

# How to Overcome CACI 506 on Alternative Methods of Care in Your Medical Malpractice Case

By Benjamin Ikuta

Statistics show that in California, a plaintiff prevails less than 15% of the time in a jury trial involving claims of medical malpractice. Jurors do not feel qualified to judge the performance of a surgery or medical procedure that they have never even heard of, much less performed. And jurors still view doctors and nurses very favorably in our community.

Another significant reason why it is so hard to win in California is the jury instructions. One of the most damaging instructions that can sink even the strongest medical malpractice case is CACI 506, titled “Alternative Methods of Care.”

## How Defense Lawyers Use CACI 506

CACI 506 instructs the jury that a health-care provider “is not necessarily negligent just because the provider chooses one

medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice.”

It is critical that you understand CACI 506 in order to combat its use at trial. Defense lawyers are often trained to weave the language of CACI 506 throughout the entire trial, starting with jury selection. They will utilize CACI 506 to advance two major themes throughout the case.

The first theme the defense lawyer will use is an argument of hindsight. Defense lawyers will argue that plaintiffs and their experts are unfairly analyzing a medical decision with the benefit of hindsight. In jury selection, opening, expert examinations, and closings, medical malpractice defense lawyers will constantly use phrases like “retrospective analysis,” “Monday morning quarterbacking,” or “hindsight bias.”

They will use the instruction to show that even if a different course of action was a “better choice” that would have invariably led to a better outcome for the patient, that it is unfair to expect the practitioner to decide on the perfect course of action. They will assert that the provider made reasonable choices based on what was known at the time.

The second related theme the defense lawyer will use is that medicine is not absolute or perfect. They will argue that providers are expected to utilize their judgment and discretion based on years

of rigorous training, education, and experience. They will contend that given the discretion involved, there is not one correct route to be followed at any given time. Given that there are different decisions that can both be reasonable, the choice by the practitioner could not be deemed malpractice.

## Combat CACI 506 Even Before You Depose the Defendant

In any medical malpractice case, even in those where the “hindsight bias” or “alternate choice” defense does not seem available, it is critical that you address these issues at the defendant’s deposition.

Establish that the defendant doctor or other provider did not discuss potential alternative methods with the nurses or patient.

It is crucial that you ask what different methods or courses of treatment the defendant considered. Then you must also ask the reasons *why* a provider decided on a particular course of treatment. Ask what guidelines or literature the provider relied on when making the decision.



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Unless a defendant produces expert testimony confirming that there was more than one acceptable and reasonable method, the instruction *should not* be given at trial.

Lack of documentation is also critical. Establish that the defendant provider, per their custom and practice, would document their decision-making process. In cases of missed diagnoses, establish that the provider utilizes a differential diagnosis process. If the alternate method of care is not charted, that greatly weakens the ability to use the defense at trial.

The goal is to lock the defendant into a position that prevents them from later claiming that other reasonable alternative methods of care were available or that their decision-making was justified.

It is critical to mention that defendants are far more thoroughly trained and prepared for trial examination than deposition. Defendant depositions are often handled by subordinates rather than the trial attorneys. The deposition often occurs prior to the depositions of other fact witnesses, such as nurses or subsequent treating providers, which will greatly impact how the evidence and testimony comes in before trial. On occasion, the defendant is deposed before the defense attorney has hired all of the experts or fully understands the expert's opinions. A defense attorney preparing a client for a deposition typically takes 2-3 hours while the same defendant would be prepared for 2-3 days for trial.

Likewise, depose any other providers, such as nurses, who were concurrently treating the patient. Establish that the defendant doctor or other provider did not

discuss potential alternative methods with the nurses or patient.

In expert discovery, ask the opposing expert where in the charting the defendant documented alternative diagnoses. Thoroughly review the expert's own publications and literature to find any criticisms with the method actually taken. And, of course, see if the expert's *own* practices ever include the path of the defendant. An expert who states that he would never follow in the footsteps of the defendant but insists that the defendant met the standard of care would not come off as a credible witness.

### **Oppose CACI 506 at Trial on the Record**

Unless a defendant produces expert testimony confirming that there was more than one acceptable and reasonable method, the instruction *should not* be given at trial. *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1352 held that it was inappropriate to instruct a jury with CACI 506 when the defendant fails to provide any evidence that a provider chose a medically accepted method of treatment among alternative acceptable methods of treatment.

In *Ayala*, the patient's theory of malpractice was that the defendant family health center was negligent in failing to test the minor patient to determine whether she was suffering from hyperglycemia. (*Id.*)

As a consequence, the patient fell into a coma and suffered from a permanent brain injury. (*Id.*)

The family health center presented extensive expert testimony from a pediatrician that the patient's health care providers acted within the standard of care even though they failed to diagnose the patient's hyperglycemia. (*Id.* at p. 1360) However, "the defense did not present any evidence that the method used to diagnose [the patient's] condition, namely, a medical history and physical examination, was one of a number of approved or recognized methods of diagnosing a patient with [the patient's] history and symptoms." (*Id.* at p. 1352.) The trial court ruled that the use of CACI 506 was "marginal" but allowed it to be given, stating that it was within the scope of evidence. (*Ibid.*)

The Court of Appeal recognized that the standard of review required that it "view the evidence in the light most favorable to [the defendant] to determine whether the giving of CACI No. 506 was appropriate." (*Id.* at p. 1353 fn. 2.) Nevertheless, the Court of Appeal found that the use of CACI 506 was an error. (*Id.* at p. 1353.) The court unambiguously held "that in order for CACI 506 to be given, there must have been expert testimony presented to the jury to the effect that a medical practitioner chose a medically accepted method of diagnosis (or treatment) from among alternative medically *accepted*

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methods of diagnosis (or treatment).” (*Id.*, emphasis added.)

In *Ayala*, the court recognized that the “proper inquiry is whether the defense presented expert testimony to the effect that there were medically accepted alternative methods ... and that [the defendant] utilized a medically accepted alternative method ... so as to entitle the defense to the giving of CACI 506.” In other words, “CACI 506 requires an evidentiary showing that a medical practitioner chose a

*medically accepted alternative method of diagnosis or treatment.*” (*Id.*) Since there was no testimony by the defense experts that the defendant chose one medically accepted alternative method of care amongst several acceptable methods, the instruction should have been rejected. (*Id.*; see also *Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1323 [finding that the trial court’s error in a medical malpractice action instructing jury on “alternative methods of diagnosis and treatment”

without supporting evidence warranted a new trial].)

Just as in *Ayala*, argue to the court that depositions and discovery revealed that there was no evidence or testimony that the defendant chose one medically-accepted alternative method of care over another.

### **How to Combat CACI 506 in Trial**

In trial, explain to the jury that the defense is trying to twist the words of CACI 506 that as long as the doctor tried their best, they shouldn’t be held accountable. Show the language of CACI 501 (Standard of Care) and establish that the course taken by the provider was careless and unreasonable.

Comparing medical malpractice to auto collisions can explain the issues. For example: A driver is approaching an unprotected intersection on a rainy night. Suddenly, a pedestrian wearing dark clothing runs into the crosswalk unexpectedly. The driver decides to slam on their brakes instead of swerving out of the way. Despite slamming on their brakes, the driver hits the pedestrian. There were two *reasonable* course of action: Applying the brakes or swerving out of the way. It would be unfair to hold the driver accountable for the pedestrian’s injuries, even if swerving out of the way would have been a better decision.

Then change the example and ask the jury to imagine a scenario where the same driver is looking at his phone and the same collision occurs. The alternate decision here, being distracted, is not a careful or reasonable method of driving a car. In such a case, the driver has to be held accountable for the pedestrian’s injuries. That is true even if the driver did not intend to harm the pedestrian.

From this, explain in detail that the course or method by the defendant was careless, akin to driving while distracted. The defendant’s treatment decision, like driving while distracted, was not a reasonable way to care for the patient.

The key to defeating the impact of CACI 506 is preparation, starting with discovery, through expert selection and deposition, and culminating with the trial, to show that there were no acceptable and recognized “alternative methods of care.” ■