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 15-02

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 15-02) and appreciates the opportunity to submit these comments.

1. CACI No. 361. Reliance Damages

Agree.

2. CACI No. 426. Negligent Hiring, Supervision, or Retention of Employee

Agree.

3. CACI No. 461. Strict Liability for Injury Caused by Wild Animal—Essential Factual Elements

Agree.

4. VF-405. Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors

Agree.

5. VF-411. Parental Liability (Nonstatutory)

Agree.

6. CACI No. 1207B. Strict Liability—Comparative Fault of Third Person

We believe that use of the word "negligence" in the second paragraph of the instruction would be inappropriate if the instruction were used to allocate liability between a negligent and a strictly liable defendant. We would select "fault" in those circumstances because the word "fault" encompasses both negligence and strict liability. So we would modify the second sentence in the second paragraph of the Directions for Use as follows:

"In the former situation, choose negligence ~~throughout~~ in the opening paragraph and in elements 1 and 2, and fault in the first line of the second paragraph."

7. VF-1720. Slander of Title

a. We would modify the third paragraph in the Directions for Use as follows:

"If the slander is by words, select the first option in questions 1 and 2 and include the optional language at the beginning of question 3. If the slander is by means other than words, specify the means in question 1 and how it became known to others in question 2, and omit the optional language at the beginning of question 3."

b. We suggest that consideration be given to making similar changes in the Directions for Use for CACI No. 1730, *Slander of Title—Essential Factual Elements*.

c. We suggest that consideration be given to striking the words "[Was the statement untrue, and did]" in question 3 as unnecessary, to simplify the question if the plaintiff's ownership is all that must be proven whether the slander was by words or otherwise.

8. VF-1721. Trade Libel

We suggest that language be added to the Directions for Use similar to that in the Directions for Use for CACI No. 1731, *Trade Libel—Essential Factual Elements*:

"Include the optional language in question 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words."

9. CACI No. 1810. Distribution of Private Sexually Explicit Materials—Essential Factual Elements

Agree.

10. VF-1902. False Promise

Agree.

11. CACI No. 2021. Private Nuisance—Essential Factual Elements

We would modify the Directions for Use to state more clearly that CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit* must be given with this instruction:

"~~Element 8~~ This instruction must be ~~supplemented~~ given with CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit*."

12. CACI No. 2021. Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit

Agree.

13. CACI No. 2330. Implied Obligation of Good Faith and Fair Dealing Explained

Agree.

14. CACI No. 2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

Agree.

15. CACI No. 2332. Bad Faith (First Party)—Failure to Properly Investigate Claim

Agree.

16. CACI No. 2334. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Policy Limits—Essential Factual Elements

We believe that the amount of a settlement demand may be reasonable or unreasonable and that other terms of a settlement demand also may be reasonable or unreasonable. Proposed new element 3 appears to reflect this understanding. But the final paragraph of the instruction essentially defines reasonableness by reference to only the amount. We believe that use of the terms "reasonable" and "unreasonable" to refer to, respectively, reasonable in amount and unreasonable by some other measure may lead to confusion. We therefore suggest that the instruction be revised to avoid this.

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

We believe that the word "unreasonably" is superfluous and unnecessary and that "without proper cause" alone better states the requirement. (*Rappaport-Scott v. Interinsurance Exchange of Auto. Club* (2007) 146 Cal.App.4th 831, 837.) We therefore would modify element 4 as follows:

"That [*name of defendant*] ~~unreasonably, that is~~ without proper cause~~,~~ failed to defend [*name of plaintiff*] against the lawsuit;"

18. CACI No. 2337. Factors to Consider in Evaluating Insurer's Conduct

We believe that the word "unreasonably" is superfluous and unnecessary and that "without proper cause" alone better states the requirement. We therefore would modify the introductory paragraph as follows:

"In determining whether [*name of defendant*] acted ~~unreasonably, that is~~ without proper cause, you may consider whether the defendant did any of the following:"

19. CACI No. 2351. Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims

Some committee members are concerned that the language "can be allocated solely to claims that are not even potentially covered" and "costs of defense that were attributable only to these claims" may be unclear to jurors who are unfamiliar with these concepts, and suggest that "were incurred solely to defend claims that were not even potentially covered" would be clearer. Some other committee members do not share these concerns.

20. CACI No. 2520. Quid Pro Quo Sexual Harassment—Essential Factual Elements

a. We believe that there is a danger that the jury will understand element 3 in the current instruction to require the loss of tangible job benefits in order to establish liability for harassment, contrary to Government Code section 12940, subdivision (j)(1). We are concerned, however, that "favorable working conditions" may be too broad and ill-defined and lacks solid authority as an appropriate standard. We believe that the language used to describe an adverse employment action in CACI No. 2509, *"Adverse Employment Action" Explained* would be appropriate in this instruction:

"That ~~terms of employment, job benefits, or favorable working conditions~~ <u>material changes in the terms, conditions, or privileges of [*name of plaintiff*]'s employment</u> were made contingent, by words or conduct, on [*name of plaintiff*]'s acceptance of [*name of alleged harasser*]'s sexual advances or conduct;"

b. We believe that the language "made contingent" may be unclear to some jurors and suggest that other language such as "conditioned on" or "depended on" be considered.

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

Agree.

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

Agree.

23. CACI No. 2521C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Employer or Entity Defendant

Agree.

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

Agree.

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

Agree.

26. CACI No. 2522C. Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant

Agree.

27. CACI No. 2523. "Harassing Conduct" Explained.

Agree.

28. CACI No. 2525. Harassment—"Supervisor" Defined Medical Care

a. Absent any cited authority that an employer can be strictly liable for harassment by a person having the responsibility to direct other employees only if that person is the plaintiff's direct supervisor (i.e., has the responsibility to direct the plaintiff's daily work activities), we believe that option c in the instruction should refer to the responsibility to direct "other employees," just as options a and b, and Government Code section 12926, subdivision (t), on which this instruction is based, refer to "other employees."

b. We would insert the word "must" in the optional sentence at the end of the instruction to clarify the point:

"[*Name of alleged harasser*]'s exercise of this authority or responsibility must not be merely routine or clerical, but must require the use of independent judgment."

c. We agree with the revision to the Sources and Authority, but would italicize "*itself*" as in the opinion.

29. CACI No. 2526. Affirmative Defense—Avoidable Consequences Doctrine (Sexual Harassment by a Supervisor)

Agree.

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

Agree.

31. VF-2505. Quid Pro Quo Sexual Harassment

We would modify question 3 in accordance with our comments on the instruction on which this verdict form is based, CACI No. 2520, *Quid Pro Quo Sexual Harassment—Essential Factual Elements*.

32. VF-2515. Limitation on Remedies—Same Decision

Agree.

33. VF-3023. Violation of Prisoner's Rights Federal Civil Rights—Eighth Amendment—Deprivation of Necessities

Agree.

34. CACI No. 3704. Existence of "Employee" Status Disputed

Agree.

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

We agree with the revisions to the instruction, but some committee members believe that "impliedly" would be clearer than "by implication." We also note that that the opening quotation marks at the beginning of item (i) do not belong there.

36. CACI No. 3903J. Damage to Personal Property (Economic Damage)

We agree with the revisions to the instruction, but we suggest that the verb tense in the second paragraph of the Directions for Use should match that in the instruction:

"Give the optional second paragraph if the property ~~was~~ can be repaired, but the value after repair ~~was~~ would be less than before the harm occurred."

37. CACI No. 3961. Duty to Mitigate Damages for Past Lost Earnings

Agree.

38. VF-4400. Misappropriation of Trade Secrets

a. CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, on which this verdict form is based in part, states in element 1 "[*describe each item claimed to be a trade secret that is subject to the misappropriation claim*]." We believe that the same language should be used in question 1 of the verdict, in lieu of "[*insert general description of alleged trade secret[s] subject to the misappropriate claim*]," for the sake of consistency and to ensure that each item on which the claim is based is described.

b. This proposed new verdict form incorporates the elements of both CACI No. 4401 and CACI No. 4402, *"Trade Secret" Defined*, but does not include the requirement stated in CACI No. 4401, element 2 that the matter must have been a trade secret at the time of the misappropriation. We suggest that the words "at the time of [*name of defendant*]'s improper [acquisition/use/[or] disclosure]" be inserted in questions 2, 3, and 4 to impose this requirement.

c. CACI No. 4401 states that misappropriation of a trade secret involves improper acquisition, use, or disclosure of a trade secret. We believe that question 5 should ask whether the defendant "improperly" acquired, used, or disclosed the trade secret, rather than whether the defendant acquired, used, or disclosed the trade secret by "improper means." This would be clearer and more consistent with both CACI No. 4401 and question 6 of this verdict form.

d. We suggest adding an optional question 8 for use if punitive damages are sought, stating, "[Did [*name of plaintiff*] prove [by clear and convincing evidence] that [*name of defendant*] acted willfully and maliciously in [acquiring/using [or] disclosing] the trade secret[s]?]" Language should also be added to the Directions for Use regarding this optional element together with references to CACI No. 4411, *Punitive Damages for Willful and Malicious Misappropriation* and CACI No. 205, *More Likely True—Clear and Convincing Proof.*

e. We believe that establishing misappropriation by acquisition, disclosure, or use ordinarily is important and believe that the Directions for Use should more strongly encourage the use of additional questions on acquisition, disclosure, or use. We suggest the following modification to the Directions for Use:

"Additional questions ~~may~~ should be added depending on whether misappropriation is claimed in question 5 by acquisition, disclosure, or use."

39. VF-4500. Failure to Disclose Important Information Regarding Construction Project

Agree.

40. VF-4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Affirmative Defense—Contractor Followed Plans and Specifications

Agree.

41. VF-4520. Contractor's Claim for Changed or Extra Work—Owner's Response That Contract Procedures Not Followed—Contractor's Claim of Waiver

Agree.

42. CACI No. 4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements

a. Labor Code section 6310, subdivision (b) provides for a recovery if the employee's complaint was "bona fide," and the Directions for Use note a split in authority concerning the meaning of that requirement. Yet element 2 includes no "bona fide" or "good faith" requirement, and the Directions for Use do not clearly state that the instruction should be modified to include such a requirement. We suggest that the words "in good faith" be inserted at the beginning of the first option in element 2 and that the Directions for Use be modified to state that this language can be modified if it is determined that some other standard is appropriate.

b. The second and third options in element 2 refer to a proceeding "to address" workplace health or safety rights. We believe that "relating to" rather than "to address" would be clearer and more consistent with the language "under or relating to" in Labor Code section 6310, subdivision (a)(2).

43. VF-4600. False Claims Act: Whistleblower Protection

We agree with the proposed new verdict form, except that in question 5 we would provide optional language referring to the plaintiff's "act" or "acts," so as to allow for the possibility that there was only a single act in furtherance of a false claims action or to stop a false claim.

44. VF-4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Affirmative Defense—Same Decision

Agree.

45. VF-4602. Whistleblower Protection—Affirmative Defense of Same Decision (Lab. Code, §§ 1102.5, 1102.6)

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