JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: January 20, 2017

Title
Jury Instructions: Revised Civil Jury Instruction No. 3103—Supplemental Report

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
January 20, 2016

Date of Report
December 16, 2016

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Executive Summary

This is a supplementary report covering only the Advisory Committee on Civil Jury Instructions' proposed revisions to CACI No. 3103, *Neglect—Essential Factual Elements*. Because of some significant opposition to the committee's proposed changes to this instruction, the committee believes that it is appropriate to set forth its decision and decision-making process about this instruction in a separate report.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective January 20, 2017, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court revisions to CACI No. 3103. The proposed revised instruction is attached at pages 6–9.[1]

[1] This proposal was presented for approval for the December 16, 2016 Judicial Council meeting agenda. It was withdrawn because it had not been returned to the full advisory committee for approval after public comments had been received and considered. The committee subsequently voted 22-1 with two abstentions to approve the revised instruction.

Rationale for Recommendation

On May 19, 2016, the California Supreme Court decided *Winn v. Pioneer Medical Group, Inc.,*[2] which resolved an issue of statutory construction under the Elder Abuse and Dependent Adult Civil Protection Act (the Act). The court held that the word "care" in the phrase "care or custody" in Welfare and Institutions Code section 15610.57(a)(1) (defining "neglect") does not apply to medical care provided by a medical professional to an elder on an outpatient basis. Instead, before there is "care" within the meaning of the Act, there must be "a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient."[3]

CACI No. 3103, *Neglect—Essential Factual Elements*, is the instruction for claims of neglect under the Act. Element 1 of 3103 currently requires, in the words of the statute, only that the defendant had "care or custody" of the elder or dependent adult. At its July 2016 meeting, the committee considered what, if any, changes to CACI No. 3103 were required in light of *Winn*.

The committee concluded that the element 1 language was now insufficient. The committee proposed, and posted for public comment, a revision to element 1 that would require the defendant to have "a substantial caretaking or custodial relationship with [plaintiff/decedent], involving ongoing responsibility for [his/her] basic needs." As can be seen from the paragraph above, the revised language was taken directly from the holding of the court in *Winn*.

The committee received seven comments on this proposed revision to CACI No. 3103. Five of these comments argued that nothing in the *Winn* case compelled any changes to the instruction and that the instruction should be left as is.[4] The committee has carefully considered the views of the objecting commentators, but continues to believe that *Winn* requires that element 1 be revised.

One of the objectors' principal arguments is that the *Winn* decision did nothing to change the Elder Abuse Act or its application, and therefore no changes should be made to the instruction.[5] The objectors would characterize *Winn* as a narrow holding: that in the context of outpatient

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[2] *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

[3] *Id.* at p. 152.

[4] The five objecting commentators are the Consumer Attorneys of California (CAOC); Sanford I. Horowitz, Attorney at Law, Santa Rosa; California Advocates for Nursing Home Reform (CANHR), by Peter G. Lomhoff, Attorney at Law, Oakland; Jody C. Moore, Johnson Moore Attorneys at Law, Thousand Oaks, and the Valentine Law Group, Attorneys at Law, Mission Viejo, by Kimberly A. Valentine. Their letters are attached at pages 108–121. Two of the commentators, Russell S. Balisok, Attorney at Law, Glendale, and the State Bar Litigation Section Jury Instructions Committee, did not object to revising element 1, but suggested additional or different revisions. These two comments are addressed in the attached comment summary.

[5] See, e.g., letter of the Valentine Group, p. 1. The Valentine Group, CAOC, and Moore letters, although not identical, all make the same basic arguments in identical or similar language.

medical treatment, in order to be held liable under the Act, it must be established that a health care provider has a caretaking or custodial relationship with the elder or dependent adult.[6]

The committee agrees that this language accurately describes the holding of *Winn*, but the committee does not view it as "narrow." The court's objective was to construe the statutory phrase "care or custody," which is the language of the current instruction. In *Winn*, the court found this language to be unclear and amenable to different constructions.[7] The court then elaborated on what the language means. Leaving "care or custody" in a jury instruction without the addition of the court's guidance would deny a jury the court's clarification of the meaning of the phrase. Therefore, the committee believes that element 1 cannot be left as is.

The objectors point out that two earlier California Supreme Court cases have established that the Act may not be used to state a claim for medical malpractice.[8] While this is true, the import of *Winn* is to make it abundantly clear that medical professionals will not be liable for elder abuse, regardless of the setting, unless there is the requisite caretaking or custodial relationship.[9]

The objectors also argue that "the proposed changes do not accurately state the law, and in fact attempt to expand a narrow judicial finding to apply to all cases involving the neglect of an elder or dependent adult."[10] But the committee disagrees with this characterization of *Winn*.

First, as the language for revised element 1 comes directly from the *Winn* holding, the committee is confident that it has accurately stated the law. Further, it is clear from the opinion that the court in *Winn* is not narrowly limiting its holding to medical care provided to an elder or dependent adult in an outpatient setting. The court clearly holds that "[i]t is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect."[11] Therefore, the requirement of a substantial caretaking or custodial relationship is not limited to outpatient medical care, but applies in any elder or dependent adult neglect case.[12]

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[6] See, e.g., letter of the Valentine Group, p. 1.

[7] *Winn, supra*, 63 Cal.4th at pp. 156−157.

[8] See *Delany v. Baker* (1999) 20 Cal.4th 23, and *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771.

[9] The facts in *Winn* involved an elder who sought medical care for foot pain as an outpatient at a medical "facility." It is unclear from the facts how the facility might have differed from a doctors' office.

[10] See, e.g., letter of Valentine Group, p. 1.

[11] *Winn, supra*, 63 Cal.4th at pp. 152, 158.

[12] Any significance of a narrow construction is hard to understand. In more conventional situations involving neglect under the Act, such as in a nursing home, or by a relative, or with an employee in-home caretaker, there is no question but that there is a substantial caretaking or custodial relationship. Only in the more limited relationships involving medical professionals might the custodial nature of the relationship be at issue. Indeed the letter from the CANHR notes that "there is unambiguously care and custody as with an in-patient in a hospital or a resident in a nursing home or assisted living facility."

Next, the objectors argue that "the language used is hopelessly vague and ambiguous, and as such renders the proposed instruction unusable."[13] The committee does not find any of the language from *Winn* that has been incorporated into element 1 to be vague or ambiguous, nor does the committee fear that the instruction will be unusable.

The objectors first challenge the word "substantial" as used in *Winn* to require a "*substantial* caretaking or custodial relationship."[14] They point to CACI No. 430, *Causation: Substantial Factor,* as evidence that the word "substantial" requires a particular definition. The committee does not share this concern. It finds the word "substantial" to have a clearly understood meaning in its ordinary everyday context. In contrast, the "substantial factor" test for causation is a very particularized and complex area of the law, which does require further elaboration. But determining whether a relationship is substantial or not is a task well within the grasp of jurors without further definition. The court in *Winn* felt no need to elaborate on the scope of a "substantial" relationship, and neither does the committee.

Next, the objectors challenge the word "ongoing" as used in *Winn* to require "*ongoing* responsibility for one or more basic needs."[15] They claim that "[t]he use of this term implies a relationship with defendant that is never ending, and will do nothing but confuse jurors as to what constitutes care or custody."[16] Again, the court in *Winn* saw no need to further refine or avoid the term "ongoing," and neither does the committee. The committee is confident that jurors will understand that an "ongoing" responsibility is one that occurs over a period of time. The committee has no fear that a jury will require the responsibilities to be never-ending.

Next, in the context of arguing that the proposed language misstates the law, the objectors challenge the meaning of "basic needs." They note that in *Winn*, the court elaborates on what constitutes "basic needs" with the explanation that they are those things "that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance."[17] The objectors do not argue that this language should be added to the instruction; rather they assert it as evidence that the instruction does not reflect an accurate statement of the law. While the committee does not view the omission of this language as indicative of legal error, it does find value in this additional explanation of "basic needs" and has added it to element 1.[18]

Finally, the objectors propose a change to proposed revisions to the Directions for Use that present the holding in *Winn*. The paragraph as proposed to be revised states:

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[13] See, e.g., letter of Valentine Group, p. 1.

[14] *Winn, supra,* 63 Cal.4th at pp. 152, 157.

[15] *Winn, supra,* 63 Cal.4th at p. 152.

[16] See, e.g., letter of Valentine Group, p. 3.

[17] *Winn, supra,* 63 Cal.4th at pp. 155, 158.

[18] Commentator Balisok suggested labeling the factors to be considered as evidence of neglect in element 3 of the instruction as "basic needs." The committee finds this to be a good suggestion and has made this revision.

> [T]he Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011].)

The objectors would limit the scope of this exclusion by adding an introductory clause: "In the case of a health care provider delivering care on an outpatient basis who fails to refer an elder or dependent adult/patient to a specialist, … ." As noted above, the committee does not read *Winn* as narrowly limited to its facts.

Comments, Alternatives Considered, and Policy Implications

The comments received from the public on CACI No. 3103 are discussed above. A document addressing the comments received on CACI No. 3103 and the committee's responses is attached at pages 10–12.[19] There were no dissenting views expressed by any committee members.

Attachments

1. CACI No. 3103 as proposed to be revised at pages 6−9.
2. Public comments on CACI No. 3103 and the committee's responses, at pages 10−12
3. Comment letters opposing changes to CACI No. 3103:
    a. Consumer Attorneys of California, by Jacqueline Serna, Legislative Counsel, at pages 13−14
    b. California Advocates for Nursing Home Reform (CANHR), by Peter G. Lomhoff, Attorney at Law, Oakland, at pages 15−16
    c. Sanford I. Horowitz, Attorney at Law, Santa Rosa, at pages 17−18
    d. Jody C. Moore, Johnson Moore Attorneys at Law, Thousand Oaks, at pages 19-22
    e. Valentine Law Group, Attorneys at Law, Mission Viejo, by Kimberly A. Valentine, at pages 23-26

[19] After the committee declined to withdraw its proposed revisions in light of the comments received, over 20 more letters were directed to RUPRO opposing the change. These letters reiterated the points made in the attached letters received on public comments. RUPRO agreed that the council should approve the revised instruction, but placed the issue on the discussion agenda for the December council meeting.

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with ~~care or custody of~~ [***name of plaintiff/decedent***], involving ongoing responsibilityfor [his/her] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [***name of plaintiff/decedent***]'s basic needs, including [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

4. **That [***name of plaintiff/decedent***] was harmed; and**

5. **That [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] conduct was a substantial factor in causing [***name of plaintiff/decedent***]'s harm.**

New September 2003; Revised December 2005, June 2006, October 2008, December 2016

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought*, in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants*, or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only*. To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to~~is instruction is not intended for~~ cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs, (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152.[202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2~~, ~~; Civ. Code, § 3333.2(c)(2).)~~.

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn*, *supra*,63 Cal.4th at p. 155.)

- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn*, *supra*,63 Cal.4th at p. 152.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn*, *supra*, 63 Cal.4th at p. 159, internal citation omitted.)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- ~~"The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment ... .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, ...' etc., who 'treats an elder ... for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)~~

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act." (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 245].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3103, Neglect—Essential Factual Elements

Russell S. Balisok, Attorney at Law, Glendale
The proposed change to 3103 element 1 speaks to "substantial" caretaking or custodial relationship with the victim. Could "substantial" be defined in the new instruction? I suggest the committee might look to CACI 430, Causation: Substantial Factor, for the definition of substantial, in order that the new 3013 be as understandable as possible to jurors.

Committee Response:
The committee does not find "substantial" to be a difficult concept for a jury to grasp.

CACI No. 430 is a very specialized instruction on causation in tort law generally. Its language is not necessarily appropriate in other situations in which substantiality is required absent some authority that says that it applies.

The language at element 1 referring to "ongoing responsibility for his/her basic needs" is problematic. My problem is with the phrase "basic needs." I recognize this language is derived from the Court's opinion in *Winn*. But confusion is sure to follow as to what "basic needs" means. In *Winn,* at the bottom of p. 158, the Court clearly includes the failure to provide medical care for physical and mental health needs as a "basic need." But will a juror so conclude without help?

In that vein, element 1 doesn't match up with the list of examples of neglect at element 3 of the instruction. In other words, uncertainty leading to confusion concerning "basic needs" could lead the jury to answer questions about "basic needs," "no" even though the jury was ready to find a failure to assist with personal hygiene, to provide medical care, to protect from health and safety hazards, prevent malnutrition, etc. I believe the simple solution to this problem is to alter element 3 to read as follows:

"That ... defendant failed to use that degree of care that a reasonable person in the same situation would have used in providing for the [victim's] basic needs including [insert one or more of the following]"

This suggested change would provide needed guidance to the jury by linking elements 1 and 3 while still limiting application of "neglect" to basic needs, and would minimize the problem that could arise with a misunderstanding and misapplication of an unaided requirement of "basic needs."

Committee Response:
The committee agreed with the comment and has made the suggested revision to element 3.

In *Winn,* the court expands on "basic needs" as things that "an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (63 Cal.4th at p. 158,) The committee has also added this language to element 1.

See also the expanded discussion of the proposed changes to this instruction in the committee's report to the Judicial Council.

California Advocates for Nursing Home Reform (CANHR), by Peter G. Lomhoff, Attorney at Law, Oakland

The commentator argues for no change to the instruction. The complete comment is attached to the committee's report to the Judicial Council.

Committee Response:
See report

Consumer Attorneys of California, by Jacqueline Serna, Legislative Council
The commentator argues for no change to the instruction. The complete comment is attached to the committee's report to the Judicial Council.

Committee Response:
See report

Sanford I. Horowitz, Attorney at Law, Santa Rosa
The commentator argues for no change to the instruction. The complete comment is attached to the committee's report to the Judicial Council.

Committee Response:
See report

Jody C. Moore, Johnson Moore Attorneys at Law, Thousand Oaks
The commentator argues for no change to the instruction. The complete comment is attached to the committee's report to the Judicial Council.

Committee Response:
See report

State Bar of California, Litigation Section, Jury Instructions Committee, by Ruben A. Ginsberg, Chair
Winn v. Pioneer Medical Group, Inc. (2016) 63 Cal.4th 148, 160, stated that to be liable for neglect under Welfare and Institutions Code section 15610.57 a defendant must have "a caretaking or custodial relationship that arises where an elder or dependent adult depends on another for the provision of all or some of his or her fundamental needs." *Winn* also stated, "the Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient." (63 Cal.4th at p. 152.) We believe the word "substantial" adds nothing helpful to the instruction and may cause misunderstanding or confusion, so we would delete the word "substantial," as in the language on page 160 of the opinion.

Accordingly, we would also delete "substantial" in the penultimate paragraph of the Directions for Use.

The Sources and Authority include the quote from *Winn* at page 152 with the word "substantial," but not the quote on page 160 without that word. We agree that only one of the two quotes is needed. We would choose the language on page 160 of the opinion (quoted above) without the word "substantial."

Committee Response:
The committee feels compelled to heed Harris v. City of Santa Monica (2013) 56 Cal.4th 203, in which the Supreme Court held that "motivating reason" was insufficient with regard to the causation element in employment discrimination. Discrimination had to be a substantial motivating reason. (56 Cal.4th at p. 232.) The committee concludes that when the court requires substantiality, it is highly significant.

Therefore, if a caretaking relationship must be a substantial one, “substantiality” is an important requirement.

Valentine Law Group, Attorneys at Law, Mission Viejo, by Kimberly A. Valentine
The commentator argues for no change to the instruction. The complete comment is attached to the committee’s report to the Judicial Council.

Committee Response:
See report

CONSUMER ATTORNEYS OF CALIFORNIA
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August 11, 2016

Attn: Mr. Bruce Greenlee, Attorney
Judicial Council of California
Advisory Committee on Civil Jury Instructions
455 Golden Gate Avenue
San Francisco, CA 94102
e-mail: civiljuryinstructions@jud.ca.gov

Re: **Invitation to comment on proposed CACI Instruction 3103**

To whom it may concern:

I write on behalf of Consumer Attorneys of California (CAOC), California's state wide, non-partisan and non-profit association of plaintiff's attorneys. Our mission statement, in part, is to "seek justice for all... by advancing the common law and promoting the public good through the civil justice system and concerted efforts to secure safe products, a safe workplace, a clean environment, and quality health care." Many of our attorneys are leading experts in the field of elder abuse.

CAOC believes that the proposed changes to CACI 3103, the "Neglect – Essential Factual Elements," will result in unnecessary litigation; lengthen trial time, and useless confusion. **Thus we respectfully ask that CACI 3103 remain unchanged**. First, the proposed changes do not reflect an accurate statement of the law, and would expand a narrow judicial finding to apply to all cases involving the neglect of an elder or dependent adult. Second, the language utilized is vague and renders the proposed instruction unusable and will open the door to additional appellate practice seeking guidance as to the definitions of the terms employed.

The portion of the instruction at issue reads as follows:

> **1. That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with ~~care or custody of~~ [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her] basic needs;**

The changes rely exclusively upon the recent Supreme Court holding in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148. The *Winn* decision did nothing to change the Elder Abuse Act or its application, and therefore no changes should be made to these instructions. In *Winn*, the Court held, in a narrow finding, that in the context of ***outpatient medical treatment***, in order to be held liable under the Elder Abuse and Dependent Adult Civil Protection Act (*Welfare & Institutions Code* §15600, *et seq.*) it must be established that said health care provider "has a caretaking or custodial relationship with the elder or dependent adult." (*Winn*, *supra*, 63 Cal.4th at 156, 165.) Nowhere in *Winn*, either in dicta or the holding does the Supreme Court suggest that the plaintiff can only meet the care or custody element of an elder abuse claim by demonstrating defendant's responsibility for a plaintiff's basic *needs*. The court repeatedly states that care or custody is demonstrated by defendant's responsibility for "*one or more of*

an elder's basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn*, *supra*, 63 Cal.4th at 158 (emphasis added).)

Further, other cases have described the type of relationship (i.e. custodial) required to satisfy "neglect" under the Elder Abuse Act, and none of those cases triggered the need for a fundamental change in the CACI instruction.

The *Winn* case which is cited in the use notes, and relied on as the authority for the purported changes was decided in the face of very specific facts (involving the outpatient care of an elder person who was competent and able bodied). Ultimately, nothing about the finding in *Winn* changes Elder Abuse or Dependent Adult law in California. At most, the case provides a definition for what constitutes "care or custody" and throughout the decision the California Supreme Court confirms that "care or custody" means accepting responsibility for attending to one or more of the basic needs of an elder or dependent adult. Nothing in the *Winn* decision changes the requirement that to prevail under the elder abuse act, a caretaking or custodial relationship must be demonstrated. The recommended change would require plaintiff to meet an additional burden of proof not required by the statute, and does so without providing guidance for the language recommended therein.

Finally, these changes do nothing to add to the clarity of the instruction and only serve to cause unnecessary confusion. The goal of the CACI instructions "is to improve the quality of jury decision making by providing standardized instructions *that accurately state the law in a way that is understandable to the average juror*." The proposed change to CACI 3103 would not have this effect. By adding language such as "substantial" and "ongoing," the proposed changes all but guarantee confusion and misapplication of the law to the facts by jurors. Use of these terms violates the explicit provisions of *Rules of Court*, Rule 2.1050 which holds that these instructions are to "accurately state the law in a way *that is understandable to the average juror*." The use of the terms "substantial" and "ongoing," without definition or context, render said terms well beyond the reach or understanding of the average juror.

In light of the above, we respectfully request that the proposed change to CACI 3013 be rejected and that the language of said instruction be left unaltered such that it continues to mirror the language of the Elder Abuse Act at *Welf. & Inst. Code* §15610.57.

Respectfully submitted,

/s/ Jacqueline Serna
Jacqueline Serna, Esq.
Legislative Counsel
Consumer Attorneys of California

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August 10, 2016

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

Re: Proposed Changes to CACI 3103

To the Advisory Committee:

I am writing on behalf of California Advocates for Nursing Home Reform ("CANHR") and myself to oppose the proposed changes to CACI 3103.

CANHR is a non-profit organization that works to improve the lives of the thousands of residents of nursing homes and other long term care facilities in California. Its activities include legislative advocacy, attorney training and referral, and other services for elderly nursing home residents and their families. It is probably the leading advocacy agency in California working on issues of elder abuse in nursing homes and other long term care facilities.

My practice is limited to injury and elder abuse cases arising in long term care facilities. I am one of the authors of CEB, California Elder Law Litigation, an Advocate's Guide. I have been amicus co-counsel in various published decisions in this field including *Delaney v. Baker* (1999) 20 Cal.4th 23 and *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, both cited in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal. 4th 148.

The proposed change to CACI 3103 should not be adopted because they would extend the holding of *Winn, supra,* to many elder abuse cases where the narrow holding of *Winn* does not apply. *Winn* concerns the meaning of "care or custody" in Welfare and Institutions Code §15610.57(a)(1) in the ambiguous situation of outpatient medical treatment, not when there is unambiguously care and custody as with an in-patient in a hospital or a resident in a nursing home or assisted living facility.

When a doctor treats an elderly patient on an intermittent basis, as in *Winn*, does the doctor have care or custody of the patient? That is not clear. It depends on the facts of the case, and the holding of *Winn* is helpful to find the answer. As *Winn* says, 63 Cal. 4th at 159, it is important to distinguish medical negligence and elder abuse, as was explained in *Delaney*, supra, discussing W.&I.C. §15657.2, and it is also important to recognize that

neglect under §15610.57 is "broad enough to encompass settings beyond residential care facilities," 63 Cal. 4th at 160.

The import of this language in *Winn* must not be ignored: Care or custody is assumed in the residential care setting, and care or custody may or not occur with outpatient care by doctors, depending on the facts.

For these reasons it is important not to rewrite CACI 3103 to ask the jury to make additional new decisions that are not required by *Winn*.

It is appropriate to discuss the *Winn* case in the Sources and Authority section following CACI 3103, and perhaps in the Directions for Use as well, but *Winn* does not apply in cases of continuing care and custody in residential care facilities such as nursing homes and assisted living facilities.

The proposed changes to CACI 3103 do not accurately follow the holding of *Winn*, but the proposed changes would seriously mislead and confuse jurors about what §15610.57 means when the plain language of the statute is clear and obvious in institutional and other situations not covered by the holding in *Winn*.

For these reasons the present CACI 3103 should be left unchanged, with possibly some new Directions for Use explaining the application of *Winn* in the exceptional cases of non-residential care or custody.

Very truly yours,

Peter Lomhoff

Peter G. Lomhoff

cc: California Advocates for Nursing Home Reform

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August 11, 2016

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Committee on Civil Jury Instructions
455 Golden Gate Avenue
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To the Advisory Committee:

As an attorney specializing in elder abuse and neglect litigation for over 20 years, I submit the following comment on the proposed revision to CACI 3101, "Neglect Essential Factual Elements:"

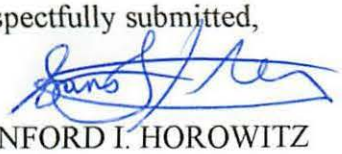
I believe the revision is unwarranted as it will be confusing to the average juror. In fact, it appears that the purpose of the proposed revision is to discourage and restrict cases brought pursuant to the Elder Abuse and Adult Civil Protection Act (EADACPA) by requiring unnecessary language from the recently decided *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148 case. Specifically, the proposed revision requests that a defendant must be found to have had a "substantial" and ongoing caretaking and custodial relationship with the elder or dependent adult (*Winn*, supra 63 Cal.4th 156, 165). Again, this language is not necessary since the *Winn* court, and all other appellate law to date, acknowledges that the cases of Delaney v. *Baker* (1999) 20 Cal.4th 23 and *Covenant Care Inc. v. Superior Court* (2014) 32 Cal.4th 771 have already established the parameters, as required under EADACPA, of a "caretaking or custodial relationship" when a person or entity accepts responsibility for tending to the basic needs of an elder or dependent adult.

Regarding the above, the *Winn* case involved outpatient treatment of a fully competent individual and, thus, there was no "care or custody" allowing for an EADACPA claim.

Conversely, *Delaney* involved a facts scenario in which an elder in a Skilled Nursing Facility was neglected in an egregious fashion. Call bells were ignored, and a Stage IV coccyx pressure sore (a wound down to the bone) developed, leading to death as a result of failure to turn the patient in addition to a lack of basic hygiene: evidence presented at the three-week trial verified that the plaintiff, Rose Wallien, was left sitting in her own feces. Similarly, the *Covenant Care* facts involved allegations of a Skilled Nursing Facility and managing care company conspiring to keep an elder, Juan Inclan, in Skilled Nursing Facilities (rather than sending him to an acute hospital for care he needed regarding dehydration, malnourishment, and severe pressure sores) in order to improperly collect lucrative Medicare payments.

Critically analyzing changes of the language of jury instructions to achieve justice is important and difficult work and it is important to avoid unintended consequences that have the potential to undo important public policy as set forth by the legislature. This is especially true in the area of elder abuse that is needed (and stated in the W&I 15000 Statutes) to protect the "vulnerable elderly".

Respectfully submitted,



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August 11, 2016

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Re: CACI 3103 Comment

To the Advisory Committee:

I have been an elder abuse litigator since April 2000 when my own grandmother was neglected in a skilled nursing facility in Southern California. I was a defense litigator at the time and I saw firsthand how difficult it was to advocate for even the most basic care of our elders in nursing homes. I took $500 inheritance and started my own practice advocating for this vulnerable population and haven't looked back.

Over the years, the legislative intent of encouraging capable advocates to take up the charge and privately enforce basic standards in elder care facilities has been slowly eroding. (Welf. & Inst. Code § 15600(j).)But elder abuse litigators are a tenacious bunch and we persevere. And while we must litigate within the bounds of the law, practically, we see unintended and at times illogical limitations being applied to the law by trial courts. I hope by submitting my comments on the proposed revision to CACI 3103, "Neglect – Essential Factual Elements" to avoid any such consequences.

I understand the committee's charge pursuant to California *Rules of Court*, Rule 2.1050 "is to improve the quality of jury decision making by providing standardized instructions *that accurately state the law in a way that is understandable to the average juror*." But the proposed changes in this instance do not serve that purpose. First, the *Winn* decision did nothing to change the Elder Abuse Act definition of Neglect, or requirement for a custodial relationship, and therefore no changes should be made to the instructions. Second, the proposed changes do not reflect an accurate statement of the law, but rather expands a narrow judicial finding based on case-specific facts (i.e. outpatient clinic) to apply to all cases involving the neglect of an elder or dependent adult. This is an invitation for confusion when claims are brought against elder care facility operators, who were obviously the intended target of the Elder Abuse Act. Finally, the language utilized is hopelessly vague and ambiguous and as such renders the proposed

instruction unusable and will open the door to additional appellate practice seeking guidance as to the definitions of the terms employed.

The proposed changes rely exclusively upon the recent Supreme Court holding in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148. In *Winn*, the Court held, in a narrow finding, that in the context of ***outpatient medical treatment***, in order to be held liable under the Elder Abuse and Dependent Adult Civil Protection Act (*Welfare & Institutions Code* §15600, *et seq.*) it must be established that said health care provider "has a caretaking or custodial relationship with the elder or dependent adult." (*Winn*, *supra*, 63 Cal.4th at 156, 165.)

First and foremost, "neglect" is defined by statute (Welf. & Inst. Code § 15610.67) and applies to those who have "care or custody" of an elder. *Winn* does not re-write the statute and therefore, CACI should not be rewritten to echo merely interpretative language. Other cases have described the type of relationship (i.e. custodial) required to satisfy "neglect" under the Elder Abuse Act, and none of those cases triggered the need for a fundamental change in CACI instruction. If *Winn* is limited to its very specific facts (outpatient medical treatment, limited and sporadic contact), then it is unclear why a modification should be made to the instruction at all.

As acknowledged by the *Winn* court, *Delaney v. Baker* (1999) 20 Cal.4th 23 and *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771 (both Supreme Court decisions) already "illustrate" the "type of caretaking or custodial relationship that the Act requires: one where a party has accepted responsibility for attending to the basic needs of an elder or dependent adult." As *Delaney* and *Covenant Care* have already provided guidance on this issue, and those cases did not prompt a proposed change in the CACI, the unique facts underlying *Winn* in no way warrant a change to the instruction and will not aid juries to reach the legally correct decision. As stated above, Winn establishes outpatient medical treatment is not a significant enough relationship to establish "care or custody". The statute has not been changed by this decision (nor could it be), and neither should the CACI instruction regarding neglect, as defined by the statute.

Second, the insertion of the phrase "involving ongoing responsibility for [his/her] basic needs" leaves out words from Winn that are critically important and therefore, the suggested language is not an accurate statement of the law. Nowhere in the case, either in dicta or the holding does the Supreme Court suggest that the plaintiff can only meet the care or custody element of an elder abuse claim by demonstrating defendant's responsibility for a plaintiff's basic *needs*. In *Winn*, the court repeatedly states that care or custody is demonstrated by defendant's responsibility for "*one or more of an elder's basic needs* that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn*, *supra*, 63 Cal.4th at 158 (emphasis added).)

Ultimately, nothing about the finding in *Winn* changes Elder Abuse or Dependent Adult law in California. At most, the case provides a definition for what constitutes "care or custody" and throughout the decision the California Supreme Court confirms that "care or custody" means accepting responsibility for attending to one or more of the basic needs of an elder or dependent adult. The changes being proposed under the guise of improving jury decision-making have the actual impact, whether intended or not, of adding an additional factual element that is not required under a plain reading of the statute.

Moreover, by adding language such as "substantial" and "ongoing," the proposed changes all but guarantee confusion and misapplication of the law to the facts by jurors. Use of these terms violates the explicit provisions of *Rules of Court*, Rule 2.1050 which holds that these instructions are to "accurately state the law in a way *that is understandable to the average juror.*" The use of the terms "substantial" and "ongoing," without definition or context, render said terms too subjective to be uniformly applied by jurors.

As to the term "substantial," this word is of such significant legal impact, that in relation to its use in a finding of causation in a negligence action, the Judicial Council has gone so far as to create a separate jury instruction on the definition and use of the term "substantial." (*See*, CACI 430, "Causation: Substantial Factor.") As such, the vague nature of the term "substantial" has already been recognized in the context of the issue of causation, and the same concern exists here if not to a greater degree where jurors, in the context of the analysis of "care or custody" under the Act, will now be called upon to delineate or create the boundaries of this undefined term without instruction or direction.

The same is true as to the term "ongoing." Here once again, jurors will be left to speculate as to the meaning of the term, particularly troublesome as the definition of "continuing to exist, happen or progress; continuing without reaching an end." (Merriam-Webster's Learner's Dictionary, <http://www.merriam-webster.com/dictionary/ongoing> last accessed August 3, 2016.) The use of this term implies a relationship with defendant which endures, and will do nothing but confuse jurors as to what constitutes care or custody. For example, does "ongoing" mean conduct persisting over one 8 hour shift enough (such as neglecting one's need to go emergently to the hospital upon a change of condition)? One day (such as failing to care for personal hygiene or implement a care plan requiring daily care)? One week (such as failing to turn and reposition with sufficient frequency to cause skin breakdown)? Entire period of residency in the elder care facility (such as systemic understaffing)?

Again, in light of the above, it is requested that the proposed change to CACI 3013 should be rejected and that the language of said instruction be left unaltered such that it continues to mirror the language of the Elder Abuse Act at *Welf. & Inst. Code* §15610.57, as set forth by the Legislature.

It is further requested that the phrase, "in the case of a health care provider delivering care on an outpatient basis who fails to refer an elder or dependent adult/patient to a specialist" be added before the final proposed "Direction for Use" such that said "Direction for Use" shall now read:

> In the case of a health care provider delivering care on an outpatient basis who fails to refer an elder or dependent adult/patient to a specialist, the Act
>
> does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient.

Thank you for your attention to this important matter.

Very Truly Yours
Johnson Moore

Jody C. Moore

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August 8, 2016
Via Electronic Mail

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Re: Proposed Changes to CACI 3103

To the Advisory Committee:

I wish to submit the following comment on the proposed revision to CACI 3103, "Neglect – Essential Factual Elements." Pursuant to California *Rules of Court*, Rule 2.1050, the goal of the CACI instructions "is to improve the quality of jury decision making by providing standardized instructions *that accurately state the law in a way that is understandable to the average juror*." The proposed changes in this instance do not serve that purpose, as 1) the *Winn* decision did nothing to change the Elder Abuse Act or its application, and therefore no changes should be made to the instructions; 2) the proposed changes do not reflect an accurate statement of the law, and in fact attempt to expand a narrow judicial finding to apply to all cases involving the neglect of an elder or dependent adult; and 3) the language utilized is hopelessly vague and ambiguous and as such renders the proposed instruction unusable and will open the door to additional appellate practice seeking guidance as to the definitions of the terms employed.

The proposed changes rely exclusively upon the recent Supreme Court holding in *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148. In *Winn*, the Court held, in a narrow finding, that in the context of ***outpatient medical treatment***, in order to be held liable under the Elder Abuse and Dependent Adult Civil Protection Act (*Welfare & Institutions Code* §15600, *et seq.*) it must be established that said health care provider "has a caretaking or custodial relationship with the elder or dependent adult." (*Winn*, *supra*, 63 Cal.4th at 156, 165.)

First and foremost, the true motive underlying the proposed changes, which is clearly an attempt to restrict Elder and Dependent Adult Neglect cases by imposing the "substantial" caretaking and custodial relationship language set forth in *Winn* on all neglect cases and not just

those involving outpatient medical treatment, is foreshadowed by the failure to accurately incorporate the language from *Winn* into the proposed new language. This is most easily illustrated by the phrase "involving ongoing responsibility for [his/her] basic needs." Nowhere in the case, either in dicta or the holding does the Supreme Court suggest that the plaintiff can only meet the care or custody element of an elder abuse claim by demonstrating defendant's responsibility for a plaintiff's basic *needs*. The court repeatedly states that care or custody is demonstrated by defendant's responsibility for "*one or more of an elder's basic needs* that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance." (*Winn, supra,* 63 Cal.4th at 158 (emphasis added).) Other cases have described the type of relationship (i.e. custodial) required to satisfy "neglect" under the Elder Abuse Act, and none of those cases triggered the need for a fundamental change in CACI instruction. If *Winn* is limited to its very specific facts (outpatient medical treatment, limited and sporadic contact), then it is unclear why a modification should be made to the instruction at all. As acknowledged by the *Winn* court, *Delaney v. Baker* (1999) 20 Cal.4th 23 and *Covenant Care v. Superior Court* (2004) 32 Cal.4th 771 (both Supreme Court decisions) already "illustrate" the "type of caretaking or custodial relationship that the Act requires: one where a party has accepted responsibility for attending to the basic needs of an elder or dependent adult." As *Delaney* and *Covenant Care* have already provided guidance on this issue, and those cases did not prompt a proposed change in the CACI, the unique facts underlying *Winn* in no way warrant a change to the instruction and will not aid juries to reach the legally correct decision. As stated above, Winn establishes outpatient medical treatment is not a significant enough relationship to establish "care or custody". The statute has not been changed by this decision (nor could it be), and neither should the CACI instruction regarding neglect, as defined by the statute.

The changes being proposed under the guise of improving jury decision-making have the actual impact, whether intended or not, of adding an additional factual element that is not required under a plain reading of the statute.

Moreover, by adding language such as "substantial" and "ongoing," the proposed changes all but guarantee confusion and misapplication of the law to the facts by jurors. Use of these terms violates the explicit provisions of *Rules of Court*, Rule 2.1050 which holds that these instructions are to "accurately state the law in a way *that is understandable to the average juror*." The use of the terms "substantial" and "ongoing," without definition or context, render said terms well beyond the reach or understanding of the average juror.

First, as to the term "substantial," this word is of such significant legal impact, that in relation to its use in a finding of causation in a negligence action, the Judicial Council has gone so far as to create a separate jury instruction on the definition and use of the term "substantial." (*See*, CACI 430, "Causation: Substantial Factor.") As such, the vague nature of the term

"substantial" has already been recognized in the context of the issue of causation, and the same concern exists here if not to a greater degree where jurors, in the context of the analysis of "care or custody" under the Act, will now be called upon to delineate or create the boundaries of this undefined term without instruction or direction.

The same is true as to the term "ongoing." Here once again, jurors will be left to speculate as to the meaning of the term, particularly troublesome as the definition of "continuing to exist, happen or progress; continuing without reaching an end." (Merriam-Webster's Learner's Dictionary, <http://www.merriam-webster.com/dictionary/ongoing> last accessed August 3, 2016.) The use of this term implies a relationship with defendant which is never ending, and will do nothing but confuse jurors as to what constitutes care or custody.

Ultimately, nothing about the finding in *Winn* changes Elder Abuse or Dependent Adult law in California. At most, the case provides a definition for what constitutes "care or custody" and throughout the decision the California Supreme Court confirms that "care or custody" means accepting responsibility for attending to one or more of the basic needs of an elder or dependent adult. At most, the *Winn* decision provides that the Supreme Court found "care" and "custody" to be synonymous. One need look no further than the first sentence of the Conclusion in *Winn* wherein the Court held, "Plaintiffs cannot bring a claim of neglect under the Elder Abuse Act unless the defendant health care provider has a caretaking or custodial relationship with the elder or dependent adult." (*Winn, supra*, 63 Cal.4th at 165.)

The *Winn* case which is cited in the use notes, and relied on as the authority for the purported changes was decided in the face of very specific facts, to wit the outpatient care of an elder person who was competent and able bodied. The recommended change would require plaintiff to meet an additional burden of proof not required by the statute, and does so without providing guidance for the language recommended therein. Nothing in the *Winn* decision changes the requirement that to prevail under the elder abuse act, a caretaking or custodial relationship must be demonstrated.

The *Winn* case arose out of the outpatient treatment of a fully competent elderly woman, and in that narrow context properly held there was no care or custody, and thus the Plaintiff could not adequately alleged neglect under the Elder Abuse Act. Nothing in the holding of *Winn* changes the statute or the law in California on the elements the plaintiffs must prove in order to prevail on a claim for neglect under the Act. As such, CACI 3103 must remain unchanged.

Again, in light of the above, it is requested that the proposed change to CACI 3013 should be rejected and that the language of said instruction be left unaltered such that it continues to mirror the language of the Elder Abuse Act at *Welf. & Inst. Code* §15610.57, as set forth by the Legislature.

It is further requested that the phrase, "in the case of a health care provider delivering care on an outpatient basis who fails to refer an elder or dependent adult/patient to a specialist" be added before the final proposed "Direction for Use" such that said "Direction for Use" shall now read:

> In the case of a health care provider delivering care on an outpatient basis who fails to refer an elder or dependent adult/patient to a specialist, the Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient.

Thank you for your attention to this important matter.

Respectfully Submitted,
VALENTINE LAW GROUP, APC

Kimberly A. Valentine, Esq.