

LITIGATION



September 5, 2024

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 24-02

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 24-02) and appreciates the opportunity to submit these comments.

1. CACI No. 370. Common Count: Money Had and Received

Agree.

2. CACI No. 371. Common Count: Good and Services Received

Agree.

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

Agree.

4. CACI No. 374. Common Count: Mistaken Receipt

Agree.

5. VF-304. Breach of Implied Covenant of Good Faith and Fair Dealing

Agree.

6. CACI No. 1009A. Liability to Employees of Independent Contractors for Unsafe Concealed Conditions

a. We agree with adding a reference to a reasonable inspection but find element 3 as revised too cumbersome. We suggest breaking it up into two elements for greater clarity:

“3. That [*name of plaintiff’s employer*] did not know of the unsafe concealed condition;

“4. That if [*name of plaintiff’s employer*] had performed a reasonable inspection of the worksite, [*name of plaintiff’s employer*] would not have learned of the unsafe concealed condition.”

b. We agree with the revisions to the Directions for Use and Sources and Authority.

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

Agree.

8. CACI No. 1009D. Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment

Agree.

9. CACI No. 1126. Failure to Warn of a Dangerous Condition Resulting From an Approved Design—Essential Factual Elements

a. We agree with the proposed new instruction.

b. We suggest adding this recent case to the Sources and Authority:

“Caltrans produced evidence that its design plans specified the quantity and placement of deer crossing signs. Appellants did not dispute Caltrans warned motorists of this danger, only that it *did not do so adequately*. The trial court resolved the issue in Caltrans’ favor As discussed above, we conclude substantial evidence supports the finding.” (*Stufkosky v. Department of Transportation* (2023) 97 Cal.App.5th 492, 501.)

10. CACI No. 1246. Affirmative Defense—Design Defect—Government Contractor

a. We would revise the proposed new optional language in element 4 to state more clearly that the United States was aware of the dangers without stating that the United States did

not need to be warned. We believe “the United States did not need to be warned because” is more explanation than the jury needs, and stating that there was no need to warn may raise questions in the jury’s mind if there is no prior reference to warning because the first alternative language in element 4 is not given. We also believe “already” is unnecessary and not helpful. We propose:

“[That the United States ~~did not need to be warned because it was already~~ aware of the dangers in the use of the *[product]*].”

b. We agree with the revisions to the Directions for Use.

11. CACI No. 1247. Affirmative Defense—Failure to Warn—Government Contractor

a. Same comment as a above.

b. We would retain the reference to *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1171 in the Directions for Use, as in the Directions for Use for CACI No. 1246.

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

a. The essence of the common law claim is misappropriation of name or likeness. We believe the introductory paragraph in the instruction should describe the claim in terms of “misappropriation” of a specific aspect of the plaintiff’s identity rather than “violation” of the right of privacy or publicity. The jury need not understand the right of privacy/publicity framework to understand this claim and need not be burdened with those terms.

We would revise the introductory paragraph as follows:

“*[Name of plaintiff]* claims that *[name of defendant]* ~~violated~~ misappropriated *[his/her/nonbinary pronoun]* right to ~~privacy/publicity/privacy and publicity~~ *[name/voice/signature/ photograph/likeness/identity]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

b. Element 1 should specify the specific aspect of the plaintiff’s identity at issue for greater clarity, as in CACI Nos. 1804A and 1804B. We propose:

“1. That *[name of defendant]* used *[name of plaintiff]*’s ~~name, likeness, or identity~~ *[name/voice/signature/photograph/likeness/identity]*.”

c. Element 3 should specify the specific aspect of the plaintiff’s identity at issue for greater clarity, as in CACI Nos. 1804A and 1804B. We propose:

“3. That *[name of defendant]* gained a commercial benefit [or some other advantage] by using *[name of plaintiff]*’s ~~name, likeness, or identity~~ *[name/voice/signature/photograph/likeness/identity]*.”

d. The Directions for Use should begin by stating that this instruction is for use when the plaintiff alleges a common law claim, while CACI Nos. 1804A and 1804B are for use with statutory claims.

e. Consistent with the above, we would revise the current first paragraph in the Directions for Use to refer to misappropriation claims rather than right of privacy/publicity claims:

“If the plaintiff is asserting misappropriation of more than one aspect of the plaintiff’s identity ~~more than one privacy or a right of publicity~~, give an introductory instruction so stating ~~stating that a person’s right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing.~~”

f. We would add language to the Directions for Use stating to select the aspect of the plaintiff’s identity that is at issue where those terms appear in brackets.

13. CACI No. 1804A. Use of Name or Likeness

a. The essence of the statutory law claim is misappropriation of name or likeness. We believe the introductory paragraph in the instruction should describe the claim in terms of “misappropriation” of a specific aspect of the plaintiff’s identity rather than “violation” of the right of privacy or publicity. The jury need not understand the right of privacy/publicity framework to understand this claim and need not be burdened with those terms.

We would revise the introductory paragraph as follows:

“*[Name of plaintiff]* claims that *[name of defendant]* ~~violated~~ misappropriated *[his/her/nonbinary pronoun]* ~~right to [privacy/publicity/privacy and publicity]~~ *[name/voice/signature/ photograph/likeness]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

b. The Directions for Use should begin by stating that this instruction is for use when the plaintiff alleges a common law claim, while CACI No. 1803 is for use with statutory claims.

c. Consistent with the above, we would revise the current first paragraph in the Directions for Use to refer to misappropriation claims rather than right of privacy/publicity claims. We would also elaborate on the relationship between the common law and statutory claims:

“If the plaintiff is asserting misappropriation of more than one aspect of the plaintiff’s identity ~~more than one privacy or a right of publicity~~, give an introductory instruction so stating ~~stating that a person’s right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing.~~ One’s name, voice, signature, photograph, and likeness are protected under both the common law and under Civil Code section 3344. While the term “identity” is sometimes used to refer to the statutorily protected categories, a plaintiff’s “identity” is protected only under the common law and not under the statute.

As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.”

d. We would add language to the Directions for Use stating to select the aspect of the plaintiff’s identity that is at issue where those terms appear in brackets.

14. CACI No. 1804B. Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign

a. The essence of the statutory law claim is misappropriation of name or likeness. We believe the introductory paragraph in the instruction should describe the claim in terms of “misappropriation” of a specific aspect of the plaintiff’s identity rather than as “violation” of the right of privacy or publicity. The jury need not understand the right of privacy/publicity framework to understand this claim and need not be burdened with those terms.

We would revise the introductory paragraph as follows:

“[Name of plaintiff] claims that [name of defendant] violated misappropriated [his/her/nonbinary pronoun] right to [privacy/publicity/privacy and publicity] [name/voice/signature/ photograph/likeness]. To establish this claim, [name of plaintiff] must prove all of the following:

b. Consistent with the above, we would revise the third paragraph in the Directions for Use to refer to misappropriation claims rather than right of privacy/publicity claims. We would also elaborate on the relationship between the common law and statutory claims:

“If the plaintiff is asserting misappropriation of more than one aspect of the plaintiff’s identity more than one privacy or a right of publicity, give an introductory instruction so stating stating that a person’s right to privacy or right of publicity can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One’s name, voice, signature, photograph, and likeness are protected under both the common law and under Civil Code section 3344. While the term “identity” is sometimes used to refer to the statutorily protected categories, a plaintiff’s “identity” is protected only under the common law and not under the statute. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.”

c. We would add language to the Directions for Use stating to select the aspect of the plaintiff’s identity that is at issue where those terms appear in brackets.

15. CACI No. 1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

a. Consistent with our comments above, we would revise the introductory paragraph to refer to “misappropriation” rather than “violation” of right of privacy/publicity:

“[Name of defendant] claims that [he/she/nonbinary pronoun] has not ~~violated~~ ~~misappropriated~~ [name of plaintiff]’s right of [~~privacy/publicity/~~ privacy and publicity] [~~name/voice/signature/~~ photograph/likeness/identity] because the [insert type of work, e.g., “picture”] is protected by the First Amendment’s guarantee of freedom of speech and expression. To succeed, [name of defendant] must prove either of the following:”

b. *Comedy III, Winter*, and other opinions use various language to describe the principal inquiry. We would revise element 1 to reflect the language we believe would be most understandable to a jury. We would delete “celebrity” because “other person” includes any celebrity.

“1. That the [~~insert type of work, e.g., ‘picture’~~] ~~adds significant creative elements to~~ [name of plaintiff/~~celebrity/other person~~]’s [name/voice/signature/photograph/likeness], ~~giving it a new expression, meaning, or message contained in~~ [name of defendant]’s [~~insert type of work~~] is so transformed that [name of defendant]’s [~~insert type of work, e.g., ‘picture’~~] is primarily [~~name of defendant~~]’s own creative expression, meaning or message rather than a literal depiction of [name of plaintiff/other person]’s [name/voice/signature/ photograph/likeness];”

c. We would delete the language “which may involve privacy rights or the right of publicity” and the sentence that follows in the first paragraph of the Directions for Use.

d. We would add language to the Directions for Use stating to select the aspect of the plaintiff’s identity that is at issue where those terms appear in brackets.

16. CACI No. 3708. Peculiar-Risk Doctrine

Agree.

17. CACI No. 3713. Nondelegable Duty

Agree.

18. CACI No. 4328. Affirmative Defense—Tenant Was Victim of Abuse or Violence

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

b. The affirmative defense established by Code of Civil Procedure section 1161.3, subdivision (b)(2) applies only if “the landlord has received documentation evidencing abuse or violence . . .” (*Ibid.*) VF-4328 appropriately includes a question on whether the plaintiff received documentation, but this instruction does not include the plaintiff’s receipt of documentation as an element of the affirmative defense. We believe the instruction should be revised to include the plaintiff’s receipt of documentation as an element of the affirmative defense.

c. We would delete the first sentence in the fifth paragraph of the Directions for Use without a case stating that the question is unsettled. We agree with the rest of the paragraph stating that the statute provides that the court shall determine certain matters.

19. VF-4328. Affirmative Defense—Victim of Abuse or Violence

a. We believe the verdict form could be simplified by reordering the questions. Questions 1 and 4 concern the affirmative defense under Code of Civil Procedure section 1161.3, subdivision (b)(1), while the other questions concern the exception under section 1161.3, subdivision (b)(2) and section 1174.27. We would renumber question 4 as question 2 and allow the jury to stop if the answer to either question 1 or 2 is no.

There are two alternative grounds to establish the exception. The questions for each ground should be made optional with directions in the Directions for Use to include the questions only if the ground is at issue. Current question 2 (which we would renumber as question 3) and current question 3 (which we would renumber as question 4) should both be made optional.

We agree that current questions 5 through 7 should be optional.

b. We would revise the directions after question 7 to state what to do if the answer is yes for greater clarity, consistent with the directions after prior questions:

~~“Answer question 8 unless your answer to~~ If your answer to question 2 above is ~~no~~ yes, then answer question 8. If you answered no to question 2 above, stop here, answer no further questions, and have the presiding juror sign and date this form.”

c. The fourth paragraph in the Directions for Use states when to omit optional questions 5 through 7. We believe it would be more helpful and easier to understand if this were stated in terms of when to include the optional questions: when a partial eviction based on Code of Civil Procedure section 1161.3, subdivision (b)(2)(B) is at issue.

20. CACI No. 4401. Misappropriation of Trade Secrets—Essential Factual Elements

Agree.

21. CACI No. 4409. Remedies for Misappropriation of Trade Secret

Agree.

22. CACI No. 4410. Unjust Enrichment

Agree.

23. VF-4400. Misappropriation of Trade Secrets

Agree.

Sincerely,

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