



March 1, 2019

Via E-mail: [civiljuryinstructions@jud.ca.gov](mailto: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 19-01

Dear Mr. Greenlee:

The Jury Instructions Committee of the California Lawyers Association’s Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 19-01) and appreciates the opportunity to submit these comments.

**1. CACI No. 101. Overview of Trial**

We do not agree with the proposal. We see no need to use the terms “petitioner” and “respondent” when “plaintiff” and “defendant” would be more understandable to the jury and would be consistent with the use of the terms “plaintiff,” “defendant” and “cross-defendant” later in the instruction.

**2. CACI No. 105. Insurance**

Agree.

**3. CACI No. 472. Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors**

Agree.

**4. CACI No. 1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof**

In the Directions for use, we would refer to a “timely request” for a limiting instruction, to be more consistent with *Kim v. Toyota Motor Corp.* (2018) 6 Cal5th 21, 38.

**5. CACI No. 2020. Public Nuisance—Essential Factual Elements**

Agree.

**6. CACI No. 2021. Private Nuisance—Essential Factual Elements**

Agree.

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

a. We believe that whether particular conduct constitutes misconduct can depend on the facts, so an example such as the bracketed example in the second line of the instruction “*e.g. had provided a false Social Security Number,*” may not be helpful. We would delete this language.

b. The language “validly discharged” in the final paragraph of the instruction is not adequately defined. We would make a more specific reference to the language in item 3 stating the appropriate standard:

“ . . . would have ~~validly~~ discharged [*name of plaintiff*] as a matter of settled company policy if . . . .”

**8. CACI No. 2508. Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation**

a. We believe the proposed new language in the second paragraph of the instruction could be stated more clearly. If the language is not changed as shown below, we would change “that occurred after” to “that occurred on or after” so as to capture the day exactly one year before the complaint was filed, which is within the limitations period. We propose:

“[*Name of plaintiff*] may recover ~~only~~ for acts of alleged [*specify the unlawful practice, e.g., harassment*] that occurred ~~after~~ before [*insert date one year before the DFEH complaint was filed*], ~~unless~~ only if [he/she] proves all of the following:”

b. In item 3, we would change “that occurred after that date” to “that occurred on or after that date” so as to capture the day exactly one year before the complaint was filed, which is within the limitations period.

**9. CACI No. 2510. “Constructive Discharge” Explained**

Agree.

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

Agree.

**11. CACI No. 2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements**

Agree.

**12. CACI No. 2444. Disability Discrimination—Affirmative Defense—Health or Safety Risk**

a. We agree with deleting the three factors in light of the same factors, and more, in CACI No. 2543.

b. Although it is not within the scope of the present invitation to comment, please consider the following suggestion. Since this instruction was first adopted, title 2, section 11067 of the California Code of Regulations has been amended to explain in more detail “an immediate and substantial degree of risk.” We suggest revising the bracketed final paragraph in the instruction based on the current regulation. We also suggest including optional language in the same paragraph encompassing a danger to others:

“[In determining whether [*name of plaintiff*]’s performance of the job duty would endanger [his/her] [the] health or safety [of others], you must decide . . . .”

**13. CACI No. 2704. Damages—Waiting-time Penalty for Nonpayment of Wages**

a. As revised, the instruction essentially uses the term “willfully” and then defines “willfully” as “intentionally.” We would use the term “intentionally” instead of “willfully” in the first item 3:

“3. That [*name of defendant*] ~~willfully~~ intentionally failed to pay these wages.”

b. *Nishiki v. Danko Meredith, P.C.* (2018) 25 Cal.App.5th 1460, 1468, elaborates on the meaning of “willful” or “intentional.” We would replace the sentence after the first item 3 with the following language based on *Nishiki*:

“A person acts intentionally if the person knows what he or she is doing and intends to do what he or she is doing.”

**14. CACI No. 3725. Going-and-coming Rule—Vehicle-use Exception**

Agree.

**15. CACI No. 3903Q. Survival Damages (Economic Damages)**

a. We would revise the second sentence in the instruction for greater clarity:

“The recoverable damages are limited to the loss or damage that [*name of decedent*] sustained ~~or that occurred~~ before [his/her] death, including . . . .”

b. We would add to the Directions for Use a statement that if this instruction is given other instructions such as CACI Nos. 3903A, 3903C, and 3903E that might duplicate some of the items of damages should not be given.

**16. CACI No. 4002. “Gravely Disabled” Explained**

Agree.

**17. CACI No. 4003. “Gravely Disabled” Minor Explained**

Agree.

**18. CACI No. 4106. Breach of Fiduciary Duty by Attorney—Essential Factual Elements**

We believe the word “intentional” encompasses “fraudulent” as that word is used in this context, so we would delete “or fraudulent” in the first sentence of the second paragraph in the Directions for Use.

**19. CACI No. 4570. Right to Repair Act—Construction Defects—Essential Factual Elements**

Agree.

**20. CACI No. 4571. Right to Repair Act—Damages**

Agree.

**21. CACI No. 4572. Right to Repair Act—Affirmative Defense—Act of Nature**

Although Civil Code section 945.5, subdivision (a) defines an “unforeseen act of nature” to include manmade events such as war, terrorism, and vandalism, the jury might be perplexed by an instruction that first states the defendant claims the harm was caused by an unforeseen act of nature and later states the defendant must prove that a manmade event such as war, terrorism,

or vandalism caused the damage (if the second bracketed option is selected). We would avoid this by revising the instruction:

“*[Name of defendant]* claims that *[he/she/it]* is not responsible for *[name of plaintiff]*’s harm because it was caused by an unforeseen ~~act of nature~~ event. To establish this defense, *[name of defendant]* must prove . . . .”

**22. CACI No. 4573. Right to Repair Act—Affirmative Defense—Unreasonable Failure to Minimize or Prevent Damages**

Agree.

**23. CACI No. 4574. Right to Repair Act—Affirmative Defense—Plaintiff’s Subsequent Acts or Omissions**

Agree.

**24. CACI No. 5001. Insurance**

Agree.

**25. CACI No. 5009. Predeliberation Instructions**

Agree.

**26. CACI No. 5012. Introduction to Special Verdict Form**

Agree.

**27. CACI No. 5017. Polling the Jury**

Agree.

**28. CACI No. 5022. Introduction to General Verdict Form Defect**

Agree.

**29. User Guide. Absence of Instruction**

We agree with the concept, but find the proposed language verbose and would revise it to state:

“Absence of Instruction: The absence of a CACI instruction on a particular rule of law does not indicate that no instruction would be appropriate.”

Sincerely,

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