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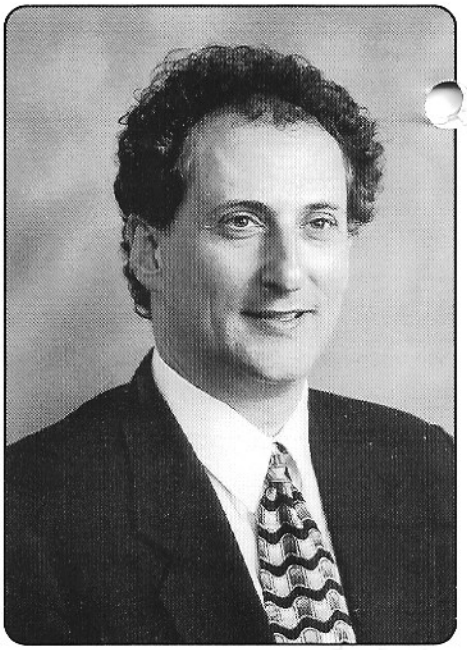
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Final Report

By Rick Baskin

This is our final issue of the *Verdict* for 1998. It has truly been an honor to be President of an association of Trial Lawyers who fight for justice for their clients and to empower the powerless in our society. We have had a great year beginning with Judges' Night at the Claremont Hotel where we honored Alameda County Superior Court Judge Gordon Baranco and Contra Costa County Superior Court Judge Barbara Zuniga as ACCTLA's 1997 Trial Judges of the Year. We were extremely proud that the Honorable Ronald M. George, Chief Justice of the California Supreme Court, was our featured speaker. We are looking forward to hosting our keynote speaker for the January 19, 1999 Judges' Night, the dynamic trial lawyer and author, Harvey Levine.

At our 1998 Judges' Night you probably picked up a flyer listing the up-coming events for 1998, all of which were a huge success. We not only enjoyed four interesting seminars but, in recognition of our need to have fun and to socialize with each other, we had two exciting parties at private homes with live music. Our monthly board meetings have been lively and well-attended with numerous guests taking part in the discussions. I hope my enthusiasm and dedication to maintaining the high ideals of our organization has helped solidify our collective power as an organization of lawyers who fight for social and civil justice for our clients.

Let me now address a very personal topic that I believe has meaning for all of us in our work and in our lives. Simply put, it is the importance of having fun. What do I mean by fun? Webster's defines it as something that provides amusement or enjoyment. Many of us work long hours and struggle to balance multiple family and other social responsibilities. Our cases involve serious matters that affect people's lives in significant ways. How can we possibly incorporate fun into our daily lives?

First of all, let's look at the essence of fun. What really goes on with us when are truly enjoying ourselves? Is it not the experience of being fully and totally in the moment, experiencing the unique beauty and possibilities of each present moment as it unfolds? Joy, or fun, is about wakefulness. In the words of Thoreau, "Only that day dawns to which we are awake." It is in the nature of our mind to go on automatic pilot and lose touch with the only time we actually have to live, to grow, to feel, to love, to learn, to

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– Rick Baskin is a sole practitioner who represents clients in serious personal injury claims, such as wrongful death, premises liability/negligent security, product liability, railroad accidents, medical malpractice, elder abuse and insurance/bad faith.

give shape to things, and to heal. Our mind, however, also holds the deep innate capacity to help us awaken to our moments and use them to advantage for ourselves, for others and for the world we inhabit. Fun is really the art of paying attention.

Think about it as a trial lawyer. When we are effective as advocates for our clients, aren't we really just having fun? When we are totally present in the moment before a jury, don't we experience a sense of that moment's uniqueness and its possibilities as it unfolds? Remember, the jury wants to be entertained. They appreciate the seriousness of the case and are devoting their time to it, but they also care deeply about reclaiming the richness of the moment. When we as trial lawyers truly enjoy ourselves and express our true selves to others, others recognize our unique and genuine self expression and are themselves awakened.

Think of all the things we do in our lives to amuse ourselves, to create that special moment of really feeling alive, of feeling a sense of well-being. How many of you can recall the last time you really had fun? Aren't you enjoying even remembering that experience? Fun at work might simply be looking out the window at a beautiful view, conversing with a friend, laughing or enjoying the turn of a phrase in a brief you've written. If you are living in the present moment, even drinking a glass of water can be enjoyable. As a matter of fact, why do we devote so much time thinking about and enjoying food such as desserts or chocolate? Because we experience the richness of the moment when we taste each bite. Recall the last vacation you took and the first thing you were asked after your return – "Did you have fun?" In fact, remember how you felt when you returned from a long vacation, how everything seemed new and unique. You had a keen sense of really feeling alive in that moment. We need to bring fun into the moments of our lives. We will be more effective advocates for our clients if we are really "paying attention" to the moment and "encouraging innocent amusement" at life by incorporating a sense of playfulness into each day of our lives.

If each one of you reading this article would just take a few minutes to think about something that made you laugh or smile, you will probably have fun just thinking about that. After making my own "fun" list, I was amazed at the exquisite simplicity and beauty of the things that are truly enjoyable to me. Frankly, I have had a lot of fun just writing this article. So if we want to cultivate enjoyment, amusement, merriment, pleasantry, cheer and interest, we should cultivate the daily experience of fun. As a matter of fact, the best thing I can say about having been your President for 1998 is that I enjoyed it immensely. For this, I sincerely thank each of you and wish you, what else, even *more* fun. ◆

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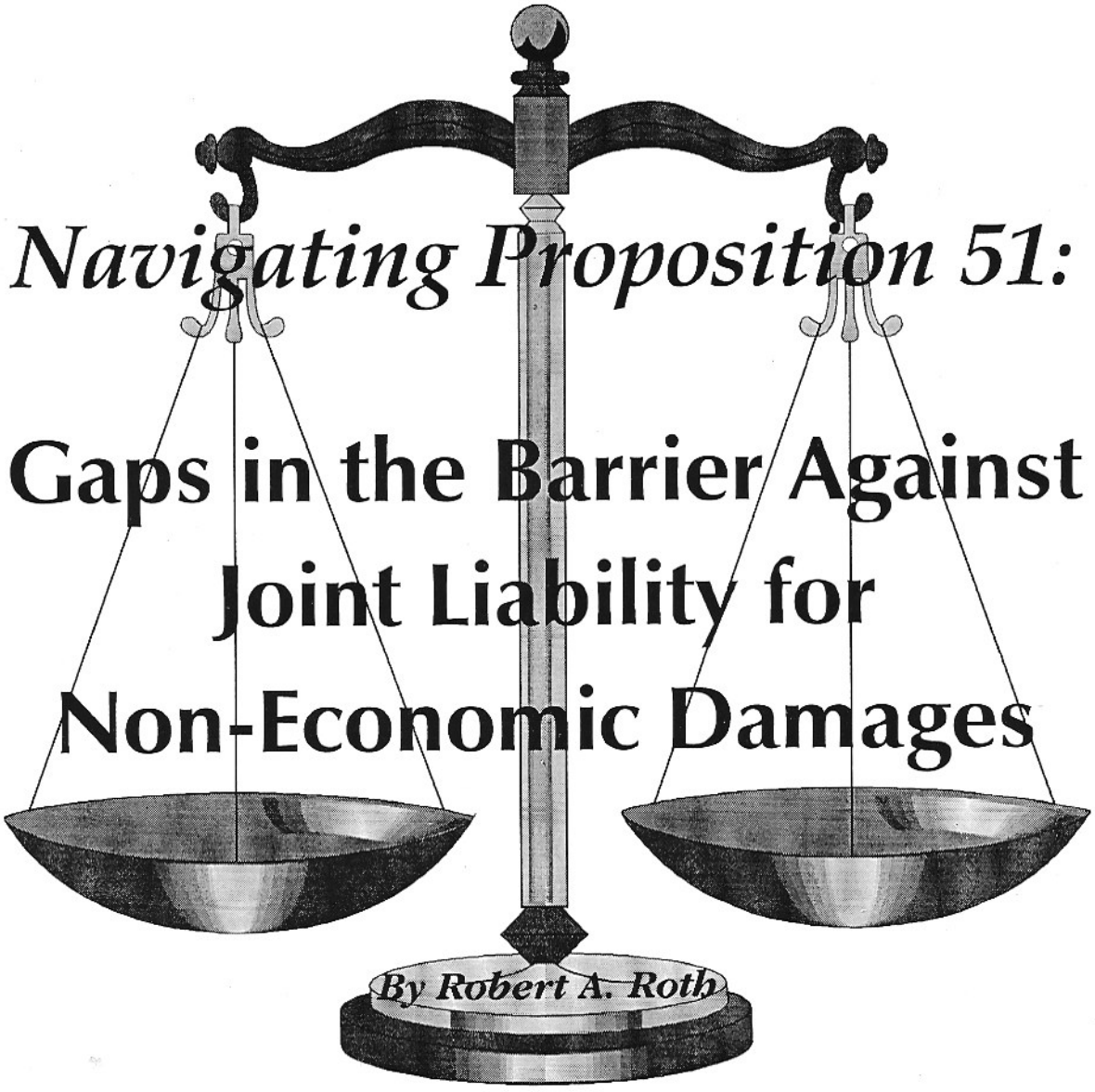
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Navigating Proposition 51:

Gaps in the Barrier Against Joint Liability for Non-Economic Damages

By Robert A. Roth

In 1986, California voters enacted Proposition 51 as a means to abolish "inequity and injustice" perceived to result from the rule holding concurrent tortfeasors jointly and severally liable for all damages incurred by a plaintiff. (Civil Code, §1431.1.) The new rule was intended to eliminate 'deep pocket' liability for noneconomic damages, so that "the plaintiff alone

assumes the risk" that a portion of damages suffered will not be recovered. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 600. See also Civil Code, § 1431.2, subd. (b)(2) [defining "non-economic damages"].) Nonetheless, "the language of Proposition 51 does not supply 'a certain answer for every possible situation,'" and courts have determined that the initiative does not apply to every situation involving concurrent tortfeasors. (*Arena v. Owens Corning* (1998) 63 Cal.App.

Nonetheless, "the language of Proposition 51 does not supply 'a certain answer for every possible situation,'" and courts have determined that the initiative does not apply to every situation involving concurrent tortfeasors.

4th 1178, 1193, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1202.) What has developed is a patchwork of appellate decisions interpreting the scope of Prop. 51. The result of such analysis can determine whether a plaintiff collects full recovery regardless of whether there are judgment-proof defendants, and whether 'deep pocket' defendants become liable for a share of a judgment disproportionate to their adjudged fault. Any lawyer confronted with a case involving concurrent tortfeasors should become familiar with how appellate courts have delineated the scope and limits of Prop. 51.

The debate over the scope of Prop. 51 has arisen from the initiative's language providing that "the liability of each defendant for non-economic damages shall be several only and shall not be joint" in cases *"based upon principles of comparative fault."* (Civil Code, §1431.2 [emphasis added].) Over the years since Prop. 51 was enacted, numerous appeals have explored a myriad of situations to determine whether liability for particular torts is "based upon principles of comparative fault," and thus subject to the initiative's limits on joint liability. Discussed below are some of the situations that may be exempt from the reach of the initiative.

RESPONDEAT SUPERIOR

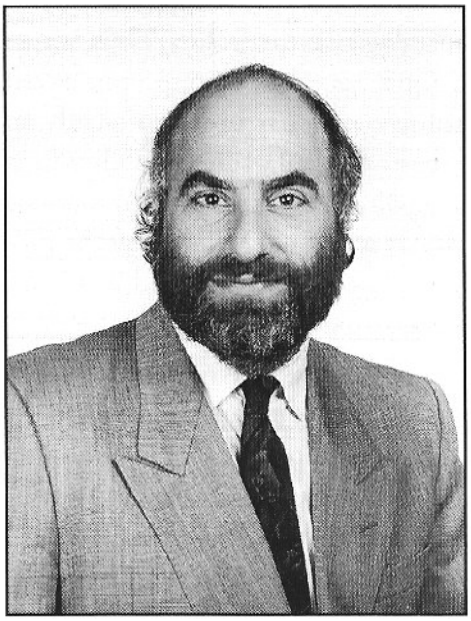
The doctrine of respondeat superior is the major exception to abolition of joint liability for noneconomic damages amongst tortfeasors. A solid line of cases holds that an employer is jointly liable for an employee's torts where respondeat superior is applicable, because the employer's liability is not "based upon principles of comparative fault" – the linchpin for application of Prop. 51. (See, e.g., *Miller v. Stouffer* (1992) 9 Cal.App.4th 70; *Rasthian v. BRAC-BH Inc.* (1992) 9 Cal.App.4th 1847; *Strithong v. Total Investment Co.* (1994) 23 Cal.App. 4th 721.)

STRICT LIABILITY

As strict liability relieves plaintiffs of the burden of proving fault in certain cases, it would appear to be a prime candidate for exemption from Prop. 51. However, but for a narrow exception, courts have found Prop. 51 applicable to strict liability and contrary case law has been eradicated by depublication. (Compare *Arena, supra,* 63 Cal.App.4th at 1195-1199 and *Moreno v. S.H. Kress & Co.* (1997) 63 Cal.Rptr.2d 191, depublished July 23, 1997.)

The one surviving exception applies in strict liability cases where a

Continued on next page



Robert A. Roth is a certified appellate specialist at Jackson Tufts Cole & Black, with offices in San Francisco and San Jose, California.

plaintiff's injury is caused by a single product and all defendants are in the same the chain of distribution. (See *Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618.) This exception may be on shaky ground, as *Wimberly* relied heavily on the subsequently depublished opinion in *Moreno*, but nonetheless has managed to evade depublication. (*Wimberly, supra,* 56 Cal.App.4th at 626. See also *Arena, supra,* 63 Cal.App.4th at 1197 [finding that *Wimberly* can still be reconciled with Prop. 51].)

IMMUNITY STATUTES

Where some of multiple tortfeasors are entitled to statutory immunity, Prop. 51 does not mandate that fault be apportioned to the immune tortfeasors, to the benefit of the remaining joint tortfeasors. Thus, where a (now repealed) statute immunized tobacco manufacturers from fault, an asbestos manufacturer's liability for a lung-diseased plaintiff's noneconomic damages was not reduced by the proportion of damages caused by the tobacco manufacturer. (*Richards v. Owens-Illinois* (1997) 14 Cal.4th 985, 1001.) As California law provides a myriad of statutory immunities, this is an issue that counsel should always investigate at the outset of a case. (See *Deering's California Codes*, General Index, "Immunity from Liability.")

Where some of multiple tortfeasors are entitled to statutory immunity, Prop. 51 does not mandate that fault be apportioned to the immune tortfeasors, to the benefit of the remaining joint tortfeasors.

NONDELEGABLE DUTY AND PECULIAR RISK

Under the nondelegable duty doctrine, a landlord cannot escape premises liability by delegating the duty to maintain property in a safe condition to independent contractors. This form of liability is considered a form of vicarious liability not subject to Prop. 51. (*Srithong, supra,* 23 Cal. App.3d at 727-728.) Likewise, it appears that an independent contractor's employer found vicariously liable under the peculiar risk doctrine for the contractor's negligence in performing inherently dangerous work, is not protected by Prop. 51. (*Miller, supra* , 9 Cal.App.4th at 84.)

PERMISSIVE DRIVER

Under Vehicle Code, § 17150, every owner of a vehicle is liable for the negligence of a permissive driver. Since this form of liability is not "based upon principles of comparative fault," vehicle owners are not protected from the acts of permissive users by Prop. 51. (*Rashtian, supra,* 9 Cal.App.4th at 1853-1854.)

INTENTIONAL TORTFEASORS

An intentional tortfeasor cannot shift liability to a non-intentional, negligent joint tortfeasor by using Prop. 51. However, the converse does not apply. Negligent joint tortfeasors are entitled to have their liability for noneconomic damages apportioned to intentional joint tortfeasors. (*Weidenfeller v. Star & Garter* (1991) 1 Cal.App.4th 1, 6-7; *Baird v. Jones* (1993) 21 Cal.App.4th 684, 690. Cf. *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 136.)

An intentional tortfeasor cannot shift liability to a non-intentional, negligent joint tortfeasor by using Prop. 51. However, the converse does not apply.

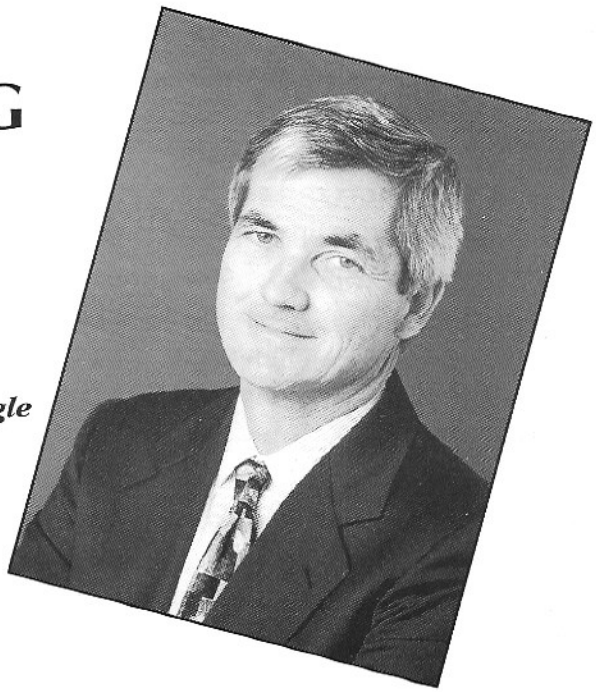
CONCLUSION

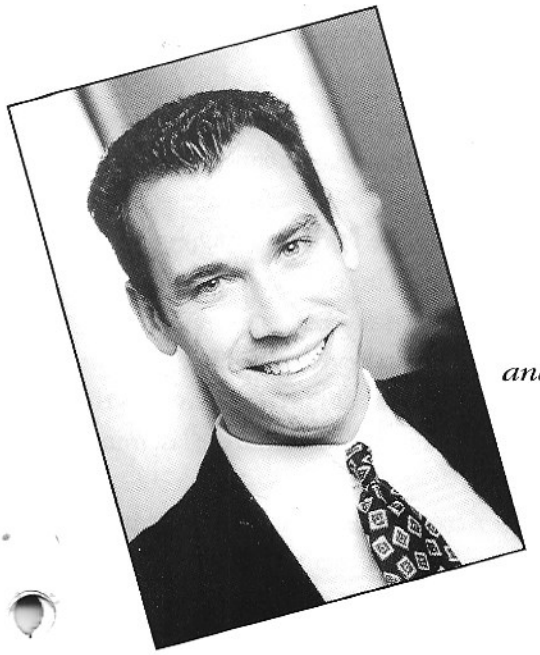
There is no reason to think that the list of Prop. 51 exceptions is exhausted. For example, no published appellate decision addresses whether a claim of civil conspiracy – for which each participant is liable "as a joint tortfeasor for all damages ensuing from the wrong, irrespective of . . . the degree of his activity" – is covered by Prop. 51. (See *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.) Arguably, conspirators are each 100% liable for all damages, and Prop. 51 would not apply.

No doubt, creative counsel will discover other liability theories that may fall outside the initiative's scope. In some cases, the battle over whether exceptions to Prop. 51 can be applied may prove central to determining what damages, as a practical matter, are recoverable. ◆

Risk Management:

STRATEGIES FOR AVOIDING MALPRACTICE LIABILITY





By Joseph P. McMonigle

and ***Douglas J. Melton***

Most lawyers would rather not think about legal malpractice. We at Long & Levit think about legal malpractice every day. I have represented lawyers for twenty-one years and I have been fortunate to try numerous legal malpractice cases. I spend my entire professional day with lawyers at Long & Levit. Our clients are lawyers. Most of the witnesses in our cases are lawyers. Most of our experts are lawyers. My experience has given me a unique perspective, not only on defending legal malpractice claims, but on how they arise and how they can be avoided. Although we enjoy our work, the purpose of this short article is to provide tips on how to avoid becoming a defendant through common-sense risk management strategies.

Risk management is a malleable concept. To be effective, risk management strategies must be tailored to the size of the firm, its practice, and its culture. In other words, everything said in this article should be viewed from the perspective of "how would this work in my firm?" This article covers five main areas:

1. Who should participate in risk management;

2. Managing and selecting professional liability insurance;

3. Implementing and managing systems for calendaring, new client acceptance and conflict identification;

4. Identifying and negotiating troublesome collections; and

5. Supervising claims against the firm – from tender to settlement/trial.

I. WHO PARTICIPATES IN THE RISK MANAGEMENT PROCESS?

The answer to this question is driven by the size of the firm, its culture and business. Every firm, however, regardless of its practice area, must make risk management a priority. All but the smallest firms should involve a key manager, preferably a non-lawyer, in risk management. Risk management should also have the unqualified support, if not the constant day-to-day involvement, of the key leaders of your firm, including rainmakers, managing partners, mentors, etc. Finally, if you are a litigation firm, your risk management program should involve a trial law-

Continued on next page

yer – a respected litigator.

The reason for involving a manager who is a non-lawyer is to keep risk management from eating-up too many productive hours. Although risk management is important, it will sap attorney time. Attorney involvement should consist of quality hours, not quantity.

II. LEGAL MALPRACTICE INSURANCE

The good news about malpractice insurance is that it is, at the moment, relatively inexpensive. On average, legal malpractice insurance premiums are lower today than they were in 1988. It is unlikely that any other expense item on your budget is cheaper today than it was ten years ago.

The market for legal malpractice insurance has fragmented over the last several years, with numerous domestic and foreign insurers vying for a piece of the action. Competition has reduced prices to an artificially low level. The upshot: this is a buyer's market and it will not last. While it does, take advantage of it. Understand your coverage and negotiate your terms. You will receive concessions. If you have an insurance coverage lawyer at your firm, this should be her project. Otherwise, unless a lawyer in your firm is willing and able to spend enough time to really develop an understanding of the available policy provisions and endorsements, and their economic and coverage implications, consider outsourcing the project. Given the low cost of malpractice insurance, now is the time to consider a multiple year policy, if available. Lock in good rates before prices go up.

The good news about malpractice insurance is that it is, at the moment, relatively inexpensive.

Pricing is not, however, the only consideration. Consider service and the carrier's claims handling practices. An inexpensive policy may not be a good deal if you are constrained with respect to choice of defense counsel or the quality of your overall defense.

Also, think through the impact of large self-insured retentions or deductibles. While they may give you a price break, in our experience very few firms budget for a large deductible. Compare the difference in price. We firmly believe that the policy with the lowest possible deductible is often the best value in the long run.

The bottom line is: don't gamble with your insurance. Insurance allows you to pass your risk to someone else. Do not assume unnecessary risk through inadequate coverage or a high deductible.

III. MANAGING YOUR SYSTEMS

Your Calendaring System. Missed deadlines are the single leading cause of attorney malpractice claims. Every firm, regardless of size of practice area, must have a centralized system to track deadlines. This is not to say that lawyers should delegate their individual responsibility to manage their own calendars. Particularly for those with litigation practices, calendaring is a non-delegable duty; it cannot be passed on to even the best staff.

We recommend having a dedicated person within the firm to track deadlines in a central system. This person should provide reminders to individual lawyers of upcoming deadlines. Such a system supplements individual calendars and provides a "safety net." In so doing, it dramatically reduces the chance of a missed deadline.

At Long & Levit, we have instituted an additional calendar-related "safety net." We have a rule that pleadings must be filed one full day *before* they are due. The only exception is reply briefs – which must be filed by noon on the day they are due. There are simply too many things that may go wrong with a filing to wait until the last minute.

Client Intake/New Business. We recommend, again, that a non-lawyer be dedicated to administering client intake/new business review. The system, however, must also involve a talented, thoughtful, well-respected partner to be the firm's gatekeeper. The partner must be able to see beyond the immediate appeal of a new client and consider that client's potential impact on the firm's practice as a whole. He or she must also be able to stand up to a rainmaker and tell them that the firm should not take on their prospective client.

Here, uniform and standard procedures are a must. You must use a written fee agreement with all new clients. Identify any potential conflicts in advance. Each of these things should occur before the firm does any work for the new client.

If you decide not to take on a potential client, you must notify them swiftly and unequivocally of your de-

cision. Your declination letter should apprise the prospective client that you will not represent him, that no attorney-client relationship exists, and that he should immediately seek alternative counsel as statutes of limitation deadlines may be approaching. Offer no legal opinions or advice in a declination letter.

Conflicts Systems. Conflicts of interest are presently one of the "hot" areas in legal malpractice. The existence of a conflict of interest is one of the few issues in a legal malpractice case subject to black and white rules. Accordingly, juries love conflicts cases.

> Particularly for those with litigation practices, calendaring is a non-delegable duty; it cannot be passed on to even the best staff.

Where a conflict existed, the remedy of disgorgement of fees is available. Imagine working for years on a case on behalf of a client only to subsequently be required to return fees you earned on the basis of a conflict of interest.

Once again, your conflicts system should involve both a dedicated staff person and a dedicated partner. These people must pass on all new matters and alert responsible partners of the existence of a potential conflict. Once again, *no work* should be done on behalf of a new client before you have affirmatively established the absence of any conflict of interest.

It goes without saying that your conflicts database must be constantly updated. There is no certainty when a conflicts check is done against only a partial list of your firm's prior clients and cases.

An often forgotten aspect of conflicts management is the screening of laterally hired lawyers, firm mergers and branch offices. If you bring in a new attorney whose prior firm represented one of your client's current adversaries, the new attorney's duty to that former client, even if she did not work on its matters, could be imputed to your firm and result in disqualification.

IV. COLLECTIONS

While the link between collections and risk management may not be immediately apparent, the reality is that over one third of all legal malpractice cases begin as fee actions brought by attorneys to recover from non-paying clients.

Wait to sue clients for fees. The statute of limitations on your fee claim pursuant to a written fee agreement is four years. Your client's claim for legal malpractice has a one year statute of limitations. The statute begins to run when your client becomes aware of an actual injury to his interests, but is tolled during the time you represent him. Be conservative in timing your prosecution of fee claims to guard against retaliatory suits.

V. WHAT TO DO IF YOU ARE SUED

Even the best risk management strategy (not to mention the best lawyering) does not guarantee immunity from legal malpractice claims. If you are sued, here are a few broad suggestions as to how you should respond.

First, tender the claim to your carrier as soon as possible. Even if a claim has not ripened into litigation, alert the carrier to a potential suit. As legal malpractice policies are almost all "claims made" policies, the earlier you tender, the more assured you are of coverage.

Second, a respected litigation partner within your firm should be charged with monitoring your defense. This partner should, ideally, be relatively detached from the underlying case and should be able to maintain a pragmatic approach. Do not let the defense be supervised by a committee of lawyers or by the lawyer who is on the hot-seat.

Third, do not micro-manage your defense. If anything, micro-manage the selection of competent defense counsel who you can trust. Getting too involved in your defense not only saps time, it dramatically increases the emotional toll the malpractice case will take on you and your firm.

Finally, select good counsel. Do not hire your friends. Do not return favors by hiring someone who once sent you a case. Choose a well-respected trial lawyer with plenty of legal malpractice defense experience. If you do not like the attorney your carrier assigns, suggest one you do like. It may be the most important decision you make with respect to your defense. ◆

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DEFENSE MEDICAL EXAMINATIONS:

Forcing Publication of a Favorable Report



By Jon R. Williams

Although routine discovery in most personal injury actions rarely leads to any groundbreaking information, perhaps nothing is more controversial than the effectiveness of a defense medical examination to evaluate a plaintiff's injuries. This is especially true when the examining physician is one of the "usual suspects" who tends to spend more time performing medical-legal work than actually treating patients.

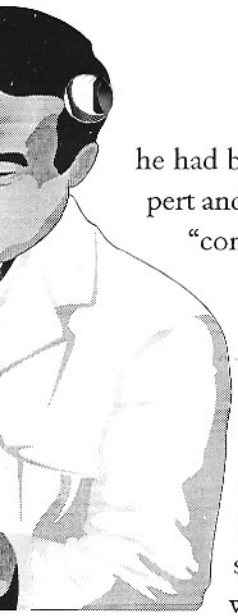
While the results of these defense examinations can sometimes be "cookie-cutter" predictable, every once in a while, a defense doctor will produce a report that actually supports the plaintiff's case. And though the occasions are becoming more and more rare in the current legal climate, especially when soft tissue injuries are at issue, the recent decision of *Kennedy v. Superior Court* (1998) 98 *Daily Journal D.A.R.* 5989, illustrates how the defendant who requests a defense medical examination sometimes does so at its own peril.

Specifically, in the *Kennedy* action, the First District Court of Appeal (Div. Five) held that a party who submits to a medical examination pursuant to Code of Civil Procedure ("C.C.P.") §2032(c) is entitled to a report of that examination on demand even if the examining physician has not prepared one. (*Kennedy v. Superior Court, supra, 98 Daily Journal D.A.R.* at 5990.) Furthermore, the *Kennedy* court held that a party who has submitted to such an examination has the absolute right to depose the examining physician in spite of the fact that the party requesting the examination may have subsequently withdrawn the physician as an expert witness and redesignated him as a "consultant." *(Id.)*

FACTS OF THE *KENNEDY* CASE

Despite the extraordinary holding of the *Kennedy* court, the facts underlying this decision are quite common. Specifically, Elizabeth Kennedy filed a personal injury action against defendant, Lucky Stores, claiming to have slipped and fallen in a grocery store, thereby sustaining injuries which apparently required reconstructive surgery. Lucky then demanded that Mrs. Kennedy submit to an "independent" medical examination pursuant to C.C.P. §2032(c). She complied.

However, when Mrs. Kennedy subsequently demanded a copy of the report of the examination, to which she was entitled under C.C.P. §2032(h), Lucky refused, claiming that the examining physician had not prepared a report. Thereafter, Lucky unilaterally cancelled the deposition of the examining doctor on the ground that



he had been withdrawn as an expert and redesignated as a defense "consultant."

In response, Mrs. Kennedy filed a motion to compel Lucky to produce a report of the doctor's examination, and to produce the examining doctor for deposition. Both requests were denied by the trial court. Mrs. Kennedy then filed a petition for review with the First Appellate District.

DEMAND FOR REPORT OF MEDICAL EXAMINATION

C.C.P. §2032(h) provides that if a party submits to a physical or mental examination in compliance with a demand, that party has the option of making a written demand for the delivery of: (1) a copy of a detailed written report setting out the history, examinations, and findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; and (2) a copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner. If this option is exercised, a copy of these reports shall be delivered within 30 days after the service of the demand, or within 15 days of trial, whichever is earlier. The work product protection set forth by C.C.P. §2018 is waived, both for the examiner's writings and reports, and to the taking of the examiner's testimony.

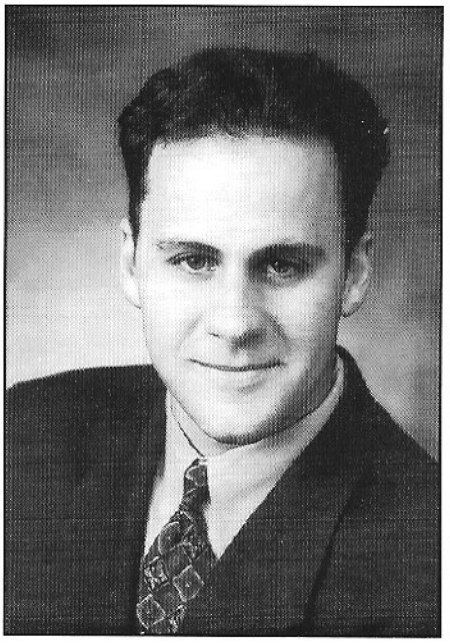
> A party who submits to a medical examination pursuant to Code of Civil Procedure ("C.C.P.") §2032(c) is entitled to a report of that examination on demand even if the examining physician has not prepared one.

Despite this well-established statutory background, Lucky took the position, agreed with by the trial court, that C.C.P. §2032 only requires disclosure of a defense examiner's report if the examiner actually made one. Mrs. Kennedy, however, contended that the statute refers to "a" detailed report, not "the" detailed report, or "any existing" detailed report, thus requiring Lucky to have a report prepared, on demand, in exchange for her submitting to the examination in the first place.

Although there is a general reluctance to order parties to produce reports not in existence, the *Kennedy* court read C.C.P. §2032 as clearly entitling a party who submits to a physical examination to a report of that examination, containing certain specified information. As reasoned in the *Kennedy* opinion, the trade-off is clear: If one party to a personal injury action is required by the opponent to submit to a medical examination, at the very least he or she is entitled to a report of the information obtained by their adversary in litigation. *(Id.)*

Seizing upon the fact that C.C.P. §2032(j) provides for reciprocal disclosure of an "existing report" of the examinee, the *Kennedy* court then interpreted the Legislature's failure to use the phrase "existing" in subdivision (h) as an indication of the expectation that a written report should be prepared for the examinee whenever it is requested,

Continued on next page



Jon R. Williams is an associate with the San Diego law firm of Higgs, Fletcher & Mack, specializing in civil writs and appeals and also practicing personal injury, professional negligence, products liability and employment law. Mr. Williams is a graduate of California Western School of Law (J.D. cum laude*) where he was Notes and Comments Editor of the* California Western Law Review/International Law Journal. *Mr. Williams has been Civil Procedure column editor for the* Trial Bar News *since 1996. He may be contacted by e-mail at JonW@higgslaw.com.*

even if one did not exist. *(Id.)* In short, had the Legislature been concerned only with "existing" reports when it drafted subdivision (h), it could have so specified. Its failure to do so reinforces the *Kennedy* court's interpretation of this statute. *(Id.)*

DE-DESIGNATION OF EXAMINING PHYSICIAN

Despite Lucky's rather sly tactic of de-designating the examining physician and re-naming him only as a "consultant," the *Kennedy* court did not believe that such a withdrawal should shield a defense medical expert from being deposed regarding his examination. As the explicit terms of C.C.P. §2032(h) waive the work product privilege as it relates to the examination, the *Kennedy* court refused to allow Lucky to subsequently "hide" its expert from deposition by re-dubbing him as a "consultant" in an attempt to reinstate the work product protection. *(Id.* at 5990.) In short, when an expert is also the examining physician pursuant to C.C.P. §2032, the specific terms of C.C.P. §2032 must control. That physician is therefore subject to deposition regarding the physical examination whether or not he is de-designated at a later time. *(Id.)*

On this basis, and without allowing any oral argument as the plaintiff's right to relief was "so obvious," the *Kennedy* court reversed the trial court's denial of the plaintiff's motion to compel, and ordered that a report of the examination be produced. *(Id.)* The *Kennedy* court also ordered that the plaintiff was entitled to depose the examining physician, whether he was de-designated by the defendant or not. *(Id.)*

CONCLUSION

The First Appellate District has articulated, perhaps for the first time in this state, the absolute responsibility of a defendant to produce a defense medical examination report, even when no report previously existed. When a report is demanded by the plaintiff, it must be produced in all circumstances *at the defendant's expense*, even if it supports the plaintiff's claims of injury.

Furthermore, in light of the sweeping language contained in C.C.P. §2032, a defendant cannot prevent the deposition testimony of the physician who conducts a defense medical examination by simply de-designating him and then calling him a "consultant." Even though the work product privilege may be invoked by such a de-designation in other contexts, when the expert in question actually conducts a medical examination, the plaintiff has an absolute right to depose him or her.

Keep this in mind the next time defense counsel hedges when you ask for a copy of a defense medical report which might actually help your client's cause. ◆

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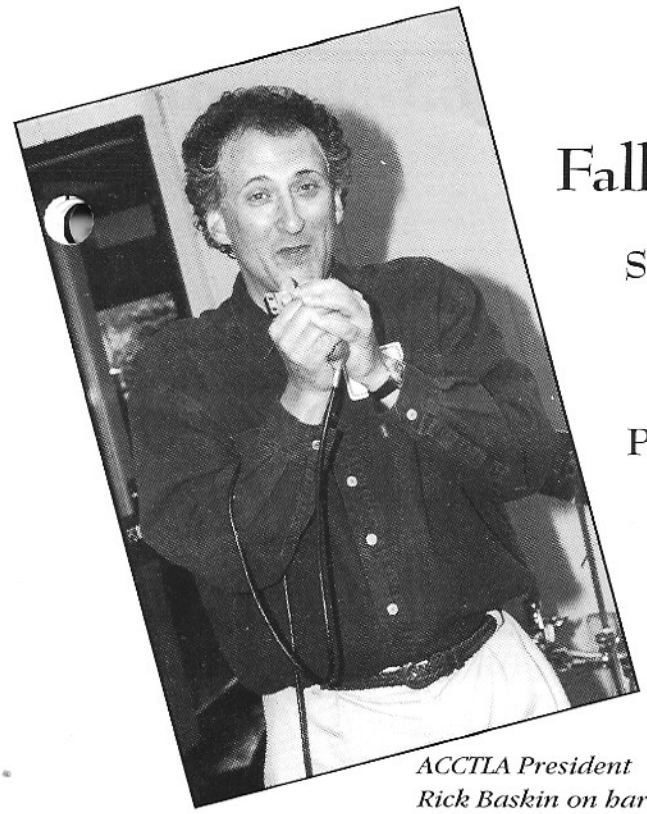
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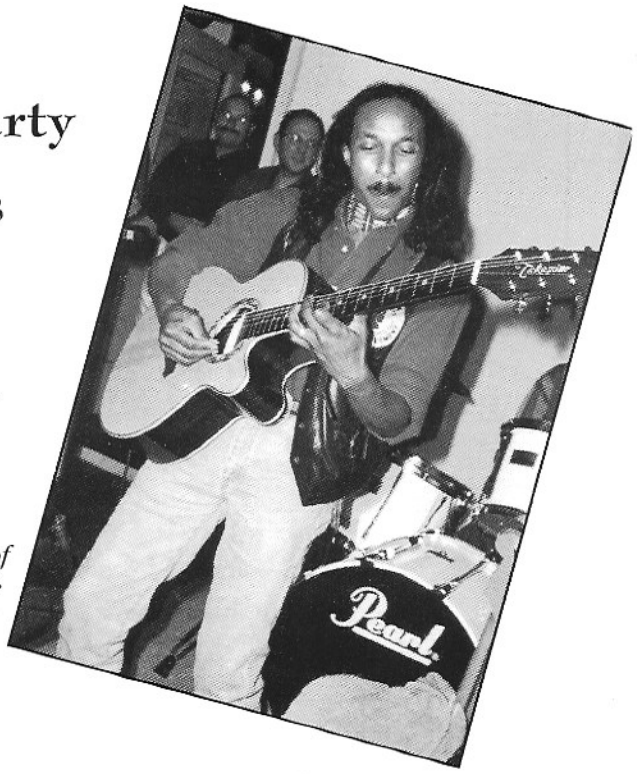
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ACCTLA President Rick Baskin on harmonica

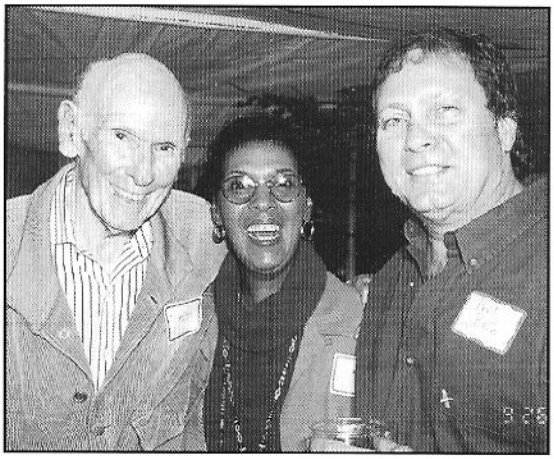


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from left: Melanie Fishkin, Beth Summers, and Jerry Fishkin

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ACCTLA
—UPCOMING—
EVENTS

January 19, 1999

Judge's Night
Claremont Resort, Oakland
6:00 p.m. reception; 7:00 p.m. dinner
(see announcement on opposite page)

◆

January 27, 1999

What's New in Tort & Trial: 1998 in Review
Claremont Resort, Oakland
Registration: 5:30 - 6:00 pm

This program includes discussion of judicial decisions and statutes affecting tort liability and civil procedure as well as cases pending in the California and U.S. Supreme Courts.

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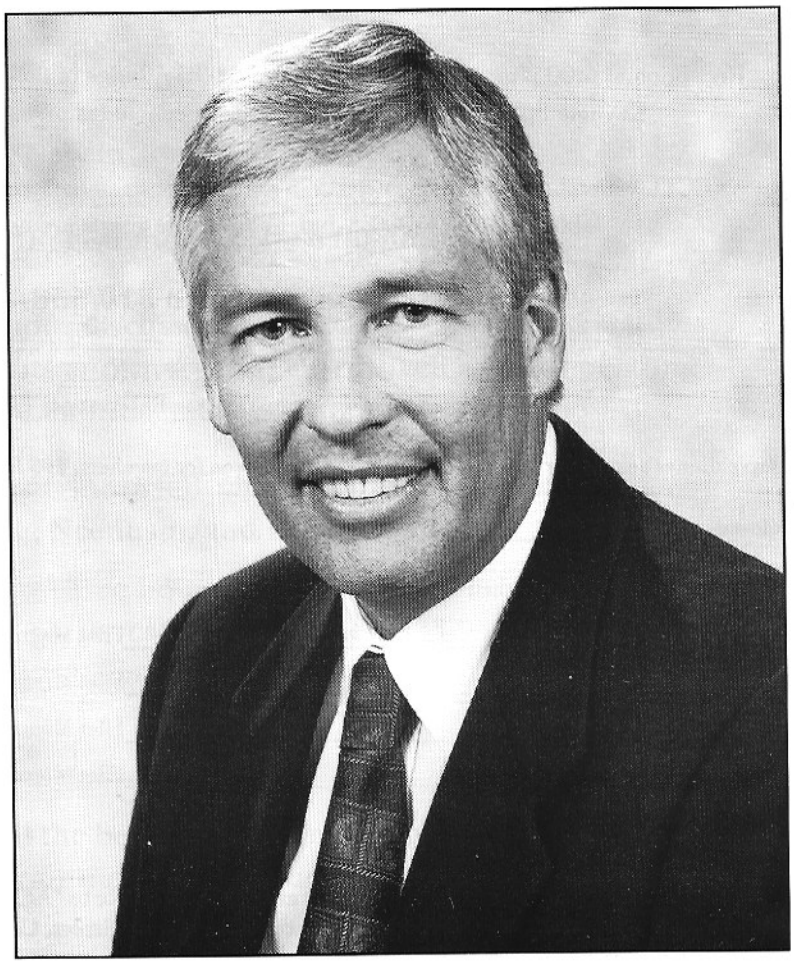
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Inspiration

A Recent $6.48 Million Verdict in a Contra Costa Construction Case

***Robert "Bob" S. Arns** of The Arns Law Firm in San Francisco recently re-established the viability of third-party cases arising out of work site injuries by obtaining a $6.48 million verdict from a Contra Costa jury on behalf of Elmo Minert and wife, Deann Minert. The case arose out of a construction injury when Mr. Minert fell 20 feet to the ground from scaffolding being erected by his employer Ivy Hi-lift. The jury was asked to determine whether the general contractor could be held liable under the control doctrine for failing to assure that the subcontractors on the job used fall protection.*



THE INCIDENT

The incident took place at the Delta Diablo Sanitary District waste water treatment facility in Antioch. Delta Diablo hired a General Contractor, UCI Construction, to renovate a "digester" tank. The digester tank was a vessel placed partially below ground level, 30 feet high from the tank floor to the roof and 80 feet in diameter.

There were only a few hatches at ground level for workers to enter and exit the inside of the vessel. Thus the vessel is referred to as a "confined space." UCI subcontracted with plaintiff's employer, Ivy Hi-Lift, to erect a scaffold in the vessel so the renovation work could be done on the metal roof of the tank at the 30-foot level. It was during the erection of this scaffold that Mr. Minert was injured.

The scaffold was about 80 percent constructed at the time of the incident. Mr. Minert, an employee of the subcontractor Ivy Hi-Lift, was working on what was called the "dance floor" at the 20 foot level. The dance floor was the top deck from which workers would stand to repair the corroded metal roof. During the process of erecting the scaffolding, Mr. Minert lost his balance and fell from the dance floor to the pit floor below suffering a serious head injury and various orthopedic injuries.

Bob Arns stated, "One of the industry standards for a confined space requires a written evacuation plan provided by the general contractor – there was none in this case. Mr. Minert laid at the bottom of this tank for 45 minutes, without anybody knowing how to remove him. In fact, the Medivac helicopter arrived and waited for at least 20 minutes before he could be removed."

Mr. Arns stated that a further basis of liability against UCI Construction was the failure to provide fall protection in the form of a self retracting line, called an "SRL," which is an inexpensive item. A self-retracting line moves with a worker and automatically coils up when the person gets closer to the anchor point. These safety precautions were explicitly detailed and required in the Delta Diablo and UCI safety manuals, yet not used on the job.

LEGAL BACKGROUND OF CASE

The case was important from a legal standpoint because it was one of the first to test the extent of the law following the Supreme Court's decision in *Toland v. Sunland Housing, supra*, and the Court of Appeals decision in *Grahn v. Tosco* (1997) 58 Cal. App.4th 1373. While some commentators had prematurely celebrated the death of general contractor liability, this case showed the continuing viability of cases under the Control Doctrine as described under Restatement of Torts section 414.

Mr. Minert's case was pending during the time the *Toland* decision was before the Supreme Court of California, but not yet decided. In March of 1998, Mr. Arns appeared as Amicus Counsel for plaintiff before the Supreme Court for oral argument in the *Toland* decision. He stated that "*Toland* solely addressed the 'peculiar risk doctrine' and did not even mention the control doctrine."

While some commentators had prematurely celebrated the death of general contractor liability, this case showed the continuing viability of cases under the Control Doctrine as described under Restatement of Torts section 414.

The Supreme Court issued the *Toland* decision on June 1, 1998, and counsel for defendant UCI Construction immediately filed for Summary Judgment. UCI asserted that *Toland* abrogated all causes of action under California law by which plaintiff could hold a General Contractor liable. This Motion for Summary Judgment was denied by the Court on the basis of the continuing viabil-

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ity of the Control Doctrine as discussed in the *Grahn v. Tosco* decision.

THE MOCK TRIAL OF THE CASE

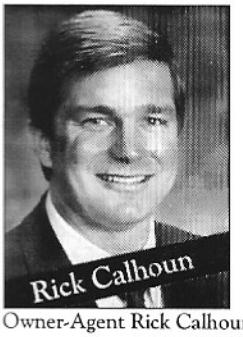
Based on the significant nature of the case, Mr. Arns used a jury consultant and participated in a mock trial. Mr. Arns chose to work with Dr. Eleanore Zicherman who has many years of experience in the techniques of jury selection and mock trials. A few weeks before the trial of the case, The Arns Law Firm performed a mock trial in Contra Costa County before a broad range of participants. Mr. Arns presented the case for the plaintiffs and Mr. Morgan C. Smith and Mr. Steger P. Johnson, also of The Arns Law Firm, presented the case the defendants.

"The mock trial was one of the most incredible experiences of this case," Mr. Arns said. "It forced us to prepare this case to the point of trial a number of weeks before the actual trial. It also forced to me prepare and present my opening statement many weeks before the actual event. The 'mock' defense was strong and hit all the key points that the actual defendants used in the trial. I was, in actuality, extremely angry with Morgan and Steger for hitting below the belt and defending the case too well. They used every cheap shot in the book and I was afraid they would unduly influence the mock jury."

The mock trial's result was a remarkable indicator of the actual trial verdict. "During the mock trial, I was struck by how conservative the jury panel was," Mr. Arns said, "however, most importantly, I was amazed at how strongly in our favor the most conservative members of the mock jury were. They each picked up on the theme of 'responsibility,' and found it distasteful for the defendant UCI to blame the entire incident on the plaintiff's employer while taking no responsibility themselves. This reaction was the same reaction that existed in the actual trial. Additionally, the mock trial average award was approximately $6 million which was extremely close to the actual verdict of $6.48 million."

THE EXPERT WITNESSES

Despite the mock trial's result, the typical concerns about the actual trial of this case remained. In order to get



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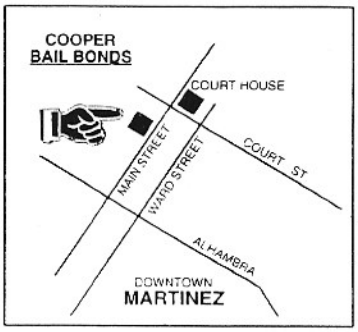
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this case to trial, the remaining expert witnesses had to be deposed. Mr. Arns had retained a roster of well qualified experts in their field; the defendants had retained a scaffolding safety expert from the Scaffold Institute of America, as well as a retired OSHA inspector.

With regard to the key issue of whether fall protection could have been used to protect the plaintiff, Mr. Arns relied upon Walter Want, an expert in self-retracting lines. According to Mr. Arns, Mr. Want "essentially put on a show for the jury of how easily self-retracting lines can be installed and used. He presented an unbeatable presentation that completely countered the defense accusation that no fall protection could have been used in his application. The defense liability expert did not have a good answer as to why self-retracting lines could not be used. The jurors were basically shaking their heads when he testified." Defense counsel decided against calling their OSHA expert who had testified in deposition that such retractable lines were feasible and could have been used.

THE TRIAL

Trial began on July 8, 1998, before the Hon. Richard Patsey in Contra Costa Superior Court. Since the judge had another engagement on July 27, 1998, the parties had the choice of attempting to try this four week case in two and a half weeks or continuing the trial. Plaintiff elected to proceed in a quick manner. "The best decision we ever made on this case was to try it on shortened time. I am always afraid of boring a jury, and with this schedule, I had to keep moving through witnesses at a brutal pace," said Mr. Arns.

The case began positively in plaintiffs' favor and never stopped. The first key concessions from the defendants, both UCI and Delta Diablo, were that UCI retained the right of control over all safety measures. Further, Mr. Arns was able to establish that not providing fall protection for this work vioated the Delta Diablo Safety Manual and the UCI safety manual.

The jury was given the case on July 23, 1998, with only one hour of time to deliberate on the 23rd before adjourning to go home. The jury asked to see plaintiff's expert economist's numbers concerning future wage loss and future medical expenses during their second hour of deliberations. At this point, defendant UCI offered $2.2 million to settle the case (its first offer ever). Plaintiffs rejected that offer. A matter of minutes later, the jury returned with their $6.48 million verdict. Following the Proposition 51 deductions and the subtraction of the workers' compensation lien, the net verdict amounted to $5.79 million.

Bob Arns stated, "This verdict is not only the highest personal injury verdict in Contra Costa County, it is probably one of the quickest seven figure verdicts as it took the jury about three hours to reach $6.48 million. The evidence was overwhelming and this jury was extremely well educated and very intelligent."

POST TRIAL MATTERS

Following trial, defendant UCI brought a Motion For New Trial or in the Alternative for Judgment Not Withstanding the Verdict. The basis of this motion was in part that *Toland* prevented any liability in this case. On October 19, 1998, Judge Richard Patsey denied the motion.

CONCLUSION

When asked what he learned from the trial of this case, Bob Arns stated, "I believe that when we try cases we should be more transparent as *lawyers* and more perceived by the jury as unbiased presenters of evidence. By that, I mean that we should stand back and not inject ourselves as just another lawyer who will say anything, credible or not. Rather, we should make a presentation as people who want to present evidence in a cogent way, in a way that the jury can understand as quickly as possible. If an opposing witness is not worthy of belief, go ahead and destroy him, but without sarcasm and then move on. These juries are smart and will appreciate what has happened." ◆

– Bob Arns has his own firm, The Arns Law Firm, in San Francisco. He specializes in construction and industrial injuries, professional negligence and product defects. Although Bob Arns has practiced law in San Francisco for 25 years, he has lived in Danville since he first started practicing.

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NOTICE

TO: Members of the Bar
District Attorney's Office
Public Defender/Alternate Defender's Office
Conflicts Panel
Probation Department
Sheriff's Office
Mt. Diablo/Walnut Creek Judges/Staff

FROM: Hon. Patricia K. Sepulveda
Assistant Presiding Judge

DATE: November 10, 1998

RE: Calendar Changes in Mt. Diablo/Walnut Creek

Effective January 1, 1999 (or as soon as feasible thereafter), all Mt. Diablo misdemeanor jury trials shall be conducted in Walnut Creek Branch Court, using a combined Walnut Creek/Mt. Diablo jury pool. Walnut Creek judges and staff will be working on the exact calendar for Walnut Creek Court that will be necessary to accommodate these trials; they will be working with all of you to accomplish this. The issues of where and when Readiness Conferences for all these trials will be conducted will be discussed at that time. All other criminal matters in Mt. Diablo or Walnut Creek shall remain status quo as far as the location at which they are conducted.

Other matters (civil in nature) shall also be added to Walnut Creek Court's calendar at the same time. This will include two-day civil court trials (arising from Walnut Creek or Mt. Diablo jurisdictions) originating from the Civil Fast Track Division in Martinez (these trials currently go off Master Calendar in Martinez and are unlimited jurisdiction cases). Also to be heard in Walnut Creek are Mt. Diablo limited jurisdiction civil cases and Mt. Diablo/Walnut Creek small claims appeals.

Again, Walnut Creek Judges and staff will be developing the actual calendars for Walnut Creek Court which will accommodate these matters. The purpose of this preliminary notice is to give all concerned parties as much advance notice as possible of the calendar modifications.

cc: Mr. Ken Torre
Hon. Peter L. Spinetta
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