MORRISON | FOERSTER

Request for Information for Legal Services:

Citizens Redistricting Commission Litigation Counsel

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About Morrison & Foerster

We are Morrison & Foerster—a global firm of exceptional credentials in many areas. Our clients include some of the largest financial institutions, *Fortune* 100 companies, investment banks, and technology and life science companies. Our clients count on us for innovative and business-minded solutions. Our commitment to serving client needs has resulted in enduring relationships and a record of high achievement. For the last eight years, we've been included on *The American Lawyer*'s A-List. *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers share a commitment to achieving results for our clients, while preserving the differences that make us stronger. This is MoFo.

Personnel

In the case of a law firm or other entity, identify the lead lawyer and other lawyers, if any, who will be assigned to the work and the anticipated percentage of time for each. Also please attach a resume for each lawyer.

Morrison & Foerster proposes the following team to handle this work:

James J. Brosnahan, Senior Partner

James J. Brosnahan is named among the top 30 trial lawyers in the United States, according to the *Legal 500 US*. A lion of the trial bar, Mr. Brosnahan is one of the most respected and recognized trial lawyers in the United States. Mr. Brosnahan has 50 years of expertise in both civil and criminal trial and appellate work. He has tried more than 140 cases to verdict, including many high-profile cases involving antitrust and competition law, complex commercial litigation, IP and patent litigation, employment law, product liability, and white-collar criminal defense. Mr. Brosnahan has argued both civil and criminal appeals in state and federal court, including two cases in the United States Supreme Court: *United States v. Caceres*, 440 U.S. 741 (1979), and *Eu v. San Francisco County Democratic Central Committee*, 109 S. Ct. 1013 (1989).

George C. Harris, Partner

George Harris's practice emphasizes appellate proceedings, international arbitration, and white-collar criminal defense. He has represented clients in a wide range of complex civil and criminal litigation matters, including many high profile cases, at the trial and appellate levels in state and federal court, and in commercial arbitrations, both domestically and internationally. Mr. Harris served as director of appellate advocacy at the University of Utah College of Law and at the University of the Pacific McGeorge School of Law, and has also taught criminal procedure, civil procedure, professional responsibility, and trial practice.

Benjamin J. Fox, Partner

Ben Fox is involved in a broad-ranging trial and appellate practice focusing on complex intellectual property issues and class action jurisprudence, among other areas of practice. He regularly is involved in high-stakes or "bet-the-company" cases and has substantial experience litigating issues arising under the United States and California Constitutions. In his appellate practice, Mr. Fox has participated in more than 60 appeals in the state and federal courts, including matters before the Ninth Circuit and Federal Circuit Court of Appeals, the California Supreme Court, and the California Court of Appeal (all districts). He is also a go-to lawyer for petitions seeking extraordinary relief during pretrial and trial.

Complete attorney biographies can be found in Appendix A.

Attorney/Firm General Description

If the Statement of Qualifications is submitted by a law firm or other entity, provide a general description of the firm.

Morrison & Foerster is an international firm with more than 1,000 lawyers across 15 offices in the U.S., Europe, and Asia. Founded in San Francisco in 1883, we remain dedicated to providing our clients, which include some of the largest financial institutions, Fortune 100 companies, and technology and life science companies, with legendary service. Clients rely on us for innovative and business-minded solutions. Our attorneys share high standards, a commitment to excellence, and a passion for helping their clients succeed. This commitment to serving client needs has resulted in enduring relationships and a record of high achievement. We are also recognized for our long-standing commitment to pro bono work and diversity.

Great client service requires insight, expertise, responsiveness, proactivity, and integrity. We strive to understand each client's business, industry, and goals. We assemble the optimal team of resources from across the firm to tackle our clients' legal challenges. When we achieve a successful IPO, trial victory, or satisfying resolution of a pro bono matter, we build lasting relationships with clients by delivering results. The firm's outstanding client work has achieved broad recognition. Our practitioners are recognized as leaders by their peers and clients in all the key reference guides, including *Chambers*, *Legal 500*, *PLC Which lawyer?*, *Best Lawyers*, *International Financial Law Review*, *Benchmark Litigation*, and others. Our corporate practices are frequently cited and ranked among the "Best Practices" in their respective markets by publications such as the *American Lawyer Corporate Scorecard*, *Mergerstat*, *Bloomberg*, *Thomson Financial League Tables*, and others. *American Lawyer*'s bi-annual "Litigation Department of the Year" survey twice cited our practice as one of the top litigation practices in the country, especially in Intellectual Property (2004; 2008), and our intellectual property and life sciences practices were ranked Band 1 by *Chambers Global* 2010.

Intellectual agility is the hallmark of Morrison & Foerster. We apply it to every matter - from the complex to the routine - to ensure the best outcomes for clients. We attract and retain the best attorneys by practicing at the highest levels of the legal profession in a culture that emphasizes collegiality, respect for everyone, professional and business ethics, and duty to the profession and our communities. Our commitment to diversity and genuine collegiality creates a work environment ideally suited to collaboration and effective teamwork. Progressive workplace policies embodying the principle of mutual respect translate into loyalty and lower turnover rates, winning results, and more stable, enduring client relationships. Others have recognized the strength of our culture: we have been on *American Lawyer*'s "A-List" every year since 2004.

Experience

a. Describe at least 10 cases argued before the California Supreme Court, including, in particular, cases involving constitutional or public policy issues.

Morrison & Foerster attorneys have appeared before this court more than 70 times.

Representative matters include:

- ***Brosnahan v. Eu*, 641 P. 2nd 200 (1982)**
  Argued a number of issues as to the limits of authority for the passage of public initiatives in California. The arguments related to Proposition 8, "The Victims' Bill of Rights." There were a number of constitutional and public policy issues involving the enforcement of criminal statutes in California. At the time, it was an extremely controversial and much debated cluster of legal issues, all of them contained in Proposition 8. (James Brosnahan.)
- ***Mandel v. Myers*, 29 Cal. 3d 531 (1981)**
  Successfully argued this case before the California Supreme Court, on behalf of the plaintiff, Shelley Mandel. The case stems from the plaintiff's repeated efforts to enforce a portion of a court judgment awarding her $25,000 in attorney's fees, entered against the various defendant state agencies and officers in April 1973, eight years prior to the trial. Shortly after the entry of the 1973 judgment, defendants filed their initial appeal, challenging, *inter alia*, both the propriety of any attorney fee award and the amount of the award granted in this case. In a decision rendered in January 1976, the Court of Appeal fully considered defendants' contentions and affirmed the attorney fee award in its entirety. (*Mandel v. Hodges* (1976) 54 Cal. App. 3d 596 [127 Cal.Rptr. 244, 90 A.L.R.3d 728] (Mandel I).) The court subsequently denied defendants' petition for hearing and, as a consequence, the trial court judgment, including the attorney fee award, became final. (James Brosnahan.)
- **James J. Brosnahan, *Oral Argument in the Supreme Court*,** The Journal of the Litigation Section, State Bar of California, The Supreme Court of California, California Litigation, Volume 5, Number 2, Winter 1992
- ***American Federation of Labor v. Eu*, 36 Cal.3d 687 (1984)**
  Holding that balanced budget initiative mandating that state legislature apply to Congress for a constitutional convention violated federal constitution and did not fall within reserved initiative power set out in state constitution. (George Harris.)
- ***Miller v. Bank of America*, 46 Cal.4th 630 (2009)**
  Victory for Bank of America in class action alleging that routine overdraft fees for customers with overdrawn accounts violated the Consumer Legal Remedies Act if the customer received public benefits. (Arturo Gonzalez.)
- ***Simmons v. Ghaderi*, 44 Cal.4th 570 (2008)**
  Obtained decision reaffirming the broad protections afforded by the mediation privilege under California law and obtaining reversal of judgment entered against our client, a medical doctor, that was based on conduct during the mediation. (Shirley Hufstedler argued; with Ben Fox.)
- ***Environmental Protection Information Center v. California Dep't of Forestry & Fire Protection*, 44 Cal.4th 459 (2008)**
  Represented Pacific Lumber in case of first impression addressing Sustained Yield Plan for logging on

property owned by client. Judgment reversed in part and remanded for further proceedings. (Ned Washburn, argued; with Chris Carr, Will Sloan.)

- ***Olson v. Automobile Club of Southern California*, 42 Cal.4th 1142 (2008)**
  Represented Automobile Club in appeal addressing the scope of recoverable costs available to prevailing parties under Code of Civil Procedure section 1021.5. The court ruled in our favor, concluding that statutory "costs" do not include expert fees. (Howard Soloway argued; with Chuck Patterson, John Sobieski.)
- ***Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223 (2006)**
  Victory in landmark appeal resolving the application to pending cases of Proposition 64's changes to California's unfair competition statute, Business & Professions Code section 17200. (David McDowell argued; with Linda E. Shostak.)
- ***Dowhal v. SmithKline Beecham Consumer Healthcare*, 32 Cal.4th 9 (2004)**
  Victory for pharmaceutical companies and pharmacies in action addressing federal preemption for state-specific labeling of products that conflicted with requirements imposed by the U.S. Food, Drug and Cosmetics Act. (James P. Bennett, Michèle B. Corash, and Brooks M. Beard.)
- ***Associated Builders & Contractors, Inc. v. S.F. Airport Commission*, 21 Cal.4th 352 (1999)**
  Represented San Francisco Airport Commission in appeal addressing bidding process to expand and renovate the airport. (Harold McElhinny.)
- ***Thompson v. Department of Corrections*, 25 Cal.4th 117 (2001)**
  Appeal asserting condemned prisoner's right pursuant to penal code section and U.S. Constitution to be accompanied by his spiritual advisor until prisoner was led to execution chamber. (Jordan Eth.)
- ***Daily Journal Corp. v. Superior Court*, 20 Cal.4th 1117 (1999)**
  Represented real-party-in-interest Merrill Lynch in action challenging release of grand jury materials to the public. The Supreme Court concluded that the lower court did not have authority to release the materials. (Dan Marmalefsky.)
- ***Butt v. State of California*, 4 Cal. 4th 668 (1992)**

  Lead counsel on behalf of a class of parents from the Richmond Unified School District. The school board had voted to close its public schools six weeks early because the district had run out of funds. Obtained an injunction preventing the schools from closing. Argued the case before the California Supreme Court, which held that a premature closure of the schools would violate a child's right to a public education. (Arturo Gonzalez.)

b. Describe at least 10 cases in which a judgment was reached in a federal court, including, in particular, cases involving constitutional or public policy issues.

c. For each matter listed above, provide the following:

(i) The names of the parties represented before the California Supreme Court and/or in Federal Court.

(ii) The principal legal issues presented in each matter handled by the attorney, law firm or entity.

Mr. Brosnahan has argued approximately 80 or 90 cases at all levels of the federal courts. By way of example, we set out the following matters:

- ***Eu v. San Francisco County Democratic Central Committee*, 109 S. Ct. 1013 (1989)**
  Represented various political parties first in the district court in San Francisco and then in the 9th Circuit and then in the U.S. Supreme Court, where we obtained an 8-0 victory striking down California legislative limitations on activities by political parties in the state. It involved the rights of political parties to be free from legislative control and the case is cited from time to time for that position. (James Brosnahan.)

- ***Plata v. Schwarzenegger,* United States Court of Appeals, Ninth Circuit Case D.C. No. 3:01-cv-01351-TEH**
  In a complete victory the firm represented Marciano Plata, et al., in a class action case in the U.S. Court of Appeals for the Ninth Circuit. The case was brought by California prisoners to challenge deficiencies in prison medical care that allegedly violated the Eighth Amendment and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. The parties consented to the entry of stipulated orders providing steps to remedy the deficiencies. When the state was unable to comply with the consent orders, the court imposed a receivership on the California Department of Corrections and Rehabilitation ("CDCR") to administer and improve prisoner healthcare. The court affirmed the judge's order denying termination of the receivership. The 9th Circuit held that the District Court had jurisdiction under the PLRA to appoint a receiver, and it held that nothing in the record contradicts the District Court's findings that the receivership was the least intrusive remedy. It also held that nothing in the record supports a finding that circumstances have changed such that the receivership is no longer the least intrusive remedy. The 9th Circuit dismissed the appeal for lack of jurisdiction as to the construction and construction planning aspects of the motion to terminate. The court held that the judge's order in that regard was not final, because the construction plan was in flux. (James J. Brosnahan and George Harris.)

- ***United States v. HARRISON ULRICH JACK, et al.*, Eastern District of California USDC Case No. 2:07-CR-0266 FCD**
  Successful defense of Laotian American charged with the attempted overthrow of the Laotian government. Very controversial criminal matter in Federal Court in Sacramento that involved the U.S. State Department, members of the Hmong Committee from California and Minnesota and many public policy issues including the right to bear arms, the scope of the conspiracy laws and the history of the Hmong people's fight in support of the U.S. forces during the Viet Nam war. Our client, Youa True Vang, had all charges dismissed before trial. (James J. Brosnahan and George Harris.)

- ***United States ex rel. Richard Wilson & Chris Maranto v. Maxxam Inc., et al.*, USDC Northern District of California, Oakland Division, Case No. C-06-7497CW (JCS)**
  Successful defense of a Federal False Claims Act Qui Tam in Oakland California. The case involved the cutting of timber on the north coast of California. It was a jury trial involving many public policy issues, congressional actions and environmental technicalities.
- ***United States of America v. John Phillip Walker Lindh*, Eastern District of Virginia, Alexandria Division, USDC Case No. CR No. 02-37-A**
  Defense of John Walker Lindh in the Federal District Court in the Eastern District of Virginia. Mr. Lindh was found in Afghanistan and charged with very serious matters. Obtained dismissal of all terrorism-related charges in a leading case regarding the United States legal war on terrorism. It was a highly complex criminal case with worldwide publicity.
- ***Xilinx, Inc. v. Altera Corporation*, Northern District of California, San Jose Division, USDC Case No. 93-cv-20409**
  Successful defense of the Altera corporation in a patent case involving reprogrammable computer chips in the Federal District Court San Jose. The opposition demanded $400 million and we received a judgment in favor of Altera.
- ***In the matter of Kevin Barry Artt v. Immigration and Naturalization Service,* Northern District of California, No. CR 92-0151 MISC-CAL**
  Successful defense against an extradition by the British government to extradite Mr. Artt to Northern Ireland in the Federal District Court in San Francisco and twice in the 9th Circuit. The case involved public issues of justice in Northern Ireland, the courts in Northern Ireland, and the proper role of the American judiciary in such a case.
- ***Coval v. Alpha Therapeutic Co., et al.*, Washington Western District, Case No. C97-cv-00035C**
  Successful result in a federal patent case in Seattle for the Alpha Therapeutic Corporation, which produces immune globulin products.
- ***In RE DeDomenico; DeDomenico v. Franchise Tax Board*, CA USBC Northern District, Case No. 93-30896 CHAP11**
  Successfully defended a $5 million civil tax trial against the State of California in Federal Bankruptcy Court in Reno, NV. The case involved the taxing power of the State of California over a resident of the State of Nevada.
- ***United States v. Caspar W. Weinberger*, Criminal No. 92-0235-TFH**
  Associate member of Office of Independent Counsel: Iran-Contra. Lead prosecutor in *U.S. v. Caspar Weinberger*. Mr. Weinberger was pardoned by the president of the United States on December 24, 1992.
- ***Taylor v. Lockheed Missiles & Space***
  Acting as lead counsel in a wrongful termination case for the defendants an international aeronautic and space equipment corporation, in the United States District Court, Northern District of California. The verdict was in favor of the defense and the jury found that the company was not guilty of racial employment discrimination.

- ***Snellman v. Ricoh,* 862 F. 2d 283, Court of Appeals Federal Circuit (1988)**
  Acted as lead counsel for a leading manufacturer of automated office equipment in a complex patent infringement jury trial in the Northern District of California. The case was particularly unusual in that it involved extensive use of special procedures, jury instructions, and evidentiary restrictions to avoid prejudice against a foreign intellectual property litigant in U.S. Court.

d. Describe representative legal work performed on behalf of public agencies, boards or commissions in the past 10 years.

Morrison & Foerster brings to bear for public agencies the same vigor, skills, and resources that we do for our private sector clients, with sensitivity to the unique responsibilities of governmental entities. We know that public-sector clients answer to constituencies with different expectations and standards than those demanded of commercial concerns. Public agencies are, of course, bound by different rules of conduct and disclosure than those governing private businesses. We are, therefore, keenly aware that any and all actions by the Commission, including the payment of legal fees to outside counsel, are likely to be closely scrutinized by constituents and possibly the news media. Accordingly, we know how to provide client services with the goal of reflecting positively on our public-sector clients.

Representative matters include:

- ***Oakland Raiders v. Oakland-Alameda County Coliseum***
  In 2003, Morrison & Foerster successfully defended the Oakland-Alameda County Coliseum, Inc., and Ed DeSilva, a former director of the Coliseum board of directors, in a lawsuit brought by the Oakland Raiders for breach of promise. The Oakland Raiders wanted $1 billion from the Oakland-Alameda County Coliseum for negligently luring the team back to the Bay Area by falsely representing that all personal seat licenses ("PSLs"), suites, and club seats were sold out for the 1995 season. Lead partner, James Brosnahan, after a five-month jury trial, earned defense verdicts for the Coliseum on fraud and bad-faith claims. Furthermore, the jury concluded that Ed DeSilva did not mislead the Raiders and returned a defense verdict on his behalf. For several years, Mr. Brosnahan reported to both the Oakland City Council and the Alameda County Board of Supervisors. The Raiders ultimately got nothing. (James Brosnahan and George Harris.)
- ***United States v. Caspar W. Weinberger*, Criminal No. 92-0235-TFH**
  In the Weinberger prosecution described above, dealt regularly with thirteen intelligence agencies, the Department of Defense, 10 U.S. senators, members of the House of Representatives, and various federal agencies.
- Over the years, at one time or another, have represented a number of mayors of San Francisco, including Willie Brown, Dianne Feinstein, and George Moscone. Also represented the Redevelopment Agency of San Francisco in a trial allowing the Moscone Center to be built. In that case, dealt with many City agencies and representatives.
- At the present time, represent and regularly report to Marin General Hospital and the Marin Healthcare District in a $120 million lawsuit against Sutter Healthcare.

- ***Williams v. State of California*, S.F. Super. Ct. 2000-04.**
  The firm was counsel for class of plaintiff-schoolchildren in a constitutional challenge to substandard conditions at K - 12 public schools, including lack of textbooks, severe overcrowding, insufficient numbers of desks, lack of functioning bathrooms, untrained teachers, and facilities that failed to meet basic health-and-safety needs. Case concluded with a landmark settlement providing state-level oversight and $1 billion commitment to improve school conditions.

- ***Gilda Garcia, et al. v. Toby Douglas, et al.* (9th Cir. pending.)**
  The firm was counsel for National Disability Rights Network as amicus curiae in challenge to drastic funding cuts for Adult Day Health Care Services imposed by ABx4 5.

- ***County of Alameda and Alameda County Sheriff's Office v. Superior Court of California, County of Alameda***
  The firm represented the Superior Court of California, County of Alameda (the "Alameda Court"), in a breach of contract case filed by the County of Alameda and the Alameda County Sheriff's Office. During fiscal year 2002-03, plaintiffs decided, without first checking with the Alameda Court, to give the sheriff's deputies a retroactive 14.8% raise. The complaint alleged that the Alameda Court breached express and implied contracts governing the provision of court security services by the Sheriff. The complaint also alleged causes of action for estoppel, breach of the implied covenant of good faith and fair dealing, and declaratory relief. The trial court (San Francisco Superior Court) previously sustained a demurrer to the County's cause of action for a writ of mandate without leave to amend, and granted summary judgment in favor of the Alameda Court on the County's remaining claims. In 2009, the Court of Appeal held that the trial court did not abuse its discretion when it dismissed the mandamus claim where the County had an adequate legal remedy, and that summary judgment was properly granted. This case protects taxpayers and the courts by requiring public agencies to secure court approval prior to providing raises to courtroom deputies and other public employees. It also confirms that such agreements must be written, and cannot be oral, in order to protect taxpayers. (Arturo González.)

- **San Joaquin County Superior Court**
  In 2005, the firm obtained a significant jury trial victory on behalf of the San Joaquin County Superior Court and one of its clerks. The Court had been sued for negligence by the wife of a man who suffered permanent brain injuries stemming from an automobile accident. Plaintiffs claimed that if the Court and its clerk had performed their duties, the driver who caused the accident would have had his license suspended. At trial, plaintiffs requested $16 million in damages. After a two week trial, a Sacramento County Superior Court jury returned a defense verdict. (Arturo González.)

- ***Metropolitan Water District of Southern California v. U.S. Fish & Wildlife***
  In the Consolidated Smelt Cases, Morrison & Foerster's client, the Metropolitan Water District of Southern California ("Metropolitan"), challenged the validity of the science behind U.S. Fish & Wildlife's ("FWS") regulatory action under the federal Endangered Species Act restricting water exports from the Bay-Delta to southern California, purportedly to protect a small fish known as the Delta smelt. Metropolitan is the largest supplier of drinking water in the nation, serving 20 million southern Californians. In 2010 the U.S. District Court for the Eastern District of California issued a summary judgment order, ruling that FWS's restrictions on water exports were not based on the "best available science," as required by the Endangered Species Act,

and were otherwise "arbitrary, capricious and unlawful" under the Administrative Procedure Act. In its conclusion, the court wrote that "the public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs." (Chris Carr, Arturo González.)

e. Describe any experience with Section 2 and Section 5 of the Voting Rights Act, including:

(i) The outcome of prior redistricting representations.

(ii) A summary of how this experience prepares the attorney and/or law firm to perform the services sought by this RFI.

Morrison & Foerster has substantial experience in voting rights matters throughout the country.

James Brosnahan has served on the board of directors of the Equal Justice Society since 2006. The Equal Justice Society is a national legal organization focused on restoring Constitutional safeguards against discrimination. The organization combines legal and policy, Grand Alliance, and communication strategies to reverse those laws and policies that erode the protections guaranteed by the 14th Amendment of the Constitution.

For a number of years, Mr. Brosnahan has lectured on the U.S. Supreme Court in various venues. Those lectures included analysis and presentation of voting rights cases, including the following:

- *Citizens United v. Federal Election Com'n*, 130 S.Ct. 876 (2010)
- *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504 (2009)
- *Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231 (2009)
- *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 128 S.Ct. 1610 (2008)
- *Purcell v. Gonzalez*, 549 U.S. 1, 127 S.Ct. 5 (2006)
- *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 126 S.Ct. 2594 (2006)
- *Lance v. Dennis*, 546 U.S. 459, 126 S.Ct. 1198 (2006)
- *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1769 (2004)
- *Georgia v. Ashcroft*, 539 U.S. 461, 123 S.Ct. 2498 (2003)

Morrison & Foerster has worked with Lawyers' Committee for Civil Rights Under Law (LCCR) for several years. LCCR is a nonpartisan, nonprofit organization with the principal mission of securing, through the rule of law, equal justice under the law. http://www.lawyerscommittee.org. Mr. Brosnahan served on the board of directors for a number of years.

Voting rights matters handled with LCCR include:

- **Voter Registration/Freedom of Information Act Project**
  A team of Morrison & Foerster attorneys based in San Francisco and certain other offices assisted the Lawyers' Committee for Civil Rights Under Law and the Brennan Center for Justice to obtain and review voter registration and purge data from a number of states. In particular, they obtained state voter registration and

voter purge data and prepared a substantive analysis of whether the state is in compliance with its own registration and purge laws. (2008)

- **Virginia Election Protection**
  The firm assisted LCCR with the creation of a short voter registration guide for registering voters in Virginia. LCCR was working with local organizations to ensure that their materials were compliant with state election law and included current information. (2008)
- **Voting Rights Hotline**
  The firm joined with LCCR to staff and run a voter hotline that answered questions from individuals about voting and reported any voting irregularities. (2008)
- **Election Protection Project**
  Attorneys in San Francisco and certain other offices researched the legality of online deceptive voting practices, including a review of related federal and state laws. The results of the research project were presented to the public in spring of 2008. (2008)
- **Updating State Voter Manuals**
  The firm drafted a legal manual on voting rights for several states in preparation for the November 2004 election. As part of the Know Your Rights/Election Protection Program, a nonpartisan nationwide effort to remove barriers to the electoral process so that minority citizens who sought to participate in the 2004 election are able to vote, voting rights manuals were prepared for all 50 states. These manuals were used on Election Day, as well as in advance with meetings with election officials, and were distributed to poll monitors, advocacy groups, attorneys, and election officials. The firm prepared the manual for the State of Oregon. (2004)

Additional representative voting rights matters include:

- ***Harold Metts v. Lincoln Almond***
  The firm represented pro bono a group of African-American residents of Providence, Rhode Island, in a voting rights discrimination case. In May 2002, these residents sued various Rhode Island state officials and legislators under the federal Voting Rights Act because the Rhode Island Legislature created new district lines for state senate districts that prevented African-Americans from electing their candidate of choice. After the district court originally dismissed this case in September 2002, Morrison & Foerster attorneys were able to twice persuade the First Circuit Court of Appeals to reverse the dismissal: once by the panel, and once by the en banc court. (2004)
- ***Johnson v. Hamrick***
  The firm represented a group of African-American citizens of Gainesville, Georgia, in a civil rights challenge to Gainesville's method of electing city council members. After remand, the United States District Court for the Northern District of Georgia entered judgment for the defendants, which the plaintiffs appealed. The Court of Appeals held that: (1) the district court did not clearly err in declining to afford special weight to the two endogenous elections involving African-American candidates; (2) the district court did not improperly evaluate split-preference elections; and (3) the district court's conclusion that plaintiffs could not show white bloc voting, as required to satisfy the third *Gingles* prong, was not clearly erroneous. (2002)

f. Describe the attorney or firm's experience with electronic discovery.

Electronic Discovery Capabilities. In recent years our clients have had to deal with staggeringly complex litigation management problems due to the explosive growth of electronic discovery. In response to these developments, we have undertaken extensive efforts to streamline the e-discovery process, to manage document collection and review problems efficiently, and - equally important - to do so in a way that protects clients from the threat of sanctions that some courts have imposed for failure to comply with requests for electronic discovery.

Part of the reason we are able to deliver flexible, cost-effective document review services is because we have already done it in so many different matters for so many different clients. In light of the extensive attention given to e-discovery in the last several years, we have continued to expend substantial resources to ensure that our lawyers and staff have unrivaled expertise in addressing the e-discovery challenges central to success in today's complex litigation environment.

Through our firmwide E-Discovery Task Force, we have developed detailed best practices for managing e-discovery legal and technological issues, and, through our Litigation Technology Group, we have assembled a team of technical experts available to support our cases anywhere in the world. Those experts - and many of our lawyers as well - have a thorough knowledge of and familiarity with the offerings of the e-discovery industry, ranging from the simplest of document management tools to the most complex commercially available artificial intelligence-driven systems.

We have developed numerous relationships with high-quality, experienced third-party vendors who work with us to provide efficient and economical ways to accommodate document collections that can involve terabytes of data. We have negotiated master services agreements with several industry leaders that provide discounted pricing and substantial risk management protection to the firm and its clients. These master services agreements include specifically negotiated provisions regarding security, confidentiality, and liability.

A number of our lawyers are looked upon as leaders in the field, authoring articles and teaching seminars on e-discovery. Because of the depth of our practice, our experience with e-discovery extends beyond the civil litigation arena to include dealings with federal and local governments in criminal and civil investigations.

In addition to handling e-discovery in litigation and investigations, we provide a number of related services to our clients, including:

- Designing, testing, and implementing policies and procedures to preserve, retrieve, review, and produce electronically stored information;
- Evaluating disparate proposals from vendors, negotiating with vendors, and managing their services to provide the best work product for the best price;
- Establishing extranet sites to provide access to key documents to the client's in-house legal staff. These can include pleadings, court orders, briefs, correspondence, agreements, deposition transcripts, key document collections, the case calendar, and other case management tools;
- Training client in-house lawyers and staff on e-discovery issues, pitfalls, rules, and best practices; and
- Establishing e-discovery contingency plans to enable our clients to be in the best position to effectively manage e-discovery demands and the unfortunately related business distractions.

Conflicts of Interest

a. Compliance with Government Code Section 8252

With respect to the attorneys who are expected to work in connection with this representation, please disclose any financial, business, professional, lobbying or other relationship that presents a potential conflict as described in California Government Code Section 8252. In addition: (1) identify any lobbying work the firm has performed in California during the past 10 years; and (2) identify any political contributions, including contributions made by a firm political action committee, to candidates as described in California Government Code Section 8252, during the past ten years.

If the law firm or entity that is awarded the contract contemplates additional staff assignments after the award of the contract, the personnel must be approved individually by the commission. Prior to the date of additional assignment, the law firm or entity must submit a resume and certification of non-conflict, identified in 4 below, for preliminary review and approval by the Commission's legal staff and/or Executive Director and current Chairperson and Vice-Chairperson. The individual may be cleared to work on behalf of the Commission until final approval. Final approval must be obtained by a "super majority" vote of the full Commission at the next Commission business meeting.

Describe any work relating to Redistricting or other work for current or prior clients during the past 10, even if such work has concluded, that could present the appearance of a conflict in connection with the representation of the Commission in connection with the defense of the Maps. For example, if the attorney or law firm either presently, or has in the past represented a political party or an interest group funded by or working on behalf of a political party, such work must be disclosed and the implications of the current or prior representation for this assignment must be described.

Morrison & Foerster, and the attorneys expected to work in connection with this representation, are in compliance with Government Code Section 8252. The firm is not aware of any conflicts.

Morrison & Foerster has not performed lobbying work in California during the past ten years.

Morrison & Foerster has not made any political contributions, including contributions made by a firm political action committee, during the past ten years.

b. Other Conflicts

In addition to compliance with Government Code Section 8252, the attorney or law firm must comply with the rules as set for forth in the California Rules of Professional Conduct. Please identity any matter in which the attorney or firm is presently adverse to the State of California. In addition, identify any work previously provided by the attorney or law firm on behalf of any potential adverse party or witness, to the extent known.

Morrison & Foerster is not aware of any conflicts.

Fee Arrangements

The Commission anticipants the services contemplated by this RFI will be provided on an hourly basis. For each professional who will be assigned to these matters, please set forth his or her hourly rate. The Commission will also consider alternative fee arrangements, and the cost of retaining the firm will be among the factors considered in awarding this contract. The initial amount authorized pursuant to this agreement shall not exceed $500,000, and shall be in place until August 15, 2012, however, the contract can be amended to extend time and add funds as necessary in order to continue the contract through the completion of all litigation.

We recognize that one of the objectives of your RFI process is to enable the Commission to more effectively control legal costs, and increase the predictability of legal expenses. With that in mind, Morrison & Foerster is committed to finding creative ways to help the Commission manage its legal fees. We are open to discussing alternative fee arrangements. Our goal is to develop and sustain strong, trust-based relationships with our clients. We believe partnering on alternatives to pure hourly billing can and should be a cornerstone of such relationships, which are constructed on a foundation of value, not hours.

Billing Rates

For the work being proposed in this RFI through August 15, 2012, Morrison & Foerster is discounting James Brosnahan's hourly rate by 14%. Below are the billing rates of the proposed team.

Attorney	Hourly Rate
James J. Brosnahan, Senior Partner	$900. (discounted from $1,050.)
George C. Harris, Partner	$820.
Benjamin J. Fox, Partner	$710.

References for Mr. Brosnahan

Javad Ashjae
President
Javad Navigation Systems, Inc.

Patricia Dunn

Greg Pusey
Livingston Capital

J. Clark Kelso, Receiver
California Prison Healthcare Receivership Inc

Ephraim Margolin
Law Offices of Ephraim Margolin

Contact details available upon request.

Attorney Biographies

- James J. Brosnahan
- George C. Harris
- Benjamin J. Fox

Attorney Biographies

James J. Brosnahan

Senior Partner
San Francisco
(415) 268-7189
JBrosnahan@mofo.com

James J. Brosnahan is named among the top 30 trial lawyers in the United States, according to the *Legal 500 US*. A lion of the trial bar, Mr. Brosnahan is one of the most respected and recognized trial lawyers in the United States. Mr. Brosnahan has 50 years of expertise in both civil and criminal trial work. He has tried more than 140 cases to verdict, including many high-profile cases involving antitrust and competition law, complex commercial litigation, IP and patent litigation, employment law, product liability, and white-collar criminal defense.

Mr. Brosnahan has received numerous awards and recognition throughout his distinguished career. In 1996, he was inducted into the State Bar of California's "Trial Lawyers Hall of Fame" and was awarded the Samuel E. Gates Award by the American College of Trial Lawyers in 2000 for his "significant, exceptional lasting contribution to the improvement of the litigation process." In 2001, Mr. Brosnahan was named "Trial Lawyer of the Year" by the American Board of Trial Advocates, and the following year, the San Francisco Lawyers' Club honored Mr. Brosnahan with its "Legend of the Law" award. In 2006, he was named one of America's most influential trial lawyers by the *National Law Journal*. In 2007, he received the American Inns of Court Lewis F. Powell Award for Professionalism and Ethics to recognize a "lifetime devoted to the highest standards of ethical practice, competence, and professionalism." Mr. Brosnahan has been recommended as a leading lawyer by *Chambers USA* every year since its launch. He is also ranked by *PLC Which lawyer?* 2009, *The Best Lawyers in America* 2011 (for the past 26 years), *The Legal 500* 2010, *Benchmark Litigation* 2010, *The Lawdragon* Top 3000 2010, Euromoney's *Expert Guides*, and the top 10 in *Northern California Super Lawyer*s since its launch in 2004.

Mr. Brosnahan is active in professional activities and is a past president of the Bar Association of San Francisco, whose Volunteer Lawyers Service Program he founded. He was also a National Institute of Trial Advocacy (NITA) Teacher of the Year.

Mr. Brosnahan has served as special counsel to the California Legislature's Joint Subcommittee on Crude Oil Pricing, the lawyer representative to the Ninth Circuit Judicial Conference, and Chairman of the Delegation. Mr. Brosnahan also serves as Master Advocate on the faculty and member of the Board of Trustees of the National Institute for Trial Advocacy.

Mr. Brosnahan authored the "Trial Handbook for California Lawyers."

Selected Press Coverage

- "Lions of the Trial Bar," *ABA Journal*, March 2009.
- "Brosnahan Still Fighting After 50 Years: Veteran Trial Lawyer and MoFo senior partner has lost only 11 of 142 trials, is as busy as ever," *Daily Journal*, 6/25/09.
- "Top 10 Northern California Super Lawyers 2009," *Super Lawyers*, 2009.

- "The Right to Counsel in Civil Cases: If Not Now, When?" *The Recorder*, 4/18/2008.
- "The Man Who Hates Injustice," *Super Lawyers*, 2006.
- "The One That Got Away," *California Lawyer*, January 1993. "End Game," originally published in the January 1993 issue of California Lawyer. Reprinted with permission. © 2010 Daily Journal Corporation, San Francisco, CA.
- "Who Gets the High-Profile cases?" *California Lawyer*, 2007.
- "Labor Woes Going Global," *The Recorder*, 2005.

Recipient of:

- AJC Learned Hand Award
- American Inns of Court Lewis F. Powell Award for Professionalism and Ethics
- Champion of Justice award from the Civil Justice Program at the Loyola Law School
- University of Virginia Justice William Brennan Award
- Lawyers Club of San Francisco inaugural "Legends of the Law" award
- California ABOTA "Trial Lawyer of the Year"
- American College of Trial Lawyers, Samuel E. Gates Award
- The Wiley E. Manuel Foundation's Community Service Award
- National Institute for Trial Advocacy Faculty Award (1991)
- National Jewish Fund, Tree of Life Award (1991)
- National Institute for Trial Advocate Award (1990)
- William O. Douglas Award (1988)
- Father Moriarty Central American Refugee Recognition (1987)
- American Bar Association Pro Bono Publico Award
- Mexican American Legal Defense and Education Legal Services Award (1985)

Education

- Boston College (BSBA, 1956)
- Harvard Law School (LL.B., 1959)

Rankings

- Listed by the *National Law Journal* in its 2006 "Top 100 Most Influential Lawyers in America."
- Listed in *The Best Lawyers in America* (2011) as a leader in the fields of Bet-the-Company Litigation, Commercial Litigation, Personal Injury, and White-Collar Defense law. Notably, Mr. Brosnahan has been listed in *Best Lawyers in America* for the last 26 years.
- United States Lawyer Rankings 2006 List of the Nation's Top 10 Criminal Defense Lawyers.
- *The Lawdragon 500* Leading Litigators in America (2006).
- Named a leading lawyer in the *2009 PLC Which Lawyer? Yearbook* for Dispute Resolution.

- Listed by *Chambers USA*, and named one of the "Best Lawyers in America" in Commercial, White-Collar/Government Investigations, and Trial Lawyers since its launch.
- *The San Francisco Magazine* has listed him yearly in the Top 10 of Northern California's SuperLawyers since its launch in 2004.
- Listed in the top 10 of the top 100 most influential lawyers in California by the *Los Angeles Daily Journal* and the *San Francisco Daily Journal* since September of 1998.
- The third member inducted into the State Bar of California's "Trial Lawyers Hall of Fame."
- One of only 14 attorneys featured in the book *America's Top Trial Lawyers: Who They Are & Why They Win*, by Dr. Donald E. Vinson.
- In April 1994 the *National Law Journal* listed Mr. Brosnahan in "Profiles in Power: The 100 Most Influential Lawyers."
- Since 1987, he has been annually named in both the Criminal Defense and Business Litigation sections of *The Best Lawyers in America*.
- In 1990, he was named by the *National Law Journal* as one of the 10 best trial lawyers in the country and in 1980 by the *San Francisco Examiner* as one of the five best attorneys in San Francisco.

Matters

- **Defense of Technology Company.** Successful defense of a former chairman of the board and technology company charged with securities civil fraud allegations after a six week jury trial in Los Angeles Superior Court. Achieved a complete defense verdict with jury out three hours.
- **Criminal Defense.** The successful defense of Laotian American charged with the attempted overthrow of the Laotian government.
- **Patricia Dunn.** Dismissal of all charges against Patricia Dunn, former chair of the board of Hewlett Packard Corporation.
- **Defense of Altera Corporation.** Successful defense of the Altera Corporation in a patent case involving reprogrammable computer chips. (Federal District Court, San Jose.)
- **Defense of 3M in Breast Implant Litigation.** Successfully defended a highly respected innovative product manufacturer in the first breast implant product liability jury trial in California. The plaintiff's science was excluded on motion and a non suit was granted at the end of plaintiff's opening statement.
- **Representation of El Paso in California Energy Litigation.** Lead counsel and chief negotiator in defense of the El Paso Corporation in all of its California litigation during the energy crisis.
- **Iran-Contra Prosecution.** Associate member of Office of Independent Counsel: Iran-Contra. Lead prosecutor in *U.S. v. Caspar Weinberger*.
- **Oakland Raiders v. Oakland-Alameda County Coliseum.** Successfully defended the City of Oakland and County of Alameda in the Oakland Raiders litigation and lead defense counsel for the Oakland Alameda County Coliseum and an individual defendant in a five-month jury trial.
- **Defense of John Walker Lindh** (USDC, Eastern District of Virginia). Obtained dismissal of all terrorism-related charges against John Walker Lindh in a leading case regarding the United States legal war on terrorism.

- **Edward Pressman, civil and criminal litigation.** Obtained successful result in civil and criminal cases for producers of the movie, *The Crow*.
- ***USA v. Steven Elias Psinakis.*** Successful defense of Steve Psinakis on charges of interstate transportation of explosive materials.

Speaking Engagements

- "Clash of the Titans - Mock Closing Argument," San Francisco, California, 12/11/2009
- "Effective Jury Selection," Oakland, California, 10/28/2009
- "Bay Area Association of Muslim Lawyers First Annual Dinner," San Francisco, California, 10/11/2009
- "Representing Unpopular Clients and the Personal Lessons That Can Come From It," San Francisco, California, 10/11/2009
- "Ethics Panel: Justice and National Security," San Diego, California, 9/11/2009
- "Great Trials and Great Trial Lawyers," DePaul University, Chicago, Illinois, 7/9/2009
- "U.S. Supreme Court Cases of the Last Year," Fresno, California, 6/19/2009
- "New Trends in Direct and Cross-Examination," Philadelphia, Pennsylvania, 3/27/2009
- "Old Lions Still Roar: Veteran Trial Lawyers Share Their Strategies," 3/18/2009
- "Terrorism and its Legal Implications," UC Hastings College of the Law, San Francisco, California, 2/18/2009

George C. Harris

Partner
San Francisco
(415) 268-7328
GHarris@mofo.com

George Harris's practice emphasizes appellate proceedings, international arbitration, and white-collar criminal defense. He has represented clients in a wide range of complex civil and criminal litigation matters, including many high-profile cases, at the trial and appellate levels in state and federal court and in commercial arbitrations, both domestically and internationally.

Mr. Harris's civil practice has included litigation in areas of professional responsibility, breach of fiduciary duty, fraud, trade secrets, intellectual property, insurance coverage and bad faith, product liability, environmental cleanup, and commercial and construction contracts. His criminal practice has included cases involving charges of insider trading, bid rigging, perjury, false government claims, tax evasion, money laundering, commodities fraud, and interstate transportation of explosives.

Mr. Harris served as associate counsel at the Office of Independent Counsel, Lawrence A. Walsh, where he was appointed for the prosecution of former Secretary of Defense Caspar Weinberger. For several years, Mr. Harris served as professor and director of the Center for Advocacy and Dispute Resolution and Director of the Appellate and International Advocacy program at the University of Pacific McGeorge School of Law. He has also taught courses in trial advocacy, appellate advocacy, civil procedure, and legal ethics at the University of Utah Law School.

He currently serves as Early Neutral Evaluator at the United States District Court for the Northern District of California. He has also held positions on the Utah State Bar Ethics Advisory Opinion Committee, the Ethics Advisory Committee to Utah Judicial Council, the Advisory Council to ABA Special Committee on Evaluation of Rules of Professional Conduct, the University of Utah Conflicts of Interest Advisory Committee, and the Multidisciplinary Practice Committee of the Utah State Bar.

During law school, Mr. Harris was editor of the *Yale Law Journal*, and received the Michael Egger Prize for best law journal note or comment on a current social problem. As an undergraduate, he received National Merit and National Honor Society Scholarships.

Education

Yale University (A.B., 1974)

Brown University (M.A.T., 1977)

Yale Law School (J.D., 1982)

Benjamin J. Fox

Partner
555 West Fifth Street
Los Angeles, CA 90013-1024
(213) 892-5207
BFox@mofo.com

Ben Fox is a partner in the firm's Litigation Department. He is involved in a broad-ranging trial and appellate practice focusing on complex intellectual property issues and class action jurisprudence, among other areas of practice.

Mr. Fox's industry experience includes representing clients in the electronic entertainment, software and animation, sports venture, and gaming industries, as well as in litigation affecting the medical devices and health care industries, financial services, transportation, education, engineering, and commercial real estate investments. He is regularly involved in high-stakes or "bet-the-company" cases for defendants and plaintiffs in the areas of copyright, trademark, patent, and trade secrets litigation, and other commercial disputes.

In his appellate practice, Mr. Fox has participated in more than 60 appeals in the state and federal courts, including matters before the Ninth Circuit and Federal Circuit Court of Appeals, the California Supreme Court, and the California Court of Appeal (all districts). He is also a go-to lawyer for petitions seeking extraordinary relief during pretrial and trial. Mr. Fox serves on the State Appellate Courts Judicial Evaluation Committee for the Los Angeles County Bar Association and is a member of the LACBA's Appellate Courts Committee.

He maintains an active pro bono practice and chairs the firm's Los Angeles pro bono program. He was counsel for the plaintiff-schoolchildren in *Williams v. California*, a statewide challenge to substandard conditions in public schools.

Mr. Fox joined Morrison & Foerster in 1997 following graduation from the UCLA School of Law, where he was elected to the Order of the Coif.

Matters

- **Beeman v. Argus Health Systems** (9th Cir. pending.)

  Representing Argus Health in the Ninth Circuit in a challenge under the California Constitution's Liberty of Speech clause to California Civil Code section 2528, on the ground the statute impermissibly compels speech. Won on the constitutional issue in 2007 in two related actions in the California Court of Appeal, Second District, *A.A.M. Health v. Argus Health* and *Bradley v. First Health Srvcs*.
- **Gilda Garcia, et al. v. Toby Douglas, et al.** (9th Cir. pending.)
  Counsel for National Disability Rights Network as amicus curiae in challenge to drastic funding cuts for Adult Day Health Care Services imposed by ABx4 5.
- **American Nurses Assn. v. Jack O'Connell**
  (Cal. Supreme Court pending.) Counsel for Child Care Law Center as amicus curiae in challenge to Court of Appeal decision permitting only licensed nurses to provide routine administration of medication to children affected by diabetes and other medical conditions.

- **Konami/Upper Deck Litigation** (C.D. Cal. 2010.)
  Counsel for plaintiff Konami Digital Entertainment in high-profile litigation against its former distributor, The Upper Deck Company, accused of counterfeiting Konami's product. Case settled after a finding of liability in our client's favor and opening statements at trial, followed by entry of a permanent injunction against Upper Deck.
- **Jneid and TriPole v. Novell, Inc.** (Cal. Court of Appeal, 4th App. Dist.)
  Counsel for Novell on appeal from a judgment on a $33 million jury verdict based on issue and evidentiary sanctions. In December 2009, the Court of Appeal reversed the judgment against Novell on constitutional due process grounds and remanded for a new trial.
- **Oakland Raiders v. Oakland-Alameda Cty. Coliseum Corp.** (144 Cal. App. 4th 1175 (2006).)
  Represented Oakland-Alameda County Coliseum on appeal, obtaining complete reversal of a $34 million judgment following a multi month trial in which the Raiders claimed more than $1 billion in damages.
- **Williams v. State of California** (S.F. Super. Ct. 2000-04.)
  Counsel for class of plaintiff-schoolchildren in a constitutional challenge to substandard conditions at K-12 public schools, including lack of textbooks, severe overcrowding, insufficient numbers of desks, lack of functioning bathrooms, untrained teachers, and facilities that failed to meet basic health-and-safety needs. Case concluded with a landmark settlement providing state-level oversight and $1 billion commitment to improve school conditions.

Education

University of California School of Law at Los Angeles (J.D., 1997)

University of Florida (B.S., 1994)

Rankings

Mr. Fox is recommended by *The Legal 500* 2011 in the area of trademark litigation and was ranked as a "Rising Star" by *Super Lawyers* 2005-2007.

Select Press Coverage

- "Lions of the Trial Bar," *ABA Journal*, March 2009.
- "Brosnahan Still Fighting After 50 Years: Veteran Trial Lawyer and MoFo senior partner has lost only 11 of 142 trials, is as busy as ever," *Daily Journal*, 6/25/09.
- "Top 10 Northern California Super Lawyers 2011," *Super Lawyers*, 2011.
- "The Right to Counsel in Civil Cases: If Not Now, When?" *The Recorder*, 4/18/2008.
- "The Man Who Hates Injustice," *Super Lawyers*, 2006.
- "The One That Got Away," *California Lawyer*, January 1993. "End Game," originally published in the January 1993 issue of California Lawyer. Reprinted with permission. © 2010 Daily Journal Corporation, San Francisco, CA.
- "Who Gets the High-Profile cases?" *California Lawyer*, 2007.
- "Labor Woes Going Global," *The Recorder*, 2005.

FRED BARTLIT | JAMES BROSNAHAN | BOBBY LEE COOK | RICHARD "RACEHORSE" HAYNES | JOE JAMAIL | JAMES NEAL | BERNIE NUSSBAUM

ABA JOURNAL

MARCH 2009 THE LAWYER'S MAGAZINE

over 70

Lions of the Trial Bar

Lions of the Trial Bar

By Mark Curriden

THEIR NAMES CAN BE FOUND IN THE PAGES OF casebooks and on the sides of law school buildings. They've tried some of the most important cases of the last 50 years, dazzling juries and swaying judges. They've won—or saved—billions of dollars for their clients, and become wealthy men in the process.

They've also represented the guilty and unpopular because they thought it was the right thing to do. They are the lawyers most of us secretly wish we could be, if only for a day.

And now they're in the autumn of their careers.

Fred Bartlit. James Brosnahan. Bobby Lee Cook. Richard "Racehorse" Haynes. Joe Jamail. James Neal. Bernie Nussbaum.

These seven lawyers are among the best litigators in America. Strike that. Most of them consider the word *litigator* an insult. They're trial lawyers.

They're all past—in some cases, well past—70 years of age, but when the nation's largest corporations and most important people face serious trouble, they still turn to these seven old-timers.

That's because, as the number of trials in the United States seems to be approaching zero, there are fewer and fewer trial lawyers with the experience to take their place. (See "The Endangered Trial Lawyer," page 63.)

Says U.S. District Judge Royal Furgeson, who's seen several at work in his San Antonio courtroom: "They represent a breed of lawyer that I fear is on the verge of extinction."

But before they go, they've got some tales to tell—stories that are timeless, provocative, profane and laugh-out-loud funny. And most of them are even true.

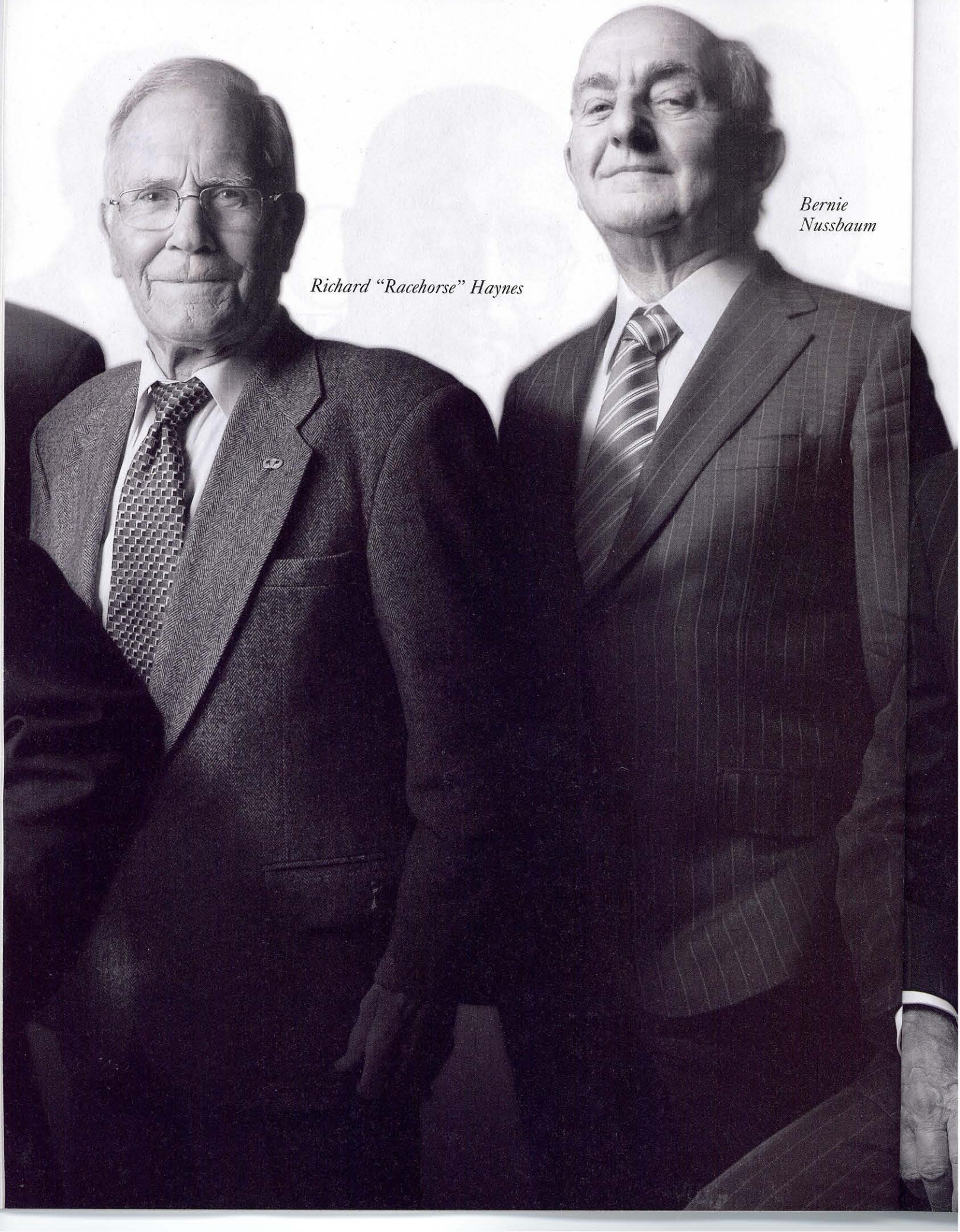
Sit back, pour yourself a drink, and learn how it was done back in the day. Class is in session.

Mark Curriden, an occasional contributor to the ABA Journal, *is a freelance writer based in Dallas.*

7 OVER 70

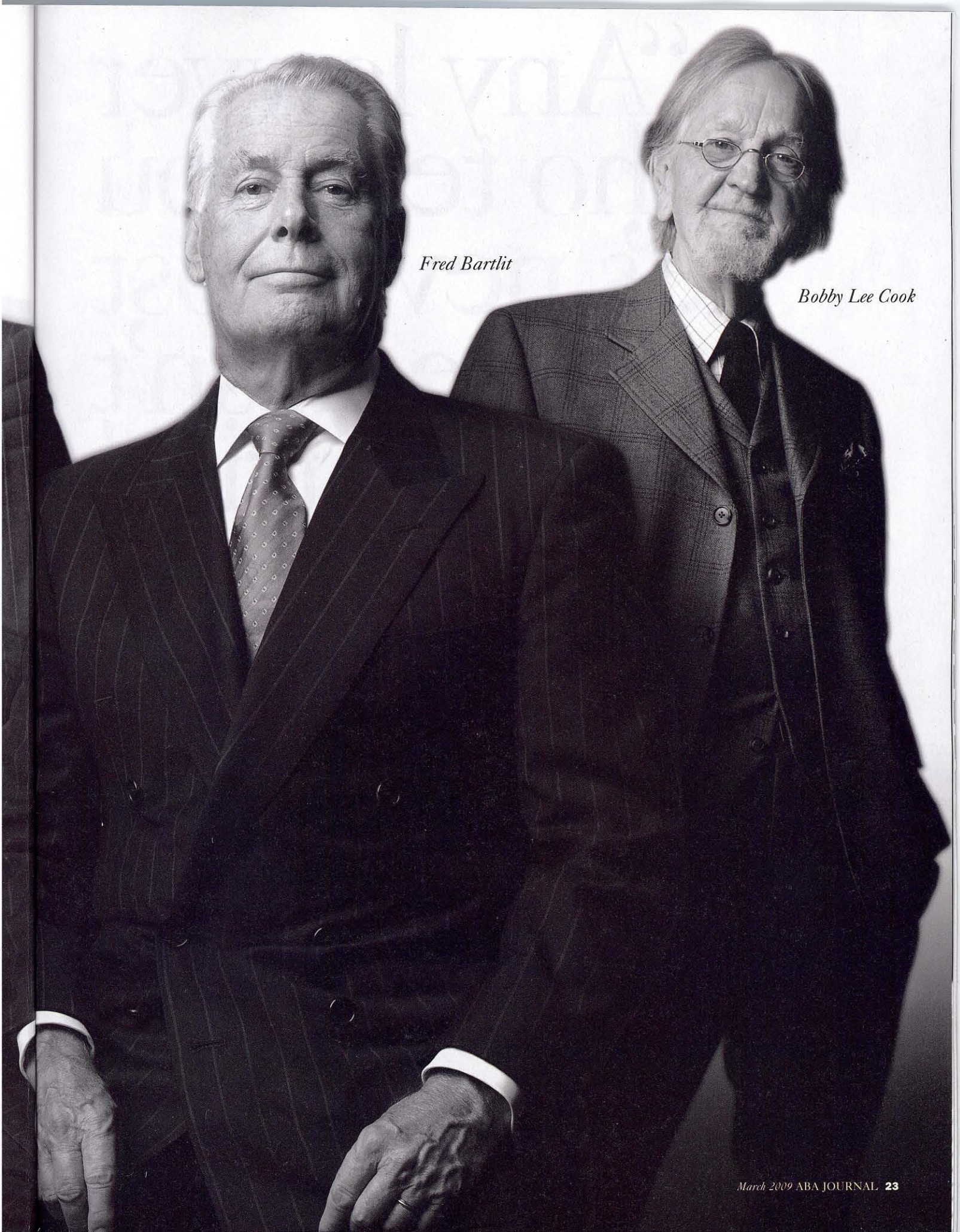
PHOTO COMPOSITE BY STEPHEN RAVENSCRAFT


Joe Jamail
James Brosnahan
James Neal



Richard "Racehorse" Haynes

Bernie Nussbaum

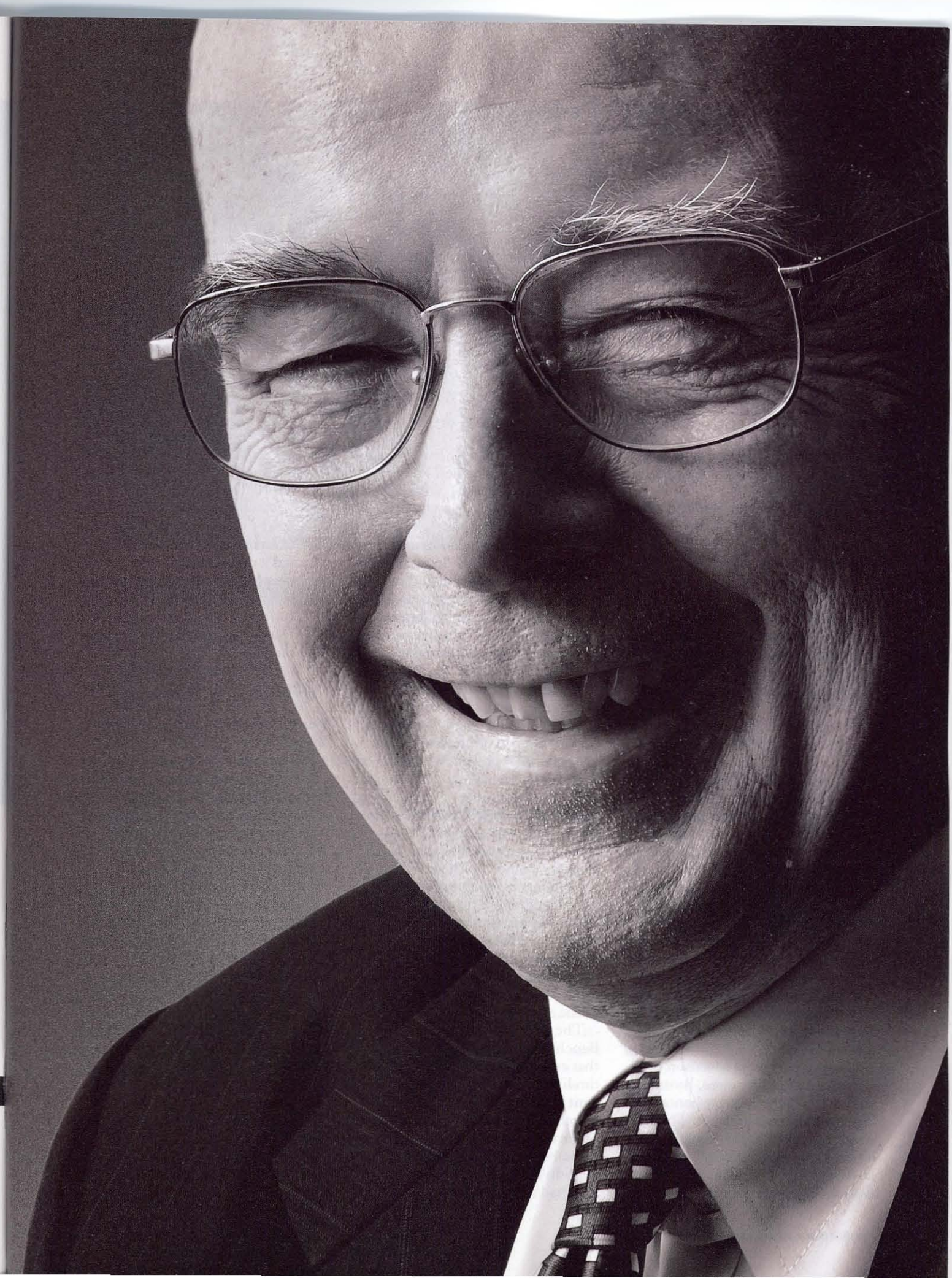

Fred Bartlit
Bobby Lee Cook

"Nothing compares to the electricity of an actual trial, and it is magnified when it is a jury trial."

—James Brosnahan

Defending clients, not movements

PHOTOGRAPH BY MEL LINDSTROM



JAMES BROSNAHAN HAS TRIED MORE than 140 cases to a verdict. He's prosecuted murderers and the secretary of defense. He's defended the chair of Hewlett-Packard and the man known as the "American Taliban." ¶But when it comes to weird moments in court, nothing tops an experience in Reno, Nev., a few years ago.

Brosnahan was defending a man in a civil tax recuperation case in federal court.

"I was sitting at the defense table, making notes for my closing argument, when I suddenly hear this scream," says Brosnahan. "I look over and my client has opposing counsel by the throat."

Brosnahan rushed over to pull his client off the lawyer. The federal judge hit the panic button under the bench, causing U.S. marshals to storm into the courtroom, weapons drawn.

"The defendant is trying to kill the tax attorney," the judge yelled out.

The marshal paused, holstered his gun and, in a calm voice, responded, "Judge, that's only a misdemeanor."

"We won the case, but my client still went to jail for six months for attacking the tax attorney," says Brosnahan.

Brosnahan turned 75 in January, but he has no plans to slow down. He has four jury trials and two nonjury trials already scheduled for this year.

"My standard for taking a case is extremely low," he says. "But nothing compares to the electricity of an actual trial, and it is magnified when it is a jury trial."

A senior partner at Morrison & Foerster in San Francisco, Brosnahan has received about every honor the legal profession hands out. The American Inns of Court honored him with its 2007 Lewis F. Powell Jr. Award for Professionalism and Ethics. The American Board of Trial Advocates and the American College of Trial Lawyers named him lawyer of the year in separate years. His online bio is 18 pages long, listing all of his major court victories, honors and published articles.

Brosnahan says his decision to try all kinds of cases—civil and criminal—has allowed him and trial lawyers of his generation to gain the courtroom experiences that following generations have not had.

"The emphasis on specialization of practices is not all good," he says. "I strongly encourage today's young litigators to take on one or two criminal cases every year. It will make your civil trial practice so much better."

EARLY DAYS IN THE DESERT

BROSNAHAN STARTED HIS LEGAL career as a prosecutor in the U.S. attorney's office in Phoenix. He remembers his first jury trial as if it were yesterday. The date, he says without hesitating, was April 10, 1961. The charge was murder. The defendant, who was a member of the Pima tribe, had repeatedly stabbed the victim, a member of the Apache tribe.

The murder took place in Bapchule, a small Arizona village that consisted of five huts. The victim lived in one hut and the defendant lived in another. During jury selection, a prospective juror announced that he also lived in one of those huts in Bapchule but claimed he didn't know the defendant.

"I had no idea what I was doing," Brosnahan says. "But I knew that there was no way this juror didn't know the defendant. That's when I first realized that sometimes jurors lie."

Brosnahan used one of his peremptory strikes to remove that juror and went on to win a first-degree murder conviction against the defendant.

"The great thing about jury trials is that there are always surprises," he says.

Brosnahan points to a trial he conducted in Santa Clara, Calif., a few years ago. He asked jurors in the venire whether anyone in the group was a party to a pending case in court. A woman seated in the second row raised her hand and said she was a defendant in a case.

"What kind of case—civil or criminal?" Brosnahan inquired.

"A criminal case," she responded.

"What is the charge against you?" he asked.

"A murder case," the woman replied.

"All at once, the jurors sitting beside her slowly started moving away," he says. "I didn't need to use a peremptory on her."

In 1989, Brosnahan represented Steve Psinakis, a Greek-American businessman charged with illegally transporting explosive materials. Psinakis had been involved in the overthrow of Ferdinand Marcos. Philippine President Corazon Aquino pressured the U.S. government to drop its case. And witnesses at trial included the Philippine secretary of state.

Twenty-seven federal agents had raided Psinakis' home, pointed guns right against his face, physically threatened him and drugged his dog.

"The judge didn't react at all to what the agents did to my client, but when he heard about the treatment to the dog, he was outraged," says Brosnahan. "That's when we learned the judge was a dog lover."

Key evidence in the case was the photographs the agents took when they raided the house, showing a

Case *U.S. v. Lindh.*

Date July 2002.

Location U.S. courthouse in Alexandria, Va.

Who James Brosnahan (center) with Morrison & Foerster colleagues (from left) George Harris, Raj Chatterjee and Tony West (right).

What John Walker Lindh, a U.S. citizen captured on the battlefield in Afghanistan, is charged with taking up arms against American soldiers. Lindh's legal team, led by Brosnahan, is heading toward a bank of reporters and photographers to field questions about Lindh's decision to accept a plea bargain.

Note Lindh, who remains a devout Muslim, received a 20-year sentence.

JAMES J. BROSNAHAN

Born 1934 in Boston.
Firm Senior partner at Morrison & Foerster in San Francisco.
Law school Harvard.

Significant cases

1992—Prosecuted former Defense Secretary Caspar Weinberger for his role in the Iran-Contra cover-up.

2002—Defended John Walker Lindh, aka the American Taliban, on charges he took up arms against the United States in Afghanistan. In a plea agreement, those allegations were dropped in favor of less serious charges that he supplied services to the Taliban.

2003—Defended the city of Oakland and Alameda County in an $836 million lawsuit brought by the Oakland Raiders for breach of promise. Jury awarded $34 million.

2007—Represented former Hewlett-Packard chair Patricia Dunn for her role in HP's illegal obtaining of private phone records of journalists and HP board members. The charges were dismissed.

Other career highlights—Winner of the 2007 American Inns of Court Lewis F. Powell Jr. Award for Professionalism and Ethics.

bowl with the makings of a bomb—wires, glue, scissors and other items. However, Brosnahan discovered other photos taken by the agents that showed the same bowl, but without glue and wires.

Under oath, the defense attorney finally got an FBI agent to admit that he had staged the photo, completely undermining the government's case. The judge was already upset at the government about the dog, he says, and this fabrication of evidence pushed him over the edge. In the end, Psinakis was acquitted.

Brosnahan says he gets a lot of "last-minute clients" who are represented by other lawyers throughout the litigation process. He says he's been hired as little as three weeks before the start of a trial.

"These clients wake up one morning and realize, holy cow, they are going to trial and they need someone who has experience actually trying cases," he says. "I actually enjoy those situations because it forces me to zero in on what matters in a case. There are not 25 or 30 important witnesses in any case. Instead, there are only two or three who truly matter."

In 1991, Iran-Contra independent counsel Lawrence Walsh lured Brosnahan temporarily back to the prosecution side to lead the trial team against Caspar Weinberger, who was the secretary of defense under President Ronald Reagan.

News made it to the FBI that Weinberger had taken and kept copious notes of Cabinet meetings at which the sale of arms for hostages was discussed. However, Weinberger told federal agents he had no such notes.

"The minute the FBI agents left his office, Weinberger pulled out his notebook and wrote that the FBI came seeking his notes and that he had lied about the existence of the notes," says Brosnahan. "Weinberger was concerned that the notes would have led to Reagan's impeachment, which I doubt. But he should have turned them over."

Five days before the 1992 presidential election, Brosnahan secured a federal indictment against Weinberger, charging him with making false statements to Congress. The indictment included a handwritten note by Weinberger indicating that President George H.W. Bush knew more than he had claimed.

Republicans accused Brosnahan of playing politics with the justice system, causing Bush to lose his reelection bid to Bill Clinton.

Continued on page 62

PHOTOGRAPH COURTESY OF JAMES BROSNAHAN

Bartlit says the jury box was filled with television cameras. There were more reporters from more places than he thought possible. Bartlit says people think he represented Bush because of his politics.

"No one from the Bush camp ever asked me if I was a Republican," he says. "I hadn't even contributed to Bush's campaign. In fact, I gave money to Joe Lieberman because I thought he was a smart and reasonable guy."

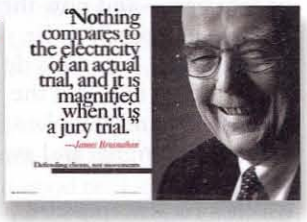
"But I wasn't in this case because I thought the country would die if my client lost; I just thought it would be a great case to try," he says.

Then Bartlit pauses, as if he is thinking about whether he truly wants to say what's on his mind. Then, he just says it.

"You know, if I were to rate my most important cases, I wouldn't even put *Bush v. Gore* in the top 10." ■

JAMES BROSNAHAN

Continued from page 53



"I was suddenly elevated from an infrequent contributor to Democratic politicians to being the mastermind behind the Democratic Party," Brosnahan says.

On Dec. 16, during a closed hearing in federal court to review secret, classified evidence, Brosnahan said he noticed that Weinberger's lawyer, prominent Washington, D.C., criminal defense attorney Bob Bennett, kept getting up and leaving the hearing.

The hearing ended with Bennett telling Brosnahan and the judge that he planned to subpoena President Bush to testify during the trial on Jan. 21—the day after Bush would leave office and thus could no longer claim presidential immunity.

"We had documented that Bush had given 218 different explanations of where he was during Iran-Contra, so we knew he didn't want to testify," Brosnahan says.

"Eight days later, on Christmas Eve, we received word from the White House that President Bush had issued full pardons for Weinberger and five others, thus ending any need to call the president as a witness in the case."

FIGHTING THE TIDE OF PUBLIC DISAPPROVAL

A DECADE LATER, BROSNAHAN WOULD FACE THE CASE of his life. He was watching the evening news when he heard about the arrest of American citizen John Walker Lindh, who had been captured on a battlefield in Afghanistan. Lindh was immediately labeled the "American Taliban."

"[U.S. Attorney General John] Ashcroft went on national television to declare that John was evil, that he was a terrorist, and that he hated America," says Brosnahan. "I told my wife that night that this kid is in a whole lot of trouble."

The next day, Dec. 2, 2001, Brosnahan was home watching the San Francisco 49ers when his office message system notified him of a pending voice mail. The message was from Frank Lindh, the young man's father, asking him to take on his son's case.

"I told John's parents that I am not a movement lawyer and that I represent individual clients, not movements," he says. "I told them that if I ever got the feeling that I was being used for the purpose of a movement, that I was off the case."

Brosnahan met with his partners at Morrison & Foerster to get their input. If his partners had advised against, he says, he wouldn't have taken the case.

That being said, "I was absolutely sure that this case could kill my career," he says.

Brosnahan took the case on Dec. 3 and immediately fired off a letter to Ashcroft and Secretary of Defense Donald Rumsfeld demanding safe transport to Afghanistan to meet with his client and instructing them to cease all interrogations of his client.

"For the first time in my legal career, no one even bothered to respond to me," he says.

Meanwhile, news broke that Brosnahan was representing Lindh. Death threats poured in via telephone calls, e-mails and letters. He was forced to hire security guards at home, at the office, and for traveling to and from court. A lawyer from Ohio told Brosnahan that he planned to bring legal action against him for simply representing Lindh. The *National Review* called Brosnahan the "American Tali-Lawyer."

Brosnahan wasn't allowed to meet with his client for 54 days.

"John was horribly mistreated," Brosnahan says. "He was kept naked in a metal can—one of those containers used for shipping cargo. It had one hole in it for air. I don't think it was legally torture, but it was horrible mistreatment."

Lindh was no terrorist, according to Brosnahan. Instead, he was a teenager who went to study in Yemen and then agreed to join Afghan forces fighting against the Northern Alliance in that country's civil war.

Brosnahan hired one of the nation's leading terrorism experts, who had worked many times for the federal government, to spend time with and evaluate Lindh. The expert concluded that Lindh was no terrorist.

To prepare for possible trial, Brosnahan conducted a poll in northern Virginia, where the case was set to be tried, to gauge public attitudes. "It wasn't good," he says. "Thirty percent of the people wanted to give John the death penalty, and the government wasn't even seeking death. But remember, this is just three months after the Sept. 11 attacks, so people were still very edgy."

In the end, Brosnahan says, he had a very strong fact-based defense for Lindh. Because this was the first terrorism prosecution post-9/11, the government didn't want to take any chances with a loss.

Brosnahan entered into plea negotiations with Michael Chertoff, who was at the time the chief of the criminal division at the U.S. Department of Justice.

"After we would talk, Chertoff would rush off to the

White House or to see Rumsfeld to obtain approval for the deal," Brosnahan says.

"I told him from the start that John would not plead to any of the terrorism counts because he had never fought against American forces and he had never intended to."

The final deal provided for Lindh to plead guilty to lesser counts of supplying services to the Taliban, and carrying a rifle and two grenades. Lindh received a 20-year prison sentence.

"I still remember the first words John ever spoke to me: 'Boy, am I glad to see you.' "

Says Brosnahan: "That's why I became a trial lawyer." ■

The Endangered Trial Lawyer

Beyond the mirth and magic in the stories of trial lawyers still nimble in the courtroom in the autumns of their careers lies a worthwhile narrative: How they got there.

Like the burlesque line about the way to Carnegie Hall: It takes practice, practice, practice. In the courtroom.

That route seems etched in water now as the number of cases actually going to trial has shrunk to minuscule. In his oft-noted research on the "vanishing trial," law professor Marc Galanter of the University of Wisconsin at Madison detailed a huge drop in federal civil cases ending during or after trial: 11.5 percent in 1962, down to 1.4 percent in 2002. That trend has been most precipitous since 1985, when the number of trials peaked at 12,529 and accounted for 4.7 percent of the cases terminated that year. In 2006, 3,555 civil cases, or 1.3 percent, went to trial. And the downtrend is likely to continue apace.

A LOOK AT THE NEW FACE OF LITIGATORS

IN THE AGE OF THE VANISHING TRIAL, HOW CAN THE YOUNG LAWYERS of today develop the kind of art and skill their elders wield so well in the courtroom?

Some of the best of the old breed are pessimistic about the prospects. Others say cowboys with six-guns and lassos are no longer needed in an age of mechanized cattle ranching.

Some say the jury trial has been usurped by heavy-handed jurists too determined to reach into questions of fact.

"There won't be any problem getting the next generation of litigators," says Houston-based antitrust litigator David Beck, co-founder of Beck Redden & Secrest. "The problem is getting the next generation of trial lawyers."

When Beck was president of the American College of Trial Lawyers in 2006-07, he appointed a task force to look at what can be done to reverse the consequences of the vanishing trial.

Many have heard the stories about litigators making partner without having tried a case—journeymen carpenters who never drove a nail. Some retire without ever knowing the visceral taste of a jury's verdict.

Criminal lawyers find themselves in much the same predicament. Critics, including judges, say that plea bargains have become not just de rigueur but bargain basement. Prosecutors pile charges on defendants who want a trial, such that they face huge multiples of the sentences meted out to those who plead.

A lot of law firms have adapted by loaning associates to local prosecutors and to pro bono projects. Law schools have developed a spate of advocacy courses and competitive trial teams. Students travel the country trying actual fact patterns before real judges, but their numbers are limited. At William & Mary Law School, adjunct professor Jeffrey Breit—an accomplished trial lawyer—says 108 first-year students recently applied for 12 slots in his program.

While the American College of Trial Lawyers and others seek to restore the tried and true, some believe those efforts are being overwhelmed by inevitability.

Julie Macfarlane, a law professor at the University of Windsor in Ontario, Canada, says the new lawyer is still a zealous advocate—just not a warrior. Negotiation is the game.

"These new lawyer roles do not have completely different skills. They're still reading the room and the faces," says Macfarlane, who authored *The New Lawyer: How Settlement Is Transforming the Practice of Law.*

But there are differences, she says. For example, it doesn't pay to try to convince everyone of the brilliance of your theory, as it might in the courtroom. You ply your skills to get the best possible resolution for your client. And rather than hold back a piece of information that can be used to trap a witness on cross-examination, the new lawyer puts it on the negotiation table.

Just the same, Macfarlane says, "this isn't about everybody singing *Kumbaya*. It's still about money. It does mean that the role models for young lawyers and law students are changing."

—Terry Carter

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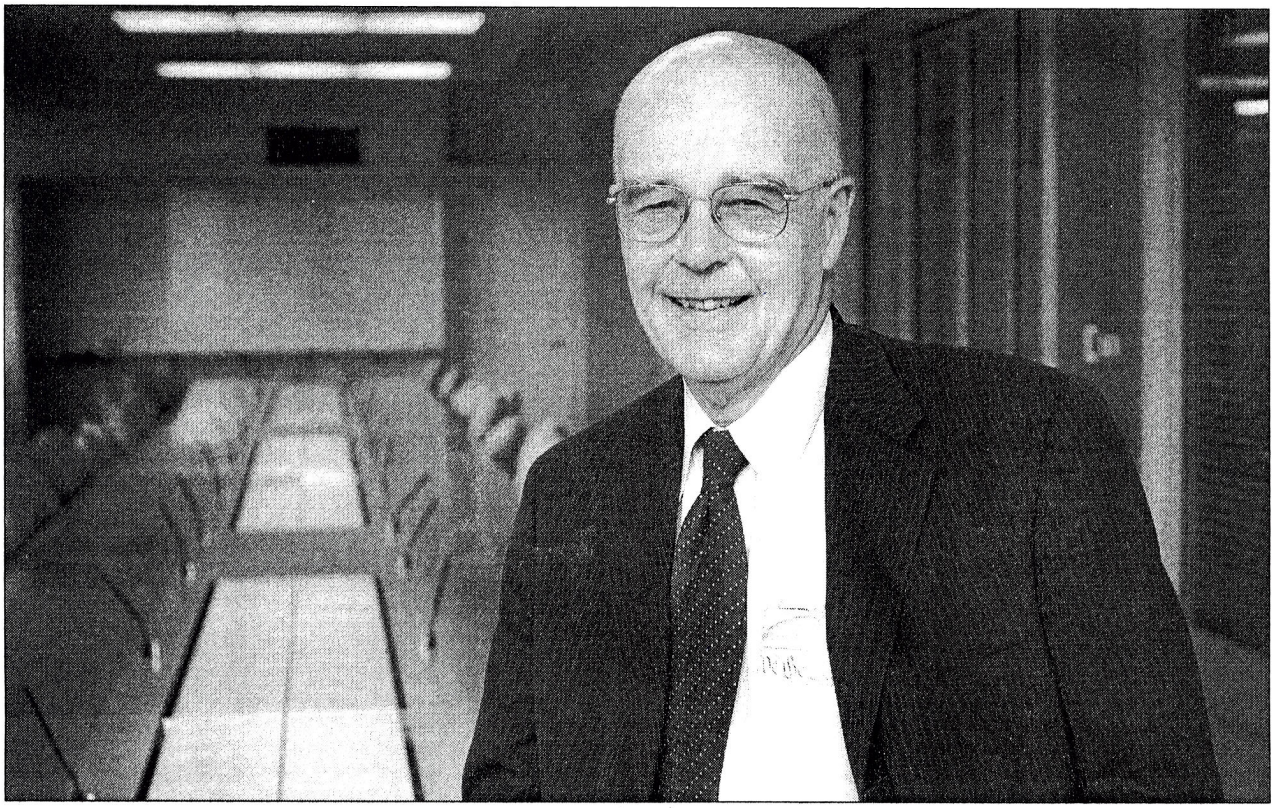


S. TODD ROGERS/Daily Journal

Veteran trial lawyer James Brosnahan, a senior partner at Morrison & Foerster, has won renown defending famous clients such as "American Taliban" John Walker Lindh and former Hewlett-Packard Co. Chairwoman Patricia Dunn. His 50-year-long career isn't slowing down, he said.

After 50 Successful Years, Brosnahan Fights On

Veteran trial lawyer and MoFo senior partner has lost only 11 of 142 trials, is as busy as ever

By Sara Randazzo
Daily Journal Staff Writer

SAN FRANCISCO — Listening to Morrison & Foerster senior partner James Brosnahan talk about the early days of his career is a bit like sitting down to hear a legal fairy tale. It was a time, he says, when attorneys weren't in it for the money. A time when leaving the firm you worked for was akin to getting a divorce — and no one got a divorce. A time before mobile phones and e-mail, when it was possible to be truly unavailable.

The time was 50 years ago, when the Harvard Law School graduate took his first job, clerking for Judge Henry Stevens on the Arizona Superior Court in Phoenix. A half century later, the MoFo veteran is as close to being a household name in the Northern California legal community as any attorney can be.

He's landed in the news frequently for his work with high-profile clients like "American Taliban" John Walker Lindh — who received a 20-year prison sentence instead of life, thanks to Brosnahan — and former Hewlett-Packard Co. Chairwoman Patricia Dunn, who was cleared of all charges after being indicted for her role in the use of "pretexting" to investigate leaks of sensitive company information.

His client list also includes Kevin Barry Artt, an Irish nationalist who fled to the U.S. after escaping from Northern Ireland's Maze Prison; Steven Psinakis, a Greek-American accused of shipping explosives to the Philippines in a plot to overthrow the regime of Ferdinand Marcos; and Michael DeDomenico, for whom Brosnahan obtained two not-guilty verdicts in what was, at the time, the largest single-year tax-evasion case brought in California.

He's twice appeared in the nation's highest court, once before and once after he testified against the 1986 confirmation of William Rehnquist to be the nation's chief justice.

By the time Brosnahan joined MoFo in 1975 from Cooper, White & Cooper, he was already a legend with nearly 90 trials to his name. His jump to the firm, which he called the second lateral move ever among San Francisco lawyers, marked the beginning of a new, trial-centered era in MoFo history.

"Bob Raven, then the head of our litigation group, had talked about bringing over to our firm the best trial lawyer in the area. We both said, 'That's Jim Brosnahan,'" remembered Melvin Goldman, a senior partner in MoFo's San Francisco office.

The 75-year-old Brosnahan is as busy now as he's ever been. The proof is written on a slip of blue paper tucked near the worn, pint-sized U.S. Constitution that bulges out of his breast pocket.

"I fill out this form every week with what I need to do," Brosnahan said, chuckling. "I've been doing this for years."

No client is too big, or too small, for Brosnahan. Take his current agenda, which involves defending Orange County billionaire Henry T. Nicholas against drug and civil charges alongside representing Youa True Vang, a Fresno man charged with conspiring to overthrow the Laotian government.

Brosnahan has often said he's not a movement lawyer, meaning he won't take on a case if

See Page 3 — BROSNAHAN

Brosnahan Still Going After 50 Years

Continued from page 1

pushing an agenda becomes more important than doing right by the client, but certain political issues consistently rile him up.

With his voice rising, he began explaining his distaste for the nation's lack of legal aid for the poor, stopping because "I feel myself on the edge of preaching."

Chewing on ICE

He also got incensed discussing one of his current cases, representing Pedro Guzman, a mentally disabled U.S. citizen who was wrongfully deported to Mexico by U.S. Citizenship and Immigration Services.

"I have a very negative view of the immigration service," Brosnahan said. "They separate families, they raid places, they detain citizens. They have no jurisdiction to do it. They're a very lawless group."

Brosnahan has taken on the immigration authorities before, including in a case he has called one of his most challenging, defending a group of Arizona church workers indicted in the mid 1980s for aiding Central American refugees seeking safety in the United States. All eight defendants were found guilty, although none received jail time.

"He's the patron saint of lost causes," said James Bennett, a MoFo partner who has worked with Brosnahan for 35 years. After a pause, Bennett added: "Or, desperate causes. Because he doesn't lose."

In the end, only one thing matters when Brosnahan decides to take on a case. "My standards are extremely low," he said jokingly. "Which is my way of saying, if there's going to be a trial somewhere I'm probably gonna do it."

This mantra comes with two caveats: In his 50 years of practice, Brosnahan has never taken on clients in trouble over guns or cigarettes.

His typically booming voice lowered to almost a whisper as he explained how, because President John F. Kennedy and Robert Kennedy were both lost to gunshot wounds, he could never represent gun manufacturers or defend clients on arms-related issues.

"They inspired us. They inspired a whole generation," Brosnahan said. "They're very important, and we lost both of them, to guns. So I wouldn't be the right person to do that."

In the cases Brosnahan does take on, his track record is nearly pristine: Of his 142 trials to date, he has lost only 11.

Harold McElhinny, recently selected as the firm's co-managing partner, joined the firm as an aspiring trial attorney in 1976 but was disappointed to learn that the year before his arrival, MoFo's litigation group had just one jury trial. All that changed with Brosnahan's arrival.

"He took our litigation practice into the courtroom," McElhinny said. "It would be unfair to say he single-handedly did it, but he was the major mover in that."

Bennett agreed. "He's probably the lawyer who is most responsible for our reputation as a go-to trial practice," he said.

From the early years of his career, which started in plaintiffs' personal injury firm Langerman and Begam in Phoenix, followed by five years in the U.S. attorney's office, Brosnahan has lived for going to trial.

His strengths in the courtroom are many, colleagues say.

"He sees a big picture, he thinks about the entire case, he sees the case through the eyes of the decider — the judge or jury — then executes on that vision," said John Keker, name partner at Keker & Van Nest and a longtime friend of Brosnahan's.

Brosnahan also has a flair for theatrics and a personality that resonates with judges and jurors.

"Like most trial lawyers, one of the secrets is he's very likeable," Bennett said.

"He can be very articulate in a moving, emotional way when need be."

Getting taken to the cleaners

Underlying it all, Keker said, Brosnahan is a fierce competitor.

"If you're not prepared to fight back you'll get taken to the cleaners by Jim Brosnahan," Keker said. "Even if you fight back, you'll get taken to the cleaners by Jim Brosnahan."

As McElhinny remembers it, Brosnahan didn't lose a single case in his first seven or eight years with the firm.

"I'd come back and say I lost and he'd be sympathetic, but I think he didn't understand how that had happened because it didn't happen to him," McElhinny said.

MoFo partner Linda Shostak joined the firm the year before Brosnahan and worked on trials with him for 15 years. She still remembers the advice he bestowed on her as a young lawyer, often doled out during walks he liked to take around the courthouse at lunch.

"One day he was giving me a critique, saying, 'It's all very good, but the questions were too long.' Could I now do a direct examination about the important features of the tree in front of us? And no question could be more than five words."

Brosnahan came of age as a lawyer in a legal landscape that looked much different than it does today. Lawyers largely marketed themselves, Brosnahan said, and the Big Law model was still in its nascent stages.

"I remember when it was first said out loud that the law was a business," Brosnahan said. "That started in the early '70s as an idea, but it gained momentum. People became much more career oriented. Then Reagan came in, and it became a mantra."

Changing with the times

As law became more of a business, attorneys gave up on firm loyalty, realizing they could shop themselves around to neighboring firms to advance their careers.

"I was the second lateral in San Francisco. My friend Joe Rogers was the first," Brosnahan said.

The early 1970s also brought the addition of greater numbers of women into the legal field, such as Brosnahan's wife Carol, an Alameda County Superior Court judge who was one of nine women in the couple's 525-person class at Harvard Law.

"As women came into the profession they looked around and saw things they didn't think were right, that they didn't like, and they were a voice," Brosnahan said. For instance, Brosnahan said women spearheaded the prosecution of spousal abuse and child abuse, which until that time was largely ignored.

Even as he grumbled about the focus on money, business and economics taking law firms in a different direction, Brosnahan conceded the industry has come a long way.

"I think the level of professionalism and education of young lawyers is vastly superior to what it was when I started," he said.

Brosnahan has seen the industry through five decades of change and has no plans to walk away any time soon. As long as he's still got work to do, he'll keep showing up at his 33rd-floor downtown office overlooking San Francisco Bay.

"It's very simple for me, the practice of law," he said. "The client always comes first, OK? Your self-interest and your personal comfort is not first... You get better as the years go by in putting the flak to one side and saying, okay, what's the best thing for this client?

"You aren't always right, but you try."

sara_randazzo@dailyjournal.com

the top 100

The following is an alphabetical listing of the lawyers who received the highest point totals in the 2009 *Northern California Super Lawyers* nomination, research and blue ribbon review process.

Abkin, Wendy, Sideman & Bancroft, San Francisco

Arguedas, Cristina C., Arguedas Cassman & Headley, Berkeley

Bank, Brigeda D., Fox & Bank, Walnut Creek

Baradat, Daniel R., Baradat Edwards & Paboojian, Fresno

Beltramo, Jr., Mario L., McCormick Barstow, Fresno

Bennett, James P., Morrison & Foerster, San Francisco

Benvenutti, Peter J., Jones Day, San Francisco

Bleich, Jeffrey L., Munger Tolles & Olson, San Francisco

Blevans, Robert E., Lewis & Blevans, Napa

Blizzard, Thadd A., Weintraub Genshlea Chediak, Sacramento

Bochner, Steven E., Wilson Sonsini Goodrich & Rosati, Palo Alto

Brandi, Thomas J., The Brandi Law Firm, San Francisco

Brosnahan, James J., Morrison & Foerster, San Francisco

Brown, Donald W., Covington & Burling, San Francisco

Buccola, Robert A., Dreyer Babich Buccola Callaham & Wood, Sacramento

Cabraser, Elizabeth J., Lieff Cabraser Heimann & Bernstein, San Francisco

Clarence, Nanci, Clarence & Dyer, San Francisco

Climan, Richard E., Cooley Godward Kronish, Palo Alto

Cooke, David D., Allen Matkins Leck Gamble Mallory & Natsis, San Francisco

Corey, George R., Corey Luzaich Pliska de Ghetaldi & Nastari, Millbrae

Cotchett, Joseph W., Cotchett Pitre & McCarthy, Burlingame

Davidson, Gordon K., Fenwick & West, Mountain View

Dell'Osso, Monica, Burnham Brown, Oakland

Dermody, Kelly M., Lieff Cabraser Heimann & Bernstein, San Francisco

Desmarais, Michael G., Law Office of Michael G. Desmarais, Los Gatos

Dickson, Kathryn B., Dickson - Ross, Oakland

Dolan, Christopher B., The Dolan Law Firm, San Francisco

Dreyer, Roger A., Dreyer Babich Buccola Callaham & Wood, Sacramento

Duffy, Pamela S., Coblentz Patch Duffy & Bass, San Francisco

Dunne, Kevin J., Sedgwick Detert Moran & Arnold, San Francisco

Eisen, Jay-Allen, Jay-Allen Eisen Law Corp., Sacramento

Eisenberg, Jon B., Eisenberg & Hancock, Oakland

Falk, Jr., Jerome B., Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco

Feldman, Boris, Wilson Sonsini Goodrich & Rosati, Palo Alto

Finberg, James M., Altshuler Berzon, San Francisco

Fink, David A., Nachlis & Fink, San Francisco

Fogel, Paul D., Reed Smith, San Francisco

Fong, Kevin M., Pillsbury Winthrop Shaw Pittman, San Francisco

Ford, Shane R., The Ford Law Firm, Oakland

González, Arturo J., Morrison & Foerster, San Francisco

Goodman, James M., Hassard Bonnington, San Francisco

Gutierrez, Jr., Max, Morgan Lewis & Bockius, San Francisco

Haag, Melinda L., Orrick Herrington & Sutcliffe, San Francisco

Hand, Margaret M., Law Office of Margaret M. Hand, Oakland

Hartog, John A., John A. Hartog, Orinda

Haslam, Robert T., Covington & Burling, Redwood Shores

Heisse, II, John R., Howrey, San Francisco

Hellman, Theodore A., Hanson Bridgett, San Francisco

Hermle, Lynne C., Orrick Herrington & Sutcliffe, Menlo Park

Hinton, Peter J., Hinton Alfert & Sumner, Walnut Creek

Holden, Jr., Frederick Douglass, Orrick Herrington & Sutcliffe, San Francisco

Huss, R. Bradford, Trucker Huss, San Francisco

Hyams, Jean K., Boxer & Gerson, Oakland

Jacobs, Michael A., Morrison & Foerster, San Francisco

Keker, John W., Keker & Van Nest, San Francisco

Kelly, Michael A., Walkup Melodia Kelly & Schoenberger, San Francisco

Kennedy, Raoul D., Skadden Arps Slate Meagher & Flom, San Francisco

Kenyon, Charity, Kenyon Yeates, Sacramento

Lombardi, Ralph A., Lombardi Loper & Conant, Oakland

Londen, Jack W., Morrison & Foerster, San Francisco

Lopes, James L., Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco

Mallory, Richard C., Allen Matkins Leck Gamble Mallory & Natsis, San Francisco

McElhinny, Harold J., Morrison & Foerster, San Francisco

McGee, Steven D., Kimble MacMichael & Upton, Fresno

McGuinn, Cynthia, Rouda Feder Tietjen & McGuinn, San Francisco

McMahon, Terrence P., McDermott Will & Emery, Menlo Park

McManis, James, McManis Faulkner, San Jose

Melodia, Paul V., Walkup Melodia Kelly & Schoenberger, San Francisco

Minami, Dale, Minami Tamaki, San Francisco

Neal, Stephen C., Cooley Godward Kronish, Palo Alto

Ney, Michael J., McNamara Dodge Ney Beatty Slattery Pfalzer Borges & Brothers, Walnut Creek

Paboojian, Warren R., Baradat Edwards & Paboojian, Fresno

Palash, Andrea L., Pierson Coats Palash & Paul, San Francisco

Palefsky, Cliff M., McGuinn Hillsman & Palefsky, San Francisco

Pitre, Frank M., Cotchett Pitre & McCarthy, Burlingame

Powers, Matthew D., Weil Gotshal & Manges, Redwood Shores

Richmond, Diana E., Sideman & Bancroft, San Francisco

Roisman, Margaret R., Roisman Henel, Oakland

Ross, Andrew, Whiting Fallon Ross & Abel, Walnut Creek

Ross, Jeffrey A., Dickson - Ross, Oakland

Rouda, Ronald H., Rouda Feder Tietjen & McGuinn, San Francisco

Ruby, Allen J., Law Offices of Allen Ruby, San Jose

Rudy, Mark S., Rudy Exelrod Zieff & Lowe, San Francisco

Shulman, Ron E., Wilson Sonsini Goodrich & Rosati, Palo Alto

Simon, Bruce L., Pearson Simon Warshaw & Penny, San Francisco

Simons, Rick, Furtado Jaspovice & Simons, Hayward

Smith, William B., Abramson Smith Waldsmith, San Francisco

the top 10

Arguedas, Cristina C., Arguedas Cassman & Headley, Berkeley

Brosnahan, James J., Morrison & Foerster, San Francisco **(3rd Top Point Getter)**

Clarence, Nanci, Clarence & Dyer, San Francisco

Cotchett, Joseph W., Cotchett Pitre & McCarthy, Burlingame **(Top Point Getter)**

Dreyer, Roger A., Dreyer Babich Buccola Callaham & Wood, Sacramento

Falk, Jr., Jerome B., Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco

Keker, John W., Keker & Van Nest, San Francisco **(2nd Top Point Getter)**

Powers, Matthew D., Weil Gotshal & Manges, Redwood Shores

Ruby, Allen J., Law Offices of Allen Ruby, San Jose

Sonsini, Lawrence W., Wilson Sonsini Goodrich & Rosati, Palo Alto

Sonsini, Lawrence W., Wilson Sonsini Goodrich & Rosati, Palo Alto

Temmerman, Jr., Robert E., Temmerman Cilley & Kohlmann, San Jose

Van Der Hout, Marc L., Van Der Hout Brigagliano & Nightingale, San Francisco

Van Nest, Robert A., Keker & Van Nest, San Francisco

Veen, William L., The Veen Firm, San Francisco

Wagner, Stephen J., Dick & Wagner, Sacramento

Walters, Stephen S., Allen Matkins Leck Gamble Mallory & Natsis, San Francisco

Watters, Richard C., Miles Sears & Eanni, Fresno

Whitney, Marshall C., McCormick Barstow, Fresno

Worth, Thomas B., Law Office of Thomas B. Worth, San Francisco

Young, Douglas R., Farella Braun + Martel, San Francisco

Zieff, Steven G., Rudy Exelrod Zieff & Lowe, San Francisco

Zischke, Michael H., Cox Castle & Nicholson, San Francisco

Attorneys selected to *Super Lawyers* were chosen by Law & Politics in accordance with the process on page 33.

Civil Service

MoFo's Jim Brosnahan says now is the time for a civil *Gideon* rule to give court-appointed attorneys in civil matters.

THE RECORDER

132ND YEAR NO. 76 www.callaw.com FRIDAY, APRIL 18, 2008 ALM

THE RIGHT TO COUNSEL IN CIVIL CASES: IF NOT NOW, WHEN?

By Jim Brosnahan

NEWSCOM

Some call it "civil *Gideon*" after the U.S. Supreme Court decision establishing the right to counsel in criminal cases. Some talk of starting an organization called "When" to support the idea. The American Bar Association house of delegates passed a resolution urging it, as did the California Bar Association's conference of delegates. The Bar Association of San Francisco, under the leadership of President Jim Donato, is making it one of his year's priorities. Unrepresented litigants flooding the courts of California makes the job of the judges much harder. Justice (Ret.) Earl Johnson, until recently a member of the California Second District Court of Appeal, and who was the second director of the Legal Services Program of the U.S. Office of Economic Opportunity (OEO), has advocated the concept for years. Jack Londen, my partner, has worked hard to move other bar leaders to support its basic reform.

What is this modest but important stir in the California legal profession?

It is the desire to establish the right to counsel in civil cases.

THE CASE FOR THE RIGHT

The present legal system in California is clearly suffering due to the lack of this kind of representation. It's like a restaurant where the patrons are asked to do their own cooking or a hospital where many of the patients are required to operate on themselves. We not only have to recognize the problem, we need to fix it.

In 1963, the U.S. Supreme Court decided *Gideon v. Wainwright*, 372 U.S. 335. The court viewed the right to counsel in criminal cases as included in the Sixth Amendment. The opinion, written by Justice Hugo Black, provided:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law."

In 1965, federal funding for legal aid began as part of the OEO. Its purpose was to provide representation to the poor. There suddenly sprung up volumes on how to represent tenants, debtors, fired employees and the poor.

Some political forces saw it as a threat. During his eight years as governor of Califor-

■ ***Jim Brosnahan*** *is a senior partner at Morrison & Foerster in San Francisco.*

nia, Ronald Reagan constantly urged President Richard Nixon to end all federal support for free legal services for the poor. In 1970, Gov. Reagan vetoed a $1.8 million grant to California legal assistance. In 1973, with President Nixon's support, Congress created the Legal Services Corporation (LSC) to increase funding for legal aid nationwide.

At its high water mark in the late 1970s, federally funded legal aid programs nationwide employed 6,200 lawyers. But beginning in the 1980s, federal funding has been cut dramatically. Today there are just 3,845 lawyers in LSC-funded programs.

The present documented need in California is wrenching. According to the California Commission on Access to Justice, only one third of the legal-services needs of low-income Californians are met. In 2005, there were only 754 California legal aid attorneys. Not only are clients being denied justice, their voices — which might effectively address systemic inequalities — have been silenced.

THE SCOPE OF THE RIGHT

Both the ABA's and California Conference of Delegates' resolutions limit the scope of civil representation to where fundamental human needs are at stake. Examples include shelter, safety and health.

But important policy questions arise when the legal system does not provide counsel to the needy who must enter court for any reason.

Here's a scenario: A spouse who has paid all child support in a timely manner suddenly has her bank account wrongfully attached. She goes to a court, which offers self-help lawyers to give her advice, but the remedy of wrongful attachment is not available because she cannot afford a lawyer. So the wrongful, spiteful attachments continue, and the help of the law is illusory.

The definition of a "fundamental" need may need to change when it comes to impoverished litigants.

THE ARGUMENTS AGAINST IT

"It would cost too much." "It's just the lawyer's employment act." "It's not clear what delivery mechanisms would be used." These and other assertions will likely come about and can be duly addressed. They're the same arguments relied on by those who opposed legal representation for persons charged with a crime. But with all its limitations, the criminal *Gideon* system has been an improvement and has been financially feasible. Likewise, the expense associated with recognizing the civil right to counsel could be reliably estimated and tolerated.

Here are three ways the right could be established in California:

1. By legislation

This year, the governor, at the request of Chief Justice Ronald George, a strong supporter of legal services for the poor, put $5 million in the early budget designed to fund an experiment in three counties to supply some civil representation. The Legislature cut it to $2.5 million and then eliminated it entirely. The California Legislature has very few members who are lawyers and even fewer who have ever gone to court. So it appears there is no practical hope that the Legislature will ever address, much less enact, a program for civil representation.

2. By initiative

There is greater hope with an initiative. Some public-opinion surveys suggest support among the populace. Proponents of a civil *Gideon* initiative would probably need $25 million to $30 million to mount such an effort. Coalitions would have to be built and legal leaders would need to lend support. The possibility of a future successful initiative should not be eliminated.

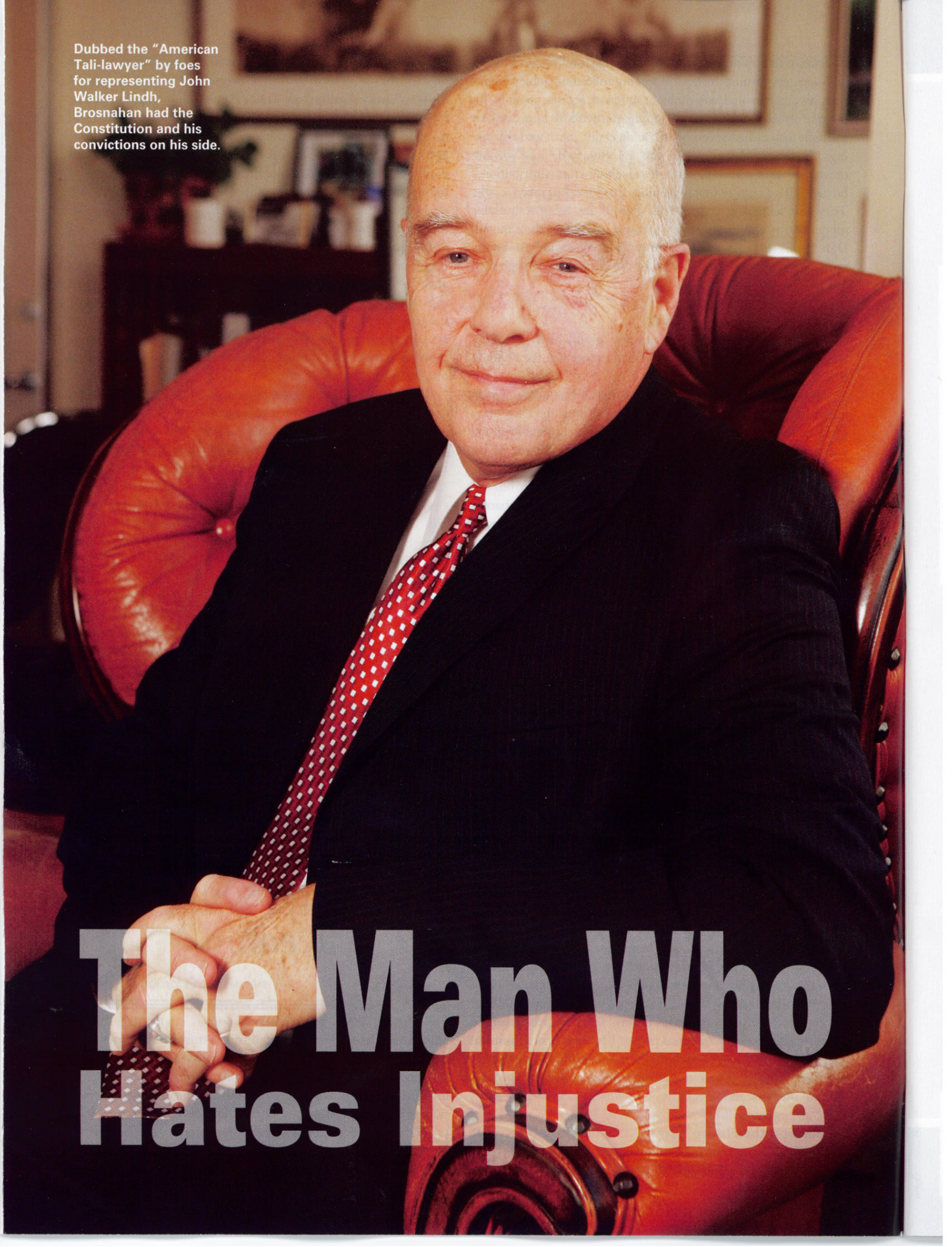
3. By court decision

The case for a favorable court decision was strongly made in an article by Justice Earl Johnson Jr. in 1978 in the Loyola Law Review: "Beyond Payne: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants," 11 Loy. L.A.L. Rev. 249 (1978). Johnson advanced four rationales for it: the adoption of the common law at the time of statehood; due process; equal protection; and a right to equal justice.

In 1981, the U.S. Supreme Court decided *Lassiter v. Department of Social Svcs*, 452 U.S. 18 (1981), denying the right to counsel to a woman who was losing her child in the proceedings. But in *Airey v. Ireland*, 2 Eur. Ct. HR Rep. 305 (1979), the European Court of Human Rights held that there is a right to counsel in cases involving civil rights. In *Airey*, an unrepresented Irish woman sought legal separation from an abusive husband. Ireland, with far less income per capita than California, now has legal aid offices all over the republic.

Many countries and states have recognized the right in various forms, some more expansively than others. Last July, Judge Mark Rindner of the Alaska Superior Court held there was a right to counsel in a case hhof denial of parental rights under the Alaska Constitution. The California Supreme Court certainly could write an opinion or opinions establishing the right to counsel in civil cases. It could be done, over time, in case-by-case increments.

For now, perhaps it is enough to suggest that no Californian should be required to be in court without a lawyer. The present system violates any concept of fundamental justice. It seems wrong to record a judgment or sign an order against a party that has no lawyer. But it happens every day in our state. I am just one of a growing number of Californians asking, when? ■



Dubbed the "American Tali-lawyer" by foes for representing John Walker Lindh, Brosnahan had the Constitution and his convictions on his side.

The Man Who Hates Injustice

Mere anarchy is loosed upon the world and Jim Brosnahan fights back

by LARRY ROSEN

PHOTOGRAPHY BY LARRY MARCUS

It's easy upon meeting Morrison & Foerster senior partner and San Francisco legend Jim Brosnahan to make the same mistake his courtroom opponents make about the man — thinking that he's predictable.

You might think, for example, that someone who received almost-daily death threats while defending the "American Taliban," John Walker Lindh, would be cautious and guarded, but Jim Brosnahan is open and sprawling. Or you might imagine that a man who has spent his career fighting for the underdog would be humorless, but Brosnahan laughs loudly, frequently and easily. The roar often comes without warning, with no build-up, just an explosion of knee-slapping volume. It's what it sounds like to be 72 and still taking huge gulps of life each day.

You might assume that a lawyer who has defended an escaped IRA prisoner and taken a stab at prosecuting President Reagan's secretary of defense would be on the front lines of every left-wing cause in an overwhelmingly left-wing town. But, again, you'd be wrong. Armed only with his pocket Constitution, a bottomless well of intellectual curiosity and an inflexible sense of conviction, Brosnahan has built his 47-year career on individual cases rather than large-scale movements.

"I'm not a movement lawyer," he says. In conversation, Brosnahan marks time with a series of exclamations: "Yeah!" or "Uh-huh!" He has had 47 years of tilting at dragons and the occasional windmill, but he's not grown tired of it yet. He seems to have no "pause" button on his personal dashboard. Even in his comfortable chair, he is seldom in repose.

"What I mean is that a movement lawyer feels the movement is more important than the client," he says.

One of Brosnahan's individual clients, though, may sometimes represent part of a larger movement. That was the case when Brosnahan tackled the extradition woes of IRA member Kevin Barry Artt. Artt was one of 38 prisoners to escape from Northern Ireland's Maze Prison ("'Left without proper documentation' is how I put it," Brosnahan says). Brosnahan, who expected a six-month case, threw himself into the cause, going to Belfast three times over the course of eight years, learning about Northern Ireland and, in some ways, himself. "It was amazing," he says. "The Ford Motor Company had a plant in Belfast at that time, and they had one Catholic worker. The rest were all Protestant. I suddenly realized what the Protestant Ascendancy was. It was like going back in the 16th century and understanding what my ancestors must have gone through."

After eight years of work on the case, the Good Friday Agreement of 1998 saved Artt and others from extradition. Brosnahan happily shows the letter he received from the British Government outlining the agreement. "I love this!" he booms.

Brosnahan is keenly aware of his Irish heritage. "To be born in Boston and be Irish is to be political," he says. "The Irish never give up." He's rangy and athletic, still carrying traces of the basketball and baseball player he was at Boston College, class of 1956. His eyes twinkle behind steel-framed glasses.

His corner office is cluttered with family photos, plaques, sports memorabilia. On one wall is a framed cartoon of him and John Walker Lindh, originally from *The Recorder*, standing together while people run screaming from them. Brosnahan's favorite worn, comfortable chair sits in a corner, all the better for him to sink into while contemplating constitutional issues, or to spring out of to make a point.

He often refers to his beloved American Constitution. Brosnahan is not the first to carry a dog-eared mini-copy of the Constitution in his pocket, and he uses it to far less dramatic effect than either Sen. Robert Byrd, who has been known to rip the small book from his pocket during an argument, or Tom DeLay, whose copy, one would assume, is used to make far different points than those of Byrd or Brosnahan. Brosnahan keeps his to remind himself that, ultimately, every issue of law and governance leads back to the Constitution. He also uses it as an ice-breaker. "It's so interesting," he says. "A good conversation starter."

Though tied to no single movement, Brosnahan is not shy with his political opinions. His strong convictions will not allow him to settle for complacency. "I don't think a trial lawyer should really aspire to just be respectable," he says. "You just have to do what you think is right."

If you want, you can just sit back — perhaps even in his worn-out Archie Bunker chair, because he will offer it to you before taking it himself — and bask in the sum total of his 47 years as a trial lawyer. Brosnahan knows surprising things about his clients; for example, that John Walker Lindh has a terrific sense of humor. He

can tell you about former Oakland Raider Bill Romanowski, whose practice-field right hook cost teammate (and Brosnahan client) Marcus Williams his professional career. "He's pretty much a sociopath," says Brosnahan, typically removing the sugar coating before speaking. "He's the kind of guy who punches somebody and then wants everyone to feel sorry for him because his hand hurts." Ask Jim Brosnahan a question: He will answer.

As a man unafraid to take chances or represent unpopular clients, Brosnahan has faced more than his share of rabid opposition. Consider Brosnahan's most controversial case, the defense of John Walker Lindh. This case produced "a howl from the people that there be no trial, that there be no court, that he just somehow be summarily dispatched."

"That's un-American. That's wrong," says Brosnahan. "It's unconstitutional, and it's not the best side of people."

Like everyone else, Brosnahan first heard of Lindh's plight via the evening news. "I said to my wife, 'The kid's in a lot of trouble,'" he says. The following day the boy's father, Frank Lindh, contacted Brosnahan. After a long discussion with his partners at Morrison & Foerster, Brosnahan, whose long career has focused mostly on "standing up to forces that are trying to do something bad to my client," chose to represent Lindh.

Dubbed the "American Tali-lawyer" by foes, Brosnahan's participation in this case brought acutely negative response to him and his firm. "It got very scary," he says, "and there were death threats. We had bodyguards for a while."

And mountains of hate mail arrived. "You get the super patriot people who think they're the only patriotic people in the world. There was this crazy lawyer from Illinois who hinted that he and his group were going to take some kind of action against me." Brosnahan kept his cool with a little help from friends. "I never answered any of it, though I came close," he says. "Barbara out here [his secretary] would talk me out of it."

"John [Walker Lindh] was in the wrong place at the wrong time," Brosnahan continues. "The Bush administration wanted him to be a terrorist. He wasn't a terrorist. But they didn't have anyone else." Once found, Lindh quickly became a symbol in the War on Terror. "He became an object. The secretary of defense, the head of the Joint Chiefs of Staff, the president of the United States, all were saying negative things about him." Lindh, Brosnahan believes, was a young idealist in way over his head. "He goes to the front to be in the Taliban army against the Northern Alliance," Brosnahan says. "It had nothing to do with the Americans. Things moved quickly. He was found in this jail and his picture was plastered all over the world, including the Islamic world."

As a father himself — Brosnahan has three grown children, two daughters and a son — he found it easy to empathize with Lindh's parents. "I really identified with the pain of the parents," he says. "They're good parents. They stood by John."

Today, John Walker Lindh has approximately 15 years remaining on his sentence. His father continues to speak on his behalf, while Brosnahan works to seek a commutation of John's sentence. His description of the young Lindh sounds similar to one of any college-aged young man. "He reads a lot. Studies all kind of things. He's very bookish. He wants to get a degree in English literature."

But Brosnahan's practice is not all flashbulbs and death threats. The cases he chooses are limited only by the boundaries of what he finds interesting — which is basically everything. He tells of a case involving a Redding doctor charged with doing unnecessary cardiac procedures. "They really bushwhacked him," he thunders. In preparation for this case, Brosnahan bought a few cardiology textbooks. As he helped halt the criminal case, he learned a few things about cardiology. "It was very interesting reading about plaque," he laughs. "I've gone to a totally different diet based on that case."

"One of the great benefits of this line of work is intellectual curiosity," he says. This is the key to Brosnahan's longevity and ability to endure. He claims to have had cases some might consider dull, but says, "They're not dull to me." Brosnahan charges into each case, each day confident that something will pique his interest. And since he is focused on clients rather than causes, he is able to easily move on to the next challenge, regardless of the outcome. "I know who I am," he says. "I'm a trial lawyer."

As for representing unpopular clients and cases, Brosnahan stays philosophical. "There are people who represent people who are despised at the moment [of their trial]. You know, I thought about this a lot during [the Lindh] case; there are a lot of public defenders who do that every day."

Brosnahan has been married for 47 years. His wife is an Alameda County Superior Court judge. They met at Harvard Law School. His children are grown and secure in their careers. Pictures of grandchildren dot his office, which is why he is concerned about the future. "Attitudes toward law and order have changed dramatically in this country. I don't know where it's going," he says. "It could get a lot worse. We have a war that never ends and could be stuck on this psychology forever.

"There's an authoritarian streak that's flowing right now and it's very scary," he says. During the Reagan/Bush-era Iran-Contra scandal, Brosnahan targeted then-Secretary of Defense Caspar Weinberger whose role in the scandal involved withholding evidence. Weinberger refused to give his detailed day-by-day notes to prosecutors. "He kept copious notes of every step [of Iran-Contra]," Brosnahan says. "He should have made them available when they were subpoenaed. He had them right in [his] office, but the concern was that Reagan would be impeached. The secretary of defense should know better than that."

During this time, opposition tried to accuse Brosnahan of playing politics. "They promoted me," he says, "from a minor Democratic contributor to the brains behind the Democratic party in California!"

Weinberger's defense attorney planned to call then-President George H. W. Bush to testify after his term ended on January 20, 1993. Somehow this information was deduced by the White House, Brosnahan says "... and now Bush, who had given 217 versions of where he was during Iran-Contra ...," made sure he wouldn't get subpoenaed. Prior to the end of his term, he pardoned six people, including Cap Weinberger. With that, the trial "'went away.'

"I wouldn't say I was bitter, but it left a bad taste," admits Brosnahan.

Brosnahan is a strong defender of lawyers, and he's appalled at the Bush administration's effort to damage trial lawyers. "I like trials, because trials have to do with what really happened," he says. "Politics has to do with the careers of politicians. Reality is only a starting point for politicians."

Brosnahan doesn't defend his profession as much as celebrate it. "I don't think you can have a democracy without a lot of very good trial lawyers," he says. "They're trained to stand on their feet and duke. You may be the president of the United States, but I don't agree with you."

He pauses to gather himself. "You're wrong, Mr. Bush! Wrong!"

CASINOS ON THE RESERVATION THE TROUBLE WITH TAKINGS

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The One That Got Away

"POST-PARDON DEPRESSION" FOR SAN FRANCISCO ATTORNEY JAMES BROSNAHAN, THE WOULD-BE PROSECUTOR OF CASPAR WEINBERGER

END

IT MIGHT HAVE BEEN THE TRIAL OF A CAREER FOR JAMES BROSNAHAN —AND THE SALVATION OF INDEPENDENT COUNSEL LAWRENCE WALSH'S RECORD. BUT THEN CAME THE PARDONS.

BY LARRY BENSKY

Left, James Brosnahan; right, Lawrence Walsh.

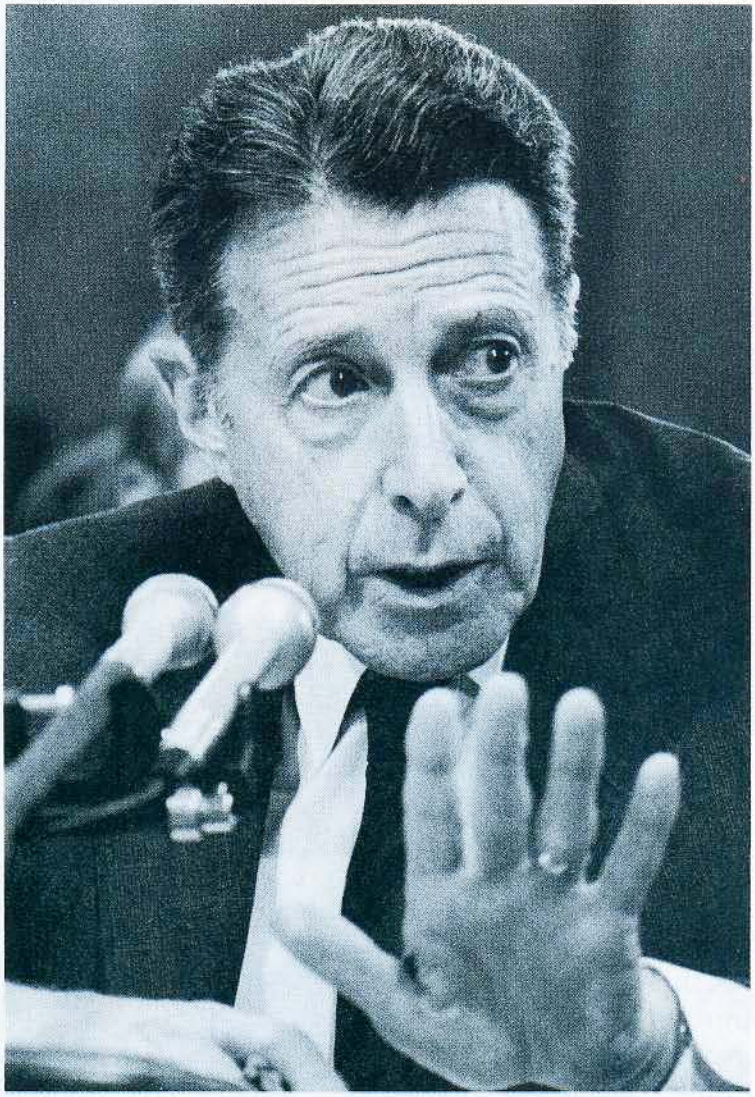
GAME

James J. Brosnahan didn't expect to be home for the new year. Yet here he was on Christmas Eve, back in San Francisco, far from the heavily guarded, claustrophobic confines of Independent Counsel Lawrence Walsh's office in Washington, D.C. Appointed only seven weeks earlier to prosecute Caspar Weinberger for the independent counsel's Iran-contra investigation, Brosnahan had been getting ready to go to trial January 5. But in a surprise move on Christmas Eve, George Bush pardoned six Iran-contra figures, including Weinberger. And Brosnahan was back in his San Francisco office.

Presiding over a packed press conference in one of Morrison & Foerster's conference rooms, Brosnahan in sorrow and in anger told reporters that Bush's pardon of Caspar Weinberger was "the worst possible precedent for the future. It's a blueprint for covering up misdeeds by powerful people in this country, and it's there for all people to study and use in the future."

The Christmas Eve pardons for Weinberger and fellow Iran-contra figures Elliott Abrams, Duane Clarridge, Robert McFarlane, Alan Fiers and Clair George,

Photo left: Ron Thomas/Bettman, Photo Right: Brad Markel/Gamma-Liaison



HARRY THUMMA/ASSOCIATED PRESS

Caspar Weinberger, Walsh's last big-name defendant.

seemingly put an end to Walsh's six-year-long series of prosecutions, which some prominent Republicans have condemned as being not about justice, but about politics—"the criminalization of policy differences," according to Bush. Weinberger and his attorneys have long claimed that Walsh is a "vindictive wretch" on a personal crusade; Brosnahan has always countered with a firm denial. "Politics has got nothing to do with this case—zero, zilch," he says.

But despite the presidential pardons and the drumbeat of condemnation, Iran-contra seems destined to be the scandal that will not die. Just hours after the pardons were announced, Walsh, from his home in Oklahoma City, and Brosnahan, in San Francisco, startled the nation with references to new documents recently discovered in the case—notes written by none other than President Bush himself, offered by the White House to the independent counsel on December 11. Because of those notes, Walsh indicated that Bush himself had now become a "subject" of his investigation.

For the next few days, Brosnahan's phone doesn't stop ringing. Does he think President Bush will be indicted for withholding the same kind of information—personal notes on Iran-contra—which formed the basis of the case against former Secretary of Defense Weinberger? Will the president try to fire the independent counsel and precipitate a Watergate-style constitutional crisis? Should the incoming Clinton Administration get involved? Brosnahan remains circumspect. Except about President Bush. "He can't pardon himself," Brosnahan says vehemently. "The pardon was not intended to be granted by a man who himself was involved in the very facts of this case. This was a preemptive strike to avoid trial."

For Brosnahan, preparing for the aborted trial was an exercise in frustration. "I'm used to it, because cases settle," he says. "But I had a feeling that the country needed this trial. It was important to establish that if the secretary of defense lied to Congress, that was illegal and inappropriate conduct."

It would have been an all-star trial, featuring a parade of prominent Reagan-Bush era political figures. Witnesses who had been scheduled to testify for the prosecution included Senators George Mitchell and Willam Cohen of Maine, Chairman of the Joint Chiefs of Staff Gen. Colin Powell, former White House Chief of Staff Donald Regan and several CIA officials. Reservations for the 42 media seats in the courtroom had already been allocated, with a long waiting list for latecomers. It would have been Brosnahan's major moment of national exposure.

Brosnahan seems rueful, joking about his "post-pardon depression," and he is already nostalgic about his Washington experience. But for him, the Christmas Eve pardons were a political as well as a personal disappointment. It was a "sad, sad day," he says. "I hope that we don't see 10, 25, 40 years from now somebody who's powerful and who wants to cover up what they did use the pardon power in this way."

Brosnahan, a partner at Morrison & Foerster since 1975, hadn't prosecuted a case since 1966, when he ended a five-year stint as assistant U.S. attorney in Arizona and San Francisco. His friend John W. Keker, who prosecuted Oliver North for the independent counsel's office, expected Brosnahan would "not have any trouble at all" switching back to the prosecution side of the courtroom. By Brosnahan's own count, his trial record now stands at 115 victories, eight defeats...and one pardon.

Brosnahan, 58, has represented defendants who faced such diverse charges as patent fraud, money laundering, libel, murder, manslaughter, product liability and savings and loan fraud. He has written the book on trial law: the *Trial Handbook for California Lawyers*. A past president of the Bar Association of San Francisco, he also has been a strong advocate of pro

Larry Bensky is national affairs correspondent for Pacifica Radio. He covered the Iran-contra hearings and the trial of Oliver North, and was awarded a George Polk award for his work. Research assistance for this article was provided by Nina Schuyler and Sharon Donovan.

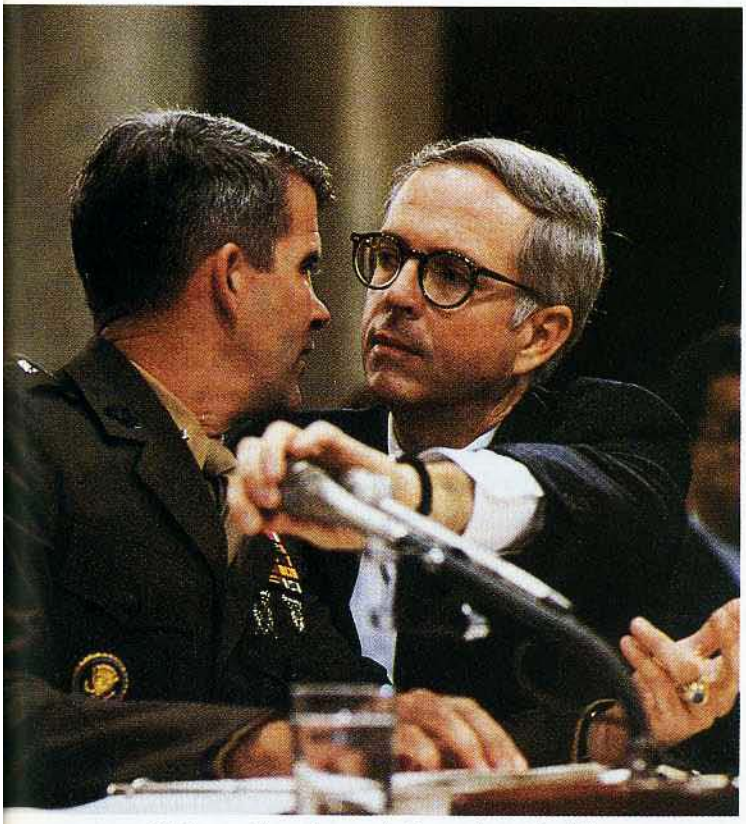
bono work, taking on major cases such as the Arizona sanctuary trial in 1985-86. His most famous previous moment came in 1986, when he accused William Rehnquist, then before the Senate as nominee for chief justice, of harassing minority voters at a Phoenix polling place in 1962.

"He's a great trial lawyer," says Keker, of Keker, Brockett & Van Nest in San Francisco. "Like the best of the English barristers, he can operate on either side of the table." Keker, who refuses to discuss reports that he was offered the Weinberger prosecution himself, recommended Brosnahan to Walsh. "I suggested to him that he couldn't find any better lawyer in the United States for virtually any trial task."

A CRUSADE AGAINST REPUBLICANS

EVEN WITHOUT the eleventh-hour pardon of Weinberger by President Bush, Brosnahan's prosecution of the former defense secretary seemed doomed. In the six years since the Iran-contra scandal exploded, Walsh had obtained few meaningful convictions, thanks partly to congressional bungling, legerdemain by the defense, hostile appeals courts and dubious prosecution tactics and strategy. With or without a conviction, however, the Weinberger trial would have been a major event in the Iran-contra investigation—not only as an attempt to resurrect Walsh's reputation, but to bring fresh air into the stale confines of the whole Iran-contra affair.

As Weinberger, Bush and Senate Minority Leader Robert Dole so strongly stressed in their statements just after the presidential pardons, Republican partisans believe that the Walsh investigation had become a political vendetta—and that, in fact, it provided the 1992 presidential race with what amounted to the Democrats' own "October surprise."



Oliver North and Brendan Sullivan. North's conviction was overturned on appeal.

DENNIS BRACK/BLACKSTAR

IT WASN'T JUST THE TIMING OF THE INDICTMENT THAT SEEMED POLITICALLY MOTIVATED; THE BROSNAHAN APPOINTMENT ITSELF RAISED EYEBROWS.

On the last business day of the month, just four days before the presidential election, the independent counsel's office issued a supplementary count in the indictment against Weinberger alleging that he made false statements to Congress in connection with its investigation into the Iran-contra scandal. Among the count's footnotes appeared evidence that then-Vice President Bush had not, as he had insisted, been "out of the loop" on the controversial decision. The "bombshell" note, contained among a reported 1,700 pages of such jottings by Weinberger, summarized a January 7, 1986, meeting at which the defense secretary annotated his account of the missiles-for-hostages deal with a list of supporters and detractors, adding, "VP favored."

But even had the case gone to trial, there would have been no courtroom reference to the "bombshell" concerning Bush, since Weinberger would not have been tried on the supplementary count. A mid-December decision by U.S. District Judge Thomas F. Hogan ruled that the October 30 charge violated the statute of limitations and improperly broadened the original indictment.

This gave further ammunition to those who, like Robert Dole, charge that 81-year-old lifetime Republican stalwart Walsh is engaged in a "high-cost, low-result crusade against Republicans." Walsh, it would seem, was at best self-destructively unsophisticated when, communicating with Brosnahan by phone and fax from his home in Oklahoma City, he signed off on the suspicious timing of the Weinberger charge.

It is not the least of the ironies in Walsh's long effort that Republicans who had been using his purportedly unsuccessful work as a pretext for abolishing the independent counsel's office reiterated their request that an independent counsel be appointed to investigate the timing of the October 30 count against Weinberger. Outgoing Attorney General William Barr refused that request in mid-December, but announced that his lame-duck Justice Department's criminal division would investigate further—leaving the possibility that another "bombshell" announcement might detonate before the Republican administration departs.

'THAT SAN FRANCISCO LAWYER'

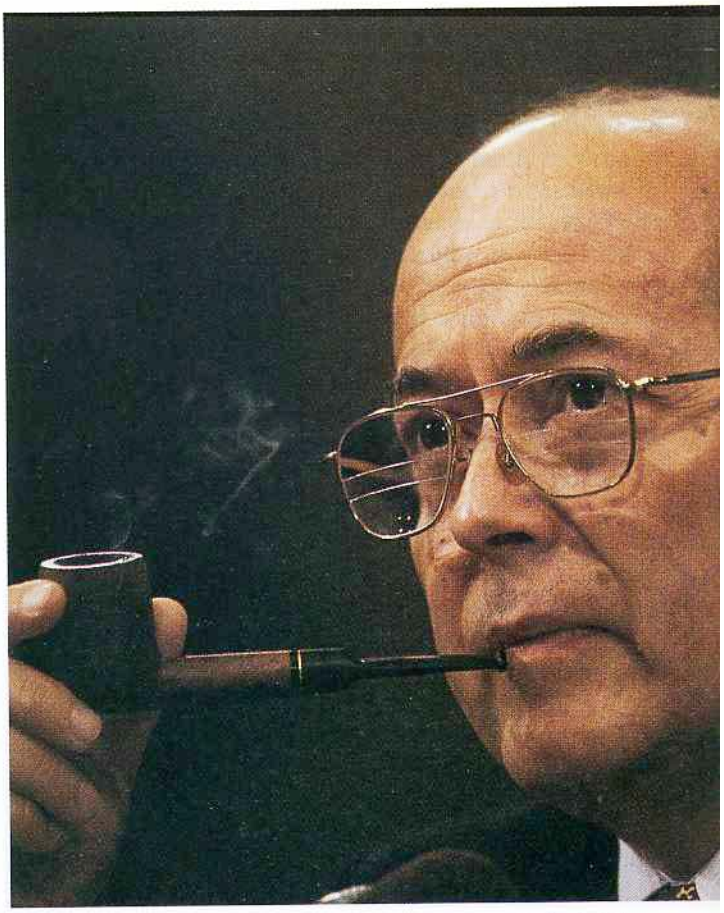
IT WASN'T just the timing of the indictment that seemed politically motivated. The Brosnahan appointment itself raised eyebrows. Republican partisans noted Brosnahan's history of Democratic Party activism, including campaign contributions to Clinton. Vice President Dan Quayle attacked "that San Francisco lawyer," while other administration apologists began more loudly floating the idea of presidential pardons for Iran-contra defendants. Advocates of the idea warned that Bush couldn't selectively excuse Weinberger, and detractors cautioned that a blanket pardon would discredit the Republican Party. But Bush, in pardoning Weinberger and the others, made a distinction between those who "did not profit or seek to profit from their conduct," and five other Iran-contra defendants, including retired Air Force Maj. General Richard Secord, who had been found guilty and have not been pardoned.

Weinberger told the press that he had "become a pawn in a clearly political game, as is shown by the return of the indictment only days before the presidential election." He called the charge "a grotesque abuse of the prosecutorial power." However, Brosnahan didn't see it that way. "The four remaining false statement and perjury charges against Weinberger, felonies that carry maximum penalties of five years in prison and $250,000 in fines, make this a case about government, how it works, how it's supposed to work, and whether it did or didn't work within these counts," he says.

Now, after the pardons, Brosnahan is still adamant about the nature of the prosecution. "Our case was breathtakingly simple," he says. "It had nothing to do with policy. It had nothing to do with politics. It had to do with the secretary of defense being asked questions and giving answers which the grand jury found were false. That was the case."

And Walsh's work in prosecuting the Iran-contra deceptions, Brosnahan says, is basic to what people have a right to expect from government. Further, allowing such deceptions to continue would represent a danger to government's proper function. "I expect that most Americans want a straightforward, honest approach to government," Brosnahan says. "If you study the histories of great societies and read about the end of them, as in Greece and Rome, you'll find they reach periods when you can't get a straight answer from anybody."

Weinberger's chief defense counsel, Robert Bennett of the Washington office of Skadden, Arps, Slate, Meagher & Flom,



DENNIS BRACK/BLACKSTAR

John Poindexter's conviction—one of Walsh's highest-level successes—was overturned on appeal.

'WALSH HAS DONE AWFUL. HIS YOUNG ATTORNEYS LEAD HIM BY THE NOSE, AND HE SEES HIMSELF AS A PURITANICAL FIGURE.... HIS OFFICE IS AN OUTRAGE.'

is among those defense attorneys and politicians highly critical of Walsh's lengthy and expensive investigation, which has run up an estimated tab of $40 million to date. "The trouble with the independent counsel's office is that there are no checks and balances," says Bennett. "They have an unlimited budget and unlimited time. Too much depends on the integrity and judgment of the person who does the job."

WHERE WALSH WENT WRONG

ATTORNEY GENERAL William Barr and others question the need for an independent counsel's office at all. Since Congress passed the independent counsel statute in 1978 as a post-Watergate era reform (5 USC § 591 et seq), 11 counsel have been appointed, with seven concluding their work without indictment. Twenty-two other inquiries by the Justice Department—preliminary procedures before the attorney general requests a three-judge court of appeals panel to name an independent counsel—have ended without an appointment.

Walsh's Iran-contra investigation is by far the longest, most complicated and most expensive since the law's inception. And it has become the most controversial. Conservative critics think of the independent counsel's office as, in the words of columnist Thomas Sowell, "a strange and dangerous post" that has arisen out of a "history of congressional attempts to criminalize foreign policy they do not like."

Ironically, many of those who support the idea of strict prosecution of wrongdoing in Iran-contra—people who are neither defense attorneys nor politicians—think that Walsh's office bears part of the blame for the case's current stalemate. "I don't think Walsh was a great appointment," says Scott Armstrong, a former investigative reporter (and partner of Bob Woodward) at the *Washington Post*. Armstrong, the founding executive director of the National Security Archive, a nonprofit Washington research library that has chronicled Iran-contra since 1985, says that Walsh "has a metabolism from another century. He doesn't understand twentieth-century conspiracies, and has frustrated the hell out of the people around him as a result."

A defense attorney for one of Walsh's prosecution targets was even harsher, reviewing Walsh's performance on condition of anonymity. "Walsh has done awful," he says. "His young attorneys lead him by the nose everywhere. He sees himself as some sort of purist, a Puritanical figure cleansing government. His office is an outrage."

Other detractors point out the Walsh prosecution's scant productivity to date. Before Bush's pardon, there had been 10 convictions, of which seven were plea bargains, mostly on misdemeanors. One indictment was dismissed after Bush administration officials blocked release of classified information necessary for it to proceed. Of the four cases that went to trial, two resulted in convictions that were reversed on appeal; and one provided a conviction, after a retrial, on two felony counts. Only one, the conviction of former CIA officer and contra resupply functionary Thomas G. Clines on four tax-related felonies, resulted in a prison sentence. A recent split-verdict conviction of former CIA Operations Director Clair George on two felony counts did little to enhance Walsh's record. George was among those pardoned by Bush.

Walsh's office has responded to the criticisms in its latest interim report, citing the hundreds of thousands of documents, declassification experts from several agencies demanding review, noncooperation from the scandal's "most central figures" and a national security shield that placed "basic operational crimes" out of prosecutorial bounds. Acts committed during the coverup, Walsh concluded, were the only targets left. Plus, say many "Iran-contrologists," the immunity granted by Congress to key witnesses during the televised 1987 hearings scuttled most future lines of attack.

BROSNAHAN SAYS THE CASE HAD NOTHING TO DO WITH POLICY OR POLITICS. IT HAD TO DO WITH LYING.

Walsh's personality didn't help assuage critics. Walsh is no shrinking violet, having earned a nearly autocratic reputation during the 1970s, when he served as president of the American Bar Association. "I wouldn't have chosen Walsh," says Chesterfield Smith, himself a former ABA president, of Holland & Knight in Miami. "He's not open to discussion or to being convinced. Simply put, he's arrogant."

Walsh's Iran-contra prosecution team has been accused of operating with a similarly imperious air. Pamela J. Naughton, formerly an attorney with the House Iran-contra committee as well as a former U.S. attorney in San Diego, has less than fond memories of working alongside Walsh's staff attorneys as they conducted parallel investigations with congressional lawyers. "I think fundamentally there was an arrogance that what they were doing was much more important than what we were doing. And that we were just 'political people' getting in the way of their investigation."

Naughton, now a partner and litigator at the San Diego office of Baker & McKenzie, recalls a trip to Toronto to interview witnesses knowledgeable about weapons deals with Iran. "It was kind of funny. They sat in on our depositions, and they made us leave the room when they did *their* depositions! They tried to say it was grand jury material. And I said, 'What grand jury? We're in Canada!' They said they had grand jury material they were going to ask them about. And I said, 'Do you have an order allowing you to disclose grand jury testimony to these witnesses?' They were shocked that anybody on a congressional staff would have any idea of how a grand jury works."

Like others familiar with the investigation, Naughton wonders about Walsh's investigative work. "I never thought they had the right mix of agents to begin with," she says. "If I had been Walsh, putting this together, I'd have gone to Customs. So many of the violations had to do with the Arms Export Control Act, and also [with] taking money in and out of the country. I think there were a lot of currency violations that were never explored. I also saw as prosecutable carrying hazardous substances aboard aircraft...filing false flight plans... there were a lot of laws that were violated."

Scott Armstrong agrees that the investigations were unfocused, perhaps fatally so. "The FBI, for reasons that I think are more bureaucratic than they are conspiratorial, did a horrible job in the initial days of the investigation," Armstrong says. "[Investigators were] kind of selecting things randomly without any apparent understanding of what they were looking for, leaving behind things that had to be resought."

Armstrong, like Naughton, believes that Walsh's office failed to prosecute numerous felonies, as it bent to the pressure the Justice Department exerted to protect classified information. "False claims cases, submitting false bills, diverting money from the public treasury—they decided, as the Republicans would have them decide, that these were political questions, not criminal questions."

MISSING THE BIG PICTURE

AN INDEPENDENT counsel delving into sensitive areas faces inherent difficulties. Getting at the truth and keeping classified information secret can be mutually exclusive goals. David MacMichael is a former CIA analyst who has followed Walsh's prosecutions closely. "Clearly the federal courts tend to give great weight to claims of national security," he says. "And the tendency for things that get toward the policy arena is for the courts to declare them political areas into which the courts don't like to intrude. But one of the reasons that the federal courts don't like to intrude on these areas is that these are precisely the kinds of high crimes and misdemeanors that the people who put our country together established for impeachment."

Walsh's office should be less vulnerable to complaints of security breaches. It has been practically leakproof. Almost all of the attorneys and aides who've worked within the independent counsel's office have maintained confidentiality. Armstrong, who has lived and worked in leaky-city Washington since 1973, has a touch of awe in his voice when he says that Walsh's office has "been very discreet. It has not leaked or engaged in political shenanigans of the type that usually accompany these politically charged cases."

Armstrong believes the major failing of Walsh's office was to see that "there was a clear conspiracy to cover up things politically. They obviously believe, from the Weinberger prosecution, that [former U.S. Attorney General Edwin] Meese and [former Chief of Staff Donald] Regan were at the center of an attempt to prevent the impeachment of Ronald Reagan. Whether they lay this out in detail in their final report will be the judgment of how much we get for our money."

And so it all comes down, as it inevitably does in deep discussions of Iran-contra, to protecting the president. There are those, like Scott Armstrong, who believe that's what the Iran-contra scandal was all about anyway: all the president's men, deeply imprinted with memories of an earlier Republican administration going down in flames, trying to avoid Ronald Reagan's impeachment for an off-the-books weapons deal with Iran, via Israel.

"The main question here—which I don't think Walsh was equipped to understand—was, 'How does a sophisticated political coverup occur?'" Armstrong says. "I think Walsh was slow in understanding the extent to which this was an attempt to keep the president from being impeached. The way Walsh proceeds—following the trail of money, things like that—you never got to the bottom of anything, you keep trying to capture the butterfly and pin it to the wall as a perfect specimen, but you never get to the context in which it occurred."

As a result, critics say, Walsh missed the central violation: the president's approval of illegal arms sales and the subsequent coverup. "If you really look at the money flow, very little of it went to the contras," explains Pam Naughton. "The coverup really was about the [November 1985] HAWK missile shipment to Iran, via Israel. It was done without a finding [a violation of the Hughes-Ryan Amendment], and it certainly was a violation of the Arms Export Control Act. It had been done through Israel, and Israeli stocks had to be replenished. And those records, as I recall... some of them had been destroyed."

WHAT THE NOTES MIGHT REVEAL

THE RECORDS question is what brings the story back to Caspar Weinberger, taker of notes, and opponent—yet executor—of the arms-for-hostages policy. "Obviously, if we had gotten his notes," says Naughton, who wrote the original letters from the congressional committees requesting Weinberger's notes and diaries from the Department of Defense, "the questioning would have been much, much different. The whole question of arms transfers, and replenishment of Israeli stocks, were key issues."

But the independent counsel's office now does have access

(Continued on page 91)

Weinberger

(Continued from page 42)

to Weinberger's notes, as well as to an undetermined selection of Bush's chronicles of the affair. That makes some people wonder if there is evidence in those notes that Reagan's impeachment might have been possible, and that Weinberger and Bush were part of a conspiracy to block that impeachment. "Mr. Reagan had said that he could live with the illegality, but not the hostages," says MacMichael. "Mr. Weinberger ultimately was the responsible officer to release these weapons (to Iran and Israel with CIA assistance). The *real* substantive charge—and it's interesting to me that it's not being pursued—is that here's the secretary of defense, who knows, on the advice of his own counsel, that the delivery of these weapons under the conditions proposed would be illegal. He's the responsible officer for the delivery of these arms into CIA custody. And he goes ahead and does so—in other words, knowingly commits an illegal act.

"His courses were very clear at the time of his meetings. He could not lawfully consent to commit an illegal act simply because the president preferred that it go forward. His only legitimate course was to refuse to do so and be fired, or to refuse to do so and resign."

Whether Bush ends up firing Walsh, or whether Walsh attempts to indict Bush, the fate of independent counsels in general is uncertain. The independent counsel statute has been allowed by Congress to expire, after members of the Bush administration began to hint that wrongdoing by Congress ought to come under any future independent counsel law. President-elect Bill Clinton has expressed support for reauthorization of the law. In its final days in office, the Bush Justice Department did in fact appoint an independent counsel to investigate searches of Clinton's passport files during the recent election. But Attorney General Barr's refusal to request a special prosecutor for the Iraqgate investigation assures that the Washington policy debate will continue. And it may revolve around criticisms of Walsh for having indicted Weinberger in the first place and the pardon that ultimately wiped out that indictment.

In an era of financial strictures, with politicians in furious competition to seem frugal, the costs of Walsh's operation are a continuing focus for criticism. But at least one of Walsh's prosecutors thinks the attack on the expense of such prosecutions is misguided. Dan K. Webb, a former Illinois U.S. attorney and now capital partner and chairman of the litigation department at Winston & Strawn in Chicago, prosecuted John Poindexter on five felony counts, obtaining guilty verdicts that were later reversed on appeal. "If you took Iran-contra," Webb says, "and said that we shouldn't do a criminal investigation because it would cost too much money, and because the people you're going to indict may very well have been well-intentioned human beings who were simply committing crimes in order to help their president...if you said that on the front end, everybody would think you're crazy.

"Because what you'd be saying is that there are certain people so powerful you should never investigate them. When you do that, you destroy the letter of the law. And the reason is, you do not put a price tag on justice."

For Brosnahan, the independent counsel's work in the Iran-contra scandal had less to do with finances than with simple criminality. And he's disappointed not to be able to make that case to the American people. "Let me tell you how simple Iran-contra is," he told the packed press conference on Christmas Eve. "Six people sat around and decided to do this. And from that day to this they have been engaged in efforts to cloud the issue, to attack anyone who raises an issue about it, and to confuse people to the point where we will not understand the seriousness of it. When you get the secretary of defense and a vice president who is now president withholding notes on a subject, you can assume it is because they view it as terribly serious. And that's what happened in this case." ❖

MARQUEE LAWYERS

WHO GETS THE HIGH-PROFILE CASES?

THIS PAST YEAR'S HOTTEST CASES PUT THE SPOTLIGHT ON SOME OF THE BEST AND BRIGHTEST IN CALIFORNIA'S LEGAL PROFESSION. WE TAKE A LOOK AT WHO TOOK CARE OF THE BIG ONES—SHAKEUPS IN BASEBALL, SCANDALS IN SILICON VALLEY, AND, YES, BATTLES OVER DIGITAL RECORDING TECHNOLOGY—AND JUST WHY THEY WERE HIRED.

BY SUSAN E. DAVIS

Contributing writer Susan E. Davis is a freelance journalist based in the Bay Area. Her last article, "Business Travel Nightmares," appeared in the March issue.

Top: Mandel Ngan/AFP/Getty Images; bottom: Xing Xang Zhou

JAMES BROSNAHAN

The list of high-profile cases that Morrison & Foerster senior partner James Brosnahan has worked on over the years is long: As a U.S. Attorney he prosecuted former defense secretary Caspar Weinberger for his role in the Iran-Contra conspiracy (before Weinberger's executive pardon). As a defense attorney he has represented Michael DeDomenico, in one of the largest single-year tax-evasion cases ever filed in California; Arizona religious groups sheltering Central American refugees; Irish nationalist Kevin Artt, convicted of murdering a prison warden; and John Walker Lindh, the young American who fought for the Taliban in Afghanistan.

Brosnahan's passion and commitment made him a natural to represent Patricia Dunn, the former Hewlett-Packard chair who was recently indicted for her role in an investigation of a board leak to journalists that relied on unethical—if not illegal—methods.

The leaked information concerned HP's long-term business plans. The methods used by the outside investigators to discover the source of the leaks included "pretexting"—investigators impersonated board members, employees, and journalists to get copies of their telephone records. These methods, though perhaps not illegal (as eavesdropping or recording clearly would be) are certainly distasteful. (Then–Attorney General Bill Lockyer, in fact, described the tactics used as both "colossally stupid" and "stupid cubed.") But they are par for the course in some corporate circles and are usually considered very effective.

Dunn, one of four HP execs who faced felony counts in the matter, claims she had been told pretexting was legal. And

"Most of these white-collar crimes shouldn't even be criminal cases," says Cris Arguedas.

James Brosnahan (right) got all charges dropped against former HP Chair Patricia Dunn after the company used pretexting to investigate leaks from its board.

Brosnahan maintained that the media had greatly overblown Dunn's role in the scandal. "In the United States we tend to have electronic executions of people even before any evidence comes in," he said in February. "In this case, the fact that we had so many excited utterances about Pattie Dunn early on was not accidental."

In mid-March all of the charges against Dunn were dismissed. Brosnahan was exultant. "Her ordeal with the courts is over," he said. "We had been working on convincing the attorney general's office for weeks that the case should be dismissed … and the judge finally agreed."

Brosnahan himself doesn't pull punches. Known for his support of unpopular causes, Brosnahan on several occasions has been accused of further politicizing his already-political cases. Conservative critics charged, for instance, that he and independent prosecutor Lawrence Walsh indicted Weinberger just days before the 1992 presidential election—and released damaging evidence about just how much George Herbert Walker Bush knew of the arms-for-hostages deal—to swing voter sentiment. And his defense of Lindh (who eventually entered a plea bargain and is serving a 20-year sentence) led the *National Review* to label Brosnahan the "American Tali-Lawyer." But when it comes to criticism, Brosnahan can give as good as he gets. In late February, after HP board member Tom Perkins publicly alluded to Dunn as the cause of HP's problems, Brosnahan issued a statement calling Perkins both "cowardly" and "a bully."

Brosnahan seems to thrive on just these sorts of confrontations. "I knew I wanted to be a trial lawyer in law school," he says. "And I knew I wanted to work on interesting cases. My very first trial was a first-degree murder case. Since then … I've been doing what I like."

CRIS ARGUEDAS

Cris Arguedas, of Berkeley-based Arguedas, Cassman & Headly, is widely considered one of the finest defense attorneys in the nation, with clients ranging from former Oakland

Top: Mandel Ngan/AFP/Getty Images; bottom: Xing Xang Zhou

Raider Darrell Russell (who faced sexual assault and rape charges in 2002) to former U.S. attorney general Ed Meese's associate W. Franklyn Chinn (in the Wedtech defense-contracting scandal). Other notable clients have included Nancy Heinen (former Apple general counsel) and Timothy Belden (the chief energy trader for Enron). One of the most famous anecdotes about Arguedas is that during her mock cross-examination of O. J. Simpson, he performed so badly that his attorneys decided to keep him off the stand.

"We're the cavalry," Arguedas says. "When people get into really serious trouble, they come to us because they know their problem will become our top priority." So when Ann Baskins, general counsel for Hewlett-Packard, got drawn into the HP spying scandal, she chose Arguedas to represent her.

John Keker (right) helped negotiate a reduced sentence for former Enron Corp. CFO Andrew Fastow.

Arguedas says she likes complicated cases—and the challenge that when she presents them to the jury, "the cases have to seem simple." But the fact that a particular matter may have become high profile "is not a plus," she says. Nor is the fact that a case may be one of the dozens of white-collar criminal cases flooding the courts these days.

"I think most of these white-collar crimes shouldn't even be criminal cases," she asserts. "A lot of times you've just got U.S. Attorneys who are making a name for themselves or they're trying to apply today's rules to practices that occurred five, six, or seven years ago. It's unbelievably unfair. These people weren't selling drugs or hitting people over the head. They're just doing their jobs, living their lives."

Arguedas represented Baskins before the U.S. House Committee on Energy and Commerce, where Baskins invoked her Fifth Amendment right against self-incrimination when asked about the scandal. In documents filed with the committee, Baskins said that she, too, had been told that pretexting was legal, but that she wished, in hindsight, she had "more actively inquired about the methods being used and taken steps to halt any that were inconsistent with HP's high ethical standards."

JOHN KEKER

Much has been made of litigator John Keker's experience as a Marine platoon leader in Vietnam; he himself emphasizes it when recounting his life story. "What's absolutely necessary in combat is to overcome fear, to act well under pressure, to be alert and focused, to take care of the people who are fighting with you, and to make no mistakes," he told the *Yale Law Report* last year. "That self control and control of your performance is something that you have to do in a trial."

That war mentality is also just what a client might need if he or she were involved in one of the hottest corporate cases of the past several years—like, say, Enron. Andrew Fastow, the firm's former CFO, retained Keker after it came to light that he had engineered multiple "special purpose entities" to transfer Enron's debt to outside companies, inflating the firm's value on the stock market. His deals earned a lot of money for a lot of people (including himself). But when Enron's financial house of cards collapsed in 2001, it left the firm bankrupt and thousands of employees bereft of jobs (and pension incomes). It also left Fastow facing 98 criminal counts, including conspiracy, fraud, insider trading, and money laundering.

As a litigator, Keker, of San Francisco's Keker & Van Nest, is known as "relentless," "fearless," and "deadly." He has represented a number of high-profile clients in high-profile cases, including Google (against Microsoft), Genentech (in a $300 million patent dispute with Chiron), and Xilinx (in its patent suit against Altera). Earlier in his career he was the chief prosecutor in *United States v. Oliver North* in the Iran-Contra investigation; his criminal-defense clients have included Wall Street banker Frank Quattrone, attorney Patrick Hallinan, and one-time Black Panther Eldridge Cleaver.

Keker helped arrange a plea bargain for Fastow, in which Fastow received a reduced sentence for helping U.S. Attorneys understand the accounting chicanery that occurred at Enron. And help them he did: Fastow's 1,000 hours of what one U.S. Attorney termed "unflappable, remarkably consistent" testimony helped the government to convict former Enron chief executives Jeffrey K. Skilling and Kenneth L. Lay, as well as recover billions of dollars from Enron's banks.

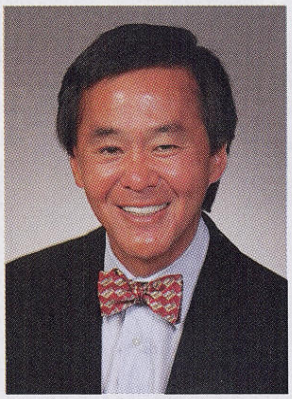
Keker, who has a reputation for being gruff, does have a softer side. He showed it at Fastow's sentencing hearing, when he told the judge that he had seen Fastow grow "from a man in denial to a man who has faced up to what he has done and became disgusted by it and recoiled and has been trying to fix it ever since, from a man who made excuses to a man who is desperate to make amends, from a man running from his mistakes to a man who is now cataloging them because he thinks it will help bring justice both in the criminal cases and [to] the victims."

The judge ended up reducing Fastow's sentence from ten years to six.

Top: courtesy of Morgan Chu; bottom: David Paul Morris/Getty Images

David J. Phillip/AP Images

MORGAN CHU



"I'm a hound for the facts," says Morgan Chu, a fan of complex cases.

Morgan Chu's notoriously relaxed demeanor with both colleagues and jurors belies a penchant for legal and technical complexities. Genetics may be involved—he has one brother who won a Noble Prize in physics and another who teaches biochemistry and medicine at Stanford. Chu himself managed to talk his way into UCLA—after dropping out of high school—and then went on to earn a BA in political science, a PhD in urban studies, and both a JD and an MSL. Yet attitude also clearly plays a role: Despite years of book learning, Chu still thinks of himself as a student.

"I like complicated cases because I get to sit down with really smart people, have them teach me about what they're doing, and make them answer all my dumb questions," he says modestly. "First I'm learning about phased-ray radar systems, then I'm learning about biotech and some new drug that can kill cancer cells. I'm a hound for the facts."

That sort of interest in complexity made Chu, a partner at Irell & Manella, a natural to represent TiVo in the lawsuit it launched against EchoStar Communications in 2005. TiVo, which pioneered the digital devices that allow television viewers to record one show while watching another (as well as rewind and replay live shows), sued EchoStar because, TiVo claimed, EchoStar's subsidiary, satellite TV provider Dish Network, had used TiVo's "time-warping" software in its own set-top boxes, infringing on the patent.

Chu is also well known for the giant sums he tends to get for his clients (for example, a $1 billion settlement for the plaintiff in *Texas Instruments v. Samsung*, and a jury verdict of more than $500 million in *City of Hope v. Genentec*). Yet even with Chu on board, the TiVo case seemed like a long shot to some legal analysts. Many observers assumed that not-yet-profitable TiVo launched the lawsuit solely to get cash flowing—whether through a verdict or through licensing fees to other cable outfits whose customers wanted TiVo-like services. Chu himself likened his small client to a "David against many Goliaths." But within two weeks the trial ended and the Texas jury awarded $73.9 million in damages to TiVo. EchoStar has both countersued and appealed the verdict.

"It has been a little more complicated than most patent cases," Chu concedes, chuckling. "But we're having a good time."

Mark Geragos (right) is drawn to civil contempt cases, such as Greg Anderson's for refusal to testify in a BALCO investigation.

MARK GERAGOS

Who do you turn to if you're accused of illegally distributing steroids and laundering money—and you're being connected to major professional athletes such as Barry Bonds, Marion Jones, and Jason Giambi?

Greg Anderson, one of the primary distributors for the Burlingame-based Bay Area Laboratory Cooperative (BALCO), originally retained Tony Serra for his case. Serra crafted a plea bargain in which Anderson pleaded guilty to illegal steroid distribution and money laundering. In October 2005, Anderson headed off to prison for four months, figuring that would be the end of the matter. In April 2006, however, the feds subpoenaed Anderson to testify before a grand jury investigating whether or not Barry Bonds perjured himself when he testified he hadn't taken steroids.

Anderson refused, saying his original plea bargain specified that he wouldn't have to help the government. But with Serra behind bars for willful failure to pay federal taxes, Anderson turned to defense attorney Mark Geragos, who in recent years had defended some of the biggest criminal cases around.

Geragos gladly took on Anderson's case. "I have an affinity for civil contempt cases," he says, "because they bring up such fascinating issues. Most of my criminal clients will do anything to stay out of jail. Civil contemnors believe they're adhering to a principle, and they're willing to be imprisoned for it."

After serving three months for his original criminal conviction in the BALCO steroid case, Anderson was sent to jail at the Federal Correctional Institute in Dublin for refusing to testify before the second grand jury. He was released two weeks later, when the grand jury session ended. But when the government convened a third grand jury and again subpoenaed Anderson as a witness, he refused to go, was found in contempt, and was imprisoned for a third time. Geragos got Anderson released for six weeks through an

Top: courtesy of Morgan Chu; bottom: David Paul Morris/Getty Images

David J. Phillip/AP Images

appeal to the Ninth Circuit. However, Anderson was subsequently sent back to prison for a fourth time. He could stay there for the duration of the third grand jury—which could be until February 2008.

Geragos's first major case was defending Susan McDougal, in the Whitewater scandal in 1992 (she was convicted and imprisoned before Geragos represented her; he won acquittals for her in both state and federal court, and then went on to win an end-of-term pardon from President Clinton). From that trial, Geragos's career snowballed into one high-profile case after another: He defended Winona Ryder against shoplifting charges; won a dismissal of the felony kidnapping, arson, and criminal-threats charges against hip-hop star Nathaniel Hale, a.k.a. Nate Dogg; won dismissal of alcohol-related counts against Bill Clinton's brother, Roger Clinton Jr.; led federal class actions against two life insurance companies for not paying out on policies issued to Armenians that had been written before and during the genocide by Turkey during World War I; and simultaneously defended Michael Jackson in the early stages of his molestation charges and Scott Peterson when he was charged with killing his wife and unborn child.

Geragos says he loves being in court. "There's nothing better," he says. "Aside from my children, I have no hobbies." He also says he's become immune to the media frenzy his cases set off, but that he's been pleasantly surprised at the reporting on the BALCO scandal. "I think the reporters have gotten the issues better than they do in most cases," he says. "I think there's an element of 'there but for the grace of God go I.' "

RICHARD MARMARO

Although relatively new to the glittering world of high-profile cases, Richard Marmaro, head of Skadden, Arps, Slate Meagher & Flom's SEC enforcement and white-collar defense practice on the West Coast, has, during the past 20 years, represented clients in matters relating to insider trading, accounting and disclosure irregularities, stock-option backdating, market manipulation, financial fraud, sexual harassment, and wrongful termination. He's considered bold and aggressive—some even refer to him as brilliant.

But Greg Reyes had never heard of the ace litigator when he was charged in Brocade Communication's stock-option investigation in 2006. When Reyes, who by then was no longer Brocade's CEO, started talking to friends and colleagues about who might represent him,"Richard's name kept coming up," he says.

As an attorney who especially enjoys representing "the underdog" against the government, Marmaro gladly took on Reyes's case. "This is a classic example of the government turning innocent business conduct into securities fraud," he says.

Richard Marmaro likes defending "underdog" white-collar clients against accounting-fraud charges he considers overblown.

Nick Ut/AP Images

Reyes is under investigation for Brocade's practice, during the dot-com boom, of "backdating options"—or giving employees stock options dated to a day when the stock price was particularly low. This practice, which was common among Silicon Valley firms competing for workers in the late 1990s (and is perfectly legal if reported accurately in the company's financial statements), can make an employee a lot of money when the stock hits a high. But the practice can muddy up profit-and-loss statements unless it's accounted for properly. Reyes and Stephanie Jensen, the company's former VP of human resources, are the first executives to face criminal charges (for securities fraud) in the backdating scandals that are now sweeping Silicon Valley. Both also face civil SEC enforcement actions.

For Marmaro, who worked as an assistant U.S. Attorney for four years in the early 1980s, this is a clear case of the feds overstepping their bounds. "At worst, what happened in Brocade is that technical accounting rules may not have been followed," he says. "Books and records may have been incorrect. The government has turned that into a securities-fraud allegation."

In an unusual move, Marmaro filed a summary judgment motion in the case, saying that all charges should be dropped because no one benefitted from the backdating practice. "Ninety-five percent of the options at Brocade were never exercised," he says. "This whole mess is about a hypothetical accounting statement."

That's a bold argument, and one that may or may not sway U.S. District Judge Charles Breyer. But in the past, Marmaro has succeeded using just that legal strategy. In the past five years, federal judges have dismissed on summary judgment—a highly unusual result—lawsuits brought by the SEC against two of his clients (first, former Fidelity National Financial director J. Thomas Talbot and then former Gateway CEO Jeffrey Weitzen). "I tried to convince the government not to file," Marmaro says, "but they didn't listen."

Reyes, who confesses to having been "extremely disoriented by the Kafkaesque nature of the internal investigations," calls Marmaro the "one blessing in this entire nightmare. He's brilliant, he's principled, he's tireless, he's aggressive, and he believes in me. I sleep well at night knowing that Richard is representing me." CL

THE RECORDER

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Labor woes going global

JASON DOIY

WON IN TRANSLATION: Morrison & Foerster partners James Brosnahan and Wesley Overson represented a scientist in a tussle with a Japanese company over Russian engineers.

By Marie-Anne Hogarth
RECORDER STAFF WRITER

A Japanese company fighting over Russian engineers in a California courtroom?

That's no longer a surprising scene. International employment disputes are becoming a common occurrence in Silicon Valley, as high-tech companies with global operations fight over key personnel. The high-stakes fights often fuel two-front wars over the meaning of non-compete clauses and allegations of trade secret theft.

Last week, in a case that one lawyer likened to the plot of a "bad Russian spy novel," a Santa Clara County judge sided with Javad Navigation Systems in a dispute with Topcon Positioning Systems over 40 Russian engineers.

Javad Navigation is a California company owned by Javad Ashjaee, who splits his time between Saratoga and Moscow. Topcon had purchased Ashjaee's Moscow-based global positioning satellite business only to see 40 employees migrate to a new Ashjaee-owned enterprise.

The dispute comes on the heels of the much-publicized tussle between Microsoft Corp. and Google Inc. over a former Microsoft employee that Google had tapped to head its research lab in China. Earlier this year, a federal judge stayed Google's suit, initially filed in Santa Clara County, pending the outcome of a similar suit in Washington state.

Yahoo, meanwhile, has tangled with small rival Nuance Communications Inc. over the employment of 13 engineers in Menlo Park and Canada.

Because the knowledge these workers possess may be key to maintaining or establishing a competitive advantage, rivals are willing to go to great lengths to win.

"Both sides spent hundreds of thousands of dollars," said Morrison & Foerster partner Wesley Overson, who, along with partner James Brosnahan, represented Javad in the Topcon spat.

The individual engineers, with expertise in a Soviet-era space-based navigation system, "make a small fraction of what was spent to hold onto them," Overson said.

Topcon was represented by Keker & Van Nest partner Robert Van Nest. After some squabbles, three of the Moscow-based employees with U.S visas flew to San Francisco for depositions.

Overson said Van Nest also hired a Russian-speaking Chadbourne & Parke lawyer in Moscow to depose one engineer there.

Overson said his firm asked the judge to bar the Russian engineer's testimony since it was recorded by the Chadbourne lawyer's secretary, apparently because no California court reporter was available to record the testimony there. Van Nest declined to discuss any of the particulars of the dispute.

Because California's public policy is generally hostile to non-compete clauses that can restrict employee mobility, it's a preferred venue for companies accused of hiring workers despite a non-compete clause, or, as in Ashjaee's case, a non-solicitation clause.

Because other jurisdictions look more kindly on non-competes, it's common to see dueling suits in different venues.

It can be an expensive proposition.

"The client always has to ask itself, 'Am I prepared?'" said Ulrico Rosales, an employment law partner at Wilson Sonsini Goodrich & Rosati. "Is this hire significant enough to be potentially fighting in two jurisdictions?"

Often the answer is yes.

"This is the world we now compete in," said Rosales. "As people try to get traction in these locations, like China or Bangalore, they are prepared to [do what it takes] to get traction, and that includes investing money in talent and fighting for talent."

But more often than not, he said, rivals are able to reach out-of-court compromises.

"I have advised over 150 clients on these issues," added Rosales.

"For every one that makes it to the courts, there is probably 50 that don't."

U.S. employment lawyers say that resolving international disputes often requires bringing in foreign attorneys to discuss possible remedies.

"We've received numerous calls from U.S.-based clients who are concerned about some kind of activity abroad, either by their own employees or their competitor raiding their employees," said Frederick Baron, an employment law partner at Cooley Godward in Palo Alto. "These situations are often tricky and difficult to find a legal remedy in the U.S. legal system."

Some firms, like Paul, Hastings, Janofsky & Walker, say they are gearing up to handle more international employment issues.

"International employment law has become huge," said partner Nancy Abell, who chairs the employment law group there. She said the 185-lawyer group is looking to add to the 10 lawyers it now has who are well-versed in international employment law.

Abell pointed to Erika Collins, recently promoted to partner in the New York office, who coordinates employment matters for clients in more than 60 countries.

Some employment lawyers think the job isn't going to change much.

John Fox, a partner at Manatt, Phelps & Phillips, said he wrote a book on labor law in Canada, Mexico and Europe back in the 1970s. He hasn't bothered to update the book, he said, having grown to believe that one person can't be an expert in the law of many countries.

"In my youth, I was crazy," he said.

Reporter Marie-Anne Hogarth's e-mail address is mhogarth@alm.com.

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