

REPRESENTING PLAINTIFFS

Nina Schuyler

It's often highly emotional. Heart-wrenching at times. With lives at stake, it can be a race against a ticking clock—depositions and interrogatories needing to be done before the client's health deteriorates. Despite the high emotion of these cases, attorneys who represent plaintiffs can't imagine doing anything else.

"When a client thanks you, not just for handling her case but for coming to understand who she is, what she's suffered, and how her life has changed, I find that very satisfying," says Amy Eskin, a partner at Hersh & Hersh.

That sentiment runs through the six Bay Area plaintiffs' attorneys profiled here, all of whom began practicing this kind of law straight out of law school and haven't looked back. Added together, they've been practicing more than a hundred years, winning scores of trials with million dollar judgments.

These lawyers are on the front lines, the ones whom the public knows best. They represent people in employment matters or when a catastrophic injury strikes from negligence, a defective product or pharmaceutical, or from asbestos exposure.

"My personality is to be a plaintiff's lawyer," says Daniel Feinberg, a partner at Lewis, Feinberg, Lee, Renaker & Jackson in Oakland. "I can't imagine not doing this. It's like asking a dog why it chases squirrels."

To succeed in this area of law, says Gilbert Purcell of Brayton Purcell, means to immerse yourself completely in each case. "There are always things to be done, and you're never done," says Purcell. But, he's quick to add, "When you have a chance to make a difference in someone's outcome, it's all you could hope for in your career."

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AMY ESKIN
HERSH & HERSH

It was the summer of 1974, and fourteen-year-old Amy Eskin was glued to the TV, watching the Watergate hearings and, in particular, Barbara Jordan, a member of the House Judiciary Committee, holding those in power accountable. “When I saw her, I knew I wanted to be a lawyer,” says Eskin. “I wanted to give people a voice to power and protect them from the abuses of power.”

Her conviction held and she joined Hersh & Hersh, first as a paralegal in 1981 and then, after passing the bar in 1987, as an associate and finally, in 1992, as a partner. As a litigator, she’s tried many cases and settled countless others. Most of these cases involve individuals who have suffered catastrophic injuries due to defective medical devices, products, or prescription drugs, or who were injured due to the negligence of a driver or company. Her practice also includes consumer class actions, wage and hour cases, whistleblower actions, and wrongful termination. “I feel honored to represent people who have the courage and integrity to stand up against someone who has harmed them,” she says.

Her firm is well known for being the first to file a case against Wyeth, manufacturer of the diet drug Fen-Phen, which was marketed as an antiobesity medication. Representing dozens of plaintiffs who developed severe heart and lung diseases from the drug, Hersh & Hersh obtained more than \$150 million for their clients. “Even though the drug has been taken off the market, people are still being diagnosed with Fen-Phen-related injuries. We still have Fen-Phen cases,” says Eskin.

Eskin also currently represents women who have been injured by a transvaginal surgical mesh, a medical device marketed as being safe and effective for treatment of incontinence and pelvic organ prolapse. The manufacturers of these devices can bypass performing human safety test-



ing by showing that their product is “substantially similar” to one already approved and on the market. “In 2008 the Food and Drug Administration issued a public health notification about the risks and problems associated with this product,” says Eskin. “In our cases, we contend that the manufacturer was aware of the risks and problems associated with mesh repair long before the FDA issued its public health notification.”

Maintaining access to justice for her clients is an ongoing challenge, she says. For example, in *AT&T Mobility v. Concepcion* the United States Supreme Court granted

AT&T’s request to allow it to use the fine print in contracts to eliminate class actions. This decision allows corporations to prevent consumers and employees from banding together to challenge companies that defraud them or discriminate against them in the workplace. Despite this decision, Eskin and Hersh & Hersh continue to represent consumers and employees.

On the other hand, says Eskin, surprisingly the U.S. Supreme Court has recognized the societal benefit of plaintiff’s work. “The justices acknowledged that state tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. Lawsuits are one way to keep people aware of the dangers,” says Eskin.

With twenty-four years of experience, Eskin firmly believes in the trial by jury system. She was elected into the American Board of Trial Advocates, which has as its mission the preservation of the civil jury trial. “Bay Area juries are still very good at seeing the truth behind negligent conduct,” she says. “They want to achieve justice for people. They are aware, more than ever, of the ways in which peoples’ rights can be ignored by corporations and employers.”

Eskin’s firm participates in BASF’s mediation program.

“It’s a very useful tool to help litigants get someone else’s read on their case,” she says. “By volunteering, you are helping the community at large.”

And that seems to be Eskin’s main motivator. “Empowering one client is the first step in making things better for everyone.”

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DANIEL FEINBERG

LEWIS, FEINBERG, LEE,
RENAKER & JACKSON

For more than twenty years, Daniel Feinberg has been a plaintiff’s lawyer, specializing in employee benefits litigation, including claims relating to pension, medical, and disability benefits. “I never thought about working at a corporate firm,” says Feinberg, a partner at Lewis, Feinberg, Lee, Renaker & Jackson in Oakland. “My personality is to be a plaintiff’s lawyer.”

For the past three years, he has served as cocounsel for journalists and staff who participated in the Tribune Company’s Employee Stock Ownership Plan (ESOP). In 2007, the Tribune Company, which owns the *Chicago Tribune* and *Los Angeles Times*, was put up for sale. In a complicated financial arrangement, real estate investor Sam Zell took control—with the ESOP as nominal purchaser, leaving the company heavily leveraged and the ESOP holding \$250 million of unregistered shares from Tribune Co., shares that can’t readily be traded. Tribune filed for bankruptcy in 2008.

In November 2010, the federal judge granted the plaintiffs’ motion for partial summary judgment against GreatBanc, the ESOP trustee, for the purchase of this stock, a transaction prohibited by the Employment Retirement Income Security Act of 1974 (ERISA). In February 2011, the judge denied GreatBanc’s summary judgment motion to cap plaintiff’s damages at either \$2.8 million—the cash payment made on the loan prior to Tribune’s bankruptcy—or \$15.3 million—in principal and interest paid. Then in March 2011, the judge granted plaintiff’s



motion for class certification and appointed Feinberg and cocounsel as counsel for the class.

“Essentially, the ESOP was left holding the bag in this deal,” says Feinberg. The class includes eleven thousand employees and former employees who were participants in the Tribune ESOP.

Feinberg has also served as class counsel in more than a dozen cases seeking forfeited vacation benefits on behalf of employees of companies such as Kelly Services, Securitas, and Providian. During the last couple years, however, the Tribune matter

has taken up most of his time.

To stay on top of his field, Feinberg taps into The Bar Association of San Francisco’s continuing legal education program to stay on top of a range of topics. “BASF has the highest-quality programs,” says Feinberg, who received the BASF Foundation’s 2006 Champion of Justice Award and who now serves on the foundation’s board of directors. “It provides an important forum where people can talk, get new ideas, and make new connections, all of which is critical for doing your work and doing it well.”

With his practice built primarily around ERISA, the biggest change in his practice over the years has not been a particular law or court case, but technology. “When I started, I’d go through a mountain of documents, reviewing them manually,” he says. “Now they are uploaded on cloud-based data systems. You can easily search and analyze documents in ways that couldn’t have been done before. The downside? There are a lot more documents to view with emails and electronic records.”

In addition to his practice, Feinberg does a lot of pro bono work. “My firm volunteers for the AIDS Legal Referral Panel,” he says. The organization provides free or low-cost legal assistance to people living with HIV

or AIDS who face problems with housing, employment, and insurance, among other things. Feinberg and the other attorneys at his firm also volunteer at clinics run by the Employment Law Center. He also speaks and publishes articles about ERISA.

“While litigation can be frustrating with its delays, overall my practice is so rewarding,” he says. “People come to you with a serious problem concerning their pension or health benefits, and it’s very fulfilling to solve their problems. In this particular field, there’s also a lot of room for creativity.”



Photo by Jim Block

DORIS CHENG

WALKUP, MELODIA, KELLY & SCHOENBERGER

You can hear it in Doris Cheng’s voice. When she talks about her practice, her tone turns passionate, serious, sober, as if remembering the hundreds of injured people who’ve come through her office door seeking help. “I can’t imagine practicing any other type of law,” Cheng says. “I find it very personally rewarding when I can make a difference in an individual’s life.”

Ever since she graduated from the University of San Francisco Law School thirteen years ago, Cheng has been with Walkup, Melodia, Kelly & Schoenberger, representing individuals and families who have suffered catastrophic losses. She has tried many trials and arbitrations, and obtained countless settlements. “My clients’ lives are completely altered because of someone else’s negligence, whether due to negligent driving, negligent maintenance of property, or a defective product,” she says.

The vast range in her practice is reflected in her results. In 2006, in a three week trial, a San Francisco jury awarded Cheng’s clients \$3 million for the death of their twenty-nine-year-old son in a medical negligence action.

The next year, she co-tried another medical negligence action in Sonoma and obtained a \$9.5 million verdict on behalf of a twenty-six-year-old paraplegic man. In 2009, she represented two families in separate actions related to carbon monoxide exposure. In one case, a defective pool heater produced lethal levels of carbon monoxide, killing a young college student. In the other case, a mother and son suffered injuries as a result of chronic low-level carbon monoxide exposure. The confidential settlements were in excess of seven figures. In a wrongful death case against a rental car company, she successfully negotiated a \$6.5 million settlement on behalf

of the decedent’s family. She recently completed a birth injury case in Southern California, wherein she obtained a settlement of \$6.8 million on behalf of a severely disabled toddler with spastic quadriplegia.

Among other things, she is currently representing a thirty-five-year-old man who underwent a surgery to remove a stricture in the urethra. During the procedure, the blade of the surgical knife broke off—twice.

Cheng and the firm are no strangers to product liability. Early in her career, Cheng represented a sixty-three-year-old Sacramento woman who was prescribed a diabetes drug that resulted in liver failure and the need for a liver transplant. The drug had been approved by the FDA, but was later recalled. The company settled that case in the amount of \$2.5 million. More recently, the firm was one of the first to file suit against DePuy Orthopaedics, Inc., who was responsible for manufacturing and distributing a defective hip replacement implant. In August 2010, DePuy announced a formal recall of its products.

Cheng is a strong believer in giving back to the legal community and has actively supported The Bar Association of San Francisco. After completing a term as

chair of the Judiciary Committee in 2008, Cheng was elected to serve on the Board of Directors in 2009. "BASF is the most impressive legal service organization in the Bay Area. It works for the benefit of lawyers, San Francisco residents and homeless citizens, and our youth. It has a powerful voice in our legislature and judiciary. It also has such a diverse membership base," she says. "BASF has exposed me to a wide variety of practice areas and given me an opportunity to participate in relevant current events and legal topics that affect all lawyers and our society."

This past year, she served as an advocacy coach for Lowell High School in BASF's high school mock trial competition. Cheng also teaches at her alma mater, serving as the coprogram director for the school's Intensive Advocacy Program. Over the past two years, she has taught trial advocacy to prosecutors and defense attorneys in association with the United States Department of Justice in Eastern Europe. She has made multiple trips to Pristina, Kosovo, and Skopje, Macedonia. "It's very exciting. There are several countries all around the world moving toward an adversarial system. The United States adversarial system has been regarded as the role model for an independent and fair judiciary," she says. She has also taught advocacy skills to solicitor advocates in Northern Ireland and lawyers in Mexicali, Mexico. She currently serves as the coprogram director of the National Institute for Trial Advocacy's Western Region Teacher Training Program.

For these works and others, Cheng has been recognized as a Northern California "Super lawyer" and as one of the Best Lawyers in America. "I'm better because esteemed organizations like BASF give me a place to serve," says Cheng.



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GILBERT PURCELL
BRAYTON PURCELL

"Go ahead. Ask me anything. I'm in a great mood," says Gilbert Purcell of Brayton Purcell.

After seven months, two trials, three separate trial phases, Purcell won a \$41 million verdict against Kaiser Gypsum Company, Inc. Purcell's client worked for forty years as a plumber in San Francisco's high-rise buildings and as a result was repeatedly exposed to asbestos. He now suffers from mesothelioma, a fatal cancer of the lining of the lungs.

After a three week trial and a half day of deliberations a unanimous San Francisco jury found Kaiser Gypsum, a manufacturer of joint compounds and wallboard materials, guilty of acting with oppression or malice by clear and convincing evidence. The jury awarded a \$20 million punitive damages verdict. "I believe this was the first punitive damage assessment ever awarded against one of the Kaiser Gypsum companies," says Purcell. "I'm very relieved because my client is a good, deserving man, and I didn't want to let him down."

In a previous trial, a San Francisco jury ruled that Kaiser Gypsum and FDCC California, Inc. (formerly known as Dinwiddie Construction Company), a general contractor, were negligent and found that Kaiser Gypsum's products were defectively designed and the companies failed to warn of the product defect. In that matter, the jury awarded Purcell's client \$1.273 million in economic damages, \$15 million in noneconomic damages, and \$5 million in loss of consortium damages.

Widely regarded as the premiere asbestos trial attorney, Purcell tried his first asbestos case in 1986 in front of California Supreme Court Chief Justice Ronald M.

George. In 1987, he tried and won his first asbestos property damage action in California against W. R. Grace & Co, manufacturer of asbestos-containing spray fireproofing. In 1995, he joined his current partner, Alan Brayton, and they formed Brayton Purcell. According to Purcell, 75 percent of the firm's cases involve asbestos, and the rest are a hodgepodge of tort-related matters.

Purcell got his first exposure to plaintiff's law while attending the Pepperdine University School of Law. During that time, he clerked at the well-known plaintiff's firm, Girardi & Keese, in Los Angeles. "That was years ago and I haven't looked back," says Purcell. "I found trial work and representing plaintiffs challenging and very rewarding. When you have a chance to make a difference in someone's outcome, it's all you could hope for in your career."

At the same time, he's the first to admit that having a successful trial practice means immersing yourself completely in each case. "You have a plaintiff who might be terminally ill and you've got to get to trial before he dies," he says. "It becomes all consuming and other parts of your life suffer."

His membership with The Bar Association of San Francisco helps him step out of his demanding practice. "You get the benefit of collegial exchange of information," he says. "When you are dealing with a case, it's helpful to know how others have handled it."

While the use of technology has changed many trial attorneys' practices, Purcell likes the old school way: "I remain true to the age-old legal tablets," he says. "I'm pretty low tech. In trial, I draw my presentations."

In addition to his recent court verdict, Purcell is grateful for a recent California Supreme Court answer to a ques-



Photo by Jim Block

tion posed by the federal Ninth Circuit Court of Appeal. In May, the Court stated in *Pooshs v. Phillip Morris USA, Inc.* that an earlier tobacco-related injury does not trigger the statute of limitations for a later tobacco-related injury. "The tobacco industry had argued that once you've had an adverse effect from smoking, you've triggered the statute for later diseases," says Purcell. "The court's answer finally resurrects the viability of smokers' cases. It often takes years for lung cancer to develop and is often preceded by lesser injuries. We're grateful that the court rejected what was a ridiculous procedural effort to deny individual smokers their rightful day in court to prove up their cases."

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KELLY DERMODY
LIEFF CABRASER HEIMANN
& BERNSTEIN

As head of Lieff Cabraser Heimann & Bernstein's Employment Law practice, Kelly Dermody has handled her share of employment cases. "I've spent a lot of my career representing the hourly, entry-level worker and women and people of color," she says.

About six years ago, she began representing another type of employee: professional, highly credentialed women on Wall Street who allege systematic and pervasive gender discrimination. Most recently, in September 2010, Dermody, along with the firm Outten & Golden in New York, filed a gender discrimination class action suit, *Chen-Oster v. Goldman Sachs, Inc.*, in federal court. The complaint charges that, among other things, Goldman Sachs pays its female professionals less than similar male professionals, passes over qualified women for promotion, ranks women unfairly based on their objective performance, and offers better business opportunities and professional support to its male

professionals. “The case involves hundreds of professional women at the top of their game,” says Dermody.

She also currently represents several thousand foreign nationals sent to the United States by a unit of the biggest company in India, Tata Group. The complaint charges that the non-U.S. employees are required by the company to endorse and sign over their state and federal income tax refund checks to Tata. In addition, these employees have not been paid their promised wages in violation of their contract.

In another one of her employment cases, in February 2011, the U.S. District Court for the Northern District of California granted preliminary approval of a class settlement of \$12 million for current and former AT&T support workers. “We alleged these IT workers had been misclassified as exempt from overtime,” she says.

Dermody became a lawyer because she wanted to do social justice work. “I wanted to make a positive difference and I hope that I have,” she says.

In addition to employment matters, Dermody also handles consumer class actions, including a series of cases Dermody led on behalf of uninsured patients who alleged they were price gouged by California hospitals. The cases resulted in refunds and bill adjustments of more than \$1 billion.

Since she began practicing in 1993, Dermody says the law that has made the most significant impact on her work is the U.S. Class Action Fairness Act of 2005. The act expanded federal jurisdiction to many class actions. “Federal courts are very busy,” she says. “The judges are overworked, so it’s very hard to get time with the judge for case management.” She added, “At



the same time, more and more state law-based class actions are being venued in federal court. It is a hard cycle for the federal system.”

And she is closely watching the recent U.S. Supreme Court decision issued in April 2011 that a company can require its customers or employees to arbitrate disputes individually rather than joining in a class action. “If this stands, some consumer class actions may be dead,” says Dermody. “We need a legislative fix. Corporations should not be given free rein to commit widespread fraud against consumers.”

In addition to her practice, Dermody provides pro bono work for a variety of nonprofits. She’s also been an active member of The Bar Association of San Francisco and is the president-elect of the association. “My involvement has helped me meet the senior leadership of the San Francisco legal community,” she says. “I’ve also met people in my peer group who are leading law departments and firms, as well as judges and mediators. It’s hard for me to imagine finding one’s way as a legal professional in this community without BASF.”

DAVID LOWE

RUDY, EXELROD, ZIEFF & LOWE

A bad economy doesn’t necessarily mean more work for plaintiff employment lawyers.

“In fact, when times are bad, employees may be more reluctant to bring a claim because they are concerned about losing their jobs and finding a new one,” says David Lowe, of Rudy, Exelrod, Zieff & Lowe.

But that doesn’t mean the employees are having an easy time of it. “Claims for unpaid wages go up,” says Lowe.

“During a recession, many employers come under increased pressure to cut costs, and that can sometimes result in cutting corners on wages or terminating workers who are otherwise protected—people on medical or maternity leave, for example.”

Despite the reluctance on the part of some employees to pursue a case in tough times, Lowe has had a very busy year so far. Lowe specializes in a broad spectrum of employment issues and handles both individual cases and class actions. Having worked with his colleague Mark Rudy and attended the Straus Institute for Dispute Resolution at Pepperdine University School of Law, Lowe is also a trained mediator.

In 2011, Lowe has litigated a major sexual harassment case and a breach of contract case and is currently preparing for two arbitrations involving significant unpaid commissions. He is also litigating a class action asserting that a financial services firm misclassified its salespersons as independent contractors, and he recently filed a class action alleging that Equinox Fitness member advisors are being illegally denied overtime pay.

Lowe grew up immersed in the world of plaintiff’s work. “My dad is a plaintiff’s lawyer,” he says. “I grew up understanding that lawyers have a unique opportunity to help people in very concrete ways, and, at the same time, lawyers can advance and protect civil rights. Particularly in employment law, you can do both: help people in their day-to-day lives and enforce basic civil rights.”

But doing this kind of work can be frustrating. “Litigation is expensive and inefficient,” he says. “The results

are sometimes arbitrary and unfair. It’s an imperfect way of achieving justice.” And that’s where working as a mediator is appealing. “It’s incredibly satisfying to resolve a legal problem in a day,” he adds.

His membership with BASF also keeps his practice enriched. “We are a small firm in a niche practice,” he says. “BASF allows me to interact with lawyers in different areas of the law. You get to know top notch lawyers practicing entertainment law, antitrust, and criminal law. I’ve gotten to know people who work in government, the big firms, and nonprofits.”

He currently serves on BASF’s Board of Directors and the Judiciary Committee and is chair of the Labor and Employment Section. He is also a member of the LGBT Issues Subcommittee. Outside of BASF, Lowe is chair of the International Bar Association’s Discrimination Committee and serves on the Board of Directors of the Lawyers’ Committee for Civil Rights and the ACLU Lawyers’ Council Steering Committee.

Nina Schuyler is a lawyer whose first novel, The Painting, was published in 2004. Her new novel, Accidental Birds, will be published in fall 2011. She can be reached at ninaschuyler@hotmail.com.