Winter 2001-2002

THE Verdict

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THE Verdict
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National crisis, civil liberties and our role as "trial lawyers"

By Paul L. Rein

WE MUST PROTECT CIVIL LIBERTIES AT THIS TIME OF NATIONAL CRISIS

At a time when fear, as well as legitimate needs for national security, may cause us to lower our standards for a free and open society, we must remember the importance of preserving our important civil liberties while our government fights back against "terrorists." A recent letter from Anthony Romero, on behalf of the ACLU, focused on that issue:

*Terror, by its nature, is intended not only to destroy, but also to intimidate a people, to force them to take actions that are not in their best interest. To overcome this attack, we must resolve to strengthen our security while at the same time fortifying the freedoms that have made our nation great. We must not let a false choice be made between our security and our civil liberties, but must instead work to ensure that both security and civil liberties remain strong. **To gain security by sacrificing America's fundamental freedoms would be to cede victory to the terrorists. And we must not let them win.***

History has taught us — from the prosecution of dissenters in World War I to the internment of Japanese Americans in World War II, to the outrages of the McCarthy era — that sacrificing liberty not only doesn't make us more secure, it in fact weakens our democracy by destroying the freedom that we are fighting to protect. History has also taught us that we must not take freedom and equality for granted, nor can we be willing to sacrifice these fundamental values, nor look the other way as they are being undermined. For if we do, the enemy will have won.

All of us who love liberty must focus on protecting what those who hate America are trying to destroy — our freedom of speech, our religious liberty, our ability to oppose government when we think it's wrong and to freely register our dissent.

We must not let the rights of any group — Arab-Americans, Muslims, or Sikhs — who love and support this country, to be sacrificed in a wave of hysteria. Nor can we allow America's precious rights of privacy and free communication to be sacrificed in unjustified and ineffectual attempts to provide us with the security we all crave.

While various proposals for changes in our legal system must be individually evaluated, we should keep these values in mind while making decisions which will have long term consequences upon all of our lives.

WHY WE ARE "TRIAL LAWYERS" AND WHY WHAT WE DO STILL MATTERS

With the current tensions of the world situation added to our own personal and business problems, it would be easy to forget our own role in affecting the experiences of all whom we contact. On a personal level, we each have a "ripple" effect, either radiating love, warmth and harmony into the world, or spreading anger, tension and fear. On a professional level, we trial lawyers have in common the decision we made to represent *consumers:* individual human beings confronted by the powerful forces of industry, corporation, and government. These persons depend upon the trial lawyer for protection.

On a daily basis we make a difference: we matter when we protect the victims of corporate fraud and conscienceless profit

taking; we matter when we use lawsuits to encourage major industries to produce safer products; we matter when we represent elderly persons abused in nursing care facilities; and we cause a ripple effect by forcing all nursing homes to reevaluate their staffing to prevent both abuse and the threat of consequent lawsuits.

We represent individuals faced with the awesome power of the state. We represent the disadvantaged, the disabled, and those who are treated unfairly because of their race, sex, religion, national origin, age, political convictions or physical condition.

We can continue to be proud that we are trial lawyers who oppose the megagiants of business and corporate power and protect the rights of the individual, acting truly as the "Consumer Attorneys of California," as our state-wide parent organization is now known. Several years ago our state organization changed its name from the "California Trial Lawyers Association," not only to accurately reflect that we represented "consumers," but also out of a sensitivity that the term "trial lawyer" had developed a negative connotation among some members of the public. However, this negativity itself was the result of a deliberate misinformation campaign by insurance carriers and others who saw the "trial lawyers," the strongest force for protecting the public against predatory insurance and business practices, as their enemy.

Why do we in the Alameda-Contra Costa "ACCTLA" still use the name "trial lawyers?" Indeed, many of our members do not often "try" cases, and our membership is diverse: we represent consumers, individual citizens faced with the power of big corporations, big insurance companies, and big government. That is the identifying thread which brings our members together despite practicing in a wide variety of areas: family law, criminal defense, bad faith insurance and insurance fraud, environmental law, civil rights law, appellate law, and commercial litigation, as well as the more traditional personal injury and tort law. Members of the Alameda-Contra Costa Trial Lawyers Association have chosen to keep "trial lawyers" in our title because we focus on developing our members' litigation skills as well as working with the courts to improve our justice system and promote the public welfare. Indeed, our By-laws state that ACCTLA's "purposes . . . . shall be to advance the cause of justice and the quality of legal representation and to promote and protect the interests of its members and the victims of injustice . . ."

Surely we can be proud to be "trial lawyers" who "do the right thing" and work on an individual basis to use our legal system to promote true "fairness" and "justice." Each of us matters when we follow our consciences and do our part toward creating a fairer and more just society. ◆

To gain security by sacrificing America's fundamental freedoms would be to cede victory to the terrorists. And we must not let them win . . . History has taught us that sacrificing liberty weakens our democracy by destroying the freedom that we are fighting to protect.

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

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Duties to Opposing Parties and Counsel

By Jerome Fishkin

An attorney does not generally have any fiduciary duty to an opposing party, unless the attorney gets more out of the transaction than his fee. *Pierce v. Lyman* (1991) 1 Cal. App. 4th 1093 thus held that an attorney for a trustee did not have any fiduciary duty to the beneficiaries, even though the trustee did. The attorney for an insurance company had no duty to the insured when representing the insurance company that allegedly defrauded the insurer. *Doctors' Co. v. Superior Court* (1989) 49 Cal. 3d 39.

There are exceptions to the general rule. An attorney may be civilly liable for intentional or negligent misrepresentation for statements made to third persons. The liability includes representations made by an attorney to opposing counsel for the purpose of influencing opposing counsel's clients. An intentional misrepresentation is a statement that the actor knows is untrue. It is negligent to make a statement without a reasonable basis for believing the statement to be true, when the attorney intends third persons to rely on the statement in their dealings with the client.

In *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal. App. 3d 104, plaintiff alleged he was the prospective lender of substantial moneys to BBC, a partnership; that defendant attorneys gave a member of the partnership a letter stating their professional opinions on certain matters; that they knew this letter was to be used to induce plaintiff to make loans to BBC; and that the plaintiff made loans and thereafter incurred liabilities based on misrepresentations in the letter. The court ruled that the plaintiff had pled a good case for negligent misrepresentation.

In *Cicone v. URS Corp.* (1986) 183 Cal. App.3d 194, attorney Cicone advised his clients to sign a business agreement in reliance on opposing counsel's oral representation that the opposing client, URS Corp., would not enforce a particular provision in the agreement to which Cicone had objected. URS Corp. nevertheless enforced the provision in question against Cicone's clients. Cicone's clients sued Cicone for malpractice, and he cross-complained against URS, its president and their attorney for fraud, negligent misrepresentation, breach of good faith and fair dealing, and equitable indemnity. The court held that Cicone could maintain a fraud action against opposing counsel upon allegations that he and his client URS Corp. had deliberately misrepresented their intentions.

The *Cicone* Court stated, "Although a duty to disclose a material fact normally arises only where there exists a confidential relation between the parties or other special circumstances require disclosure, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud." (Citations omitted).

In *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices* (1989) 207 Cal. App. 3d 1277, Home Budget Loans (HBL), a



An attorney may be civilly liable for intentional or negligent misrepresentation for statements made to third persons.

mortgage broker, required that a Mrs. Austin consult with an attorney as a condition of arranging for a loan. The attorney was to review the loan documentation and provide a written verification to HBL that the attorney had explained the terms of the loan transaction and that Austin understood those terms and wished to proceed with the loan. The attorney wrote a letter to HBL representing that Austin understood the terms and wished to proceed, even though these representations were false. In reliance on the representations, HBL disbursed the proceeds of the loan. HBL was subsequently sued by Austin, who in turn claimed she did not understand the loan terms. HBL was allowed to cross-complain against the law firm for costs and indemnification.

An attorney may be civilly liable for intentional or negligent misrepresentation for statements made to third persons. The liability includes representations made by an attorney to opposing counsel for the purpose of influencing opposing counsel's clients.

Whether reliance is justified is a question of fact for the determination of the trier of fact in negligent misrepresentation cases. *Cicone* points out: "Negligence in reliance upon a misrepresentation is not a defense where the misrepresentation was intentionally made to induce reliance upon it."

There is State Bar exposure also. In *Crooks v. State Bar* (1970) 3 Cal. 3d 346, Crooks' client, a business broker, employed him as an escrow agent in the sale of a bar. In carrying out the escrow, and under his client's direction, Crooks accepted $2,000 in escrow with instructions from an equipment vendor. He spent $1,200 on the transaction in accord with client instructions but contrary to those of the vendor. He was found culpable for using the escrowed money contrary to the escrow instructions given by the equipment vendor, even though his clients' directions differed from those of the third party.

Consistent with *Crooks* is *Wasmann v. Seidenberg* (1988) 202 Cal. App. 3rd 752. The parties negotiated a marital settlement agreement, under which the wife kept the house but was required to pay $70,000 or sign a secured note. The husband's attorney sent the deed to the wife's attorney with directions to secure cash or security before giving the deed to the wife. The wife's attorney, Seidenberg, didn't. The court held that Seidenberg could be civilly liable for breaching his ethical duty as an escrow agent; he should have complied or returned the deed. ◆

—Jerome Fishkin is a sole practitioner in San Francisco, specializing in Attorney Professional Responsibility and Conduct matters. He acts as an expert witness and advises attorneys on ethics and law practice management. He represents attorneys in State Bar disciplinary matters, fee disputes, sanction hearings, federal disciplinary proceedings, and anywhere else where professional challenges arise.

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Are Litigation Costs Loans or Expenses?



By Glen L. Moss

It is axiomatic that lawyers must advance money for various costs on behalf of their clients. These costs include filing fees, fees for experts, depositions, and other ordinary and necessary expenses of litigation. The Internal Revenue Service has persuaded the courts that these advances are "loans" to be repaid when a case is resolved. *Canelo v. CIR*, 53 T.C. 217, 224 (1969), *aff'd* 447 F.2d 484 (9th Cir. 1971).

Since costs are "loans," the lawyer is not entitled to deduct the costs in the year they were incurred. Instead, the lawyer must wait until the case is over and the "loan" is repaid from the settlement, fee award, or other recovery. This treatment of advances for client costs is in contrast to money paid for rent, and other expenses. Such expenses are deducted in the year the money is spent.

This article summarizes the law dealing with treatment of client costs for lawyers who generally work on a contingent fee basis. A subsequent article will summarize the treatment of a recovery from the viewpoint of the client.

The focus of an audit is the fee arrangement between the lawyer and client. The law recognizes two types of arrangements and treats them very differently. The two arrangements for personal injury contingency fee lawyers are a "net fee" and a "gross fee" contract. *Boccardo v. CIR*, 56 F.3d 1016 (9th Cir. 1995).

The "net fee contract" provides that the lawyer recovers costs advanced from the settlement, fee award or other recovery. The agreement also provides that the client will repay these costs from the recovery. These "net fee" contracts provide that the lawyer explicitly agrees to pay all costs. The client explicitly agrees to repay the costs if and only if there is a recovery. The costs advanced by the lawyer under this arrangement are loans, and are not deductible as expenses. *Canelo v. CIR, supra*; *Boccardo v. U.S.*, 12 Cl. Ct. 184 (1987).

After losing in the Court of Claims with its "net fee" contract, the Boccardo firm changed its fee agreement to a "gross fee" contract. Armed with this new "gross fee" contract, the Boccardo firm continued to deduct its costs in the year they were incurred. The IRS again audited the firm. Once again the IRS disallowed the deductions of client costs and argued Boccardo was merely loaning money to its clients.

In this second round of litigation, Boccardo won. The Ninth Circuit agreed the Boccardo firm could deduct the costs advanced in the year the costs were incurred.

The new "gross fee" contract provided:

The Law Firm's fee shall be 33-1/3% of the gross sum recovered in the event that said claim is settled before suit is filed, otherwise 40% of said gross sum. . . .

In the event there is no recovery on said claim the Law Firm shall receive nothing for its services or the costs paid. . . .

Boccardo v. CIR, 56 F.3d at 1017.

This contract differs from the "net fee" contract, which bases the fee on the net recovery, after first deducting the costs. The Ninth Circuit noted the economic consequences of these two contracts differ. For example, assume a recovery of $100.00 and $10.00 in costs advanced before suit was filed. With a "net fee" contract, the attorney receives back the $10.00, together with 33-1/3% of the "net recovery" of $90.00. The lawyer receives $40.00 and the client receives $60.00.

In contrast, under a "gross fee" con-

tract the lawyer would receive $33.33 and the client would receive $66.67. Based on these real economic consequences, the Ninth Circuit concluded that the costs could be deducted in the year they were incurred.

Under a "gross fee" contract . . . the IRS ruled out-of-pocket costs incurred by an attorney that are not charged to the client may be deducted in the year the attorney determines not to bill the client.

The conclusion from these cases is that out-of-pocket costs not billed explicitly to the client will be deductible. In Letter Ruling 9432002, CCH paragraph 8526.4037, the IRS confirms this conclusion. The IRS ruled out-of-pocket costs incurred by an attorney that are not charged to the client may be deducted in the year the attorney determines not to bill the client.

This entire analysis is based on the typical personal injury claim in which money is paid by the defendant in return for a settlement agreement and dismissal of litigation. In fact, the Ninth Circuit even noted that its analysis related to personal injury firms that must pay the costs of its clients. *Boccardo v. CIR, supra*, 56 F.3d at 1018. Thus, it is uncertain whether this same analysis would apply to cases involving statutory attorneys' fees, such as ADA, FEHA, or copyright infringement litigation. In these cases, the Court may award the successful plaintiff his "costs." Thus, the lawyer expects a recovery of the costs advanced in addition to the fee awarded. This is essentially the arrangement with the "net fee" agreement.

To be safe, the lawyer advancing the costs in these cases should treat them as loans. As loans, there is no deduction when the cost is advanced. Likewise, there is no receipt of income when the loan is repaid. Instead, the loan repayment is a return of capital. To facilitate such conservative treatment, the IRS has announced that attorneys can automatically receive permission to change their method of accounting to reflect the advances as loans, and the recovery as loan repayment instead of deductible business expenses. [Ref. Proc. 99-49, I.R.B. 1999-52, 725].

— ACCTLA Board Member Glen L. Moss is a partner in Moss & Murphy in Hayward. He has represented individuals and small businesses in matters involving insurance coverage, tax, and other issues for over 30 years.

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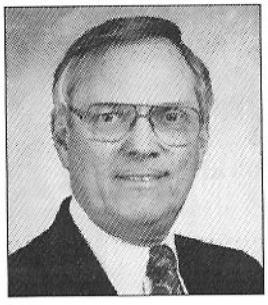
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Employers Remain Strictly Liable for Sexual Harassment Committed By Supervisors

California Court of Appeal Rejects Federal Affirmative Defense in FEHA Sexual Harassment Cases

By Julia Sherwin

In two companion cases in 1998, the United States Supreme Court created an affirmative defense for employers sued for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a). The Supreme Court held that, if the sexual harassment is committed by a supervisor, and no tangible employment action is taken against the employee, the employing entity has an affirmative defense if it proves that (1) it exercised reasonable care to prevent and promptly correct sexual harassment; and (2) the plaintiff employee unreasonably failed to take advantage of the employer's preventative or corrective opportunities. *Burlington Industries v. Ellerth* (1998) 524 U.S. 742, 764-765; *Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 807-808.

Since *Faragher* and *Ellerth* were handed down, employers have sought to insulate themselves from liability for sexual harassment committed by their supervisory agents and employees, by proving that they had written policies in place to prevent sexual harassment and internal procedures for complaining about it, and that victims of sexual harassment unreasonably failed to avail themselves of the internal complaint procedures.

However, many employers' written policies on sexual harassment fail to meet the minimum requirements of California law. Under California Government Code §12950, if an employer does not provide its employees with the California Department of Fair Employment & Housing (DFEH) information sheet, it must, at a minimum, provide its employees with the following written information:

(1) The illegality of sexual harassment;

(2) The definition of sexual harassment under applicable state and federal law;

(3) A description of sexual harassment, utilizing examples;

(4) The internal complaint process of the employer available to the employee;

(5) The legal remedies and complaint process available through the DFEH and the EEOC;

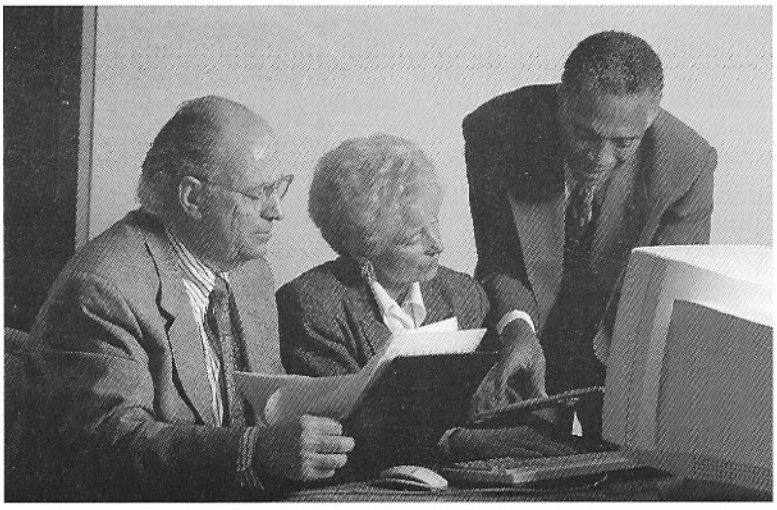
(6) Directions on how to contact the DFEH and the EEOC;

(7) The protection against retaliation provided by §7287.8 of Title 2 of the California Code of Regulations for opposing harassment or for filing a complaint with, or otherwise participating in an investigation, proceeding, or hearing conducted by, the DFEH or the EEOC.

Cal. Gov. Code §12950.

An employer's failure to include these minimum mandatory elements in its sexual harassment policies requires further litigation within a case to which a *Faragher/Ellerth* defense applies, to rebut the employer's claim that it meets prong (1) of the defense.

Additionally, a large percentage of sexual harassment victims are reluctant to report the harassment to their employers. For example, a 1995 report by the U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Workplace: Trends, Progress and Continuing Challenges*,[1] found that only 12% of sexual harassment victims reported the harassment. *Merit Systems Report*, p. 30.



Many employers' written policies on sexual harassment fail to meet the minimum requirements of California law.

Reasons victims gave for their reluctance to report the harassment included, among others, thinking it would make their work situation unpleasant (29%), thinking nothing would be done about the harassment (20%), fearing the situation would not be kept confidential (19%), not wanting to hurt the harasser (17%), fearing that reporting the harassment would adversely affect their career (17%), embarrassment (11%), fearing they would be blamed or would not be believed (17%). *Id.*, p. 35.

Therefore, the Supreme Court's new affirmative defense for employers does not comport with the reality that many victims of sexual harassment are reluctant or afraid to use the employer's internal complaint process. It requires further litigation within each case, to establish that the victim's failure to report the harassment was "reasonable," in an environment in which the majority of sexual harassment victims do not report the harassment.

To avoid the *Faragher/Ellerth* defense, many plaintiff's employment practitioners decided to forego Title VII claims and proceed under California's more protective law, the Fair Employment & Housing Act (FEHA), Cal. Gov. Code §12940 *et seq.*

Then, in April 2001, the Ninth Circuit held that the *Faragher/Ellerth* affirmative defense applies to FEHA claims. In *Kohler v. Inter-Tel Technologies,* 244 F.3d 1167 (9th Cir. 2001), the district court granted summary judgment in favor of an employer on the plaintiff employee's sexual harassment claims under FEHA, finding that no tangible employment action had been taken against the plaintiff, and the employer met both prongs of the *Faragher/Ellerth* affirmative defense. The Ninth Circuit affirmed, predicting that the California Supreme Court would apply the *Faragher/Ellerth* defense to FEHA claims.

On November 29, 2001, the California Court of Appeals rejected *Faragher, Ellerth* and *Kohler*. In *Department of Health Services v. Superior Court Of Sacramento County (McGinnis),* (2001 Cal. App. LEXIS 2675), the Third Appellate District held that employers remain strictly liable for sexual harassment committed by supervisors under FEHA, and no *Faragher/Ellerth* affirmative defense applies.

The *McGinnis* court pointed to differences between FEHA and Title VII. FEHA provides broader and more explicit protection to employees than Title VII. For example, unlike Title VII, FEHA explicitly states that sexual harassment is an unlawful employment practice. FEHA specifically provides: "Harassment of an employee . . . *by an employee other than an agent or supervisor* shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment." Cal. Gov. Code §12940(j)(1) (emphasis added).

Thus, as the *McGinnis* court recognized, a number of California cases have held employers strictly liable for sexual harassment committed by supervisory level employees. *Kelly-Zurian v. Wohl Shoe Co.* (1994) 22 Cal. App. 4th 397, 415; *Doe v. Capital Cities* (1996) 50 Cal. App. 4th 1038, 1048, 1046; *Murillo v. Rite Stuff Foods* (1998) 65 Cal. App. 4th 833, 842; *Carrisales v. Department of Corrections* (1999) 21 Cal. 4th 1132, 1136-1137; *Weeks v. Baker & McKenzie* (1998) 63 Cal. App. 4th 1128, 1146; *Fiol v. Doellstedt* (1996) 50 Cal. App. 4th 1318, 1327, 1328.

The *McGinnis* court accordingly held that the *Faragher/Ellerth* affirmative defense is "inapplicable to state claims," particularly FEHA claims. Although *McGinnis* was decided by the Third Appellate District of the California Court of Appeal, all superior courts in the state are bound to follow that decision. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara* (1962) 57 Cal. 2d 450, 455 ("Decisions of every division of the District Courts of Appeal are binding upon all the . . . courts of this state, and this is so whether or not the superior court is acting as a trial or appellate court. Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction.").

On November 29, 2001 . . . the Third Appellate District held that employers remain strictly liable for sexual harassment committed by supervisors under FEHA, and no Faragher/Ellerth affirmative defense applies.

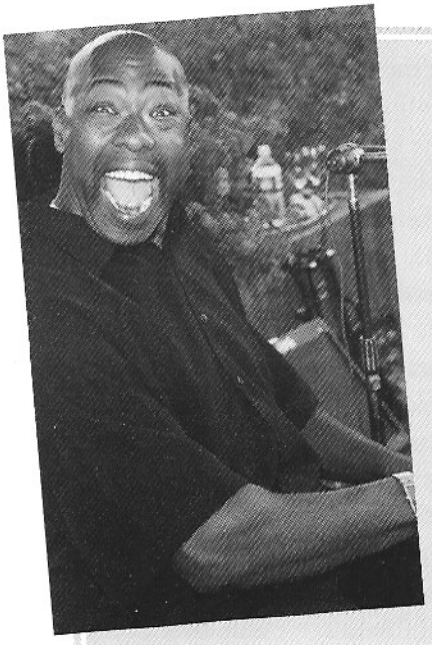
—Julia Sherwin is a partner in the Oakland law firm Haddad & Sherwin. Her practice is concentrated in the areas of civil rights, police misconduct, employment discrimination, and personal injury.

[1] Hereafter, "Merit Systems Report."

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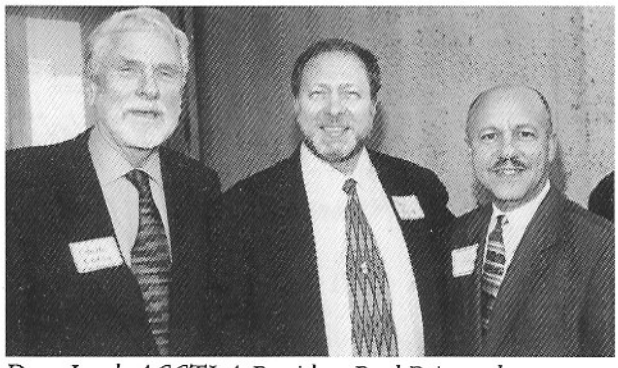




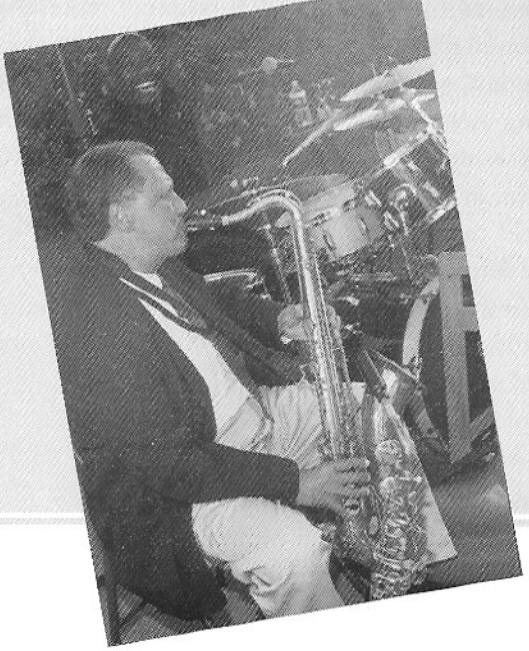
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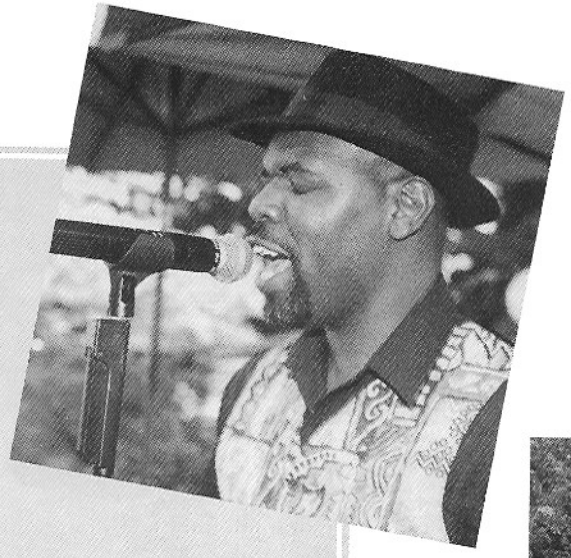
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Terri Dale and California Court of Appeal Justice Ignazio Ruvolo

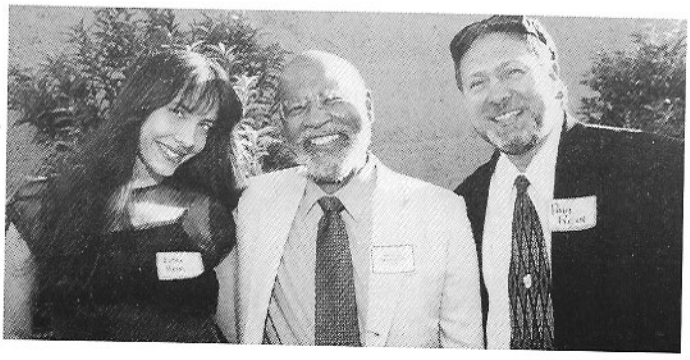


ACCTLA Secretary Kelly Balamuth with Brenda Rein

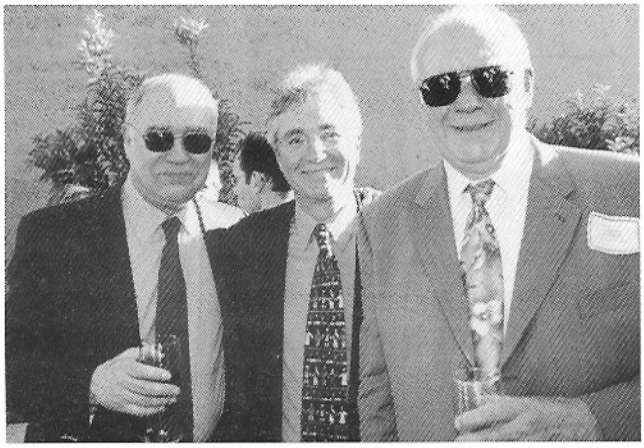




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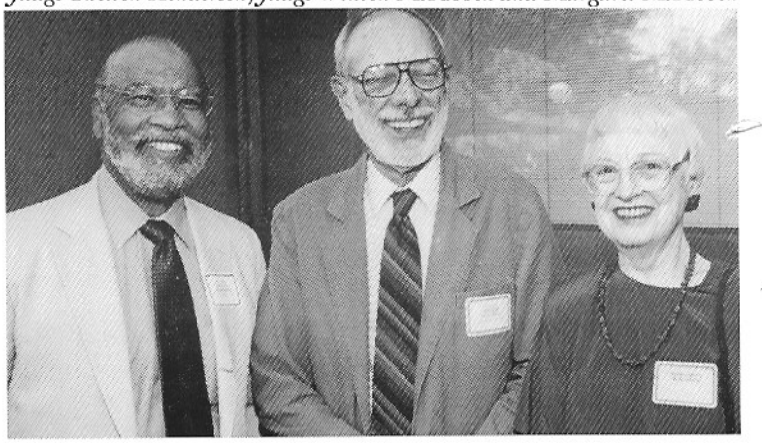


ACCTLA President Paul Rein, with his daughter, Lisa Rein, and U.S. District Judge the Hon. Thelton Henderson



ACCTLA Past Presidents Peter Hinton and David McClain with Alameda County Judge Joe Carson

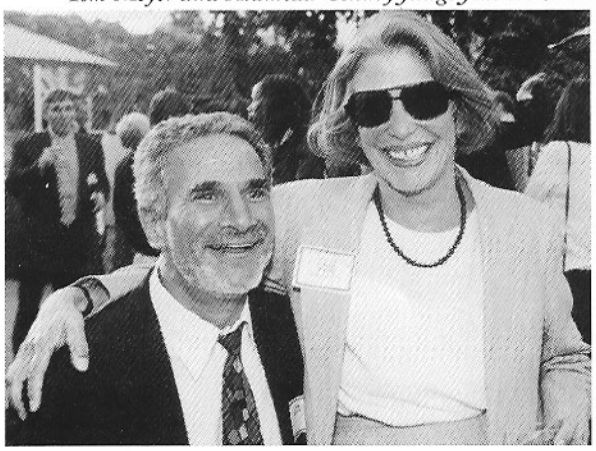
Judge Thelton Henderson, Judge Winton McKibben and Margaret McKibben

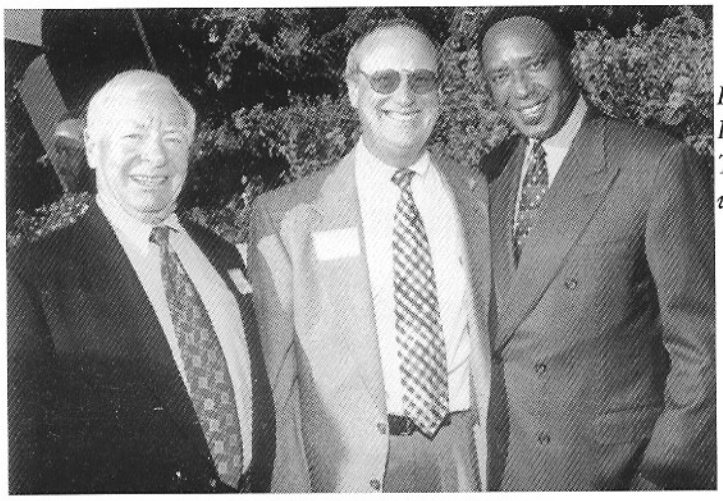


ACCTLA board member Richard Phelps with the Hon. Harry Sheppard, Alameda County Presiding Judge



Tom Meyer and Alameda County Judge Jennie Rhine





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Paul Sandhu, M.I with Helen Cavin an ACCTLA board memb Lyle Cav



Alameda Judge Barbara Miller with Rick and Cindy Simons



Judge Harlan Grossman of Contra Costa County and Judge William McKinstry of Alameda County



ACCTLA Past President David McClain with Judge Barbara Miller, Alameda County Superior Court



Alameda County Judges David Krashna, Gail Bereola and Kenneth Burr



Alameda County Judge of the Year (2000) Bonnie Sabraw with ACCTLA board member Molly Harrington





Alameda County Judge Cecilia Castellanos with John Lohse



Betty Gray, Noreen Quan and Barbara Schock

MEDIATION
MAKING IT WORK FOR YOU

Preparing Plaintiff for the Mediation Session

By Jerry Spolter

The following is a selection of lessons learned as a practicing attorney, seasoned with observations made over the years as a mediator, regarding the dynamic role of the plaintiff-client at the mediation session.

Without a doubt, the plaintiff's behavior at the mediation often is the major variable which will influence the settlement outcome.

We of course all know that your case will probably settle at mediation — nearly all do. But the questions are: 1) Will you receive top dollar? and 2) will you leave any money on the table?

What the plaintiff says (or doesn't say) and what he/she does (i.e., conduct and body language) — whether in joint session or in private caucus — can have an enormous impact upon the end of the day result. (And these intangibles can influence not only the defendant's last dollar in settlement, but may also break loose defendant's payment of mediation fees, flexibility regarding release execution requirements, and timeliness of settlement draft delivery.)

Believe it or not, defendants ***enjoy*** *paying money to people (translation: plaintiff and plaintiff's counsel) who are amiable and whom they respect and find reasonable. Respect is earned through meticulous preparation and professional oral presentation and reasoned response. Amiability is what your parents taught would follow if you are polite and cooperative (not submissive). I can't possibly count the times I have observed insurance claims personnel and defendant business decision-makers make that one last phone call or extend the last dollar to plaintiffs whom they like and respect yet withhold the discretionary range of authority from those plaintiffs who whined, overreached and stretched the truth.*

The plaintiff and his/her attorney are a team, and perceived as "one" by the folks on the other side of the table. Any deficiency of one attaches to the other. The overdramatized limp, the exaggerated wage loss, the feigned neck-rubbing and the disingenuous claim combine with anger, hostility and personal vindictiveness to quickly turn off the folks with the money. On the other hand, a warm handshake coupled with a touch of stoicism and genuine likeability on the part of the plaintiff can be the plaintiff attorney's "Exhibit A" and maximize settlement value at the mediation.

What the plaintiff does is often as important as what the plaintiff says, so instructing your client on the basics of body language and non-verbal behavior is every bit as important as the alert to "shut up when I kick you under the table."

In addition to the following "Iron Rules" that I have noted during more than 1000 mediations through the American Arbitration Association, I am including a "Client Checklist for Mediation" which my partner Brian McDonald prepared for our firm's clients in anticipation of their participation in mediations.

SPOLTER'S OBSERVED IRON RULES OF SUCCESSFUL NEGOTIATORS

Mind set: Prepare each case with the certainty that it will go to trial.

Pre mediation/negotiation:

• *Prepared parties do better than unprepared parties.* Give the other side everything they need to hang their hat on — witnesses, experts, x-rays, etc., and be totally familiar with the facts, medicine and damages of your case.

• *Principled negotiation.* If you've got a good case, don't hide it!

• *Know before whom you speak.* Research counsel, defendant and the mediator.

• *Prepare, prepare, prepare.* Negotiate from a position of strength. Posturing doesn't sell — neither to the neutral nor the other side. Put together a dynamite mediation brief with supporting documents and highlighting.

• Just as with defendants who deny liability when reasonably clear, plaintiffs who overreach lose credibility and often never recover.

Attitude:

• *Nice people do better than not nice people.* This goes for counsel as well as parties.

• *Listen.* Let the other side speak first — you just might learn something. . . *and* your respectful and active listening will predispose your adversary to be more receptive when you speak. "Listen, and you will increase your chance of being heard."

• *Separate the people from the problem.* People who get angry and personalize the case, "the other side's witnesses are 'liars' and their counsel are unethical," can only antagonize/polarize their opponents and minimize chances for a successful negotiated result.

• *Avoid "The Gypsy Curse."* Treating a case as if *you know you are right* tends to reduce communications and impede an open mind.

• *Practice intellectual honesty.* Agree with your opponent when he or she is right — "you've got a point." Concede weaknesses in your case.

• *Keep animosity down, reserves up.*

• *Never adopt a bottom line.* Pick three numbers for yourself and anticipate those of the other side. 1) What you ask for; 2) What you want; and 3) What you *have to* have.

During mediation:

• You, not the mediator, control the process *and* control the mediation — but you have to let us know.

• Get people to talk about their wants and needs; don't let them talk about their positions (the last thing you talk about are numbers) — don't rush the process; don't worry about the cost of mediation. This is your best opportunity to resolve the case.

• Be quiet, sweet and patient — let the process (and the mediator) do the work for you.

• Don't allow your mediator to be evaluative — mediators don't know what you and your opponent aren't telling them.

• The time to negotiate is *at the mediation — don't be too coy!*

• Don't let the mediator quit.

• Persuade the mediator to force the other side to deal on a principled basis — avoid "reactive devaluation."

• Always treat the other side with respect and don't lose your sense of humor.

• Use humor. Be able to laugh at yourself.

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CLIENT CHECKLIST FOR MEDIATION

(provided by Brian McDonald)

With sufficient preparation, your mediation can be successful the great majority of the time. Mediation takes on several forms to deal with different types of cases.

Continued on next page

Reprinted with permission of the Consumer Attorneys of California and Jerry Spolter. Mr. Spolter is a noted San Francisco mediator and trial attorney, and partner in Spolter, McDonald & Mannion. Brian McDonald is a partner with Spolter, McDonald & Mannion. He is a Certified Family Law Specialist and has successfully mediated more than 300 disputes through the American Arbitration Association.

This checklist is directed to the family law mediation in which lawyers are present. I believe it is applicable to other mediations as well.

Once you decide it is the right time to submit your matter to mediation (generally the earlier the better!), your advocacy concerns typically turn to assembling information in a brief, scheduling, anticipating, speculating, planning, etc. When you go to trial, you will have had numerous client meetings reviewing testimony and anticipated cross examination, and, when appropriate, videotaping and playback.

If the goal is to reach a final, binding, life-long resolution of your client's case on the day of the mediation, you need to have your client as fully and completely prepared as if for trial.

Your first step in preparing your client should be your evaluation of how active your client should be in the mediation. This will depend on such things as your client's skills as a communicator, the need for the client to communicate his or her story before serious negotiations can begin, and how effective the client will be with the other party and counsel. An articulate client who actively participates in these aspects of the process can be extremely effective.[1]

The following outline checklist can be copied and sent to your client several days before the scheduled mediation. Thereafter, your review of these points together with your client will make the client more comfortable, and allow the client to understand the pace and process of the mediation. *Your client particularly needs to understand the differences in the roles of the neutral mediator, counsel, and the parties, as outlined in the following checklist.* With preparation, your client will be of more assistance to you and will enhance the chances of resolution.

CLIENT CHECKLIST FOR MEDIATION

The mediator

Who is the mediator? So that you may become familiar with the mediator's background, a copy of the mediator's resume is attached detailing his/her training and experience. I would not have agreed to using this mediator if I did not believe his/her reputation to be excellent.

Who else will be present, and why

We need to discuss additional people we need or want at your mediation. Critical expert witness? Current spouse? Significant other? If we bring an expert witness to the mediation, both the expert — and you — must understand that the expert is there not to give one-sided opinions as a hired gun (as would be expected at trial), but to answer specific questions as essential to increasing settlement prospects.

Logistics — location and duration

- *Date:*
- *Where:*
- *Time:*
- *How long will it last?* It is impossible to estimate. While it may take less than a day, be prepared to work as long as it takes to finally resolve the problems. Do not make any evening plans.

OUTLINE OF STANDARD MEDIATION

1. The initial meeting — mediator, parties, attorneys.

- The mediator will introduce everyone and go over the ground rules.
- The lawyers will make an opening statement to outline their important points.
- I will address certain important issues in your case at this time. The mediator may ask *you* to speak. We need to be as precise and correct as possible.
- Ask me if there are areas that we do *not* want to discuss at the joint initial meeting so that you and I can be in agreement on them. We may want to hold certain information until later in the mediation.

2. The first separate "caucus" (private meeting). We will meet with the mediator and the other side is no longer present.

3. Subsequent private meetings. The mediator may go back and forth several times.

4. Lawyer caucuses. It may be that the mediator asks the lawyers to meet separately. Do not fear as nothing will be decided without your full and complete understanding and specific approval.

5. Later joint sessions are possible.

6. Memorandum of Understanding or Settlement Agreement. When we reach an agreement, a written agreement will be prepared, approved, and signed by everyone, including you and me. In order for the Agreement to be enforceable pursuant to Code of Civil Procedure §664.6, you must sign it personally. I cannot sign it on your behalf.

WHAT IS THE ROLE OF THE MEDIATOR?

- The mediator is a neutral and will remain neutral. The mediator is therefore impartial, has no decision-making authority and will maintain confidences.

• The mediator is not a judge or a jury and will not make a decision.

• Our job is to convince the other side, not the mediator.

• The mediator is present to facilitate discussions and to assist the parties to reach a lasting resolution.

• Do not be afraid! The mediation is non-binding. Only if you agree and sign an agreement, will it be binding. If no agreement is reached, we will continue with the lawsuit and go to trial. There is no penalty if we do not reach an agreement at mediation. We will merely have to pay our share of the mediator's cost for reviewing each side's position papers and conducting the mediation itself.

• The mediation is confidential under California Evidence Code §1119. We will sign a written agreement (called a stipulation) at the beginning of the mediation which will ensure confidentiality. This means that nothing you say during the mediation, nor any concessions you may make toward settlement, can be used against you later if the case does not settle at the mediation.

• The mediator can never be a witness later in the case.

• The mediator may play devil's advocate in the separate private meetings with you and me, and will help both sides identify the strengths and weaknesses of their case. The other side will be present in the beginning meeting, but not at the later private meetings.

• Please keep in mind throughout the mediation that the mediator will not be making any decisions; you will be the only one empowered to make any decisions.

MY ROLE AS YOUR LAWYER AT THE MEDIATION

• My role is different at this mediation than it would be at trial. Due to the nature of the mediation, my role will be much more conciliatory at the mediation.

• Mediation is not the place for "in your face" posturing, threats and ultimatums; this behavior is counterproductive. The goal of all participants is to create a cooperative atmosphere that is conducive to resolving the dispute.

• I will present an opening statement that is aimed at getting a favorable resolution for you at the mediation.

• I will not object to evidence.

• I may not put on *all* of your case. I may withhold matters at the beginning.

• I will be present at all caucuses and will go over the strengths and weaknesses of our case with the mediator. I will talk openly and cordially to the mediator in the private caucus. If I *acknowledge a weakness in our case, it is for a good reason (to get the case resolved!).*

• I want you to participate, and I want you to observe. If I do not want you to answer a question from the mediator, I will interrupt. Please do not be offended if this happens. Remember, I am there to help you get the best resolution possible.

• I want you to listen closely to what is said in the caucus(es). After the mediator leaves and goes to speak privately with the other side and we are alone, we may re-evaluate our position based on the information we learn from the mediator.

• If you and I have not discussed it, I request that you not disclose any new information at the mediation — either in joint session or private caucus with the mediator — without first disclosing it privately to me.

• My approach will be very different if we do not reach a resolution at mediation and decide to go to trial.

• I may express understanding or empathy with the other side at the mediation to achieve a positive resolution. This does not mean that I agree with the other side, and does not mean I am selling out your case.

• I may avoid certain issues at the mediation if I feel they will hurt the chances of resolution and adversely affect our position.

• At all times I want to be respectful of the mediator and the mediation process. I will also be respectful of you and your goals.

• I understand the dispute is yours. I will ask you to make the final decisions subject to my advice and counsel.

YOUR ROLE AT THE MEDIATION

• Concentrate on listening to the points raised by the other side at the joint session and the mediator at the joint and private sessions as they will pinpoint what they perceive to be the strengths and weaknesses of your case.

• Mediation is your opportunity to evaluate and reevaluate your case in light of the information provided to you by me and the other side.

• I want you to participate in the negotiations and discussions when we are in private caucus. However, try not to lose your temper, or you will lose your point and our focus.

Continued on next page

• Since you may be asked some questions by the mediator in the initial joint session, we will discuss beforehand the remarks you should make and the feelings you want to express. Remember this must be done in a constructive manner. I want you to talk about your case in an accurate and believable manner that is consistent with the documents and records. Do not whine or complain. When you come across genuine, you will be most helpful to your case.

• Unless we decide otherwise — and remember to alert me in private as to any new information of which I am not aware — at the separate caucuses and because of the confidentiality of the process, you may speak freely and openly to the mediator. If you ever have a doubt about what to say, always tell the truth.

• Expect the mediator to play devil's advocate in the private caucus. This will hopefully give us a neutral, objective review and analysis of your case. Since the mediator will be repeating what the other side is telling him/her to a great extent, this is what we can expect to hear at trial. Do not conclude that this means that the mediator is agreeing with the other side.

• If an agreement is reached, the mediator will draft the agreement. I will review it with you and, if it is acceptable, I will ask you to sign it.

• Remember we are trying to walk away with a lasting agreement, not win an argument. Be patient with yourself, this is a new experience for you. Enter the process with an open mind and allow the mediation a chance to work.

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CONCLUSION

In the words of Zero Mostel, ". . . if you've got it (a great plaintiff), flaunt it!" Too many attorneys are reluctant to showcase the plaintiff in the joint session, and only in the private session does the mediator realize that the plaintiff is sincere, articulate, forthright and likeable. Unfortunately, too often by this time the spontaneity of this presentation has been squandered on the mediator, and lost on the other side's decisionmakers. Instead of the defense learning at the joint session what a wonderful plaintiff you have, they will assume by your client's silence in the joint session that there is something to hide or that the plaintiff is being stifled by plaintiff's counsel because he/she will make a bad witness. Without a doubt the assessment of the plaintiff's "witness potential" is uppermost on defendant's agenda and their conclusion will have a major impact on the defendant's case evaluation.

". . . If you've got it (a great plaintiff), flaunt it!"

Certainly there are many factors that contribute to the success or failure of a mediation, e.g., content and timing of mediation brief, selection of the neutral, etc. But don't overlook preparing your client. The impression conveyed by the plaintiff's dress, attitude and presentation will certainly impact the outcome — positive or negative. It's the attorney's job to make sure it is positive. ◆

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[1]Certain information in this article has also been incorporated and adapted from the article "Ready, Set, Mediate" by William A. Quinby, published by California Law Business, July 29, 1996.

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If you are interested in submitting an article to THE VERDICT, send it to Julia Sherwin, Haddad & Sherwin, 1111 Broadway, Suite 2300, Oakland, CA 94607. Articles must be submitted on disk.

MEMBER news



News listed alphabetically by firm name; ACCTLA members' names in bold.

Gwilliam, Ivary, Chiosso, Cavalli & Brewer — *Eric Ivary Begins New Career as Mediator*

After 30 years as a trial attorney, ACCTLA Past President **Eric Ivary** is launching a new career as a mediator/arbitrator and neutral case evaluator. The cases best suited to his background are medical malpractice, termination/harassment, employment, public entity liability and insurance bad faith. While Mr. Ivary is capable of doing almost any type of accident case, his interest lies in the more challenging cases.

Mr. Ivary says: "Because I have spent so much of my last 30 years in courtrooms, I believe that I am uniquely qualified to provide the kind of insight that can bring litigants to resolution without the necessity of trial. Give me a call if you think I can help you resolve any of your cases."

Haddad & Sherwin — $1.2 Million Verdict in Police Misconduct Case

In July 2001, ten U.S. District Court jurors in Sacramento unanimously awarded the mother of Doron Lifton, a paranoid schizophrenic man who was killed by Fairfield and Vacaville police officers, $1,208,417.00 in wrongful death damages. Mr. Lifton walked away from an automobile accident in a daze. He was pursued by five police officers who were using profanity and shouting commands at him, which both the officers and eyewitnesses testified Mr. Lifton seemed unable to understand. Less than 3 minutes after the police first contacted Mr. Lifton, and 14 seconds after they had contained him in a large field, the police fired 14 shots at Mr. Lifton, killing him. The police alleged that they had to shoot Mr. Lifton because he hit, or was about to hit, a police officer with a 4' long metal pole. The jury found that the police negligently created the situation resulting in Mr. Lifton's death, by violating their own policies and training in how to deal with emotionally disturbed people. The jury found the decedent 30% responsible for his own death, resulting in a net verdict of about $846,000.00. The Plaintiff is represented by **Michael J. Haddad** and **Julia Sherwin**.

Rebecca Lifton v. City of Vacaville, et al., U.S. Dist. Court Case No. S-98-1678 DFL DAD, Sacramento

Hinton & Alfert — $5.5 Million Verdict in Wrongful Death Case Involving Failure to Administer Driving Test

Plaintiff's decedent, 35-year-old Rick Cromwell, was a Lodi police officer who stopped Jasper Laraway, an 85-year-old driver, after Laraway made a left turn against a red light from a through lane, into the path of an oncoming vehicle clearly in his view. Officer Cromwell issued a priority reexamination, requiring Mr. Laraway to undergo a DMV driving test. The DMV required Mr. Laraway to provide a medical report from his physician and have an eye exam. The DMV failed to require Mr. Laraway to take a driving test. Instead, it gave Mr. Laraway an oral telephone interview and told Mr. Laraway he could keep his driver's license, before the interviewer received the accident report that gave rise to the reexamination referral. Days later, Mr. Laraway pulled out from a mall exit directly into the path of the same Officer Cromwell, who was chasing a speeding vehicle. The resulting collision killed the officer. The Court found that the DMV had a mandatory duty, as a matter of law, to administer a driving test to Mr. Laraway, pursuant to Vehicle Code § 12818(a). Mr. Laraway settled the case for his insurance policy limits of $50,000. In May 2001, the jury unanimously found the DMV 90% negligent and Mr. Laraway 10% negligent, and awarded Officer Cromwell's surviving wife and two daughters $2 million in economic damages and $3.5 million in noneconomic damages. The Plaintiffs are represented by ACCTLA Past President **Peter J. Hinton**, as well as Joseph J. Appel of Appel & Appel.

Cynthia Cromwell v. State of California, San Joaquin County Superior Court Case No. CV008749, Stockton.

Continued on next page

ACCTLA MENTORING PROGRAM

ACCTLA has designed and is offering a "Mentoring Program" to improve the quality of litigation in our courts. Attorneys who call will be referred to a mentor attorney for 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 are all ACCTLA members, with varied degrees of experience in varied areas of the law.

Whether your concerns are motions in limine, jury selection, problems that arise during trial, issues relating to proposed instructions, or questions involving any of the earlier stages of litigation, please call **ACCTLA Executive Director Patricia Parson at (510) 538-8286.**

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A-V Rated by Martindale-Hubbell

Hinton & Alfert — $8 Million Settlement Involving Explosion at Tosco's Avon Refinery

Plaintiff Neal Jones, an iron worker, was welding a walkway at Tosco's Avon Refinery in Martinez, California. During efforts to extinguish a small fire below where Mr. Jones was working, the "water" from the fire hose caught fire and turned the hose into a flame thrower, engulfing Mr. Jones in a huge fire ball. While trying to escape, Mr. Jones fell and sustained comminuted fractures to his wrist, soft tissue injuries to his shoulder, and second degree burns to his face. He was later diagnosed with Post Traumatic Stress Disorder. His injuries ended his career as an iron worker. His wife brought a claim for loss of consortium as well.

Plaintiffs established that butane and propane had backed up from a hydrocarbon line into the firewater line. These backups had occurred at least two times before the incident which injured Mr. Jones, and Tosco management had refused to install two safety measures to prevent the backups. It would only agree to replace one of five leaking valves, at a cost of $450. None of the leaking valves were tested or inspected. Tosco's refusal to install recommended safety measures, or even to inspect the faulty valves, resulted in the backup of butane and propane into the firehose that caused Mr. Jones' injuries. After the second day of trial in August 2001, the case settled for $8,000,000.00. The Plaintiffs are represented by **Peter J. Hinton** and Joseph Appel of Appel & Appel.

Jones v. Tosco Corporation, Contra Costa County Superior Court. ◆

a perspective from a
Personal Life Coach

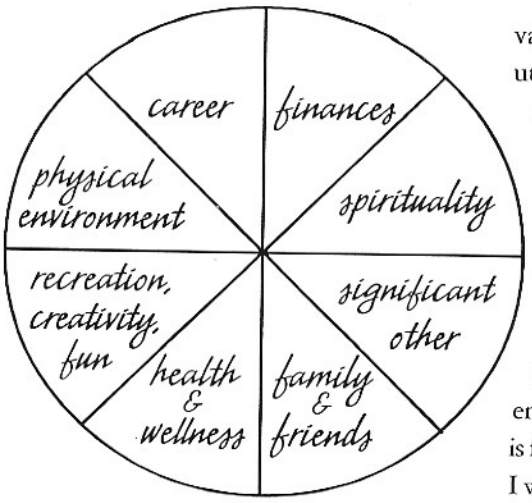
By Mark Susnow

For most of our lives we have been motivated by a certain sense of justice that has usually pitted us against the powers that be. Early in our careers we felt excited and exhilarated about what we were doing, because we were in some way living our dream.

At some point in our careers, the enthusiasm waned when we realized that what we were doing was also a business. Following our dream became more elusive, our vision became more clouded, and we started to compromise our attitudes and beliefs.

Our dreams and idealism of a better world soon became buried and forgotten. Our lives became more complex as our responsibilities increased, with concerns about providing for our families and, for some of us, our addictions.

We lost that spring in our step and that smile on our face, and started to wonder if it was all worth it. For most of us it has been worth it, but along the way there have been a lot of casualties. What good is it to get that big verdict or big settlement if we can't get along with our family or friends? And what good is that big verdict or big settlement if we are too sick to enjoy it?



After thirty years as a plaintiff's personal injury attorney who occasionally represented criminal defendants, I retired from the practice of law. Throughout my life, I have always been looking for a way to keep that spring in my step and that smile on my face. Most of my life I have explored different disciplines and philosophies, such as yoga and meditation, that have given me a different way of looking at life's challenges.

As a life coach, I help you to clarify what is really important in your life. When we become clear as to our real values and priorities and live life from that perspective, fulfillment in our business and personal life is more possible.

The process by which we identify your values and priorities only takes a few minutes. In fact, all you need is a pen and paper. Draw a circle and divide it into eight segments. When you are done, you will have what looks like a wheel with eight spokes. Each segment represents a different aspect of your life. The different aspects are finances, career, significant other, family and friends, health and wellness, physical environment, spirituality, and the last one is fun, recreation and creativity. Now what I want you to do is to evaluate each aspect of your life by designating a number between 1-10 that corresponds to your level of satisfaction. Your highest level of satisfaction will be a 10. Once you complete the wheel, it usually becomes clear as to what areas of your life you want to explore. Together, we devise a strategy so that you feel that you are closer to that next level in your life.

To help you have a vision of what you are capable of and that next level, I ask you to remember 4-5 peak experiences, moments in time in which you felt on top of the world.

Throughout the coaching relationship, which is totally confidential, the focus is on putting back into your life that spring in your step and that smile on your face, and along the way we can rediscover what motivated us to begin this journey in the first place. This does not happen overnight, and we check in on the phone usually weekly. And sometimes we have communications via e-mail. The goal is to empower you so that you are living closer to that dream. It is an exciting and very rewarding process.

Take the next step and explore the potential that coaching can add to your life.

Perhaps together we can rekindle that passion that makes life really worth living and exciting to all of those around us. ◆

— Mark Susnow is a personal life coach who can be reached at 415/453-5016. Confidential sessions can be scheduled on the phone or in person. E-mail:domark7@home.com.

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Professor of Law and Former Dean of Santa Clara University School of Law,
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Reception at 6:00 p.m. ◆ Dinner at 7:00 p.m. / Trial Judge of the Year Awards

Judges, commissioners, referees and their guest are complimentary.

For more information or to make reservations, call Pat Parson at 510/538-8286.

ACCTLA ALAMEDA CONTRA COSTA TRIAL LAWYERS' ASSOCIATION

2002 Dues Notice

Enclosed is my check payable to ACCTLA for my 2002 membership dues. I apply for the following type of membership:

___ **Law Student**: $15 / ___ **Legal Assistant**: $30 / ___ **New Admittee**: $35 / ___ **2nd or 3rd year in practice**: $50

___ **4th Year and Over**: $95 / ___ **Expert**: $150 / ___ **Sustaining Membership**: $400 (includes free admission to Judges' Night, the February *What's New in Tort and Trial Practice* seminar, and other benefits)

I am a: ___ **Regular member** (practice predominantly involves representing plaintiffs in tort matters, criminal defense, family law or general civil litigation).

___ **Associate member** (non-voting member whose practice primarily involves insurance defense or criminal prosecution).

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Please return this form with appropriate payment to:
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