LITIGATION

CALIFORNIA LAWYERS ASSOCIATION

March 4, 2022

Via E-mail: civiljuryinstructions@jud.ca.gov.

Mr. Eric Long
Advisory Committee on Civil Jury Instructions
Judicial Council of California
455 Golden Gate Avenue
San Francisco, CA 94102

re: Invitation to Comment—CACI 22-01

Dear Mr. Long:

The Jury Instructions Committee of the California Lawyers Association's Litigation Section has reviewed the proposed revisions to civil jury instructions (CACI 22-01) and appreciates the opportunity to submit these comments.

1. VF-410. Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts

Agree.

2. CACI No. 1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

a. We agree with the proposed revisions to the instruction but believe that another element is needed. *Sandoval v. Qualcomm Inc.* (2021) 12 Cal.4th 256, 274, indicates that for the hirer to be liable for negligence to an employee of an independent contractor based on the hirer's retained control, the employee must have been working on a task within the independent contractor's scope of work. This is because " 'retained control' refers specifically to a hirer's

authority over work entrusted to the contractor." (*Ibid*.) We propose the following as new element 2:

"2. That [*specify nature of work*] was part of the work that [*name of defendant*] entrusted to [*name of contractor*];"

b. We would add to the Sources and Authority language from *Sandoval* supporting new element 2:

" 'A hirer "retains control" where it retains a sufficient degree of authority over the manner of performance of the work entrusted to the contractor. . . . So "retained control" refers specifically to a hirer's authority over work entrusted to the contractor, i.e., work the contractor has agreed to perform.' (*Sandoval*, *supra*, 12 Cal.5th at p. 274.)"

3. CACI No. 1306. Sexual Battery—Essential Factual Elements

a. Proposed new (d) and (e) refer to "a sexual organ" and "[a/an] sexual organ/anus/. . . ." We believe the jury would better understand the instruction if the person to whom the sexual organ belongs were identified. We believe that person is either the defendant or someone else (not the plaintiff).

b. Civil Code section 1708.5, subdivision (d)(1) defines "intimate part" to include "the breast of a female." We believe proposed new (d) and (e) are overbroad because they refer to a "breast" with no limitation. This could be remedied by inserting the words "of a female" after "breast" in (d) and (e), although that seems grammatically awkward. Alternatively, (d) and (e) could be rewritten to incude the limitation, or language could be added to the Directions for Use stating that the instruction should be modified if there is a factual question whether the breast of a female is at issue.

c. We believe "has been removed" in (d) should be "had been removed" and "removed" in (e) should be "had removed."

d. Accordingly, we suggest the following revisions to (d) and (e):

"(d) That [*name of defendant*] caused contact between ~~a~~ [*name of defendant*/*name of other person*]'s sexual organ, from which a condom ~~has~~ had been removed, and [*name of plaintiff*]'s [sexual organ/anus/groin/buttocks/[or] breast];]

"[OR]

"(e) That [*name of defendant*] caused contact between ~~[a/an]~~ [*name of defendant*/*name of other person*]'s [sexual organ/anus/groin/buttocks/[or] breast] and [*name of plaintiff*]'s sexual organ from which [*name of defendant*] had removed a condom;]"

4. CACI No. 1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements

a. We agree with the proposed revisions to element 2 of the instruction.

b. We would revise element 3 to clarify the requirement of contemporaneous observation, particularly now that element 2 allows virtual presence:

"3. That [*name of plaintiff*] was ~~then~~ aware at the time the [*describe event*] occurred that the [*e.g., traffic accident*] was causing [injuryto/the death of] [*name of victim*];"

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

Agree.

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

a. We agree with the proposed revisions to the instruction, except that we would change "[or]" after the first alternative element 6 to "[and/or]" and provide an option to renumber the second alternative element 6 as element 7 because we believe both versions of element 6 should be given when the plaintiff claims both an excess judgment and other damages.

b. Although it is beyond the scope of the invitation to comment, we would revise element 5 for greater clarity and because we believe the reference to some conduct other than failure to accept the settlement demand is confusing and unnecessary:

"5. That [*name of defendant*]'s failure to accept the settlement demand was ~~the result of~~ unreasonable ~~conduct by [*name of defendant*]~~; [and]"

c. Although it is beyond the scope of the invitation to comment, we believe the first sentence in the second paragraph after the elements refers to a settlement demand that is reasonable in amount and should explicitly so state. The second sentence then makes it clear that a settlement demand that is reasonable in amount my be unreasonable for another reason:

"A settlement demand for an amount within policy limits is reasonable in amount if . . . ."

7. VF-2304. Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Demand Within Liability Policy Limits

Agree.

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

a. We believe the bracketed language "[*name of employer*]" may be confusing when the covered entity is a labor organization, employment agency, apprenticeship training program, or training program leading to employment. The prohibition against harassment applies not only to employers but also to these other entities. (Gov. Code, § 12940, subd. (j)(1).) Also, there may be both an individual and an entity defendant. To avoid confusion, we suggest that (1) references to "[*name of defendant*]" be replaced by "[*name of individual defendant*]" and (2) "[*name of employer*]" be replaced by either "[*name of entity defendant*] or (2) "[*name of covered entity*]" throughout the instruction.

b. Alternatively, language could be added to the Directions for Use to modify the instruction if the covered entity is a labor organization, employment agency, apprenticeship training program, or training program, as in the Directions for Use for CACI No. 2521A.

c. We believe the language added to the Directions for Use regarding use of the verdict form belong in the verdict form's Directions for Use. If this language is included here as well, we would revise the language for greater specificity to "include optional question 2 on the verdict form" rather than "include an additional question on the verdict form."

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

Same comments as CACI No. 2522A.

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

Same comments as CACI No. 2522A.

11. CACI No. 2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process

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

b. We would revise the paragraph in the Directions for Use discussing the split of authority as follows for greater clarity:

"Bracketed element 7 reflects that there is a split of authority as to whether the employee must also prove that a reasonable accommodation was available. (Compare *Shirvanyan v. Los Angeles Community College Dist*. (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] ["the availability of a reasonable accommodation is an essential element of an interactive process claim"] and *Nadaf-Rahrov v. The Neiman Marcus Group, Inc*. (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under

the statute] with *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] [if the employer's failure to participate in good faith causes a breakdown in the interactive process, liability follows]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict]~~; *Shirvanyan v. Los Angeles Community College Dist.* (2020) 59 Cal.App.5th 82, 87 [273 Cal.Rptr.3d 312] [adopting the Scotch court's reasoning]~~.) See also verdict form . . . ."

12. VF-2507A. Work Environment Harassment—Conduct Directed at Plaintiff—Individual Defendant

a. We agree with the proposed revision to the verdict form.

b. We believe language should be added to the Directions for Use for this verdict form on when to include optional question 2. We would insert the following language as a new fourth paragraph:

"Include optional question 2 if optional element 2 is included in CACI No. 2522A."

13. VF-2507B. Work Environment Harassment—Conduct Directed at Others—Individual Defendant

Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522B.

14. VF-2507C. Work Environment Harassment—Sexual Favoritism—Individual Defendant

Same comments as VF-2507A, but refer to optional element 2 in CACI No. 2522C.

15. VF-2513. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process

We would revise the paragraph in the Directions for Use discussing the split of authority as stated above for CACI No. 2546 for greater clarity.

16. CACI No. 2754. Reporting Time Pay—Essential Factual Elements

Agree.

17. CACI No. 2760. Missed Rest Breaks—Essential Factual Elements

a. We would change the title to "~~Missed~~ Failure to Provide Rest Breaks—Essential Factual Elements" because we believe the essence of the claim is that the employer failed to provide rest breaks.

b. We would revise the second paragraph of the instruction to describe more clearly an employee's entitlement to rest breaks, including a second rest break if the workday lasts from 6 to 10 hours (not 7 to 8 hours) and that a rest break cannot be combined with a meal break or another rest break. We prefer "authorize and permit" rather than "provide" in this paragraph because it describes the employer's obligation more accurately and avoids the potential ambiguity created when an employee did not take an authorized rest break.

c. We believe the juror's comprehension of this instruction would be enhanced if the bracketed definition of "workday" followed immediately after the first and second paragraph in which the term is used, rather than after the elements.

d. We would elaborate on the required rest break before stating the elements, rather than provide some explanation before the elements (i.e., "The employer must relieve the employee . . .") and some after (i.e., "An employer 'provides' a rest break only if . . .").

e. We would revise element 1 to make the plaintiff the subject and eliminate the alternative language referring to 6 to 10 hours. A single instruction should encompass all the unprovided rest breaks, which may include a single rest break on some workdays and more than one on others. We believe this instruction should not attempt to specify the number of hours worked each day in question, but instead should state the minimum number of hours required for a rest break and allow the jury to decide whether the employer failed to authorize and permit any rest breaks based on the evidence as guided by counsel's argument.

f. We would revise elements 2 and 3 to explicitly refer to rest breaks "to which [*name of plaintiff*] was entitled" because those are the only compensable rest breaks, and we would substitute "authorize and permit" for "provide" in element 3.

g. We believe the amount of damages is not an essential element of the cause of action and suggest that a separate instruction should be drafted on damages.

h. We believe element 3 is an essential element and should be mandatory, not optional.

i. Accordingly, we would revise the instruction as follows:

"[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] wages because [*name of defendant*] did not provide [*name of plaintiff*] with one or more paid rest breaks ~~during one or more workdays~~.

"~~An employer must provide paid 10-minute rest breaks and must schedule them, if practicable, in the middle of each work period.~~ An employer must ~~provide~~ authorize and permit rest breaks once every four hours (rounding up by the half hour) and must schedule them in the middle of each work period, if feasible. This means that over the course of a workday, an employer must provide a 10-minute rest break to an employee who works longer than 3.5 hours ~~[and] [must provide a second 10-minute rest break if the workday lasts 7 to 8 hours]~~. An

employer must authorize and permit a second paid 10-minute rest break to an employee who works more than 6 hours and up to 10 hours.

"['Workday' means any consecutive 24-hour period beginning at the same time each calendar day.]

~~The employer must relieve the employee of all job duties during a rest break but has no obligation to keep records of employee rest breaks or to ensure that an employee takes a rest break.~~

"An employer meets its obligation to authorize and permit a rest break only if the employer relieves the employee of all job duties during a rest break and relinquishes control over how the employee spends [his/her/*nonbinary pronoun*] time. An employer has no obligation to keep records of employee rest breaks or to ensure that an employee takes a rest break. Rest breaks must be uninterrupted and cannot be combined with a meal break or another rest break.

"To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of ~~defendant~~ plaintiff*] ~~employed~~ worked for [*name of ~~plaintiff~~ defendant*] for 3.5 hours or more on one or more workdays ~~lasting [longer than 3.5 hours/longer than 6 hours but no more than 10 hours]~~;

2. That [*name of plaintiff*] did not take one or more 10-minute rest breaks to which [*name of plaintiff*] was entitled; [and]

~~[~~3. That [*name of defendant*] did not provide [*name of plaintiff*] with one or more 10-minute rest breaks to which [*name of plaintiff*] was entitled.~~; and]~~

~~4. The amount of wages owed.~~

~~An employer "provides" a rest break only if the employee is relieved of all work duties and the employer relinquishes control over how the employee spends the employee's time. An employer who does not provide one or more rest breaks during a single workday must pay one additional hour of wages for the workday at the employee's regular rate of pay.~~

~~["Workday" means any consecutive 24-hour period beginning at the same time each calendar day.]~~

~~["Regular rate of pay" for [*name of plaintiff*] from [*insert beginning date*] to [*insert ending date*] was [*insert applicable formula*]. [*Repeat as necessary for date ranges with different regular rates of pay*.] Multiply the regular rate of pay by the number of workdays that [*name of plaintiff*] has proved one or more rest breaks were not provided.]~~

"[Rest breaks, which are paid, and meal breaks, which are unpaid, have different requirements. You should consider claims for missed rest breaks separately from claims for

missed meal breaks. For example, providing an unpaid meal break does not satisfy the employer's obligation to provide an employee with a paid 10-minute rest break.]"

i. We would add language to the Directions for Use noting the special on-call rules applicable to certain security officers under Labor Code section 226.7, subdivision (f):

"Different on-call rules apply to the security services industry. (See Lab. Code, § 226.7(f). This instruction should be modified in a case involving those employees."

j. Rather than state that element 1 should include shift length if uniform, we believe the Directions for Use should state that element 1 can include shift length if uniform because opinions may differ on whether it is better to include shift length in element 1. We would modify the second paragraph in the Directions for Use as follows:

"~~The instruction should~~ Element 1 can be modified to include the shift length if there is uniformity in that allegation, and can specify which breaks the plaintiff claims to have missed~~, if possible~~. Depending on the length of the shift, multiple rest breaks could be at issue. ~~In element 1, select the appropriate length of shift or modify the element to encompass longer shifts that require third, fourth, or fifth rest breaks.~~"

k. We would delete the fourth and fifth paragraphs in the Directions for Use referring to regular rate of pay consistent with our suggestion to delete damages from the instruction.

l. We believe the fifth bullet in the Sources and Authority would be more helpful and understandable if some of the language were deleted:

"~~Though under the basic calculation the right to 10 minutes' rest would accrue for any shift lasting more than two hours, the third sentence of Wage Order No. 5's rest period subdivision modifies this entitlement slightly. Under the third sentence, "a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours." Thus, employees working shifts lasting over two hours but under three and one-half hours, who otherwise would have been entitled to 10 minutes' rest, need not be permitted a rest period. The combined effect of the two pertinent sentences, giving full effect to each, is this:~~ Employees are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to 10 hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029 [139 Cal.Rptr.3d 315, 273 P.3d 513].)"

m. We would add language to the Sources and Authority at the end of the seventh bullet discussing *Augustus*: "The Legislature has abrogated *Augustus* for the security services industry only. (See Lab. Code, § 226.7(f)(5).)"

18. CACI No. 2765. Nonpayment of Wages Under Rounding System—Essential Factual Elements

a. We believe the cases require an evaluation of the effect of rounding on the employees as a whole rather than on an individual employee. A rounding policy must be "used in a manner that it will not result, over a period of time, in failure to compensate the *employees* properly for all the time worked." (*See's Candy Shops, Inc. v. Superior Court* (2012) 210 Cal.App.4th 889, 907, emphasis added.) "Federal district courts interpreting the provision have almost universally concluded that a rounding system is valid if it 'average[s] out sufficiently,' rejecting claims that minor discrepancies in individual employee's wage calculations establish that the employee is entitled to assert a claim for underpayment of wages." (*AHMC Healthcare, Inc. v. Superior Court* (2018) 24 Cal.App.5th 1014, 1021.) "[T]he regulation does not require that every employee gain or break even over every pay period or set of pay periods analyzed." (*Id.* at p. 1027.) " '[R]ounding contemplates the possibility that in any given time period some employees will have net overcompensation and some will have net undercompensation' " (*AHMC*, at p. 1027.) A rounding system is invalid if it " 'systematically undercompensate[s] employees.' " (*Id*. at p. 1021.) We would clarify this requirement by adding a new second paragraph:

"A rounding policy is lawful if, on average and over time, the employees are paid for all the time they actually worked, even if some individual employees are undercompensated while others are overcompensated. A rounding policy is unlawful if it consistently results in failure to pay the employees for time actually worked."

b. We would revise element 1 accordingly and for greater clarity:

"1. That~~, over time,~~ [*name of defendant*]'s method of rounding ~~led to a reduction in [*name of plaintiff*]'s wages~~ consistently resulted in failure to pay the employees for all the time they actually worked; and

19. CACI No. 2768. Missed Meal Breaks—Essential Factual Elements

a. We would change the title to "~~Missed~~ Failure to Provide Meal Breaks—Essential Factual Elements" because we believe the essence of the claim is that the employer failed to provide meal breaks.

b. We suggest that a separate instruction should be drafted for the situation where the employer's time records show absent or noncompliant meal periods, giving rise to a rebuttable presumption of meal period violations. (*Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58, 75-76.) We believe the rebuttable presumption and what the employer must show to overcome it could be explained more clearly in a separate instruction. Accordingly, we would make element 3 mandatory, delete the second optional element 3, which addresses the rebuttable presumption, and delete the five items listed after the elements relating to the employer's required showing to overcome the rebuttable presumption.

c. We would delete element 4 on damages and draft a separate instruction on damages.

d. We would revise the instruction as follows for greater clarity and brevity and to avoid redundancy:

"[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/*nonbinary pronoun*] wages because [*name of defendant*] did not provide one or more meal breaks as required by law.

"An employer must provide an opportunity to take a 30-minute, uninterrupted, unpaid meal break for each period of work lasting longer than 5 hours. The employer must relieve the employee of all duties, relinquish control over the employee's activities, and allow the employee to leave the premises, and must not impede or discourage the employee from taking a 30-minute, uninterrupted meal break. However, the employer has no obligation to ensure that an employee takes a meal break or to ensure that an employee does not work during a meal break.

"To establish this claim, [*name of plaintiff*] must prove all of the following:

1. That [*name of ~~defendant~~ plaintiff*] ~~employed~~ worked for [*name of ~~plaintiff~~ defendant*] for one or more work periods lasting longer than 5 hours;

2. That [*name of plaintiff*] ~~did not take one or more meal breaks~~ was not provided the opportunity to take a meal break of at least 30 uninterrupted minutes, no later than the end of [*name of plaintiff's*] fifth hour of work for each work period.

~~[3. That [*name of defendant*] failed to provide [*name of plaintiff*] with one or more meal breaks as required by law; and]~~

~~[3. That [*name of defendant*] does not have [accurate] records showing that plaintiff took each meal break; and]~~

~~4. The amount of wages owed~~.

~~"[An employer fails to "provide" a meal break as required by law if it does not relieve the employee of all duty, does not relinquish control over the employee's activities, does not allow the employee to leave the premises, does not permit the employee a reasonable opportunity to take an uninterrupted 30-minute break, or impedes or discourages the employee from doing so. The employer does not have an obligation to ensure that an employee takes a meal break or to ensure that an employee does no work during a meal break.]~~

~~"[If [*name of plaintiff*] has proved these four facts, then your decision on this claim must be for [*name of plaintiff*] unless [*name of defendant*] proves all of the following:~~

~~1. That [*name of defendant*] provided [*name of plaintiff*] a reasonable opportunity to take uninterrupted meal breaks;~~

~~2. That [*name of defendant*] did not impede [*name of plaintiff*] from taking meal breaks;~~

~~3. That [*name of defendant*] did not discourage [*name of plaintiff*] from taking meal breaks;~~

~~4. That [*name of defendant*] relieved [*name of plaintiff*] of all duties during meal breaks; and~~

~~5. That [*name of defendant*] relinquished control over [*name of plaintiff*]'s activities during meal breaks[, including allowing [him/her/*nonbinary pronoun*] to leave the premises].~~"

e. We would add at the end of the second paragraph in the Directions for Use, "Different meal and rest period rules also apply to the security services industry. (See Lab. Code, § 226.7(f). This instruction should be modified in a case involving those employees."

20. CACI No. 2769. Affirmative Defense—Missed Meal Breaks—Waiver by Mutual Consent

a. We would change the title to "Affirmative Defense—~~Missed~~ Failure to Provide Meal Breaks—Waiver by Mutual Consent" because we believe the essence of the plaintiff's claim is that the employer failed to provide meal breaks

b. In both alternative sets of elements, element 1 refers to a "period" of hours, while element 2 refers to "the workday." We believe element 2 should refer more specifically and consistently to "that work period."

21. CACI No. 2770. Affirmative Defense—Missed Meal Breaks—Written Waiver of Off-duty Meal Breaks

a. We agree with this proposed new instruction, except that we would change "Missed Meal Breaks" in the title to "Failure to Provide Meal Breaks."

b. The California Supreme Court has granted review in *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, which is cited in the Sources and Authority. We suggest awaiting an opinion by the Supreme Court before publishing this instruction.

c. The citation to subdivision 11(C) of Cal. Code Regs., tit. 8, § 11040 in the Sources and Authority is mistaken. The correct citation is subdivision 11(A).

22. CACI No. 3714. Ostensible Agency—Physician-Hospital Relationship—Essential Factual Elements

Agree.

23. CACI No. 3905A. Physical Pain, Mental Suffering, and Emotional Distress

Agree.

24. CACI No. 3919. Survival Damages

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

b. We believe CACI Nos. 3905 and 3905A should be given whenever item 5 is given because No. 3905 lists the items of noneconomic damages and No. 3905A explains how to determine noneconomic damages, which this instruction does not explain. Accordingly, we would modify the second sentence of the final paragraph in the Directions for Use:

"For actions or proceedings filed on or after January 1, 2022 and before January 1, 2026 (or if granted a preference under Code of Civil Procedure section 36 before January 1, 2022) and depending on the case, ~~it may be preferable either to~~ include item 5 (an item of noneconomic damages) ~~or to~~ and give CACI No. 3905, Items of Noneconomic Damage, and a version of CACI No. 3905A . . . ."

25. CACI No. 4000. Conservatorship—Essential Factual Elements

Agree.

26. CACI No. 4002. "Gravely Disabled" Explained

a. We would change "unable voluntarily to accept meaningful treatment" in the final sentence of the instruction to "unable to voluntarily accept meaningful treatment" because we believe jurors would find this language more natural and comprehensible.

b. CACI No. 4000 uses the term "gravely disabled," and this instruction (No. 4002) defines that term. But this instruction repeatedly qualifies "gravely disabled" by stating "presently gravely disabled." We believe this creates confusion as to whether "gravely disabled," the term used in No. 4000, is the same as or different from "presently gravely disabled" and the significance of any difference. We believe this instruction should consistently use the same term, "gravely disabled," and should not state "presently gravely disabled." This instruction explains that the jury should not consider the likelihood of future deterioration or relapse, so there is no need to qualify "gravely disabled" with 'presently" to convey that point.

c. Although it is beyond the scope of the invitation to comment, but closely related to our comment above, we would strike the word "presently" from the language "is presently unable to provide for the person's basic needs" in the instruction. We believe "is" adequately conveys the present tense, the instruction explains that the jury should not consider the likelihood of future deterioration or relapse, and the word "presently" is unnecessary and potentially confusing.

Sincerely,

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