

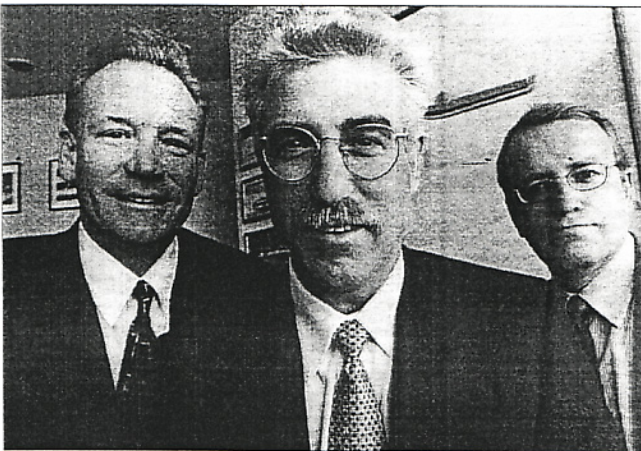
VERDICTS & SETTLEMENTS

SUPPLEMENT TO THE LOS ANGELES DAILY JOURNAL AND SAN FRANCISCO DAILY JOURNAL • FRIDAY, MARCH 26, 1999

Jury was Able to 'See Through' Disability Claim

In June 1994, Carole Sacks Allen, her father, Sheldon Allen, and their law firm were sued for legal malpractice by their former clients, Rodolfo and Isabel Ramirez. Although Allen was dismissed from the case a year later she claimed that the lawsuit spanned such severe emotional distress that it precipitated the onset of a medical condition called lupus, which has permanently disabled her from the practice of law. In July 1996, Allen brought a malicious prosecution action against her former clients and their second attorney, David Drexler, alleging that the legal malpractice suit against her was filed unreasonably and without probable cause. Additionally, Allen contended that as a result of the legal malpractice action, she suffered severe stress, aggravation of an asthma condition and the activation of systemic lupus, which led to brain damage and permanent disability. However, defense counsel in this case were able to obtain a directed verdict as to the Ramirezes and a unanimous defense verdict as to the attorney David Drexler. Jonathan B. Cole and Jon D. Robinson of Nemecek & Cole in Sherman Oaks represented all of the defendants prior to trial. Before the trial, Cole brought in James J. Kjar of Reback, Hulbert, McAndrews & Kjar in Manhattan Beach to represent David Drexler. After the judge granted the motion for directed verdict in favor of the Ramirezes, Cole and Robinson were associated back to join Kjar as David Drexler's attorneys. In discussing jury selection, Cole explains the defense counsel's strategies and how they led to the defense verdict in the case. "The first jury that walked in, we took them, and he (plaintiffs counsel) dinged them. I think we peremptory challenged one juror. Our thinking was... I had this basically young female litigator who was essentially telling her peers that getting sued and being a defendant for one year in a case where she had little or no involvement in defending the case, which cost her no money and from which she was voluntarily dismissed, caused the exacerbation of a purported medical condition called lupus. She alleged that her brain was starved of oxygen, she was cognitively impaired as a result, disabled for life, and wanted \$2.5 million. Our thinking was that hard-working people would see through this. And that's why we were very comfortable, because almost every juror that came on there was a hard-working person. We were very comfortable that anybody who had to work for a living was not going to believe or buy into this story that a lawsuit is going to do this to somebody."

Background: Cole obtained a bachelor's degree in philosophy at the University of Colorado in 1973 and his law degree from Lewis & Clark School of Law in 1976. He has been practicing for 21 years, specializing in errors and omissions, professional liability and complex business litigation matters. He and his partner, Frank Nemecek, started their own law firm with one other associate in 1984 and presently have 13 attorneys at the firm. Cole and his wife, Barbara, who has been the office manager since the firm's inception and according to her husband is "the glue that holds the firm together," have three children: Amy, Graham and Marshall. Robinson was born in Cedar City, Utah and received a bachelor's degree in International Relations from Brigham Young University in 1982. He obtained his JD from the University of the Pacific, McGeorge School of Law, in 1986 and has litigated professional liability, legal malpractice and malicious prosecution cases for 11 years. In his off-time, Robinson officiates and coaches youth basketball and track and field. Robinson and his wife, Mirka, have six children:



The Debunkers — "Our thinking," says Jonathan B. Cole, center, "was that hard-working people would see through this. We were comfortable that anybody who had to work for a living was not going to buy this story." At left is co-counsel James J. Kjar. At right is Jon D. Robinson.

Kaleb, Darren, Zachary, Kessia, Daniella and Krista. Co-counsel Kjar is a California native who graduated from USC with a major in philosophy in 1977. Kjar obtained his law degree from Loyola Marymount in 1980 and has been practicing as a civil litigator in the areas of professional liability, insurance bad faith, product liability and general liability for 18 years. Kjar spends his free time with his daughter, Courtney, 12, and also enjoys bicycle racing, composing music and reading. The following questions were answered by Jonathan Cole.

Your client, Rodolfo Ramirez, was originally involved in an accident where a lid from a pressurized irrigation tank blew off in his face. Can you describe the accident and the injuries that he suffered as a result?

"Rodolfo Ramirez was the driver of a truck that delivered fertilizer. Rodolfo arrived at an irrigation job site to deliver fertilizer, which was contained in a concrete holding tank in his truck. He started to transfer the fertilizer through a pipe into a red holding tank, when he discovered a leak. And this stuff is like uric acid, so it's dripping, leaking and he shuts down; but, the back-wash is still leaking and he can't pump it back in. He then takes a bucket to gather the leak, but it won't hold all of the fertilizer that's leaking. So he sees what he perceives to be a holding tank hooked up to the irrigation system where he can pour the leaking fertilizer in. He goes over to the cylindrical, stainless steel tank, which has a plate-sized lid attached to it, leans down, hits the release lever and the

thing explodes in his face. It was pressurized, but there were no warnings... it was never intended to be a pressurized tank. And Rodolfo was blinded in one eye, suffered frontal lobe brain damage, had 27 bones broken in his face... his face was shattered. As a result, he was permanently disabled, has severe facial scarring and still suffers from headaches and other pains."

How did it occur that while Rodolfo was hospitalized, an individual approached him and brought him to the Law Offices of Sheldon Sacks?

"We contended that an individual named Mr. Uribe approached Mr. Ramirez while he was in the hospital to solicit him to obtain representation through the Law Offices of Sheldon Sacks. It was quite odd that an injured plaintiff in Ventura would end up in an attorney's office in Beverly Hills, [an attorney] who never really handled or tried any products liability cases. During some initial discovery, Uribe admitted to Drexler that he was affiliated with Sheldon Sacks, but later... Uribe changed his story and stated under oath that he just happened to be at the hospital checking on an unpaid bill when he saw Ramirez. Uribe then apparently suggested he go to Sheldon Sacks' Law Office, drove him there and then sat in on the meeting between them. The court granted a motion in limine to keep out the nomenclature of "cap-er" or solicitor in reference to Uribe, but allowed the evidence in as it pertained to Drexler's state of mind in terms of when the case was presented to him and why he made the

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decisions that he did. The defense was allowed to introduce evidence that the case was basically protracted through Urbieta that he was the person who introduced it. Urbieta never testified at trial."

What were the purported representations made by Sacks to Ramirez about his expertise?

"Sheldon Sacks represented that he had substantial experience in this area. He also stated that he had some involvement in the Rodney King case; that he had been involved in some million-dollar cases; and that Ramirez's case was worth over a million dollars. However, in actuality, although they did claim to have vast experience in the premises liability area, the firm had never handled a product liability case, especially one as complicated as this one. At trial, they tried to make an issue that this was not a product liability case, but a premises liability case."

How did Sacks and his daughter allegedly mishandle the Ramirez's case?

"We did practically nothing to properly prepare the case for trial. They didn't join all of the correct defendants...they basically allowed the defendants to do their work. They sued one defendant, who in turn sued other defendants and then they let that defendant essentially do the work. They left that was proper. They failed to retain all the necessary experts, to take all the necessary depositions. Essentially, they did a minimal amount of work up to the point of five days before trial, when the voluntary settlement conference occurred. The way we perceived it was that they employed a strategy of doing as little as they could, going to the settlement conference, and taking whatever they could get. At the settlement conference, there was no translator present, other than the Ramirez's 15-year-old daughter. They proceeded to negotiate a settlement that consists of a guaranteed \$1,250,000 a month for 20 years or until he dies, whichever is longer. They never even gave the Ramirez's the option of obtaining cash. But the attorneys would get a fee of \$100,000 in cash. Sacks and Allen were both present and were leaning on Ramirez to accept this settlement and make the deal. He was told 'you owe it to your family, you're going to lose if you go to trial...' Allen told him that he could lose his house if they went to trial, because the defense could get costs. The end result of this was that the mother and daughter ran out crying, and Ramirez got up and said, 'Do what you want, I'm leaving.' That night, Ramirez called Sacks and told him that he wasn't taking the settlement. We proved at trial that after Ramirez notified Sacks that he wasn't accepting the settlement, and that Drexler was taking over as counsel, Sacks exchanged letters by facsimile with opposing counsel, confirming the terms of the deal. He did this to try to create a record to enforce the deal. Proving this intentional misconduct was important [to our case] in order to show that Drexler was justified in suing Sacks and Allen for negligence, fraud, breach of fiduciary duty and intentional infliction of emotional distress."

How did David Drexler allegedly rehabilitate the Ramirez's case?

"Drexler was retained the day after the settlement conference, four days before trial. Drexler begged the judge for a continuance and demanded that Sacks give him the file. Sacks refused to relinquish the file and had to be ordered by the trial judge to do so. The judge agreed to grant a continuance for 90 days, but precluded any further discovery of any sort, any further designation of experts, etc. Drexler did an incredibly remarkable job pulling this case together, which had been deficiently handled. Sacks had done no investigation, hadn't met with any medical experts, [and] hadn't prepared any of the medical experts to testify. Because he didn't conduct any discovery on the five defendants that were sued, four of them got out on non-suits and only the landowner defendant was left in the case. It was a long shot, but Drexler took it to trial and hit for \$1.9 million. The award was reduced to \$1.2 million because of the comparative negligence found against Ramirez and his employer. Drexler was absolutely convinced that he would have been able to avoid that comparative negligence finding had the case been properly prepared [by Sacks]."

Did Drexler thereafter advise the Ramirez to sue their former attorneys for legal malpractice?

"The entire decision to sue Sacks and Allen and the theories to be advanced were based upon Drexler's legal advice given to the Ramirez's, which they relied upon in good faith. This was the basis of our directed verdict as to the Ramirez's. To suggest that the Ramirez's had malice or intent, or did anything other than rely on their lawyer, is just

absurd. Notwithstanding that, Allen still felt the need to sue her former clients."

Why was Carole Allen included as a defendant in the legal malpractice suit?

"[First,] she was an active participant in the case. Second, she actively participated at the voluntary settlement conference, when she attempted to browbeat the Ramirez into accepting the settlement. Third, she and her father were, in truth and in fact, partners."

You allege that in August 1996, the Ramirez's voluntarily dismissed Allen for tactical and economic reasons not bearing on the substantive merits of their claim. What were those reasons?

"Drexler is a one man shop. He was in front of Judge Calustian, who has rather stringent and onerous requirements. One of those requirements is a strict limitation on the amount of time he would allow the case to be tried. Sacks and Allen were represented by a large law firm and had the case staffed with multiple attorneys. We proved that in the 60 days preceding her dismissal, they billed 400 hours on this file. They basically pummeled Drexler...the most intense pummeling was two separate motions for summary judgment, one on behalf of both Sacks and Allen. So Drexler, to conserve resources and fight the main battle, decided he didn't need her. Drexler thus wrote a letter stating that for economic reasons, he wasn't going to keep prosecuting Allen and he then directed and focused his attention on Sacks."

Did the legal malpractice action against Sheldon Sacks ever get to trial?

"Sacks' motion for summary judgment was initially denied by Judge Calustian. But after the jury was seated, Calustian, on his own motion, reconsidered it, and decided that there was no causation for purposes of damages. In other words, regardless of whether Sheldon had committed malpractice, Drexler did such a great job at trial, there's no way he could prove that the malpractice caused any damage. And to argue that the reduction was because of Sacks was speculation. He could not establish causation as a matter of law. Calustian reconsidered on those grounds, and threw out the case. It went to the Court of Appeal, which agreed with Calustian. Drexler took his best shot, he had probable cause, and certainly didn't do it for any other reason than to get a full recovery for the Ramirez's."

Allen then filed a malicious prosecution action against the Ramirez's and Drexler, contending that they'd sued her without probable cause, knowing she was not a partner in her father's firm and had no involvement in their case. What was your response to those allegations?

"Allen actively participated at the settlement conference and appeared at a status conference in the case. She admitted she was there for the whole settlement conference and was intimately involved, although she claimed she didn't say or do anything, but just sat there. As to partnership, we proved, through the use of her W-2 [forms], that her income fluctuated with the profitability of the firm. One of the most dramatic pieces of evidence the jury saw was that her salary went up almost 50 percent annually for a couple of years and then precipitously fell. This wasn't consistent with the theory of an employee-employer or associate relationship. Additionally, we proved that she obtained a profit participation in a very large case. Finally, we showed that Allen's initials were on the bottom of all of the letters in the file and that her name was included in all of the pleadings. She was all over the place...her 'fingerprints' were all over the file. Our expert, Charles Mazursky, testified that from his review of the file, Drexler had a duty to his own clients to name Carole Allen in the legal malpractice suit."

Allen also alleged that as a result of the lawsuit filed against her by your clients, she suffered an exacerbation of her asthma and the activation of systemic lupus, which caused brain damage and disabled her from the practice of law. According to Allen, how did the lawsuit precipitate the onset of lupus?

"First of all, she's had asthma since she was a kid. We also proved that the onset of the lupus condition and its exacerbation preceded this legal malpractice lawsuit. And, in fact, we proved that it substantially and significantly flared, if it flared at all, post-lawsuit. One of the foremost medical experts in lupus, Dr. Wallace, testified on plaintiffs' behalf that she had lupus and that it can be exacerbated by stress. He further testified that the stress of this lawsuit exacerbated her lupus. And we blew a hole in that big enough to drive a truck through. We asked, 'what is the basis upon which

you opine that the lawsuit exacerbated the lupus?' Dr. Wallace responded that Allen had told him this occurred. Additionally, he testified that there was a temporal relationship — that she had a swollen foot right after being served with the lawsuit and that this was symptomatic of the onset or 'flare' of the lupus. It started the flare, it ran its course and it was that flare which damaged her brain, hence, causation. However, we proved that the foot flare had occurred three months before the lawsuit was filed."

How were the damages in this case unusual for a malpractice prosecution case?

"What was not unusual was the \$85,000 for attorney's fees. But what was unusual was that Allen didn't sue it and that her father had taken care of it. Keep in mind that the \$85,000 was the total for her and her father, yet she tried to get the entire amount in our case. As to the \$75,000 in medical bills, this covered over a two to three year period of time and included a couple of hospitalizations for the asthma and the lupus. What was extremely unusual was the damages claimed for the exacerbation of lupus. And then they wanted \$2 million for lost earnings, which, for some unknown reason, they abandoned at the commencement of trial. Instead, they were asking for generalized pain and suffering damages for the rest of her life. In my opinion, she abandoned the loss of earnings claim because it would have opened up what we were able to develop anyway: the huge profit participation, where we proved that her father gave her some \$400,000 arising out of one particular case."

After plaintiff and defendants rested, there was a directed verdict for Rodolfo and Isabel Ramirez. How did this come about?

"When plaintiff rested, I made a motion for non-suit on the grounds that as a matter of law, there was probable cause for the Ramirez's lawsuit because they properly relied upon the advice of counsel. Additionally, they made a good faith, full and fair disclosure to their lawyer and their lawyer gave them the advice to do what they did. In other words, even if Drexler's advice was erroneous, they had the right to rely. Even though the judge denied the motion for non-suit, he reconsidered it after the defense rested and granted it as a motion for directed verdict."

What did your post-verdict discussions with the Jurors reveal?

"The jury was instructed on Wednesday morning and came in with a verdict on Friday at noon. All of the jurors, including the alternates, found that there was no favorable termination. In other words they believed that Drexler had dismissed Allen voluntarily for economic and other considerations not bearing on the merits of the case. However, based on our discussions with the jurors, they believed that there was probable cause to file the lawsuit. They also didn't find the causation between the lawsuit and the damages that Allen was claiming. If they'd had the opportunity to fill out the entire special verdict form, it would have been in our favor. But because the first question was, 'Was the lawsuit favorably terminated in favor of Allen?', and the answer was 'no,' the jury was instructed to stop and return the form to the bailiff. After the trial, I interviewed all 16 jurors at length and there wasn't an element of her case that any one of them bought. They all felt she was involved, that she was a partner, that Drexler did the right thing by suing her and that whatever [medical condition] she had wasn't caused by this lawsuit. They basically didn't buy any one of her claims."

How did you expect the trial to come down? Were you at all surprised by the verdict?

"In my heart, when this case walked into the office, I absolutely thought that it was frivolous. I was very much persuaded by a declaration by Jack Denove, who is a well-known plaintiffs lawyer and the expert for Sacks in the legal malpractice case. After that case was concluded, he gave Drexler a declaration wherein he stated unequivocally that the Sacks firm had committed malpractice and that his only opinion would be that there was no causation for damages. So, from my perspective, here was Sacks' own expert admitting that their conduct had been below the standard of care. So how could Drexler not have had probable cause to sue them? If you can't prove damages, that doesn't mean that you didn't have probable cause. But I was most surprised about the lack of credibility on the part of Sacks and Allen: they were consistently impeached throughout the proceeding and I think that sold the case. That and the fact that the medical testimony didn't hold together."

—Diane Taylor