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the Verdict

Summer 2023

Alameda-Contra Costa
TRIAL LAWYERS' ASSOCIATION



A fond tribute to

William F. Whiting

page 10



Alan Charles Dell'Ario

Certified Specialist, Appellate Law
State Bar of California, Board of Legal Specialization



Charles Dell'Ario has been representing individuals and small businesses in the California and federal courts since 1974. Beginning in 1997, Mr. Dell'Ario has specialized in appellate matters and has participated in over 250 appeals in the California Courts of Appeal, Supreme Court of California, Ninth U.S. Circuit Court of Appeals and the United States Supreme Court.

Fighting the Good Fight for Plaintiffs

Now in my 49th year, I continue to fight successfully for tort plaintiffs in the appellate courts. In connection with my trial lawyers, ACCTLA-member Todd Walburg and co-counsel Celine Cutter, I established the duty of public agencies to maintain their streets and roads free of dangerous conditions that would increase the risks of recreational cycling. Our client was grievously injured when her bike struck a large pothole, throwing her to the pavement. The defendant argued she had assumed the risk of its bad roads. (Williams v. County of Sonoma (2020) 55 Cal.App. 125.)

Former ACCTLA and CAOC president Micha Liberty and I have teamed to fight the cause of school children victimized on account of their disabilities. The Supreme Court of California granted our petition for review and will decide the issue of first impression whether the state Unruh Act applies to the 7 million public school children. The high court only grants about 55 of the 3,500+ petition it received each year.

If you're facing an appeal or writ, get the best. If your appeal is winnable, I will do it.

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— Don't trust your appeal to just anyone! —

Statement of Editorial Policy

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executive director's corner



Mariana Harris

ACCTLA — Alameda-Contra Costa Trial Lawyers' Association — it's a really long name but ends in Association. I'm sure you know that there are associations for almost everything, but did you know that there is an association for executive directors of legal associations? Well, there are several around the country, but since September of 2022, I've been the President of the Executives of California Lawyers' Associations (ECLA). As the name suggests, it's an association of EDs, like me, who run associations for lawyers in California. We have:

- a listserve (in which you couldn't even imagine the type of questions that come up);
- a retreat every year, where we discuss best practices, new technology and share ideas;
- and a business meeting in conjunction with California Lawyers Association's annual California Bar Leadership Conference.

Being active in ECLA has really helped me in so many ways. I encourage you to be active in ACCTLA! You might be surprised at the many ways we can help you – not only in your practice, but it's also a great way to make new friends!

For futher information, please contact me at 925.257.2414 or acctriallawyers@gmail.com.

from the president



Jennifer Fiore

Welcome to the second edition of the 2023 *Verdict*. I'm excited to announce the new editors of The Verdict — Tiega Varlack and Michael Haley — who recently joined Winston Moody on the editorial team. Tiega and Michael jumped in headfirst when we needed a vacancy filled in April by the departure of Board Member Ian Rivamonte.

While the ACCTLA Board was sad to see Ian go, we enthusiastically congratulate Judge Rivamonte on his appointment by Governor Gavin Newsom to the Superior Court of Monterey County. We look forward to witnessing him serve "the great people of Monterey County with fairness, integrity, and dedication."[1]

With fairness, integrity, and dedication in mind, ACCTLA Board Members and members of the legal community at large provide moving tributes to Past President Bill Whiting in this edition. We honor a lawyer who exemplified the finest of our profession. Take a moment and be inspired to be more like Bill.

This edition contains great practicable tips from the latest on forced arbitration by Brittany Smith to gearing up for toxic torts by Tiega Varlack. Curious about DocuSign? Learn about the latest technology from Michael Haley.

The ACCTLA Board and I hope to see you in person at the Summer BBQ on August 6, 2023, when we'll be honoring our member of the year, Jayme Walker. Congratulations Jayme!

— Jennifer Fiore is a trial attorney and shareholder with Fiore Achermann, where she focuses on catastrophic personal injury, wrongful death, public entity liability, sexual abuse, maritime and other torts. She can be reached at Jennifer@theFAfirm.com.

[1]Statement of Judge Rivamonte, https://fbanc.org/announcements/fbanc-congratulates-judge-ian-rivamonte.

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Getting to know your ACCTLA ExCom

Cassie Springer Ayeni

President-Elect



Are you a generalist or a specialist lawyer?
My sole area of expertise is in ERISA long-term disability claims, appeals and litigation.

How long have you practiced law?
21 years.

Can you describe your typical client?
Most of my clients are professionals who expected to work full time until retirement. Then, a health crisis causes them to reevaluate that plan and take a medical leave of absence on the advice of their physician. The client applies for benefits under the employer's short- or long-term disability insurance policy, but the insurer relies on its own in-house medical team to deny the claim. The client then reaches out to me to try to reverse the decision. Increasingly, though, my clients may even approach me for help after a disabling diagnosis, but before stopping work, to assess the disability claim and put together the strongest possible disability application.

Besides your law degree, do you have any kind of special training or insights that you apply to your cases?
The world of ERISA litigation is small. I've been fortunate enough to get to know many fine attorneys across the country who practice in my field, primarily through my work with the ABA Employee Benefits Committee, of which I was co-chair from 2019-2022, and the Joint Committee on Employee Benefits, to which I am the ABA's Labor & Employment Law Section Liaison. Learning from each other through these organizations, including by authoring and editing articles and books on the topic, and speaking at ERISA conferences and webinars, has been key in my professional development.

Cat Cabalo

Immediate Past President

Are you a generalist or a specialist lawyer?
I am a specialist. My practice is disability rights.

How long have you practiced law?
I clerked for the Hawaii Supreme Court right after law school in 2001 and started practicing in 2002. Wow, I feel old right now!

Can you describe your typical client?
My clients have all different kinds of disabilities. Some of them use wheelchairs, others are blind or low vision, some are deaf or hard of hearing, others use service dogs, and some have learning/processing disabilities. All of my clients are strong and resilient individuals who have a desire to serve the public interest through their cases.

Besides your law degree, do you have any kind of special training or insights that you apply to your cases?
A meditation practice I started after my Dad died over a decade ago has been very helpful in allowing me to breathe through the general stress of my practice, choose cases that I believe will not be energy vampires, interact compassionately with the plethora of different types of opposing counsel and defendants I encounter, and best support my clients. ▶



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2023 President



Are you a generalist or a specialist lawyer?
Personal injury and wrongful death generalist with significant experience in sexual assault, elder abuse and maritime cases.

How long have you practiced law?
22 years

Can you describe your typical client?
Hard to say there is a typical client since I represent people of all ages and backgrounds.

Besides your law degree, do you have any kind of special training or insights that you apply to your cases?
Life experience growing up in a blue-collar family and understanding what that's like for many clients.

Teresa Li

Secretary

Are you a generalist or a specialist lawyer?
Both. My practice is personal injury law, with a focus on traumatic brain injury.

How long have you practiced law?
Over a decade.

Can you describe your typical client?
My clients are all people who sustained serious injuries due to the wrong doing of another. I go after the big insurance companies and corporations to hold them responsible for their wrongdoings.

Besides your law degree, do you have any kind of special training or insights that you apply to your cases?
Before I became a lawyer, I was a mechanical engineer. So I have a good grasp on accident reconstruction, which can come in handy when dealing with car accident cases.



Casey Kaufman

Treasurer

Are you a generalist or a specialist lawyer?
I focus on personal injury only with a further focus on product liability and dangerous condition of public property.



How long have you practiced law?
Since 2004

Can you describe your typical client?
Regular people who have been physically injured by the actions of another.

Besides your law degree, do you have any kind of special training or insights that you apply to your cases?
I received an environmental science degree at UC Berkeley. I think that type of science-based education makes me look at my cases analytically from the very start. ◆

ACCTLA's Mentoring Program

Take advantage of ACCTLA's Mentoring Program to improve the quality of litigation in our courts. Attorneys who call will be referred to a mentor attorney for a free consultation. The mentor will not prepare your case but will assist you in your approach to the case.

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.

For further information, please contact Mariana Harris
(925) 257-4214 or acctriallawyers@gmail.com

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Leslie Landau

ACCTLA members, Superior Court Judges and Commissioners from Contra Costa County and Alameda County, Appellate Justices, Northern District Federal Judges, Magistrate Justices and their guests are invited to attend.

Tuesday, September 26, 2023
5:30 – 7:30 pm
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Please join us for wine, beer, soft drinks and hors d'oeuvres
Please RSVP by Friday, September 15, 2023 to Mariana Harris at ACCTrialLawyers@gmail.com or 925-257-4214

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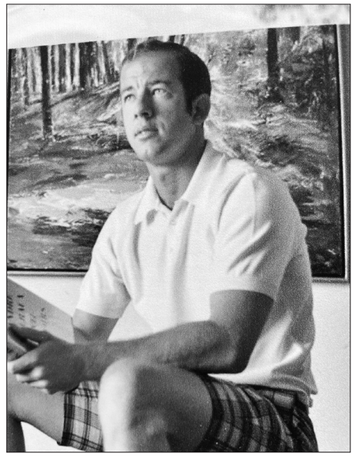
ACCTLA reports with great sadness the passing of Bill Whiting, for decades one of our most stalwart past presidents, members, and supporters. Bill embodied the best of our profession, practicing family law for over 50 years while honoring the values of courtesy, honesty and expertise. Bill graduated from UC Berkeley School of Law in 1965, and left soon after for military service with the Marines in Vietnam. Upon his return in 1968, he began his long and distinguished career in the East Bay. He was in the first group of family law attorneys to receive the Certified Specialist recognition in 1980. Bill was President of ACCTLA in 1983, and, as a Past President for the next 40 years, could be seen at nearly every event, including our most recent Judge's Night. Bill's thoughtful counsel will be missed by everyone on the board and by his many friends and colleagues. The law firm he founded, Whiting, Ross, Abel and Campbell, stands as a monument to the integrity, professionalism, and high standards Bill stood for throughout his life and career.



He will be greatly missed by all of us to whom he provided encouragement, support, and a shining example of the best in our profession.
–Rick Simons
Honorary Past President

Bill was a great man and a great attorney. He fought for his clients with integrity and tenacity. He had the ability to persuade with both words and silence. I got to see a little bit of his personal side when he and his wife joined my wife's church. Bill embraced his faith and walked the walk when it came to respecting and welcoming everyone. I will miss him.
–Jim Yu
2014 ACCTLA President

For years, Bill Whiting was the epitome of what anyone facing a tough, contentious divorce wanted in their corner: smart, ethical, tough, well-tied into the local family law bar. When I found myself potentially facing that situation, he was the first person I called. He was reassuring while not mincing words about what lay ahead. I felt reassured and confident about the process. He also provided a book for my review, which was a timely reminder throughout the dissolution process about what was important and how to get there. In the years since, Bill was always friendly and maintained an active interest in this organization that he helped create and cared so much about. Thank you, Bill.
–John Schreiber
ACCTLA Board Member



I knew Bill Whiting for over 30 years, including his year as president of our organization. I think he was underrated as an important leader of ACCTLA. Perhaps this was because he was a quiet and sometimes soft spoken man, yet when he expressed himself, especially at our Board meetings, all listened carefully since he always had good and important things to say. Furthermore, he stayed involved on the Board long after his presidency, unlike many others.
His ongoing leadership became clear in recent years as he advocated for a broader make-up of the members of our Board. More family law members joined as did more general practitioners and criminal defense attorneys as we moved from a primarily personal injury organization to representing a broader part of the lawyer community in both counties. This has helped us choose good judges of the year, especially from Contra Costa County and his sage advice in that regard was critical.

I watched him as he built one of the strongest and best family law firms in the Bay Area. Yet, he never let his success affect who he was: a gentleman, a man of great integrity and a true friend. We will all miss him. Rest in Peace my friend.
–J. Gary Gwilliam
1974-75 ACCTLA President

Bill Whiting was a long time close friend of my wife Vickie and me. Bill and I were classmates at Boalt Hall, UC Berkeley Law from 1962 to 1965.

Bill was a great athlete. He loved intramural sports at Cal while in law school. He excelled in football and softball and helped those Boalt Hall teams win the Cal Intramurals each year. We were co-captains of the Boalt Hall basketball team each year.

While in law school, Bill was a hasher for three years at the Alpha Delta Pi sorority where he served food for the sorority girls including Vickie. Over the last 50-plus years, Vickie and I often were with Bill at law school reunions, functions and at other social events with our mutual friends.

I have been referring family law matters to Bill for years and he and his partners have achieved excellent results for every one I have referred to them including a recent very difficult case. He was a tough, effective, fair and honorable attorney.

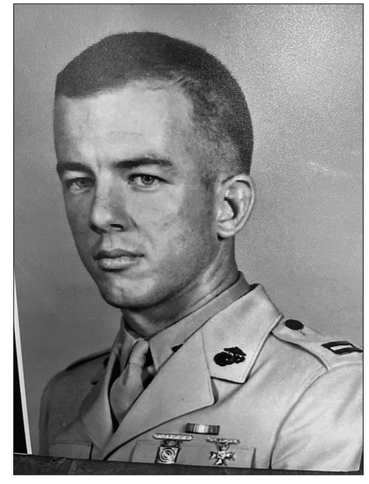
Boalt Hall published the experiences and comments of Boalt graduates as part of our 25th reunion in 1990. Bill's comments provide insight to his overall professional approach to law and life.

"After 25 years of practice, I recognize the wisdom of lawyers who found ways to use their talents in endeavors other than the pure practice of law. Running a small practice (7 attorneys) can be exciting as we have all the same problems of any small business — for which law school provided no preparation whatsoever. I am a certified family law specialist and I enjoy dealing with clients and being in court."

Bill was an effective ACCTLA president during his administration. He was an excellent president and has been a great supporter of ACCTLA every year.

Immediately after law school Bill joined the Marines during the Vietnam war. He loved the Marines and was a proud loyal Marine throughout his life. The Marine flag ceremony at his service was extremely emotional for all of us.

We appreciate and will greatly miss his steady, honest, intelligent and honorable approach to legal issues. Vickie and I will miss him as a long-time, personal friend.
–Lew Van Blois
1978 ACCTLA President



I wrote a letter to my mentor, boss and role model, Bill Whiting, right after he took ill. Here are some excerpts from it, with footnotes for context.

A fresh-faced clerk[1] walked into your office in the summer of 2003,[2] handed you some papers, and said "good morning, Mr. Ross."[3] You were so kind, you ▶



didn't even correct me. It was my first day.

From that year to this, there has never been a time when I couldn't take advantage of your open-door policy, walk right into your office, plop myself down on your well-worn guest chairs,[4] and know your mind on some important matter. From the taxation of equity compensation[5] to matters of the heart,[6] from the presumption of undue influence[7] to the criteria for selecting a youth baseball team,[8] your advice was as liberal in its giving as it was enlightening in its reception.

. . .

For so long as there is a vacancy in your office, there is an emptiness in my heart.

I love you, Bill. You've always been a father to me.

Please return to us, and continue to show me the path of truth. Continue to help keep my moral compass well calibrated.[9]

– Love,

Scott {Lantry}

---

[1]Me.

[2]A little context might be helpful. I was 20 years old in 2003. I graduated college in 2005 and I passed the bar in 2008. From 2003 through 2008, I spent my summers working as a file room clerk at the firm Bill Whiting founded. I worked at that firm continuously as a lawyer, except for a two-year hiatus where I defended foreign airlines in federal court litigation.

[3]His name was Mr. Whiting. His partner's name was Mr. Ross. An inauspicious beginning, to be sure.

[4]The 1970's called. They want their guest chairs back.

[5]Bill launched my career in handling family law matters involving equity compensation (stock options, restricted stock, et cetera – the taxation of which is relevant to calculating support) when he handed me a case that turned into the published appellate opinion (In re Marriage of Macilwaine (2018) 26 Cal.App.5th 514). His mentorship led me to an unqualified Superior Court victory.

[6]Bill combined a remarkable understanding of people with a highly attuned intellect; a fearsome combination of book-smarts and street-smarts.

[7]That was a reference to the first case I second-chaired for him, one involving the presumption that one-sided transactions between spouses are presumptively unenforceable under California's interspousal fiduciary rules.

[8]When selecting a youth baseball team, Bill once suggested I pick the kids whose mothers were the most attractive. (In all seriousness, Bill and I each have two sons, and despite his strong worth ethic, he encouraged me unrelentingly to take time off to coach my boys' baseball teams. He was a family lawyer that showed me the importance of family.)

[9]Bill had the most finely tuned moral compass of any professional I have ever met. A divorce lawyer without one just ain't worth a damn, in my estimation. Now that Bill has left us, I will have a much harder time keeping mine well calibrated. ◆



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Helpful Tech Tools and Services
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by Michael Haley

Small law firms and solo attorneys are constantly wondering if they are doing enough with respect to technology and services such that they can increase efficiency in their firms. This is especially true given the changes and challenges the global pandemic created for the legal profession. | This article will cover certain categories of tech and services, which are becoming increasingly popular throughout the legal profession. By understanding which tools other legal professionals are using in our new, more virtual world, you can decide what your firm can use to help it operate as effectively as possible. | What will work best for your firm depends on factors like your firm's size and practice area. Not every firm would benefit from the same tools or service. So be sure to do your own research prior to moving forward with any of these options.

Law Practice Management Software

Legal practice management software is a starting point for most attorneys looking to increase efficiency in their firms. Practice management software helps to streamline, centralize, and automate day-to-day legal, business, and administrative tasks. Services provided through practice management include calendaring, client intake, document management, task management, client contact management, and more.

When it comes to legal practice management software there are a wealth of options. A few leaders in this space are Clio, MyCase, Lawmatics, Practice Panther, Law Ruler, CasePeer, and Smokeball. Our office uses CasePeer and it has streamlined many of the office operations.

Each of these providers offer a different array of services, some of which may be helpful to you and your firm, and some of which may not. Thus, when it comes to legal practice management software specifically, doing your own research to insure you are selecting the right provider is key.

Virtual Receptionists

Virtual receptionists, also known as legal answering services, are becoming popular with solo attorneys and small law firms who want to be responsive but don't want to hire a full-time employee. They are also beneficial to firms who want to free up for their staff to focus on more important work. The benefits of a virtual receptionists include 24/7 availability, increased client satisfaction, saved time and money, and boosted work productivity.

Services like Ruby Receptionist offer live virtual reception and chat options. Other providers with similar services are Back Office Betties, Lex Reception, Posh Virtual Receptionist, The Law Practice Exchange, and Smith.ai.

E-Signatures Tools

In the right circumstances, electronic signatures can deliver a wealth of benefits in the modern legal workspace. E-signatures remove the time and expense needed to coordinate hand-written signatures and instead allow for signatures to be obtained in fast, convenient, and an easy-to-use manner. A bonus is that using e-signatures also saves paper.

It is important to note that wet or manual signatures are still required in certain situations. However, if they meet the right criteria, e-signatures are legally binding and treated the same as hand-written signatures in many circumstances.

There are a variety of e-signature programs available, however the standout in this marketplace is DocuSign.

Online File Storage

Online file storage software provides a more convenient, secure and streamlined way for attorneys to access documents. This is especially helpful in the era of remote work where attorneys and law firms need a tool that allows them to collaborate and work from anywhere.

Dropbox is the world's most popular online document storage system and is used by a wealth of attorneys and law firms nationwide. Other options for online documents solutions include Microsoft OneDrive, Google Drive and Box.com.

Mobile Scanner Applications

Everyday attorneys need to sort through a range of documents daily from expense receipts to legal records. The ability to easily digitize, access and share these items on demand, from anywhere, can be hugely beneficial. The mobile application Evernote is widely regarded in the legal industry given its easy-to-use functionality and ability to capture, organize and save notes and recordings. In addition to that, Evernote also integrates with your smartphone camera and allows you to capture an image from almost any surface, rotate it, crop it, and adjust it to the dimensions required, and easily share it from your mobile device.

Conclusion

There has been a wealth of tech tools and services flooding into the legal industry following the global pandemic. Implementing the right tools and services can certainly help increase your firm's efficiency, profitability, and client satisfaction. That said, attorneys and law firms don't have to do it all at once and can start with just one or a few tools.

Most importantly, it is critical to perform your own research prior to adopting any of these tools or services to insure they are secure and the right fit for you and your law firm. ◆



— Michael Haley, an attorney at Haley Law Offices, specializes in personal injury, medical malpractice, and civil rights cases.

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Our LinkedIn person is Sophia Achermann (sophia@thefafirm.com) and here is the QR code for our account.

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What everyone should know about

Forced Arbitration

by Brittany Smith

Arbitration is heavily prevalent across the United States. Millions of employees and consumers are regularly, frequently, and unknowingly bound to this practice. A majority of all nonunion, private-sector employees (approximately 56.2%) are bound by arbitration agreements. According to the Economic Policy Institute, which issued a report on forced arbitration, "by extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration." (Colvin, Alexander J.S., "The growing use of mandatory arbitration," Economic Policy Institute, accessible at https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.)

Yet their agreement to arbitrate is rarely truly voluntary. "[I]t is a cardinal principle that arbitration "is a matter of consent, not coercion." (*Volt Info. Sciences v. Leland Stanford Jr. U.* (1989) 489 U.S. 468, 109.) Arbitration agreements have never been granted undue preference. (See *Lamps Plus, Inc. v. Varela* (2019) 139 S.Ct. 1407, 1415, quoting *Granite Rock Co. v. Teamsters* (2010) 561 U.S. 287, 299 (the Supreme Court of the United States emphasizing that the foundational and "first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly a matter of consent.") The Ninth Circuit held, "Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes." *(Prudential Ins. Co. of America v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1304.)

"Mandatory arbitration completely favors the big companies and organizations that demand it and is fundamentally unfair to plaintiffs," said Gwilliam Ivary Chiosso Cavalli & Brewer partner and co-founder Gary Gwilliam. The company writes the arbitration agreement and does not permit an employee or consumer to alter the same or decline to enter into the agreement. A company is often a "repeat player" who is more likely to return to arbitration than an individual employee or consumer. The company knows the arbitrator, and the arbitrator knows them, and may be more inclined to side with the company. The company picks the arbitrator that they prefer. The unsuspecting individual, who is comparatively uninformed, will likely just go along with the company's choice.

> "The unsuspecting individual, who is comparatively uninformed, will likely just go along with the company's choice.

Although this binding arbitration is technically voluntary, this is not truly the case. Most Americans have little knowledge that they have been bound to arbitration every time that they are hired, purchase a cell phone, or sign forms with a doctor's office. Nor do they realize that this process deprives them of their day in court.

Further, they have little knowledge of what arbitration actually entails. Indeed, if an employer or a company actively notifies the individual that they are bound to arbitration, they often misrepresent what the process involves. Companies frame arbitration in a positive light. Usually, individuals are not informed about the negative aspects of arbitration. For example, when a Human Resources representative is onboarding an employee, they might say things like, "we split the costs" and "it will save you time and money."

Arbitration hearings are cloaked in secrecy. What we lose is the public knowledge that can come from filing a lawsuit. If an employee goes straight to arbitration, there is no public record, and no warning to future employees or prospective whistleblowers. It serves a social good to hold companies responsible publicly.

No one should be forced into a process they do not understand. People should have a choice whether or not to enter into an arbitration agreement. Instead, this is, in fact, forced arbitration. Generally, employees and consumers have no choice but to agree to arbitrate any disputes. An agreement to arbitrate should be truly voluntary, with the individual being fully informed as to what arbitration entails.

If an individual files their case in court, it is generally extremely difficult to beat a company's motion to compel arbitration. Gwilliam Ivary recently fought several employment arbitration agreements, appealing to the Supreme Court of Califor- ▶

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nia. Despite many factors weighing in the plaintiffs' favor, the Court denied our efforts to keep our clients from forced arbitration.

Arbitration gained traction in 1925 when Congress passed the Federal Arbitration Act. Since then, courts have been issuing rulings supporting arbitration and strengthening a preference for the same. In 2011, in *AT&T Mobility v. Concepcion* (2011) 563 U.S. 333, the United States Supreme Court struck down a California law that sought to prevent arbitration clauses from restricting class action lawsuits. Recently, in 2022, the Court preempted a California law that would have allowed workers to sue under California's Private Attorneys General Act. In February of this year, the Ninth Circuit Court of Appeals blocked Assembly Bill (AB) 51, a law that endeavored to prohibit employers from requiring that individuals agree to arbitrate as a condition of employment. (*Chamber of Commerce v. Bonta*, No. 20-15291 (9th Cir. Feb. 15, 2023).

There are significant barriers to ending the courts' preference for arbitration. In addition to the might of the Federal Arbitration Act, these barriers include an individual's lack of knowledge as to the fact that they have been bound to arbitration and what arbitration means. "Arbitration" itself can be a boring subject, which is part of the problem. The public is uninterested in reading extensive contracts, often in small print, in which arbitration agreements are typically buried. Further, an employee or consumer who simply wants a job or a phone will enter into arbitration agreements in order to obtain the same. The arbitration clause will not be their focus. Refusing to sign can mean no job or phone. Yet it should not be so easy to force people to sign over their rights and their entitlement to a fair trial.

However, there is a sea of change across the nation's courts and legislatures regarding mandatory arbitration. Underscoring those changes is the recognition that, in some instances, mandatory arbitration lacks consent of the parties and is devoid of the fundamental and ordinary principles of justice and fairness. "Mandatory arbitration is now falling out of favor and, thankfully, enlightened courts and legislators are beginning to take action to ban this practice," Mr. Gwilliam said. AB 51 itself highlighted an indication that forced arbitration is losing traction. In 2022, President Biden signed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, barring companies from settling sexual harassment suits through arbitration. And in 2016, the Consumer Financial Protection Bureau proposed a rule prohibiting companies from inserting any language into contracts that would restrict consumers from bringing class action lawsuits. Further, the California Constitution "treats the historical right to a jury resolution of disputes that have been brought to a judicial forum as fundamental, providing that in a civil cause, any waiver of the inviolate right to a jury determination must occur by the consent of the parties to the cause *as provided by statute*." (*Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944, 951, quoting Cal. Const., art. I, §16.) "[T]rial by jury is '"an inviolate right,"' '"a basic and fundamental part of our system of jurisprudence.… As such, it should be zealously guarded by the courts.… In case of doubt therefore, the issue should be resolved in favor of preserving a litigant's right to trial by jury."' (*DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 176, as modified (Aug. 8, 2007), quoting *Cohill v. Nationwide Auto Service* (1993) 16 Cal.App.4th 696, 699.) Thus, not only does the Seventh Amendment to the United States Constitution protect an individual's right to a jury trial, but California, too, has codified this right into a protected, substantive right that generally cannot be taken away.

With the palpable, active change in the landscape of mandatory arbitration outside of the courts, it is vital that the courts align and recognize the inherent unconscionability of mandatory arbitration in the employment context. ◆



—Brittany Smith is a discovery specialist at Gwilliam Ivary Chiosso Cavalli & Brewer. Her work is overseen by Founding Partner, Gary Gwilliam.

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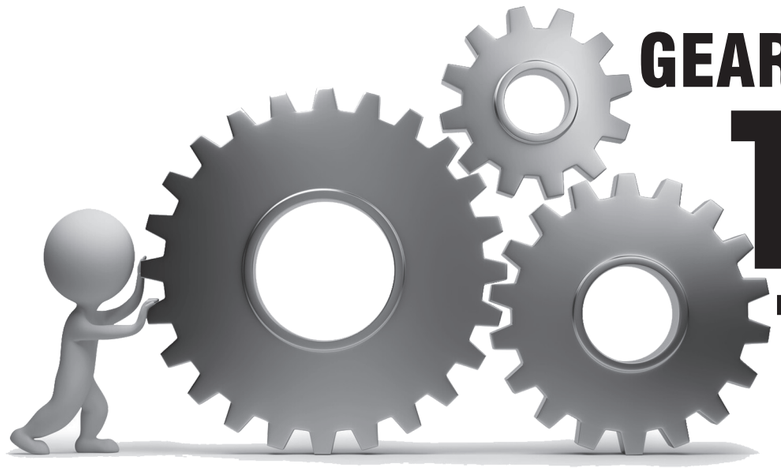

GEARING UP FOR TOXIC TORTS

by Tiega-Noel Varlack

By doing thorough research at intake and building a strong relationship with clients, you can help hold wrongdoers accountable.

Environmental and toxic torts affect communities of color and low-income communities at higher levels for many reasons.[1] However, historically, these same people have faced an uphill battle when trying to hold negligent corporations accountable.

For instance, in *Bean v. Southwestern Waste Management Corp*., members of a predominantly Black neighborhood in Houston applied for a preliminary injunction pursuant to 42 U.S.C. §1983 to stop a solid waste facility from being located near a high school that lacked air-conditioning.[2] The federal district court denied the preliminary injunction, finding that the plaintiffs did not show a substantial likelihood of proving that the decision to site the facility near the high school was discriminatory.[3] And in *Chester Residents Concerned for Quality Living v. Seif*, residents in Chester, Pa., sued under Title VI of the Civil Rights Act of 1964 to stop the siting of a solid waste facility in their community, alleging that they were subject to disparate impact.[4]

In 2014, the city of Flint, Michigan, switched its water source from Lake Huron to the contaminated Flint River, exposing residents to unhealthy levels of lead.[5] Individual claims, class action claims, and criminal complaints were filed.[6] In 2020, the state of Michigan agreed to a $600 million settlement with the residents of Flint, which was approved in March.[7]

Whether on behalf of an individual, a neighborhood, or a group of people, these cases present many challenges — but they are fundamental to righting wrongs. Here are some tips to get started when handling toxic tort claims.

The Basics

Toxic torts arise in various scenarios, but a common theme is that they start with "exposure" to a substance. That exposure can be through polluted air, land, and water, as well as through toxic products. As in the cases briefly described earlier, minority and lower-income communities may be exposed to toxins in air, soil, and water due to waste management sites and other industrial facility sites near their homes.[8] Companies often locate their facilities in or near minority communities resulting in "hazardous waste sites, polluting industrial facilities and other locally unwanted land uses [that] are disproportionately located in nonwhite and poor communities."[9] Siting decisions often are made based on the path of least resistance — that is to say, poor Black and brown people often have fewer resources and less political clout to put up a fight to siting decisions.

Toxins also have been found in various personal care products. In the Black community, for example, many individuals, especially women and girls, grew up using certain cosmetics and other personal care products, such as Johnson's Baby Powder and Shower to Shower[10] and hair relaxers and straighteners.[11]

Some toxic tort claims are brought on behalf of children who are exposed to hazardous materials through their parents. This can happen, for example, when the mother ▶

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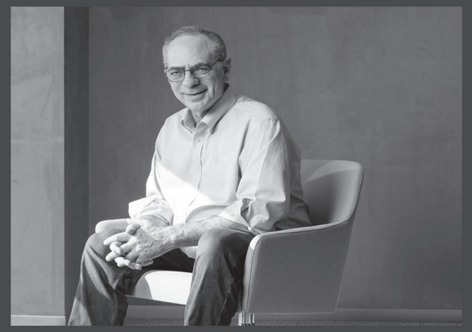

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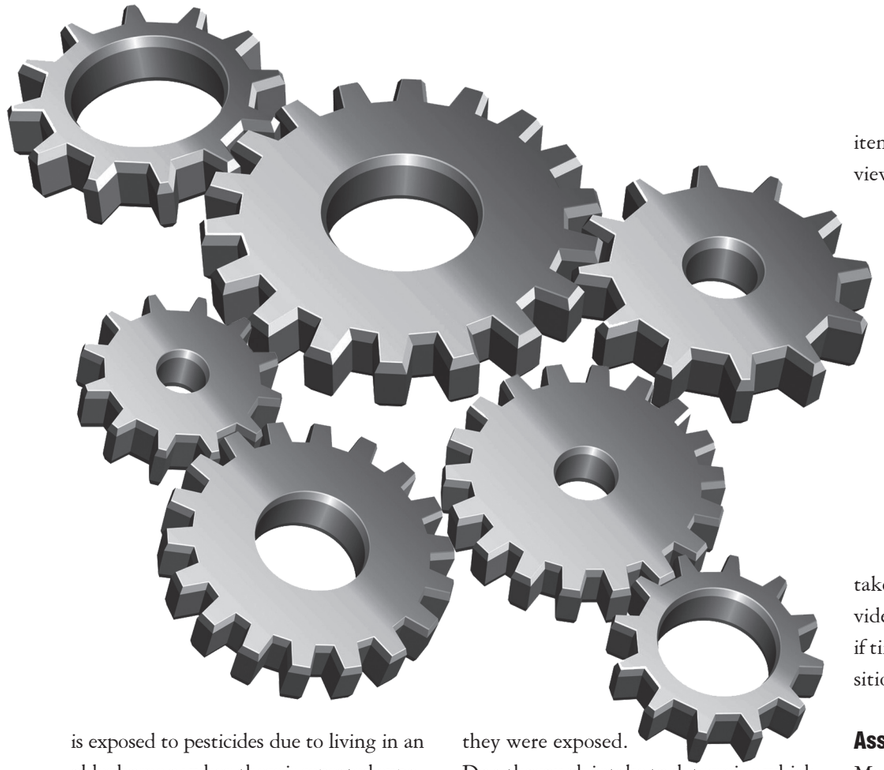

is exposed to pesticides due to living in an older home or when there is repeated exposure to organophosphate insecticides. This can disproportionately affect communities of color when the home is not maintained by landlords in depressed areas.[12]

Many toxic tort cases also involve people who were exposed to chemicals in the workplace. For example, some of the cases involving the glyphosate-containing weed killer Roundup allege that exposure to this product caused the plaintiffs' cancers.[13] There even have been cases when parents may carry the toxins home from work and expose their families. A class action on behalf of California agricultural workers against Dow Chemical and its successor alleges that over 100,000 homes of workers in California are contaminated with the insecticide chlorpyrifos, harming the workers' children.[14]

Initial Intake

Often your clients will not know exactly when they were exposed to the toxic substance or the amount or dose to which they were exposed. Do a thorough intake to determine which claims are viable at the start.

Typically, there are three types of clients: people who were exposed to a toxic substance and have an injury linked to that exposure, those who were exposed to a toxic substance but who have not yet shown an injury or symptoms, and those who have an injury that may be connected to a toxic exposure.[15] Your approach should be case specific, but the initial questionnaire to clients should include the following requests for documents and information:

- medical history, including a list of all past and present symptoms
- employment history, including a list of co-workers
- information on where they have lived
- lifestyle habits, including smoking, alcohol, and drug use
- military service
- workers' compensation history
- family medical history.

Also give potential clients a list of items to bring to the initial intake interview, such as:

- proof of employment and wages
- income tax returns
- documentation of medical history
- relevant photographs
- in wrongful death cases, the death certificate
- the product or toxic substance itself, if it is still in their possession
- any packaging or containers for the product or substance.

If the plaintiff has a terminal illness, take steps to preserve the record, such as videotaping the plaintiff. In this situation, if time permits, take a preservation deposition in person or via videoconference.

Assessing the Exposure & Injuries

Many of the early toxic tort cases dealt with exposure to asbestos, which caused signature injuries, namely asbestosis, lung cancer, and mesothelioma.[16] However, as more substances and products have been linked to negative health effects in recent years, it's likely your client's injury may come from nontraditional causes and may not be considered a signature injury. In those situations, after gathering your client's information and reviewing the records, consider ordering a medical examination to diagnose the cause of injury. Also hire a general causation expert, such as an epidemiologist, to find out whether the exposure to the substance is capable of causing your client's disease. Keep in mind, you must prove the duration of exposure and concentration levels of exposure.

Identify the exposure. Once you conclude a toxic substance caused the injury, you must determine how your client was ▶

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exposed: by inhalation (breathing in the toxic substance); by ingestion (drinking contaminated water or food); or dermally (absorbing the toxin through the skin). You must prove causation — that the exposure, at the concentration levels and duration levels determined, injured your client.

For clients who already have symptoms and an injury, the diagnosis and prognosis are critical. These are the baseline for any suit, and the plaintiff's claims often rest on reported symptoms and their documentation.[17] A complete medical history will support your efforts to eliminate prior unrelated physical problems, if possible; determine whether the exposure exacerbated a preexisting condition;[18] and identify symptoms that have a known etiology relating to the toxic substance in question.

This history will also help document the progression of the plaintiff's condition and its effect on the plaintiff's ability to pursue daily activities and counter defense counsel's theories of alternative causation.[19] And a careful review of your client's medical, employment, military, and housing records can help fill in gaps in your client's exposure time line.

In addition to what you requested on the initial intake questionnaire, important documents, especially in cases involving workers, may include:

- Social Security records
- employer's records
- workers' compensation claims made by other employees (to help determine the frequency of illnesses or injuries in the work environment)
- in death cases, the decedent's autopsy results, if available.[20]

Identify the who & when. When investigating the exposure, document the type or brand of the product or substance at issue. Ask clients to bring in product packaging or receipts. Have your client share photos of themselves using the product — photos in social media posts also work well. You need to establish the amount, strength, volume, or dose, as well as the exposure duration, including accurate start and end dates. Identify all trade or brand names of the relevant product or substance. All of these are relevant in determining whether the toxin caused the injury and who released the toxic substance or placed it into the stream of commerce.

There can be varying levels of complexity depending on the type and source of exposure. You also must lock down the timing of your client's exposure and at

"And a careful review of your client's medical, employment, military, and housing records can help fill in gaps in your client's exposure time line.

what point the client discovered that exposure may be linked to their injury or symptoms. Be ready to submit detailed declarations or offers of proof to show what your client learned and when and who they learned it from.

If the plaintiff alleges exposure occurred at the workplace, for example, gather names of all products the plaintiff remembers working with, the names of coworkers, and any information on union membership. Also gather information on other employees' work sites and descriptions of the work they performed, as well as any safety measures provided on the job.

Gather information from your client about the area where they work, where they live, and the types of chemicals or pesticides used. Ask them to bring in clothing, water samples, and other items from their home so you can have these tested.

Working with Clients

Have an open dialogue with your clients about expectations. Your clients probably don't realize that their personal life and injuries will be made public in court filings. Before discovery begins, and especially during deposition preparation, explain to your client that defense counsel is going to ask for the names of their family members; other people in their lives who know about the events underlying the case (including their injuries and disease); fellow employees; and more. But tell your clients that defense counsel is doing this to discover who the witnesses are.

There are also special considerations for plaintiffs who are from different socioeconomic backgrounds.[21] At intake, ask about the client's living situation, and set clear expectations for communications. For example, get an emergency contact in case your client's living situation and phone service change.

Remember that your clients live with the impacts of the toxic exposure every day, and it is not uncommon for them to call regularly for an update. If your client has had to move out of their home due to toxic exposure, the case will be all that they can think about. When that happens, I try to work with my clients to find a therapist or free counselor to help them cope with their daily worries. Likewise, when I represent someone who has been sickened by a toxin, I find out who their care team is and how to get in touch with them if needed.

Many clients do not want to speak to staff, only to an attorney. Train your staff to set aside designated times to return ▶

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client calls weekly and to help them understand that they will relay the message to the attorney. Also email or text your client periodically, and send a client update via the mail at least once a month — it goes a long way.

Be up front with your clients about what damages are available and how ascertainable they are. Potential damages include general damages, such as pain and suffering, fear of cancer, and emotional distress; special damages, such as medical expenses, future medical monitoring, property devaluation, and loss of income; and, depending on the facts of the case, punitive damages.

Give your clients homework so they are engaged in their case. In my firm, we give clients wage loss work sheets and cost tracking sheets, and we ask them to write a diary to the attorney to ensure their communication remains protected by privilege.[22] However, each jurisdiction has a different view of work product and privilege so check the law in your jurisdiction to see what applies.[23]

In some cases, I insist on the use of protective orders. In toxic exposure cases, the effects on the body can be devastating. If your client had a mastectomy or lost all their hair, for example, the last thing you want to do is share photos of them without a protective order. Having one in place helps you assure your client that their dignity will be preserved because sensitive items uncovered in discovery will be truly confidential.

In addition, when representing multiple family members in a toxic tort claim, even if there is no apparent conflict, have each party sign a waiver form. Schedule a joint meeting with them to discuss what confidentiality means, and send separate letters to each client addressing how each separate family unit has chosen to be represented.[24]

By doing thorough research at intake and building a strong relationship with your clients, you can help them obtain justice after they are injured due to toxic exposure. ◆

— Tiega-Noel Varlack is the founder of Varlack Legal Services in Hayward. She can be reached at tiega@varlacklegal.com.



[1]For more, see Danielle W. Mason, *Environmental Justice for All*, Trial, Jan. 2023, at 18.

[2]*Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).

[3]*Id.* at 680.

[4]*Chester Residents Concerned for Quality Living v. Seif,* 132 F.3d 925, 937 (3d Cir. 1997) (Private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to §602 of Title VI of the Civil Rights Act of 1964.). The U.S. Supreme Court granted certiorari in that case but dismissed the case as moot when the landfill abandoned its plans to move to the area. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915 (1998).

[5]Amy Diaz, *Flint Water Crisis Lawsuits Are Moving Forward: Here's an Update*, Flint Beat, Jan. 14, 2022, https://flintbeat.com/flint-water-crisis-lawsuits-are-moving-forward-heres-an-update/.

[6]*Id.*

[7]Mich. Dep't Attorney General, Historic *Flint Water Civil Settlement Approved by Genesee County Circuit Court*, Mar. 21, 2023, https://www.michigan.gov/ag/news/press-releases/2023/03/21/historic-flint-water-civil-settlement-approved-by-genesee-county-circuit-court.

[8]For more, see U.S. EPA, *Environmental Justice Timeline*, July 18, 2022, https://www.epa.gov/environmentaljustice/environmental-justice-timeline.

[9]Jim Erickson, *Targeting Minority, Low-income Neighborhoods for Hazardous Waste Sites*, Mich. News, Jan. 19, 2016, https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/.

[10]For more on the talc litigation, see Christopher M. Placitella, Dennis M. Geier, & Jared M. Placitella, *A 30,000 Foot View of Cosmetic Talc Cases*, Trial, Oct. 2020, at 34.

[11]Che-Jung Chang et al., *Use of Straighteners and Other Hair Products and Incident Uterine Cancer*, 114 J. Nat'l Cancer Inst. 1636, 1638–1639 (Oct. 17, 2022), DOI: 10.1093/jnci/djac165. Cases have been filed across the country against manufacturers of the relaxers, and claims have been consolidated into an MDL in Illinois federal court. *See In re Hair Relaxer Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 1:23-cv-00818 (N.D. Ill. 2023).

[12]Instead, the landlord sends an exterminator out, rather than making substantial upgrades to the property to prevent pests in the first place.

[13]Tina Bellon, *Monsanto Ordered to Pay $289 Million in World's First Roundup Cancer Trial*, Reuters, Aug. 10, 2018, https://tinyurl.com/mt82h8jm.

[14]Compl., *Calderon de Cerda v. Corteva, Inc.*, No. 20C-0250 (Cal. Super. Ct. Sept. 16, 2020). *See also* Don Thompson, *Pesticide Caused Kids' Brain Damage, California Lawsuits Say*, Associated Press, July 12, 2021, https://tinyurl.com/29tjrann.

[15]For more on toxic tort basics, see 57 Am. Jur. Trials 395 *Handling Toxic Tort Litigation*, Westlaw (database updated Feb. 2023).

[16]Such injuries are known as "signature injuries" because they are so closely causally related to exposure to a particular substance. *See also* 1 Lawrence G. Cetrulo, Toxic Torts Litigation Guide §1:3, Westlaw (database updated Dec. 2022).

[17]*Allen v. United States*, 588 F. Supp. 247, 406 (D. Utah 1984), *rev'd on other grounds*, 816 F.2d 1417 (10th Cir. 1987); *Brenner v. Am. Cyanamid Co.*, 263 A.D.2d 165, 173 (N.Y. App. Div. 1999). *See also In re TMI Litig. Cases Consolidated II*, 911 F. Supp. 775, 806 (M.D. Pa. 1996).

[18]*Schimmenti v. Ply Gem Indus., Inc.*, 156 A.D.2d 658, 660 (N.Y. App. Div. 1989) (Plaintiff smoked two packs of cigarettes per day for 20 years and was allergic to feather pillows, mold, and spores. Given the many possible causes of injuries, urea formaldehyde could not be isolated as a causative agent.).

[19]*See, e.g.*, Michael Dore, 3 Law of Toxic Torts §22.19, Westlaw (database updated Mar. 2023) (Consider for inclusion on the medical questionnaire the following categories of disorders: "infectious diseases; tumors (both benign and malignant); glandular problems (including diabetes); blood disorders; nervous system problems; circulatory disorders; respiratory system afflictions; digestive system diseases; skin or tissue problems; muscular or skeletal conditions; genital problems; pregnancy or delivery difficulties; birth defects (including stillbirth); and mental afflictions.").

[20]A client authorization or subpoena will be necessary to gather these documents. However, in some cases, a public records act or Freedom of Information Act request may suffice if the information sought is held by the Social Security Administration or the sheriff coroner.

[21]Matthew A. Shapiro, *The Indignities of Civil Litigation*, 100 B.U.L. Rev. 501, 501–02 (2020).

[22]*League of Cal. Cities v. Super. Ct.*, 194 Cal. Rptr. 3d 444, 451 (Cal. Ct. App. 2015) ("[W]hile the holder of the protection from disclosure granted by the attorney work product doctrine is the attorney, the client has standing to assert the work product protection on behalf of the attorney if the attorney is absent.").

[23]For example, see *Towne Place Condo. Ass'n v. Phila. Indem. Ins. Co.*, 284 F. Supp. 3d 889, 894 (N.D. Ill. 2018) ("[P]rogress or status reports, investigation summaries, and general updates are generally not privileged merely because they were written by a lawyer to the client.").

[24]When representing multiple family members, at a minimum, follow the basic rule set out in Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n 2020).

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Braswell v. Maayah
San Francisco County Superior Court
Verdict: $494,627.08

On April 6, 2019, the plaintiff underwent an unplanned c-section for the birth of her first child. The defendant obstetric surgeon treated the c-section as an emergency. On April 14, 2019, five days after the plaintiff was released from the hospital, she developed a surgical site infection. She returned to the hospital and was immediately admitted for a serious wound infection. She underwent emergency debridement surgery on the first night of admission and two additional debridement surgeries during her hospital stay.

The plaintiff contended that the defendant obstetric surgeon breached the standard of care by failing to order prophylactic antibiotics for the c-section. The plaintiff claimed routine antibiotics would have prevented her infection. During October of 2021, the plaintiff served the defendant with a CCP §998 offer of $239,999.99.

Trial proceeded on April 10, 2023. The defendant contended that she did not breach the standard of care, arguing that antibiotics were not a priority due to the alleged emergency. The defendant further argued that the plaintiff could not establish causation, contending that standard antibiotics would not have prevented the type of infection the plaintiff developed, and the plaintiff's infection developed too long after the c-section for a causal relationship to exist. The defendant also contended other medical providers were at fault for the failure to administer antibiotics.

The jury returned a verdict on April 25, 2023, finding the defendant obstetric surgeon 85% at fault for total damages of $494,627.08. The $350,000 non-economic damages award was reduced due to the cap on such damages pursuant to Civil Code §3333.2. Judgment was entered against the defendant in the amount of $357,127.08 on May 10, 2023. The plaintiff's claim for expert witness costs due to the defendant's failure to accept her §998 offer is currently pending. ◆

Plaintiff's Counsel
Jayme L. Walker
Winston W. Moody

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If you have any news you'd like to share, please email it to one of the following:

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Alameda-Contra Costa
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— Calendar of Events —

Sunday, August 6
5th Annual BBQ and Potluck
Roberts Regional Recreational Park | 11am - 1pm
(see page 19 for more details)

Thursday, August 24
MCLE: Elder Abuse in a Family Law Context:
What Every Family Lawyer Should Know About Elder Abuse (and vice versa)
Zoom | Noon

Thursday, August 31
Diversity Mixer
Seawolf Public House | 5 - 7pm
(see page 29 for more details)

Thursday, September 7
MCLE: Questioning Witnesses at Trial
Zoom | Noon

Tuesday, September 26
Fall Cocktail Reception
Lafayette Park Hotel | 5:30 - 7:30pm
(see page 9 for more details)

Tuesday, October 10
Diversity Scholarship Fundraiser | 5:30 - 7:30pm
Seawolf Public House

Thursday, October 26
MCLE: Updates in Employment Law
Zoom | Noon

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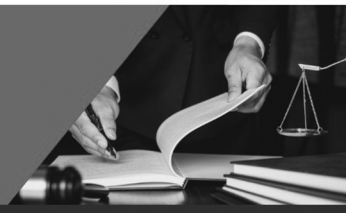

What does Rule 8.3 mean?

As of August 1, 2023, Rule 8.3 of the State Bar Rules of Professional Conduct mandates that all lawyers "shall" without delay report to the State Bar "credible evidence that another lawyer has engaged in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation or misappropriation of funds or property that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respect."

Join us in a discussion regarding the scope, obligations of attorneys under the rule, and potential ramifications it may bring!

Thursday, August 17, 2023
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PANELISTS



Richard Zitrin

Internationally known attorney Richard Zitrin is an author, professor, lecturer, mediator and expert on legal ethics and professional responsibility. Richard Zitrin is currently a lecturer Emeritus at UC San Francisco Law School (formerly Hastings College of Law) and an Adjunct Professor at the University of San Francisco, on the topics of Professional Responsibility and Ethics. He is the 2019 recipient of the State Bar's Harry Sondheim Award for his contributions to attorney professional standards in California, the founding Director of the USF Center for Applied Legal Ethics, and a Certified Specialist in Legal Malpractice.



Merri Baldwin

President of the Bar Association of San Francisco in 2017. Merri Baldwin is a member of the California Lawyers Association Legal Ethics Committee and a past chair and member of the State Bar of California Committee on Professional Responsibility and Conduct, Vice-Chair of the State Bar's Closing the Justice Gap Working Group and Committee Co-Chair for the ABA Litigation Section Committee on Professional Services Liability Litigation. She has been named by Super Lawyers magazine as one of the top attorneys in Northern California every year since 2006.



Rick Simons

Former President of CAOC and longtime ACCTLA Board member, with extensive trial experience including multiple verdicts in the field of childhood sexual assault in religious institution cases. Rick Simons is Liaison Counsel for the JCCP "Clergy Cases III" in 2004-6, and Co-Liaison Counsel of the current JCCP 5108 "Northern California Clergy Cases". Rick Simons has served as an expert witness in legal ethics and professional standards in multiple cases, and both presented at seminars and published articles on legal ethics issues faced by practitioners in civil litigation. He is the Winner of CLAY Award (2005) and SFTLA Trial Lawyer of the Year (2013).

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