

California Civil Jury Instructions

Edited by Lisa Miller



Lisa Miller

The new California civil jury instructions have provoked comments from Bench and Bar alike. Rather than provide you with the view of a single attorney, which is the path we normally follow, here are excerpts from a round table discussion that occurred at the offices of Ivanjack & Lambirth on September 30, 2003. The event was sponsored by Timothy A. Lambirth in Los Angeles, and organized by Lisa Miller, principal of Valley Village's Miller Consulting. She has edited the material for us. The participants in the discussion, all of whom practice in Los Angeles, were Patricio T.D. Barrera of Macin Barrera &

O'Connor, and Brian J. Panish of Greene Broillet Panish & Wheeler, who generally represent plaintiffs; Robert M. Dawson of Fulbright & Jaworski and Timothy A. Lambirth of Ivanjack & Lambirth, who generally represent defendants; and retired Justice John Zebrowski, Second Division, Second District, and former business litigator Nancy J. Warren, who now mediate cases otherwise destined for Superior Court. The participants have divergent views of the rules and we welcome comments from our readers.

Justice Zebrowski: [CACI] is the next generation of the effort to provide some form

jury instructions. Before BAJI, judges would come up with [their own] instruction[s] at the end of each trial, exchange forms and keep files of what instructions they were going to give. But [litigators] would get a wide variance in instructions. It used to be much more common for verdicts to be reversed on grounds of instructional error, so BAJI instructions were created to avoid misstatements on the law that lead to reversals on appeal.

The BAJI instructions [are] criticized a lot because of their wording and syntax. The reason [for these characteristics] is because the BAJI instructions were not directed toward ease of understanding. They were directed toward making a statement of the law that would not be found in error by the courts of appeal.

I used to be the consultant for the BAJI committee, so I am familiar with the way [it] worked. Given the focus on trying to avoid reversal on appeal due to instructional error, many times, the BAJI committee look[ed] at language in appellate case[s] and used that language verbatim, or paraphrased it, to get an accurate statement of the law. Appellate cases weren't written to explain the law to lay people. When you take that language and put it into a jury instruction, it's not always intelligible to jurors.

Ms. Warren: [The CACIs] use language that people understand, so they don't have to run to a dictionary and back to the judge and ask what the individual words mean.

Mr. Lambirth: It looks like they're optional, that these aren't required to be used by the trial bench.

Mr. Panish: They have been recommended for use by Chief Justice Ronald George. September 1 they came into effect. Judges are in programs introducing these new instructions and they're starting to be used.

Justice Zebrowski: Theoretically, the BAJI was [only] recommended, but it came

into universal use.

Mr. Panish: But arguments still took place as to what instructions should be given, and I'm sure that will continue. But proffering special instructions will be disfavored, now that there is a more comprehensive set of instructions covering almost all of the possible causes of actions that juries have to decide.

Mr. Barrera: I'm excited about the CACIs. They're an improvement, although in some ways, [the CACIs] make it tougher for plaintiffs.

Mr. Panish: CACI is definitely a step forward. They have a more comprehensive set [of instructions] to be used with a lot of recipes or formulae for all the elements of each cause of action. Before, even right before the final argument began, the lawyers would be hashing out with the judge which BAJI 2.60 instruction should be given, and it could change from the night before the final argument until the time the final argument was to begin. [The CACIs] are a big advantage. Many of the special verdicts and burden of proof instructions are [set] out specifically in each area.

Mr. Dawson: A good trial lawyer builds the entire trial around the jury instructions, and [the CACIs] are presented in a very different way. They visualize a lot more, which is what lawyers do to communicate.

Mr. Lambirth: It's always a good idea to pull the operative jury instructions, build your analysis and look for the evidence to support or defeat the elements. It looks like some of the elements have been dropped, particularly with regard to some of the breach of contract and fraud claims.

Mr. Barrera: You don't necessarily change the elements, just the description or wording. [Judges] have to be tired of reading these old instructions. You know the jury is asleep, they're not listening. Now you can

pitch it to the jury as something new, that [will] help the[m], and maybe they'll get excited.

Ms. Warren: The CACIs give the jury a little more credit [than BAJI] for understanding some legal terms. With respect to punitive damage, the CACIs actually use the words "punitive damage." The BAJIs tried to describe it.

Mr. Dawson: But when you simplify things, you change them and sometimes leave things out. It's going to take a few years of road-testing with the courts of appeal to find out where the pot holes are.

Mr. Lambirth: The CACIs have greased the wheels of justice, and it's going to make things easier for juries to come up with decisions. But I don't know if that's necessarily a good thing. Some of the BAJI [language] made jurors be a little more contemplative about what exactly it meant. I'm concerned now they might just steamroll right through to a verdict. With regard to breach of contract, business litigators in trial would talk about a material breach, and everybody would ask, "What is a material breach? What does the word 'material' mean?" With regard to fraud, we talked about a "material fact." The word "material" is not found anywhere in CACI with regard to breach of contract and fraud. It talks about "an important fact." But just because it's "important" may not mean it's "material," so that might be an area ripe for appeal.

Mr. Panish: The committee had lawyers and judges [and] a linguist, as well as non-lawyers. They spent a lot of time making sure they were making middle-of-the road, proper statements of the law. I don't see where the [CACIs] have lessened the burden for the plaintiff, where [the plaintiff doesn't] have to prove something was defective or that a breach occurred. You're still going to have to prove your case.

Mr. Lambirth: I disagree. The CACIs lean a little bit in favor of the plaintiffs. When jurors understand what the law is and what the elements are, and they're explained simply, it helps the plaintiffs with their burden of proof. BAJI made them stop and think. The plaintiff has the benefit of giving the initial opening statement and the final rebuttal. The momentum is with the plaintiff, and the CACIs aren't going to slow [that] down.

Ms. Warren: On the other hand, if you have a case where the jurors think it's fair to give the plaintiff an award, but the law really isn't in favor of the plaintiff, and you have this BAJI instruction that isn't as clear as it can be, that will give the jury permission to award for the plaintiff. But under the CACIs, where [jurors] have to go down the line and answer every question, they won't be able to award in favor of the plaintiff.

Mr. Dawson: Some of the changes favor the plaintiff in important ways. Defendants should take a careful look at the instruction on punitive damages against the principal for the act of an agent and the verdict form on fraud. In the punitive damages instruction, some of the language has been changed subtly in an effort to make it less ponderous and less ominous. But [this] makes it easier for a juror to find punitive damages. For example, the BAJI spoke in terms of a defendant "being guilty of." The CACI talks about "engaging in contact with." The BAJI talked about "conscious disregard," which raises the issue of conscience [for] some people. The CACIs only talk about a "knowing disregard." Where BAJI talked about "wilfully and deliberately failing" to do something, the CACI only talks about "deliberately." The language regarding "passion and prejudice" has been removed [in the CACI] from the punitive damage instruction. You have similar changes in the punitive damage instruction with regard to a principal for the act of an agent. The concept of "gratification" has been basi-

cally removed as a term, which is very important. The verdict form on fraud has been simplified in a way that makes it easier for the jury to find in favor of fraud.

Mr. Panish: I hope that's true.

Mr. Barrera: In some ways, the punitive damage instruction is actually tougher for plaintiffs with respect to the concept that the plaintiff has to prove that the acts were ratified or approved by a managing agent. Frankly, I don't like the wording of the managing agent instruction. I think the [CACIs] took some of the language out with respect to the holding of *College Hospital*, and now they've made it very tough for plaintiffs to get punitive damages. If I were a defense attorney, I would hold up that managing agent language and just read that to the jury, and I would bet you would have a pretty good shot at thwarting punitive damages. I think that's improper. They also took out the word "reprehensibility." I've argued punitive damages to a jury, and I jumped on reprehensibility because I think that is a word people can identify with. And the [CACIs] took that out and left "vile."

Mr. Dawson: You used to have to prove "for profit and gratification," that the principal had confirmed or accepted the behavior. Now all you have to do is prove that they approved it. What is "approval"? It means that they sort of quietly were happy that it happened. How is the jury going to interpret that word "approval"? It is a much softer term and a much lower bar.

Mr. Lambirth: On Managing Agent, BAJI 14.74, they dropped two sentences. One is "the mere ability to hire and fire employees is not in and of itself sufficient to establish a managing agent." That was nice to have. With regard to the special verdict for intentional misrepresentation, BAJI [listed] nine elements. That's nine chances where, if I could get a "No," it was all over. Now it's down to six [elements]. That seems like a benefit in favor of the plaintiffs' bar.

Ms. Warren: One of the things I'm hearing that delights me as a mediator is that plaintiffs think [the CACIs] make it harder for them, and some defendants think [the CACIs] make it harder for them. Those are the types of things I can use in mediation to get people to resolve their cases.

Justice Zebrowski: I mediate a lot of cases, and I quite often look at the jury instructions. I want to discuss with the attorneys what the jury is going to be instructed on so we can talk about what the chances are that it might go one way versus another. Recently, I was talking with some fairly senior and accomplished attorneys who told me that they have never heard a mediator ask what a jury will be instructed on regarding a particular point. I do it quite a lot.

Mr. Panish: We talk about it in our mediation brief. If there is some question about this, then your potential settlement value goes down. So when you are preparing your case, you had better know what the law is that you have to prove, and what evidence you are marshalling to prove that, when you proceed to trial or mediation.

Mr. Dawson: The law and the facts don't matter. It's the jury's perception of the facts and the law [that matters]. There is a revolution [in the] jury instructions because [the CACIs] change the visualization and interpretation of the instructions for the jury. And that has to change what all of us do in presenting ourselves.

Mr. Panish: The Judicial Council of California civil jury instructions, CACIs, are approved by the judicial council, and are the state official jury instructions pursuant to California Rule of Court 855(a). They are the instructions.

Justice Zebrowski: But those rules go on to say [that] the validity of the statements are to be decided by the court.

Mr. Panish: The Supreme Court and the Chief Justice have sent a clear message that

these are the ones that are supposed to be used, unless for some reason they are not applicable. For most cases these instructions will be used.

Justice Zebrowski: As a practical matter, they will be used, because BAJI will probably not be supported in the future. The BAJI instructions may eventually become obsolete and fade away.

Mr. Lambirth: I can see counsel bringing some type of motion prior to trial to get a resolution as to what jury instructions are going to be, so you know going into the trial whether you're dealing with the CACIs or the BAJIs.

Ms. Warren: We have one judge on record, Judge Munoz, saying that he'll use the BAJI instructions, if there is any doubt, because they're tried and true.

Mr. Dawson: Arguing with the instructions is going to come mostly from the defense side. But the [CACIs] are the future and we had better embrace them.

Mr. Barrera: [We're] always taught to make the judge's job easier in brief writing, presentation of exhibits and evidence. Your job is also to make the jury's job easier, and these instructions accomplish that. They're simple, they're in plain English and they're favorable to the jury.

Mr. Lambirth: In the old days, you would blow up a BAJI, and it did not make any more sense in writing eight feet tall as it did reading it on a small piece of paper. With these plain-English jury instructions, I can see counsel on both sides making more reference, making more argument and forming their final argument in keeping with the jury instructions.

Mr. Barrera: I served on jury duty recently. The idea is to improve that experience. The jurors have sat through the trial, they've heard the argument, they've listened to the evidence, they want to get in and reach a verdict. They want to feel they are accom-

plishing something, that they are there to help people resolve a dispute. With some of the old instructions, the jurors would get hung up on some of the language, but now, the [CACIs] address that, and jurors won't get tied up on the language.

Justice Zebrowski: It's very valuable to the process to have an atmosphere in which the jurors think very carefully about what they're doing, rather than treating it as something that is very simple and doing it very quickly. These instructions are going to create a little disconnect [with] the existing body of law because these instructions use terms that have been used for a long, long time in the law differently than they have been used in the past. They use the term "burden of proof" in here differently than it is used in the case law. They don't say "material" in the contract instruction, they say "significant." Sometimes they don't say anything about whether it is "material" or "significant." They just talk about a "breach."

Mr. Lambirth: The appellate cases in the future are going to result in a few more speed bumps being thrown into the CACIs just to slow things down and augment them with some language to make them comport with the BAJIs.

Ms. Warren: Jurors can spend more time deciding about credibility of witnesses and determining what the facts are, and then applying the law to the facts will come a little easier.

Mr. Panish: Jurors deliberate based on the evidence. What makes them take longer or go faster is the weight of the evidence. If it's an overwhelming case, they may go faster. If the evidence is really close and one side or the other may not preponderate, then that is what they get hung up on.

Justice Zebrowski: It's important to remember that we are dealing with a complex subject and we're trying to simplify something that is not simple.