

WINDY CITY LITIGATION MANAGEMENT

EVERYTHING ABOUT COUNSEL SELECTION THAT YOU WERE AFRAID TO ASK

**John Fitzpatrick
Wheeler Trigg O'Donnell**

**Selection of
Trial Counsel**

--

“The Zen Approach”

**John M. Fitzpatrick
Wheeler Trigg O’ Donnell**

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Corporations & GCs

- **Risk Averse** – do anything to avoid going to trial regardless of facts or defensibility of case
 - Time, money & potentially bad “PR” affects bottom line
- **General Counsel:** “Can you make this go away – approach plaintiff lawyers for quick settlement....”
 - OMG - hire a “Big firm” - generally no actual trial experience but high hourly rates & sends legions of associates; begs to do “focus groups” – recommends settlement after billing for yrs

“....if I have the biggest firm – can’t be second guessed...”

2

Corporations & GCs

- **Plaintiff’s Mantra:** “Profits over safety; Corp Greed; bottom line only, send them a message.....”
 - Conflicting documents from **Marketing Div** which need to maximize sales and profits; vs **Science Div** which discusses trying to “rush” new drugs to the market; vs **Pharmacovigilance** – OMG – what do we have to submit to the FDA

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Corporations & GCs

- Dangerous Jurisdictions – WVA; Texas; Oakland, Ca; Philly; Madison County Illinois
- Sue MDs – drive wedge between Corp & MD
- Discovery Wars: Create issues for sanctions in discovery wars – threaten punitive damages; huge cost to respond - distract weak liability

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“Get A Trial Lawyer – Not A Litigator”

GC: Can we settle quickly & cheaply

- If look too “enthusiastic” to settle – does it create more cases & higher expectations
- If your defense lawyer has “no trial experience” – plaintiffs know that 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
- Punitive Damages

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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 – looks skyward for an answer “...we’re all trial lawyers by training.....”
 - “I’ve tried cases over the yrs... but most settle..... I was ready to go to verdict – but client was so happy – wanted me to shut it down .. But I’ve gotten some great settlements.....”

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TRIAL EXPERIENCE

- **SECOND:** “After all – trying a case is like riding a bike – you never forget.....” Really???
- If you took your loved one to a cardiac surgeon – wouldn’t you ask...
 - How many open heart surgeries have you done in the last year – maybe last 5 years?
 - What are you complications and your rate of success
 - His response – “...well – I’ve done a few, read about it ... and after all – heart looks the same in most people... And no deaths....”

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TRIAL EXPERIENCE

- **THIRD:** Ask to speak to clients they have represented at trial
 - Do Lawyers have history of “Bailing Out”?
 - Early reports – CASE IS DEFENSIBLE & lawyers bill like drunken sailors - We’re going to win – 80% of time
 - But as Trial Nears – CASE IS 50/50 – big “cop out” – “how can a lawyer lose when he says – “50/50”?

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TRIAL EXPERIENCE

- **Week Before Trial – CASE MUST SETTLE – WE’RE GOING DOWN**
- **During Trial – lawyer collapses – we need to settle before it makes the papers..... Avoid punitive damages ?**
- **After you pay \$10 million – your “relieved” lawyer says – we could’ve been hit for \$20 million – I saved you \$10 million – you lucky guy...”**

ARE YOU KIDDING ME?

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EXCUSES – THE DREADED “SYMPATHY FACTOR”

- **Fourth: When asked about chances of winning – lawyer replies – “there’s a lot of sympathy for the plaintiff... tough jurisdiction – not sure jury will understand?”**
 - All cases are sympathetic
 - Good trial lawyers tell “a story”
 - Ask lawyer to give you a “10 min opening” – tell me a story – if lawyer can’t – have the **WRONG LAWYER**

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EXCUSES – THE DREADED “SYMPATHY FACTOR”

- Fifth: Ask lawyer – how many big cases have you tried and won?
 - If Lawyer replies – “I really don’t keep statistics like that because so many cases settle...” – RUN FOR THE HILLS
 - If Lawyer replies – “Well – it depends on how you define WIN – I’ve gotten some great settlements in middle of trial...” – LEAVE and DON’T COME BACK

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HIRE EXPERIENCED TRIAL LAWYERS

- Don’t underestimate intelligence of jury
- Don’t ignore medicine/medical literature
- Don’t conduct “social experiments” with company assets – ie, don’t hire a lawyer because of race/gender because juries don’t like being “pandered to”....

Nothing beats TRIAL EXPERIENCE

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Case Overview

- March 21, 2008 – Ms. Williams & her 2-yr old son, JD, entered AT&T store in Alexandria, LA
- Playing unsupervised while mom shopped, JD began running under a plastic, A-shaped sign, weighing @ 18 lbs
- He pushed it – collapsed against window; lost balance & fell “backwards” w/sign landing on top of him
- Seconds later - mom picked him up – JD shown on video running & playing in store w/o any ill effects until he & mom left– @ 20 min later

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Exemplar Sign

Plaintiffs' Claims

- Next Day, Johnathan suffered first of many epileptic seizures & taken to hosp
- Now diagnosed w/ post-traumatic epilepsy & suffers from severe headaches & brain damage

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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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Plaintiffs' Expert Ron Gabriel, M.D.

- Pediatric Neurologist, used extensively by Plaintiffs, opined:
 - A moderate/ severe traumatic brain injury (TBI) from fall w/ sign hitting head & head hitting floor - complicated by posttraumatic epilepsy
 - Permanent learning disability – severe impact on future employment and life in general

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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 JD's head NEVER hit ground during fall
- Force exerted against forehead by sign as it fell to ground were benign – head accelerations no greater than those associated w/ everyday activities – jumping rope

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Current Status of Case

- WTO located & retained two top experts in country:
 - Catherine Corrigan, Ph.D., MIT, Harvard, Biomechanical Engineering, Corp VP, 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 – testified JD was normal, bright, healthy little boy – never been told by mother of any epilepsy, seizures and/or special medical needs

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Attacking Plaintiffs’ Experts

- Read their publications
- Attack financial bias
- Check credentials

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Ron Gabriel, M.D.

- **BIAS: Medical/Legal**
 - Testified extensively last 40 yrs; **80 - 90% for Plaintiffs last 15 yrs**; 40+ states; greater than 500 deps & 200 trials
 - Reviews 1-3 cases/mo. – probably more; same w/ deps; 3-5 Trials/Yr; works 200 hrs/mo. w/15% or more for medical legal
 - Charges \$400 hr; \$1500 w/2 hr min for dep
 - \$20K+ for this case

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“I don’t know how much I make....”

- How much did you make last yr – or any year from medical legal? “I DON’T KNOW...no idea... my biller in Texas?
 - 30 hrs/month - \$12K/month: **\$144K/yr**
 - Deps – 24 deps x \$1500: **\$34K**
 - 3 Trials – x \$20K: **\$60K**
 - **@ \$235K/yr - \$286K/yr**

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Ron Gabriel – Credibility in Courts

- Testimony to Support “Novel” Theories – been Excluded Numerous Times
 - “...plays fast and loose with facts and literature....has no credible evidencejunk science.....” (US Ct of Claims x 3).
 - Gabriel: Bunch of Govt lawyers didn’t like me (Judges)
 - “... slants his testimony; uses unreliable scientific data to support novel theories; cannot testify...” (Michigan Courts)
 - Gabriel: They have reversed it... I think...but have nothing to prove that...

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Ron Gabriel, M.D.

■ **Credentials:**

- Hasn't **published anything** since 1980 (except a textbook on shotguns) – although working on 3 articles for 15 yrs....
- Not on staff at any hospital – hasn't admitted a patient in 15 yrs – "...I'm just a consultant – work alone – with lawyers..."
- Thrown out of UCLA in 1996

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**Stephen Minton, MD
Neonatologist**

"Lied on his CV"

I. Credentials

- Community Neonatologist
- No faculty appointments
- Published article – but "no name on it"
- Chapter in textbook – "Lied"



II. Medical/Legal

- Hasn't testified in Ct in 20 yrs
- But making up for it now
 - 15 hrs + 50 hrs = 65 x \$500 = \$32,500
 - 2 days @ \$4,000 = \$8,000
 - \$40,500 for this case

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**Stephen Minton, MD
Neonatologist**

III. Experience

- Works in Provo, UT w/ large population of Mormons
"where we don't have a lot of drugs, alcohol, & bad habits like people in urban cities (DC)
...Thus he treats "pure" prematurity?

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Metabolic Acidosis Necessary to Cause Brain Damage
pH < 7; ± Base Excess > -12

Dr. Lussky
Dr. Burris
Dr. Minton

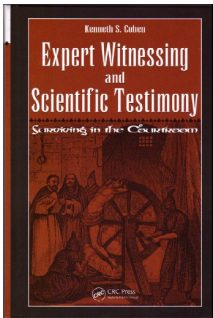
Agree

Disagree

Green Book
ACOG
Am. Acad. Pediatrics
CDC
Child Neurology Society
Society for Maternal-Fetal Medicine
March of Dimes
N.I.H.
Dr. Fisher
Dr. Clancy
Dr. Boyle

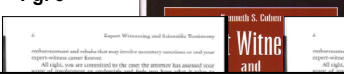
31

Experts' Publications

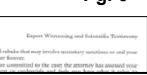


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Credibility is your most important asset, and bluffing your way partially through a case, only to be found out later that your background and experience were insufficient and misleading to either party, will be an embarrassment and rebuke that may involve monetary sanctions or end your expert-witness career forever.

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1975
Kenneth Cohen's
Application to Cal
Western University

14. HIGH SCHOOL FROM WHICH YOU GRADUATED CULVER CITY DATE 1956

LIST COLLEGES AND UNIVERSITIES ATTENDED

1.	DEGREE RECEIVED	MAJOR	DATE OF ATTENDANCE
<u>SDSU</u>	<u>S. G. M.S.</u>	<u>MICROBIOLOGY</u>	<u>1967</u>
<u>SEE TRANSCRIPT</u>			

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

What was your primary field of study? MICROBIOLOGY

Misrepresentation

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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
Doctor of Philosophy
Cal Western Univ

California Western University upon recommendation of the
Nominating Faculty and by virtue of the authority
vested in the Board of Governors has conferred upon

Kenneth S. Cohen

the degree of
Doctor of Philosophy

in the field of
Microbiology

With all the Rights, Privileges and Honors thereto appertaining.

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1976 Kenneth Cohen's Official Transcript from Cal Western Univ

California Western University
OFFICIAL TRANSCRIPT

Name Kenneth E. Cohen Sex M Birthdate ID

Graduate X Undergraduate Major Occupational Health Enrolled on 11/75

Prior Degree(s) 1967 - Bachelor of Science - San Diego State U. Verified: Y X N
1967 - Master of Science - San Diego State U.

Misrepresentation

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2004 US Gov. Accountability Office re: "Diploma Mills"

GAO
United States Government Accountability Office
Testimony
Before the Subcommittee on 21st Century Competitiveness, Committee on Education and the Workforce, House of Representatives

DIPLOMA MILLS

Diploma Mills Are Easily Created and Some Have Issued Bogus Degrees to Federal Employees at Government Expense

GAO
U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Cohen's App to Become a "Professional Engineer"

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

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**1975 Kenneth Cohen's
Application to American
Board of Ind. Hygiene**

[illegible]

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

NAME		PHILIP GUYOTT, JR.		DATE	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035	2036	2037	2038	2039	2040	2041	2042	2043	2044	2045	2046	2047	2048	2049	2050	2051	2052	2053	2054	2055	2056	2057	2058	2059	2060	2061	2062	2063	2064	2065	2066	2067	2068	2069	2070	2071	2072	2073	2074	2075	2076	2077	2078	2079	2080	2081	2082	2083	2084	2085	2086	2087	2088	2089	2090	2091	2092	2093	2094	2095	2096	2097	2098	2099	2100	2101	2102	2103	2104	2105	2106	2107	2108	2109	2110	2111	2112	2113	2114	2115	2116	2117	2118	2119	2120	2121	2122	2123	2124	2125	2126	2127	2128	2129	2130	2131	2132	2133	2134	2135	2136	2137	2138	2139	2140	2141	2142	2143	2144	2145	2146	2147	2148	2149	2150	2151	2152	2153	2154	2155	2156	2157	2158	2159	2160	2161	2162	2163	2164	2165	2166	2167	2168	2169	2170	2171	2172	2173	2174	2175	2176	2177	2178	2179	2180	2181	2182	2183	2184	2185	2186	2187	2188	2189	2190	2191	2192	2193	2194	2195	2196	2197	2198	2199	2200	2201	2202	2203	2204	2205	2206	2207	2208	2209	2210	2211	2212	2213	2214	2215	2216	2217	2218	2219	2220	2221	2222	2223	2224	2225	2226	2227	2228	2229	2230	2231	2232	2233	2234	2235	2236	2237	2238	2239	2240	2241	2242	2243	2244	2245	2246	2247	2248	2249	2250	2251	2252	2253	2254	2255	2256	2257	2258	2259	2260	2261	2262	2263	2264	2265	2266	2267	2268	2269	2270	2271	2272	2273	2274	2275	2276	2277	2278	2279	2280	2281	2282	2283	2284	2285	2286	2287	2288	2289	2290	2291	2292	2293	2294	2295	2296	2297	2298	2299	2300	2301	2302	2303	2304	2305	2306	2307	2308	2309	2310	2311	2312	2313	2314	2315	2316	2317	2318	2319	2320	2321	2322	2323	2324	2325	2326	2327	2328	2329	2330	2331	2332	2333	2334	2335	2336	2337	2338	2339	2340	2341	2342	2343	2344	2345	2346	2347	2348	2349	2350	2351	2352	2353	2354	2355	2356	2357	2358	2359	2360	2361	2362	2363	2364	2365	2366	2367	2368	2369	2370	2371	2
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1975 – 1979 Kenneth Cohen's ABIH Examination History

Kenneth Cohen's ABIH Examination History



4011 Mount W. Joseph, Suite 102 Lumbert, Michigan 48033 P (517) 323-8238 F (517) 311-4456 E abi@abi.org

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 Amer.
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

RECEIVED 4 885
Consulting HEALTH Services
Division of TROSC Corporation
P.O. 24, 1985
JIM SHAFER, Ph.D., CIH,
Executive Secretary, ABIH
960 South University Road
Lombard, IL 60149
PH.D., PE, CIH, Masters Work

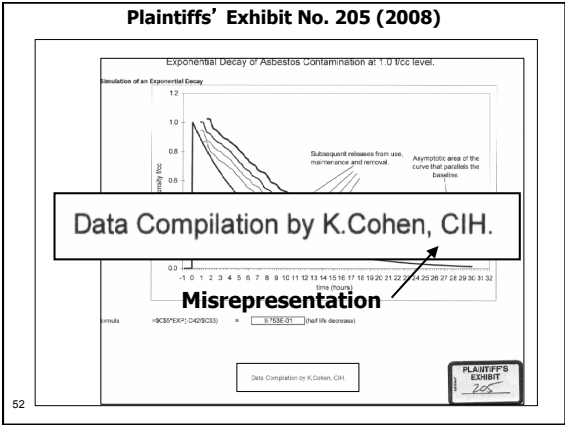
I was unable to finish the thesis writing and publication due to family commitments requiring my return to full time employment.

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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**April 2005
Cohen's CV**

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; THERAPUTIC AND ABUSE SUBSTANCES.
 - * ERGONOMICS AND WORKPLACE DESIGN.
 - * HOMICIDE, MEDICAL ASPECTS.
 - * HOMICIDE, CHEMICAL EXPOSURE INDUCTION.
 - * 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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**DON'T BE AFRAID TO
MAKE A CHANGE**

- Choose someone with national scope of practice
- Choose someone who tries & wins high-exposure cases
- Choose a trial lawyer w/significant trial exp – not a "litigator"



It's YOUR MONEY – spend it wisely

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John M. Fitzpatrick

Partner

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.

