

**PROFESSIONAL RESUME OF
TERRY S. KAPLAN**

**BILLET & KAPLAN
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1. Professional Resume:

Terry S. Kaplan, born October 20, 1944, New York, New York.

Education: Graduated UCLA 1966, B.A., with honors
Graduated UCLA 1968, M.A. History
Graduated USC School of Law, 1971, Order of the Coif, USC Law Review,
Comment Editor
Admitted to the California Bar, 1972
A.V. rated by Martindale Hubbell

Employment: 5/71 - 1/72 Richards, Watson & Dreyfuss (associate)
2/72 - 12/75 Manatt, Phelps & Rothenberg (associate)
1/76 - 5/77 Manatt, Phelps & Rothenberg (partner)
6/77 - 9/83 Cohen & Ziskin (partner)
9/83 - 12/85 Crowe, Collisson & Kaplan (my P.C. was a partner)
1/86 - 1/93 Collisson & Kaplan (my P.C. was a partner)
2/93 - 2009 Billet & Kaplan, changed to Billet, Kaplan & Dawley
(my P.C. is a partner)
2009-present Billet & Kaplan (my PC is the sole proprietor)

Associate member, CLTA, and member Los Angeles County Bar Association, Litigation and Real Property Sections. Speaker at Lorman Seminars (five) on Title Insurance and Title Matters (2002-2007) and speaker at Banking Practice Seminars (1979-1983).

Over the past 40 years I have specialized in litigation, with an emphasis on representing financial institutions and title insurance and title companies. From 1979 through the present I have represented Banks (both creditor and debtor representation) and title insurers in over 1,000 cases in all manner of litigation; in addition, I have represented title company and insurance company insureds, defending the insureds or suing the insurance companies for breaching obligations under

insurance policies.

In addition, I have represented plaintiffs and defendants in almost every aspect of commercial litigation in federal and state courts, including contract disputes, tort litigation of all kinds, including fraud, as well as securities fraud cases (plaintiffs and defendants), breach of fiduciary duty, attorney malpractice, negligence cases of all kinds, unfair competition as well as copyright infringement cases, bank litigation (including debtor and creditor representation), check cases, forgery cases, cases involving truth-in-lending, Regulation Z, Commercial Code Articles 3, 4, 5 and 9, collection cases, judicial and non-judicial foreclosures, RICO cases (primarily defense), escrow cases (plaintiffs and defendants), landlord/tenant disputes, unlawful detainer proceedings (plaintiff and defendant), attachments, TRO and injunction cases, writ proceedings, class actions and actions involving Business and Professions Code §17200 – unfair business practices (plaintiffs and defendants), Civil Code §1770 – deceptive practices (plaintiffs and defendants), lemon law cases, as well as representing plaintiffs and defendants in insurance disputes and insurance bad faith cases, and representing insurers on claims and representing financial institutions under financial institution bond claims (I have recovered over \$40 million on behalf of Financial Institutions on financial institution claims).

I have qualified as an expert in Los Angeles County Superior Court on insurance bad faith, insurance claims handling, escrows, attorney malpractice, real estate matters and partnerships.

2. Trial Experience:

Over the last 40 years I have tried approximately 20 non-jury trials and arbitrations, the last five of which include the following and are representative of my trial experience:

A. July, 2008-December, 2008. *Bookstein, et al. v. Green, et al.*, JAMS Arbitration Reference No. 1200038924.

Parties: Kevin Green, SE2 Investors, LLC, KG Burbank, LLC, Citrus Manager, LLC, and 225 Santa Monica Associates, LLC (Claimants and Cross-Respondents); Harvey Bookstein, Alameda 10474 Associates, LLC, 10474 Santa Monica Associates, LLC, HAR-10474 SM Blvd., LLC, Alameda 2901 West, LLC, HAR-Manager IV, LLC, 2901 West Alameda, LLC, HAR-Alameda, LLC, HAR-Manager III, LLC, HAR, LLC, Harriet Bookstein, HAR-Citrus, LLC, and HAR-Clock Tower, LLC (Respondents and Cross-Claimants). Potential damages, \$25-30 million or more.

I was co-counsel on a case in which we represented Bookstein and his co-parties, against Green (a co-party, and property manager) and his companies, regarding the parties' respective interests in a number of high rise office buildings, and for damages. Each side alleged breach of fiduciary duty against the other and rights under a written agreement terminating Green's management company, and providing for a buyout of the Green interests in the properties. We

asserted, on behalf of the Bookstein parties, that Green and his entities had embezzled funds from the LLC's, breached fiduciary duties and failed to properly manage and rent the properties. The case involved complex issues of: (i) tracing assets, (ii) establishing what had been lost or stolen (in the absence of records and despite fabricated records), (iii) valuation of the properties, (iv) offsets, (v) damages, and (vi) calculations of the buyout of the Green parties' interests, and also involved presentation of multiple witnesses and experts on accounting, and appraisal of real estate, including the value of the properties, lost opportunities, and damages, all without the benefit of depositions.

The Arbitrator dismissed the Green parties' claims, and found the sums the Green parties were entitled to (approximately \$11.5 million for their interests in the properties), which was set off against \$11.5 million in additional damages the Green parties had caused the Bookstein parties, and therefore ruled the Green parties were to be paid nothing for giving up their interests in the properties. The Court awarded damages against the Green parties after the offset of \$9,231,000, prejudgment interest, attorney's fees of \$1,133,976, and costs of \$174,019. The net result was our clients obtained the properties, free of Green's \$11.5 million interest, and a judgment against Green and his entities for over \$9.4 million, in addition to recovery of possessions of property occupied by Green's firm.

B. April, 2008. Non-jury trial, *Rubins v. Taylor*, Los Angeles County Superior Court Case No. BC357620.

Parties: Plaintiffs Tye and Cristina Rubins; Defendants Alan and Sharon Taylor. I was appointed by Lawyers Title to defend the Taylors against claims by an adjacent landowner (Rubins) to: (i) an express easement, easement by implication or easement of necessity over the Taylors' property to the Rubens' property, (ii) to quiet title to or reform the deed to Taylors' property to provide access to the adjoining parcel, and (iii) to enjoin an encroachment of a portion of the Taylors' home onto the Rubins' property. I defended on, among other grounds, the Taylors had cut off whatever rights the Rubins allegedly had by adverse possession. I cross-complained on behalf of the Taylors for declaratory relief, including to establish claims of adverse possession to the encroachment of the Taylors' home onto the adjoining property. Potential damages to the Taylors, \$400,000-\$500,000 and damages to Plaintiffs in excess of \$1,000,000.

The case was tried over approximately five trial days. The Court granted our motion to try the defense of adverse possession by the Taylors first, to determine if that cut off Rubins' alleged claims. After we rested our case, the Court stated we had established adverse possession, cutting off Plaintiffs' claimed rights to an easement, and enabling the Taylors to maintain an easement for the encroachment onto Plaintiffs' property subject to Plaintiffs putting on their case. The case then settled by payment of \$25,000 to Plaintiffs, dismissal with prejudice of Plaintiffs' Complaint, and a quiet title judgment in favor of the Taylors, quieting their title against the Rubins' easement claims, and a recorded permanent easement for the Taylors and their successors to allow and maintain the encroachment onto Rubins' property.

C. February, 2000. Non-jury trial, *Fender Avenue Company v. LaSalle National Bank, et al.*, Orange County Superior Court Case No. 799833.

Parties: Plaintiff and Cross-Defendant, Fender Avenue Company and Fullerton Business Center, Defendants and Cross-Complainants, LaSalle National Bank - Trustee, J.E. Roberts Companies, Robert Rosenblum, Lehman ALI and Continental Lawyers Title Company. Trial of approximately five days. I represented Continental Lawyers Title Company ("Continental"). The case involved a trust deed securing a \$12 million loan that described two parcels of property and omitted 10 parcels of property that the lender asserted was supposed to secure the loan (the 10 parcels were worth approximately \$10 million, and the two parcels shown on the trust deed were worth about \$2 million). Plaintiffs asserted the parties never intended the 10 parcels to be security for the loan, and that Continental had recorded a corrective trust deed without Plaintiffs' consent (it consisted of the originally recorded trust deed, and had attached to it a new legal description covering all 12 parcels), thereby slandering the Plaintiffs' title to the 10 parcels, and releasing any obligations under the original trust deed, per Civil Code §1700. Cross-Complaints were filed for declaratory relief to establish the original trust deed encumbered all 12 parcels and to establish recording of the corrective trust deed was authorized. Claimed damages by Plaintiffs over \$10,000,000; potential loss to the insured and Continental, over \$10,000,000.

The case required extensive discovery and motion practice to obtain the evidence of the borrowers' knowledge and intent as to the collateral and other issues. I shared defense of the case with Anya Stanley of Gibbs, Gidden (who represented the insured), to the Court without a jury. We moved to try equitable issues first (declaratory relief claims in the Cross-Complaint as to the issue of whether the original trust deed was intended to encumber two or 12 parcels) and the motion was granted. After approximately five trial days, we rested our case and Plaintiffs then settled the case with Plaintiffs: (i) ratifying the corrective deed to cover all 12 parcels, (ii) paying \$500,000 in attorney's fees, (iii) dismissing their Complaint with prejudice, and (iv) stipulating to a quiet title judgment in favor of the Lender (establishing the trust deed covered all 12 parcels) and to judicial foreclosure of the properties. (Plaintiff had the opportunity to, and did, pay off the loan before the foreclosure sale.)

During pretrial discovery, I moved under the crime-fraud exception to the attorney-client privilege, for discovery of Plaintiffs' communications with their counsel relating to the recording of a reconveyance of the trust deed in issue that had been delivered by mistake to Plaintiffs and recorded by them (the Plaintiffs had, before trial, signed recorded documents reinstating the trust deed, on the ground the reconveyance was delivered by mistake). The Court granted the motion, providing valuable evidence used in the trial.

3. Other Noteworthy Verdicts, Judgments, Appellate Decisions:

I have had primary responsibility on the following reported Appellate decisions:

A. *Roy v. Superior Court* (2005) 127 Cal.App.4th 337. Parties: Plaintiff Lucky Star Industries, Inc., Defendants: The Audio Source, Inc., Michael Roy, Stanley Roy, and Janice Quinn. We represented the Plaintiff, Lucky Star Industries, Inc. against Defendants in a case over failure to pay for goods sold to a Chicago Company, alleging fraud, breach of contract and to pierce the corporate veil of the corporate, contracting, Defendant. We defeated a motion to dismiss based on lack of jurisdiction. Defendants asserted they were foreign residents with insufficient contacts to California.

Defendants petitioned for a Writ of Mandate after denial of their motion. The Court of Appeal stayed the proceedings in the trial court and ordered briefing. The Court of Appeal ruled that despite Defendants' affirmative defense in their answer of lack of jurisdiction, Defendants had waived the defense by answering and participating in the action notwithstanding a 2002 amendment to C.C.P. §418.10(e). Our briefing reviewed the legislative history and public policy relating to C.C.P. §418.10, and analyzed case law, explaining why the amendment did not, and could not, be interpreted to support Defendants' position.

After the Court of Appeal ruled the case proceeded and was pending trial. Because of Stanley Roy's and Michael Roy's failure to comply with discovery orders (which we obtained after showing the documents sought had been destroyed in a "flood" was false), we moved for and obtained a terminating sanction order holding the Roys were the alter ego of The Audio Source, Inc. (the purchaser of the goods). Thereafter, the case settled as to the Roys and a judgment of \$596,000 was entered against The Audio Source, Inc. and Janice Quinn on default prove-up.

B. *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Company* (2002) 27 Cal.4th 705. I represented the CLTA, as *amicus*, on this review by the Supreme Court of a judgment in favor of Summit Financial and against Continental Lawyers Title Company. Summit had asserted Continental, as an escrow, had failed to remit the payoff on a trust deed to Summit, despite assignment of the note to Summit. The Supreme Court disapproved *Kirby v. Palos Verdes Estates Escrow Co.* (1986) 183 Cal.App.3d 57, and held, absent fraud or collusion on the part of the escrow, an escrow owes no duty to strangers to the escrow and its duty is to strictly follow its instructions.

My Amicus Brief provided authority and argument not provided by counsel for Continental Lawyers Title Company, or explored issues (in a way not covered by Continental) showing an escrow or subescrow holder cannot (and should not on policy grounds) be liable to a stranger to the escrow, explored the problems of an escrow as an agent for two or more parties, each side in an adversary position (citing cases dealing with similar situations), and the problems that would follow if the Courts allowed strangers to sue an escrow.

C. *Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948. I represented the Bank on appeal from an action holding the Bank partially liable for negligence in honoring checks embezzled by an employee of the Plaintiff. The issues involved whether a two or three year statute of limitations applied to the claims (the Court ruled the three year statute applied) and whether the Plaintiff was entitled to prejudgment interest. The Court held Plaintiff could *not* recover prejudgment interest, which provided a considerable saving to the Bank.

D. *Lawyers Title Insurance Corporation v. Feldsher*(1996) 42 Cal.App.4th 41. I represented Lawyers Title in this case against the Company in which an appeal from a judgment holding the title insurer, as assignee and subrogee of its insured's rights, was not equitably subrogated to a lien senior to the Feldshers' lien although it had been paid off and released with the insured's loan funds provided via a loan to the owner of the property. The Company had insured the lien of its insured as senior to the Feldshers' lien. While we argued a mistake as to the lien priority should not result in the unjust enrichment of the Feldshers (who benefitted by having the senior lien paid off with the loan funds), the Court of Appeal held the title insurer was bound by the fact the insured knew there was a senior lien on the property, and held the title insurer was not entitled to prevail on an unjust enrichment theory, because it would have deprived the Feldshers of the "benefit of their bargain."

E. *Manneck v. Lawyers Title Insurance Corporation* (1994) 28 Cal.App.4th 1294. I represented Lawyers Title on an appeal from a judgment in favor of Lawyers Title in a breach of title policy and bad faith case based on the title insurer's alleged failure to take action in the face of a claimed encroachment of the insured's improvements upon adjoining land owned by another. The Court of Appeal followed our briefing and ruled, under the title insurance policy, there was no coverage because there was no "forced removal" of the insured's encroaching structures, and the provision was not ambiguous. The Court also ruled coverage could not be established by "estoppel" or "waiver," nor under the "covenant of good faith and fair dealing."

F. *Collisson & Kaplan v. Hartunian* (1994) 21 Cal.App.4th 1611. The Court upheld a judgment against Hartunian based on terminating sanctions for Hartunian's failure to make discovery in the face of a Court Order. I filed a brief for Collisson & Kaplan. The Court ruled Hartunian's appeal quibbling over the meaning of interrogatories Hartunian had objected to was meritless and imposed sanctions against Hartunian and his lawyer for wasting the Court of Appeal's time on a frivolous appeal.

G. *Tan v. California Federal Savings & Loan Ass'n.* (1983) 140 Cal.App.3d 800. I participated as co-counsel for the lender on an appeal from a ruling holding California case law preventing acceleration of loans because of a due on sale clause was pre-empted by the National Banking Act. We briefed this issue and we ultimately prevailed on this point on appeal, after the U.S. Supreme Court ruled in *Fidelity Federal S&L Ass'n. v. de la Cuesta* (1982) 458 U.S. 151, that state law preventing enforcement of due on sale clauses as to federally chartered institutions was

pre-empted by federal regulation. The Court held the due on sale clause in that case applied but that a prepayment penalty could not be obtained because the clause in that case could be exercised only if the debtor elected to prepay the loan and the Court held the prepayment in that case was because of the lender's acceleration of the loan.

H. *Wana the Bear v. Community Construction, Inc.* (1982) 128 Cal. App. 3d 536. I represented a developer whose development had uncovered an Indian burial ground, on appeal from our successful demurrer to writ of mandate proceedings. The Petitioner had asserted the development could not proceed because under Health & Safety Code §8100 the burial ground (the developer's property) was a cemetery. ("Six or more human bodies buried at one place constitute the place a cemetery.") My brief included substantial analysis of the background of the statute and California history, as well as policy arguments, which led to an opinion affirming the judgment of dismissal by the trial court.

I. *Bank of Hemet v. United States*, 643 F.2d 661 (9th Cir. 1981). I represented Bank of Hemet in a case in which the Bank held a junior lien securing its loan and purchased the property at a foreclosure sale of a senior lien. The I.R.S. held a junior tax lien on the property and purported to "redeem" the property by tendering the sum the Bank had paid at the foreclosure sale, rather than the balance owed the Bank on the loan. The Court of Appeal accepted our arguments, ruling that because C.C.P. §580a limited the Bank's rights to collect a deficiency on its foreclosed out lien, in order to redeem the property the I.R.S. had to tender to the Bank an amount by which the fair market value of the property at the time of the foreclosure sale exceeded the amount the Bank paid at the sale to acquire the property, *plus* what the Bank paid to purchase the property (but not to exceed the amount of the Bank's debt plus what it paid to purchase the property.)

J. *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461. I participated in this appeal on behalf of Windham, from the trial court's grant of a Writ of Mandate ordering the Board of Medical Quality Assurance to set aside and dismiss a disciplinary action based on Windham's prior tax evasion conviction. The trial court ruled the conviction was not substantially related to the practice of medicine and the Court of Appeal reversed, holding a conviction on tax evasion necessarily involves moral turpitude.

In addition, I have handled approximately 15 more appeals for title companies and other clients, most of which resulted in favorable unpublished decisions for my clients.

4. References:

A. Eric Early, Esq., Early, Sullivan, Wright, Gizer & McRae LLP, 6420 Wilshire Boulevard, Suite 880, Los Angeles, CA 90048, telephone: (323) 301-4670.

B. The Honorable Robert Altman, Judge, Los Angeles Superior Court, Retired, ADR Services, Inc., 1900 Avenue of the Stars, Suite 250, Los Angeles, CA 90067, telephone: (310) 201-0010.

C. Robert Garrett, Esq., Garrett & Tully, 225 South Lake Avenue, Suite 1400, Pasadena, CA 91101, telephone: (626) 577-9500.

D. Lore Hilburg, Esq., Law Offices of Lore Hilburg, 1943 Buckingham Road, Los Angeles, CA 90016, telephone: (323) 934-4443.

E. Thomas Levine, Esq., Vice President and Senior Counsel, Comerica Bank, 15503 Ventura Boulevard, Sherman Oaks, CA 91403, telephone: (818) 379-2943.

F. Steven Fried, Capital Finance, 45605 Navajo Road, Indian Wells, CA 92210, telephone: (760) 776-5749.