modifications of the introductory paragraph. The first eschews use of the term "sophisticated user" in favor of simply stating the elements of the affirmative defense without introducing to the jury a term that is familiar only to lawyers and that may add nothing to jurors' understanding of this instruction. The second retains the term "sophisticated user" as a short-hand reference that may be useful.

First alternative: "[*Name of defendant*] ~~claims that [he/she/it]~~ is not responsible for any harm to [*name of plaintiff*~~] based on~~ caused by a failure to warn ~~because [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense,~~ if [*name of defendant*] ~~must~~ proves that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known all of the following:"

Second alternative: "[*Name of defendant*] ~~claims that [he/she/it]~~ is not responsible for any harm to [*name of plaintiff*] ~~based on~~ caused by a failure to warn ~~because~~ if [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense, [*name of defendant*] must prove that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known all of the following:"

b. We suggest that the third element of the affirmative defense be modified as follows for greater clarity:

"~~Any ways~~ How to use the [*product*] in a way that ~~to~~ reduces or avoids the [*product*]'s risks, if ~~that were known to~~ [*name of defendant*] knew that information."

17. CACI No. 1305. Battery by Police Officer

We disagree with the proposed deletion of language from this instruction. *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514, held that the same three factors should be considered in determining whether force was reasonable for purposes of a negligence action (wrongful death). *Hernandez* cited CACI No. 1305 with approval and stated that the three

factors should be considered "in determining whether police officers used unreasonable force for purposes of tort liability." (p. 514.) We would retain the three factors and cite *Hernandez* in the Sources and Authority.

18. CACI Nos. 1620, 1621, 1622, 1623.

Agree.

19. CACI No. 1803. Appropriation of Name or Likeness—Essential Factual Elements

Agree. In addition, we suggest that a new instruction be created on the affirmative defense that requires balancing the plaintiff's right of privacy against the public interest in the dissemination of news and information.

20. CACI No. 2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

We believe that the Directions for Use should state more clearly (1) that the court decides whether the claim was potentially covered by the policy and (2) that this instruction should be given only if the court decides that there was potential coverage. We suggest that the beginning of the second paragraph in the Directions for Use be modified as follows:

Whether the claim was potentially covered by the policy is an issue for the court to decide. Give this instruction only if the court decides that the claim was potentially covered. ~~The court will decide the issue of whether the claim was potentially covered by the policy.~~

21. CACI No. 2407. Employee's Duty to Mitigate Damages

a. We believe that failure to mitigate damages is an affirmative defense and therefore suggest that the title of this instruction, and other instructions on the duty to mitigate, be changed to "Affirmative Defense—Failure to Mitigate Damages."

b. We believe that the "see also" citation to *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98, added to the first bullet point in the Sources and Authority adds nothing substantial to the California Supreme Court authority already cited, *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182. The point was conceded in *Rabago*. We would delete the citation to *Rabago*.

c. We believe that the citation to *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432, added to the same bullet point belongs in a separate bullet point. The parenthetical description of the case is actually a quotation. Moreover, *Villacorta* is consistent with the quoted language from *Parker*, so "but see" is not appropriate. We suggest that the new bullet point should precede the current third bullet point, which makes the same point, and should read:

" 'Wages actually earned from an inferior job may not be used to mitigate damages . . . .' (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432.)"

22. CACI No. 2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

We agree that this instruction should plainly state, rather than only imply, that the conduct that plaintiff allegedly was required to engage in would violate public policy. But we believe that the proposed new sentence in the introductory paragraph inappropriately combines the public policy with defendant's requiring the plaintiff to violate it (which is addressed in element 2). For example, price fixing is a violation of public policy, and requiring an employee to engage in price fixing is a tort if it results in a constructive discharge. Rather than state that it is a violation of public policy to require an employee to engage in price fixing, we believe that the new sentence should state that price fixing is a violation of public policy and leave it to element 2 to state that defendant is liable only if defendant required plaintiff to engage in such conduct.

Accordingly, we would modify the new sentence as follows:

"[*Specify conduct alleged to violate public policy, e.g., price fixing*] ~~It~~ is a violation of public policy ~~for an employer to require that an employee [*specify claim in case, e.g., engage in price fixing*]~~."

23. CACI No. 2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy

a. The essence of this claim is that plaintiff was subjected to intolerable working conditions that violated public policy and was forced to resign. We believe that the first sentence in the Directions for Use says it well: "This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy." But the instruction itself does not convey this so clearly, and the example in the proposed new sentence does not correspond with the example in element 2. We believe that the two examples should be the same. And the example given seems to combine two separate Labor Code violations, failure to pay overtime and failure to pay minimum wage, into one. We suggest that the introductory paragraph be modified as follows for greater clarity and consistency:

"[*Name of plaintiff*] claims that [*name of defendant*] forced [him/her] to resign ~~for reasons~~ <u>by subjecting [him/her] to working conditions</u> that violate<u>d</u> public policy. It is a violation of public policy for an employer to ~~require an employee to~~ [*specify claim in case, e.g., <u>require an employee to</u> work ~~more than forty hours a week~~ for less than minimum wage*]. To establish this claim, [*name of plaintiff*] must prove all of the following:"

b. We would modify element 2 to correspond with the example given in the introductory paragraph:

"That [*name of plaintiff*] was subjected to working conditions that violated public policy, in that [*describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was ~~treated intolerably in retaliation for filing a workers' compensation claim~~ required to work for less than minimum wage*"];"

c. We suggest that the title be modified to "Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions ~~for Improper Purpose~~ That Violate~~s~~d Public Policy."

24. CACI No. 2442. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements

Agree.

25. CACI No. 2443. Affirmative Defense—Same Decision

We agree with this proposed new instruction, but find it cumbersome. The instruction is a single sentence with three ifs, which could be confusing. We believe that the initial clause ("If [*name of plaintiff*] proves that [his/her] disclosure was a contributing factor to [his/her] discharge") is unnecessary because the jury need not decide whether plaintiff has proven his or her case to find that the affirmative defense applies. We would delete this initial clause.

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

Agree.

27. CACI No. 2547. Disability-Based Associational Discrimination—Essential Factual Elements

a. We agree with this proposed new instruction, but we suggest that the bracketed references to the disabled person's "[*e.g., physical condition*]" in elements 3 and 4 should be changed to "[*describe the physical disability, medical disability, or medical condition*]." We believe that the condition described in elements 3 and 4 must qualify for protection under the statute, and therefore suggest that such statutory language be used.

b. We suggest that the Directions for Use be modified to emphasize this same point by adding the following language at the end of the second paragraph of the Directions for Use: "If a general term or specific health condition is selected, such a term or condition must fall within the statutory definition of 'physical disability,' 'mental disability,' or 'medical condition.' (See Gov. Code, § 12926, subds. (i), (j), (m) & (n).)"

c. We suggest that language be added to the Directions for Use stating that the instruction should be modified if the claim is based on plaintiff's association with a person who is perceived to be disabled, rather than actually disabled.

28. CACI No. 2730. Whistleblower Protection—Disclosure of Legal Violation—Essential Factual Elements

a. Element 1 of the previous version of this instruction stated, "That [*name of plaintiff*] was an employee of [*name of defendant*]." We find this language clearer and more direct than the proposed new language and would use this language in element 1.

b. We believe that the defendant in most cases will be the employer, rather than a person acting on behalf of the employer. If the defendant is not the employer, other references in the instruction to the defendant may need to be changed to be consistent with the statute. For example, Labor Code section 1102.5, subdivision (b) states that "[a]n *employer, or any person acting on behalf of the employer,* shall not retaliate, against an employee for disclosing information, or because the *employer* believes that the employee disclosed or may disclose information . . . ." (Italics added.) If the defendant is the employer, then "[*name of defendant*]" is appropriate the first time it appears in element 2. But if the defendant is a person acting on behalf of the employer, it may be appropriate to name the employer rather than the defendant in element 2. The reference to "[*name of defendant*]'s policies" in the first bracketed sentence after element 7 also may need to be changed if the defendant is not the employer. Rather than include the bracketed language "[acting on behalf of]" in element 1, we would delete that language and state in the Directions for Use that the instruction should be modified if the claim is based on the conduct of a person acting on behalf of the employer.

29. CACI No. 2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements

a. Labor Code section 1019, subdivision (a) refers to an alleged violation of "this code or local ordinance." Element 1 in this instruction refers instead to defendant's violation of "a legal obligation." We believe that the language "violation of law" accurately conveys the meaning of section 1019 and is more familiar language to lay jurors than "violation of a legal obligation." We suggest that element 1 be modified as follows:

"That [*name of plaintiff*]

[in good faith, filed a complaint, or informed someone, about ~~an~~ [*name of defendant*]'s alleged violation of law ~~by [*name of defendant*] of a legal obligation~~[;/.]]

[or]

[sought information regarding whether or not [*name of defendant*] is in compliance with [his/her/its] legal obligations[;/.]]

[or]

[informed someone of that person's potential rights and remedies for [*name of defendant*]'s alleged violation of ~~a legal obligation~~ law and assisted [him/her] in asserting those rights[;/.]]"

b. Labor Code section 1019, subdivision (b)(1)(C) was amended in June 2014, effective January 1, 2015. The amendment adds the words "or a false report or complaint with any state or federal agency." Accordingly, we suggest that the language "[filed or threatened to file a false police report[;/.]]" in element 2 be amended as follows:

"[filed or threatened to file a false [police report/report or complaint with a state or local agency[;/.]]"

30. CACI No. 3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment —Substantial Risk of Serious Harm

a. We agree with the revisions to the instruction.

b. We would delete the quotation from *Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240, in the Sources and Authorities. The quotation provides no clear guidance and appears to provide no solid authority.

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

We disagree with the proposed revisions that are based on *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, a 6-5 en banc opinion. The holding in *Peralta* is by no means settled law binding on California courts. It is not unlikely that other federal courts will reach the opposite conclusion. We believe that until more solid authority can be cited, the bracketed final paragraph in the instruction and the citations to *Peralta* in the Directions for Use and Sources and Authorities should be deleted.

32. CACI No. 3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act---Essential Factual Elements

a. Civil Code section 54.3, subdivision (a) authorizes an award of actual or statutory damages, and section 55.56 states the requirements for an award of statutory damages based on a construction-related accessibility claim. This new instruction includes the elements required to recover statutory damages on such a claim, as distinguished from the elements required for an award of actual damages. We believe that the title and the Directions for Use should make this clear. We suggest that the title be modified to "Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Statutory Damages— Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)"

b. We suggest that the following sentence be added at the beginning of the Directions for Use:

"Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim."

c. We suggest that the final paragraph in the Directions for Use be modified as follows:

"This instruction can be modified for use if actual damages are sought by deleting element 2 and all that follows and adding a new element 2 stating that the defendant's conduct was a substantial factor in causing the plaintiff's harm. If actual damages are sought, CACI No. 30~~26~~67, *Unruh Civil Rights Act—Damages*, may be given.

33. CACI No. 4342. Reduced Rent for Breach of Habitability

Agree.

34. CACI No. 4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

We suggest that the proposed new paragraph in the Directions for Use be modified for greater clarity and consistency. The point is that the instruction can be adapted for use when an owner claims to be a third party beneficiary of a construction contract between the developer and a builder. That was the situation in the cited case, *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422-1423. *Burch* cited *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70, which held that an owner could maintain a cause of action against a subcontractor for breach of the implied warranty of quality and fitness if the owner was an intended beneficiary of the contract between the general contractor and the subcontractor. We believe that this deserves mention as well.

We suggest that the proposed new paragraph be modified as follows:

"This instruction may be adapted for use ~~with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects~~ if an owner claims to be a third party beneficiary of a construction contract between the developer and a contractor or between a general contractor and a subcontractor. ~~That claim would be based on the proposition that the homeowner is a third-party beneficiary of the builder-developer contract.~~ (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422-1423; *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70.)"

35. CACI No. 5012. Introduction to Special Verdict Form

Agree. We believe that the proposed new language clarifies an important point regarding the requirement that all jurors deliberate on each question, and we enthusiastically support the revision.

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