



I've got a CACI jones

Using jury instructions for more than just instructing juries



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BY MILES B. COOPER

The firm principal threw open the door from his office and stomped down the hall. “Who wrote this?” He clenched a draft mediation brief in his hands. A new associate started to duck into a doorway. The principal, sensing movement, called out. “You, get me CACI!”

“Casey?” the associate asked.

“CACI, dammit, CACI. Jury instructions. Somebody’s got to fix this mess.”

Jury instructions – a brief history

Twenty-two judges, plaintiffs’ lawyers, and defense lawyers comprise the Judicial Council of California’s jury instructions committee. As cases get decided and new statutes are enacted, the committee discusses, argues, crafts and recrafts the instructions on the law that are read to California juries. The committee updates the instructions twice a year. The CACI jury instructions were a response to concerns that the prior jury instructions were “impenetrable” to the average juror. CACI instructions, approved in 2003, are the “plain English” instructions. They replaced the earlier BAJI instructions as the official instructions for California.

What happened to BAJI? Thomson-Reuters, the copyright-holder, still publishes and updates them. But they are no longer the official instructions, nor does a standing court-supported committee oversee the content. CACI has a BAJI to CACI conversion table. This table is informative – there are some instructions that lack a CACI corollary.

CACI use is mandatory, right? Nope. Under California Rules of Court, rule 2.1050(a)&(e), their use is “strongly encouraged” and they are recommended for use unless a judge “finds different instructions would more accurately state the law and be understandable by jurors.”

That’s one reason to be aware of BAJI. The law didn’t simply disappear when an instruction failed to make the CACI cut. There are judges and lawyers who practiced for decades under BAJI. Beware the pre-Discovery Act opposing counsel – they still lurk in courthouse corners, and they’ll savage their opposition with battle-tested jury instruction expertise if left unchecked. One common method employed, “Well, judge, it seems to me BAJI’s got a better approach on this issue...”

Special instructions

Some lawyers love special instructions. These are instructions suggested by counsel to fill in perceived CACI gaps. Here

be dragons – special instructions are a leading cause of reversal on appeal. Four out of five appellate specialists agree – tread in special instruction territory only if one must. (The fifth specialist needs a new client.)

First and last resource

Law students learn legal research. Not once in my three years did anyone suggest referencing jury instructions, though. My boss (our firm principal in the example) took care of that oversight. He taught young lawyers to use jury instructions from a case’s very beginning. The instructions outline what we have to prove. They can be used to frame the investigation, the complaint, and discovery. Quote CACI in the legal analysis sections for demand letters, mediation briefs, and mandatory settlement conference statements.

Model language on current CACI instructions. We cut and paste cobblers dig up old complaints to source for new complaints. Look at the boilerplate language. Does it still reference proximate cause? Why? CACI instructions use legal cause. Does your tried and true closing argument burden of proof module talk about preponderance of the evidence? That’s nice, but the word preponderance does not appear in jury instructions anymore.

Trial – instructions are not just find and replace

Having trial prep help is great. Don’t hand over the jury instructions, though. Some people believe drafting jury instructions is simple – find and replace the party names and remove a couple brackets. It is far more nuanced. The brackets and use notes inform the preparation. New instructions appear without fanfare and can be used to one’s advantage. Anyone notice the demonstrative evidence or bias instructions when they quietly appeared? The rote mechanics of preparing them repeatedly drill the language into the trial lawyer’s lexicon. Master CACI, master the jury instruction conference, and master the trial.

As for tools for the job, Thomson West’s California Jury Instruction Selector software still appears to be the least annoying of the unsatisfying options out there. If you’ve got a better option, let us know.

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Back to our firm principal. He found the mediation brief’s young author. The principal, armed with CACI, flipped open to the appropriate instruction – the number memorized. “Your legal analysis is way too complicated,” he chided, “All they need is this.” The author nodded, went back to work, and made the



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change. The principal and young author later went to mediation. The mediator turned to the author and said, “That was a very well done brief – particularly the legal analysis. I’m assuming you wrote that.” The principal looked to the author with a knowing grin and said, “Yes, he did. He’s becoming quite the lawyer.”

Thanks, Mr. Veen, for the instruction on instructions.

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