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Fall 2017



The History of ACCTLA:

The Beginning and Early Years

J. Gary Gwilliam

2018 DUES NOTICE

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from the editor



Jayme L. Walker

Alas, ACCTLA this is my last editor's message for my year as editor of the *Verdict*. It has been both a pleasure to bring you these articles and to put together three issues of this magazine but it has also been a toil to find people to contribute and to get everything in working, publishable order. Those are the most rewarding experiences, the ones that include hard work followed by successful outcomes. That is when we are in flow. Those of you who have helped out by contributing your articles, your announcements, and those of you who have reached out and said thank you, have made this a worthwhile endeavor and made me proud and happy to be a part of this organization. We all have busy practices and in the grind of all our obligations, it is difficult to find time to do one more thing. But all of us continuing to come together as part of this organization, participating in its events, contributing to this magazine, mentoring new members, and helping out this community is a worthwhile endeavor that I hope this issue inspires all of us to do more in those regards.

In this issue, my mentor, Gary Gwilliam, wrote an article on the history of this organization. It was extremely interesting for me as a relatively new member and I was delighted to see that he had yellowed copies of some of the first editions of the *Verdict*. I was so delighted that we decided to reprint one here. Moreover, this is a reminder that we were once without an organization and some of our active past presidents helped bring it back to life. ACCTLA is valuable and continues to serve the purposes for which it was formed, including promoting collegiality, high quality education, and fostering a relationship between the bench and the bar.

My own article continues to follow the year-long theme of my tenure at this magazine, which is promoting social justice by promoting diversity and promoting representation and pro bono commitment to those most vulnerable in Alameda and Contra Costa County.

Finally, the article by a new, young lawyer, Cassie Springer, follows the ongoing theme of promoting mentorship and diverse, young lawyers in this organization. Bravo to Cassie for stepping up to the plate.

Many thanks — to all of you — for your readership. Cat Cabalo will be taking over as editor next year and I encourage you to help her by submitting top-quality work she can publish for the benefit of all our members. ◆

In solidarity,

Jayme

—Jayme L. Walker is a partner at Gwilliam, Ivary, Chiosso, Cavalli & Brewer. She exclusively represents plaintiffs in employment, civil rights, and personal injury cases.

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THE Verdict

A publication of the Alameda-Contra Costa Trial Lawyers' Association

- Since 1970 -

Editor

Jayme L. Walker
Gwilliam, Ivary, Chiosso, Cavalli & Brewer
1999 Harrison Street, Suite 160
Oakland, CA 94612 • 510.832.5411

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LEGISLATIVE WRAP UP 2017

by Nancy Peverini

What a crazy year 2017 turned out to be. With the election of President Trump, it was crucial that California continue to lead on consumer protection efforts. While our partners at the American Assn. for Justice continue the federal fight, CAOC fought hard to successfully defeat *all* tort reform bills introduced in 2017. Further, CAOC passed positive legislation limiting forced arbitration in fraud cases, ensuring that attorney voir dire is protected, and protecting abused children, among other bills.

TORT "DEFORM" LEGISLATION KILLED

During 2017 we turned back *every* measure pushed by the tort reformers. Among them:

- MICRA limits for Caltrans claims (AB 965-Kiley)
- Limits on PAGA Suits (AB 281-Salas, AB 945-Melendez, AB 1045-Flora, AB 1429-Fong, AB 1430-Fong)
- Limits on asbestos victims' claims (AB 1056-Kiley)
- Contingency fee limits (AB 1146-Flora)
- Prevailing attorneys fees for toxic polluters (AB 1621-Allen)
- Limits on construction defect claims (AB 1489-Brough)
- Weakening wage and hour laws/ Changes to meal and break laws (AB 1173-Harper, AB 1174-Harper, SB 524-Vidak, SB 662-Berryhill)
- Limiting regulation and oversight of doctors (SB 572-Stone)
- Immunity for owners of dangerous boilers and tanks (AB 1389-Bigelow)
- Public entity immunity for fire rings (SB 720-Allen)
- Limits on disability access claims (AB 150-Mathis, AB 913-Gray)
- Elimination of consumer protections for insureds (AB 1679-Burke)
- Immunities for realtors (AB 1289-Arambula)
- Immunities for nitrate polluters (AB 1605-Caballero)

CAOC SPONSORED BILLS

Through your input and suggestions, Consumer Attorneys of California sponsored seven bills this year. Five were signed, including our big sponsored bill to address forced arbitration and prevent another Wells Fargo-sized scandal, one has been vetoed and the last is going to move forward next year. Meanwhile, we continue to work behind the scenes on other issues, like liens. Here is a rundown of our 2017 legislation:

2017	Total
Bills Introduced and Read	2980
Bills Tracked by CAOC	261
Sponsored	7 Introduced 5 Chaptered
Supported	62 (30 Chaptered)
Opposed	26 (0 Chaptered)

Forced Arbitration

SB 33 (Dodd), signed by Gov. Jerry Brown, will prohibit financial institutions from forcing customers to give up their legal rights via forced arbitration when the bank has committed intentional fraud or identity theft, as occurred with the Wells Fargo fraud scandal. We would like to thank CAOC past-president Brian Kabateck for taking lead on this important bill.

Fair and Impartial Juries

SB 658 (Wiener), signed by Gov. Brown, will address the issue of unreasonable and arbitrary restrictions on attorney examination of potential members of a jury. Special thanks to CAOC President Greg Bentley for his assistance on SB 658.

Protecting Seniors

AB 859 (Eggman), which Gov. Jerry Brown vetoed on October 2, would have prevented the intentional destruction of evidence in cases involving physical abuse of elderly and dependent adults. The bill would have allowed elder abuse civil neglect cases to be enforced using a preponderance of the evidence standard. This bill would not have passed without the help of CAOC Executive Committee member Kathryn Stebner.

Immigrant Legal Rights

AB 1690 (Assembly Committee on Judiciary), signed by Gov. Brown, will clarify that California Civil Code §3339, which states that a person's immigrant status is irrelevant to liability issues, applies to consumer protection laws in addition to the listed labor, employment, civil rights, and employee housing laws.

Helping Sexually Abused Children

SB 755 (Beall), signed by Brown, addresses abusive defense psychological exams of children who have been sexually abused by creating a three hour presumptive time limit on these exams. Special thanks are owed to CAOC members Micha Star Liberty and Bob Allard for their input on this bill.

Court Assistance

AB 644 (Berman), signed by Brown, extends the requirement that counsel for parties in civil litigation engage in a meet and confer process before demurrer, to the substantially equivalent pleadings of motions to strike and motions for judgment on the pleadings.

Helping Asbestos Victims

SB 632 (Monning) will be heard in 2018. It clarifies that dying asbestos victims receive the benefit of current law that provides a presumptive time limit of a seven-hour deposition for dying victims. We would particularly like to thank Frances Schreiberg from the Kazan Law Firm for her help.

You can view any bill at www.leginfo.legislature.ca.gov.

We have also been busy on plenty of other fronts, by working behind the scenes in the budget process to aid your practice and by killing bills that could hurt the legal rights of your clients. For example, we had a lot of activity on liens in 2017. Liens remain a major issue, especially in light of *Cuevas v. Contra Costa*. CAOC's amicus committee engaged with appellate counsel on *Cuevas*, and our lien committee remains active as well. CAOC battled the Department of Healthcare Services in its effort to eliminate the 50% rule. At CAOC's urging, both houses of the Legislature rejected the DHS budget play. The Department, however, continues to press for the change. We will carry on our fight to protect this equitable rule. The CAOC lien committee is chaired by Lee Harris with invaluable help from Past President Bruce Brusavich.

CAOC also continued its strenuous advocacy for trial court funding. While the governor's budget contained $35 million in new money for the courts, this sum was mainly to make up for cost increases and replace old technology. Therefore, the trial courts in many counties continue to struggle, especially the civil courts. The judicial branch makes up only 2% of the entire state budget, and we will not rest until civil courts are adequately funded so that injured people can receive justice without delay.

CAOC AMICUS COMMITTEE

CAOC's amicus committee, led by Co-Chairs Sharon Arkin, Lee Harris and Kevin Green and by Staff Counsel Saveena Takhar, had another successful year shaping consumer law by filing almost a dozen amicus briefs. More than 80% of the amicus committee's work takes place in the California Supreme Court. The com- ▶

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mittee's volunteer writers contribute their valuable time without reimbursement to craft thoughtful and compelling briefs that shape the law governing your practices. Given its capacity, the committee has been strategic in choosing where to allocate its resources.

One important victory this year was addressing discovery available under PAGA. In *Williams v. Superior Court* (2017) 3 Cal.5th 53, the plaintiff sought contact information for employees statewide who worked for Marshalls department stores. The trial court restricted contact information to one store — where Williams worked. The motion was denied as to all other Marshalls stores unless Williams could show his PAGA action was meritorious. Reversing unanimously, California Supreme Court held that good cause was not required for the discovery that Williams sought. As the court observed, PAGA fills a void left by lack of "adequate staffing and resources" at government agencies "to police labor practices throughout an economy the size of California's."

LOOKING AHEAD TO 2018

There are many issues already in the hopper as we look towards 2018. CAOC has subcommittees working in the following areas: Equifax/cyber security/privacy; sexual harassment; liens; fire/homeowner's insurance; autonomous vehicles; intermediate case tiers; nursing home staffing levels; and minor's compromises.

We do face serious obstacles next year. Three initiatives have been filed to limit PAGA claims, which if qualified will appear on the November 2018 ballot. CAOC is actively investigating and researching the initiatives. Other obstacles include well financed corporate Democrats, term limits, and the fact that there are few attorneys in the Legislature. Obstacles aside, CAOC and our members continue the important job of pushing pro-consumer legislation and building relationships with lawmakers. Our efforts are paying off, as evidenced by our successes in 2017. While we celebrate this year's victories for consumers, we also continue to focus on finding new ways to build strategic alliances and awareness of our causes, which continually face big business opposition. Facing challenges in the pursuit of justice is what we do; it is what you do; and we can succeed. This fight will not be easily won, but it is one we will continue to wage in years to come. It is our collective job (we, as advocates, and you, as CAOC members) to build relationships with the legislators, to support CAOC's political program and to explain the importance of the civil justice system and its impact on their constituents. It doesn't happen overnight and we must be vigilant about this crucial task. We could not have done this without the CAOC membership, and we thank you.

The CAOC legislative counsel/advocacy team (Nancy Drabble, Nancy Peverini, Lea-Ann Tratten, Jacquie Serna and Saveena Takhar) would like to particularly thank 2017 President Greg Bentley, 2018 President Lee Harris, and 2017 Legislative Chair Mike Arias for their efforts this session. We also thank our partners in the Communications Department (Eric Bailey, J.G. Preston, Sharon Scott, Chris Weaver), CAOC's grassroots and political support team (Paul Woods, Mark Wirth, Samantha Helton), CAOC legislative support staff (Alex Galeana) and the rest of the talented CAOC staff.

As always, we thank you, our members, for your support of CAOC's legislative program. And thank you for your support of Consumer Attorneys of California. ◆

—CAOC Legislative Director Nancy Peverini can be reached at nancyp@caoc.org.

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On page 8 of the Summer 2017 edition of *The Verdict,* we inadvertently identified Judge Kimberly Colwell as Judge Victoria Kolakowski. Our sincere apologies!

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Appellate Report

by Val McGinty

TWO GREAT ARBITRATION CASES

Where False Claims Act claims are outside scope of arbitration agreement, arbitration is properly denied. Welch; 9th Cir. 16-16070.

Where employee is powerless to bargain over arbitration agreement's terms, which favor employer, it is invalid. Baxter; 1st Dist. A144744.

EXCESSIVE FORCE

In excessive force case, denial of summary judgment based on qualified immunity was proper. Estate of Lopez; 9th Cir. 16-15175.

In excessive force case, officer was entitled to qualified immunity in shooting of plaintiff's mentally disturbed husband. Isayeva; 9th Cir. 15-17065.

No qualified immunity where officer's shooting of driver following car chase was unreasonable. Longoria; 9th 16-15606.

ELDER ABUSE

On writ review, elder abuse claims were reinstated where elder died after unnecessary surgery. Stewart; 4th Dist. E067316.

NEGLIGENCE

Where plaintiff failed to show employer was liable for employee's negligence under special errand rule, summary judgment was affirmed. Morales; 1st Dist. A145865.

Where expert opinion on asbestos exposure raised triable issue, summary judgment was error. Lyons; 1st Dist. A150567.

Negligence claim against fellow dirt bike participant properly barred by primary assumption of risk doctrine. Foltz; 2d Dist. B277995.

TOUGH CLASS ACTION RESULT

Denial of class cert proper where admin cost to identify class is so high as to render any benefit de minimis. Kendall; 4th Dist. D070390.

EMPLOYMENT

Where housekeeping employee was raped by drunk trespasser, sustaining demurrer to FEHA claim was error. M.F.; 4th Dist. D070150.

CIVIL PROCEDURE

Reversal of summary judgment where denial of plaintiff's motion for continuance and a new trial was "outside bounds of reason." Denton; 1st Dist. A147384. ◆



— Valerie T. McGinty is a certified appellate specialist who represents plaintiffs exclusively. She can be reached at valerie@plaintiffsappeals.com.

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This program is not just for newer attorneys, but also is available for seasoned practitioners who run into problems or simply want to bounce ideas off another seasoned practitioner. The mentors — who are all ACCTLA members — have varied degrees of experience in varied areas of the law, and can address your concerns regarding Motions in Limine, jury selection, problems that arise during trial or issues relating to proposed instructions, or questions involving any of the earlier stages of litigation.

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Jeane Struck, Esq. is a practicing attorney and JAMS neutral whose practice includes personal injury, professional liability, construction, product liability, premises liability, errors & omissions claims, and habitability matters. Ms. Struck has over 30 year of experience with matters involving athletic organizations, health industry professionals, architects, engineers, landlords, businesses, and public entitles. She will share her insight and expertise on Elimination of Bias in ADR.



Jerome Fishkin is a Professional Responsibility specialist who advises and represents attorneys. He has defended attorneys in Superior Courts across the state, the State Bar Court, Bankruptcy Court, US District Court, the Ninth Circuit, US Patent & Trademark Office. Jerry counsels attorneys on issues involving attorney ethics, law practice management, dealing with toxic clients, coping with legal bullies, sanction hearings, disqualification motions, contempt hearings, client legal mental capacity and undue influence. The Fishkin & Slatter LLP website posts updates on new attorney ethics cases every month, and has an extensive description of the attorney disciplinary process at www.FishkinLaw.com

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David Mann is a graduate of Ohio State University and Stanford Law School. He served as a Deputy Public Defender in San Francisco before becoming a solo criminal defense practitioner. After 12 years of practice, substance abuse-related issues caused him to resign from the bar with disciplinary charges pending. Following a relentless battle with addiction, which included numerous hospitalizations and periods of living on the streets, he succeeded in getting clean and sober in 1998. Since then he has worked, among other things, as a cab driver, a private investigator, a paralegal and a drug and alcohol rehabilitation counselor. He presently serves as the Northern California Consultant to The Other Bar, a statewide organization of recovering attorneys, judges, and law students. In this capacity, he spends his time providing outreach and education to the legal community, and assisting attorneys as they struggle with substance abuse and related challenges that threaten their ability and/or eligibility to practice law.

ACCTLA would like to thank our generous sponsors for helping make this event a success:

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The History of ACCTLA



the beginning and early years...

Thank god I'm a packrat. Sometimes that's a good thing and sometimes not; but in this case, it's definitely a good thing. When I volunteered to write the history of the beginning and early years of our organization I knew I had some old files but had no idea I had kept *everything* from my involvement in the organization from 1973-1975 and beyond. By that I mean every piece of correspondence, all the minutes of the past board meetings, all the notices of the past board meetings and educational meetings, all bills I paid as treasurer, and more general memorabilia. To my partner Jayme Walker's delight, I also kept all of the early publications of the *Verdict* magazine, which I found valuable in researching my article on the early history of ACCTLA.

I want to add that another packrat did much of the same thing. That's Lew van Blois, who was our first editor of the *Verdict* magazine in the spring of 1975 and our president in 1978. I am pleased to report that Lew will write a second, follow-up article focusing on his beginning years as the editor, essentially from 1975-1980. My history will go from the very beginning in 1970 to about 1975.

The Beginning

In the summer of 1975, I was a young plaintiff's lawyer with the firm Nichols, Williams, Morgan and /Digardi in Oakland. I joined the California Trial Lawyers Association (now known as Consumer Attorneys of California or CAOC) in 1966 when a personal friend of mine, Bob Beloud from Upland, California, was president. Therefore, I was fortunate as a young lawyer to get to know the early presidents including Jack Wercheck, Marvin Lewis, Bob Cartwright and Tom Anderson (who was president of the organization in the summer of 1970).

The Alameda-Contra Costa Trial Lawyers had formed an early chapter at the very beginning of the California Trial Lawyers Association in the early 60's. However, that chapter had not flourished and, by 1970, we had no active chapter in our area. An Oakland lawyer named Jim Quinn, who practiced with his wife Vivian, had been attending some of the CTLA conferences and had talked to some of the leadership about reforming our chapter. So he sent out a letter announcing a meeting on June 23, 1970 for the formation of the new Alameda-Contra Costa Trial Lawyers' Association. *(See page 14.)*

The meeting was well attended with over 150 trial lawyers present. Jim Quinn ran the meeting and it was clear from the beginning that he fully expected to be elected president since he had organized the event. That was not to be. Jim and Vivian were not terribly popular lawyers in Oakland, so my partner, Ed Digardi, who was considered one of the top lawyers in the entire area, spread the word that we needed to have an alternate nominee for president. When he got to the meeting, he had spoken with a number of us. So he sat next to an outstanding criminal defense and plaintiff trial lawyer from Pittsburg named Dick Sanders. He had convinced Dick to run for President and the word spread quietly throughout the meeting that this was a guy we should go for. So, when Jim suggested himself as president and asked if there would be any other nominees, Ed Digardi stood up casually and said, "Well I'd like to nominate my friend Dick Sanders." Jim turned to Dick and asked if he was interested in running. Dick stood up casually and said, "Well, I didn't ask for this job but, if I'm elected, I'll serve" and sat down. That was the extent of Dick's nominating talk and, after Jim Quinn spoke at length for why he should be president, the vote was taken. The vote was overwhelmingly for Sanders — by about 80% as I recall. So he became our first president and we were off to the races.

The other officers were nominated and I was privileged and happy to be the first treasurer of the organization. The following is a list of Officers and Board of Directors installed at the first meeting:

Officers

President Richard Sanders, Pittsburg
Vice-President William Dixon, Oakland
Secretary Charles McCrory, Fremont
Treasurer J. Gary Gwilliam, Oakland

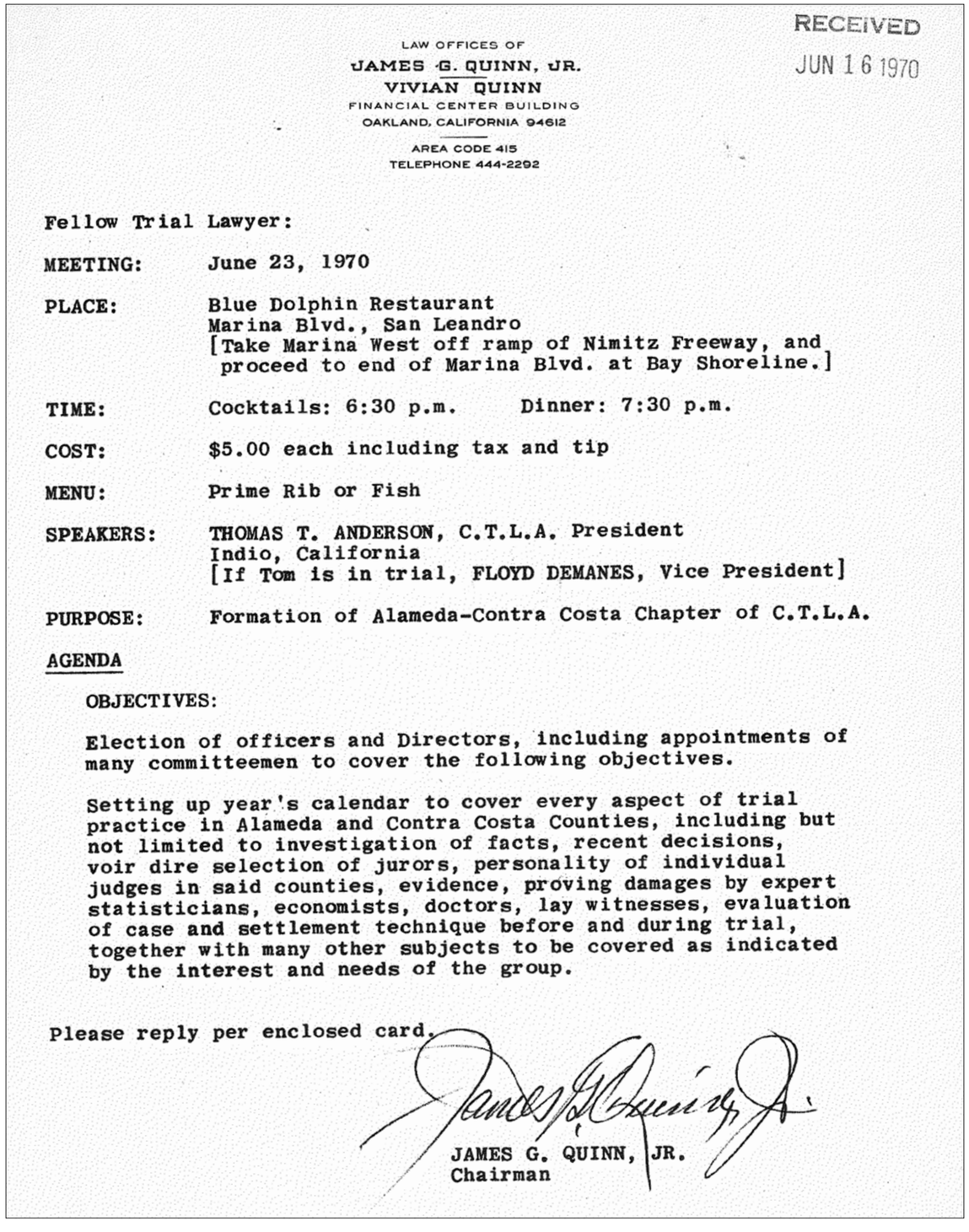
Board of Directors

Harold Strom, Oakland
Alfred Delucchi, Hayward
Norman Hendricks, Concord
James E. Scott, Pittsburg
James Crew, Hayward
Jack Lipian, Oakland
Burke Critchfirls, Livermore
James L. O'Dea, Oakland
Alfred Naphan, Oakland
David A. Dolgin, Martinez
James Quinn, Oakland
Wesley Helm, Richmond
H.W. Sherbourne, Pleasant Hill
George Kilbourne, Walnut Creek
William Belcher, Jr., Oakland

Our first meeting was a week later, June 30, 1970, at the Elegant Farmer Restaurant in Jack London Square in Oakland. The minutes to that meeting show that we approved that membership would not be open to lawyers who did primarily insurance defense work or to prosecutors. It was also moved at that first meeting that the President and Vice President positions would alternate between Alameda and Contra Costa Counties and that the officers would serve for a one year term. We also approved the board meeting for once a month and set forth our early committees, including by-laws, membership, public relations, judiciary committee, and a program committee.

At our second meeting, July 21, 1970, we approved annual dues at $15 per year and set up the first annual meeting on September 22 at the Hilton Hotel in Oakland with Marvin Lewis as our speaker. His topic was "A Cable Car Named Desire" referring to his infamous case of a cable car accident where the victim later became a sex addict because of her injuries. Unbelievably, he won a $50,000.00 verdict for her! So that was a hot topic!!

Our third meeting was held on August 25, 1970, again at the Elegant Farmer in Jack London Square. We continued to follow up with early organizational matters, such as figuring out our letterhead and agreeing that each board member would pay the all-important sum of $20 to open an account for our treasury. Our membership was rapidly expanding, including such interesting lawyers as Roderick Duncan who later became an Alameda County Superior Court Judge and Fred (Doc) Haley, who was a dear friend of mine and, of course, the father of our recent past president Matt Haley. Alfred Delucchi was one of our original board members and later became an Alameda County Superior Court Judge ▶



RECEIVED
JUN 16 1970

LAW OFFICES OF
JAMES G. QUINN, JR.
VIVIAN QUINN
FINANCIAL CENTER BUILDING
OAKLAND, CALIFORNIA 94612

AREA CODE 415
TELEPHONE 444-2292

Fellow Trial Lawyer:

MEETING: June 23, 1970

PLACE: Blue Dolphin Restaurant
Marina Blvd., San Leandro
[Take Marina West off ramp of Nimitz Freeway, and proceed to end of Marina Blvd. at Bay Shoreline.]

TIME: Cocktails: 6:30 p.m. Dinner: 7:30 p.m.

COST: $5.00 each including tax and tip

MENU: Prime Rib or Fish

SPEAKERS: THOMAS T. ANDERSON, C.T.L.A. President
Indio, California
[If Tom is in trial, FLOYD DEMANES, Vice President]

PURPOSE: Formation of Alameda-Contra Costa Chapter of C.T.L.A.

AGENDA

OBJECTIVES:

Election of officers and Directors, including appointments of many committeemen to cover the following objectives.

Setting up year's calendar to cover every aspect of trial practice in Alameda and Contra Costa Counties, including but not limited to investigation of facts, recent decisions, voir dire selection of jurors, personality of individual judges in said counties, evidence, proving damages by expert statisticians, economists, doctors, lay witnesses, evaluation of case and settlement technique before and during trial, together with many other subjects to be covered as indicated by the interest and needs of the group.

Please reply per enclosed card.

JAMES G. QUINN, JR.
Chairman

of some renown when he presided over the Scott Peterson murder trial and the trial of Tyrone Robertson for the murder of Huey Newton. Another early interesting member was Stanley Gold, who became the premier criminal law judge in Alameda County for many years. I still have a membership list in my file from about the end of 1970 that has the names of 96 trial lawyers on it.

At our November 24, 1970 meeting at the Elegant Farmer, we had our first discussion of honoring local judges. The minutes read as follows:

"Then followed a discussion that Judge Schenone of the Livermore Justice Court would be sworn in on December 1 as Judge of the Municipal Court. It was agreed that a suitable plaque should be obtained and be presented to Judge Schenone. Dick Sanders agreed that he would appear at the installation and make the presentation."

The board also decided that when Sam Conti was sworn in as a federal judge in Martinez, he too would be presented a plaque on behalf of our chapter. Judge Conti was a Superior Court Judge in Contra Costa County at that time.

Our second general membership committee meeting was on February 6, 1971 at the Newell House, featuring a program of Dick Sanders, Dave Dolgin, Al Naphan and Ed Digardi on the topic of "How to Maximize Recovery in Minimum Personal Injury Cases." We assured our members that, "the above speakers are all experienced trial lawyers. They promise a comprehensive, down-to-earth discussion." As you can see, hot topics in education haven't changed that much.

The CTLA Annual Convention was held in San Francisco in February of 1972 at the Fairmont Hotel. This involved a very hotly contested election for President between Herb Hafif, from Southern California, and Bob Barbagelata, from the North. It resulted in a one-point vote victory for Herb Hafif. That began a several year conflict between the Northern and Southern parts of CTLA, which almost led to a split in the organization. (I refer to this in more detail in my Forum article *50 years as a CTLA/CAOC Member. May/June 2016 Vol. 46 No. 3*. Copies available upon request.)

In the meantime, there was a very serious move for no-fault insurance in our state. The no-fault insurance law would have required all but the most serious automobile injuries and deaths to be submitted to binding administrative tribunals. In essence, all our bread-and-butter automobile cases would be eliminated. The law was strongly supported by the entire insurance industry and their lobbyists who pushed it hard in the legislature for several years in the 1970's. Fortunately, CTLA was barely able to defeat them. At one time by only one vote!

No-fault raised its ugly head again in 1988 and was one of five Initiatives on the ballot that year. The insurance industry heavily supported them and included another related initiative that would have limited *all* our contingent fees to 10%, which would have pretty much ended our practices. I was President of CTLA that year and through the heroic efforts of all our members, we raised $15 million and defeated all the insurance initiatives even though they outspent us by spending $70 million to pass them. That's a whole other story I could talk about at another time.

Our next annual meeting was on April 25, 1972 at the Round Hill Country Club in Alamo. Our speaker was Herb Hafif, the President of CTLA. At that time, we voted in new officers. Interestingly enough, Coley Fanin was elected to our Board at that time. Of course, he later became a longtime Contra Costa Superior Court Judge, one of the founders of Judicial Arbitration and Mediation (JAMS), and one of our trial judges of the year. In addition, we honored four new judges with plaques: Lou Edmonds and Robert Duggan from the West Municipal Court in Contra Costa; Judge Joe Schenone of the Livermore Municipal Court; and Judge Al Delucchi from the Hayward Municipal Court in Alameda County.

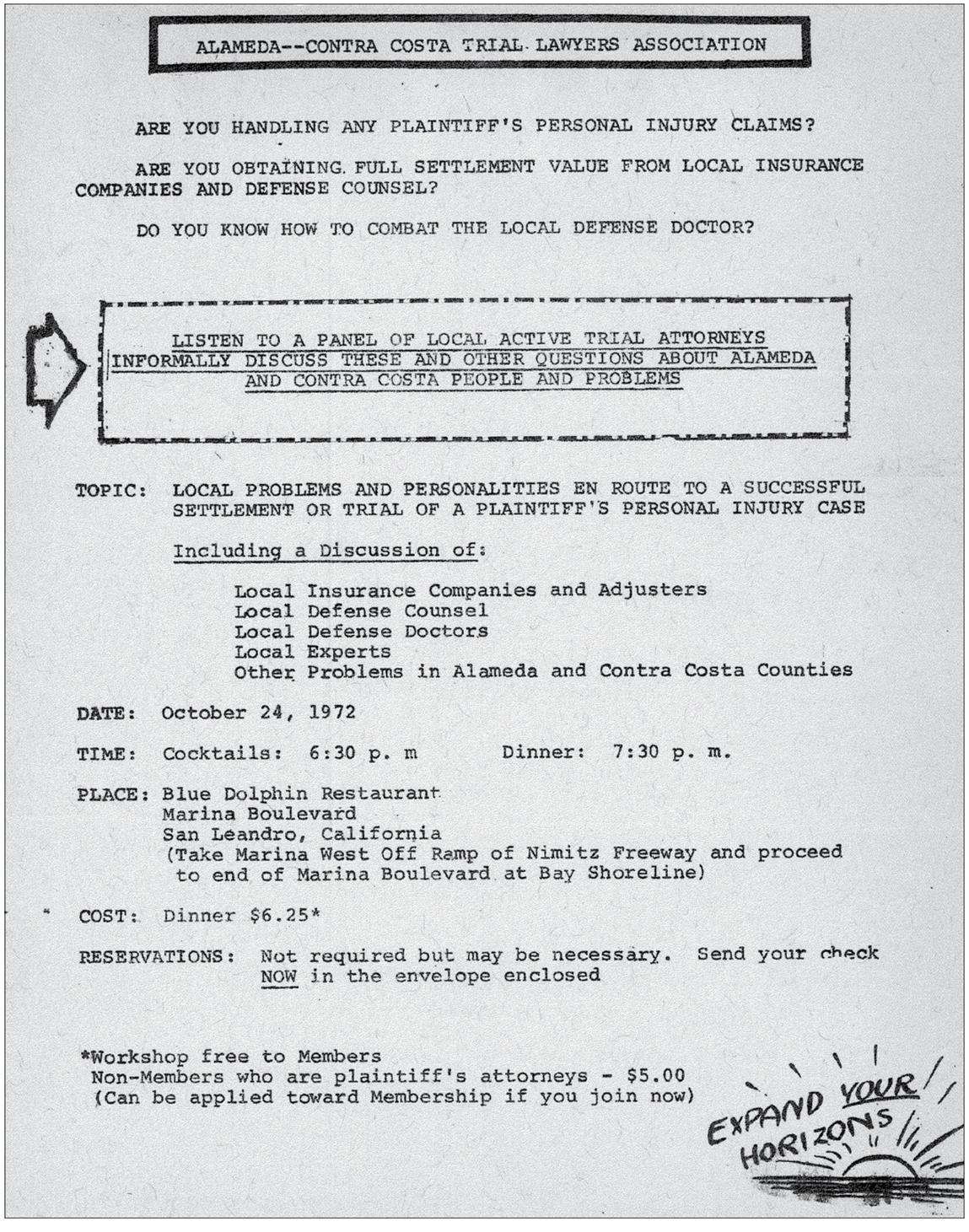
We held one of our first educational programs on October 24, 1972 at the Blue Dolphin Restaurant. My friend, Lew van Blois, who had been put on the board, was instrumental in organizing that seminar. A copy of the flyer for the event is on page 16.

During our August 15, 1972 Board meeting at the Mirabeau Restaurant in Oakland, we discussed a report of our Judicial Awards Committee, which suggested that all the new judges should get an award at the judge's induction ceremony. However, we did request that there be a unanimous vote of the Board of Directors about these judges, if possible. Following that, at our November 14, 1972 meeting, it was decided that the following judges should receive a plaque: Coleman Fanin; Wilson Locke; Joe Carson; Joseph Jay; and Sam Hall.

In 1973, we elected new officers. The President was Dave Dolgin, who had been Vice President; Fred Krake was Secretary; and George (Fred) Dunker was Treasurer. I also remained Treasurer because I had all the bank checks and it would have been complicated to have someone take that over.

In our membership report of January 1974, we had 212 members and $712 in our treasury.

On April 5, 1974, we had what was originally called "Old-Timers Night" but was changed to "Seniors Advocacy Night" at the Castlewood Country Club, where we honored longtime members Jesse ▶



ALAMEDA--CONTRA COSTA TRIAL LAWYERS ASSOCIATION

ARE YOU HANDLING ANY PLAINTIFF'S PERSONAL INJURY CLAIMS?

ARE YOU OBTAINING FULL SETTLEMENT VALUE FROM LOCAL INSURANCE COMPANIES AND DEFENSE COUNSEL?

DO YOU KNOW HOW TO COMBAT THE LOCAL DEFENSE DOCTOR?

LISTEN TO A PANEL OF LOCAL ACTIVE TRIAL ATTORNEYS
INFORMALLY DISCUSS THESE AND OTHER QUESTIONS ABOUT ALAMEDA
AND CONTRA COSTA PEOPLE AND PROBLEMS

TOPIC: LOCAL PROBLEMS AND PERSONALITIES EN ROUTE TO A SUCCESSFUL SETTLEMENT OR TRIAL OF A PLAINTIFF'S PERSONAL INJURY CASE

Including a Discussion of:

Local Insurance Companies and Adjusters
Local Defense Counsel
Local Defense Doctors
Local Experts
Other Problems in Alameda and Contra Costa Counties

DATE: October 24, 1972

TIME: Cocktails: 6:30 p. m Dinner: 7:30 p. m.

PLACE: Blue Dolphin Restaurant
Marina Boulevard
San Leandro, California
(Take Marina West Off Ramp of Nimitz Freeway and proceed to end of Marina Boulevard at Bay Shoreline)

COST: Dinner $6.25*

RESERVATIONS: Not required but may be necessary. Send your check NOW in the envelope enclosed

*Workshop free to Members
Non-Members who are plaintiff's attorneys - $5.00
(Can be applied toward Membership if you join now)

EXPAND YOUR HORIZONS

Nichols, Robert Collins, Robert Condin, Cliff Hildebrand, Jimmy Myers, Bernie Allard and Vance Portilier. These lawyers were longtime civil plaintiffs and defense attorneys who were well known in our counties. However, they were not leaders or necessarily active in ACCTLA at the time. Regardless, the event was a big success.

At the meeting on May 1, 1974, which was held at the Sea Wolf in Jack London Square, a nominating committee of the Board nominated me for President, Wes Helm for Vice President, Fred Dunker for Treasurer and Peter Hinton for Secretary. We were all elected at the membership meeting on June 18, 1974 at the Mira Vista Country Club in El Cerrito.

I held my first board meeting as President on June 25, 1974, at the Sea Wolf. We finally increased our dues to $20 per year. We also decided to redo our bylaws and I appointed my partner, Bill Gibbs, to take on that task. At that time, we had $1,943 in our treasury. We also began to discuss the budding subject of liens in personal injury litigation. I became involved in what turned out to be one of the first educational programs on that topic that now causes us so many headaches.

At the August 27, 1974 board meeting, it was reported that our balance in our treasury jumped up to $2,893.

We had an interesting discussion at our board meeting on January 14, 1975 about our General Meeting on April 4, 1975 to be held at the Castlewood Country Club. Our minutes state, "The theme of the meeting will be 'the new and old judges.' We will honor Superior Court Judges who have been on the bench for less than a year and retired Superior Court Judges."

Our first issue of the *Verdict* was published in the Spring of 1975. I'm really pleased that we have this available and that the first half of this issue is being reprinted on the next page. As you can see, Lew van Blois was our Editor. I suggest you read my President's message for a good idea of where we were at that time. We were very proud of the fact that we had 300 members. The publication is also interesting to give a good sense of what issues were present at that time, including the new law of comparative negligence and the budding medical malpractice crisis.

While I was President of our association, I was also on the State Board of Governors of CTLA (now CAOC) by way of being chapter president. I became very involved in that organization, staying on the board for a couple of years thereafter. Of course, I went on to be President of that organization in 1988 and remain active in it to this date.

Getting back to ACCTLA, we elected Wes Helm for President in 1975; Vice President was Fred Dunker; Secretary Peter Hinton; and Treasurer Jerry O'Neil. During our May 28, 1975 meeting, we gave praise to Lew van Blois for our first issue of the *Verdict*, which was praised as highly successful. Lew was then authorized to publish the *Verdict* throughout that year and, of course, it has continued to be in publication ever since.

I think the purpose of the organization was clear, both to the leadership and the members. We were an educational organization and we wanted to keep members abreast of both local and state issues that might affect their practices as plaintiff's trial lawyers. Perhaps just as importantly, we were a social organization that wanted to promote collegiality between ourselves, the bench and the bar. So, from the very beginning, we began to honor judges and asked them to come to our organization meetings. At first, we had different lawyers agree to pay for the cost of the judges they brought to the meetings. However, before long, we agreed to pay for those bills out of the organization's treasury. I believe we have stayed true to these purposes up to this point in time as we continue to have very successful educational seminars and our annual Trial Judge of the Year dinners are always well attended. Lastly, the congeniality in our organization remains strong. Perhaps, that's why after so many years, there are still a number of us original members and officers who stay active in the organization. In short, I am proud of our beginnings and who we have become after all these years. I'm especially proud that the organization has grown into a diverse organization with leadership including women and minority attorneys in Alameda and Contra Costa Counties.

It's always hard to know how much to include and how much not to include in an article like this. But I hope this gives you all a feel of the early years in the organization. I look forward to my good friend, Lew van Blois, following up with this series from 1975 to 1980. I look forward to his next installment of our past history.

In the meantime, feel free to contact me about any of this while I still have a working memory of it all! Lastly, I have no intent of ever abandoning this organization that I care so much about and will stay active in for as long as I am able. ◆

—J. Gary Gwilliam, a partner of Gwilliam, Ivary, Chiosso, Cavalli & Brewer is considered one of the best consumer trial attorneys in the state. He is a past president of Consumer Attorneys of California (formerly California Trial Lawyers Association) and The Public Justice Foundation (formerly Trial Lawyers for Public Justice). He has tried over 180 jury trials to verdict. Mr. Gwilliam is an author of the award-winning book, Getting a Winning Verdict in My Personal Life: A Trial Lawyer Finds His Soul, and numerous articles on California consumer law. He is a frequent lecturer in areas of tort law, employment law, substance abuse and ethics.



Alameda-Contra Costa Trial Lawyers Association

Verdict

VOL. 1 NO. 1 P.O. BOX 1769 OAKLAND, CALIFORNIA 94604 SPRING 1975

Thoughts on Comparative Negligence

by Richard D. Sanders

The decision in Li v. Yellow Cab makes it necessary for personal injury attorneys to re-appraise the traditional approach to the settlement and trial of accident cases. The Supreme Court decision knocks out contributory negligence and substitutes therefor a pure system of comparative negligence (i.e. — that persons are responsible for their acts to the extent their fault contributes to an injurious result).
The Court recognized "certain practical difficulties attendant upon the adoption of comparative negligence" and there is some discussion concerning the nature of the difficulties. However, the Court states that the decision is to be received as a first step in a proper and just direction, not as a compendium containing the answers to all questions that can be expected to arise. Therefore, very few guidelines are set in anticipation of the expected problems. The Court felt that the problems can be more appropriately resolved at the trial level and, therefore, granted trial judges broad discretion in adopting such procedures as may accomplish the objectives and purposes expressed in the opinion.
While most trial lawyers probably join the Supreme Court in expressing faith in our trial judges collectively, most of us have some individual reservations. It is a known fact that individual attitudes and philosophies of trial judges have been known to be subject to some variables.
Without some rules to guide them, trial judges are going to produce a variety of procedures, all purportedly designed to accomplish the objectives of the Supreme Court opinion. This may result in considerable appellate review and, therefore, some uncertainty will prevail for an indefinite time.
In the meantime, how are we lawyers going to go about representing our clients when we are not too clear on how the trial courts will exercise the broad powers granted by the Supreme Court?
There will undoubtedly be many seminars in the immediate future where we can obtain the benefit of expert advice. C.T.L.A. has such a seminar scheduled for San Francisco on May 24th. There are literally hundreds of books and/or articles written about the subject and there will undoubtedly be

Thoughts On Comparative Negligence (continued on page 5)

Editorial

ACCTLA Verdict

by R. Lewis Van Blois
Editor-in-Chief

Plaintiff lawyers have organizations representing their client's and their interests both nationally and statewide. The California Trial Lawyers Association, in particular, has been instrumental in advocating the positions which protect the injured plaintiff in our society. Alameda and Contra Costa lawyers directly benefit from CTLA in many ways including educational programs, legislative representation and amicus curiae briefs, the most recent success being Li v. Yellow Cab Co.
But to many Alameda-Contra Costa County attorneys, the activities of state and national organizations appear remote. Most lawyers do not specialize in personal

Editorial ACCTLA Verdict (continued on page 5)

J. GARY GWILLIAM (President) • R. LEWIS VAN BLOIS (Editor-in-Chief)



President's Message

I am very pleased to report to the general membership in the first newsletter published by the Alameda-Contra Costa Trial Lawyers Association. We hope that this publication will provide a better means of communication between the Board of Governors of our association and the general membership. Lew Van Blois, the editor of the newsletter, has spent many months of effort to get it off the ground. I take my hat off to him for a job well done.

I would like to outline some of the accomplishments of the association during the last year. The Board of Governors has met twelve times since April 1974. These meetings have provided a great deal of thought-provoking discussions on a wide variety of issues of interest to trial lawyers in this area. There have also been several committee meetings, including a meeting of our medical malpractice committee to discuss the current medical malpractice crisis in this state. We feel our organization should take our own independent stand on this subject even though the California Trial Lawyers Association, the State Board of Governors and a great many other interested groups of attorneys are also working very hard to solve the issues presented by the cancellation of the malpractice insurance for the physicians. Ed Digardi of our association has testified before the Legislature in Sacramento with regard to pending legislation on the subject. Jerry O'Neill has also been active on this committee, and if any of you have any suggestions with regard to the action our association can take, I would suggest that you call Jerry or myself.

Our association has been much more active socially during the last year than ever before in its history. On April 5, 1974, we had a dinner at the Castlewood Country Club in which we honored five of the respected and old-time trial lawyers in Alameda-Contra Costa County. Burke Critchfield organized the dinner and did a great job. It was a successful event and was very well attended by the Superior and Municipal Court Judges from both counties.

On June 18, 1974, we held our election at the Mira Vista Country Club. Judge Richard E. Arneson gave a very interesting speech concerning the Angela Davis trial.

On November 22, 1974, the association hosted a cocktail party at Dick Bridgman's home in Orinda. It was well attended by a number of judges and lawyers in the two counties.

Recently, we had another dinner at the Castlewood Country Club and honored the new and the old judges. Burke Critchfield again did an outstanding job and there were over twenty Superior Court judges and their wives in attendance.

We had another successful seminar which was held at Francesco's Restaurant on October 23, 1974. The topic, liens against personal injury awards, was discussed by a panel consisting of Ed Clancy, Lew Van Blois, Dave Dolgin, Pete Hinton and myself. I believe everyone in attendance at that seminar took home some bread and butter information which he could immediately apply to the cases in his office.

Our financial situation has remained solvent. Fred Dunker, our Treasurer, is to be congratulated for keeping us in the black.

Bill Gibbs took on the heroic job of completely revising our outmoded by-laws. I know personally that he spent many hours on the revision and they were finally unanimously adopted on February 4, 1975.

Last summer several of us took on the task of attempting to completely revise our membership list because we realized that many attorneys in this area were not receiving notices of our meetings. Pete Hinton, who in my opinion has been the outstanding board member during the last year, organized a printing company to send out all of our mailings. We have approximately 300 paid members on our list and an additional list of attorneys to whom we can send notices of our seminars and meetings. Even though we have increased our membership, I know there are many other attorneys who should be more active in our organization and be on our mailing list. If you know of any such person, please call Pete Hinton so that he can have him placed on our mailing list.

Lastly, I want to personally thank all the members of the Board of Governors who have worked so hard this year. I believe that the Alameda-Contra Costa Trial Lawyers Association is now one of the largest and most active chapters in the state. Through the efforts of these gentlemen, our organization has gained the recognition, stature and respect of the bench and bar which it rightly deserves. I know that it will continue to grow.

J. Gary Gwilliam
President

The Medical Malpractice "Crisis" and You!



by Jeremiah F. O'Neill, Jr.

You're a relatively young practicing attorney; your business is just starting to grow roots; mostly you do a general practice but you either strive for a personal injury practice or, at least, keep a sharp lookout for potential "P.I." cases to refer to the trial lawyer of your choice. You really don't run across many medical malpractice cases, and, perhaps, might not even recognize one, especially if it be hidden in the thickets of an otherwise recognizable negligence case — auto accident, workmen's compensation, products liability, et al.
Or, you're a seasoned trial attorney of several years of experience representing injured persons — investigating, negotiating and ultimately litigating any number of injury cases to conclusion. Many times you will encounter and recognize situations that seem to involve some degree of medical culpability. For reasons of your own, business or personal, you generally refer these matters to other plaintiff attorneys who specialize in that field.
In either situation, your reaction to the present furor over the "medical malpractice crisis" is somewhat ambivalent. On the one hand the picture of the plaintiff trial attorney painted by the media, the doctors and the insurance companies rankles and irritates. They are trying vociferously, and with some success to pin the "fugitive from justice" label on the plaintiff trial attorney:
WANTED — DEAD OR ALIVE
This man is unscrupulous, greedy and opportunistic. He preys upon an unsuspecting public, stealing money from the doctors, insurance companies and his own clients alike. He has caused an alarming increase in medical malpractice

The Medical Malpractice "Crisis" And You! (continue on page 7)

Report on Election Meeting

The annual general membership meeting will be held on June 12, 1975, at Francesco's Restaurant located at Hegenberger Road and Pardee Drive in Oakland. The meeting will include a panel discussion by Jury Commissioners of Alameda and Contra Costa counties followed by a question and answer period. The topics of discussion will include motions to advance and continue trials, and how to get a trial department.
At that meeting the election of officers and members of the Board of Governors of ACCTLA will be held.

The nominating committee has nominated the following persons:

President	Wesley Helm
Vice President	Fred Dunker
Secretary	Peter J. Hinton
Treasurer	Jerry O'Neill

Board of Governors:

Richard Bridgman	Edwin Clancy
Joseph Connolly	Burke Critchfield
Edward Digardi	J. H. Filice
Eric Schnurmacher	Bill Gagan
William Gibbs	Fred Kracke
Dave Levy	Harry W. Sherbourne
Richard D. Sanders	Lew Van Blois
Gary Gwilliam	David Dolgin
Dennis O'Brien	Dick Breitwieser
Peter Elkind	Henry Laskey
Steve Kazan	

Fred Dunker is the chairman for this meeting. Kindly contact him for reservations. We hope that all members will attend this important and informative meeting.

Peter J. Hinton
Secretary

Trial Lawyers Honor Judges



CTLA President Elmer Low is greeted by ACCTLA members from left to right Lew Van Blois, Editor of VERDICT, Elmer Low, Chapter President Gary Gwilliam and Secretary Pete Hinton.

A recognition dinner, minus speeches, was held on April 4, 1975, to honor Superior Court judges of Alameda and Contra Costa counties. Recently retired and recently appointed judges received special recognition.
The event at the Castlewood Country Club in Pleasanton drew a crowd of 200 with more than 20 judges present. Seated at the head table were Judge and Mrs. Spurgeon Avakian representing Alameda County, Judge Jackson Davis, the presiding judge of Contra Costa County and friend, California Trial Lawyers Association President Elmer Low, ACCTLA President Gary Gwilliam and his wife and Master of Ceremonies Burke Critchfield and his wife.
Speeches were limited to greetings from president Gary Gwilliam and state president Elmer Low of Los Angeles. Those recently retired and recently appointed judges receiving special recognition included Judge Homer Patterson of Contra Costa County and Judges Lewis Lercara, William McGuiness, Carl Anderson and John Vukasin of Alameda County.
The informal cocktail party preceding the event gave trial lawyers and judges the opportunity to share experiences. Piano music was an added pleasure to the festive candlelight dinner. Arrangements for the event were made by ACCTLA board members Eric Schnurmacher and Burke Critchfield. This is the second year that Burke Critchfield has presented a truly enjoyable evening for judges, trial lawyers and their wives.

Join ACCTLA Now

If you are not currently an ACCTLA member or if you are a member but have not paid your current dues, you are cordially invited to complete the application below and mail it along with your check for $20.00 to

Jerry O'Neill
2150 Valdez Street
Oakland, CA 94612

Membership Application

ALAMEDA-CONTRA COSTA TRIAL LAWYERS ASSOCIATION

I hereby apply for membership in the Alameda-Contra Costa Trial Lawyers Association. I certify that I am not principally engaged in personal injury defense practice or in criminal prosecution.

I enclose herein my annual dues in the sum of $20.00, covering the 1975-76 fiscal year.

☐ Renewal ☐ New Member

Name _____

Address _____

Alameda-Contra Costa
TRIAL LAWYERS' ASSOCIATION

The Alameda-Contra Costa Trial Lawyers' Association invites you to our

47th Annual Judges' Night Gala

Thursday, January 18, 2018

Cocktails at 6 pm – Dinner at 7pm

Claremont Club & Spa
41 Tunnel Road
Berkeley, CA 94705

Sponsorship Opportunities Available

Diamond Sponsor ($ 2500)
Recognition in event literature, the *Verdict* and the Website
Reserved Table for 10 or 8 with a Judge and their guest.

Gold Sponsor ($ 1000)
Recognition in event literature, the Verdict and the Website
(tickets purchased separately)

Silver Sponsor ($ 500)
Recognition in event literature (tickets purchased separately)

To discuss sponsorship opportunities please contact
Mariana Harris at 925-257-4214 or e-mail at ACCTrialLawyers@gmail.com

We look forward to seeing you there. Thank you.

Fall Cocktail Reception

October 12, 2017 • Lafayette Park Hotel

Honoring Contra Costa County

Trial Judge of the Year

Barry Goode



Barbara Ruvolo, Justice Ignazio Ruvolo, Gary Gwilliam, Judge Jill Fannin and Judge Barry Goode



Elise Sanguinetti, Justice Maria Rivera, Justice Ignazio Ruvolo

Marjorie Heinrich





Judge Margaret Fujioka, John Hill and Denise Mejlszinkier



J. Michael Brown and Gary Gwilliam



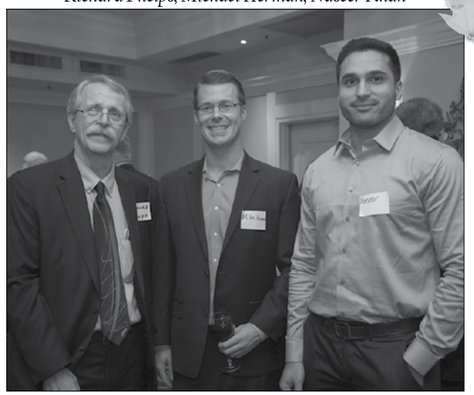


Judge Wade Rhyne, Justice Mark Simons and Judge Barry Baskin



Judge Jill Fannin with Justices Barry Baskin and Maria Rivera

Richard Phelps, Michael Herman, Naseer Khan



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Cat Cabalo, Judge Benjamin Reyes, Susan Reyes, Catherine Haley and Suizi Lin

Judge Wynne Carvill and Lyle Cavin



ERISA
Disability Traps & Tricks *for the* Non-ERISA Practitioner

by Cassie Springer Ayeni

The Employee Retirement Income Security Act, better known as ERISA, is referred to by at least one judge as *"Everything Ridiculous Imagined Since Adam."* Florence Nightingale Nursing Service, Inc. v. Blue Cross and Blue Shield, .832 F. Supp. 1456, 1457 (N.D. Ala. 1993), affirmed, 41 F.2d 1476 (11th Cir. 1995) (Acker, J.). It gets its sordid reputation from its limited remedies, roots in trust law, and limited discovery rules. Yet ERISA is so vast that every lawyer should know a little bit about it.

Most practitioners know that ERISA covers employer-sponsored retirement plans, yet few realize that with minor exceptions[1] it also governs all employer-sponsored health plans, disability benefit plans, and life insurance plans. 29 U.S.C. §1002. Of these categories of ERISA litigation, disability benefit lawsuits comprise 64.5% of ERISA litigation, health care accounts for 14.4% or ERISA litigation, and pension just 9.3%. Anderson, S., *ERISA Benefits Litigation: An Empirical Picture*, 28 ABA J. Lab. & Emp. L. 1 (2012) at p. 7. Why is that? Though ERISA was originally designed to protect pension claims, more and more employers are eliminating traditional pension plans for employees or have outsourced to fiduciaries, and ERISA provides limited relief for breaches of fiduciary duties. Health claims are notoriously mishandled (we all probably have our own examples of that!), yet if a plaintiff brings an ERISA claim for denied health benefits, the remedy is that the medical provider gets reimbursed, and there are no punitive, compensatory, or consequential damages available to the plaintiff. Disability benefit claims, however, are another story. If a worker with an employer-sponsored disability benefit plan files a claim for benefits, that claim is typically administered and paid for by an insurance company. And because these insurers have a financial conflict of interest, many disability benefit claims are denied despite the claimant's doctor's decision that the claimant should stop working. The remedy under ERISA is payment of the disability benefits through the date of judgment, and benefits can potentially continue until retirement age. In other words, disability benefits are worth a lot over the claimant's working lifetime. That's why a little ERISA knowledge comes in handy for any practitioner.

SCREENING FOR ERISA

First, in screening these calls from potential clients, be aware that some issue spotting will be incredibly valuable, as most individuals do not even realize that their claim for disability benefits is governed by ERISA. Most individuals call with an assumption that the appropriate area of expertise is disability discrimination, workers' compensation, Social Security disability, or California state disability insurance. But if the employer offered a disability plan, it is ERISA help they need.

Trap #1: Assuming that the potential client knows what kind of attorney she needs for her disability issues.
Trick #1: Simply ask "did your employer offer a disability benefit plan?" If so, ERISA will probably govern.

SEVERANCE WAIVERS OF ERISA CLAIMS

Second, many people with disabilities may contemplate quitting their job for performance issues or have already been told they will be terminated. If they are getting close to retirement age, they may assume that an early retirement is the honorable way to exit the job. The disabled worker may be offered separation or severance pay, but many standard separation or severance agreements actually waive all claims under ERISA! If someone could potentially obtain a monthly disability benefit until retirement age through their disability benefit plan, this is an extremely valuable benefit to waive in exchange for severance. Indeed, the prudent plaintiff's attorney should routinely screen for disability if negotiating severance, as no one would want to give the green light for waiving hundreds of thousands of dollars in disability benefits in exchange for a little severance.

Trap #2: Failing to edit out a waiver of ERISA claims.
Trick #2: Carve out any claims for disability benefits, health benefits, or pension benefits that might arise under ERISA. An example of a good carve out is: "However, the following claims are specifically and expressly excluded from the foregoing Release: (i) health insurance benefits under ERISA or the Consolidated Omnibus Budget Reconciliation Act (COBRA); (ii) claims with respect to benefits, including short- and long-term disability benefit benefits, under a welfare benefit plan governed by the Employee Retirement Income Security Act (ERISA); or (iii) claims with respect to vested benefits under a retirement plan governed by ERISA." Most employers understand the practicality of this, particularly because such claims are usually (but not always) filed against the disability insurer, not the employer.

STRICT ERISA DEADLINES

Third, although it is best for the potential client to find an ERISA attorney before making the decision to apply for disability benefits, most do not. Rather, most potential clients try to find legal help only after the insurer has denied the claim for disability benefits. At that point, ERISA's Regulations prescribe a 180-day period for appealing the denied benefit claim. This process MUST be completed or else the claimant loses the right to file suit, also known as "failure to exhaust administrative remedies."

Trap #3: Failing to submit an appeal of an adverse disability benefit decision within 180 days of receipt of that decision.
Trick #3: Don't miss this deadline! But if all else fails, immediately call the insurer to request an extension. ERISA's regulations allow for "at least" 180 days, but it is up to the insurer to allow an extension. If granted over the phone, immediately follow it up in writing and indicate a date by which the claimant will submit the appeal.

EVIDENCE IN THE APPEAL

Fourth, although filing a hasty appeal is all that is necessary to preserve the ability to file a lawsuit, a scant appeal letter will not win the appeal, nor will it enable an ERISA practitioner to take the case for litigation. ERISA disability litigation is limited to the factual evidence presented in the aforementioned administrative appeal. Once in court, in all but rare circumstances, there will be no depositions, further medical records, or opportunities for direct or cross-examination. And there are also no jury trials. So if you help someone with their disability benefit appeal, please be sure to include all evidence necessary to win the case down the road.

Trap #4: Assuming that there will be a chance in court to put in more evidence supporting the disability claim.
Trick #4: Throw in everything but the kitchen sink into the appeal! If you think the evidence might be useful in litigation, put it into the appeal. Declarations from the client, friends, family, medical providers, and colleagues, as well as all relevant medical records and expert reports, are key to submit in the appeal of a denied claim.

FILING AN ERISA OR ERISA-RELATED CLAIM

Finally, if you do decide to litigate an ERISA claim, be aware that these claims must be brought in federal court or you will face removal of the ERISA claims and all claims related to the ERISA claims. With limited exceptions, if you are bringing state law claims and ERISA claims, ERISA will preempt those state law claims.[2]

Trap #5: Failing to separate any state law claims from ERISA claims.
Trick #5: Don't even mention ERISA or other employee benefits or benefit-related remedies in your state law complaint. Leave the ERISA claims alone and litigate those separately as ERISA claims in federal court, or face removal.

Trick #6: Give me a call. I'm an ERISA nerd and I'm happy to field your ERISA questions! 510.926.6768 Option 1, or cassie@benefitslaw.com. ◆



— Cassie Springer Ayeni is the President of Springer Ayeni, A Professional Law Corporation, in Oakland, CA, where she focuses on ERISA disability and life insurance cases. She can be reached at cassie@benefitslaw.com or www.benefitslaw.com

[1]Those exceptions are for public employees (anyone who works for the government such as teachers, legislators, public safety officers, etc.), and "church plans," (anyone employed, even tangentially, by a religious organization including those who work at Catholic hospitals).

[2]ERISA's "savings clause" provision saves from preemption any law that regulates insurance, banking, or securities. ERISA §514(b)(2)(A). An example of the application of the savings clause is in California's "notice prejudice" rule, which provides that claims can proceed even where there is late notice unless the insurer is prejudiced by the late notice. Because this is a law that regulates insurance and does not provide a remedy that conflicts with ERISA, the law is not preempted. UNUM Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 373, 119 S. Ct. 1380, 1389, 143 L. Ed. 2d 462 (1999).

Maximizing Damages for Low Wage Workers



by Jayme L. Walker

Shortly after the neo-Nazi rally and murder of a protester in Charlottesville, North Carolina, I saw an internet meme that said "If you ever wondered what you would be doing during the civil rights movement, you're doing it now." At first this caused me a crisis of conscience, and to some extent, it still does. But I've started to use it as a daily mantra of what I can do to contribute to the advancement of a more just society. As plaintiff's lawyers in Alameda and Contra Costa County, we are all in a unique position to promote justice. As an employment lawyer, where I can be most effective is the vindication of California's employment protections against the most vulnerable workers, low wage workers.

In California, women make up over half of all low wage workers and low wage workers are disproportionately women of color and immigrants.[1] A study by Oxfam, a non-profit organization dedicated to the alleviation of poverty, showed that most low wage workers work in service jobs that are primarily performed by women. These include waitress jobs, healthcare aides and childcare workers.[2] Over the next decade the amount of people working these low wage jobs is expected to increase.[3] These workers are especially vulnerable to violations of their civil rights because they can't afford to complain.

HARASSMENT IS PERVASIVE IN LOW WAGE INDUSTRIES

Workers in low wage industries face a disproportionate number of workplace abuses. In a study by Restaurant Opportunities Center in coordination with several prominent women's advocacy groups, it was found that restaurants are the single largest source of sexual harassment claims in the United States. While only seven percent of American women work in the restaurant industry, more than a third of all sexual harassment claims to the EEOC come from that industry. More than two thirds of women surveyed in the study reported sexual harassment by managers and a whopping 80% reported sexual harassment by co-workers.[4]

While restaurants may be the largest source of sexual harassment claims to the EEOC, farmworkers, many of whom are undocumented, experience workplace abuses that often go unreported. Female farmworkers experience outrageous sexual harassment, including sexual assault and rape, in extremely large numbers. Human Rights Watch found that 80% of the farmworkers interviewed in California's Central Valley had experienced some form of sexual abuse at work.[5] Many immigrants, undocumented or here on employer sponsored visas, are reluctant to challenge any unlawful conduct by their employers for fear of being deported.

That is why it is important that we as lawyers do what we can to help these workers when they do speak up and it is important to maximize the impact when one of these brave workers takes on an exploitative employer.

MAXIMIZE DAMAGES BY FOCUSING ON WRONGFUL CONDUCT OF EMPLOYER

There is a saying that good plaintiffs make good cases, but bad defendants make even better cases. The approach to maximizing damages for low wage workers is essentially the same as it would be in any other case. The focus needs to be put on the defendant's wrongful conduct. An employer's particularly reprehensible conduct can make a case with minor economic loss considerably more valuable both in the emotional distress toll such conduct takes on the employee and the possibility for punitive damages. Take for example a minimum wage restaurant worker who is repeatedly sexually harassed by another employee. She keeps working and keeps quiet because she needs the job. Where the restaurant management had reason to know the harassment was occurring and did nothing to stop it or where the harasser has a history of abusing women and the employer continued to employ the person, those are the kind of facts that need to be developed to maximize damages for the victim.

Where the victim employee does complain and the employer fails to prevent retaliation against this employee leading to her resignation, those facts can also lead to big damages for emotional distress. Consider being brave enough to speak up about harassment only to be retaliated against to such a degree, that one is forced to quit the job or is ultimately fired for some pretextual reason.

Where a defendant employer clearly exploits a low wage worker, fails to seriously investigate or remedy complaints, and retaliates against the employee for complaining, such conduct is often a pattern of activity designed to silence employees, exploit labor laws, and exploit the fact

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Low Wage Workers (continued from page 24)
that the Defendants' workers have little bargaining power. Most jurors are also employees and understand the importance of being treated fairly in the workplace. By building your case around facts showing that the Defendant employer treats its employees unfairly, you maximize damages in cases where economic damages may be low.

MAXIMIZE DAMAGES BY PROTECTING YOUR PLAINTIFF

Protecting your client's privacy in an employment case easily warrants its own article and has been the source of many very good articles, including one by our own Alexis McKenna in *Plaintiff* magazine. It is important to be familiar with the law in this area in order to protect the plaintiff from unwarranted intrusions that could hurt their case, but also because Defendants have often used privacy rights as a shield to hide legitimate discovery about how other employees were treated or to hide evidence that other employees had complained of similar conduct.

A recent California Supreme Court opinion, *Williams v. Superior Court* (2017) 3 Cal. 5th 531, set the record straight on the test for discovery of information which is arguably private, and overruled cases that held that a compelling need must always be established prior to discovering such information.[6] *Williams* was a PAGA representative action for wage and hour violations. The Plaintiff in that case merely sought contact information of other employees who may have been subjected to wage violations.

Williams held that where an objectively reasonable expectation of privacy exists under the circumstances, and a threatened intrusion is serious, the court must conduct a balancing test taking into consideration what alternative less intrusive means exist to obtain the information. The court clarified that just because some privacy interest is implicated, the party seeking discovery need not always articulate a compelling interest. However, the court noted that obvious invasions of interests fundamental to personal autonomy must still be supported by a compelling interest and a demonstration that the discovery sought cannot be obtained by less intrusive means.[7]

While this case will make it easier for Plaintiff to get the discovery they need, it is important not to let Defendants use it to conduct a fishing expedition into Plaintiff's private affairs. The court held in the circumstances of this particular case, there was no serious intrusion into privacy that warranted a balancing test or a compelling need. Although the court did not address examples of privacy interests that would require a compelling interest, certainly when it comes to Defendants seeking information from the plaintiff regarding medical records, psychological history, sexual history or current employment records, we should be arguing that a compelling interest must still be demonstrated.[8]

Protecting the privacy of the plaintiff can go a long way towards maximizing their recovery. When the defense is seeking your client's medical records, asking them totally irrelevant questions about their relationships in the deposition, and subpoenaing their current employers, this can demoralize the plaintiff and can cause problems for you with a jury if any damaging information somehow gets admitted into evidence at trial.

In employment cases, you can assert the privacy rights of third parties when it comes to questions about your client's personal relationships. When it comes to medical records or psychological history, consider limiting the scope especially with regard to the timeframe for which such information is being sought and make sure you see it first!

For a low wage worker who couldn't pay their rent, or suffered extensive financial damage as a result of an unfair termination, consider whether you really need to use any medical or psychological records or an expert. Certainly the emotional distress just from that experience warrants significant damages without a psychiatrist telling anyone it does.

If the plaintiff was lucky enough to secure alternative employment, it is important not to let the defendant interfere with that by subpoenaing the employee's current employer. Certainly there are less intrusive means to obtain such records, i.e. through the plaintiff herself.

If you are representing an employee who is undocumented, do not allow any inquiry into their immigration status. California Labor Code Section 1171.5(a) provides: *(a)All protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state. (b) For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law.*

Where the plaintiff has been a victim of a crime, such as a sexual assault, it may be possible to obtain a U visa if they are willing to assist law enforcement in the prosecution of the perpetrator.

IT COSTS A LOT TO WIN . . . AND EVEN MORE TO LOSE

Very good lawyers differ in their opinions as to when experts are and are not needed in employment cases. Some phenomenal

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Low Wage Workers (continued from page 26)
lawyers I know, like my partner and mentor Gary Gwilliam, say that if the case is worth taking, it's worth working up right with all the appropriate experts. Other good lawyers say you don't need emotional distress or human resources experts for any good employment case. Ultimately, when and if hiring experts makes sense should be decided on a case by case basis. The amount of economic damages sustained by the plaintiff should not be part of the consideration when deciding whether to hire experts. In the end, in employment cases where the wrongful conduct of the Defendant has caused the employee significant harm, the amount of economic damage doesn't really matter if you maximize emotional distress damages by tying those damages together with the reprehensible conduct of the Defendant.

As I discuss above, if you have reasons not to delve deeply into the client's psychological history and the client has suffered obviously distressing circumstances as a result of the termination, it may not be necessary to hire an expert psychologist. However, where you are representing a person that does not have a complex psychological history, a person that doesn't show emotion well or doesn't have people close to them that can elaborate on the emotional toll the termination has taken on them, having an expert articulate that and explain the reasons such a person may not seek treatment can be helpful to a jury, a mediator and a defense counsel. A good emotional distress expert can sometimes act as a liability expert, telling the story of what happened to the plaintiff and the effect of the wrongful conduct of the Defendant better than the plaintiff themselves. This is extremely important if the plaintiff may have a lack of witnesses on their side.

Whether or not you choose to use an emotional distress expert, it is incumbent upon the lawyer in a low wage case to really develop the emotional distress damages. Get your client's medical records to see what they told their doctors, talk to their entire family, talk to their friends, talk to your client about what is going on in their life from the very beginning of the case and document carefully what they have experienced that is directly related to the termination. How has it impacted their family, their friends, their engagement in their community, and their ability to do the things the love? This is the one part of the case where you should really focus on the plaintiff and in order to be effective, you have to know your client and what they have been through since the termination. Tell the story of your proud, hard-working plaintiff who worked a low wage job to support her family. While at work she endures sexual harassment that humiliated her so much that she changed her appearance. Show the before and after photos of how the plaintiff changed. When she finally complains about the harassment, she is retaliated against and the employer starts nitpicking her performance. When she is fired or just can't take it anymore, she can't make rent that month and she fears she is going to lose her apartment. Then she has to go and apply for food stamps to get by suffering further humiliation when she always worked so hard to support herself. How did her family suffer? What did her kids need that she couldn't buy? Even if you hired an emotional distress expert, you need to know what your client suffered and be able to tell the story. When you tell the story or the damages, you always tie it back to the wrongful conduct of the Defendant that caused the damages.

Finally, in the right case, a good human resources expert can help with summary judgment motions and help a jury understand how the employer should have responded to the situation. Several courts have held that experienced human resources expert's testimony is relevant and helpful to juries.[9] Regarding expert testimony on human resources issues, the Court of Appeal declared in *Kotla:*

> *Expert testimony on predicate issues within the expertise of a human resources expert is clearly permissible.* For example, evidence showing… that an employee's discharge was grossly disproportionate to punishments meted out to similarly situated employees, or *that the employer significantly deviated from its ordinary personnel procedures in the aggrieved employee's case, might well be relevant to support… an inference of retaliation.* Opinion testimony on these subjects by a *qualified expert on human resources management* might well assist the jury in its factfinding. (emphasis added).[10]

Human resources experts can be generalists that apply in any workplace context or be specialized to workplace investigations, public entity internal affairs investigations, insurance industry experts, and medical industry experts. For instance, in a case where hospital workers were fired for allegedly violating HIPAA, a HIPAA compliance expert testifying that the employees did not violate HIPAA is powerful evidence of pretext.

PROMOTE SOCIAL JUSTICE BY GIVING PRO BONO ADVICE AND DOING PRO BONO CASES

It could be the plaintiff's lawyer's lament that it costs a lot to win these cases, but even more to lose. Ultimately, we all have to make business decisions about how to work up cases and when to take cases and when to turn them down. Some of the most rewarding things I've done in my career have been the times where I've helped an employee navigate their own situation and save their job or helped them obtain a small settlement so that they could move on with their life. Sometimes, it might only take an hour of your time to hear out an employee seeking some advice whether or not they ultimately file a lawsuit.

We can all promote social justice with the skills we have whether or not we take a case for a fee or just help an employee because it's the right thing to do. When I started law school, the dean of my school now Alameda Superior Court Judge Jeff Brand was asked if there were too many lawyers in the market. He replied, "There will never be enough lawyers working for social justice." When you maximize recovery for vulnerable low wage workers, you help promote a more just society. When you work their cases up right, regardless of the amount of economic damages involved, you promote better results for all workers in their position. The message is sent that we trial lawyers will not allow low income to justify discrimination and harassment in the workplace. ◆

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[1]"California's New Minimum Wage: Who Are California's Low-Wage Workers", Legislative Analyst's Office, December 6, 2016. Available at http://www.lao.ca.gov/LAOEconTax/Article/Detail/223.

[2]"Undervalued and Underpaid in America", Oxfam America, November 28, 2016, p.4. Available at https://www.oxfamamerica.org/static/media/files/Undervalued_FINAL_Nov30.pdf.

[3]*Id.* at p.5.

[4]"The Glass Floor: Sexual Harassment in the Restaurant Industry", Restaurant Opportunities Center United, October 7, 2014, p.2. Available at http://rocunited.org/wp-content/uploads/2014/10/REPORT_TheGlassFloor_Sexual-Harassment-in-the-Restaurant-Industry.pdf.

[5]"Workplace Violence and Harassment of Low-Wage Workers", Berkeley Journal of Employment and Labor Law, Vol. 36 Issue 1, p.175. Available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1481&context=bjell.

[6]*Williams v. Superior Court*, (2017) 3 Cal. 5th 531, at 555.

[7]Id. at 557.

[8]See *Britt v. Superior* Court, (1978) 20 Cal. 3d 844, *Board of Trustees v. Superior* Court (1981) Cal. App. 3d 516, and *Lentz v. Superior* Court (1994) 28 Cal. App. 4th 1839.

[9]*See Kotla v. Regents of Univ. of California* (2004) 115 Cal. App.4th 283, 289-90, *In re Apollo Group Inc. Sec. Litig.* 527 F. Supp. 2d 957, 964 (D.Ariz. 2007), and *Humphreys v. Regents of Univ. of California* 2006 WL 1867713, at *3 (N.D. Cal. July 6, 2006).

[10]*Kotla v. Regents of the University of California* (2004) 115 Cal. App. 4th 283, 294.

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Lindsay Slatter was on the team of attorneys that established the civil liability of a government entity whose police officer raped an arrestee, Mary M. v City of Los Angeles (1991) 54 Cal 3rd 202. Jerome Fishkin argued the successful quantum meruit case to the California Supreme Court, Huskinson v Wolf (2004)32 Cal 4th 453. Together they represented Sergio Garcia, the first undocumented immigrant to be admitted to practice law, in Re Garcia (2014) 58 Cal 4th 440.



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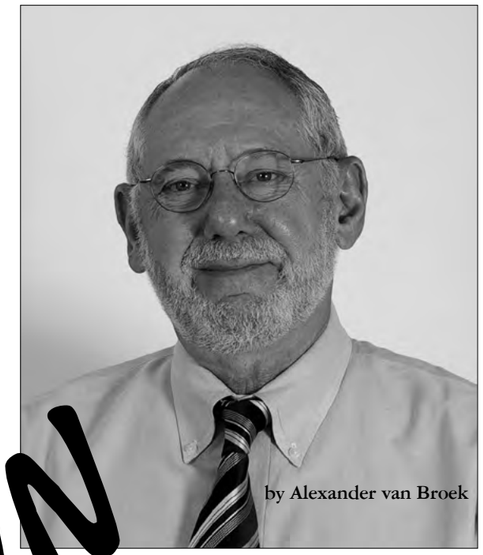

by Alexander van Broek

FUN for Defendants

Attorneys for plaintiffs need to be aware of the defensive use of the federal enclave doctrine ["FED."] If material facts of your case occurred on a federal enclave, be sure to file all possible federal law claims because your state law claims may be dismissed (preempted) under the FED. Also, your case may be removed to federal court if the FED issue arises.

PI attorneys probably won't face loss of their claims under the FED because battery, defamation, and negligence, for example, are state law claims that existed before most federal enclaves were created. In addition, the FED has been modified to permit PI claims.

Which attorneys should really worry? Those who use recent state statutes and common law, like me. The Fair Employment and Housing Act, many state labor laws, wrongful termination in violation of public policy, intentional interference with prospective economic advantage, negligent infliction of emotional distress, are state law claims that came into being after many federal enclaves were created.

WHAT IS A FEDERAL ENCLAVE?

Article 1, section 8, clause 17 gives Congress the power to obtain from the States "Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings" and exercise authority over them. Although Congress agreed in 1841 that it had to get consent to erect federal buildings from the state involved, in 1885 the Supreme Court ruled that there were two additional ways for the United States to acquire federal enclaves: (1) cession by a state, and (2) the United States could "reserve" legislative jurisdiction at the time of statehood, and expanded these "cessions" and "reservations" beyond the needful building purpose of the Enclave Clause. *Fort Leavenworth Railroad Company v.* Lowe (1885) 114 U.S. 525.

HOW DOES THE FED AFFECT CLIENTS AND THEIR ATTORNEYS?

Plaintiffs got some help in 1928, when Congress made state wrongful death and personal injury claims applicable to federal enclaves. *16 U.S.C. § 457*. In 1937, the Supreme Court held that the states could reserve jurisdiction when consenting to federal legislative jurisdiction. *James v. Dravo Contracting Co.* (1937) 302 U.S. 134. But, many court cases now hold that state laws do not apply on federal enclaves, including criminal laws, human rights laws, *Hooda v. Brookhaven Nat. Laboratory* (E.D.N.Y. 2009) 659 F.Supp.2d 382, anti-discrimination laws, *Osburn v. Morrison Knudsen Corp.* E.D. Mo. 1997) 962 F. Supp. 1206; *Miller v. Wackenhut Services*. (W.D. Mo. 1992) 808 F.Supp. 697, and whistle-blower laws, *Stiefel v. Bechtel Corp*. (S.D. Cal. 2007) 497 F.Supp.2d 1138.

ARE THERE EXCEPTIONS TO THE FED?

If the state law claim existed before the creation of the federal enclave, the state law claim may be allowed. The FED will not apply if a state reserved jurisdiction when ceding the land to the United States, or if federal legislation reversed the effect of FED.

In *Kasperzyk v. Shetler Sec. Servs., Inc*. (N.D. Cal. Jan. 3, 2014) 2014 U.S. Dist. LEXIS 547 ("*Kasperzyk*") Judge Chen found that the state torts occurred on a federal enclave created in 1874, but he limited the effect of the FED as follows: he ruled that because 16 U.S.C. § 457 permits claims for death or personal injury within federal enclave, he would allow the state claims to go forward but only as to personal injury damages, and he disallowed economic damages. (*Scott v. Gino Morena Enter. L.L.C.* (U.S.D.C. C.D. 2015) 2015 WL 847160, *3 disagrees with *Kasperzyk* on procedural grounds.)

FIND OUT WHEN THE FEDERAL ENCLAVE WAS CREATED

You need to know the date the federal enclave in question was formed. The existence of a federal enclave may be noticeable: lands and buildings operated by the United States, military installations, federal courthouses, and national parks. The courts will take a judicial notice of a deed for this purpose. It will be prudent for you to locate the deed for any location where material facts in your case took place. A court might also take judicial notice of a finding in another court case, as in *Kasperzyk* which took judicial notice that the Presidio was a federal enclave based on a California statute ceding the territory to the United States in 1897. (Id. at *12.) Other sources for this information include statutes, cases, an historical society, and legislative or executive actions. There is book entitled *Highlights from Federal Enclave Law* by Roger W. Haines, Jr. I consulted with Mr. Haines, who may be located on the Internet.

FIND OUT THE DATE OF ORIGIN OF EACH CAUSE OF ACTION

Find out when each vulnerable cause of action originated or was first noted by the courts of your jurisdiction. You want to be able to say that your cause of action was in existence in your state when the federal enclave was ceded by your state or created within your state. A neat summary of the history of FED is found in *Stiefel v. Bechtel Corporation* (S.D. Cal. 2007) 497 F.Supp.2nd 1138, 1148.

This constitutional provision permits the continuance of those state laws existing at time of surrender of sovereignty, except insofar as they are inconsistent with the laws of the United States or with the governmental use for which the property was acquired, unless they are abrogated by Congress, so that no area may be left without a developed legal system for private rights. [citations omitted.] Because the federal government has exclusive jurisdiction, such laws become federal laws, although having their origin in the laws of the state. [citations omitted.] Only state laws in effect at the time of cession or transfer of jurisdiction, however, can continue in operation. [citation omitted.] Laws subsequently enacted by the state are inapplicable in the federal enclave unless they come within a reservation of jurisdiction or are adopted by Congress. [citations omitted.]

In *Stiefel*, the plaintiff successfully argued that FED did not apply to his retaliation claims under Labor Code sections 6310 and 6311 (pertaining to worker safety) because those laws "derive from very similar statutes . . . that were adopted in in 1937."

HOW DO YOU KNOW IF YOU STATE LAW CLAIM IS PREEMPTED BY THE FED?

In California, battery and assault have been known as civil wrongs since *In Ex Parte Prader* (1856) 6 Cal. 239, where the California Supreme Court held that a party cannot be imprisoned under a judgment, in a civil action, for assault and battery. See, also, *Valdez v. Percy* (1939) 35 Cal. App.2d 485. If the federal enclave was created after the state cause of action originated, it is likely that you can successfully argue that it is not preempted by the FED.

The Fair Employment and Housing Act was passed in 1980 but is based prior law passed in 1948. Intentional infliction of emotional distress was first recognized in California in 1950. *Bowden v. Spiegel, Inc.* (1950) 96 Cal.App.2d 793; *Richardson v. Pridmore* (1950) 97 Cal.App.2d 124. Negligent infliction of emotional distress was first recognized in California in 1980. *Molien v. Kaiser Found. Hosps*. (1980) 27 Cal.3d 916.

Unjustifiable interference with business relations may have first appeared in California in *Masoni v. Board of Trade of San Francisco* (1953) 119 Cal.App.2nd 738. The unfair competition law (Bus. & Prof. Cod. §§ 17200, et seq.) was enacted in 1977. Claims under Lab. Cod. §§ 201-204 are barred by FED but unjust enrichment and promissory estoppel are not. *Mersnick v. USProtect Corp*. (N.D. Cal. 2006) 2006 WL 3734396.

The earliest California version of a minimum wage law was passed in 1913.

In *Korndobler v. DNC Parks & Resorts at Sequoia* (2015) 2015 WL 37976252015 Wage & Hour Cas.2d (BNA) 194, 912, the court dismissed all the state law wage and hour claims except the minimum wage claim. The court noted that Sequoia National Park became a federal enclave in 1920. The court held that because California did not reserve its labor law rights at the time of cession, the plaintiff's overtime and penalty claims were barred. See a similar result in *George v. UXB Intenational, Inc*. (N.D. Cal. 1996) 1996 WL 241624.

In *Booher v. JetBlue Airways Corporation* (2016) 2016 WL 164292926, Wage & Hour Cas.2d (BNA), Judge Jeffrey S. White accepted defendant's argument in opposition to plaintiff's motion for summary judgment on plaintiffs' claim for overtime wages that (this was creative work by defense counsel) some of the time that flight attendants were in the air occurred in the airspace over federal enclaves such as the Yosemite National Park. Though he denied plaintiff's S/J motion, the court noted that at trial the amount time to be discounted might be insignificant.

OTHER EXCEPTIONS TO THE FEDERAL ENCLAVE DOCTRINE

At the time of the cession of the land to the federal enclave the state may have expressly reserved its authority to enforce its laws, See, *Sundaram v. Brookhaven National Laboratories* (E.D. N.Y 2006) 424 F.Supp.2d 545. Congress may have passed a statute providing that state laws are not preempted at a particular federal enclave. See, *Goodyear Atomic Corporation* (1988) 486 U.S. 174. In *Lebron Diaz v. General Security Services Corp*. (D.P.R. 2000) 93 F.Supp.2nd 129, individuals employed by the defendant at a federal courthouse brought a lawsuit for unpaid bonuses and sick leave under Puerto Rico law. The employer moved to dismiss on the grounds of FED. The court accepted plaintiff's argument that the Service Contract Act explicitly applied local laws to the federal enclave. (Other courts have reached the opposite conclusion.)

WHAT DO YOU DO IF YOUR CLAIM IS PREEMPTED?

Don't file that claim, because you might be removed to federal court unnecessarily. If your state law claim is preempted, try to find a federal law claim that provides the same or similar remedies.

THE FED AUTHORIZES REMOVAL TO FEDERAL COURT

A defendant may employ the FED to remove a case to federal court under 28 U.S.C. section 1446. The defendant must sufficiently allege the "now-federal nature" of the plaintiff's cause of action. For example, in *JAAAT Technical Services, LLC v. Tetra Tech Tesoro, Inc*. (E.D. Va. 2016) 2016 WL 1271039, the court found exclusive federal jurisdiction. A defendant might also remove a case on the basis of FED after discovery gives rise to sufficient information to support removal, on the ground that the initial pleading was ambiguous and therefore did not provide unequivocal notice of the right to remove. *Akin v. Ashland Chemical Co*. (10th Cir. 1998) 156 F.3d 1030, 1035. In the face of a removal, it worthwhile for a plaintiff to identify grounds to dispute FED allegations, because a federal court is entitled to rely upon removing party's factual allegations which are undisputed by the plaintiff. *Montez v. Department of the Navy* (5th Cir. 2004) 392 F.3d 147.

CONCLUSION

You have now been warned about the federal enclave doctrine. In this era, when Congress and each new Cabinet Secretary is antagonistic to legal claims on behalf of workers, farmers, consumers, whistleblowers and tort victims, me must anticipate defense efforts to expand federal preemption of our clients' state law claims. ◆

— Alexander van Broek is a sole practitioner representing plaintiffs in labor and employment claims in the Bay Area.

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Alameda-Contra Costa Trial Lawyers' Association
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36th ANNUAL
WHAT'S NEW IN TORT & TRIAL:
2017 IN REVIEW

To practice successfully in 2018, you need to know about the new 2018 statutes and judicial decisions that affect tort liability and civil procedure. Miss this program at your own risk!

TUESDAY, FEBRUARY 27, 2018
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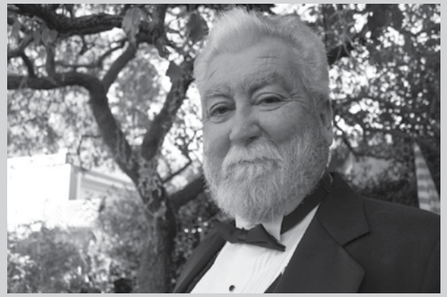
~ In Memoriam ~



Kevin Lancaster

For more than three decades, Kevin Lancaster, who passed away on October 2, 2017, was a tireless advocate for those who suffered from catastrophic injuries. As a team leader at the Veen firm, Kevin's uncompromising devotion to practicing law with civility, fairness and integrity allowed him to be at the forefront of expanding workers' rights and to ensure they received full compensation through civil actions. Kevin also paved the way for attorneys to view workers' compensation cases in a broader sense in order to rule out other possibilities, and his efforts ultimately resulted in new laws and safety regulations.

In 2004, he brought to light the dangers posed by everyday cartridge pool filter systems after working on several cases in which such a filter had turned into a pressurized bomb. Due to a design flaw, the filters, which had been marketed as safe and easy to use, stored too much air, causing the devices to explode while being cleaned or replaced and resulting in serious injury or death. Manufacturers downplayed the danger, made small modifications to the filters and failed to address the serious risks of potential explosions. Kevin pressured manufacturers to address these issues and make significant modifications, and he worked tirelessly to publicize these dangers.

Outside the courtroom, Kevin was dedicated to giving back to both the legal and local communities. He put on free legal clinics, participated in public radio call-in shows and served as a moot court judge for cases involving appellate and trial practice at the University of San Francisco School of Law and Golden Gate University School of Law, and on behalf of the American Trial Lawyers Association and the American Bar Association. He also served as a juvenile court judge pro tem for the San Francisco Youth Court and directed a high school moot court program.

Moreover, Kevin served as a faculty member of the "Tort and Trial" series sponsored by the Consumer Attorneys of California and ACCTLA, for which he reviewed and analyzed all California and U.S. Supreme Court and appellate cases bearing on tort and trial practice. He provided MCLE instruction for statewide and local trial lawyer chapters, the California Applicants' Attorneys Association, the CEB and Industrial Safety Professionals. In addition, Kevin was an author of the practice guide California Causes of Action (15th edition, James Publishing).

Recently, he was honored with the 2017 San Francisco Trial Lawyers Association's Lifetime Achievement Award.

Raised in Southside Boston, the son of a shipyard worker, Kevin later went on to become a welder, a sailor, a cowboy in Kentucky, a Nixon era White House aide, a big rig operator, and an organic produce manager. He ultimately met the love of his life, Neuritsa, and settled in her hometown of Oakland, California. Those that know Kevin know he embraced the complexities of justice and choosing to raise a family in the dynamic diversity of Oakland was a direct reflection of his values. He is survived by his wife, Neuritsa, daughter Anoush Lancaster, who is following in his footsteps as a trial lawyer with Stebner & Associates representing personal injury plaintiffs and victims of elder abuse, daughters Grace and Shana and son, Sam Lancaster and three grandchildren, Amir and Mila Jackson-Sattler and Sebastian Lancaster.

Alameda-Contra Costa
TRIAL LAWYERS' ASSOCIATION

CALENDAR OF EVENTS

Thursday, December 7, 2017
Finish Up Your MCLE with ACCTLA
Scott's Seafood, Jack London Square, Oakland
5:30pm check-in / *6:00 - 9:00* program
3 hours MCLE credict (includes 1 hour Elimination of Bias, 1 hour Legal Ethics and 1 hour Competence Issues)
(See page 11 for further information)

Thursday, January 18, 2018
Judges' Night
Claremont Hotel & Spa, Berkeley
6:00pm Cocktails / *7:00* Dinner
(See page 19 for further information)

Tuesday, February 20, 2018
Board Meeting

Tuesday, February 27, 2018
Tort & Trial Seminar
Scott's Seafood, Jack London Square, Oakland
5:30pm check-in / *6:00 - 9:15* seminar
3 hours MCLE credit (includes 1 hour Legal Ethics)
(See page 33 for further information)

Tuesday, March 20, 2018
Board Meeting

MEMBER *news*



MEMBER VERDICTS AND SETTLEMENTS

$5,321,050 compensation verdict for pipeline worker diagnosed with mesothelioma

Frank and Cynthia Hart v. Keenan Properties Inc., Alameda County Superior Court Case No. RG16838191.

Maune Raichle Hartley French & Mudd, LLC is proud to announce a verdict on behalf of our deserving clients, Frank and Cindy Hart, who prevailed at trail against Keenan Properties, Inc.

Frank worked in underground construction and pipe laying from 1975 until he retired in 2015. His work involved handling and installing asbestos cement pipe manufactured by CertainTeed and Johns-Manville from 1975 until 1991. Installing asbestos cement pipe required occasional cutting, which caused asbestos exposure. For 5 months during the winter of 1976-77 Frank installed Johns-Manville asbestos cement sewer pipe in McKinleyville, California. The asbestos cement pipe at the McKinleyville project was brokered and sold by Keenan Pipe and Supply, predecessor to Keenan Properties, Inc. Frank Hart was diagnosed with mesothelioma in October 2016.

At trial, Keenan denied it brokered and sold the AC pipe at the McKinleyville jobsite or that it was responsible for any of plaintiffs' injuries and harms. Keenan's pre-trial offer under CCP §998 was for a dismissal and waiver of costs.

Trial commenced on June 12 and the jury returned a verdict totaling $5,321,050 on July 14. The jury found Keenan 17% liable for Frank's injuries.

The Harts were represented at trial by William Ruiz (lead) and Meeti Sudami, both ACCTLA Board Members.

Keenan Properties, Inc. was represented by Joseph Gunter, Michael Sandgren, Haley Hansen and Kyle Clawson of Selman Breitman, LLP, San Francisco.

The Van Blois Law Firm settles three multi-million dollar cases

The construction accident case of Doe vs. Doe Framing and Doe Building Company settled for $3,375,000 shortly before trial in July. The plaintiff, a 50 year old wallboard taper, fell from the unguarded edge of a second floor wall opening. The temporary guardrail at the opening was missing and the dispute centered on how long it had been missing, who removed it and who had the authority to stop work. The owner/builder filed a Motion for Summary Judgment in Alameda County Superior Court, arguing immunity under the Privette case. The Court ruled that the "retained exception" to Privette defeated the motion. Defendants argued comparative negligence because plaintiff knew the railing was missing but still continued to work and walked off the edge of the opening.

Plaintiff sustained multiple spinal fractures, resulting in loss of movement and sensation below the nipple line. Attorneys Tim Knowles and Lew Van Blois represented the plaintiff.

Another case settled at trial and resulted in a recovery in excess of $5 million for plaintiffs and included lifetime medical monitoring for the plaintiffs who were exposed to asbestos containing materials while renovating an old military building. The damages included severe emotional distress from a reasonable fear of developing cancer that was significantly increased by the exposure. Attorneys Lew ▶

got news?

If you have member news that you'd like to share, please contact:

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Van Blois and Darren Van Blois achieved the result with the help of asbestos specialists Ron Shingler and Rick Brody.

Jung et al. v. Suk, et al.
Alameda County Superior Court
Hon. J. Spain
Settlement $1,250,000.00

On June 13, 2015, 2015, defendant, Tina Suk, hosted a party at her residence in the Castro Valley hills. This was a party to celebrate a college graduation. Suk's residence was gated and had a twisting driveway.

Defendant, Nam Hee Lee, attended the party and became extremely intoxicated. At approximately 0020 June 14, 2015, Lee tried to leave.

People tried to dissuade her from driving. Lee ended up hitting two cars in the driveway before giving up. Lee got out of her car but failed to secure the emergency brake nor place it in park. Lee's car began to roll. Jung Suk Lee (unrelated to Nam Lee) jumped in to stop the car but accidentally hit the accelerator running over and mortally wounding Lee as well as Young Jo Park.

Lee's son recognized she was seriously injured. He called 911 but was told response time was 15-20 minutes. Lee's son drove Lee to Eden Hospital where she was DOA.

Eden reported a suspicious death to law enforcement. At about 0300, law enforcement surrounded Lee's residence ordering everyone outside. Law enforcement then conducted a protective sweep of the residence, finding Park in an anteroom off of the kitchen. Park's vitals were: pulse 36; b/p 53/29. Resuscitative measures were implemented. Park was taken to Eden here was pronounced at 0330.

Plaintiffs, the widow and father of the decedent, filed suit for wrongful death against Suk and Lee. As Lee predeceased Park, plaintiffs opened an Estate to ensure her insurance carrier did not seek to drag things out. That matter settled quickly for the policy limits of $250,000.00.

As to Suk, plaintiffs argued Suk assumed a duty when she took Park inside rather than obtaining medical aid. The autopsy revealed Park did not have injuries to his skull nor chest area (save for compression fractures). Rather, Park suffered pelvic fractures. Plaintiffs argued Park slowly bled out into his peritoneal cavity and that prompt or even delayed medical care would have saved his live.

Park's BAC was .12 at death. Suk argued Lee was primarily responsible for Park's death; Park was extremely intoxicated and thus at fault himself; Park did not want medical care; Park had a sporadic work history, poor earnings and was a big consumer of his income. Finally, Suk argued that Park's undiagnosed occluded left anterior descending artery would have led to premature demise. Suk's carrier ultimately paid its policy of $1,000,000.00. Plaintiff's Counsel: Michael E. Gatto.

MEMBER PUBLICATIONS

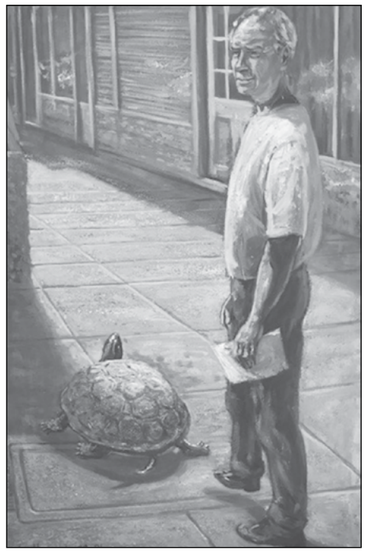
Alan Charles Dell'Ario is pleased to report that he has an article appearing in the next issue of CAOC's *Advocate — Winning the Appeal at Trial.* He presented "Coping with Cuevas" on a panel on medical malpractice at the CAOC convention on Saturday, November 18.

MEMBER HONORS

The Law Offices of Van Blois & Associates is pleased to announce receipt of honors from Best Lawyers, Northern California. Best Lawyers bestows these honors based upon peer review. R. Lewis Van Blois was honored as the Product Liability Litigation — Plaintiffs, Lawyer of the Year for 2018. Michael E. Gatto was honored as the Personal Injury Litigation — Plaintiffs, Lawyer of the year for 2018.

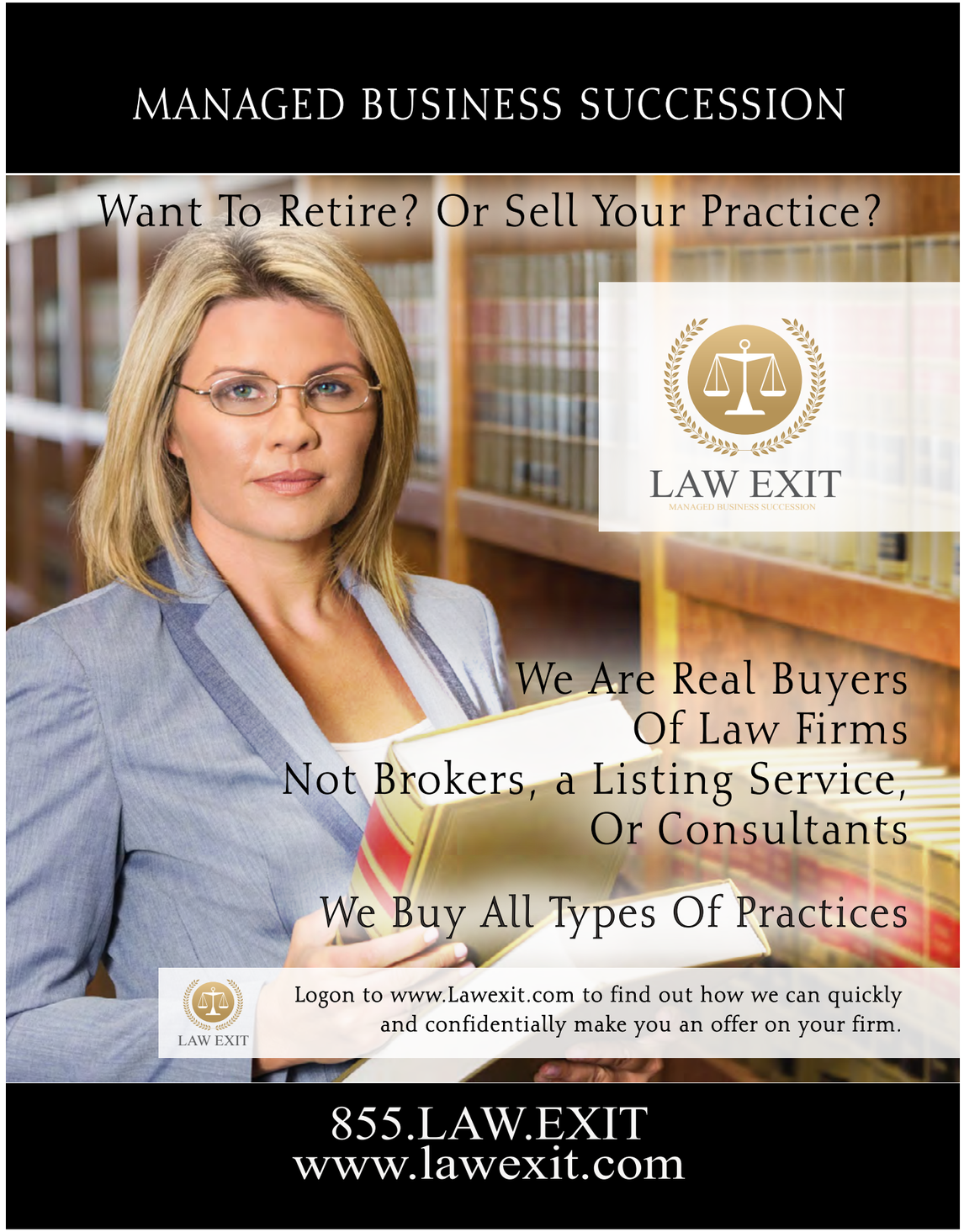
MEMBER MEDIATORS

After a six year delay due to a companion class action case, our past-president **David Hicks** was awarded fees for successfully mediating a settlement in a federal class action. The judge awarded Mr. Hicks fees in the amount of $34,782 at a rate of $660 per hour. Now that's a tireless mediator! With 45 years trying cases behind him, he's accepting mediation appointments throughout northern California, under the name North State Mediation. *(Below is David hurrying justice along.)*



MEMBER APPEALS

The Dolan Law Firm obtained a ruling from the 1st Appellate District of California upholding a Contra Costa Trial Court determination that an employment arbitration provision was both procedurally and substantively unconscionable. This victory both re-establishes and furthers many of the *Armendariz* standards. *Baxter v. Genworth* 2017 WL 4837702 Appellate Argument by Chris Dolan, Attorneys of Record Christopher B. Dolan, Emile A. Davis, Menaka Fernando. ◆



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