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 17-02

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 17-02) and appreciates the opportunity to submit these comments.

1. CACI No. 117. Wealth of Parties

a. We agree with the instruction.

b. The Directions for Use state categorically that apart from the defendant's wealth with respect to punitive damages, a party's wealth or poverty is not relevant. We believe this statement is overbroad and unnecessary. The plaintiff's financial vulnerability is a factor to consider in determining the degree of reprehensibility of the defendant's conduct for purposes of evaluating the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) The plaintiff's financial vulnerability in this context means his or her wealth or poverty. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 18.) We suggest revising the Directions for Use as follows:

"This instruction may be given unless liability and punitive damages are to be decided in the same trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108.) The plaintiff's wealth or poverty may be relevant to the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419; *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5

Cal.App.5th 1, 18.) Otherwise, ~~the~~ a party's wealth or lack of it ordinarily is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553.)"

2. CACI No. 556. Affirmative Defense—Statute of Limitations—Medical Negligence—Three-Year Limit

Drexler v. Petersen (2016) 4 Cal.App.5th 1181 refers to the plaintiff's discovery of the exacerbation of "a preexisting disease or condition." (*Id*. at pp. 1184.) We find the reference to worsening "symptoms" in the fourth paragraph in the Directions for Use somewhat imprecise in light of the language in the opinion and therefore would substitute "preexisting disease or condition has developed" for "symptoms have developed."

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

We agree with the proposed revision. We offer the following additional comment for your future consideration.

The latter part of the instruction sets forth alternative grounds negating the affirmative defense. These are exceptions to the exception to liability. But we believe the language, "However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that" could be misconstrued to mean that the defendant is liable if the plaintiff proves any of the three alternative grounds without having to also prove the elements of the claim. We suggest modifying this language as follows:

"However, [*name of defendant*] ~~is~~ may still be responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that"

We also suggest adding language to the instruction to make it clear that the plaintiff must prove the elements of his or her claim apart from establishing an exception to the affirmative defense.

4. CACI No. 1709. Retraction: News Publication or Broadcast

Agree.

5. CACI No. 1722. Affirmative Defense—Statute of Limitations—Defamation

Agree.

6. CACI No. 1724. Fair and True Reporting Privilege

a. As stated in the instruction, the fair and true reporting privilege (Civ. Code, § 47, subd. (d)) is a complete defense to defamation, and the defendant has the burden to establish the privilege. Thus, the privilege is an affirmative defense, and this instruction should be labeled "Affirmative Defense—Fair and True Reporting Privilege."

b. We would modify the second alternative in element 2 to more accurately reflect the statutory requirement that the report or communication to a public journal be of a "judicial," "legislative," or "other public official proceeding," or of anything said in the course of a "judicial," "legislative," "or other public official proceeding" (Civ Code, § 47, subd. (d)(1)):

"[something said in the course of a judicial, legislative or other public official proceeding;]"

7. CACI No. 1802. False Light

Briscoe v. Reader's Digest Assn. (1971) 4 Cal.3d 529, 543, and *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, footnote 13, support the proposition that a false light claim and a defamation claim based on the same facts may be duplicative. We believe that the Directions for Use should state this more clearly and should suggest that consideration be given to not instructing on false light if the court will instruct on defamation.

The proposed language, "the standard applied in the instructions should be the same" may suggest that the CACI instructions should be modified in some manner if both defamation and false light instructions are given to ensure that the "standards" are the same, and the proposed language "[t]he court should consider whether separate instructions on each claim should be given" may suggest that the instructions should be combined into a single instruction. However, we believe the lesson from *Briscoe* and *Eisenberg* is to consider not instructing on false light if the court will instruct on defamation, as stated.

We would modify the penultimate paragraph in the Directions for Use as follows:

"If ~~a false light claim is combined with a~~ the jury is instructed on defamation ~~claim~~, the ~~standard applied in the instructions should be the same. The~~ court should consider whether an ~~separate~~ instruction~~s~~ on ~~each claim~~ false light would be superfluous and therefore should not be given. ~~in light of~~ (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13; ~~and~~ *Briscoe*, *supra*, 4 Cal.3d at p. 543.)"

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

Agree.

9. VF-1803. Privacy—Appropriation of Name or Likeness

Agree.

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

We would modify the first paragraph in the Directions for Use as follows for greater clarity:

"Nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100.) Element 2 requires that the defendant must have created a condition or allowed a condition to exist by failing to act. If there is an issue as to the nature of defendant's conduct that caused the interference, modify or expand element 2 to ~~include the applicable~~ describe the alleged conduct."

11. CACI No. 2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

Agree.

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

a. The cases cited in the third paragraph in the Directions for Use show a split of authority. Rather than choose between these divergent authorities and state that element 3 may be modified in accordance with one of those authorities, we suggest simply noting the split of authority, which would allow counsel and the court to decide whether to modify the instruction:

"~~Element 3 may be modified if there was a settlement rather than a judgment in excess of the policy limits.~~ In cases involving equitable subrogation between insurers, ~~it has been held that a judgment is not required in all cases; a settlement may suffice~~ there is a split of authority regarding whether a judgment in excess of the policy limits is required. . . ."

b. We would add the following information regarding the subsequent history of *Ace American Ins. Co. v. Fireman's Fund In. Co.* (2016) 2 Cal.App.5th 159, where the opinion is cited in both the Directions for Use and Sources and Authority, to alert readers to potential concerns regarding its precedential value (see Cal. Rules of Court, rule 8.1115(e)): "(rev. granted Nov. 9, 2016, rev. dismissed Mar. 15, 2017, S237175)"

13. CACI No. 2805. Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment

Agree.

14. CACI No. 3053. Retaliation for Exercise of Free Speech Rights—Essential Factual Elements

a. Element 2 of CACI No. 2505, *Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))*, on which this instruction seems to be patterned, includes alternative language to use if the parties dispute whether the alleged retaliatory act constituted an adverse employment action. An adverse employment action is required for this section 1983 cause of action as well, as noted in the Directions for Use and in *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071. We suggest modifying the Directions for Use for this instruction to state that element 2 should be modified if the parties dispute whether the alleged retaliatory act constituted an adverse employment action, with a cross-reference to No. 2505.

b. We would strike the language "even if [he/she/it] also retaliated based on [*name of plaintiff*]'s protected conduct" at the end of element 7. The introductory sentence before element 6 already states that if the plaintiff proves elements 1 through 5, the defendant is not liable if element 6 or 7 is true. There is no need to repeat this in element 7. And this language seems to equate a substantial factor with "based on," which may confuse or mislead the jury. In addition to striking this language, we suggest adding a cross-reference to CACI No. 430, *Causation: Substantial Factor*.

15. CACI No. 3724. Social or Recreational Activities

We agree with this proposed new instruction, except that we would add the words "part of the employment relationship" at the end of (b) to make it clear that social or recreational activities must be a customary part of the employment relationship, rather than just "customary."

16. CACI No. 3726. Going-and-Coming Rule—Business Errand Exception

Agree.

17. CACI No. 3727. Going-and-Coming Rule—Compensated Travel Time

We would add the following language at the end of the Directions for Use to emphasize the important point that reimbursement of travel expenses is insufficient to make the employee's commuting time within the scope of employment:

"The mere reimbursement of the employee's travel expenses is not sufficient to bring the employee's commute time into the scope of employment. (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042.)"

18. CACI No. 4111. Constructive Fraud

a. Element 5 expresses the reasonableness of the plaintiff's reliance in a way that may be difficult for the jury to understand. *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, stated, "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." Accordingly, we would modify element 5 as follows for greater clarity:

"5. That had [*name of defendant*] disclosed complete and accurate information, [*name of plaintiff*] ~~reasonably~~ would ~~have~~, in all reasonable probability, have behaved differently."

b. Actual and reasonable reliance are presumed when the defendant is a fiduciary. The presumption is rebuttable. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1302; *Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) In light of the rebuttable presumption of reliance, we believe that element 5 should be made optional and should be given (together with

CACI Nos. 1907 and 1908) only if the defendant presented evidence that there was no reliance. The Directions for Use should explain this, and *Edmunds* and *Gump* should be added to the Sources and Authority.

c. The final sentence in the third paragraph in the Directions for Use is difficult to understand. Perhaps the point is that the plaintiff, acting reasonably, would have behaved differently had all correct information been disclosed.

19. CACI No. 4207. Affirmative Defense—Good Faith

The meaning of "collude" may be unclear to jurors. We would modify the first sentence in the last paragraph of the instruction as follows:

"'Good faith' means that [*name of defendant/third party*] acted without actual fraudulent intent and that [he/she/it] did not ~~collude with [*name of debtor*]~~ know of or otherwise actively participate in any fraudulent scheme."

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

Agree.

21. CACI No. 4700. Consumer Legal Remedies Act—Essential Factual Elements

a. We would modify element 1 as follows for greater clarity and to avoid using the words "acquired" and "sought to acquire":

"That [*name of defendant*] ~~acquired, or sought to acquire, by purchase or lease,~~ purchased, attempted to purchase, leased, or attempted to lease [*specify product or service*] for personal, family, or household purposes;"

b. The last sentence in the penultimate paragraph in this instruction, "[He/She] does not need to prove that it was the primary factor or the only factor in the decision," is an incomplete explanation of a "substantial factor" and may favor the plaintiff. We would delete this sentence and add to the Directions for Use a statement that CACI No. 430, *Causation: Substantial Factor*" should be given with this instruction.

22. CACI No. 4701. VF-2100. Consumer Legal Remedies Act—Notice Requirement for Damages

Agree.

23. CACI No. 4702. Consumer Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff

We agree with this instruction, but we would modify it to make it clear which items are listed in the conjunctive and which are listed in the disjunctive. There are several series or lists in this instruction: three elements (1, 2 & 3) listed in the conjunctive, three factors listed in the disjunctive (2(a), (b) & (c)), and three items listed in the disjunctive (2(b)(1), (2) & (3)). Following the usual convention of stating "and" or "or" only after the penultimate item in each series would make it necessary for jurors to refer to the penultimate item in each series, or to the introductory sentence preceding each series, to determine whether the jury must find each item in the series is true or need only find that one item in the series is true. Inserting "and" or "or," as appropriate, after each item would make it clear to the jury whether they must find all items are true or only one of them is true:

"1. That [*name of plaintiff*] has suffered substantial physical, emotional or economic damage because of [*name of defendant*]'s conduct; and

"2. One or more of the following factors:

"(a) [*Name of defendant*] knew or should have known that [his/her/its] conduct was irected to one or more senior citizens or disabled persons; or

"(b) [*Name of defendant*]'s conduct cause one or more senior citizens or disabled persons to suffer:

"(1) loss or encumbrance of a primary residence, principal employment, or source of income; or

"(2) substantial loss of property set aside for retirement, or for personal or family care and maintenance; or

"(3) substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person; or

"(c) One or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to [name of defendant]'s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct; and

"3. That an additional award is appropriate."

24. CACI No. 4710. Consumer Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction

The statutory language "bona fide error" used in element 1 of this instruction may be difficult for jurors to understand. We would substitute the words "an honest mistake" for "a bona fide error."

DISCLAIMER

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Very truly yours,

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