

# **A TRIAL LAWYER'S GUIDE TO THE UNIVERSE**

**John Fitzpatrick  
Wheeler Trigg O'Donnell**

## Tough Cases; Tough Defenses

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## GREAT RESULTS!

John M. Fitzpatrick  
Wheeler Trigg O'Donnell

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## Corporations & Mass Tort

- **Risk Averse** – do anything to avoid going to trial regardless of the facts or defensibility of case
  - Takes time, money & potentially bad “PR” which affects bottom line
- General Counsel: “Can you make this go away quickly – approach plaintiff lawyers for quick settlement....”
  - If forced to trial – only because of “greed” of plaintiff’s lawyer in demand to settle
  - Hire a “Big firm” which generally has no trial experience; but sends legions of associates; high hourly rates; begs to do “focus groups” – then recommends settlement after billing for years
  - “....if I have the biggest firm – can’t be second guessed...”

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## Corporations & Mass Tort

- Plaintiff’s Mantra: Profits over safety; Corp Greed; bottom line only.....
  - Marketing Dpt vs Science Dpt vs Pharmacovigilience
  - Dangerous Jurisdictions – WVA; Texas; Oakland, California; Philly; Madison County Illinois
  - Sue MDs – attempt to drive wedge between Corporation and Doctor
  - Discovery Wars: Create issues for sanctions in discovery wars - distract weak liability

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### “Get A Trial Lawyer – Not A Litigator”

**GC:** How do I make this go away?

- Can we settle quickly and cheaply
- If look too “enthusiastic” to settle – does it create more cases and higher expectations
- If your defense lawyer has “no trial experience” – plaintiffs know he/she will cave

**Until You Show Plaintiff Attorneys that You are Willing to Go To Trial – you lose.**

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### CATASTROPHIC CASES

(Should always raise Red Flag)

- Class Actions/Mass Tort – drugs; medical devices; securities;
- Asbestos
- Traumatic Brain Injury – TBI
- PVS/COMA
- Finger Pointing among co-defendants
- Solvency of co-defendant carrier
- Brain Damaged Baby
- Paralysis/Amputation
- Problem Jurisdictions – NYC; WVA; Madison County; Miss; SF; Philly
- “Big Name” Plaintiff’s Attorney

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### Sample of Cases Taken to Verdict by Major Firms

FIRM	PARTNERS	CASES TRIED TO VERDICT SINCE 1/1/00	PER PARTNER FREQUENCY OF VERDICTS
Cravath, Swaine	28	7	Once every <u>8.0</u> years
Davis, Polk	35	3	Once every <u>23.3</u> years
Mayer, Brown	92	26	Once every <u>7.1</u> years
O’Melveny, Meyers	80	37	Once every <u>4.3</u> years
Simpson, Thatcher	36	15	Once every <u>4.8</u> years
Skadden, Arps	96	24	Once every <u>8.0</u> years
Wachtell, Lipton	27	3	Once every <u>18.0</u> years
Wilmer, Cutler	37	2	Once every <u>37.0</u> years

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### TRIAL EXPERIENCE

- **FIRST:** Ask the Question – how many cases to verdict have you taken in last 5 yrs
  - Senior Partner: Avoids answering question – “...we have a lot of trial lawyers .....
  - “I’ve tried many cases over the years... but most cases settle..... I was ready to go to verdict – but my client didn’t want that.....I’ve gotten some great settlements.....”
  - “After all – trying a case is like riding a bike – you never forget.....”
  - Cardiac surgeon – “I read about it”

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### TRIAL EXPERIENCE

- **Second:** Ask to speak to clients they represented at trial
  - Lawyer have history of “Bailing Out”?
    - Early reports – CASE IS DEFENSIBLE
    - Trial Nears – CASE IS 50/50 – big “cop out”
    - Week Before Trial – CASE MUST SETTLE – WE’RE GOING DOWN
    - During Trial – lawyer collapses – “we need to settle before it makes the papers.....”?

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### EXCUSES – THE DREADED “SYMPATHY FACTOR”

- **Third:** When asked about chances of winning – lawyer replies – “there’s a lot of sympathy for the plaintiff...”
  - All cases are sympathetic
  - Good trial lawyers can tell “a story” and make the case understandable
  - Don’t underestimate intelligence of a jury
  - Can’t ignore the medicine/medical literature
- **Defensible Cases SHOULD BE DEFENDED**
  - or open floodgates for more

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## Case Overview

- March 21, 2008 – Kellianne Kelly-Williams & her 2-yr old son, Johnathan Davis, entered an AT&T store in Alexandria, LA
- While playing unsupervised in the store while mother shopped, Johnathan began running under a plastic, A-shaped sign, weighing approx. 18 lbs - which was placed in a corner of the store near the front window

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## Exemplar Sign




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## Case Overview

- After running repeatedly under/@ sign, Johnathan pushed it – it collapsed against window
- He lost his balance & fell “backwards” w/sign to ground, landing on top of him
- Seconds later - mother picked him up – Johnathan was shown on video surveillance running & playing in store w/o any ill effects until he & mom left – approx. 20 minutes later

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## Plaintiffs' Claims

- Shortly after accident, Johnathan suffered first of many epileptic seizures & taken immediately to hosp
- Since been diagnosed with post-traumatic epilepsy & suffers from severe headaches & brain damage
- Demand - \$20 million – 2 months before trial

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## Issue 1: Negligence

- I. Did AT&T have responsibility to supervise 2-yr old child while mother shopped in AT&T store?
  - a. Was sign inherently dangerous?
  - b. Was sign an “attractive nuisance”?
  - c. Did AT&T fail to supervise child?

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## Issue 2: Causation

Did the plastic sign in the AT&T store cause an injury to Johnathan Davis resulting in epilepsy & traumatic brain injury?

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## Issue 2: Causation

Did the plastic sign in the AT&T store cause an injury to Johnathan Davis resulting in epilepsy & traumatic brain injury?

**Plaintiffs Must Prove Both Issues 1 & 2  
by a Preponderance of Credible  
Evidence in Order to Prevail!**

### Plaintiffs' Causation Expert

**Ron Gabriel, M.D.**

- Pediatric Neurologist, used extensively by Plaintiffs, opined that as a result of the fall, Johnathan sustained:
  - A double impact contrecoup traumatic head injury
  - A moderate/ severe traumatic brain injury (TBI) complicated by posttraumatic epilepsy
  - A frontal lobe syndrome
  - Residual pathology w/in central nervous system
  - An “emerging” learning disability – causing him to function academically & in eventually in the workplace - far below original expectations

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### Plaintiffs' Engineering Expert

**Gary S. Nelson, Ph.D, CSP, P.E.**

- Industrial Safety & Human Factors Engineering Expert, used extensively by Plaintiffs, opined AT&T knew / should have known of:
  - Responsibility to establish a premises free of recognizable hazards
  - Presence of inherently unstable display sign exposed curious children to an unreasonable & unacceptable danger should it collapse
  - The sign was a reasonably foreseeable hazard – likely to result in severe injury to persons exposed to the sign

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**AT&T's Child Psychologist  
Dr. Robert Asarnow**

• Initial Report:

- "...when Johnathan was 2.8 yrs old, sign fell & hit him in front of head & knocked him to the floor."
- Mother said "...there may have been a momentary lack of consciousness."

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**Plaintiffs' Demand**

- At Mediation (2 months before trial) – "\$20 Million – non negotiable"
  - Our experts did not help
  - Local recommends "lots \$"
- Can you find a trial lawyer?

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**What are the Facts?**

- Video surveillance shows Johnathan's head NEVER hit the ground during fall
- Force exerted against forehead by sign as it fell to ground w/ Johnathan were benign – head accelerations no greater than those associated w/ everyday activities – jumping rope
- CEO of sign manufacturer testified ballasting the sign is unnecessary – only used in windy conditions – no warning to use ballast – has never heard of injury being caused by sign

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## Side-by-Side Video

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## Current Status of Case

- WTO located & retained two top experts in country:
  - Catherine Corrigan, Ph.D., MIT, Harvard, Biomechanical Engineering, Corporate Vice-President, Exponent, Philadelphia
  - Robert Clancy, M.D. – head of Child Neurology at Philadelphia Children's Hospital
- Met w/ & “rehabilitated” Drs. Giza & Azarnow by showing them a side-by-side video of incident from 2 camera angles & obtained supplemental reports
- Located & deposed former daycare providers – who testified Johnathan was normal, bright, healthy little boy – never been told by mother of any epilepsy, seizures and/or special medical needs

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## Photo from Surveillance



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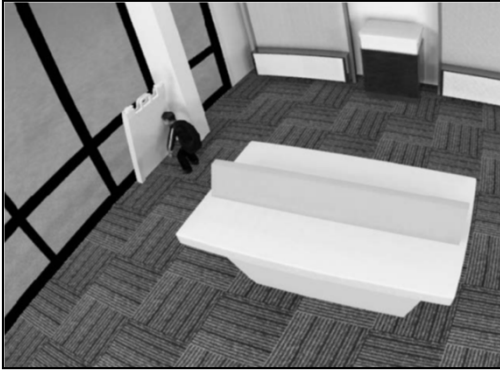
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### 3-D Model from Same Photograph



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### Catherine Corrigan, Ph.D. AT&T's Biomechanical Engineer

#### Conclusions

The surveillance video shows that Johnathan utilized his right hand to brace himself as he fell to the ground and that at no time did his head come into contact with the floor. Exponent's testing with both ATDs and surrogates of Johnathan's size and stature indicates that Johnathan did not sustain head accelerations greater than those associated with everyday activities. The risk of concussion and brain injury associated with the accelerations sustained during the subject incident was essentially zero.

The opinions in this report are offered to a reasonable degree of biomechanical certainty, and are based on the materials reviewed as well as the education, experience, and knowledge of the authors. If additional information becomes available, this report may be modified or amended.

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### Joseph Sala, Ph.D. AT&T 's Human Factors Expert

#### Summary of Opinions and Conclusions

In summary, the opinions in this report are stated to a reasonable degree of scientific certainty and include the following:

- The advertising sign in question is not a structure that would inherently attract the attention of or be considered as a play structure by young children.
- Supervision and environmental controls are methods parents frequently use to reduce the chance of injury to their children. Despite being in an environment over which she could not exercise control, and in which the range of potential hazards was unknowable, Ms. Kelly-Williams did not take precautionary measures by supervising her child to decrease the likelihood of an accident.
- The statement "BALLAST WITH SAND" provided on the sign cannot be taken as a warning to sign owners of a hazard as that alleged in the present matter, and cannot be taken as a mandatory statement of use or safety instruction.

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**Robert Clancy, M.D.  
AT&T's Child Neurologist**

In conclusion, I cannot confirm that he has had any head injury from striking his head on the floor. The nature of the accident was trivial to minor at worst and he didn't manifest any symptoms of concussion as his behavior demonstrates on the surveillance tapes after the accident. None of his scans showed signs of trauma and none of his EEGs showed signs of epilepsy. It is not anticipated, in my experience or from the medical literature, that he would experience any sequelae from this accident. On the other hand, the seizures which his mother has reported are totally unrelated to his AT&T accident. He has normal intelligence and is presently doing well in school. I fully anticipate he can achieve satisfying gainful employment in many appropriate lines of work in the future. I hold these opinions with a reasonable degree of medical certainty.

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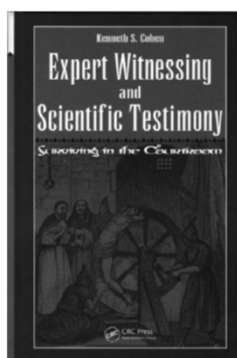
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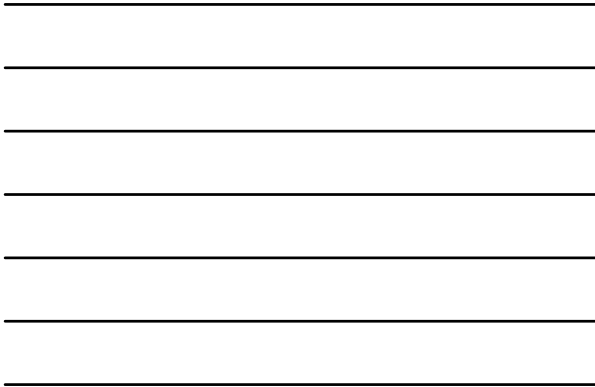
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## Kenneth Cohen

- BS in Microbiology from San Diego State College (1965)
  - Took 10 Years to Graduate
  - Flunked Out of 5 Previous Schools
- Failed to Get His Masters After 3 Tries – Then Lied
- Ph.D. From a Diploma Mill
- Failed the C.I.H. Exam 7 Times
- In the Navy – Never Served on a Ship
- 1994-1998 Worked for Plaintiffs While @ Cal OSHA
- Still Misrepresents Himself as a C.I.H (as of 2008)

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### 1975 Kenneth Cohen's Application to Cal Western University

14. HIGH SCHOOL FROM WHICH YOU GRADUATED CULVER CITY MAY 1950

LIST COLLEGES AND UNIVERSITIES ATTENDED	DEGREE RECEIVED	MAJOR	DATES OF ATTENDANCE
1. <u>SDSC</u>	<u>S.C. MS</u>	<u>Microbiology</u>	<u>1967</u>
2. <u>SEE TRANSCRIPT</u>	<u>SEE RESUME</u>		
3. _____			

List the approximate number of college level semester units you have accumulated \_\_\_\_\_

What was your primary field of study? MICROBIOLOGY

Misrepresentation

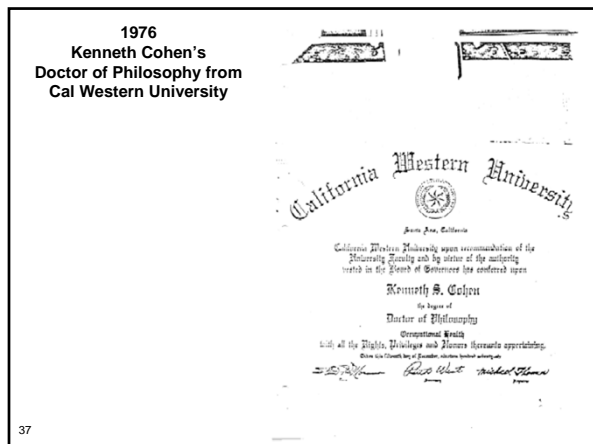
35

### 1975 Kenneth Cohen's Synopsis of Confidential Resume

Work leading toward a Bachelors Degree in Microbiology at San Diego State College, completed in 1965.

Work leading toward a Masters Degree in Microbiology at San Diego State College, completed in 1967. Program included both research and written thesis.

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1976 Kenneth Cohen's  
Official Transcript from  
Cal Western Univ

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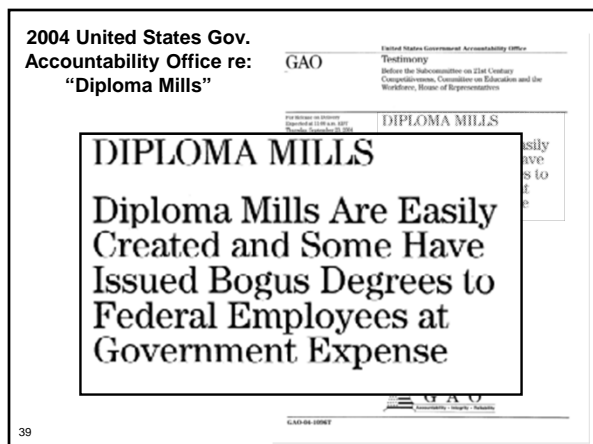
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# Kenneth Cohen's Application to Become a "Professional Engineer"

Application for Professional Engineer License

NAME: Kenneth Cohen

ADDRESS: 1401 N. 1st, St. #4, CA 920017

EDUCATION:

SCHOOL	MAJOR / Minor	Degree Program	DATE
San Diego State Univ.	Microbiology/Chemistry	BS	1965
San Diego State Univ.	Microbiology/Chemistry	MS	1967
California Western Univ.	Occupational Health/ Industrial Hygiene engineering.	PhD	1976

educational background is indicated below;

SCHOOL	MAJOR / Minor	Degree Program	DATE
San Diego State Univ.	Microbiology/Chemistry	BS	1965
San Diego State Univ.	Microbiology/Chemistry	MS	1967
California Western Univ.	Occupational Health/ Industrial Hygiene engineering.	PhD	1976

Diploma Mill

Misrepresentation

# 1975 Kenneth Cohen's Application to the American Board of Industrial Hygiene

APPLICATION FOR EXAMINATION - AMERICAN BOARD OF INDUSTRIAL HYGIENE

NAME: Kenneth Cohen

ADDRESS: 1401 N. 1st, St. #4, CA 920017

EDUCATION:

Degree	Year	No. of Years Attended	Full Time	Major Subject	Minor Subject
B.S.	1965	2	Y	Microbiology	Chemistry
M.S.	1967	2	Y	Microbiology	Chemistry

Total Years: 4

Remarks: I have completed the requirements for the examination and am eligible to sit for the examination.

Misrepresentation

# Kenneth Cohen's San Diego State College Transcript

San Diego State College Transcript

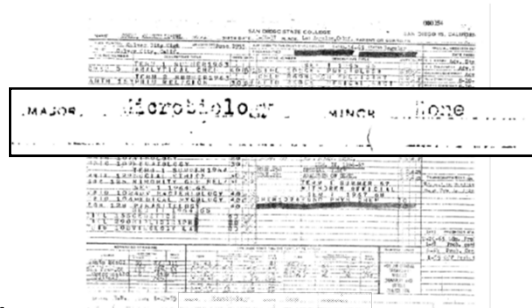
NAME: Kenneth Cohen

ADDRESS: 1401 N. 1st, St. #4, CA 920017

EDUCATION:

Term	Course	Grade
TERM 1, SUMMER 67	WITHDREW OFFICIAL	SEM 1, 1967-68

# **Kenneth Cohen's San Diego State College Transcript**



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## **1975 – 1979 Kenneth Cohen's ABIH Examination History**



**Kenneth S. Cohen**

### **ABIH Examination History**

CORE Examination	Comprehensive Practice Exam
Fall 1975 Failed	
Spring 1976 Passed	Failed
Fall 1976	Failed
Spring 1977	Failed
Fall 1977	Failed
Spring 1978	Failed
Fall 1978	Failed
Spring 1979	Passed

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## **1979 Biographical Directory of the American Public Health Association**

**COHEN, KENNETH SAMUEL (72)** OHS  
b Los Angeles, Calif. May 30, 37. Educ: San Diego State Univ. BS(microbiol), 65,  
MS(microbiol), Calif Western Univ, PhD(occup health), 76. L&C: Med  
Technologist, Calif; Prof Engr, Calif; Pub Health Microbiologist, Calif. Pres P&A  
Activ: Lectr consult, Am Soc Safety Engrs, Park Ridge, Calif, 76-; instr, Univ Calif  
Med Sch, Davis, 78-; indust toxicologist, Consult Health Serv, El Cajon, Calif, 78-  
Past Prof Exp: Safety & health consult, Micronomics Int, La Mesa, Calif, 72-76;

**Misrepresentation**

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March 20, 1985  
Letter from ABIH  
Exec Sec to Cohen

Dear Ken,

The Board has asked us to contact you about a question that has been raised recently. That is, an allegation has been made that the MS degree from San Diego State University which you claimed on your application for certification has not been completed or conferred. We are unable to resolve the question since at the time of your application the Board did not ordinarily require official transcripts of degrees, as is required now.

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March 24, 1985  
Letter from Kenneth,  
Ph.D, PE, CIH, to ABIH

I was unable to finish the thesis writing and publication due to family commitments requiring my return to full time employment.

I do not claim a Masters degree, although I completed all requirements, course work, and experimentation leading to the degree. The need for a formal awarding of the degree has not been sufficient to prompt me to return.

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## Retired/Inactive CIH/CAIH Policy

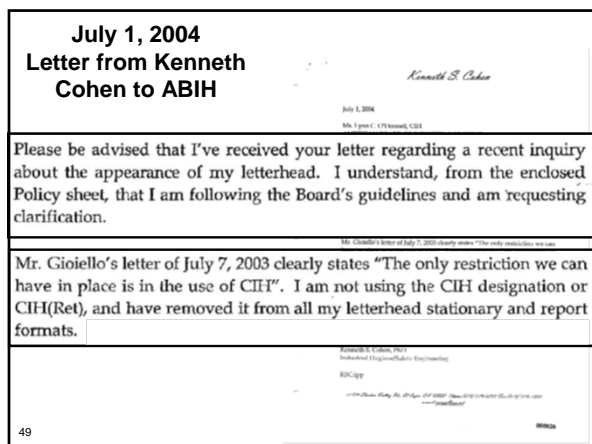
Retired/Inactive CIH/CAIH Policy  
Effective June 2001

The policy of the Board regarding Retired/Inactive status is:

1. Upon request the Board, a Diplomat in good standing will be granted Retired/Inactive status.
2. Retired/Inactive status is subject to:
  - CIH/CAIH who have retired from the full-time or part-time practice of industrial hygiene.
  - CIH/CAIH who continue to practice but do not plan to continue their certification.
3. The designation of Retired/Inactive CIH/CAIH will be used in the ABIH directory and website.

A Diplomat who has declared himself/herself to be Retired from industrial hygiene practice or Inactive, but who is found to be working in industrial hygiene and using the CIH, CIH (Ret), CAIH or CAIH (Ret) designations, will be subject to the ABIH Adverse Actions provision.

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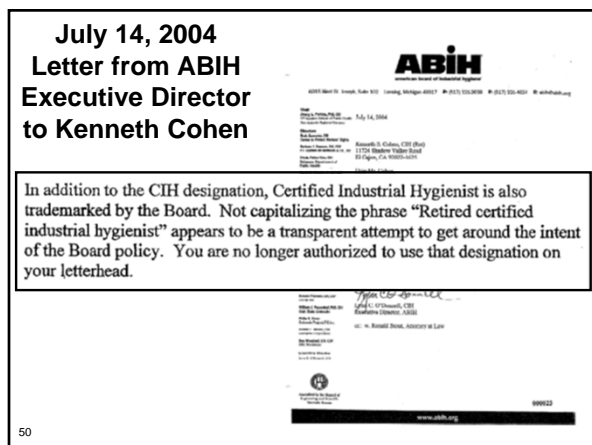
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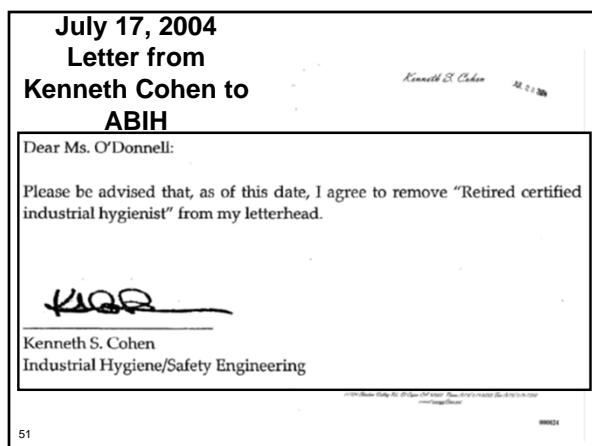
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The image is a composite of three elements related to a legal case:

- Top Graph:** A line graph titled "Simulation of an Exponential Decay" and "Exponential Decay of Asbestos Contamination at 1.0 f/cc level." The y-axis is "Conc. (f/cc)" from 0.0 to 1.2. The x-axis is "Time (hours)" from -10 to 32. Multiple curves show decay over time. Annotations include: "Subsequent releases from one, maintenance and removal" (pointing to a curve) and "Asymptotic area of the curve that parallels the baseline" (pointing to the lower part of the curves).
- Middle:** A black-bordered box containing the text "Data Compilation by K. Cohen, CIH." in a serif font.
- Bottom:** A calculator screen showing "PLAINTIFFS EXHIBIT 205" in a stamp-like font. Above the screen is the text "Misrepresentation" in a large, bold, sans-serif font. An arrow points from the boxed title to the calculator screen.

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# April 2005

## Kenneth Cohen's Curriculum Vitae

### SELECTED COURT QUALIFICATIONS AND TESTIMONY

Expert witness testimony, Court qualified in Municipal, Superior and Federal jurisdictions, or Professional Litigation support consultation has been given throughout the United States, in the following areas:

- \* ALCOHOL AND INTOXICATION EFFECTS
- \* ASBESTOS: Maritime, Commercial, Industrial, and Residential applications. Health effects.
- \* DEFENSE AND PLAINTIFF ATTORNEY REVIEW: of case aspects in many areas of potential litigation.
  - \* DRUGS; THERAPEUTIC AND ABUSE SUBSTANCES.
  - \* ERGONOMICS AND PRODUCT DESIGN.
  - \* HOMICIDE, MEDICAL ASPECTS.
  - \* HOMICIDE, CHEMICAL EXPOSURE INSURANCE.
  - \* MEDICAL, HOSPITAL, AND STAFF MALPRACTICE CASE REVIEW.
  - \* MICROBIOLOGICAL CONTAMINATION OF FOOD: Products and Sources.
  - \* OCCUPATIONAL TOXICOLOGY
  - \* PRODUCT DEFECT, LABELING AND LIABILITY.
  - \* PRODUCT FAILURE ENGINEERING
  - \* SAFETY ASPECTS OF INDUSTRIAL, COMMERCIAL, AND RESIDENTIAL SITES.
  - \* WARNINGS, LABELS, AND HUMAN FACTORS ENGINEERING

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- Re-Entrainment Theory:
  - Boiler Explosion in February 1949
  - Asbestos Release (No Data re: How Much, for How Long, from What Products – It Doesn't Matter)
  - Dust Reduced by 50% With Each Air Change
  - 5-6 Air Changes per Hour = ~2,400 Air Changes in 6 Weeks
  - Dust Will be Re-Entrained *Forever* – It Will Never Reach Zero
  - Plaintiff Boards Ship in April 1949 (2 Mos. Post-Explosion)
  - "Even 1 Fiber Remaining After 50 Years Would Still Be a Substantial Exposure"
  - "Everyone on the Ship Should Have Been Wearing Respirators 24/7 in 1949"

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## JUNK SCIENCE – BLATANT ADVOCACY

## DON'T BE AFRAID TO MAKE A CHANGE

- Choose someone with national scope
- Choose someone who tries and wins high-exposure cases
- Choose someone before key defendants are deposed
- Choose someone before expert witnesses are identified or deposed
- Choose someone before the insured says "that's why I have insurance" and won't listen to anything but settlement



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## BOTTOM LINE ~~IS~~ *JUST* WIN

- No time for the faint of heart or saving a few dollars on defense costs
- You get what you pay for:  
Cheap lawyers = Lousy results
- PAY GOOD LAWYERS TIMELY
- LOYALTY AND PARTNERSHIP

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## **John M. Fitzpatrick**

Partner

[fitzpatrick@wtotrial.com](mailto:fitzpatrick@wtotrial.com)

P 303.244.1874

F 303.244.1879

John Fitzpatrick, a former concert pianist and Army Airborne Ranger, began his legal career in 1981 with the U.S. Army JAG Corps as a prosecutor trying criminal cases in Colorado. He became the 8th Army Division's Chief Prosecutor in South Korea in 1983 and was selected to be the senior medical malpractice attorney for the U.S. Army Tort Branch at the Pentagon in 1986, where he tried 12 civil cases to verdict in federal courts across the country before entering private practice in Richmond, Virginia in 1988.

Over the next 20 years, "Fitz" developed a reputation as the "go-to" trial attorney for high-exposure cases for both national and local clients. Whether the case involves claims of product defects in aviation, asbestos, pharmaceuticals or medical devices, high-exposure birth-trauma claims in medical malpractice, or chemical releases of toxic substances, Fitz has an unparalleled record of success with high-exposure cases. He has tried in excess of 200 cases to verdict in 30 states and obtained defense verdicts in the vast majority of them.

Fitz moved to Colorado in 2007 to join the national litigation firm of Wheeler Trigg O'Donnell. He quickly became known locally as a respected national trial lawyer when his peers selected him as one of Colorado's Super Lawyers in 2008 and 2009. He was chosen a Law Week Colorado "Lawyer of the Year" for 2008. Also, in 2008, General Electric's Asbestos Section of the Environmental Law Division named Fitz GE's "Outside Counsel of the Year."

### **PRODUCT LIABILITY**

Fitz's civilian trial career started when he was selected as the youngest national trial counsel for Owens-Corning's national asbestos trial team in 1989. He currently serves as national trial counsel for GE, Foster Wheeler, Leslie Controls, Velan Valve, and Dana Corporation. Fitz has taken more than 40 asbestos cases to verdict in some of the toughest jurisdictions in the United States.

### **MEDICAL MALPRACTICE**

Fitz has extensive experience trying medical malpractice actions throughout the United States. His first trial in Virginia in 1989 led to the building of the largest medical malpractice team in Virginia over the next 20 years. He generally had three to five of the top defense verdicts in any given year and often averaged 10 verdicts per year. His expertise in brain-damaged baby cases led CNA Insurance to ask him to become their national trial counsel for birth-trauma cases in 2002. He assisted CNA in selecting a national "brain-damaged baby" team. This concept of establishing "SWAT" lawyers with particular expertise to try cases across the country gained acceptance with many other national companies. Since then, Fitz has been chosen to be national trial counsel for HCI, UHS, Premier, Medical Protective, The Doctors Company, SwissRe, GE Healthcare and MedStar in their high-exposure cases. Since 2004, Fitz has tried 25 high-exposure cases to verdict in 13 states and prevailed in 95% of them. In 2005, Fitz was named CNA's 2004 Health Pro Litigator of the Year.

### **COMMERCIAL LITIGATION**

Because of his trial experience, Fitz was asked to assist in the defense of a significant commercial case involving allegations of fraud in 2008. He also acted as lead counsel in a large employment discrimination case for Circuit City in Maryland in 2005.