LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

August 29, 2019

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 19-03

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 19-03) and appreciates the opportunity to submit these comments.

1. CACI No. 105. Insurance

a. The committee believes the following language in the instruction is overbroad: "The presence or absence of insurance is totally irrelevant." We believe the prohibition on consideration of insurance is more limited. The collateral source rule prohibits reducing damages by compensation received from a source other than the tortfeasor (such as an insurance payment) and makes evidence of such a payment inadmissible, while Evidence Code section 1155 makes evidence of insurance inadmissible to prove negligence or other wrongdoing.

Rather than leave the instruction unchanged and add language to the Directions for Use suggesting that the instruction be modified in some cases, we would revise the instruction to describe the prohibition on consideration of insurance more precisely. This should include both the prohibition on consideration of defendant's insurance (which is reflected in the proposed revision to the Directions for Use) and the prohibition on consideration of plaintiff's insurance (which is not mentioned in the proposal).

We would modify the instruction as follows:

"You must not consider whether any of the parties in this case has insurance in deciding whether [*name of defendant*] [was negligent/is liable for damages] or in deciding the amount of any damages. ~~The presence or absence of insurance is totally irrelevant.~~ You must decide this case based only on the law and the evidence."

b. The Directions for Use mentions the restriction on considering the defendant's insurance, but does not mention the restriction on considering the plaintiff's insurance (i.e., the collateral source rule). The Sources and Authority include authority for both restrictions. We would modify the Directions for Use to include some mention of the collateral source rule and to reflect our proposed modification stated above.

2. CACI No. 301. Third Party Beneficiary

Agree.

3. CACI No. 325. Breach of the Implied Covenant of Good Faith and Fair Dealing —Essential Factual Elements

a. We suggest the following modification to the second sentence in the instruction to make it clear that "covenant" refers to the "implied promise" described in the first sentence:

"This implied promise, or covenant, means that each party will not do anything . . . ."

b. We suggest substituting "implied promise" for the word "duty" in the second paragraph of the instruction for consistency and to clarify the point:

"[*Name of plaintiff*] claims that [*name of defendant*] violated the ~~duty~~ implied promise to act fairly and in good faith."

c. We would express new element 5 in a more active voice for greater clarity:

"That ~~[*name of defendant*]'s conduct was a failure to~~ by doing so [*name of defendant*] did not act fairly and in good faith;"

4. CACI No. 372. Common Count: Open Book Account

a. We agree that an introductory paragraph explaining the language "open book account" would be helpful. But we would modify the proposed language to more accurately convey that a book account must include substantially all of the credits and debits between the parties in connection with their transaction ("*the* credits and debits"), rather than only some credits and debts ("credits and debits"). Code of Civil Procedure section 337a and the cases cited in the Sources and Authority refer to "the credits and debits."

" 'A book account . . . only when it contains a statement of the debits and credits involved in the transactions completely enough to supply evidence from which it can be

reasonably determined what amount is due . . . ." (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [bullet 1].) Thus, a book account must be substantially complete.

b. We would include a description of the fiduciary relationship at issue in the first sentence, when that alternative language is given, so the jury can relate the term "fiduciary relationship" to the relationship at issue.

c. The authorities cited in the Sources and Authority do not support the statement that a book account is open if entries can be added to it from time to time. The *Interstate Group Administrators* case cited in bullet 3 and other cases state that a book account is open if there is a balance due. (E.g., *Professional Collection Consultants v. Lujan* (2018) 23 Cal.App.5th 685, 691.) *Reigelsperger v. Siller* (2007) 40 Cal.4th 574, 579, footnote 5, stated that the parties may have "an open-book account relationship within the meaning of [Code of Civil Procedure] section 1295, subdivision (c)" even if the account is settled if they anticipate future transactions. But section 1295, relating to arbitration provisions in medical service contracts, is not involved in this instruction, and the plaintiff would not be suing on an open book account if the account were settled (i.e. fully paid).

d. Code of Civil Procedure section 337a describes a "book account" as "a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and *shows the debits and credits in connection therewith* . . . ." (Italics.) Thus, a book account shows the debits and credits in connection with one or more transactions between the parties. Just as the first paragraph in the instruction refers to "a record of <u>the</u> credits and debits between parties," we believe the second paragraph should refer to "an open book account in which the credits and debits . . . were recorded," rather than "open book account in which financial transactions . . . were recorded."

e. Code of Civil Procedure section 337a states that the creditor must make entries in the regular course of business. This instruction omits this requirement, which should be added.

f. Code of Civil Procedure section 337a states that a book account "is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefore, or (3) on a card or cards of a permanent character, or is kept in *any other reasonably permanent form and manner*." (Italics added.) This instruction omits this requirement, and the Sources and Authority cite no authority for an electronic book account or that a book account must be written, rather than recorded in some other reasonably permanent form and manner.

g. We suggest the following modifications to address these points:

A book account is a record of <u>the</u> credits and debits between parties [to a contract/in a fiduciary relationship, such as [<u>*describe fiduciary relationship*</u>]]. [The contract may be oral, in writing or implied by the parties' words and conduct.] A book account is "open" if ~~entries can be added to it from time to time~~ <u>a balance is due on the account</u>.

[*Name of plaintiff*] claims that there ~~wa~~is an open book account in which the ~~financial transactions~~ credits and debits between the parties were recorded and that [*name of defendant*] owes [him/her/it] money on the account. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of plaintiff*] and [*name of defendant*] ~~had financial transactions with each other~~ [entered into a contract with each other/were in a [*describe fiduciary relationship*]]

2. That [*name of plaintiff*] kept ~~[a/an] [written/electronic] account~~ a detailed statement of the debits and credits involved in the transaction;

3. That [*name of plaintiff*] recorded the debits and credits in the regular course of business;

4. That [*name of plaintiff*] kept the detailed statement in a reasonably permanent form and manner;

~~3~~5. That [*name of defendant*] owes [*name of plaintiff*] money on the account; and

4~~6~~. The amount of money that [*name of defendant*] owes [*name of plaintiff*].

h. We believe Code of Civil Procedure section 337a should be added to the Sources and Authority.

5. CACI No. 373. Common Count: Account Stated

a. For consistency and to avoid confusion, we believe the language "prior transactions" in the introductory paragraph should be repeated in element 1 rather than use other language, "previous financial transactions," to refer to the same thing. And we believe the qualifier "financial" is unneeded and potentially misleading when any prior transactions resulting in a creditor/debtor relationship will do.

b. We find the language in element 2 "the amount claimed to be due" ambiguous. It could refer to the amount claimed to be due in the present lawsuit or the amount claimed to be due at some time in the past. We believe it should be the latter and would clarify element 2 to make this clear.

c. The language in element 3 "the stated amount" refers to "the amount stated in the account" in current element 2. The proposed revision eliminates "the amount stated in the account" from element 2, making it unclear what "the stated amount" refers to. Our proposed modifications are below.

d. We suggest the following modifications to the elements to address these points:

1. That [*name of defendant*] owed [*name of plaintiff*] money from ~~previous financial~~ prior transactions.

2. That [*name of plaintiff*] and [*name of defendant*], by words or conduct, agreed that ~~the amount claimed to be due was the correct amount owed by~~ [*name of defendant*] ~~to~~ owed [*name of plaintiff*] a specified amount;

3. That [*name of defendant*], by words or conduct, promised to pay ~~the stated~~ the specified amount to [*name of plaintiff*];

4. That [*name of defendant*] has not paid [*name of plaintiff*] [any/all] of ~~the~~ the specified amount ~~owed under this account~~; and

5. The amount of money [*named of defendant*] owes [*name of plaintiff*].

e. We would add *Leighton v. Forster* (2017) 8 Cal.App.5th 467, 491, to the Sources and Authorities as a more recent case stating the same elements.

6. CACI No. 375. Restitution From Transferee Based on Quasi Contract or Unjust Enrichment

a. We agree with the proposed new instruction and the Directions for Use.

b. We would modify the fifth bullet point in the Sources and Authority to reflect the split of authority on the question whether unjust enrichment is a cause of action.

Some courts state that there is no cause of action for unjust enrichment (*Everett v. Mountains Recreation & Conservation Authority* (2015) 239 Cal.App.4th 541, 553; *Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1138; *Jogani v. Superior Court* (2008) 165 Cal.App.4th 901, 911; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 793), while others recognize such a cause of action (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1132; *Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593; *Hirsch v. Bank of America* (2003) 107 Cal.App.4th 708, 722 [finding "a valid cause of action for unjust enrichment"].) Some courts state that unjust enrichment is synonymous with restitution and recognize a cause of action for restitution based on unjust enrichment. (*Rutherford Holdings, LLC v. Plaza Del Rey* (2014) 223 Cal.App.4th 221, 231; *Chapman v. Skype, Inc.* (2013) 220 Cal.App.4th 217, 233-234; *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370.)

Ghirardo v. Antonioli (1996) 14 Cal.4th 39, 50, held that a real property seller who understated the amount due to payoff a prior loan was entitled to judgment "under traditional equitable principles of unjust enrichment." *Ghirardo* stated, "The complaint set forth a common count 'for payment of money' that rests on a theory of unjust enrichment. The claim was adequately pleaded and proved." (*Ghirardo*, *supra*, 14 Cal.4th at p. 54.) *Ghirardo* therefore reversed the judgment with directions to enter judgment for the plaintiff in the amount of the unpaid balance. (*Id.* at p. 55.) *Ghirardo* arguably supports the existence of a cause of action for unjust enrichment or restitution based on unjust enrichment.

7. CACI No. 434. Alternative Causation

We believe the statement that there is a split of authority on whether all potential tortfeasors must be named as defendants goes too far. The discussion on this point in *Vahey v. Saci*a (1981) 126 Cal.App.3d 171, 177, is very limited and arguably is contrary to *Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588. We would relegate *Vahey* to "but see."

Sindell stated, "There is an important difference between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible

for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug." (*Sindell*, 26 Cal.3d at p. 602; see also *Setliff v. E. I. Du Pont de Nemours & Co*. (1995) 32 Cal.App.4th 1525, 1534.) *Sindell* stated, "According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (Rest.2d Torts, § 433B, com. g, p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id.*, com. h, p. 446.)" (*Sindell*, at p. 602, fn. 16.) Because not all defendants were joined, *Sindell* modified the alternative liability theory: "Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted."

Accordingly, we suggest the following modifications:

"This instruction is based on the rule stated in the case of *Summers v. Tice* (1948) 33 Cal.2d 80, 86 [199 P.2d 1], in which the court held that the burden of proof on causation shifted to the two defendants to prove that each was not the cause of plaintiff's harm. ~~There is a split of authority as to whether~~ Generally, all potential tortfeasors must be defendants at trial for the rule of *Summers* to apply. (~~Compare~~ *Setliff v. E. I. Du Pont de Nemours & Co*. (1995) 32 Cal.App.4th 1525, 1534-1535 [38 Cal.Rptr.2d 763] [California courts have applied the alternative liability theory only when all potential tortfeasors have been joined as defendants] ~~*with*~~ *;* but see *Vahey v. Saci*a (1981) 126 Cal.App.3d 171, 177 [178 Cal.Rptr. 559] [*Summers* applies to multiple tortfeasors not to multiple defendants].) The ~~issue will arise~~ instruction may need to be modified if there are potential *Summers* tortfeasors who settled before trial, are immune, are beyond the court's jurisdiction, or are not before the court for other reasons."

8. CACI No. 513. Wrongful Life—Essential Factual Elements

We agree with the proposed revision to the instruction. Although it is not within the scope of the invitation to comment, we suggest modifying the final bullet point in the Sources and Authority as follows:

"Wrongful life does not apply to ~~normal~~ children born without any mental or physical impairment."

9. CACI No. 1125. Conditions on Adjacent Property

Agree.

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

Agree.

11. CACI No. 2423. Breach of Implied Covenant of Good Faith and Fair Dealing —Employment Contract—Essential Factual Elements

a. We suggest the following modification to the second sentence in the instruction to make it clear that "covenant" refers to the "implied promise" described in the first sentence:

"This implied promise, or covenant, means that each party will not do anything . . . ."

b. We suggest moving the first two sentences of the proposed new language in the Directions for Use for CACI No. 2424 to the Directions for Use for this instruction because that language explains when to use this instruction.

12. CACI No. 2424. Affirmative Defense—Breach of the Implied Covenant of Good Faith and Fair Dealing—Good Faith Through Mistaken Belief

We suggest moving the first two sentences of the proposed new language in the Directions for Use for this instruction to the Directions for Use for CACI No. 2423 and deleting that language from the Directions for Use for this instruction.

13. CACI No. 2544. Disability Discrimination—Affirmative Defense—Health or Safety Risk

Agree. We note that the opening bracket is missing from the paragraph beginning "However."

14. CACI No. 2545. Disability Discrimination—Affirmative Defense—Undue Hardship

a. We agree with the proposed revisions to the instruction, except that rather than use the term "disability" we believe the instruction should advise counsel to describe the source of the plaintiff's limitations, as in CACI Nos. 2540 and 2541:

"[*Name of defendant*] claims that accommodating [*name of plaintiff*]'s ~~disability~~ [*select term to describe basis of limitations, e.g., physical condition*] would create an undue hardship to the operations of [his/her/its] business."

b. We would add to the Directions for Use some of the same language in the Directions for Use for CACI No. 2541:

"Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as 'physical disability,' 'mental disability,' or 'medical condition.' (See Gov. Code, § 12940(a).) Or it may be a general term such as 'condition,' 'disease,' or 'disorder.' Or it may be a specific health condition such as 'diabetes.' "

15. CACI No. 2560. Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements

a. We agree with the proposed revisions to the instruction.

b. We would revise the second sentence in the second paragraph of the Directions for Use as follows to avoid suggesting that the instruction "alleges" anything:

"Give the second option for element 6 ~~in order to allege the employer's desire~~ if the plaintiff claims the employer terminated or refused to hire the plaintiff to avoid a need for accommodation."

16. CACI No. 2561. Religious Creed Discrimination—Reasonable Accommodation—Affirmative Defense—Undue Hardship

Agree.

17. CACI No. 2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked

Agree.

18. CACI No. 2740. Violation of Equal Pay Act—Essential Factual Elements

We would strike the final sentence in the Directions for Use, "No California case has expressly so held, however," because we believe it is not clear that the cited cases did not hold on point.

19. CACI No. 3023. Unreasonable Search or Seizure—Search or Seizure Without a Warrant—Essential Factual Elements

We agree with the proposed revisions.

Although it is not within the scope of the invitation to comment, we believe the language "because [he/she] did not have a warrant" in the first paragraph of the instruction unduly emphasizes element 2 over the other four elements and may confuse jurors by suggesting that plaintiff claims the reason for the search was the lack of a warrant. We would strike this language.

20. CACI No. 3709. Ostensible Agent

Contrary to the proposed new language in the Directions for Use, we believe the situation where a physician is not an employee or agent of the hospital does not require a different instruction. We construe the language from *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038, quoted in the Sources and Authority to mean the first element is readily inferred in the hospital setting and the dispute typically turns on whether the plaintiff had reason to know that the

physician was not an agent or employee of the hospital; in other words, whether the plaintiff reasonably believed that the physician was the hospital's employee or agent and reasonably relied on his or her belief to that effect. An instruction should include all elements even if an element is uncontested because "[o]mitting uncontested elements may leave the jury with an incomplete understanding of the cause of action and the plaintiff's full burden of proof." (CACI User Guide, p. 2.) As stated in the User Guide, rather than eliminate any uncontested elements, an instruction should indicate when the parties have agreed that an element is established.

Accordingly, we would either delete the proposed new language in the Directions for Use or modify that language to explain that if the parties agree that the first element is established, the instruction should so state.

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

Agree.

22. CACI No. 3903K. Loss or Destruction of Personal Property (Economic Damage)

Agree.

23. CACI No. 3903Q. Survival Damages (Economic Damages)

Agree.

24. CACI No. 4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

Agree.

25. CACI No. 4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

Agree.

26. VF-4300. Termination Due to Failure to Pay Rent

We would insert the word "judicial" before "holidays" in the final sentence in the Directions for Use to make it clear that only judicial holidays are excluded.

27. VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability

We would insert the word "judicial" before "holidays" in the fifth paragraph in the Directions for Use to make it clear that only judicial holidays are excluded.

28. VF-4302. Termination Due to Violation of Terms of Lease/Agreement

We would insert the word "judicial" before "holidays" in the final sentence in the Directions for Use to make it clear that only judicial holidays are excluded.

29. CACI No. 4575. Right to Repair Act—Affirmative Defense—Failure to Properly Maintain Home

Agree.

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

Hager v. County of Los Angeles (2014) 228 Cal.App.4th 1538, 1549-1552, considered and rejected the proposition based on *Mize-Kurzman v. Marin Community College Dist*. (2012) 202 Cal.App.4th 832, 858, that a report is not protected if the information was previously reported. We believe the Directions for Use should state this more clearly:

"It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, disagreed and held that protection is not ~~necessarily~~ limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)"

31. CACI No. 4900. Adverse Possession

a. We question the need for this proposed new instruction. An action to establish title by adverse possession is a quiet title action, which is an action in equity. There is no right to jury trial of a quiet title action if only title is at issue. (*Thompson v. Thompson* (1936) 7 Cal.2d 671, 681; *Aguayo v. Amaro* (2013) 213 Cal.App.4th 1102, 1109-1110; *Estate of Phelps* (1990) 223 Cal.App.3d 332, 340.) If the right to possession is at issue, whether the action is equitable and triable by the court or legal and triable by a jury depends on the circumstances. (*Thompson*, at p. 681.)

If the plaintiff is out of possession and seeks to both quiet title and recover possession, the action is legal and there is a right to jury trial. (*Thompson*, 7 Cal.2d at p. 681; *Medeiros v. Medeiros* (1960) 177 Cal.App.2d 69, 72-73.) If the plaintiff is in possession and the defendant claims a recent ouster and seeks to recover possession, the action is legal and there is a right to jury trial. (*Thompson*, at p. 681.) If the plaintiff is in possession and the defendant claims an ouster and seeks to recover possession, but the ouster was not recent, the quiet title claim is tried by the court while the defendant's claim for possession is tried by a jury. (*Thompson*, at pp. 681-682.)

Thus, adverse possession is triable by jury only if possession is also at issue, and even then only in some circumstances. Any standard instruction should include the issues relevant to possession, and the Directions for Use should explain when the instructions should be given and

the appropriate modifications. We believe such a complicated instruction is not well suited for a standard instruction. So we disagree with this proposed new instruction.

b. The Directions for Use presumes there is a right to jury trial on the existence of adverse possession but the controlling authority is to the contrary in many circumstances, as discussed above.

32. CACI No. 4901. Prescriptive Easement

a. We agree with this proposed new instruction, but we would include "was using" as an alternative to "has been using" in element 1. Stating that plaintiff "was using" the property for a period of five years seems more consistent with the past tense used in the introductory paragraph ("all of the following were true") and in the other elements ("was," "was," and "did not have"). On the other hand, if it is desirable to emphasize that plaintiff's use is ongoing at the time of trial, "has been using" can be selected.

b. The Directions for Use state that a claimant for a prescriptive easement is entitled to a jury trial if there are disputed factual issues and the claimant seeks damages or other legal relief. But there is a right to jury trial on the existence of a prescriptive easement even if the plaintiff only seeks an injunction. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124.)

" ' "If, however, [as here, the] right to an easement is involved in substantial dispute, no injunction will be granted until the claim has been established at law." ' [Citations.] This differentiation rests upon the rule that ' "under the English common law as it stood in 1850, at the time it was adopted as the rule of decision in this state, 'if a plaintiff applies for an injunction to restrain the violation of a common-law right, if either the existence of the right or the fact of its violation be disputed, he must establish that right at law;" or, in other words by a jury, if one be demanded." ' [Citations.] [¶] The proper remedy available to appellants '[a]t common law . . . was an action on the case.' [Citations.] 'The right of trial by jury existed with respect to [this] common law remedy . . . and, consequently, such right exists in a civil action under modern practice which formerly would have fallen within that common law form of action.' " (*Arciero*, 17 Cal.App.4th at p. 124.)

Accordingly, we would modify the second sentence in the Directions for Use:

A claimant for a prescriptive easement is entitled to a jury trial if ~~there are disputed issues of fact and legal relief (e.g., damages) is sought~~ <u>the existence of a prescriptive easement is disputed, even if the only remedy sought is an injunction</u>. (*Arciero Ranches v. Meza* (1993) 17 Cal.App.4th 114, 124.)

33. CACI No. 4902. Secondary Easement.

a. We would change the title to "Interference with Secondary Easement" to make the title more descriptive, consistent with other CACI titles.

b. We believe the language "land on which the easement lies" is potentially confusing because it suggests physical use of the surface of the property, but an easement may involve some other use. We also find the language "a duty not to do anything unreasonable that interferes with the rights . . ." imprecise because "unreasonable" should modify "interference" rather than "anything." The conduct itself may be reasonable, but the interference unreasonable. We would modify the second sentence for greater clarity:

"~~A person with an easement~~ An easement owner and the owner of land ~~on which the easement lies~~ subject to an easement each have a duty not to ~~do anything unreasonable that interferes~~ unreasonably interfere with the rights of the other to use and enjoy their respective rights."

c. We would strike "In this case," in the second paragraph of the instruction as superfluous and unnecessary.

34. CACI No. 4910. Violation of Homeowner Bill of Rights—Essential Factual Elements

a. We agree with this proposed new instruction.

b. We would modify the Directions for Use to state that if the plaintiff seeks a penalty the instruction should be modified to require an intentional or reckless violation or willful misconduct.

35. CACI No. 5001. Insurance

We would revise this instruction and Directions for Use consistent with our proposed revisions of CACI No. 105, *Insurance*, above.

36. User Guide

Agree.

Sincerely,

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