

CASE IN FOCUS

LITIGATOR PROFILE

Cross-Examination Skills Honed in Dinner Table Debates

Name: John D. O'Connor.

Name of firm: Tarkington, O'Connor & O'Neill.

Location of firm: One Market Plaza, Spear Tower, 41st Floor San Francisco, CA 94105.

Education: University of Michigan (J.D., 1972); Notre Dame (B.A. Political Science, 1968).

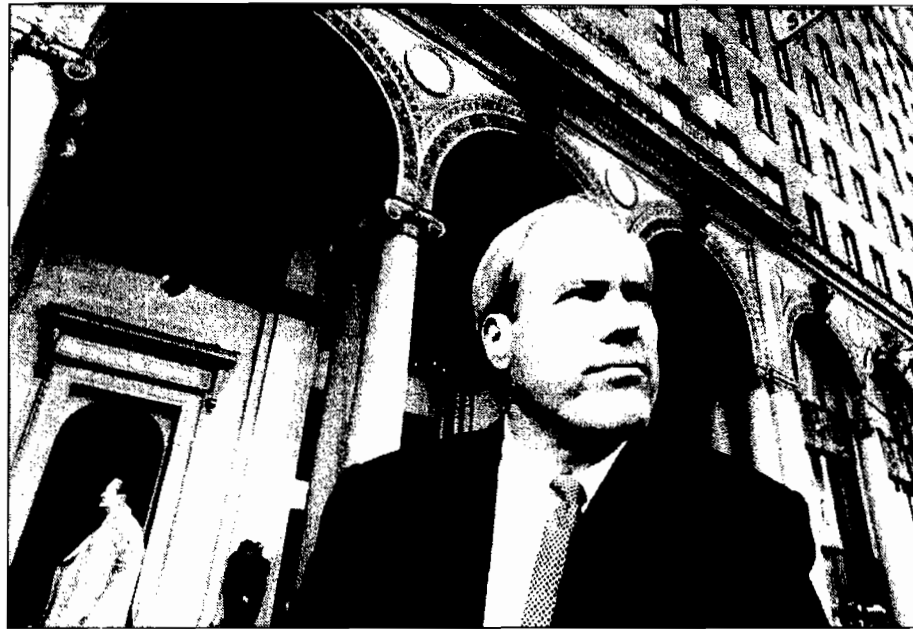
Affiliations: Federal Bar Association, American Bar Association (Litigation, Tort & Insurance sections), The State Bar of California, San Francisco Bar Association, California Association of Defense Counsel and Defense Seminar Association.

Length of time practicing law: 23+ years

Types of cases: Litigation, both plaintiff and defense tort, business, white-collar criminal and banking and financial institutions' litigation. O'Connor's firm has represented the Federal Deposit Insurance Corporation, the Resolution Trust Corporation and the National Credit Union Administration.

Background: Born and raised in Indianapolis, O'Connor grew up in a family of lawyers. His father used to cross-examine him at the dinner table about his whereabouts that day. Although his parents wanted him to become a doctor, O'Connor enjoyed his family discussions and debates and thought he was best suited for the law. From 1972 through 1973, O'Connor worked for Belli, Ashe & Choulos. He spent the next five years as an assistant U.S. attorney in the Northern District of California. That position allowed him to gain experience in civil and white collar criminal government cases. In 1981, he started his own firm with Chris Tarkington and Stephen O'Neill. He enjoys the FDIC work because it gives him a chance to represent both plaintiffs and defendants.

Keys to success: O'Connor believes that his success is due to a passion for the truth, development of cross-examination skills and professional behavior. "When a trial lawyer



CRISTINA TACCONE / For the Daily Journal

NO GAME PLAYER — "When a trial lawyer succumbs to the temptation to 'score points,' he loses touch with what is important and loses his connection with unbiased jurors who will value truth," John D. O'Connor says.

succumbs to the temptation of the moment to 'score points,' he loses touch with what is important and loses his connection with unbiased jurors who will value truth." O'Connor says a passion for and belief in the truth of the case can lead to the development of cross-examination skills. O'Connor thinks that the quality of cross-examination suffers compared to what he observed in the early 1970's. "With the expense of today's litigation, a crowded court docket, and the prevailing reluctance of most institutional clients to try a case unless absolutely forced to do so, combined with the increasing number of lawyers, it is a virtual certainty that very few lawyers will ever develop sufficient trial experience to become excellent cross-examiners." O'Connor feels that a lawyer can bring his case into focus and has

a profound impact on an undecided juror through effective cross-examination. He does not take advantage of or personally attack a weak opponent. "It should be obvious to the jury that the only thing important to a trial lawyer is getting at the truth, a maxim that many espouse but very few put in practice."

Favorite trial moment: O'Connor tried his first jury trial with Melvin Belli — a case in which he represented a high school music teacher who was thrown in jail for public intoxication, developed thrombosis, did not receive prompt medical care and had a leg amputated. The plaintiff contended he could have been a great opera star had the incident not occurred. O'Connor persuaded the court to

allow him to play a tape of the plaintiff singing as the last evidence before the jury deliberated. The song was "This Nearly Was Mine" (from "South Pacific"). "There was nary a dry eye!" The case settled before the jury returned.

Personal: O'Connor spends his free time with his wife of 19 years, Jan, and their three children, John Jr., 17; Christy, 15; and Carly, 13. He also devotes his free time to promoting positive activities for youths. He served as director and *pro bono* attorney for the Haight-Ashbury Free Medical Clinic and was on the board of Big Sisters of Marin. He has a passion for basketball and either plays it or watches his three children play the sport as often as possible. He also enjoys all racquet sports. In addition, O'Connor likes to read non-fiction history, philosophy and theology books.

What other lawyers say about this attorney: William Morrisroe of the California Department of Transportation, said O'Connor "is extraordinarily well prepared. His method of cross-examination is interesting and effective because he can simultaneously impeach the witness and entertain the jury." O'Connor's "a very skilled trial lawyer. He was very professional and put on a good case for his client," said William F. Elfving of Hoge, Fenton, Jones & Appel, San Jose. Steven G. Teraoka of Teraoka & Associates, San Francisco, described O'Connor as "a very bright trial lawyer with a remarkable memory. He presents a factually persuasive presentation in a very relatable and down-to-earth manner." Teraoka added that O'Connor has the ability to put "complex matters in a masterful, logical and understandable" light.

Jury Rejects Claim That Faulty Brakes Caused Fatal Crash

Type: Personal injury (vehicular), wrongful death, product liability.

Verdict: Defense Verdict.

Case/Number: Wesley A. Miller, Jr. and Scott Miller v. Lee Orchards, et al. / 052033.

Court/Date: Yuba Superior / December 8, 1995.

Judge: Hon. John Golden.

Attorneys: Plaintiffs — Leon McCaslin (Yuba City). Defendants — John D. O'Connor, Andrea E. Saint (Tarkington, O'Connor & O'Neill, San Francisco) for Midland Brake, Inc.; William R. Morrisroe (Sacramento) for The State of California.

Technical Experts: Plaintiffs — Joseph Balsler, Ph.D., materials science, Livermore; Milo D. Bell, mechanical engineer, Livermore; Bernard Cuzzillo, Ph.D., brake systems/failure analysis, Berkeley; Albert J. Ferrari, mechanical engineer, Oakland; Dennis I. Goslin, economist, Chico; Ross Little, vehicle design/brake systems, Sacramento; Lyman Lorenson, Ph.D., polymer and organic chemist, Orinda; Lindley Manning, mechanical engineer, Reno, NV; Lowell Shifley, Ph.D., highway design, Reno, NV. Defendant, Midland Brake, Inc.

— Kirk Blackerby, economist, Morgan Hill; Garrison Kost, Ph.D., failure analysis/accident reconstructionist, Menlo Park; John E. Moalli, Ph.D., polymers/civil engineer, Menlo Park; Stanley Stokes, brake systems, Sahuarita, AZ. Defendant, The State of California — Robert Lindskog, accident reconstructionist, Cupertino; Ronald Nelson, traffic engineer, Sacramento.

Medical Experts: Plaintiff — Robert Berry, M.D., emergency trauma, Marysville; Jack Bonura, D.D.S., dentist, Redding; Dea Halverson, M.D., neurologist, San Jose; Donald Harrington, M.D., orthopedist, Marysville; Robert McClellan, M.D., orthopedic surgeon, San Jose; Robert Milani, M.D., thoracic surgeon, Marysville; Richard Morgan, M.D., plastic surgeon, Chico; Ziad Niazi, M.D., pediatric urologist, Redding; John Palmer, M.D., pediatric urologist, Sacramento; Leonard Schaer, M.D., emergency trauma, Marysville; Stanley Shatsky, M.D., neurosurgeon, San Jose; Robert Vogel, M.D., orthopedic surgeon, Marysville; Robert Wright, M.D., urologist, Marysville; Luis Zavala, M.D., neurosurgeon, San Jose. Defendant — William Kirby, M.D., pediatric urologist, Auburn.

Facts: On October 15, 1991, the defendant truck driver was operating a truck overloaded with prunes owned by defendant truck owner, Lee Orchards, on Highway 70 at Feather River Boulevard in Yuba County. The truck lost its brakes due to a rupture in the primary cup of the master cylinder, failed to make the off-ramp turn out and drove off the ramp across Feather River Boulevard. The truck ran over the plaintiffs' vehicle and dragged it under the truck for 200 feet. Wesley Miller, Sr. (deceased), a 43-year-old contractor, Linda Miller (deceased), a 35-year-old part-time secretary, Wesley Miller, Jr., a 16-year-old high school student, and Scott Miller, a 13-year-old student, were in the plaintiffs' vehicle at the time of the accident. Wesley Miller, Sr. and Linda Miller, died as a result of the accident. The defendant, Midland Brake, Inc. ("Midland"), manufactured the brakes on defendant's vehicle. The defendant, State of California ("State"), was sued as the entity in possession of the off-ramp where the accident occurred. The plaintiffs, Wesley A. Miller, Jr. and Scott Miller, were the sons of Wesley and Linda Miller. They brought this action against the defendants driver, truck owner,

Midland and State based on negligence, strict liability, products liability, wrongful death and dangerous condition theories of recovery.

Contentions: The plaintiffs contended that the truck's brake failure was caused by the rupture of the rubber primary cup seal of the truck's master cylinder, which had been installed in the truck as an after market replacement for the original equipment. The plaintiffs also contended that microscopic examination of the primary cup seal demonstrated that the rupture of the seal was caused by an inherent defect in the seal as a result of rubber "flashing" debris that had become lodged in the seal during the manufacturing process, causing the small void which later developed into a premature crack. The plaintiffs further contended that the State failed to have a "Jersey barrier," and sand-filled crash barrels or other barriers to prevent a vehicle from proceeding into traffic on Feather River Boulevard from the off-ramp. Midland admitted that the truck brakes failed, causing the truck driver to lose control of the vehicle; the accident would not have

happened but for the failure of the primary cup seal and the master cylinder; the crack arrest fronts indicated the possibility of a progressive crack, the exact timing of which was unknown; the crack originated at the point of the claimed defect; and that cracks of that type were rare and, in terms of mileage, occurred somewhat early in the life of the master cylinder. Midland contended that the crack was not the result of an inherent manufacturing defect; the anomalous appearance of the rubber at the fracture origination site was typical for polymers of that sort; part of the void system seen on the high magnification photograph "mated" with corresponding protrusions on the opposite crack face; and the surface "void" was probably an environmentally caused void resulting from a drying of the rubber after it was removed from the master cylinder. Midland also contended that the fracture could not have occurred in progressive fashion as opined by plaintiffs' experts because a new primary cup seal would have compressive stresses at very low braking pressures in the fracture site area and, therefore, a fracture of this type would not occur until the seal had been worn. Midland further contended that the premature fracture was a result of serious abuse or misuse of the truck by its drivers caused by frequent stops, sudden braking and excessive loads. The State contended that the freeway off-ramp did not constitute a dangerous condition of public property.

Injuries: The plaintiffs alleged that the following injuries were sustained as a result of the accident: 1) the death of plaintiffs' parents, Wesley Miller, Sr. and Linda Miller; 2) Wesley Miller, Jr.: a mandibular fracture, loss of several teeth; continued pain and suffering while drinking hot or cold liquids requiring insertion of dental bridges; the likelihood of future dental surgery; raised scarring in the jaw, neck and shoulder areas on his left side requiring future surgical revision; loss of the epididymis and sperm-producing capability of the left testicle as a result of recurring epididymitis; potential sterility resulting in distress and anxiety; a transected urethra necessitating extensive urethral surgery removal of the urethral strictures, and the likelihood of future stricture surgery; difficulty with urination; lack of flexion in the neck and back requiring cervical fusion; pain in the tailbone with prolonged sitting; and pain in the left thigh with exercise; and

3) Scott Lee Miller: fractures of first cervical spine (C-1) with subluxation and separation requiring craniocervical fusion; spinal injury, lack of flexion in his neck and back; residual injuries including fractured left femur; and pain in his tailbone with prolonged sitting.

Damages: The plaintiffs alleged damages in the amount of \$5,300,000 including \$14,885 (funeral expenses for Wesley Miller, Sr. and Linda Miller) \$3,000 (property damage to plaintiffs' vehicle) and \$220,000 (loss of parental financial support).

Specials in Evidence: MEDS \$216,404 past and future (Wesley Miller, Jr.); \$199,804 (Scott Miller).

Trial Jury: Length 28 days; Poll 11-1 (Midland), 12-0 (State); Deliberation 1.25 hours.

Settlement Discussions: The plaintiffs demanded \$2,000,000 from Midland and \$500,000 from the State. Midland offered \$200,000 and the State offered \$5,000. The other defendants (the driver, the truck owner and the manufacturer of the truck) were sued on product liability theories of recovery and settled before trial for a total of \$1,500,000.

Other information: The verdict was reached approximately three years, two months and one week after the case was filed.