

EXTRA

Trials, transactions
and the insider's guide
to the practice of law.

Supplement to the Los Angeles Daily Journal
and San Francisco Daily Journal

WHAT'S IT WORTH?

Man hit by falling iron on building site lands \$1.5 million... Bank to pay 5,750,000 after thief raids customer's account... Elderly patient trips in doctors office, falls into \$220,000 settlement...Rear-end plaintiff rejects offer for \$2,300, wins only \$100...**For more verdicts and settlements summaries, see page 20.**

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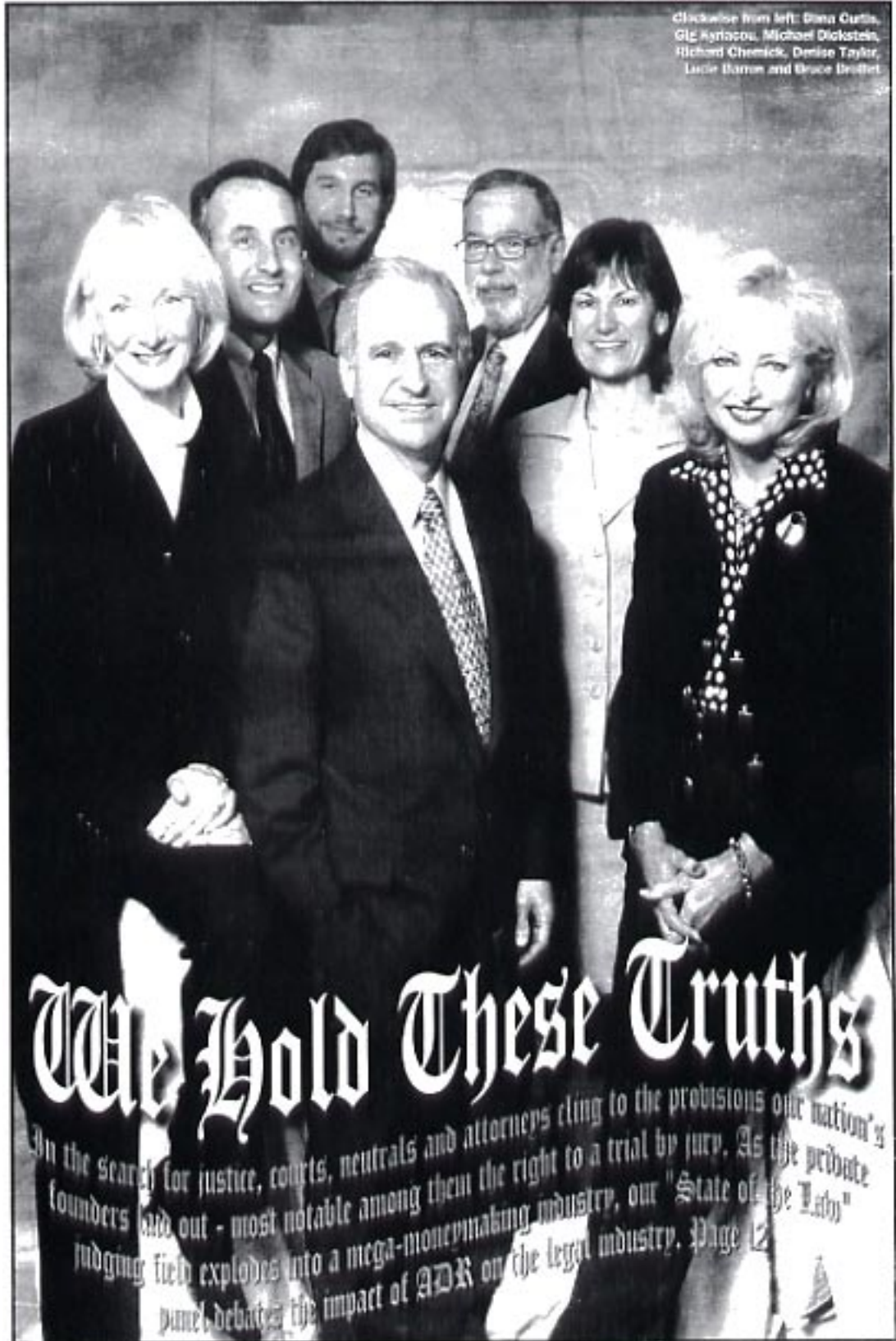


Photo: Tom Hagen/MLB.com

KYRIACOU: I don't like the phrase "both sides go away unhappy." I prefer both sides go away satisfied or at least relieved. And I think the goal of mediation is to reach a mutual agreement that is better than the alternative of going to trial, given the risks involved, and usually better on a lot of different levels, better emotionally, financially, and based on that person's life at that particular time and, frankly, based on the skill of counsel. Prepared, quality litigators do better in mediation, just as they would do better in trial.

CURTIS: That was really a very interesting question because I was thinking that really doesn't apply in mediation, justice. And yet there are cases in which justice is really absolutely what a party is looking for, and justice as it applies to the resolution. And so I think the difference is that the parties really determine the standard, and they don't have to be the same on both sides. But the question is what will satisfy as many of the person's needs and interests as possible. And this leaving equally unhappy, if that's the best we can do, that's the best we can do, and sometimes it is the best that we can do,

TAYLOR: I'm in a room with a bunch of mediators so you don't like that phrase, but it is a phrase that is used a lot.

DICKSTEIN: I think the answer is you can always compromise in the middle, but there is also the potential in mediation to make a better deal, a deal that is more satisfying to each of the parties than what they would otherwise get. And that's what is lost when you say everybody leaves unhappy because if they're actually unhappy, then they should just walk out the door and not make an agreement if the world is actually better outside than in that room.

TAYLOR: Well, let's face it People who are in litigation are often going to be unhappy and are usually going to be unhappy no matter what happens, whether they go to trial or whether they mediate. And that's why you mediate a lot of cases, because as unhappy as you may be with the outcome of the mediation, you are going to be more unhappy if you spend the time, money and emotions going through the trial process and then maybe losing your case altogether.

CURTIS: I think there is a mediator tool here that is really important and that is really helping people adjust their expectations. It's one thing to say we're going to leave equally unhappy and that's our goal, but you could reach exactly the same result through a process that is respectful of the human beings who are involved and really examine what the opportunities are where people really do leave feeling like, "yeah, this maybe isn't everything I wanted, but this satisfies almost everything."

KYRIACOU: Its an evolution. If you took the numbers that the case settled for at the end of the day and put them at the beginning of the day, both sides would have been horribly unhappy. But going through the process, at the end of the day they're both satisfied that they made the right decision. Even if they're not totally happy with what they got or their expectations weren't met, expectations were adjusted by both sides throughout the day based on information that would have come out through the course of litigation and the quality of arguments made on each side. ... One of the things that I try to do at the end of the day is I give four or five good reasons why they settled the case so that if they have to go home and talk to a spouse or a parent, they can explain it so they feel good about why they did what they did. And that helps in a lot of cases to get people over the hump of settlement.

CURTIS: I had a person come to my class a few weeks ago at Stanford, and he made the statement that fear and ambiguity are really the mother's milk of mediation. And I think that you can accomplish through exploiting fear and ambiguity a settlement in which people leave equally unhappy, but I really question whether that is the highest level at which we can be operating.

DICKSTEIN: And I think that that is exactly the problem with the focus that a lot of us have right now, which is what I said before that mediation has two parts; Deal making and talking about what is going to happen. What you're saying, Dana, is everybody is so fixated on what is going to happen and why its not going to be so good and not spending nearly enough time on saying, "OK. How do we make a deal that makes people happy?"

CURTIS: Well, in some respects. I think it's really important to figure out what will likely happen. I'm just saying that it can be done in a way that is designed to inform instead of to manipulate or to create fear and then exploit that so that you can help people move. I think that we can do better than that.

BROILLET: Well, remember the term dispute resolution. At the end of the day if all that has happened is that the two angry parties or angry companies or whoever are still furious with each other and have agreed to take a sum of money, then what you've accomplished at the end of the day is to put a sum of money on it that takes it out of the courthouse but the dispute is still there, it hasn't really advanced the cause a long way.

TAYLOR: With a lot of cases, whether they're employment disputes or our medical malpractice cases that had a doctor-patient relationship that went awry — we're dealing a lot of times with undercurrents of personal feelings and pain.

CURTIS: On both sides, really.

DICKSTEIN: You can have a young lawyer sitting there who has a relationship problem with his client because he or she has to impress the client, and that matters in a mediation. So from a mediator perspective, you have to think about all of those relationships, the underlying ones and the other

TAYLOR: That's absolutely true. And the clients, the insurance carriers, if there is one ... there are a lot of relationships that the mediator has to take into account

GAIDOS: We're into a new year now, so why not, just to wrap up, go around and throw out some predictions of what you see coming ahead for 2004 in the ADR field.

DEWEY: Or what you would like to see.

BARRON: I really do believe the industry is going to grow ... that it's going to become much, much more institutionalized and is going to continue to grow at an exponential level.

DICKSTEIN: I think it's going to grow, and I think it's going to broaden, which I think is an interesting development. Now, we have just spent all of this time talking about arbitration and mediation, but you're really starting to see things happening that involve different levels of internal dispute resolution mechanisms. And these panels, as I said at Kodak, I think it's totally fascinating that they have some employees and some supervisors on a panel that makes a decision that is binding on the company but not the employee. And it is things like that that are novel and different that I think are going to develop more and more and are very interesting.

TAYLOR: I think that as the industry grows, there will be more and more sophisticated mediators who are facilitators and trained in mediation as opposed to the old MSC judge who retires and becomes a mediator. I think that the training that is out there makes the mediators more sophisticated. And the ones that are busy are going to be better at it. They're going to have to be because of the competition.

CURTIS: I predict we're going to have more court challenges in various circumstances as the profession evolves and grows. And I think it's so exciting to be able to witness this and participate in the discussions around it because so much of the law has been developing for many years that right

now we're getting to see it at each step. And I think that as that occurs, it gives the profession an opportunity to really examine more carefully how we practice and the impact that we have.

KYRIACOU: I hope for some of the things that Dana talked about, in the sense that as the litigators become more sophisticated that the process allows more creativity so we can achieve better resolutions where the parties are more satisfied. There is nothing comfortable about a mediator having that case where everyone just settled on a number because its better than the alternative, but they don't like it and they walk away unhappy.... I find that there are many occasions where the relationship between counsel builds as a result of the settlement. You see that where at the end of a tough case and a difficult situation and plaintiffs counsel and defense counsel sort of forge a new relationship that may or may not exist going through trial but has many more opportunities through the mediation process since more cases are resolved through mediation than trial.

CHERNICK: 2004 is going to be a very bad year for the courts, the economics. The court budget situation, which was bad last year, is going to deteriorate more in 2004. It's not fat that they're cutting out; it's muscle. That is going to affect the balance that had traditionally existed in California between the private and the public system. And it is going to tilt, for a while at least, people's interest in finding private resolution because they simply can't get what they would regard as reasonable public resolution because of those constraints. It's going to be a little boost for ADR I'm not sure in the long run its the right kind of boost because I think the important balance that should exist between the private and the public system is going to be out of whack for a while, but that eventually will get back once the economy restores.

BROILLET: And just one follow-up to that. Going back to the original notion that the thing that makes the cases settle is when the ultimate dispute reaches the jury, we have to make sure that that survives our economic times, and we hold that so that the ability to get things taken care of via justice is [sustained].

CHERNICK: We have to give the mediators appropriate leverage.

BROILLET: That's right.

KYRIACOU: There is a great assault on the jury trials these days with the advent and the increase in the number of arbitration clauses that are popping up in the employment field, to name one, but probably also across the board.

BROILLET: We should always remember our roots. I think that one of the things that we articulated in the Declaration of Independence when we were declaring our independence was that King George wouldn't give us the right to trial by jury. So we should remember our roots as we go through these years.

TAYLOR: And I strongly echo that on the other side ... defense attorneys and plaintiff attorneys stand together on the importance of the jury system.

DICKSTEIN: And mediators, too. It seems that no one disagrees on that.

DEWEY: One of the things that we all learned tonight — or maybe already knew — is that it's so true that the private judging field is very much a part of that and it is the balance that is needed.



Gig Kyriacou

Independent, Toluca Lake

Kyriacou mediates disputes in employment, entertainment, personal injury and other legal areas. He is a member of the Los Angeles Superior Court ADR Committee.