



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 16-01

Dear Mr. Greenlee:

The Jury Instructions Committee of the State Bar of California’s Litigation Section has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 16-01) and appreciates the opportunity to submit these comments.

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

a. Some of the brackets in the instruction appear to be misplaced. In element 2, we would delete one of the opening brackets before “was” and the closing bracket after “incompetent,” so it reads:

“That [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] to perform the work for which [he/she] was hired;

b. In element 3, we would delete one of the opening brackets before “was,” the closing bracket after “incompetent,” one of the opening brackets before “unfitness,” and the closing bracket after “incompetence,” so it reads:

“That [*name of employer defendant*] knew or should have known that [*name of employee*] [was/became] [unfit/ [or] incompetent/*other particular risk*] and that this [unfitness/ [or]incompetence/*other particular risk*] created a particular risk to others;”

c. In element 4, we would delete one of the opening brackets before “unfitness” and the closing bracket after “incompetence,” so it reads:

“That [*name of employee*]’s [unfitness/ [or] incompetence/*other particular risk*] harmed[*name of plaintiff*]; and”

We believe that these modification are consistent with element 5 where there are no double brackets around “[hiring/ supervising/ [or] retaining].”

d. We suggest adding authority to the Sources and Authority supporting the addition of the optional language “other particular risk.”

2. CACI No. 440. Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements

Agree, except we would delete the word “reasonably” in factor (a) as superfluous.

3. CACI No. 450C. Negligent Undertaking Factual Elements

Agree.

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

Agree.

5. CACI No. 1100. Dangerous Condition of Public Property—Essential Factual Elements

Agree.

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

We consider both the proposed new optional language “[its/specifically delegated]” in element 1 and the proposed new third paragraph in the Directions for Use confusing and unnecessary, so we would delete them. Current element 1 adequately states the requirement that the body or employee must have exercised discretionary authority. One cannot exercise discretionary authority that one does not have. The proposed optional language and the proposed new paragraph in the Directions for Use explaining how to select between “its” and “specifically delegated” seem to suggest that only a governing body can have its own discretionary authority, and any other body or employee can have only discretion specifically delegated, presumably by a governing body. The authorities cited in the Sources and Authority do not seem to support this proposition.

7. CACI No. 1700. Defamation Per Se—Essential Factual Elements (Public Officer/ Figure and Limited Public Figure)

Agree.

8. CACI No. 1722. Retraction: News Publication or Broadcast (Civ. Code, §48a)

Agree.

9. CACI No. 2020. Public Nuisance—Essential Factual Elements

Agree.

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

Agree.

11. CACI No. 2210. Affirmative Defense—Privilege to Protect Own Financial Interest

Agree. Please note that the first bullet point in the Sources and Authority omits a citation before the word “Prosser,” the opening quotation mark on that same line should single rather than double, and there should be a closing single quotation mark on the last line.

12. CACI No. 2332. Bad Faith (First Party)—Failure to Properly Investigate Claim— Essential Factual Elements

Agree.

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

a. We believe that an insurer’s failure to accept a settlement demand that is reasonable in all respects, including amount, is necessarily unreasonable. A reasonable settlement demand and an unreasonable refusal are different sides of the same coin. To instruct the jury on both the reasonableness of the demand and the unreasonableness of the refusal may suggest that there is some distinction, which the authorities do not support. Accordingly, we would delete proposed new element 3 and the proposed new penultimate paragraph in the instruction defining “unreasonably.”

b. We would simplify and clarify the final paragraph in the instruction by limiting it to cases in which the insurer claims the demand was unreasonable because of the amount, which we believe are the great majority of cases. We suggest the following:

“A settlement demand for an amount within policy limits is reasonable, and [~~name of defendant~~]’s rejection of the demand is unreasonable, if [*name of defendant*] knew or should have known at the time the demand was rejected that the potential judgment was likely to exceed

the amount of the demand based on [*name of plaintiff in underlying case*]'s injuries or loss and [*name of plaintiff*]'s probably liability. ~~However, the demand may be unreasonable for reasons other than the amount demanded.~~"

c. We would modify the Directions for Use to state that the instruction should be modified if the insurer claims that the demand was unreasonable for a reason other than the amount, and delete the proposed new language explaining when to give element 3.

14. CACI No. 2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

a. The instruction is revised in accordance with subdivisions (l)(4) and (m)(2) of the statute, so we would add those two subdivisions to the citation in the title.

b. We believe that element 5 should refer to the actual discharge or demotion as a substantial factor rather than the decision as a substantial factor:

"That ~~[*name of defendant*]'s [decision to the~~ [discharge/demotion/*specify other adverse employment action*]] [*name of plaintiff*] was a substantial factor in causing [*name of plaintiff*]'s [~~him/her~~] harm.

c. We would change "specify other protected activity" within brackets in the second line of the final paragraph to "specify other unlawful activity" because the bracketed language should refer to the discrimination, harassment, or other unlawful activity rather than the plaintiff's protected activity.

d. The proposed new sentence in the first paragraph in the Directions for Use refers to retaliation or discrimination against a person for requesting "a reasonable accommodation," but subdivisions (l)(4) and (m)(2) prohibit retaliation against a person for "requesting accommodation." We would delete the word "reasonable." This is consistent with the final sentence in the instruction, which refers to requesting "a [disability/religious] accommodation" without the need to show that the requested accommodation was a reasonable accommodation.

e. We suggest adding to the Sources and Authority the following quotation from *Yanowitz v. L'Oreal, USA, Inc.* (2005) 36 Cal.4th 1028, 1043, which we find particularly clear and succinct:

"It is well established that a retaliation claim may be brought by an employee who has complained of or opposed conduct that the employee reasonably believes to be discriminatory, even when a court later determines the conduct was not actually prohibited by the FEHA."

f. We believe that the quoted language from *Nealy v. City of Santa Monica* (2015) 235 Cal.App.4th 359, 381, is no longer good law in light of recent amendments to Government Code section 12940 prohibiting retaliation because of a request for a disability or religious accommodation, as reflected in the revised instruction. We would delete the quotation from *Nealy* in the Sources and Authority on page 57, second bullet point.

15. CACI No. 2506. Limitation on Remedies—After-Acquired Evidence

a. The proposed revisions change this instruction from an affirmative defense to a limitation on remedies, according to the title, but the instruction itself is unchanged and does not inform the jury what to do if it finds the three elements are satisfied. The last sentence in the first paragraph in the Directions for Use seems to state that it is not clear how this instruction should be used. In our view, this instruction and the Directions for Use lack sufficient guidance for either the jury or counsel and the court, and should be withdrawn until the law is more certain.

b. The first sentence in the Directions for Use states that the doctrine of after-acquired evidence is an equitable defense. In light of the rule from *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 430-431, that the doctrine is not a defense to liability, we consider it more accurate to state that the doctrine can limit remedies. Accordingly, we suggest the following modifications to the first sentence in the Directions for Use:

“The doctrine of after-acquired evidence doctrine is an equitable defense that is determined by the court based on the facts of the case can limit available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. (*Thompson v. Tracor Flight Systems, Inc.* (2001) 86 Cal.App.4th 1156, 1172-1173.)”

16. CACI No. 2512. Limitation on Remedies—Same Decision

Agree.

17. CACI No. 2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing

a. This instruction should be appropriate for both rental housing and condominiums, so we would delete the word “rental” in element 1.

b. We would make elements 6 and 7 optional by using brackets in the instruction and in the Directions for Use explain when to give those elements.

18. CACI No. 3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

a. We would clarify the first sentence in the third paragraph in the Directions for Use as follows:

“Additional considerations and verdict form questions will be needed The instruction needs to be modified if there is a question of fact” believe that

b. We believe that the proposed new fourth paragraph in the Directions for Use goes further than it should by identifying an issue and seeming to offer an answer by citing two

statutes, while stating that the answer is unknown. We would delete this paragraph and wait for a case on point.

c. The proposed new bullet point in the Sources and Authorities quoting *Scott v. Harris* (2007) 550 U.S. 372, 381, footnote 8, relates exclusively to summary judgment and is not relevant to jury instructions given at trial, so we would delete this bullet point.

**19. CACI No. 3021. Unlawful Arrest by Peace Officer Without a Warrant—
Essential Factual Elements**

a. We believe that the jury should be instructed on the probable cause requirement only if the jury is also instructed that the court will decide that issue, so the jury does not decide for itself whether there was probable cause. We therefore would make the language “and without probable cause” in element 1 optional:

“That [*name of defendant*] arrested [*name of plaintiff*] without a warrant [and without probable cause].”

b. We would explain in the Directions for Use that this optional language should be given only if the optional paragraph at the end of the instruction is given.

c. We would modify the optional paragraph at the end of the instruction for clarity as follows:

~~“[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff*] was arrested without probable cause. The plaintiff must also prove that [*name of defendant*] arrested [*name of plaintiff*] without probable cause. The trial judge, rather than the jury, must decide if [*name of defendant*] arrested [*name of plaintiff*] without probable cause. But in order for me to do so, you must first decide.”~~

“[The law also requires that [*name of defendant*] arrested [*name of plaintiff*] without probable cause. ~~requires that~~ The trial judge, rather than the jury, decide if [*name of plaintiff*] was arrested without probable cause. But in order for me to do so, you must first decide.”

**20. CACI No. 3040. Violation of Prisoner’s Federal Civil Rights—Eighth
Amendment—Substantial Risk of Serious Harm**

a. We agree with the revision to the instruction.

b. The Ninth Circuit Court of Appeals granted an en banc hearing in *Castro v. County of Los Angeles* (9th Cir. 2015) 797 F.3d 654 on December 28, 2015, so the prior opinion should not be cited in the Directions for Use and Sources and Authority.

21. CACI No. 3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements

We would substitute “[*name of plaintiff*]” for “[his/her]” twice in the first line of the instruction for greater clarity, and substitute “[*name of defendant*]” for “[he/she]” in the second line for the same reason.

22. CACI No. 3060. Unruh Civil Rights Act—Essential Factual Elements

Agree.

23. CACI No. 3710. Ratification.

a. The plaintiff may claim both that the defendant had authorized the agent to act on the defendant’s behalf and, alternatively, that the defendant ratified the agent’s conduct after the fact. The language “although not authorized to do so” in element 1 would contradict the first part of such a claim, and we believe this language is unnecessary in these instructions. We would delete this language.

b. Element 3 largely repeats element 2. We could consolidate the two elements by deleting element 3 and modifying element 2 as follows:

“That [*name of defendant*] learned of all the material facts involved in [*name of agent*]’s conduct after it occurred;”

c. The second sentence in the final paragraph refers to the defendant’s conduct, which occurred in the past, so we would change “keeps” to “kept” and “learns” to “learned” as follows:

“Approval can be inferred if [*name of defendant*] voluntarily ~~keeps~~ kept the benefits of [*name of agent*]’s unauthorized conduct after [he/she/it] ~~learns~~ learned of it.”

24. CACI No. 3923. Public Entities—Collateral Source Payments (Gov. Code, § 985)

We would change “shall” to “must” in both the first line and the second line of the instruction. The word “may” in the second line could suggest some discretion, when the statement should be clearly mandatory. We also suggest adding language to clarify the meaning of “speculate,” which is not a common word for many jurors, and “benefit,” and would modify the final sentence for clarity:

“You must award damages in an amount that fully compensates [*name of plaintiff*] for [his/her/its] damages in accordance with instructions from the court. You ~~may~~ must not speculate, wonder, guess, or consider any other possible sources of money or benefit that [*name of plaintiff*] may have received for [his/her/its] harms. After you have returned your verdict the court will make whatever adjustments are necessary in this regard.”

25. **CACI No. 4000. Conservatorship—Essential Factual Elements**
Agree.
26. **CACI No. 4005. Obligation to Prove—Reasonable Doubt**
Agree.
27. **CACI No. 4013. Disqualification From Voting**
Agree.
28. **CACI No. 4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))**
Agree.
29. **CACI No. 4201. Factors to Consider in Determining Actual Intent to Hinder, Delay, or Defraud (Civ. Code, § 3439.04(b))**
Agree.
30. **CACI No. 4202. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements (Civ. Code, § 3439.04(a)(2))**
Agree.
31. **CACI No. 4203. Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements (Civ. Code, § 3439.05)**
Agree.
32. **CACI No. 4204. “Transfer” Explained**
Agree.
33. **CACI No. 4205. “Insolvency” Explained**
Agree.
34. **CACI No. 4206. Presumption of Insolvency**
Agree.

35. CACI No. 4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

Agree.

36. CACI No. 4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09)

Agree.

37. VF-4200. Actual Intent to Hinder, Delay, or Defraud Creditor—Affirmative Defense—Good Faith

Agree.

38. VF-4201. Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received

Agree.

39. VF.4202. Constructive Fraudulent Transfer—Insolvency

Agree.

40. CACI No. 4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

a. We would change “both” in the second sentence to “all” because there are three (not two) required elements.

b. We would insert “and” after element 2.

c. We would modify element 3 as follows for clarity:

“That ~~[name of defendant] performed and was compensated~~ [name of plaintiff] paid [name of defendant] for contractor services for the [name of plaintiff] as required by performed under the contract;”

d. We would modify the final sentence as follows for clarity and because we think this instruction should expressly state that the plaintiff is entitled to recover damages (unless the defendant meets its burden of proof), and specifically all compensation paid to the defendant. The following instruction (CACI No. 4561) then would only clarify the meaning of “all compensation paid.”

“~~[Name of defendant] must then~~ If [name of plaintiff] proves these three things, [name of plaintiff] is entitled to recover all compensation [he/she/it] paid to [name of defendant]. However, plaintiff is not entitled to recover any compensation if [name of defendant] proves that

while performing these services, [he/she/it] had a valid contractor’s license at all times as required by law.”

41. CACI No. 4561. Damages—All Payments Made to Unlicensed Contractor

a. Our proposed revisions to the prior instruction (CACI No. 4560) make the first sentence of this instruction unnecessary, so we would delete it.

b. Language in the second paragraph in the instruction could be misconstrued to mean that the plaintiff has the burden to prove not only that the plaintiff paid money for services under the contract, but also that defendant was unlicensed. We would modify this paragraph to clarify the defendant’s burden of proof:

“If you decide that [*name of plaintiff*] has proved that [he/she/it] paid money to [*name of defendant*] for services under the contract and that [*name of defendant*] has failed to prove that [*name of defendant*] was unlicensed at any all times during performance, then [*name of plaintiff*] is entitled to the return of all amounts paid, not just the amounts paid while [*name of defendant*] was unlicensed. The fact that [*name of plaintiff*] may have received some or all of the benefits of [*name of defendant*]’s performance does not affect [his/her/its] right to the return of all amounts paid.”

42. CACI No. 4603. Whistleblower Protection—Essential Factual Elements

The proposed revision states that the instruction should be modified “if the retaliation is against a family member of the person who engaged in the protected activity.” Strictly speaking, this is correct, but using the words “family member” first to refer to the employee’s family member and then to refer to the employee may be confusing. We would revise the final sentence in the first paragraph of the Directions for Use so that “family member” consistently refers not to the employee but to the employee’s family member:

“Modifications will also be required if the retaliation is against an employee whose family member of the person who engaged in the protected activity.”

43. CACI No. 4606. Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements

Agree.

44. CACI No. 5018. Audio or Video Recording and Transcription

Agree.

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Very truly yours,

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