Questioning CACI

Especially When Medical Expense Damages Are at Issue!

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Hope for the best, but plan for the worst. That's good general advice, and it applies in the context of litigation as well. In the litigation context it means that defense counsel should attempt to establish and preserve potential appellate issues that can be asserted in the event of an unfavorable trial outcome. One good way to preserve potentially meritorious appellate issues is, in appropriate cases, to question CACI.

The standard CACI jury instructions are written by committee, may reflect compromises, and may not always reflect current law.

The CACI instructions are approved by the Judicial Council as the state's "official [jury] instructions." (Cal. Rules of Court, rule 2.1050(a).) The Rules of Court "strongly encourage[s]" trial judges to use them. (Cal. Rules of Court, rule 2.1050(e).) As a result, trial courts almost always use the CACI instructions as written, and routinely reject requests to modify them. This circumstance presents a challenge and an opportunity to preserve potential appellate issues.

The CACI instructions are produced by the 22-member Judicial Council Advisory Committee on Civil Jury Instructions, which is composed of California judges, law professors, and practicing attorneys with divergent practices and views of the law. (Cal. Rules of Court, rule 10.58.) The committee also solicits comments from CACI users and views these standard instructions as "the work product of the legal community" as a whole. (Preface to CACI Updates (Nov. 2017).) Accordingly, the CACI instructions are often the product of compromise that may infect instructions with imperfections, which can be cured by seeking appropriate modifications.

Additionally, CACI instructions are not always completely up to date. As acknowledged in the preface to CACI, "[t]hese instructions, like the law, will be constantly changing. Change will come not only through appellate decisions and legislation but also through the observations and comments of the legal community." (Preface to CACI (Sept. 2003).) Accordingly, counsel should not hesitate to request modifications to the standard CACI instructions to ensure that the instructions given to the jury correctly state the law, and even anticipate imminent changes in the law, regarding the legal theories and defenses governing the litigation.

Litigants have the right to legally correct, nonargumentative jury instructions on every litigation theory supported by the evidence.

California law regarding a litigant's right to legally correct, nonargumentative jury instructions is clear. " 'A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him [or her] which is supported by substantial evidence.' " (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 475, quoting *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); accord, Code Civ. Proc., § 609.) Additionally, a party generally *must* request an "additional or qualifying instruction" in the trial court to preserve the right to challenge an instruction on appeal on grounds it is "too general, lacks clarity or is incomplete." (*Bell v. H.F. Cox, Inc.* (2012) 209 Cal.App.4th 62, 81 (*Bell*); see *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal. App.4th 655, 694 (*Bullock*) [" 'Each party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary.' "].)

"A court may refuse a proposed instruction if other instructions given adequately cover the legal point." (*Bullock*, *supra*, 159 Cal. App.4th at p. 685.) However, "[t]he trial court may not force the litigant to rely on abstract generalities, but must instruct in specific terms that relate the party's theory to the particular case." (*Soule*, *supra*, 8 Cal.4th at p. 572 [trial court erred by refusing defendant's proposed causation instruction that was tailored to its defense theory, and instead giving general causation instruction that was legally correct but not tailored to the case]; see *Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1277.)

continued on page 18

The trial court will " 'refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomprehensible to the average juror....' " (*Bell*, *supra*, 209 Cal.App.4th at p. 80; *Bullock*, *supra*, 159 Cal.App.4th at pp. 684-685.) And the "trial court has no duty to instruct on its own motion, nor is it obligated to modify proposed instructions to make them complete or correct." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 526.) Accordingly, to ensure that potential appellate issues are properly preserved, extreme care should be taken to ensure that proposed special or modified CACI instructions are complete, correct, and nonargumentative. (See Cal. Rules of Court, rules 2.1050(e), 2.1055(b) [governing form and format of proposed instructions], 2.1058.)

Defendants should request modified CACI instructions in cases where medical expense damages are in issue.

With these principles in mind, following this article are sample modified CACI instructions that defense counsel may consider proposing in cases involving medical expense damages claims. Such claims are being extensively litigated in the wake of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 (*Howell*) and its progeny. As a result, the CACI instructions need to be modified to reflect the new appellate decisions addressing these important issues. (See, e.g., *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __ [**2018 WL 2112307, *8 & fn. 4**] [Where CACI 3903A, which refers to medical " 'cost' instead of any type of 'value,' " was used *without objection* the trial court did not err by admitted plaintiff's evidence regarding billed amounts for medical services].)

First, CACI Nos. 105 and 5001 on the admissibility of evidence regarding insurance should be modified. As written, these instructions prohibit the jury from considering evidence of insurance for any reason. Yet, as explained in one of the authorities cited in the Sources and Authorities following these CACI instructions, "Evidence of insurance coverage may be admissible where it is

continued on page 19

SAMPLE MODIFIED CACI INSTRUCTIONS FOR MEDICAL EXPENSE DAMAGES LITIGATION
[additions to CACI indicated in bold text]

Modified CACI Nos. 105 and 5001
(Evidence of Insurance)

You must not consider whether any of the parties in this case has insurance **[for the purpose of determining liability issues]**. The presence or absence of insurance is totally irrelevant **[to liability issues]**. You must decide **[the liability issues in]** this case based only on the law and the evidence.

Supporting Argument: Evidence Code section 1155 (section 1155) states that "[e]vidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is *inadmissible to prove negligence or other wrongdoing*." (Emphasis added.) The modified instruction comports with the plain language of section 1155.

Evidence that a plaintiff has insurance that pays for needed medical services is generally inadmissible under the "collateral source rule." (*Helfend v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 1, 16-18; *Acosta v. Southern Cal. Rapid Transit Dist*. (1970) 2 Cal.3d 19, 25-26.) However, the collateral source rule should not apply to a plaintiff who elects not to use medical insurance and instead seeks medical treatment from lien providers (so they can claim inflated "billed" amounts as damages). The predicate for the application of the collateral source rule is "if an injured party *receives some compensation for his injuries*...." (*Helfend*, at p. 6, emphasis added.) By definition, if available insurance is *not used*, the injured plaintiff is not "receiv[ing] some compensation."

Moreover, even if health insurance were a collateral source benefit, such evidence may be admissible in the court's discretion if it is relevant to another issue, such as malingering or the failure to mitigate damages. (*Id*. at pp. 16-17; *Hrnjak v. Graymar, Inc*. (1971) 4 Cal.3d 725, 733 [plaintiff's receipt of collateral insurance benefits is admissible upon a persuasive showing that it "is of substantial probative value" on an issue such as malingering]; *Blake v. E. Thompson Petroleum Repair Co., Inc*. (1985) 170 Cal.App.3d 823, 831; *ML Healthcare Services, LLC v. Publix Super Markets, Inc.* (11th Cir. 2018) 881 F.3d 1293, 1298-1304.) However, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __, [2018 WL 2112307, *6], but urge the trial court to follow *Blake* and *Hrnjak* rather than *Pebley*, thereby preserving this potential appellate issue.

coupled with other relevant evidence, provided that the probative value of the other evidence outweighs the prejudicial effect of the mention of insurance. (*Blake v. E. Thompson Petroleum Repair Co., Inc.* (1985) 170 Cal.App.3d 823, 831 [216 Cal.Rptr. 568].)" (Use Note to CACI No. 105 p. 17; Use Note to CACI No. 5001 p. 1283.) That's almost always the case when medical expense damages are at issue, since the negotiated rates paid by health insurers are only a small fraction of the nominally "billed" amounts that plaintiffs often offer as a benchmark for recovery. Moreover, a plaintiff may be found to have failed to mitigate damages where medical services are obtained at rates significantly higher than comparable care available at these lower negotiated rates. However, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC*, *supra*, __ Cal.App.5th __ [2018 WL 2112307, *6], but urge the trial court to follow *Blake* and *Hrnjak v. Graymar, Inc.* (1971) 4 Cal.3d 725, 733 [plaintiff's receipt of collateral insurance benefits is admissible upon a persuasive showing that it "is of substantial probative value" on an issue such as malingering] rather than *Pebley*. The proposed modified CACI Nos. 105 and 5001 instructions below address this problem with the CACI instructions, and preserve the issue for further appellate review.

Modified CACI No. 3903A
(Medical Expense Damages)

[Past] [and] [future] medical expenses. [To recover damages for past medical expenses, [name of plaintiff] must prove the reasonable [value] of reasonably necessary medical care that [he/ she] has received.] **[Your award of past medical expense damages must be the lesser of (1) the amount actually paid or incurred for the necessary medical care, or (2) the market value of the necessary medical care.]**

[To recover damages for future medical expenses, [name of plaintiff] must prove the reasonable [value] of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.] **[Your award[s] of medical expense damages must be based on the market value for such services.]**

[The market value of medical care is measured by the amounts typically accepted as payment in full for those services when rendered to patients in plaintiff's circumstances, and may not be based on billed amounts that will not actually be paid for such services. You should award plaintiff an amount of damages that is reasonably necessary to compensate [him/her] for any harm caused by defendant, but should award no more than that amount.]

Supporting Authorities: *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 ("We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less."); *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640; see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 179-181 (" 'the reasonable market or exchange value of medical services will not be the amount *billed* by a medical provider or hospital, but the "amount *paid* pursuant to the reduced rate negotiated by the plaintiff's insurance company" ' "); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 (*Howell*'s market value approach "applies to the calculation of future medical services"); *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1331 (the "full amount billed for past medical services is *not relevant* to a determination of the reasonable value of future medical services" and evidence of billed amounts "cannot support an expert opinion on the reasonable value of future medical expenses" (emphasis added)); see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ("[A] person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.

The next modified instruction is CACI No. 3903A regarding medical expense damages. This instruction requires the jury to award damages based on the *market value* of medical services as measured by the amount typically *accepted as payment in full* for those services (and not the much larger amounts stated in unpaid medical "bills"). Numerous California appellate decisions supporting this modified instruction are included.

The final modified instruction is CACI No. 3930 concerning mitigation of damages. Unlike the unmodified version of CACI No. 3930, the modified version explains that plaintiffs have the *duty* to take all reasonable steps to *minimize medical expense damages.* Defense counsel can cite this modified instruction when informing the jury that plaintiff is not allowed to recover damages

continued on page 20

in excess of the amount that would have been incurred, or will be incurred, through available health insurance that provides comparable care at lower rates rather than so-called "billed" rates. Once again, counsel should acknowledge the recent divergent decision in *Pebley v. Santa Clara Organics, LLC*, *supra*, __ Cal.App.5th __ [2018 WL 2112307, *6], but urge the trial court to follow the *Howell/Corenbaum* line of authority rather than *Pebley*, thereby preserving the issue for appellate review.

Proposing modified CACI instructions may lead to more accurate verdicts and/or preserve strong appellate issues.

These legally correct, nonargumentative instructions on defense theories regarding medical expense damage claims should lead to a verdict that more accurately measures the plaintiff's actual harm. If the court refuses them, the proposed instructions preserve potentially meritorious appellate issues, which could lead to reversal of an adverse judgment on appeal, or a settlement due to the prospect for reversal.

Modified CACI No. 3930
(Mitigation of Personal Injury Damages)

If you decide **[defendant]** is responsible for the **[plaintiff's injury, plaintiff]** is not entitled to recover damages for **[past and future medical expenses that plaintiff]** could have avoided, **[or will be able to avoid in the future]**, with reasonable efforts or expenditures.

You should consider the reasonableness of **[plaintiff's]** efforts in light of the circumstances facing [him/her] at the time, including [his/her] ability to make the efforts or expenditures **[to minimize his/her medical expenses]** without undue risk or hardship.

If **[plaintiff]** made reasonable efforts to avoid **[incurring damages]**, then your award should include reasonable amounts that [he/she] spent for this purpose.

Supporting Argument: Virtually all plaintiffs claiming medical expense damages either had or could have had health insurance covering such expenses, which is available to everyone regardless of pre-existing conditions. (42 U.S.C. §§ 300gg-1(a), 300gg-2(a), 18031(a); see *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 179-181.)

The plaintiff has the duty to take reasonable steps to minimize the loss allegedly caused by a defendant's actions. (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1568 ["A plaintiff has a duty to mitigate damages and cannot recover losses it could have avoided through reasonable efforts"]; *Placer County Water Agency v. Hofman* (1985) 165 Cal.App.3d 890, 897; *Mayes v. Sturdy Northern Sales, Inc.* (1979) 91 Cal.App.3d 69, 85-86 ["A plaintiff cannot recover damages that would have been avoidable by his or her ordinary care and reasonable exertions ... [and] [i]ncreased loss due to the plaintiff's willfulness or negligence is the plaintiff's own burden" (citations omitted)]; see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ["a person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure"]; *Pattee v. Georgia Ports Authority* (S.D.Ga. 2007) 512 F.Supp.2d 1372, 1381-1382 [plaintiff's failure to purchase private health insurance following his termination evinces a failure to mitigate future medical expense damages]."); but see *Pebley v. Santa Clara Organics, LLC* (May 8, 2018, B277893) __ Cal.App.5th __, [2018 WL 2112307, *6].)

By neglecting to obtain, maintain or use health insurance the plaintiff fails to mitigate medical expense damages, since the negotiated rates actually paid by health insurers are substantially less than the billed rates quoted by providers. (See, e.g., *Sanjiv Goel M.D., Inc. v. Regal Medical Group, Inc.* (2017) 11 Cal.App.5th 1054, 1058-1059 [emergency physician billed more than $275,000 (nearly 30 times) the $9,660 found to be the reasonable value of his medical services, based on expert testimony "that the average range of [negotiated] rates by private payors in the industry ranged from 135 percent to 140 percent of the Medicare rates"]; *Luttrell v. Island Pacific Supermarkets, Inc.* (2013) 215 Cal. App.4th 196, 199 [$690,548 billed, but $138,082 accepted as full payment – a discount of 80 percent]; *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 306-307, 309 [$17,168 in damages at billed rate reduced to $3,600 the hospital accepted as full payment – a discount of nearly 80 percent].)

It is critical to make a clear record regarding the proposed modified instructions and defense counsel's objection (or at least lack of agreement) to instructions that the court actually gives. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 ["When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two."]; see also Code Civ. Proc., § 647 [counsel is presumed to object to instructions given by the court absent *express acquiescence* in the instructions].)

The standard of review governing instructional error is relatively favorable to the appellant. The propriety of jury instructions is a question of law reviewed de novo, so the appellate court does not give any deference to the trial court's ruling on instructions. (*Yale v. Browne* (2017) 9 Cal.App.5th 649, 657; *Alamo*, *supra*, 219 Cal.App.4th at p. 475.) To determine whether instructional error is prejudicial, the appellate court reviews the entire record,

continued on page 21

CACI – continued from page 20

not simply the evidence that supports the verdict. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802 (*Cassim*) ["errors in civil trials require that we examine 'each individual case to determine whether prejudice actually occurred in light of the entire record' "].) Moreover, the appellate court *views the evidence in the light most favorable to the party claiming error*, and assumes that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the appellant and rendered a verdict in the appellant's favor on those issues. (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715 (*College Hospital*); *Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755; *Bourgi v. West Covina Motors, Inc.* (2008) 166 Cal.App.4th 1649, 1664.)

Finally, an appellate court will deem instructional error to be prejudicial if " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' " (*Clifton v. Ulis* (1976) 17 Cal.3d 99, 105-106.) " '[P]robability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility*." (*College Hospital*, *supra*, 8 Cal.4th at p. 715; accord, *Cassim*, *supra*, 33 Cal.4th at p. 800.)

In sum, defense counsel always should carefully scrutinize the applicable CACI instructions and recent appellate decisions to determine whether to propose modifications to the standard instructions. Doing so reflects sound planning for the worst-case trial outcome.