Fall 2000

THE Verdict

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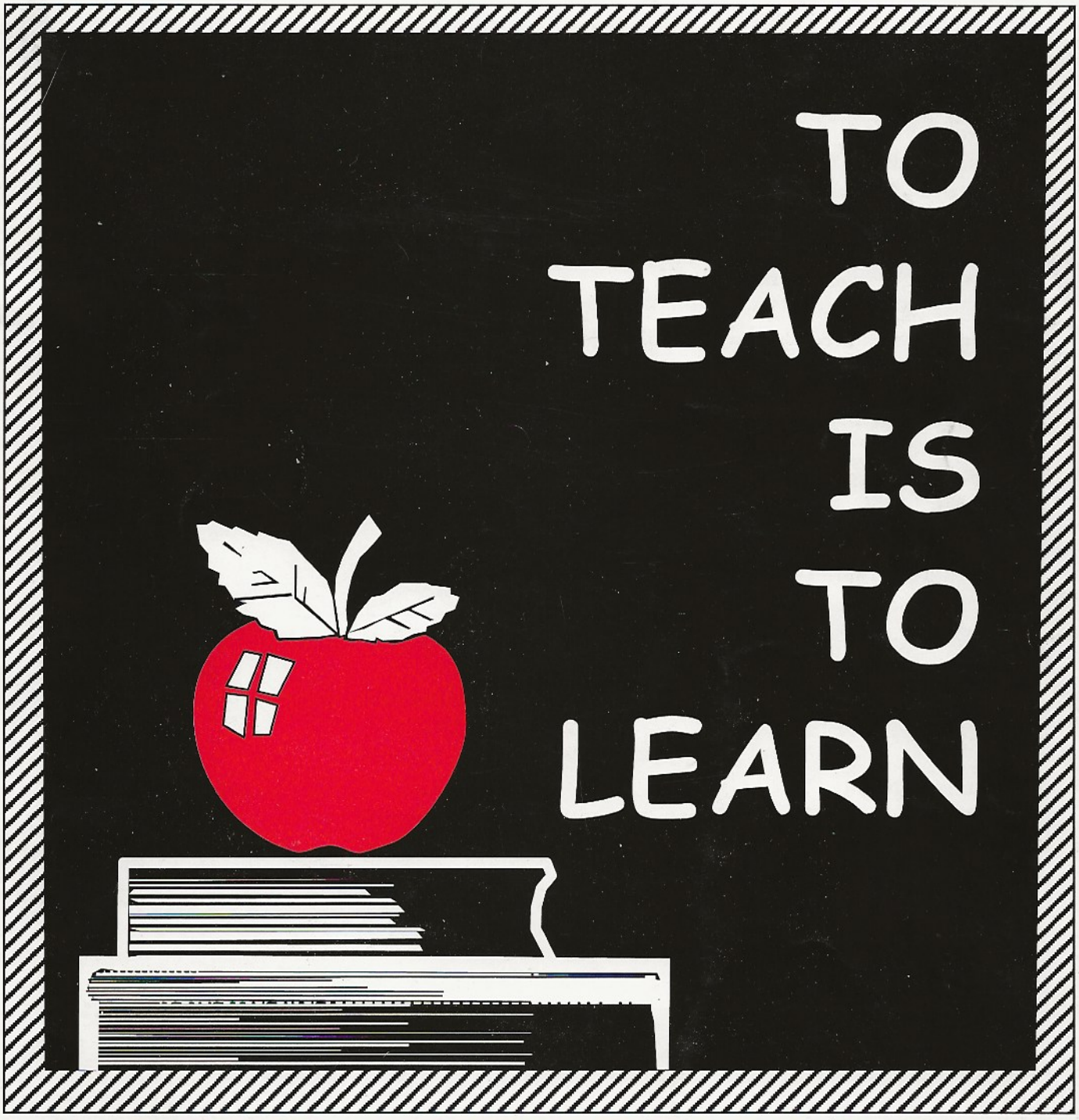

Introducing ACCTLA's mentoring program!!

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Become a mentor or use ACCTLA's mentoring program. Both will help you become a better lawyer. (See page 9 for more details.)

Membership also entitles you to ACCTLA's Membership Directory, a complete list of all members of our organization.

CALENDAR OF EVENTS

MCLE Seminar ..... Fall 2000
Further information to come.

Judges' Night ..... January 2001
Join ACCTLA as we honor Alameda and Contra Costa County judges.

What's New in Tort and Trial ..... January 2001
Learn about all the 2000 cases affecting tort and trial practice and obtain the invaluable handout.

THE Verdict
Fall 2000

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ABOUT THE COVER

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Statement of Editorial Policy
This magazine presents a forum for the various authors of matters published herein. Therefore, it does not necessarily represent the views of ACCTLA, which publishes this magazine as a public service without charge to members and judges. Materials submitted may be subject to review and editing.



To Teach Is To Learn

By Aaron H. Simon

When I began the practice of law some twenty-five years ago in Los Angeles, I differed in at least two significant respects from my present form. First, I thought I knew a great deal more than I actually did (in Twainsian contrast, I now generally feel that I know a great deal less than I actually do). Second, I was still limber and athletic enough to think that I could master a new physical discipline (it's been years since I so deceived myself). Naturally, in true trial lawyer fashion, I chose karate.

I joined a small independent downtown L.A. group, and attended classes on a fairly regular basis. Predictably, after a year or so, I plateaued, having gone about as far as my limited abilities could take me. Nonetheless, I pressed on, class after grueling class, trying to attain what for me would remain unattainable: a black belt.

In the process, I became familiar with the teaching methods of our instructor, an infinitely patient man who delighted in the process of learning by repetition. It was a process that worked remarkably well for this particular discipline, but it was frustrating for those of us who were eager to advance unrealistically quickly through the ranks.

Our instructor had another teaching practice that rankled the more impatient of his students: each of us had to spend a substantial amount of time teaching students of lower rank. This was a waste of time, I concluded, that could only function to delay the attainment of my goal. Finally, I blurted out my dissatisfaction, saying in clear terms that I was there to learn, not to teach. My instructor looked at me for a moment, a mixed look of sadness and pity, and responded slowly, as though speaking to someone who had a difficult time understanding new concepts. He said this: "To teach is to learn." I finally understood.

To teach is to learn.

That thought was the most important lesson I took away from those classes. Long after my martial skills, such as they were, became memories, I remind myself what my own teacher once taught me.

Bringing the lesson to the present, there are, of course, numerous applications. One can be seen in the efforts of our own organization in establishing a mentoring program for our members. Several of our board members have worked tirelessly on this project, and it is about to be launched (see page 9 for details). However, they cannot do it alone. They need experienced trial lawyers who are committed to improving the caliber of our representation. They need lawyers capable of handing to the next generation of trial lawyers the skills necessary to assure our clients their rights. In short, they need you.

When you are contacted about participating in our program, please do not shrug it off as one of those well-intentioned projects that you just don't have time for. You will help another trial lawyer, and you may even get something from the experience that you didn't expect.

Remember, to teach is to learn.

— Aaron Simon practices in the firm of Kazan, McClain, Edises, Simon & Abrams. The firm represents plaintiffs in asbestos and latex litigation.

ACCTLA ALAMEDA CONTRA COSTA TRIAL LAWYERS' ASSOCIATION

2000 Dues Notice

Patricia A. Parson
ACCTLA Executive Director
1884 Knox Street
Castro Valley, CA 94546
Phone and Fax: 510/538-8286

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THE Verdict
A publication of the Alameda-Contra Costa Trial Lawyers' Association
- Since 1970 -

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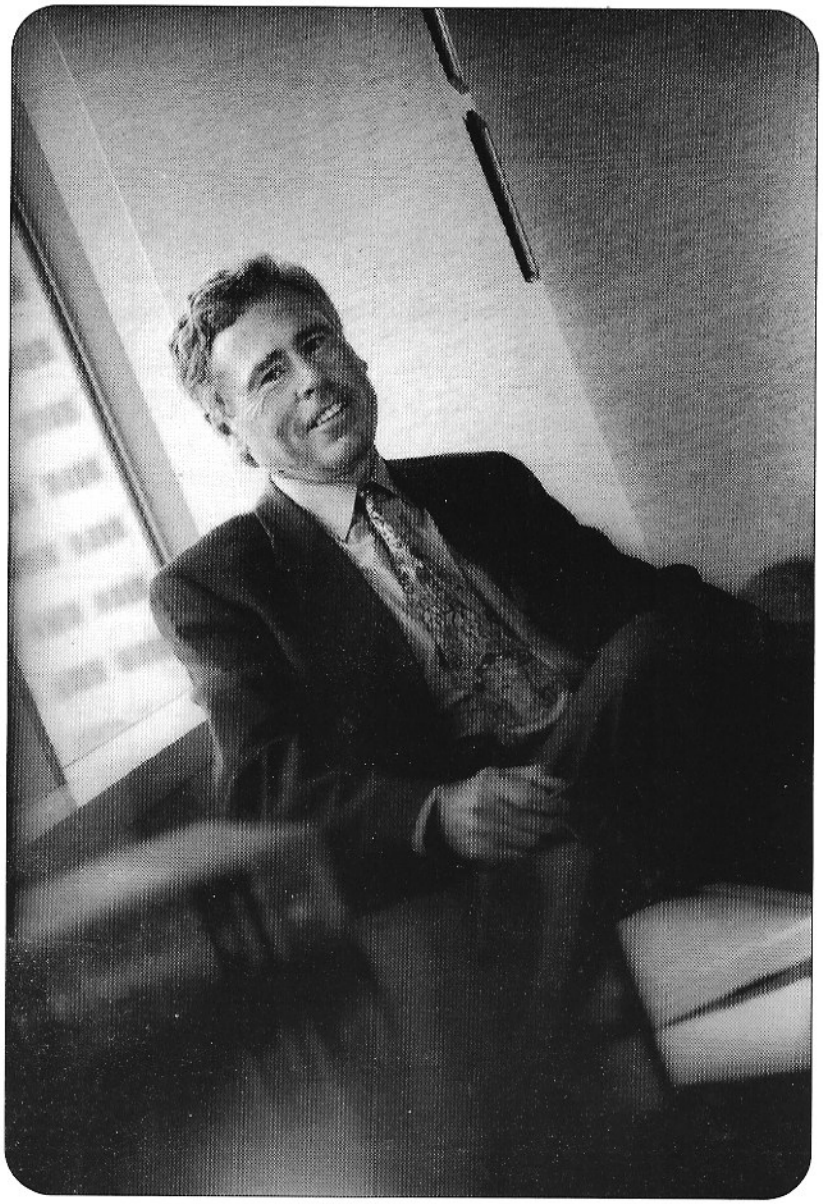
KNOWING YOUR *True Case*

By Eric H. Ivary



As lawyers, we all believe we know the facts of our case. But to recognize the truth in your case involves something else. Before we can begin to present our facts in the form of "evidence" we must first realize that we are talking to an audience, a jury, composed of people we have barely gotten to know. So, to truly tell the jury the compelling story of your case, you have to recognize it yourself.

THE TRUTH

The truth is in you and you need to find it before you can tell your client's story to a jury. My personal way to do this is to assume that all jurors are just people I already know – my neighbors, family, people I talk to in restaurants, the mechanics at my garage. Just people who watch TV game shows, soap operas, and ESPN – not especially smart, probably didn't think much of the O.J. Simpson case, and probably are skeptical of the judicial system. My mental image is that these people are the students in my class and I'm going to be the best teacher they ever had. If I'm to be a guide, I need a plan. But the Donner Party had a plan. I need a good plan – it must be real. To be real to the jury, it must be real to me. If it's not, the jury will know.

Social scientists tell us that, with juries, the truth is defined as the central core, the inescapable impression we must face about our case. It's what drives the case and motivates the jury to do something or to do nothing. If this sounds strange, it is. But how many of us have won cases, only to find out after talking to the jury that we won because they liked the least important witness or because they "knew" the defendant truck driver must have run the stop sign because truck drivers always take those "little white pills." Sound familiar? We weren't so brilliant after all. We thought we won because of our great skill at cross-examination. We find out the jury hated that part, but loved the way our client admitted that she always tried to look both ways and was sure she did this time. They liked her and they *believed* her.

But how many of us have won cases, only to find out after talking to the jury that we won because they liked the least important witness or because they "knew" the defendant truck driver must have run the stop sign because truck drivers always take those "little white pills." Sound familiar?

The point I'm making can be made another way. Have you ever won a case in your mind, only to have a jury vote for the defense? You berate the stupid jury – you won the real case; the jury must have been listening to some other case. What happened?

The truth is, there are at least two cases in every case. You must recognize the real one because that's the one the jury will hook onto.

THE TRUTH OF OUR CASE CAN BE GOOD OR BAD

It does not matter whether the truth of our case is good or bad. Either way, it must be acknowledged and acknowledged right away. If it's good, no problem. It becomes the case theme. If it's bad, you must be the first to acknowledge it so that it will have little or no impact. The worst thing to do is to let the defense bring it up first. Gerry Spence preaches that there is a place for the truth in every case. But as plaintiffs' lawyers who go first, we get to define that place.

THE PLAN

So how do we go about getting there?

Assume that your jury is a group of skeptical nice people and you are their guide or teacher – *not* a bossy teacher, but the best and most entertaining teacher they ever had.

Continued on next page

KNOWING YOUR TRUE CASE (cont.)

Construct the story of your case. Use a jury consultant, focus group, whatever it takes to find out what there is about your case (your client's story) that is compelling. Find out the negatives and the positives before you begin, not by interviewing the jury after you lose. Defuse the negatives by putting them in the right context in voir dire and opening statement.

Voir dire: Social scientists tell us that primacy is important. I like to think of this as the rule of first impressions. Get your theme out early. Voir dire questions should encourage honesty. A bad answer out loud is a good thing if it's honest, because it will encourage other potential jurors to be honest and to speak up instead of hide, and you can get rid of those silent assassins.

Opening statement: Once your theme, the motivational core of your case, is clear, tell the jury what it is. Tell them again and again. Each time a new subject arises, emphasize that it's really not new – just a variation on your theme.

The evidence: The nice thing about the truth of your case is that, as the truth, it's *safe*. It's bulletproof. The defense, on the other hand, will have to try to "explain" or try to outright confuse the jury. But if the defense cannot outright *deny* the truth, they're in trouble, big trouble.

The road to your client's reward: Plan your evidence and your witnesses from beginning to end. Think of them as trail markers which will keep the jury on the path to the truth. Even if a witness or evidence is interesting, don't put it on the path if it doesn't fit. You don't want your jury to wander off the path. Soon, they could be on the defense path. Don't create an unnecessary issue – even if you can win the point.

The defense case: Plant little time bombs for the defense. What I like to do before I begin my case is to make a list of the defense points - the ones I know the defense thinks are the really important ones. Here the rule is *different*. Whether these points are on my path or not, I deliberately and systematically refute them (or at least one or two of them) as part of my opening statement and evidence. The judge and jury may wonder why I keep proving something that's so obvious when it seems to have so little to do with the case. Example: "My client never missed a single day of work in 20 years. Never." Why call a bunch of witnesses to prove a negative? Why call co-workers, the parish priest, fellow teachers (my client here is a school teacher). Why? Because I know the defense has hired a psychologist who is going to claim my client is a faker, a malingerer. In my experience, even after I've poisoned the well, the defense will stick to their plan and drink the water. The result: a total loss of credibility which spills over to their entire defense.

Argument: Argument is your chance to shine. You've now earned the right to tell the jury that you have delivered on your promise to tell the truth and the defense didn't. You tell them what you said you would prove – use the same words – and compare the words the defense used to promise what they'd deliver. The rest is fun. Remind the jury graphically of all the little trail markers you've planted along the way that have led to this point. Then take out the verdict form. Because they believe you, because you have told them the truth, *the whole truth*, they will make every effort to fill it out the right way. The results can be very rewarding.

— Eric Ivary practices with the Oakland law firm of Gwilliam, Ivary, Chiosso, Cavalli & Brewer.

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THE Verdict

The Verdict magazine is distributed as a benefit to ACCTLA members. The Verdict is also distributed to all judges in Alameda and Contra Costa counties as well as to every major plaintiffs' firm in the East Bay. The Verdict is a magazine of general interest, read by professionals who want to keep up with the latest legal and political developments in California law.

The affluent readers are a ready market for quality services and merchandise. The Verdict offers a rare opportunity to reach this sophisticated market while supporting an organization that continues to make both practical and thoughtful contributions to the California legal landscape.

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The ACCTLA Board of Directors announces the commencement of a mentoring program to assist Alameda and Contra Costa attorneys in the handling of litigation

Announcing ACCTLA's Mentoring Program

The ACCTLA Board of Directors announces the commencement of a mentoring program to assist Alameda and Contra Costa attorneys in the handling of litigation. Reacting to problems that appear to exist throughout the Court system, in the trial of cases, a Committee was formed to help less experienced attorneys in handling issues that may come up in the course of litigation.

The actual Mission Statement is:

It is the intent of the Mentor Program of the Alameda County-Contra Costa County Trial Lawyers Association to improve the quality of practice before our Courts. To this end, volunteer mentors will be available to respond to inquiries at any stage of any civil litigation, to attorneys who primarily represent injured plaintiffs or consumers or (where insurance is not involved) individuals, in the selection, development, prosecution and presentation of their case.

Attorneys looking for assistance with their cases are invited to contact Pat Parson at (510) 538-8286, for assignment to a mentor. The mentors are volunteer attorneys, with experience in the areas that help is requested. Once the assignment is made, hopefully, the mentor will be able to assist the requesting attorney with suggestions, so that the handling of the attorney's case can be done more efficiently, more economically and more professionally.

No fees will be charged by the Mentoring Committee for its assistance. A waiver will need to be signed by the requesting attorney, as to any potential malpractice claim, on the basis that the mentor will not be controlling the litigation, only making suggestions upon being asked.

The Mentoring Program is open to all attorneys who are handling consumer cases, or who are in cases where they are not compensated by an insurance company, or who are handling cases where insurance is not present on either side. Membership is not required in the ACCTLA for a first time caller, but anyone calling a second time, or making significant time demands on the mentor, will be required to join.

WOULD YOU LIKE TO BE PUBLISHED?

Publication in the Verdict is excellent exposure. Our readers are most interested in issues surrounding plaintiffs' personal injury, family, appellate, criminal and/or business law. Transforming a brief on an interesting issue or writing about a recent case you have tried can be a fast and easy means to prepare an article that many local attorneys and judges will read.

If you are interested in submitting an article to THE VERDICT, send it to Molly Harrington, Gwilliam, Ivary, Chiosso, Cavalli & Brewer, 1999 Harrison Street, Suite 1600, Oakland, CA 94612. Articles must be submitted on disk.

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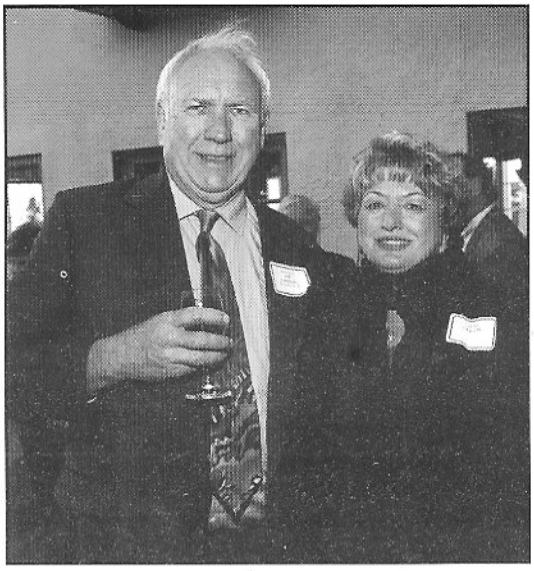
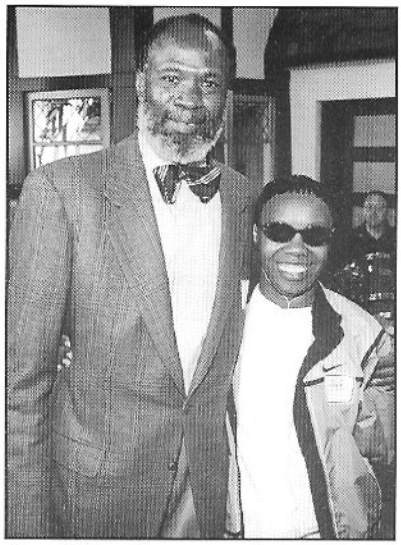




Hon. Henry Ramsey and Zakiya Hooker

Zakiya

Breaking Musi ACCTLA's Sum

She's a singer, song-writer, and

By Jo A

ACCTLA's Summer Cocktail party commem The mixer had all the ingredients for a g But what really put this year's event over BLUZ 4 U.

Who is Zakiya Hooker? That's a good question lawyers. Many court insiders would omit from singer with style and sass. Like her songs, she li more. Zakiya exudes a spirit of defiance and dar of musicians and songwriters.

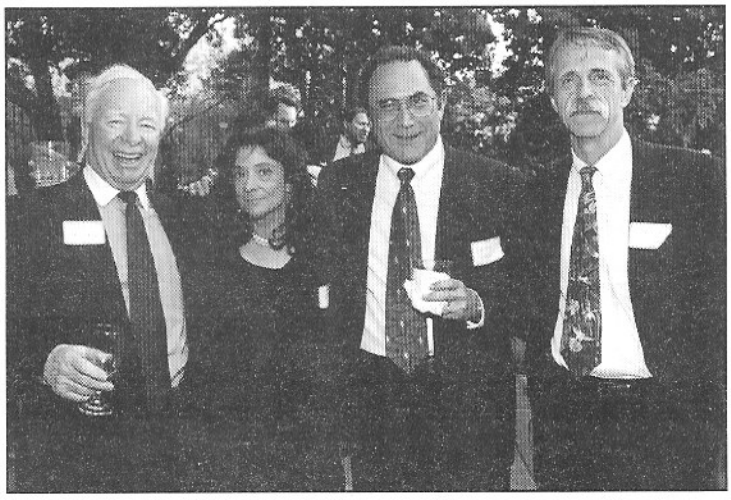
ACCTLA members know Zakiya Hooker as a p Manager for Jury Services, supervises the daily duty. What happens when talent combines with story of Ms Hooker's success in the courthouse

Seventeen years ago, Zakiya Hooker got a job w attendant. Zakiya didn't earn much money a benefits. She was a single-mom raising three respect among peers and management as a persi servant. Today, her position as Court Manager i operation and makes it look easy.

When Zakiya Hooker was a little girl, she wa listening to the blues. Her father encouraged he as her inspiration and idol. Zakiya's already mad tour. She's played at Los Angeles' famous House Charlie Musselwhite, and John Lee Hooker. (Di

Zakiya is moving up and out in her care promised to play one more gig at next y your last chance to see her up close and per the opportunity to dance at a private part

Be there – or be square.

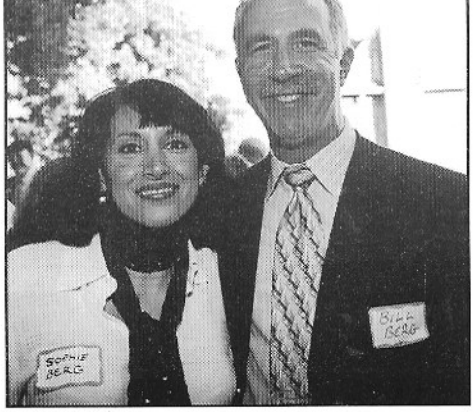


From left: Richard Bridgman, Jo Ann Kingston (party organizer), Aaron Simon (ACCTLA President) and Richard Phelps



From left: Hon. Joyce Cram, Matthew Eglin and Kelly Balamuth (ACCTLA Treasurer)

Our hosts: Sophie and Bill Berg



Special thanks to:

Sophie and **William Berg**, our gracious h garden; **Peter Hinton** for his wine sele penultimate organizer; All others who ma

Hooker!

cal Boundaries at mer Cocktail Party

...Alameda County Court Manager?

nn Kingston

ated this organization's swing into the new millennium. eat party – ambience, food, libation, and location. ne top was songstress Zakiya Hooker and her band –

r Alameda County judges and trial their answer that Ms. Hooker is a s our spirits and leaves us wanting g accompanied by a first-rate band

ite bundle of energy who, as Court nflux of people summoned for jury nbridled attitude is the fascinating nd music industry.

rking as an Alameda County court d didn't receive any Civil Service sons. Ms. Hooker quickly gained ent, intelligent, and dedicated civil well-deserved. She runs a seamless

ed to be a singer and performer. She grew up taught her, and became her biggest fan as well it to Hollywood and been around the world on of Blues alongside giants like John Hammond, I mention that John Lee is Zakiya's father?)

, but she has not forgotten her friends. She's r's 2001 Summer Cocktail Party. This will be nal. After next year, I doubt any of us will have to the sounds and swing of BLUZ 4 U.

sts, for offering their great home and fabulous ions; Pat Parson for being a sweetheart and e the party a screaming success.



Hon. Ken Burr and Linda Burr

From left: Hon. David Krasna and Hon. Demetrios Agretelis



From left: Pat Flier, Hon. Richard Flier and Paul Rein (ACCTLA Secretary)





Rick Baskin on harmonica and Zakiya Hooker and BLUZ 4 U

Documents & Depositions in Bad Faith Cases: A Practical Approach

by Gerald L. Kroll

How does the insured's counsel back the insurance company into a corner from which there is no escape? The insurance company will probably do it for the insured since insurers have a habit of setting themselves up for bad faith. But, the plaintiff still needs an effective discovery plan to uncover and prove his case through the insurance company's documents and witnesses.

THE "NUTS AND BOLTS" DOCUMENT LIST

What may look like a good bad faith case on its face may look even better after discovery commences. After all, there's nothing like finding the insurer's dirty laundry in its file documents.

So, where does the attorney start? True, every case is different. But, in the bad faith field, there are certain categories of documents that routinely deserve attention during discovery.

What follows is a general list of document categories that should be considered when pursuing your bad faith case:[1]

Claim File. Insurance companies are required to maintain a file which contains all documents, notes and work papers, including correspondence, which reasonably pertains to the claim in enough detail so that events which transpired can be readily determined by a review of that file. (Cal. Code of Regulations, Article X, Chapter 5, Subchapter 7.4, section 2965.3.)

In that regard, insurance companies routinely maintain a file commonly known as the "Claim File" which contains documents relating to the claim presented. The Claim File is normally maintained at the local, regional and home office levels. In other words, there can be three separate files, in three separate locations containing some identical as well as some different information. So, a document production demand should include all three.

Inside the Claim File, one will find everything from handwritten notes, to internal messages, to correspondence, to claims activity log notes. These documents will assist the attorney questioning the claims handler and his superiors by providing a road map of action taken, by whom and on what date. They are absolutely essential for the expert witness.

Underwriting File. Insurers also routinely maintain a so-called "Underwriting File" which contains documents relating to the placement of the insurance policy. Some examples of what may be found in the Underwriting File include, but are not limited to, the insurance policy, the application, rating forms, communications with the agent or broker, endorsements to the policy, notes, and general correspondence relating to the insurance contract. In essence, this file should contain the written record of how the policy came to be in force.

When evaluating the insurance risk, the Underwriter may also ask to see claims information. That means that documents from the Claim File may also find their way into the Underwriting File.

E-mail or Computer Generated Information. It is a good idea to seek discovery of e-mail communications or other computer generated information in addition to the other categories mentioned. True, if it relates to the claim, it should already be in the Claim File – whether electronically stored or not. But sometimes it's not. So, no matter how the attorney chooses to accomplish this (*e.g.*, by including e-mail and computer generated information among the documents demanded for each

category, by making a separate request for them, or simply defining the term "document" to include them), he should demand production of electronically stored documents.

Insurance Company Records Relating to Agency Issues. The relationship between the agent or broker, on the one hand, and the insurer, on the other hand, may be a central issue. If so, demand that the insurer produce its documents which refer to its business relationship with the broker or agent. Be on the lookout for documents that can be used to establish actual or ostensible agency. When documents are finally produced, you may discover a written contract (sometimes labeled "Agency Agreement" or "Producer's Agreement") that sets forth the nature and extent of the broker or agent's actual authority.

Reserves and Reinsurance Materials. Insurance companies establish reserves to pay claims and expenses related to defending the insured. When the insurer has established a "Loss Reserve," it has set aside funds toward payment of the insured's loss. In addition, an "Expense Reserve" may be maintained to cover such items as adjusters' fees, attorney's fees and costs.

The existence of reserves may be relevant in many ways and actually undermine the insurer's position (*i.e.*, to show that the carrier set a reserve due to the potential for coverage while, at the same time, it refused to defend its insured).

In addition, many insurers are reinsured for their losses with reinsurance companies. The dollar amount that any particular insurer retains for its own account will vary as will the type of reinsurance protection. Nonetheless, the usefulness of reinsurance information should be considered. At the least, there may be important non-privileged references to the nature and financial exposure of the claim in the documents flowing between the insurance company and its reinsurer. For guidance concerning discovery of reserves and reinsurance information see *Lipton v. Superior Court,* 48 Cal.Rptr.2d 341 (1996).

Claims Manual. Did the insurance company handle the claim in accordance with its own policies and procedures? A good starting place can be the company's own Claims Manual. It is usually a rather thick document providing the claims handler with company policies and procedures for handling different types of claims. Some companies may seek to cloak the production of this document in a protective order by claiming trade secret or even battle to keep this document out of your hands completely. But by making the effort, the insured may reap rewards. Comparing how the claim was handled to how it should have been handled – according to the company itself – can be a valuable exercise.

The Second District Court of Appeal took a hard look at an insurer's attempt to block production of a Claims Manual in *Glenfed Development Corp. v. Sup. Ct. (National Union Fire Ins. Co.),* 53 Cal.App. 4th 1113, 62 Cal.Rptr.2d 195 (1997). In holding the insurer's Claims Manual discoverable, the court was unimpressed by the insurance company's argument that the Claims Manual would not be admissible at trial and was not likely to lead to admissible evidence. In fact, the court cited three cases (including *Neal v. Farmers Ins. Exchange,* 21 Cal.3d 910, 923, fn. 8, 148 Cal.Rptr. 389 (1978)) for the proposition that, for years, California courts have found claims manuals admissible in coverage litigation. Further, it found the current Claims Manual discoverable even though it was not distributed until long after the policy was issued.

Underwriting Manual. If the case involves an underwriting issue, then find out whether or not the insurance company maintained an Underwriting Manual. That is where one may find the guidelines that should have been followed when the insurer agreed to the coverage in the first place.

Policy Language and Its Genesis. Some insurers maintain a copy of the policy in the Underwriting File. Some do not. To cover that situation, the document production request should include a category seeking the insurer's copy of the insurance contract.

Also, when issues arise relating to the origin of policy language, the nature and extent of policy coverage or policy interpretation, consider requesting the drafting history documents. The Second District Court of Appeal has noted that:

[T]he drafting history documents are analytically indistinguishable from the claims manual and are clearly discoverable (citation omitted). *(Glenfed Development Corp. Sup. Ct. (National Union Fire Ins. Co.), supra.,* 53 Cal.App.4th 1113, 1116, fn 1.

Extra Contractual Liability Insurance. To shield themselves from adverse financial exposure in bad faith lawsuits, the in-

Continued on next page

This article originally appeared in the Volume 27, Number 2, March 2000 issue of the Consumer Attorneys Association of Los Angeles' Advocate.
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surance company may have purchased liability insurance. While insurers are prohibited by public policy in this state from insuring against punitive damage awards, they can seek to obtain insurance to respond to economic/non-economic damages sought as a result of the insurer's breach of the covenant of good faith and fair dealing.

Just as the discovery of liability insurance information in a personal injury lawsuit is fairly routine, the plaintiff should obtain the details of the insurer's insurance coverage, if any, which might respond to the damages you are claiming.

Information About Other Bad Faith Suits and Other Claims with Similar Subject Matter. This is where things get a little tricky. If any discovery request is going to draw an objection or start a range war, this is one of them. Expect the insurance company to raise every objection imaginable to block efforts to obtain this information. Some examples of what to expect are objections based upon burden, confidentiality and other insureds' right of privacy.

Nonetheless, the information contained in the claims files relating to other insureds may be relevant or lead to discovery of admissible evidence. For example, you may be able to provide the true meaning placed on policy terms by the insurer or prove prior misconduct by the same claims handler through non-parties' claim files. So, the battle may be worth it.

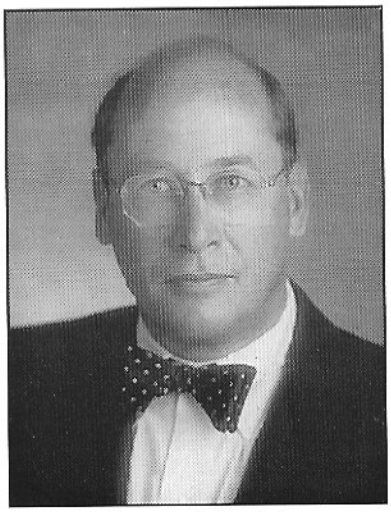
Cases that are instructive on this issue include: *Colonial Life & Ac. Ins. Co. v. Sup. Ct. (Perry)*, 31 Cal.3d 785, 183 Cal.Rptr. 810 (1982) (use of other insureds' claim files to show conduct as a "regular business practice"); *Moore v. American United Life Ins. Co.*, 150 Cal.App.3d 610, 197 Cal.Rptr. 878 (1984) (use of non-party claims files to prove the insurer knew the standard to determine "disability"); *Canada v. California Union Ins. Co.*, 118 FRD 242 (DDC 1986) (use of other insureds' claims files to show interpretation of "asbestos"); *Neal v. Farmers Ins. Exch., supra* (proof of malice demonstrated by prior course of conduct).

Insurance Department Records. Provided that you are suing an insurance company admitted to conduct insurance business in this state, you should determine what documents you can obtain directly – and informally – from the Department of Insurance. At a minimum, the Department should have on file a copy of the insurer's Annual Report which contains a financial snapshot of the defendant. This information is especially handy to prove a defendant insurer's net worth during the punitive damage phase of trial.

SEC Records. When the insurance company is a publicly traded company, consider obtaining records from the Securities and Exchange Commission. Information contained within the filings required by that agency may prove useful to your case.

Records of the Agent or Broker. Sometimes what doesn't exist in the insurance company's records, does exist within the records of the Agent or Broker. There is a high probability that the agent or broker maintains both Underwriting/Placing records as well as documents relating to the claim file. The plaintiff's attorney must make it a priority to obtain these documents as they are vital for at least the following reasons:

- They can provide the missing link to prove the case against the insurance company (for example, the agent or broker may tend to be more candid about the claim than the insurance company personnel and that may, in turn, be reflected in her documents);



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• They can provide evidence of the agency relationship between the agent or broker on the one hand and the insurer on the other hand; and,

• They can provide evidence of malpractice on the part of the broker/agent.

Get Input From Your Experts. Lining up experts and consultants early is a good idea. The experts can help to steer the case in the right direction so that counsel obtains the documents she needs. After all, they are the "experts" and should know what they need to review before forming an opinion.

PRIVILEGE ISSUES

Bad faith lawsuits routinely involve issues relating to the attorney-client and attorney work-product privileges. While a detailed discussion of these issues is outside the scope of this article, a few deserve brief mention.

Inadvertent Disclosure. Many times, attorney-client communications between the insurer and its counsel are inadvertently contained within the hundreds or thousands of pages of material produced by the insurance company. In *State Compensation Insurance Fund v. WPS, Inc.,* 70 Cal.App.4th 644, 82 Cal.Rptr.2d 799 (1999), relying on Evidence Code section 912, the Court of Appeal refused to take a "tough luck" approach on the privilege issue. Rather, the court ruled that an underling's "slipup" resulting in an accidental, inadvertent disclosure of privileged information by the attorney did not translate into a waiver of the privilege.

Dominant Purpose Test. The Supreme Court set forth the "dominant purpose" test in *Holm v. Superior Court*, 42 Cal.2d 500 267 P.2d 1025 (1954). The Court held that photographs and reports sent by a city's claim investigator to the city's defense counsel were privileged. In doing so, the Court determined that the dominant purpose for creating the reports and photographs was a means of communicating confidential information to the attorney. (*See, Travelers Ins. Co. v. Superior Court,* 143 Cal.App3d 436, 191 Cal.Rptr. 871 (1983) [for the privilege to attach, the trial court must determine whether the dominant purpose of the communication was for transmittal to an attorney in the course of professional conduct].)

Claims Attorney Communications Privileged. The insurance company may hire an attorney to investigate a claim and provide coverage advice. In the event that the purpose in retaining the lawyer was nothing other than for a legal opinion or advice, you will likely be faced with a successful claim of privilege. (*Houston General Ins. Co. v. Superior Ct. (Thomsen),* 108 Cal.App3d 958, 166 Cal.Rptr. 904 (1980); *Aetna Cas. & Surety Co. v. Superior Ct.* (Pietrzak), 153 Cal.App3d 467, 200 Cal.Rptr. 471 (1984).)

"Advice of Counsel" Defense Waives Attorney-Client Privilege. As an affirmative defense to the bad faith lawsuit, the insurance company may claim that it relied upon the advice of its counsel. If so, the insurer has waived the attorney-client privilege, at least with respect to advice it received and relied upon. (*See Transamerica Title Ins. Co. v. Superior Ct. Ibank of the West),* 188 Cal.App.3d 1047, 1053, 233 Cal.Rptr. 825 (1987).)

Joint Client Exception to Attorney-Client Privilege. Defense counsel hired by the insurance company has both the insurer and the insured as clients. That means neither one can invoke the privilege in civil litigation between them. (Evid.C. §962; *Glacier General Assur. Co. v. Superior Court (Camou),* 95 Cal.Rptr., 3d 836, 157 Cal.Rptr. 435 (1979).)

Communications Intended for Information or Assistance of Counsel. Under the prevailing view, claim reports by the insured to his liability insurance carrier are protected as privileged. (*See, Heffron v. Los Angeles Transit Lines,* 170 Cal.App.2d 709, 718, 339 P.2d 567, 74 A.L.R.2d 526 (1959); *Gene Compton v. Superior Court,* 205 Cal.App.2d 365, 23 Cal.Rptr. 250 (1962).)

DEPOSITIONS

Once the insurance company has produced its documents, it is time to move on to who did (or failed to do) "what," "to whom," and "when." What claims information did the insurance company gather? How was it handled? Who made the decision to deny coverage? When was it made? What was the decision based upon? There are just a few of the many questions counsel will pose to the insurance company personnel involved with your client's claim.

Some examples of the categories of individuals the attorney will want to depose include:[2]

Claims Handler/Adjuster. The claims handler/adjuster is the front-line person assigned to handle the claim. Her "fingerprints" will be all over the claims file even if she is simply an information gatherer for the company. This individual should be able to walk you through the claims file, including the claims activity log. Although it may seem tedious, spend the time during the deposition to make the witness tell you each and every claims handling step that she took. Identify the supervisor/manager to whom the claims adjuster reported and find out the instructions and communications the claims adjuster received from that person.

Continued on next page

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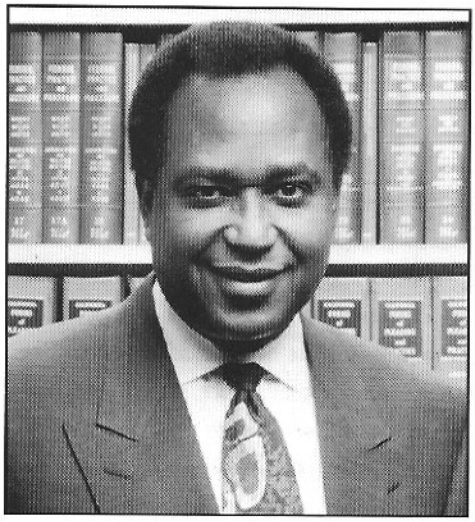
A Book Review

Blue vs. Black: Let's End the Conflict Between Cops and Minorities

by John L. Burris
Published 1999 by St. Martin's Press



By Paul L. Rein



John Burris, ACCTLA member, former ACCTLA Board member, and ACCTLA seminar speaker on Civil Rights issues, has published an entertaining and constructive analysis of the complex interactions between urban police and the racial minority community. His book, "*Blue v. Black*," features the *subtitle*'s focus on finding solutions for lessening tension, increasing communication, and "*ending the conflict*." First hand accounts of important police/civilian encounters and Civil Rights trials document prejudicial attitudes among *some* urban police.

This well-written book will hold your interest, and makes a genuine effort to be objective and to explain the challenges and difficulties faced by police, while suggesting improvements in policies and practices to allow police to properly do their job *without* overstepping their legal authority. Burris seeks an improved focus on selection and training of police to weed out those unable to control and limit the amount, scope and use of force to these legitimate needs of proper law enforcement.

Burris shares an understanding of the challenges facing police, gleaned from his years working with police as a prosecutor in Chicago and Alameda County in the late 1970's. He strives to be objective, striking a balance between legitimate ends of law enforcement and the rights of racial minorities to be free from police overreaction and abuse; to obtain equality of treatment, dignity and courtesy from challenged police officers who sometimes treat minority citizens as presumptive "enemies."

Within two weeks of going into private practice in 1979, Burris was appointed by Oakland Mayor Lionel Wilson to investigate the police shooting death of unarmed 15 year old Melvin Black, shot eight times in the back by police allegedly seeking a sniper. Burris's 700 page report was initially *suppressed*, hidden by the powers that be until Melvin Black's family obtained the report as part of a wrongful death civil suit.

Burris found that civil rights law gave him the opportunity to make an impact, "representing victims," "redressing wrongs and holding people accountable." He adopted the vocation of standing up for victims "not necessarily criminals, but regular people going about their business, to be sure that official lies did not go unchallenged."

Yet Burris makes clear that he is *not* "anti-police," and believes "only a handful are truly brutal." However, bad cops often get away with it, largely because of the "code of silence." We need "strong leadership in the law enforcement hierarchy and more careful attention to hiring, training, and evaluating police officers."

Burris' book comes out at a time of increased political focus on police harassment for "*Walking while black/driving while black*," where many "law-abiding" minority drivers believe they have been unlawfully stopped, detained, arrested, searched, or hassled by overzealous police. Ironically our new California Governor, whose strongest financial supporters have been police, correctional officers, and prison building contractors, has *vetoed*

Continued on next page

"driving while black" legislation, which sought statistical study of existing records to ascertain the degree to which racially biased traffic stops may exist. *Many* minority citizens of all social and economic backgrounds can confirm there *is* a major problem that needs addressing; it is a constant source of police/minority stress, a problem white drivers may be unaware of, noticed by the media only when the black person complaining about harassment turns out to be a person of prestige in the community.

BRUTALITY STORIES

Burris describes police misconduct cases he personally litigated: the infamous *Rodney King* beating (Burris was associate trial attorney and handled closing arguments at the civil jury trial resulting in $3.3 million compensatory damages award against the Los Angeles police); *Rodney Davis*, yanked from his car and needlessly blasted with 50,000 volts of electricity from a Taser "stun gun"; the wrongful beating and arrest of *Darryl Hampton*, respected director of the West Oakland "corn Community Center; *Bertha Ketter*, in her sixties, *choked* by a female police officer who decided the gum she was chewing might be some form of drug; multiple persons hassled without cause for "walking while black," a major form of police harassment; and a case of local interest, the arrest and beatings of multiple black attendees at the 1994 "Festival at the Lake" (Lake Merritt, Oakland).

Burris uses police mishandling incidents to highlight how *proper* police training in effective communication could have *avoided* confrontational situations.

The stories told by Burris and supported by jury findings should help to awaken those skeptical that police hassling of minorities is *still* a major fact of life. Burris balances the book by giving examples of police departments and individuals who work to *improve* police-community relations, including supervisors in the Oakland Police Community Policing Division.

Burris describes common factors sometimes learned the hard way by minority citizens coming into contact with police: the "attitude test" (showing "wrong" attitude, i.e., the lack of "proper" *respect* for police, and being hassled, roughed up, or arrested for "interference" as a result); the police *"code of silence"* which keeps police from testifying against or reporting abuses by other police officers, keeping "good" cops from helping to weed out the "bad apples."

POLICING THE POLICE

District attorneys have problems prosecuting police brutality crimes because of the close working relationship between police and the D.A. A District Attorney cannot "objectively" evaluate claims of misconduct and brutality against the same officers with whom he works on a daily basis.

While *Rodney King* had the fortuitous circumstance of a videotape to overcome police coverup efforts, real justice requires the police themselves to follow the law and require the same of their fellow officers. When instead, they group together and *support* officers charged even in the most glaring of abuses – for example the NYC sodomizing of Abner Louima, in a New York police department restroom, where the guilty officers were *cheered* upon returning after a short suspension – there is little likelihood of attitude changes needed for improved police community relations.

In a chapter entitled "The Failure to Communicate," Burris calls for police training in communications and strategy to de-escalate conflict situations; to treat all citizens with respect and courtesy; and to avoid letting their own egos turn "contempt of cop" into a primary criminal offense. Officers need training, "to act rather than react, to set aside emotions, to respect the rules of law." Evaluations of new officers by trained superiors and training and monitoring skills at de-escalation, people-handling, communication, attitude and cultural sensitivity are needed.

Burris describes police abuses, intertwined with discussions of potential "solutions," and "what works." He compares statistical analyses of police review board, civilian review board, and police commissions results in investigating alleged police misconduct. One problem in "weeding out" bad police officers is that, even when municipalities have settled police abuse lawsuits, the involved officers are rarely disciplined, even when particular officers have citizen complaints against them in large numbers of separate incidents. Would requiring a police department's budget to *pay for* monetary settlements of "police misconduct" civil cases, provide incentive to retrain and discipline problem officers, motivated by the direct financial cost to the police department when it must pay damages?

Ultimately, Burris seeks a *partnership* between the police and the community. He quotes the supervisor of an Oakland community policing division, that:

"Community policing is about... changing stereotypes, breaking down myths, and reintroducing police as individuals, as people who happen to keep law and order in your neighborhood. Our presence should be comforting rather than confrontational or hostile."

Burris' book should stimulate efforts to understand and improve police relations with minority communities.

— Paul Rein is in private practice in Oakland. He specializes in disabled access rights litigation.

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