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August 20, 1992

Ms. Jennifer L. Machlin
Administrative Counsel
Commission on Judicial Performance
State of California
101 Howard Street, Suite 300
San Francisco, CA 94105

Re: 4-13-92 Complaint against Justice Joan D. Klein

Dear Ms. Machlin:

This letter follows (and will recap) our 8-11-92 conversation, wherein I telephoned you in response to your 7-13-92 letter to me. This letter will also address your total failure to investigate my complaint against Justice Klein and will again and further demonstrate the undisputable and unrefutable basis of the complaint.

Regarding our conversation, first, I apologized for not responding earlier to your letter, explaining that I had been out of the country and had just returned on 8-10-92. Upon reading your letter on the morning of 8-11-92, I promptly telephoned you.

Next, I brought up the fact that your letter stated it was replying to my ". . . letter of April 13, 1992 . . ." and then pointed out to you that actually I had <u>not</u> sent a letter, but in fact had <u>filed a formal complaint</u> with the Commission (on the Commission's own form), which set forth some extremely serious allegations against Presiding Justice Joan D. Klein and her court, regarding the 3-2-92 <u>nonpublished</u> appellate decision she authored. In particular and in no uncertain terms I stated that Justice Klein's decision had repeatedly ignored the law, consciously mistated the law, had no legal basis and was clearly DISHONEST! I then informed you that I thought your letter (investigation) was totally lacking and fell woefully short of being a serious response to such serious allegations.

I then brought up the fact that although in your letter, you ". . . concluded that the facts do not constitute grounds for proceeding further" your letter was conspicuously totally absent of any basis for your conclusion. (Although, in an attempt to justify your lack of action, of course your letter does contain a standard self-serving disclaiming paragraph). You responded, informing me that the Commission's investigation was "confidential" and that you could not disclose to me the basis of your (the Commission's) conclusion(s).

I then advised you that I was quite shocked at your response, as it was my understanding (and please correct me if I am wrong) that the fundamental purpose of the Commission is to protect the public. Clearly, I, as well as the public, therefore should be entitled to know what your investigation consisted of and what your conclusion(s) are based upon; otherwise, how could I or the public ever know that you had in fact done any investigation? Or know that your conclusion(s) were proper and correct?

You simply repeated that your investigation and the basis of your conclusion(s) were "confidential." I then informed you that I simply could not accept that comment or your conclusion(s).

I then inquired whether you had in fact received and reviewed the petitions (Appellants' Petition for Rehearing - APR, to the Appellate Court and Appellants' Petition for Review before the Supreme Court - APRSC) mentioned specifically in my complaint, that I had previously served on the Commission. You again replied that you could not inform me what the investigation consisted of. I again expressed my dismay at your comment and then informed you that your 7-13-92 letter appeared to state that you in fact had not reviewed the petitions. You then reluctantly conceded that your investigation in fact had not included a review of the petitions. I then again asked you what your investigation had consisted of and what your conclusion(s) were based upon, only to again receive your standard reply that such was "confidential."

I then informed you that I was shocked that you actually could have made any conclusion(s) without having reviewed the petitions or court record of this matter. I then advised you I had in fact sent the petitions to the Commission, to the same address that was listed on the Commission's complaint form (as evidenced on the accompanying proof of service forms) and that per your request, and per my expense, I would send (enclosed here) another copy of the petitions.

Next, I inquired about what efforts you had in fact made to locate the copies of the petitions sent to the Commission, or otherwise obtain copies from another source (such as the appellate or Supreme Court). You again refused to answer my inquiry, stating again that your investigation was "confidential." (I do note however, that you at no time ever contacted me or my office to request copies and that I filed the complaint on 4-13-92, wherein the petitions are referenced).

I then informed you that it appeared to me that you actually had done very little (or maybe even nothing) to investigate this very serious matter. In fact, I advised you that one would have to conclude, that when you (the Commission) ". . . determined that the factual information provided does not afford a basis for commission action", you (the Commission) actually had no basis for making any determination, but instead had simply processed this very serious matter with superficial attention, responded with your standard self-serving disclaimer and hoped to satisfy me (and the public) with your mere appearance of having done something.

Based on the above, I must conclude that you (and the Commission) have totally failed in your duty to investigate this very serious matter and to protect the public, because as set forth above it readily appears you have in fact done nothing. Moreover, as set forth in detail below, had you done a proper investigation you would have to conclude that the appellate decision authored by Justice Klein is simply dishonest, as there is no basis for the conclusions set forth in the decision. Furthermore, when her errors were brought to her attention, she did absolutely nothing to correct them. There simply is no defense of her (and her court's) conduct and decision. The decision repeatedly ignores the law, mistates the law, goes against legal authorities, can not withstand analysis, and can not withstand the light of day. The decision simply is undisputably and unrefutably DISHONEST.

Finally, I informed you that I would be writing a letter to the Supreme Court, regarding its denial to review this matter, pointing out its own inexplicable failure to address: the very serious issues raised in appellants' petition; the serious and repeated injustices to Ms. Ornelas and Ms. Castro and the almost total failure by the trial court and appellate court to follow the law. As I further advised, if the Supreme Court does not remedy the situation, I intend to bring this matter to the attention of the U.S. Department of Justice and request that they investigate it and intend to file a complaint in Federal District Court against the California courts, who under authority and color of law, have clearly violated my clients' civil rights by illegally denying my clients' their right to a jury trial.

Since you have totally failed in your duty to investigate this matter and do not seem to appreciate the serious nature of the allegations, I will again take the time to educate you and the Commission.

First, the subject lawsuit is a third generation lawsuit (Case 3) where plaintiffs/appellants Maria Ornelas and Fabiola Castro sought damages against their prior attorneys Browne Greene (who represented them in Case 1 a 1976 single-vehicle accident product liability lawsuit) and Melvin Belli (who represented them in Case 2 a legal malpractice lawsuit against Greene regarding his improper handling of Case 1) for their failure to recognize, disclose and assert conflicts of interest. The **fundamental** conflict concerned those attorneys representing the negligent-driver of the vehicle, Ventura Munoz, along with negligent-free passengers in the vehicle, Maria Ornelas and Fabiola Castro, when it was obvious from the accident that driver Munoz would bear some (later determined 100%) fault for causing the accident. (It is **undisputed** that attorney Greene (and later Belli) believed ,of course wrongfully, that there was no conflict; obviously they both then are guilty of not advising appellants of the conflict and its attendant risks). It is not surprising then that Mr. Munoz was in fact later determined to be totally legally responsible for killing Ms. Ornelas' 8-day-old baby son, Jesus and for causing the horrible burns both Maria and Fabiola received in the vehicle accident.

About the only proper ruling that the trial court made in this matter, was to find, **as a matter of law that the conflict existed**. The same is true of the appellate court (Justice Klein) when it affirmed the conflict. ACTUALLY THE CONFLICT WAS BLATANT AND OBVIOUS AND NO OTHER CONCLUSION WAS POSSIBLE, which only demonstrates how blatant and eggregious the errors by Greene and Belli were. In fact, the record actually shows that Greene was **repeatedly told about** the existence of the conflict, yet still ignored it and his attendant fiduciary duties to clients Ornelas and Castro; Belli then also ignored the conflict, his duties and the record. Both Greene and Belli admitted they never even attempted to research the issue, claiming that was "absurd." (See Appellants' Brief at 19-21). After the finding of the conflict it is then **axiomatic** that attorneys Greene and Belli, as a matter of law owed **fiduciary legal duties (element 1)** to their clients to disclose and give advice regarding the conflict. (California Rules of Professional Conduct, Rule 5-102 and Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898; Betts v. Allstate (1983) 145 Cal.App.3d 369, 382).

Then, as both Greene and Belli admitted they had ignored the conflict, their **breaches of duties (element 2)** are established as a matter of law. (Lysick v. Walcom (1968) 58 Cal.App.2d 136, 148). The failure of these attorneys to disclose the conflict and their joint representation of Ms. Ornelas and Ms. Castro, along with negligent-driver Munoz was fraud and in clear violation of Rule 5-102 , **a foundational fiduciary duty**. The law is clear and **undisputable**, that this duty is mandatory, conclusive and that the courts are required to take judicial notice of such violations. (Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1147). (Need I remind you that the fiduciary duty of the attorney to the client is of the "highest character" and the attorney has a "wider obligation to exercise due care to protect a client's interest in all ethical ways and circumstances." (Day at 1147). I remind you, because it is obvious that the attorneys and judges handling these cases up to this point are either unaware of, have forgotten, or simply do not care what the law says).

Following the establishment of those breaches by Greene and Belli, the law is clear and undisputible, that **causation (element 3)** and **damages (element 4)** are presumed. (Lysick, supra, at 148 and Krause v. Davis (1970) 6 Cal.App.3d 484, 490). Obviously, not knowing about the conflict and not being advised of such by their prior attorneys, Ms. Ornelas and Ms. Castro were kept in the dark about their case, deprived of material information and therefore never could appreciate the risks (particularly the risk of having the negligent-driver Munoz sitting on their side at trial) of not prevailing with their case, when evaluating whether to take their case to trial or to accept settlement offers (particularly, the $2,000,000 settlement offer from Ford). (See also Lysick at 148 and Betts at 716; and for the clear prejudice and harm that resulted to Ms. Ornelas and Castro see Appellants' Brief at 24-38, APR at 3, ftnt 3 and APRSC at 8, ftnt 3).

It therefore is obvious that plaintiffs/appellants established the four (4) requisite elements of their professional negligence case and that their case was entitled to go to the jury. The Trial Brief submitted by plaintiffs/appellants at trial set forth the above evidence and law in an even more detailed manner.

This is the posture in which the case came before Judge Nelson on 6-16-90. As you and the Commision will recall, after the trial I had to file a complaint against Judge Nelson regarding his illegal conduct during the trial (most glaring were his repeated admitted failure to read filed briefs and his numerous, **but totally unfounded,** threats to hold plaintiffs/appellants counsel in contempt and threats of sanctions; in fact after the trial he held **bogus** contempt/sanction hearings). It is **undisputable** that Judge Nelson "beat up" and "mugged" plaintiffs Ornelas and Castro and their counsel at the purported trial and "robbed" them of their right to a jury trial. Rather than to see that the law was applied and that justice occurred, this judge ignored and disgracefully misapplied the law. Then later, rather than face the disciplinary hearing scheduled by the Commission, Judge Nelson wisely stepped down from the bench. His disgraceful transgressions during the trial are set forth in detail in the complaint I filed with the Commission, as well as Appellants' Brief.

Clearly the Commission was aware of his repeated ignorance of the law, lack of temperance, and his total indifference to justice from the numerous newspaper/magazine articles (1988-9) that commented upon the LA County Bar rating him "unqualified" and California Lawyer's Magazine rating him "one of the state's ten worst judges." (See Appellants' Brief at 2 and APRSC at 28). His transgressions both prior and subsequent to this trial, were also brought to the Commission's attention from the wide and extended list of other complaints filed against him by numerous other litigants and attorneys he abused. I bring this up to show that it is **undisputable** that my clients did not receive a fair trial before Judge Nelson and to remind you that one of the main grounds on appeal was Judge Nelson's **undisputable** judicial misconduct.

Reference to Judge's Nelson's misconduct is most important because it shows Justice Klein, not only ignored Judge Nelson's illegal conduct, but **arrogantly and irresponsibly** then states at page 10 of her decision that ". . . we find the contentions raised by Ornelas and Castro in the appeal to **lack merit** . . .". **How could any judge ever make such a**

comment? Was Justice Klein at all interested in justice or in plaintiffs/appellants receiving a fair trial? **Or a fair appellate hearing**? **This comment alone**, by Justice Klein, in light of Judge Nelson's illegal conduct and the **undisputable** eggregious misconduct of attorneys Greene and Belli in committing fraud upon and breaching mandatory fiduciary duties to Ms. Ornelas and Ms. Castro, clearly demonstates a bias on her part, a misunderstanding of the law and/or a total misunderstanding and appreciation of her duties as a judge. **This clearly is a judge who does not care about the law and justice.** Not only is it **undisputed** that these contentions are true and therefore must have merit, they are of the highest merit and go to the foundational makeup and integrity of the Bar, judiciary and the entire legal system. **Again, how could any judge then conclude that these issues "lack merit"?** It is not surprising then that Justice Klein did not want her decision published.

I also bring up Judge Nelson's background, to show that one would have to conclude that he should have clearly been removed from the bench years before this trial and there simply is no excuse for the Commission's failure in not having done so, other than institutional failure. Rather than protect the public from this rogue judge, who repeatedly demonstrated ignorance and contempt for the law, as well as justice and the rights of the people, the Commission protected him and thereby its actions **actually harmed** the public. (It appears that you have done it again here). Obviously, the Nelson matter puts the Commission's credibilty at issue, but when taken with your actual failure to investigate this matter to date, as well as the Commission's past record in failing to discipline the judges of this state, one would have to conclude the Commission's credibility is simply lacking.

Judge Nelson deprived my clients of their right to a jury trial, by granting a directed verdict for defendants Belli. His ruling had **absolutely no legal basis** and that **can not be disputed**. Judge Nelson made this ruling after he repeatedly stated he did not understand plaintiffs/appellants' case. (See Appellants' Brief at 10,12,13 and 39). Of course he then never let their counsel explain the case and the law to him, constantly stopping counsel's attempts with totally unfounded threats of sanctions and contempt. (See Appellants' Brief at 8-22). This was a judge who also thought that the "guest statute" was still valid law that would bar Ms. Ornelas and Ms. Castro from suing negligent-driver Munoz. (Appellants' Brief at 40).

To arrive at his ruling Judge Nelson invented the ficticious issue that driver Munoz not having any assets would serve as a purported basis to eliminate plaintiffs/appellants' case. **What is amazing** is that issue was never a part of the case and is simply not material to the conflict issue or the case. Moreover that fictional issue clearly flies in the face of the **undisputed fact** that there in fact was a Case 2 and that Case 2 went to trial against Greene regarding Ford's settlement offer, which thereby **undisputedly** established a valid and legally competent settlement offer of $2,000,000 was made from Ford in Case 1, and hence a **"collectible recovery"** and **"the law of this case."** (<u>Clemente v. State</u> (1985) 40 Cal.3d 202). The pretext that Munoz not having any assets is a relevant issue in this case (much less dispositvie of this case) is subterfuge, disgraceful and dishonest, but from an analytical perspective it is simply juvenile. It is disturbing that a trial judge would attempt such deception, but it is sickening to then see an appellate court accept and adopt such deceit and then champion it with its own decision. (Of course, then there is your conduct).

Plaintiffs/appellants case here focused on the conflict and on the definite and certain $2,000,000 settlement offer from defendant Ford in Case 1. The judge then had to fabricate another erroneous ruling that the settlement offer was inadmissible. As will be shown, these two rulings (later affirmed by the appellate decision) **undisputably and**

unrefutably have no legal basis and in fact fly in the face of established legal authority. Simply put these rulings were DISHONEST. This is the posture in which plaintiffs/appellants case went before the appellate court.

Again, anyone interested in justice and the legal system would have to believe this case would merit some heightened attention from the court of appeal, as it made some extremely serious allegations of attorney and judicial misconduct. Moreover, is the fact that the trial judges in both Case 1 and Case 2, as well as the appellate court in Case 1, also ignored the conflict of interest. Not only was this set forth in appellants' brief (at 1 and 32), but the brief also reminded the court of its **own duty**, pursuant to Evidence Code section 451(c), that the courts are required to take judicial notice of breaches of the Rules of Professional Conduct by attorneys. (at 40).

This matter came on for hearing of the appellate oral argument on 1-15-92, as the 4th matter on the calendar. Regarding the 3 previous matters, which concerned some rather bland and esoteric matters, the court acted in a professional, interested, patience and polite manner. However, when this matter came before the court, both Justice Klein and Croskey demonstrated an abrupt change in their demeanor, becoming hostile, impatient, rude and disinterested (it readily appeared that their minds were made up and that they did not want to hear from appellants' counsel, just like Judge Nelson). As you are aware, this is set forth in more detail in my complaint; also I know of at least 2 witnesses that can attest to the demonstatrated marked change in behavior by the justices). I therefore will not belabor this point, other than to state that appellants' counsel specificaly cited and referenced the case of Smith v. Superior Court (1984) 151 Cal.App.3d 491, 496, to Justice Klein, when she stated that plaintiffs/appellants damages were "too speculative." Justice Klein amazingly snapped back "So what, that case is not relevant here!" **In fact, it is undisputable that Smith is relevant and controlling on the purported issue that appellants' damages are "too speculative". It is also undisputable that Smith would hold in this case that appellants' damages are not speculative. What is really amazing, in fact incredulous and almost unblievable, is that Justice Klein herself was the author of the Smith decsision.**

Simply put, in no uncertain terms, these justices demonstatrated a total lack of judicial temperance (particularly Justice Klein and Justice Croskey) and made it abundantly clear that they did not want to hear and would not listen to the arguments of appellants' counsel.

On 3-17-92 Justice Klein's decision was filed. Again, about the only proper conclusion that the decision makes, is to affirm the trial court finding that as a matter of law, the conflict of interest existed between negligent-free passengers Maria Ornelas and Fabiola Castro, with negligent-driver Munoz. Amazingly though, after making that finding, the court then baldly asserts that appellants' "Conflict of interest [is] incomplete." How? **Why? Based on what authority?** What is clearly incomplete is that assertion by the court, as it is **undisputed** that there is no legal authority to support that baseless claim. **Maybe that is why the appellate decision fails to provide any authority to support that false claim?** In fact, the entire decision fails to cite/reference **even one case** concering the law of conflicts of interest. **How can this court ignore an entire body of law that is actually foundational and determinative of this case?** Particularly a body of law which is at the foundation of the attorney-client relationship and is at the heart and integrity of the legal system? Moreover a body of law, which when this case is given a proper analysis, is in fact dispositive of the case in favor of appellants, rather than defendants/respondents, and **clearly and undisputably refutes** Justice Klein's decision.

Regarding the law of conflicts of interest, Justice Klein, her court and her decision ignore **undisputed** law that states:

DUTY

1. The Rules of Professional Conduct are mandatory and conclusive and that the courts are required to take judicial notice of violations of the rules by attorneys. (Klemm v. Superior Court (1977) 75 Cal.App.3d 893, 898; Day v. Rosenthal (1985) 170 Cal.App.3d 1125, 1147; Evidence Code section 451(c). Rule 5-102 states: "(a) A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any , in the subject matter of employment. A member of the State Bar who accepts employment under this rule shall first obtain the client's written consent to such employment. (b) A member of the State Bar **shall not represent conflicting interests, except with the written consent of all parties concerned." It is undisputable that attorneys Greene and Belli owed appellants legal duties.**

BREACH

2. This **fundamental** conflict (the **undisputed** wrongful conduct of negligent-driver Munoz, in killing baby Jesus and causing the horrible burns suffered by Ms. Ornelas and Ms. Castro (see APR at 3, ftnt 3 and APRSC at 8, ftnt 3), being one of, if not the main issue for determination at the trial) was a conflict that was **not capable of being waived** and there is "no case" authority allowing dual representation of conflicting interests at trial. (Klemm at 898; Price v. Giles (1987) 196 Cal.App.3d 1469, 1473). It defies "common sense", reason, the law of conflicts of interest and the mandatory fiduciary duties Greene owed to allow the clearly culpable tortfeasor-driver Munoz to be grouped with negligent-free passengers Ornelas and Castro. (Klemm at 898).

3. Representing conflicting interests at trial would be "unthinkable" (Klemm at 898) because it would be "impossible" for the client(s) "to receive a fair trial". (Price v. Giles (1987) 196 Cal.App.3d 1469, 1473).

4. Where such conflicting interests are dually represented at trial by the same attorney, such a trial amounts to "irregular proccedings" and requires reversal. (Price at 1473). **It is undisputable that attorneys Greene and Belli breached legal duties owed to appellants when they ignored the conflict.**

CAUSATION

5. Failure of the attorney to make full disclosure to the client (here the total faliure of both Greene and Belli to recognize, disclose and assert the conflict) "will amount to fraud" and the attorney "must demonstrate that the client was fully informed on all matters related to transactions between them." (Ball v. Posey (1986) 176 Cal.App.3d 1214, 1215).

6. As a matter of law, "when an attorney attempts dual relationship without the full disclosure required of him, he is civilly liable to the client who suffers loss caused by lack of disclosure." (Lysick at 148). Lysick, like the instant case, involved an attorney who was representing conflicting interests, where the attorney took the case to trial without properly disclosing settlement offers to the client and thereby caused the client to suffer harm. There it was determined that the attorney was "civilly liable" to the client for ignoring the conflict of interest.

7. A breach of duty involving a conflict of interest "is not a case in which the question of breach turns on legal technicalities requiring the fine exercise of professional judgment." The issue is simply whether the attorney abandoned the best interests of the client in deference to the conflict. Such an occasion is not mere negligence and is "not the type of conduct to be condoned in the legal profession." (Betts v. Allstate (1984) 154 Cal.App.3d 688, 716). Like Betts, the subject case does not involve a breach of legal technicalities or a question of professional judgment; it involves the undisputable and unrefutable commission of fraud upon and the breach of mandatory fiduciary duties by attorneys Greene and Belli. Clearly, it not only appears that this appellate court condones such behavior, but it rewards it by ignoring this fraud and constructing a fraudulent opinion of its own to support the baseless and unfounded rulings made by an undisputed rogue trial judge.

8. The ignorance of the conflict was a breach of fiduciary duties. (Klemm at 898 and Day at 1147). The breach of a fiduciary duty shifts the burden of proof the the fiduciary attorney to prove all obligations were met. (Barbara A. V John G. (1983) 145 Cal.App. 369, 383).

It is undisputable that attorneys Greene and Belli caused appellants to lose the $2,000,000 settlement offer and to present the wrong case at trial, by failing to recognize, assert and advise of the conflict.

DAMAGES

9. Where "it is established that the attorney is, in fact, undertaking to represent conflicting interests, injury to the former client is presumed." (Krause v. Davis (1970) 6 Cal.App.3d 484, 490 and Lysick at 148; also see Civil Code 2235 and Mallen & Levit, Legal Malpractice 2d (1980) Ch. 7, Fiduciary Obligations, section 125, Disclosure and Consent, p. 218 (Appellants' Brief at 43 and APR at 6) and Ch. 18, The Litigation Attorney, section 580, Failure to Inform of or effect Settlement, p. 726 (exhibit E to APR)). Clearly, where appellants were never told of the conflict, they were thus never told of its risks to their case and therefore could never be properly advised about the $2,000,000 settlement offer. Their loss and their damages, obviously are a clearly foreseeable consequence that flow from the **undisputable** wrongful conduct of attorney Greene ignoring the conflict and then representing negligent-driver Munoz. **It is undisputable that attorneys Greene and Belli caused appellants to suffer damages -- the loss of the $2,000,000 settlement offer and the presentation of the wrong case at trial by being grouped with negligent-driver Munoz.**

The above case law **undisputably** establishes that plaintiffs/appellants had sufficient evidence to prove their case and that their case should have gone to the jury, but for the misconduct and illegal ruling of a rogue trial judge. Examining the record on Judge Nelson, his conduct actually is not surprising, as he was ignoring the law for years. What is surprising though, is that the Commission allowed him to get away with it. Even more surprising, is that this appellate court would jeopardize its honor, its office and likewise ignore its sworn duty to uphold and follow the law. There simply is no explanation for the appellate court totally ignoring the entire body of law on conflicts of interest, other than that **it is DISHONEST**. The Commission is reminded that on 3-17-92 appellants respectfully filed the APR with the appellate court, which in detail set forth these and the other eggregious errors by the appellate court. Here, the court was given a clear opportunity to correct its serious errors and do what was right. However, without even a comment the appellate court summarily denied a rehearing, **reaffirming its own undisputable and unrefutable wrongful conduct.**

Most importantly, rather than address the actual issues presented in this case and follow the attendant law, this appellate court in a misleading and disingenuous fashion crafts its decision with the opening statement: "Because Ornelas and Castro concede they have no evidence that a collectible judgment could have been recovered in the underlying action, the trial court properly directed a verdict in this legal malpractice action in favor of Belli."

This statement is misleading and disingenuous because that issue simply is not material to this case. Although appellants did readily admit Munoz had no assest (and arguably could not satisfy a judgment), **that issue was not and never was what appellants' case was about!** Appellants' case focused upon the definite and certain $2,000,000 settlement offer from Ford, which clearly was a "collectible recovery" under the law and satisfies the "damage" element of appellants' case. (See Lysick at 148, Betts at 716, exhibits B-E attached to APR and APRSC at 19-23, all which **undisputably** demonstrate that settlement offers are a "collectible recovery"; **and all undisputably ignored by the appellate court**). **That is the main issue of this case!** Whether Munoz had any assets or not simply is not material to appellants' case, as conflicts deal with and are determined by first looking at the factual situation concerning fault. Once a conflict situation is present, as set forth above in detail, the law clearly **mandates** that the attorney must recognize the conflict, disclose it and assert it. The attorney simply can not ignore the conflict; if the attorney does so, it is at his/her peril and the attorney is subject to "civil liability" to the client who suffers harm (Lysick) and damages to the client are presumed (Lysick and Krause); the attorney is also subject to disciplinary action. (Rule 5-102 and Klemm). **THAT IS THE ISSUE IN THIS CASE, NOT THE ASSET SITUATION OF MUNOZ!**

The above statement by the appellate court is also DISHONEST. This is demonstrated by the fact that this is not only a ficticious red herring issue intentionally grasped by the court, but also because the court then has to conciously fabricate further assertions/conclusions that also ignore the law, but moreover in fact contradict the law. For example, after the above statement by the court, the court states: "Ornelas and Castro's attempt to substitute Ford and Greene as sources of a collectible judgment is unavailing."

Not surprisingly, that statement is **not followed by any authority**, but is followed by these statements: "The jury absolved Ford of wrongdoing in the personal injury case. Thus, it must be accepted as established that Munoz alone caused the accident." These statements by the court are **also not followed by any authority**. What is amazing is that all 3 of these statements ignore and **simply beg the question of the conflict and the attorneys' attendant duties/breaches**, as we know the conflict was totally ignored by Greene and Belli and the case was tried with the conflict PRESENT! The wrongful conduct of Munoz was always Ford's defense: before trial, at trial and on appeal. **Ford also contended Munoz was negligent for overloading the truck, not having a gas cap on the truck and for not having the truck battery secured in/with a bracket; Ford also asserted that the battery was the ignition source of the fire and that the missing cap allowed gas to spill and feed the fire after it started in the engine compartment. Finally, Ford pointed out that the testimony of driver Munoz was materially different than that of passenger Ornelas regarding Munoz**

having driven the freeway on-ramp before; Munoz claimed that it was his first time, while Ornelas testified she had ridden with Munoz driving it on several occasions prior to the accident. It defies "common sense", reason, the law and the mandatory fiduciary duties that Greene owed, to allow the clearly culpable tortfeasor-driver Munoz to be grouped with negligent-free passengers Ornelas and Castro. **No wonder the jury absolved Ford!** The prejudice to appellants and their case was not only obvious, but it in fact turned out to be **FATAL!** (For the affect the conflict had on the jury see: declaration of jury-foreman Michael Wyatt (Appellants' Brief p.35), the Appellant Brief prepared by Belli in Case 1 (Appellants' Brief p.36) and the declarations of appellants' expert witnesses attorneys Richard DuPar and Tom Low (Appellants' Brief p.44 and 3 CT 719-27); also see APR ftnts 5-9). Greene's (and later Belli's) ignorance of the conflict, his failure to disclose the conflict and his failure to assert it are his breaches of duty to appellants and are what caused them to be totally uninformed about the risks of their case. These statements by the court are clearly wrong conclusions that ignore basic analysis, ignore the conflict and ignore the law! **For some inexplicable reason, nowhere in its entire decision does the court ever address the serious issues of fraud and breach of the fiduciary duties by Greene and Belli. HOW CAN THAT HAPPEN?** Recall the court is required to take judicial notice of these breaches.

Contrary to the court's assertion, appellants never attempted to "substitute" Ford; Ford's settlement offer was a settlement opportunity, which attorney Greene had an **undelagable** duty pursuant to <u>Rule</u> 5-105 (a breach of duty that the courts were required to take judicial notice of) to communicate and properly communicate (**without doubt**, when Greene failed to disclose the material information of the existence of the conflict, he could not porperly communicate the offer; **in fact, such conduct is negligence as a matter of law.** (<u>Lysick</u> at 153)). The $2,000,000 settlement offer form Ford was a "collectible recovery" from Case 1 (the gravamen of appellants' case here). Appellants established at trial and respondents never disputed that Ford made the $2,000,000 offer and could have readily paid it. Independent and regardless of Munoz' asset situation Greene was obligated to properly communicate the settlement offer. Again, Greene's ignorance of the conflict caused appellants to lose that offer and present the wrong case at trial. Appellants do not attempt to "substitute" Greene either; again Greene committed fraud and breached fiduciary duties owed to appellants. Greene is liable to appellants for his wrongful conduct and the resultant damages. (See <u>Lysick</u> at 148 and <u>Krause</u> at 490). Establishing Greene's liability and his ability to pay the damages (a "collectible recovery") are facts of the present case (Case 3) against Belli. Appellants established at trial and respondents never disputed that Greene had a $5,000,000 insurance policy covering his wrongful conduct here - hence a "collectible recovery" from Case 2.

The appellate court then states: "Any legal malpractice lawsuit based upon the failure to recognize the conflict of interest between driver Munoz and passengers [Ornelas and Castro] necessarly depends upon Munoz'z ability to satisfy a judgment?" **Why? Based upon what authority? Of course the court does not provide any authority, because there is none.** Actually, this is just another misleading fiction created by the court, which not only ignores, but is contrary to the law regarding settlement opportunites and conflicts of interest. The court follows the above statement with **another unsupported** assertion /conclusion: "The intervening lawsuit cannot supply a solvent defendant that did not exist at the outset." **What?** What kind of misdirection is this? There was a "solvent defendant" in Case 1, defendant Ford. There was a "collectible recovery", the $2,000,000 settlement offer from Ford. The appellate court statements here are not only incorrect, but they are a deliberate fabrication of a fiction to mislead. The court's statements ignore settlement opportunites (particularly the existence and fact of Case 2, which established the law of this case; see Clemente), beg the issue of the conflict and ignore the law regarding conflicts of interests. It is undisputable that this is a total failure of the court's duty to follow the law and is DISHONEST. **Conduct like this cannot be tolerated.**

Particularly disgraceful and dishonest is the following statement by the court: "Additionally, any measure of damages based upon what would have, could have, or should have occurred with respect to any settlement offer made to Ornelas, Castro and Munoz is far to speculative to provide a certain measure of damages." **Why? Based upon what authority? Of course the appellate court does not provide any. And why not?** Because this court again undisputably was **concocting another fiction.** As you will recall, as set forth above, appellants' counsel provided dispostive authority to the court at the oral hearing, establishing that there was no issue regarding "certainty of damages", per the case of Smith v. Superior Court, which in fact was **authored by Justice Klein herself.** Justice Klein howerever responded, "So what, that case is not relevant here!" Then later, after Justice Klien's decision came down, the APR was filed and at page 4, ftnt 4(c) (and later again in the APRSC at 9, ftnt 4(d)) at length pointed the incorrectness of this conclusion to Justice Klein, as Smith under a **heading that is entitled "Certainty of Damages"** states the exact opposite. Smith in pertinent part states: "Deterrence is an important policy consideration for allowing the maintenance of suits when damages cannot be shown with certainty. To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depradation. **Such is and cannot be the law . . .**" (Citations)." (at 501).

Simply put, as stated in the APRSC at page 11, **HOW CAN THIS APPELLATE COURT IGNORE ITSELF?** Continuing, the APRSC states: ". . .**This appellate court has failed to do its duty. This appellate court lacks credence; its decision in the subject case lacks credence, is wrong and in fact is dishonest. Shame on this appellate court.**"

YES, SHAME ON THIS APPELLATE COURT. Such conduct simply is disgraceful, dishonest and despicable. Such conduct can not be tolerated. However, recall your letter stated you had: "concluded that the facts do not constitute grounds for proceeding further" and " . . . determined that the factual information provided does not afford a basis for commission action."

SHAME ON YOU. SHAME ON THE COMMISSION.

I again remind you that the APR pointed out this error and the many other errors, serially and in detail to Justice Klein, however the appellate court summarily denied the petition. In particular, the APR (and later in the APRSC) stated:

". . .The gravamen of appellants' case was the definite and certain $2,000,000 offer made and that could have been paid by Ford. The wrongful conduct of Greene (and later Belli) caused appellants to lose that money. Furthermore, driver-tortfeasor Munoz caused appellants' injuries and thus was never entitiled to any portion; but moreover the problem of dispersing that money amongst the plaintiffs-clients that Greene (and later Belli) represented again only DEMONSTRATES THE CONFLICT PROBLEM! **Finally, any**

purported problems of speculation are the clearly foreseeable product of Greene's wrongful conduct.

"The above statement by the court is simply wrong and simply ignores the law. Mallen & Levit, Legal Malpractice, 2d (1980) Ch. 11, Damages, Section 302, Speculative Damages, at page 352 states:

> **"No one can say precisely what the plaintiff lost or should have lost in such situations, but difficulty or imprecision in calculating damages does not exculpate the attorney. Even though damages cannot be calculated precisely, they can be estimated. Otherwise, the attorneys could avoid liability merely because damages are difficult to measure. The beneficiaries would tend to be those whose errors were the greatest and whose conduct suceeded in complicating the issue of calculating the extent of the client's injury." 40 (emphasis added).**
>
> **40. "The integrity of the Bar as an essential part of of judicial system is to important to permit its reputation to be impugned by a justifiable charge that its members are free of an obligation to respond in damages for breach of the ordinary standards of due care, simply because the damages are difficult of ascertainment.**
>
> **"That the 'speculative nature' of the damages is no defense to a negligent lawyer whose client has lost the opportunity to have his claim adjudicated by a court and jury . . .The better reasoned opinions hold that a client is entitled to his day in court and to damages, which include the value of his lost claim, even though the ascertainment of those damages involves an adjuication, in the subsequent suit between the client and lawyer, of the issues which would have been tried in the first suit, had it been properly filed and prosecuted. The courts recognize the difficulties inherent in trying these issues in a suit in which the claimed debtor is not a party, and in which the evidence which he might have presented may not be available to the lawyer as defendant, but, on balancing the interests, place the burden on the defendant lawyer rather than leave the innocent client to bear the loss of his unlitigated claim." Better Homes, Inc. v Rodgers, 195 F.Supp 93,96 (N.D.W. Va. 1961).** (emphasis added).

In this case, the attorneys committed fraud and breached mandatory fiduciary duties, as opposed to the "breach of ordinary standards of due care" referenced above in Better Homes. The \$2,000,000 offer from Ford was definite and certain and due to attorney Greene's ignorance of the conflict (his commission of fraud and breach of fiduciary duties) plaintiffs/appellants Ornelas and Castro lost that settlement offer and presented the wrong case at trial. Attorney Belli then followed suit, also ignoring the conflict and prosecuting the wrong malpractice case. This is clear and udisputable. **Why and how**

could this appellate court ignore these clear facts? Why and how could this appellate court ignore the clear law and its clear duty to follow the law? Why did this appellate court concoct these transparent and unfounded fictions? This appellate court must answer these questions.

Continuing with its fictions the appellate court states: "Our opinion is not altered by the suggestion the jury might have viewed the case against Ford differently had Munoz been a defendant with Ford instead of a plaintiff suing Ford. It flies in the face of reason and insults the jury system to contend the jury would have found Ford negligent had Munoz also been a defendant." **Why? Once again bald assertions/conclusions that are not followed or supported by any authority,** but again only beg the conflict question and ignore the clear mandate of the law. The law clearly states that an attorney **can not** represent conflicting interests at trial (Klemm and progeny), to do so is fraud and the breach of fiduciary duties (Lysick, Ball and Betts) and where the attorney in fact does, damages to the client are presumed and the attorney is civilly liable to the client (Lysick and Krause). Moreover, the above assertions/conclusions ignore: 1) that Greene (his office) was in fact successful against Ford on another case, Biehle v. Ford, LASC Case No. NCC 67226 involving the same product defect allegations as here, **but did not have a conflict, because the only plaintiff was the driver**; 2) the declaration of jury foreman in Case 1, Michael Wyatt, which clearly sets forth the prejudical effect the conflict had on the jury, particularly Greene's alientation of the jury when he tried to discredit County Cororner Bucklin regarding the death of baby Jesus, which Munoz caused; 3) the jury verdict was 9-3 in favor of Ford; and 4) the testimony of appellants' expert legal witnesses regarding how the case(s) should have been properly handled. **The above assertions/conclusions by the court ignore the conflict, the law governing conflicts, the evidence and are simply DISHONEST.** What flies in the face of reason is this appellate decison. What insults the jury system is this appellate court.

Continuing, the court states: "The trial court properly excluded the settlement offers and focused instead on Munoz'z solvency." **Why? Based on what authority?** Again, **no supporting authority or analysis is provided** for these bald assertions/conclusions. **Why? There simply is none.** As repeatedly pointed out, the asset situation of Munoz is not material to this case. The gravamen of appellants' case was the $2,000,000 settlement offer from Ford. The law is **clear and without dispute** that settlement offers are recoverable in subsequent malpractice cases. (Lysick, Betts and Mallen & Levit, Legal Malpractice , Lost Settlement Opportunities, supra). When Greene ignored the conflict he caused appellants to lose that money. Neither respondents nor the court has ever explained why Greene did not have a duty to properly communicate that settlement offer. **It is undisputed that Greene owed that duty; undisputed that he breached that duty and undisputed that he ignored the conflict and did not advise the clients of the conflict and its attendant risks. There simply was no proper basis to exclude the settlement offer and none has been provided.** This court is again without basis and has dishonestly created another fiction.

Next: "Their claim the burden of proof on the issue of causation and damages should shift to Belli is rejected in Campbell, supra." Although, the court finally attempts to provide authority to support one of its conclusions, its purported analysis once again is misleading and wrong. First, the Campbell decision has been routinely critized by legal commentaries for "not being a model of clarity" and in fact those authorities proclaim that the burden of proof should be shifted to the attorney in a case like this. (CEB, How to Recognize and Handle NONMEDICAL MALPRACTICE, Section 2,3, Proximate Cause, p.194 and CEB, Handling Attorney Malpractice Cases, Program Handbook, October 1991, Section 3, Proximate Cause, p.16). Second, Campbell is readily distinguisable from the instant case, as Campbell did not involve a conflict of interest and attendant fiduciary duties, nor was fraud on the client involved; each which provide an independant basis for shifting the burden to the attorney.

The appellate court decision fails to even consider these facts, much less address them. **In addition, the appellate court without comment ignored the following other independent authorities/basis for shifting the burden of proof to the attorney**: Barbara A. v. John G. (1983) 145 Cal.App.3d 369; Krause v. Davis (1970) Cal.App.3d 484, 490; Civil Code section 2235; and Mallen and Levit. Legal Malpractice 2d (1980) Ch. 7, Fiduciary Obligations, section 125, Disclosure and Consent, p.128; also see Appellants' Brief at 43) that was set forth in APR at 6, ftnt 4(f) and APRSC at 11, ftnt 4(g). The appellate court's ruling here is incorrect, as this authority mandates shifting the burden to the attorney under the facts of this case. Regardless, having established the conflict, duty and breach of duties by both Greene and Belli, appellants' case was entitled to continue and go to the jury for determination on the issues of causation and damages. The ruling granting the directed verdict had no legal basis. (Gibson v. South Pacific (1955) 137 Cal.App.2d 337, 347; Lawless v. Calaway (1944) 24 Cal.2d 86, 89; lysick at 153). **It was fraud upon appellants, the public, the law and justice for this appellate court to write its decision affirming the direceted verdict.**

Next: "Ornelas and Castro's analogy to cases involving breach of a statutory or regulatory safety provision where the burden on the issue of causation shifts upon proof of violation is not applicable here." **Why? How?** It is **undisputed** that attorneys Greene and Belli ingored the conflict and Rule 5-102 -- both Greene and Belli are therefore **undisputably negligent per se**! Although the appellate court cites Haft here (this actually was the case appellants used to support their contention that the burden shifted to the attorney) **the court does nothing else; in particular the court fails to provide any reasoning or explanation why Haft is not applicable here, nor does the court refer to any specific language from Haft that states such.** A reading of Haft in fact, shows it does not make such a statement/holding. **Apparently this is just another falsehood from this court.** As previously stated, this case concerns the commission of fraud and breaches of mandatory fiduciary duties by both attorneys Greene and Belli. This fiduciary duty of the attorney "is of the highest character" and is a "wider obligation to exercise due care to protect a client's interest in all ethical ways and circumstances" and the courts are required to take judicial notice of these violations by Greene and Belli. (Day at 1147). The **undisputable** facts of this case thus provide an even more compelling basis to shift the burden of proof than the facts of Haft itself. Haft thus is in fact applicable to this case and proper analysis requires the burden to be shifted to attorneys Greene and Belli "**to absolve themselves if they can.**" (Haft v. Lone Palm Hotel (1970) 3 Cal.3d 756, 772). **Why does Haft not apply to attorneys? Why are attorneys not subject to the same law as others are?**

In conclusion, it is **undisputable** that:

1. As a matter of law there existed a fundamental conflict of interest from the underlying accident between negligent-free passengers Maria Ornelas and Fabiola Csatro, with negligent-driver Munooz.

2. As a matter of law plaintiffs/appelants Ornelas and Casrto established a prima facia case of professional negligence against attorneys Greene and Belli for their failure to recognize, disclose and assert that conflict of interest.

3. Judge Nelson committed several blantant and illegal acts of judicial misconduct that "robbed" appellants of their right to a jury trial; most prticular, that of ignoring the law and issuing a baseless grant of a directed verdict.

4. Justice Klein and her court committed judicial misconduct by writing the appellate decision in this matter that ignores the law repeatedly; and when given the opprtunity to correct her (their) errors, refused. It is undisputed that Justice Klein and her court have some explaining to do.

5. The conduct of this appellate court can not be tolerated.

6. An overview look at this entire matter would give one the appearance of a "club" or "brotherhood" (with sisters) circling the wagons to protect itself -- i.e. a coverup.

7. You and the Commission have totally failed in your duty to investigate this matter, failed in your duty to protect the public and that you both have some explaining to do. Your conduct can not be tolerated.

On behalf of my clients, the public and myself I hereby demand that you explain your failure to have taken this matter serious and your failure to have investigated my complaint. I also demand to know what you and the Commission have done to date and will do in the future regarding your investigation.

As you are aware, the public is continually expressing their displeasure with attorneys, judges and the entire legal system. It is no wonder with such cases like Michael Milken, Justice Karlin, Rodney King and then this case, which domonstrates instituional failure on every level. When attorneys and judges do not follow the law they bring contempt for and disrespect to the law. If attorneys and judges do not follow the law, then obviously there is little reason for the public to believe in and follow the law either. The conduct demonstrated by you and Commission in this case should only give them reason for further alarm. I will do my best to see that the public knows what went on in this case and your puported investigation.

Finally, I would request that you consider my letter, reconsider your investigation and then do what is right, do your duty.

Should you have any questions, or need any further assistance, feel free to call or write.

Gary L. Zerman

GARY L. ZERMAN

enclosures: APR
APRSC