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# SHOULD YOU DEMAND A JURY?

*HOW JURY INSTRUCTIONS DRIVE  
OUTCOMES IN CONSTRUCTION TRIALS*

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# What You'll Learn

- Why jury instructions drive strategy from Day 1
- What's missing in most pattern sets
- How to draft/argue targeted “specials”
- Jury vs. bench: a practical framework



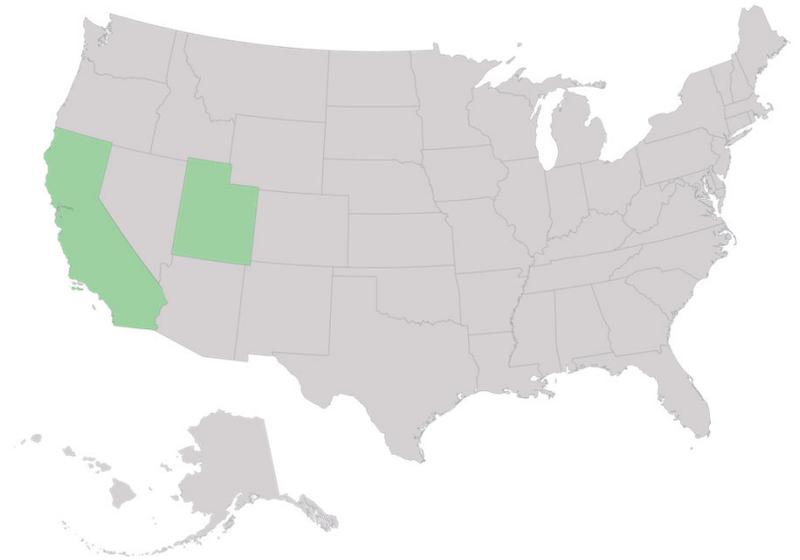
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# The Core Thesis

- Jury instructions decide cases
- Generic “breach of contract” charges miss scope/time/money nuance
- Start with instructions: they shape forum, discovery, experts, and story

# Agenda

- Landscape of construction instructions (CA, UT, others; ABA Models)
- Legal standards for special instructions
- 8 common doctrinal gaps & model fixes
- Forum choice checklist (jury v. bench)
- GC's perspective

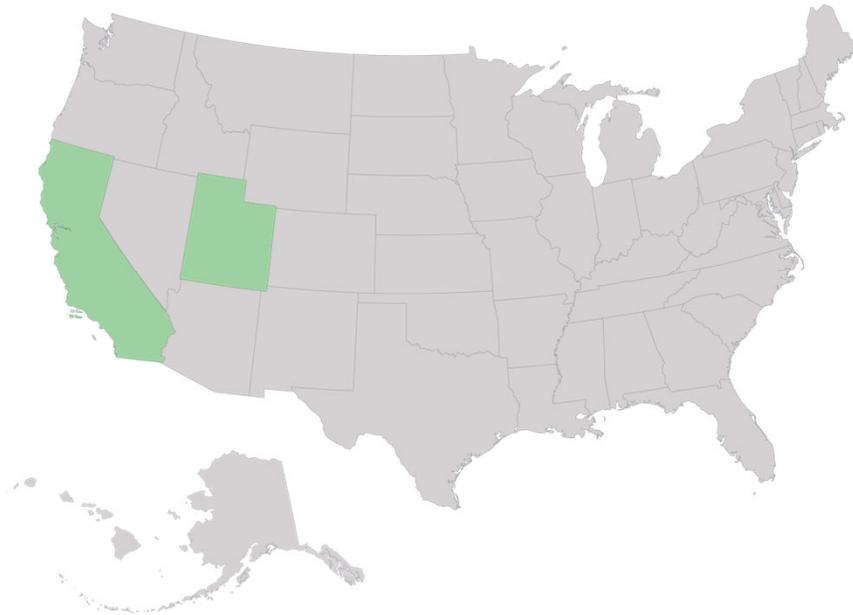


# Why Instructions Matter

- Complex tech + contracts ≠ generic civ pro charges
- Mismatch leads to juror confusion & error
- Early instruction review = leverage

# Reality Check: Pattern Sets Are Thin

- Few jurisdictions have construction-specific coverage
- CA (CACI) & UT (MUJI) = strongest—but still gaps
- ABA Model Construction Instructions fill holes

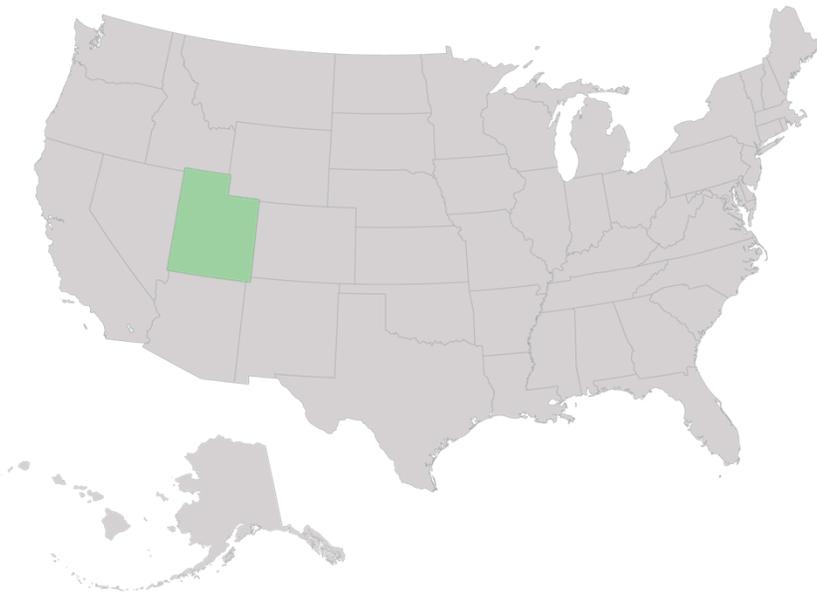


# California CACI

- 33+ construction-oriented instructions (e.g., extra work, implied warranties)
- Still missing: pass-through, nuanced liquidated damages enforceability, etc.

# Utah MUJI

- **Targeted gems:** CV2206 (duty to disclose), CV2209 (defective plans), CV2225/2226 (delays)
- Useful templates beyond Utah

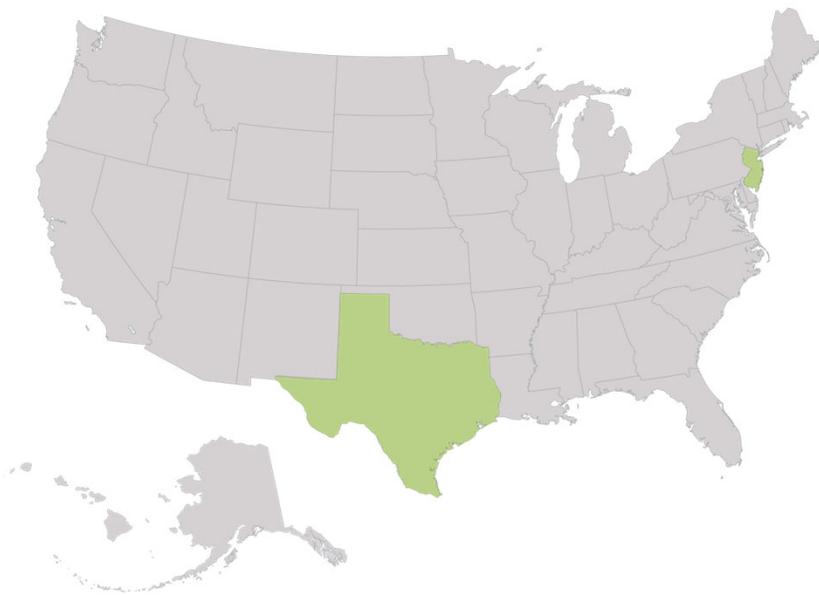


## Utah MUJI *(Cont'd)*

- **CV2209 Defective plans and specifications.**
- If [contractor] proves that [he] acted reasonably in following [describe plans and specifications] provided by [owner], then [contractor] can recover from [owner] the costs caused by reasonable reliance on the plans and specifications.

## NJ & TX: Limited Coverage

- Fewer construction-specifics (e.g., “pay-if-paid,” substantial completion)
- Necessitates tailored specials

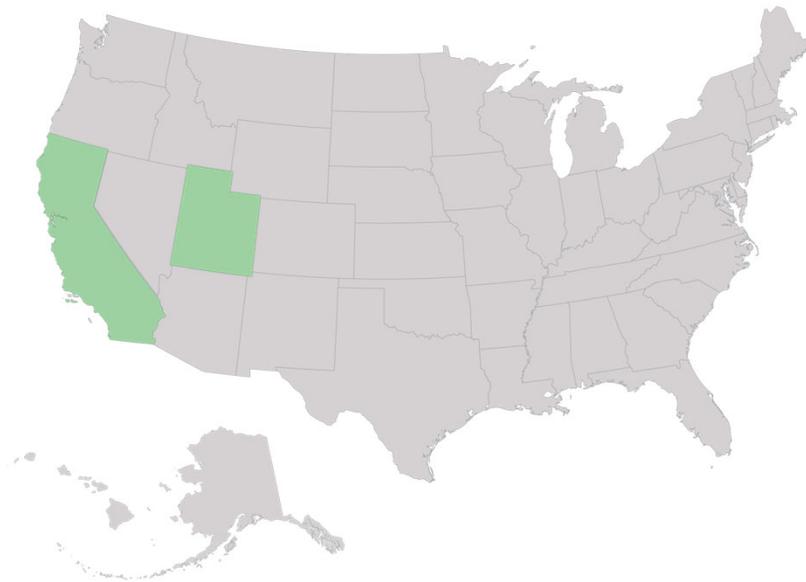


# ABA Model Instructions

- Strong starting point where patterns are silent
- Used by courts for guidance; 3d Cir. has endorsed referencing them as aids

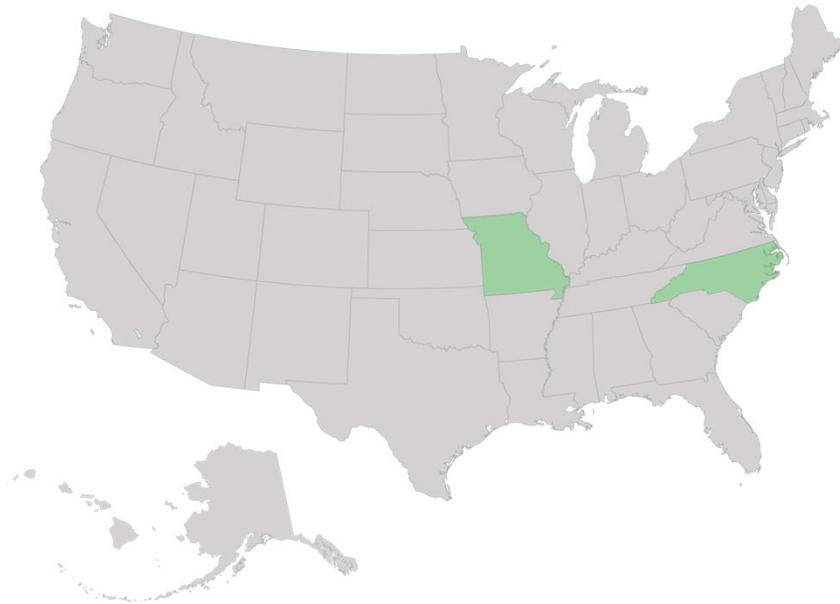
# Legal Standard: You're *Entitled* to Accurate Law

- Litigants get instructions that accurately/state the governing law applied to the evidence
- Custom OK if: correct, relevant, clear (CA test)



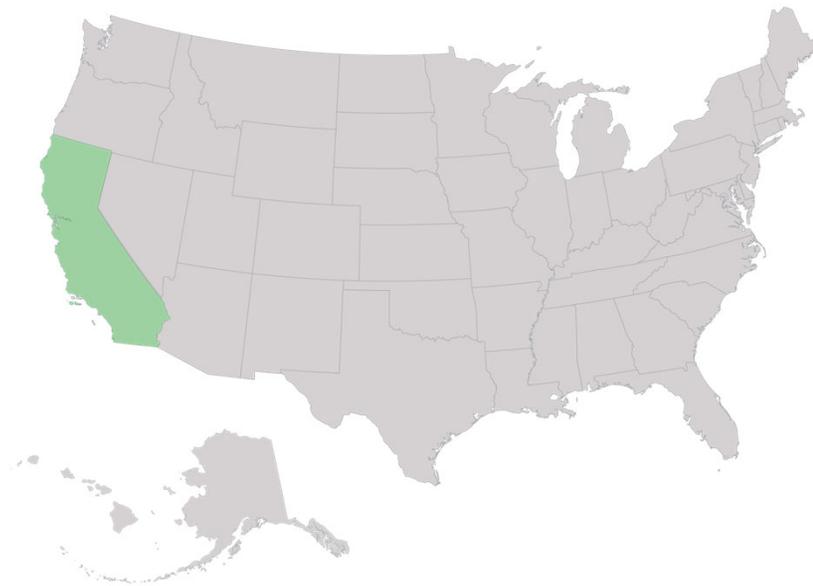
# But Courts Love Patterns

- **NC:** “Preferred method ... is the use of the approved ... Pattern Jury Instructions.”
- **MO:** “Use of [MAI] is mandatory.”



# California: More Permissive (If You Do the Work)

- Customs allowed if they meet correctness—relevance—clarity
- Avoid repetition/argument; tie to precedent

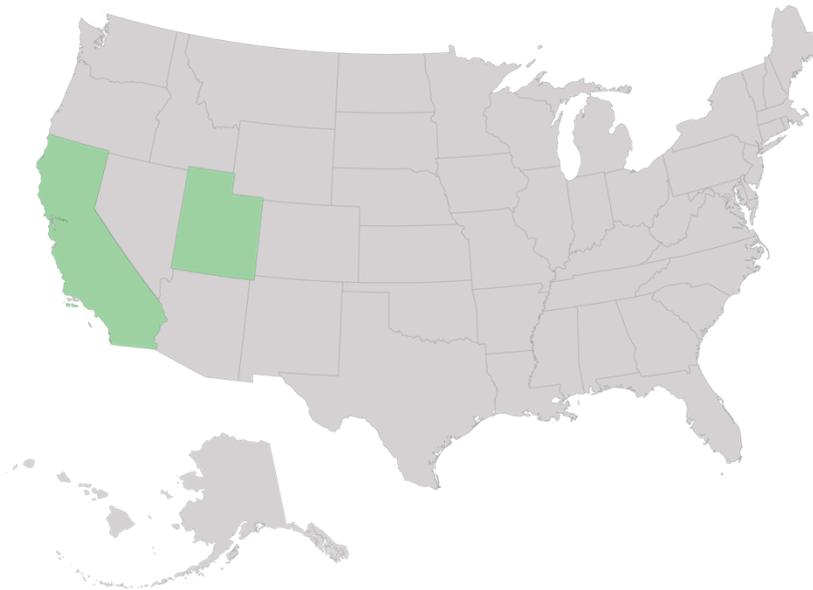


# Drafting Tips that Win

- Anchor each sentence to controlling authority
- Fill true gaps; don't re-argue facts
- Use plain English; limit elements

# Gap #1: Implied Warranty of Adequacy of Design (Spearin)

- Owner warrants plan/spec adequacy if contractor must follow
- CACI 4500 helps but lacks “warranty” context
- Utah CV2209 is lean



## Spearin: Model Instruction (Plug-and-Play)

- **Elements:** (1) Owner furnished plans; (2) Contractor required to follow; (3) Reasonable reliance; (4) Plans defective; (5) Harm
- **Add context line:** “Owner impliedly warrants correctness for intended purpose.”

## Gap #2: Duty to Disclose (Pre-Bid)

- Common; patterns rarely address
- Prime may assert sub claims against owner despite lack of privity
- Owner liability where it withheld “information ... important to [contractor’s] ability to perform” and knew contractor lacked it. (CV2206)

## Gap #3: Pass-Through Claims

- Common; patterns rarely address
- Prime may assert sub claims against owner despite lack of privity

## Gap #4: Extra Work & Change Orders

- CACI touches, but a stand-alone change-order instruction helps
- ABA 5.02 is clear and balanced
  - “On the issuance of a change order, the owner has an obligation to pay ... and to extend the time needed for performance.”  
(ABA § 5.02)

## Gap #5: Notice & Substantiation Clauses

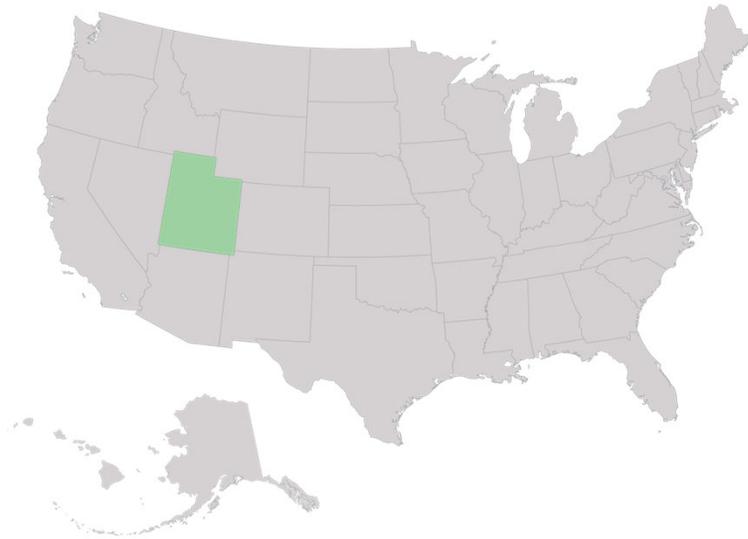
- **CACI 4521/4522:** baseline (notice; waiver)
- **Add limits:** prejudice, prior breach, bad faith, modification by conduct
- Owner breach examples include “inadequate design, excessive or disorganized changes, [or] fail[ure] to make timely payments.”  
(*Amelco*)

## Gap #6: Owner Interference / Means & Methods

- Implied duty not to hinder or delay
- ABA 4.03 gives elemented breach framework

## Gap #7: Delays & Concurrency

- Patterns rare; UT CV2225/2226 help but can over-simplify
  - **UT CV2225 Concurrent delay.**
  - If you find that both parties contributed to the delay, then neither party is entitled to recover damages as a result of the delay.
- **ABA 6.09: critical path + concurrency allocation**



## Gap #8: Liquidated Damages

- **CACI 4532:** calculation assumes enforceability
- Juries often must resolve predicate facts on reasonableness/penalty

## Three More Useful Add-Ons

- Design vs. performance specifications (ABA 8.03)
- Commercial availability (ABA 4.09 + CACI 4502)
- Adequacy of contract time (ABA 4.19)

## Strategic Choice: *Jury vs. Bench*

- Complexity favors bench (tech, CPM, multi-party allocation)
- Clean story + tight instructions favors jury
- Judicial receptivity to specials matters

## Forum Checklist (Use Early)

- Do patterns cover your claims/defenses?
- Will judge accept well-supported specials?
- How technical/voluminous is the record?
- Are equities likely to resonate with jurors?

# Front-Loading Instructions Into Case Strategy

- Plead with instruction end-state in mind
- Tailor discovery (e.g., critical path, prejudice)
- Retain experts to “teach” elements

# Packaging Specials for the Court

- Show fit to evidence (no fact-arguing)
- Pair each sentence with citation
- Offer neutral alternatives (Court choice)

# Hypo #1: Defective Design Delays

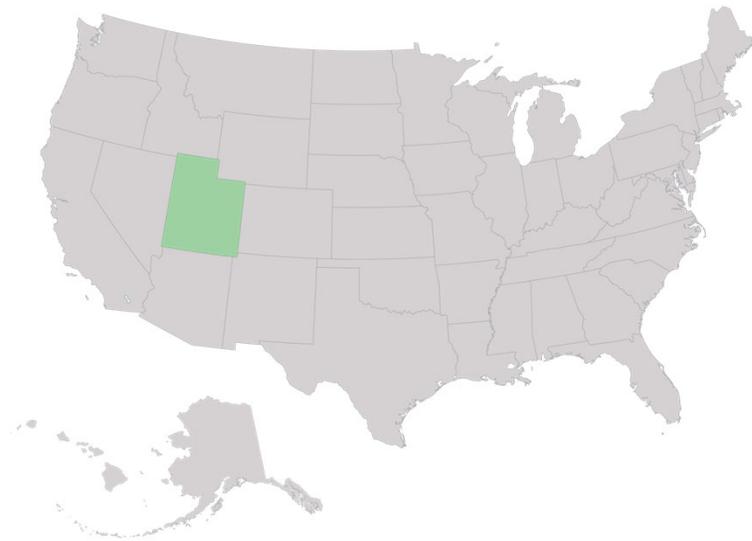
- **Issue set:** Spearin + owner interference + change order pricing
- **Instruction package:** CACI 4500 + ABA 4.03 + 5.02

## Hypo #2: Notice vs. Waiver/Prejudice

- **Issue set:** late claim, owner's actual knowledge, payments
- **Instruction package:** CACI 4521/4522 + *Amelco* limitations

## Hypo #3: Concurrency

- **Issue set:** owner-caused utility relocation + contractor staffing gap
- **Instruction package:** ABA 6.09 + UT CV2226 carve-outs

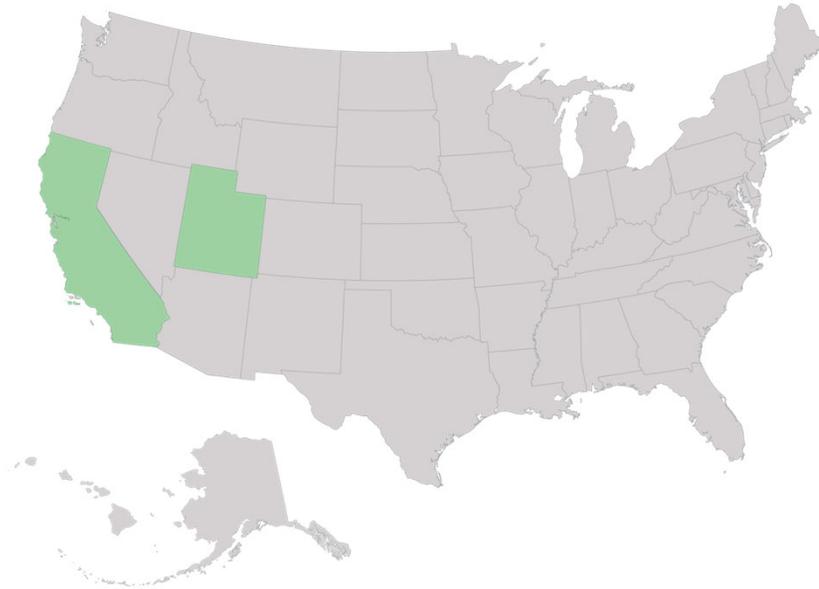


# Key Takeaways

- Don't default to a jury demand—vet instruction viability first
- Start with instructions to steer forum, discovery, experts
- Plug pattern gaps with tightly supported specials

# Resources & Q&A

- CA CACI; Utah MUJI; ABA Model Jury Instructions (Construction)
- Bruner & O'Connor (selected chapters)
- Construction Lawyer Spring 2025 article (download link in materials)



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## Utah CV2206: Owner's duty to inform.

- [Contractor] claims that [owner] had a duty to disclose the following information before the bid was submitted: [describe information.] You must decide whether, [contractor] has proved that:
  - (1) [owner] did not disclose the above-described information to [contractor];
  - (2) the undisclosed information was important to [contractor]'s ability to perform the contract; and
  - (3) [owner] had knowledge about the undisclosed information that was not available to [contractor].
- If you find that [contractor] has proved all of these facts, then [owner] is liable to [contractor] for damages.

# Utah CV2209 (defective plans); Utah CV2225 (concurrent delay)

- **Utah CV2209: Defective plans and specifications.**
  - If [contractor] proves that [he] acted reasonably in following [describe plans and specifications] provided by [owner], then [contractor] can recover from [owner] the costs caused by reasonable reliance on the plans and specifications.
- **Utah CV2225: Concurrent delay.**
  - If you find that both parties contributed to the delay, then neither party is entitled to recover damages as a result of the delay.

## Utah CV2226: Damages for delay.

- [Contractor] claims damages for delays. The contract provides that [contractor] is entitled to extra time to complete the work but is not entitled to recover damages caused by the delay. However, there are circumstances in which [contractor] may recover damages for delay regardless of the contract.
- To succeed on this claim, [contractor] must prove
  - [(1) that [owner/owner's agent] caused the delay by direct interference, active interference, or willful interference with [contractor]'s work.]
  - [(2) the delay was not reasonably foreseeable at the time the parties entered into the contract and the delay was excessive and unreasonable.]

# CACI 4500: Breach of Implied Warranty of Correctness of Plans and Specifications— Essential Factual Elements

- **[Plaintiff] claims that [defendant] provided plans and specifications for the [project/describe construction project, e.g., kitchen remodeling] that were not correct. To establish this claim, [plaintiff] must prove all of the following:**
  - 1. That [defendant] provided [name of plaintiff] with plans and specifications for [defendant]’s [short name for project, e.g., remodeling] project;
  - 2. That [plaintiff] was required to follow the plans and specifications provided by [defendant] in [bidding on/[and] constructing] the [e.g., remodeling] project;
  - 3. That [plaintiff] reasonably relied on the plans and specifications for the [e.g., remodeling] project;
  - 4. That the plans and/or specifications provided by [defendant] were not correct; and
  - 5. That [plaintiff] was harmed because the plans or specifications were not correct.

# CACI 4502: Breach of Implied Covenant to Provide Necessary Items Within Owner's Control—Essential Factual Elements

- In every construction contract, it is understood that the owner will provide access to the project site and do those things within the owner's control that are necessary for the contractor to reasonably and timely perform its work. [Plaintiff] claims that [defendant] breached the contract by [specify what owner failed to do, e.g., failing to procure a disposal permit for hazardous materials]. To establish this claim, [plaintiff] must prove all of the following:
  - 1. That [plaintiff] could not reasonably or timely perform [its] work without [short name for item, e.g., a disposal permit];
  - 2. That [defendant] knew or reasonably should have known that [e.g., a disposal permit] was necessary for [plaintiff] to reasonably and timely perform the work;
  - 3. That [defendant] had the ability to [e.g., procure a disposal permit];
  - 4. That [plaintiff] could not [e.g., obtain a disposal permit] without [defendant]'s assistance;
  - 5. That [defendant] failed to [e.g., procure a disposal permit] in a timely manner; and
  - 6. That [plaintiff] was harmed by [defendant]'s failure.

# CACI 4520: Contractor's Claim for Changed or Extra Work

- *[Plaintiff]* claims that *[defendant]* required *[it]* to perform *[changed/ [or] extra]* work beyond that required by the contract. *[plaintiff]* claims that *[[it]* should be compensated/ *[and]* should have been given a time extension *[under the contract]*.
- To succeed on this claim, *[plaintiff]* must prove all of the following:
  - 1. That the *[changed/ [or] extra]* work was *[not included in/ [or] in addition to that required under]* the original contract;
  - 2. That *[defendant]* directed *[plaintiff]* to perform the *[changed/ [or] extra]* work;
  - 3. That *[plaintiff]* performed the *[changed/ [or] extra]* work;  
and
  - 4. That *[plaintiff]* was harmed because *[defendant]* required the *[changed/ [or] extra]* work.

# CACI 4521: Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed

- The contract between the parties provided for certain procedures that had to be followed if *[plaintiff]* wanted to be paid for changed or additional work that was not required by the contract. These procedures are called “change-order requirements.” [The change-order requirements of the contract provide as follows: *[specify]*.]
- *[Plaintiff]* seeks additional compensation beyond that provided for in the contract for *[specify, e.g., fill and grading]* because *[specify, e.g., the soil conditions at the project site were not as represented]*. *[Defendant]* claims that *[plaintiff]* failed to comply with the contract’s change-order requirements, and that therefore *[it]* is not entitled to payment for the changed or additional work that *[it]* performed.
- To obtain additional compensation, *[plaintiff]* must prove that *[it]* *[followed/was excused from having to follow]* the change-order requirements.

# CACI 4522: Waiver of Written Approval or Notice Requirements for Changed or Additional Work

- The contract between the parties required [*plaintiff*] [to obtain [*defendant*]'s written approval/to give written notice to [*defendant*]] in order to be paid for changed or additional work that [it] performed.
- [*Defendant*] claims that [*plaintiff*] failed to comply with the contract's [written approval/notice] requirements, and that therefore [*plaintiff*] is not entitled to payment for the changed or additional work that [it] performed. [*Plaintiff*] claims that [it] was not required to comply with the contract's [written approval/notice] requirement because [*defendant*] gave up [its] right to insist on [written approval/notice]. Giving up a contract right is called a "waiver."
- To succeed on this waiver claim, [*plaintiff*] must prove [by clear and convincing evidence] that [*defendant*] freely and knowingly gave up [its] right to require [*plaintiff*] to follow the contract's [written approval/notice] requirements.
- A waiver may be oral or written or may arise from conduct that shows [*defendant*] clearly gave up that right.

# ABA 4.03: Duty To Cooperate And Not To Hinder Construction Work

- The law holds that the owner has an implied duty not to obstruct, hinder, or delay the project. An owner breaches a contract when its actions unreasonably obstruct, hinder, or delay the contractor's work.
- The contractor claims that the owner breached the contract because its actions interfered with the contractor's ability to perform the work. To establish this claim, the contractor must prove all of the following:
  - (1) The contractor and owner entered into a contract.
  - (2) The contractor did all, or substantially all, of the material things required by the contract (or was excused from having to do those things).
  - (3) All conditions required for the owner's performance had occurred (or were excused).
  - (4) The owner interfered with the contractor's work in a way that was unreasonable.
  - (5) The contractor was damaged by the owner's conduct.

# ABA 4.09: Warranty Of Commercial Availability Of Materials, Products, And Equipment

- When an owner specifies a single source for construction [materials, products, or equipment], the law holds that the contractor is not responsible if those materials or equipment are not (1) commercially available or (2) suitable for the project.
- The contractor claims it is not responsible for time and cost delays because the owner required it to obtain [insert name of material, product or equipment] from a single source, and the [material, product or equipment] was not commercially available from the specified source. To establish this claim, the contractor must prove all of the following:
  - (1) The contract specifications required the contractor to obtain [insert type of material, product, or equipment] from a single specified source.
  - (2) The [material, product, or equipment] required by the contract was not commercially available from the single specified source.
  - (3) The lack of availability impacted the contractor's work.

# ABA 4.19: Implied Warranty Of Adequacy Of Contract Time

- The law holds that if the owner requires the contractor to complete the work within a specified time, it must be reasonably possible for the contractor to perform the work within the designated time period.
- Here, the owner seeks damages from the contractor because the work finished late. The contractor defends that it is not responsible for delay damages because it was not reasonably possible for the contractor to complete the work within the required time. To prove this defense, the contractor must demonstrate the following:
  - (1) The contract required the contractor to complete the work within a designated amount of time.
  - (2) The owner knew or should have known that it was not reasonably possible for the contractor to complete the work within the designated time.

# ABA 5.02: Change Orders

- A change order is a written document that is signed by the owner and contractor acknowledging a change in the work required of the contractor and an adjustment, if any, to the agreed-upon contract price and/or schedule. You have heard testimony that there were certain change orders issued to the contractor by the owner during the course of the construction project. If you find that the contract contains a provision allowing the owner to issue change orders and requiring the contractor to perform work pursuant to change orders, then the owner is permitted to issue change orders and the contractor is required to perform them.
- Change orders on a construction project are very common. The fact that the owner made changes to the work does not by itself constitute a breach of contract. However, a refusal by the contractor to perform the work requested by the owner pursuant to a change order constitutes a breach of contract, unless the contractor can prove that it had legal justification for refusing to perform the work. On the issuance of a change order, the owner has an obligation to pay the contractor for the extra work and to extend the time needed for performance.

## ABA 6.09: Concurrent Delay (Slide 1 of 2)

- When multiple events, caused by multiple stakeholders, impact the project during the same time, it is called a concurrent delay. In this case, the contractor claims that its own delay should be excused because the owner caused a delay to another work task during the same time, and the owner's delay was concurrent with the contractor's delay.
- To prove that its delay was concurrent, the contractor must demonstrate the following:
  - (1) Contract performance was delayed by multiple events.
  - (2) Multiple events caused critical path delays of the project.
  - (3) Multiple events were attributable to both the contractor and the owner.
  - (4) It is impossible to allocate critical path delay between the events.

## ABA 6.09: Concurrent Delay (Slide 2 of 2)

- In order for you to find that a delay was concurrent, you must determine that both the owner and the contractor took some action that would have independently caused a critical path delay. In other words, the critical path would have been delayed the same number of days even if the contractor had not caused its delay because the owner was simultaneously causing a critical path delay.
- If the contractor can demonstrate that a concurrent critical path delay existed, the contractor is entitled to an extension of time for each day the owner concurrently delayed the critical path (but is not entitled to additional money).
- You must, however, consider each day of delay separately. You may find that an owner's delay was only concurrent with the contractor's delay for a portion of time. For example, you may determine that the owner's delay caused seven days of critical path delay and the contractor's delay caused ten days of critical path delay. In this case, the contractor would be entitled to an extension of time of seven days—the number of days that its critical path delay was concurrent with the owner's critical path delay.
- [In liquidated damages cases:] You cannot assess liquidated damages against the contractor for any day of critical path delay in which the owner caused a critical path delay that was concurrent with the contractor's critical path delay.

## ABA 8.03: Design Specifications

- Design specifications are a contract document that describes in detail the materials or products the contractor must install and the manner and method in which the contractor must perform the construction work. When design specifications are used and are part of the contract documents, the owner implicitly warrants to the contractor that the methods and materials so designated will produce an acceptable result. The contractor must follow the design specifications as one would follow a road map. The contractor is allowed to rely on the accuracy of information and instructions contained in the design specifications, and the contractor will not be liable to the owner for loss or damage that results solely from insufficiencies or defects in such information, plans, and specifications.