



# California LITIGATION

CALIFORNIA  
LAWYERS  
ASSOCIATION

VOLUME 36 | ISSUE 2

SEPTEMBER 2023



## INSIDE THIS ISSUE

A TRIAL LAWYER IN FULL:  
THE LIFE AND CAREER OF  
JAMES J. BROSNAHAN

Written by Dan Lawton

PAGE 23

CALIFORNIA'S GUN PURCHASE  
WAITING PERIOD: A HISTORY OF  
THE FUTURE

Written by Bill Slomanson

PAGE 32

# A TRIAL LAWYER IN FULL: THE LIFE AND CAREER OF JAMES J. BROSNAHAN

Written by Dan Lawton\*



Jim Brosnahan grew up as the only child of parents who raised him in a two-bedroom apartment in Brookline, Massachusetts, during the 1930s and 1940s. His father, a bookkeeper, earned five dollars a week. When Brosnahan was two-and-a-half years old, a doctor diagnosed him with rheumatic fever and a possible heart ailment. The doctor ordered the boy confined to bed, lest he move around and be stricken with heart failure. Except for occasional visits to the living room, the boy stayed in bed for the next two-and-a-half years until he was six years old. His knowledge of the world came from listening to Jack Benny and serials on a transistor radio with his dad after he arrived home from work in the evenings and from peering out a window at kids playing in a nearby driveway. At age six, when he was allowed to leave his bed at last, Brosnahan attended the first grade. He didn't know how to read. Four years later, he would be made to repeat the fourth grade, and re-read the Baltimore Catechism under the hawkish gaze of the teacher, a Catholic nun. The boy prayed daily that God would let him leave her behind someday.

Today, at age 89, Jim Brosnahan is the greatest trial lawyer of his generation. He has tried 150 jury trials and belongs to the California Trial Lawyer Hall of Fame. He has worked both as a federal prosecutor and in the private bar, in a

small law firm and a huge one (Morrison & Foerster). As a special prosecutor, he was chosen to prosecute former secretary of defense Caspar Weinberger during the Iran-Contra affair. At another time, he defended John Walker Lindh, the so-called "Johnny Jihad" whom our government deemed an enemy combatant after capturing him on a battlefield in Afghanistan. He has devoted thousands of hours of time to pro bono work, and is the author of the *Trial Handbook for California Lawyers*, the best book of its kind.

Brosnahan's new memoir, "Justice At Trial: Courtroom Battles and Groundbreaking Cases" (Rowman & Littlefield 2023), recounts his courtroom triumphs, which are many, his defeats, which are few, and his remarkable life.

I first met Jim Brosnahan in 1992, at his office in San Francisco. He was tall and genteel, bespectacled and balding, rangy, with an oval head that seemed slightly oversized. He was a formidable physical presence, something he offset with a folksy, disarming manner and toothy smile that seemed part-genuine, part-Irish street corner pol. He stood six feet and five inches tall. I knew he had played basketball at Boston College. When I

shook his hand, I asked myself inwardly, *How did anyone guard this guy in the low post?*

Brosnahan was an inveterate storyteller, whose tales nearly always involved flashes of dark humor, irony, and colorful splashes of detail. He spoke in a unique way. His voice was a tenor, high up in the register, soft, half-slurry at times, sleepy-sounding, with a tiny trace of a Boston dialect. To one meeting him for the first time, he sounded like he might be just waking up from a nap.

Those too lazy to study him more closely would fail to detect what was behind the somnolent voice: a keen intellect, a visceral hate for bullies and all the dirt they do, a finely-tuned detector of bullshit and phonies, a tireless work ethic, a passionate love of the facts, a knowledge of the world acquired through voracious reading, a burning desire to win, and a hunger for unlocking the riddle that gnaws at every great trial lawyer: *what, exactly, happened?*

It's tempting to view "Justice At Trial" superficially, as a collection of yarns, a literary victory lap taken by a lion of the trial bar in the winter of his life. And that it is, partly. Brosnahan recounts the epic trials and cases on which he worked during a 60-year career. The cast of characters would rival any in an Oscar-winning Hollywood film. The tall, stern National Park Service ranger, standing ramrod-straight in his brown uniform, demands that the newly-minted prosecutor, on his first day at work, prosecute the leaders of a Boy Scout troop who had picnicked in a national park, knowing it to be closed at that hour. (Brosnahan said no.) The unflappable Cecil Poole, Brosnahan's mentor and the first African-American U.S. Attorney in U.S. history, whose response to racism was to be the "best lawyer he could be," and who, when he did confront racist behavior, adopted "a bemused wonderment, as though viewing strange conduct in a psychiatric hospital." A larcenous banker, Don Silverthorne, a "portly, loquacious prankster," who looted millions of dollars from depositors at the bank which he headed and blew them at the roulette table in Las Vegas in the company of a female companion, Fifi LaTour, and appeared in a newspaper photograph sitting at his desk in the bank with bare feet, clad only in a polka-dotted robe. Defense lawyer James MacInnis, who looked like a "Roman senator with a full head of flowing gray hair" and spoke in mellifluous sentences, displayed hyper-polite manners, and had a voice which conveyed an "empathetic sound for sadness in the world." The neat-freak prosecutor Bob Banion, on whose tidy desk each item was arranged parallel to all the others, and possibly thought "all people should be

perfectly neat and tidy like his desk." And former U.S. secretary of defense Caspar Weinberger, whose "face moved from amused to stern as needed" and whose mouth "at rest had a half-moon shape with the corners up as if to say, 'Now, this is interesting.'"

Brosnahan brings these characters, and a host of others, to life in vivid detail. Every bit of the author's huge storytelling talent is on display here.

The would-be reader who might casually dismiss "Justice At Trial" as a literary ego trip or protracted boast of victories won and competitors bested would be badly mistaken. Though the defeats recounted here are few, they are bitter. One of them was the Arizona sanctuary case, in which Brosnahan represented Socorro Aguilar, a Catholic church worker who gave sanctuaries to refugees, and whom the government had charged with illegally abetting unlawful immigration. After a marathon jury trial ended with a guilty verdict, Brosnahan accepted a ride back to his hotel from a reporter, who tried to make Brosnahan feel better. "I was as low as I have ever been in the law," writes Brosnahan, who wondered, then at the peak of his career, if he "should be done with law" and "wind down my practice." Elsewhere, Brosnahan writes morosely of having lost a tax fraud case in the U.S. Supreme Court.

How many would most of our colleagues, who inflict tales of their triumphs and successes on us at Inn of Court gatherings and social occasions, admit such things after a crushing defeat? Not many. This book is no brag sheet. It is a candid and contemplative memoir told by an honest man who, though proud of his successes, is unafraid to admit his failures, regrets, and mistakes.

Woven into "Justice At Trial" are lessons for lawyers of all ages and levels of experience. Rather than preach these lessons, Brosnahan reveals them indirectly, through storytelling, so they occur to the reader organically. The lessons are pure gold for lawyers of any age and level of experience. *Decide who you are before embarking on life as a trial lawyer, not the other way around. Listen more than you talk. Gentle persuasion goes farther than domineering or bullying. If you're panicking, conceal it behind a stoic demeanor. Be alert in the moment, always conscious of what is happening right now in the room, rather than slavishly stuck to a script. Don't let the long hours and hard work of trial lawyering blind you to chances to be creative.*

Too, there are lessons in "Justice At Trial" for the leaders of law firms. Brosnahan gives us a peek behind the

curtain of the law firm where he practiced for 46 years, Morrison & Foerster, which underwent crises from time to time — “financial pressures when recessions gave clients problems paying their bills,” disagreements over controversial cases and clients, and so forth. “We always worked it out,” Brosnahan writes. At a law firm retreat, a young associate, then twenty-five-years old, who had been with the firm only three weeks, rises from his seat to address the assembled partners and associates. He says, “The trouble with this firm is . . .” Brosnahan waits for a thunderbolt to rip through the ceiling, but nothing happens. At MoFo, management accepted input from young associates. And senior lawyers pushed money down to younger lawyers, as a way to build the firm.

The landscape of law firms in America is littered with the carcasses of long-gone firms whose leaders were too self-obsessed, narcissistic, secretive, greedy, and drunk on their own power and stature in the legal firmament to care enough about what was best for their lawyers or be humble enough to listen to them. Had they read this book, maybe some of them would still be intact today.

In his foreword, Erwin Chemerinsky opens with this: “Every law student should read this book.” He’s only partly right. If you’re long out of law school, you should read it too.

In 2000, I attended an ABTL conference in Maui. The roster of presenters and list of attendees glittered with the names of the VIPs. Justice Anthony Kennedy was there. In some of the big meeting rooms, various lawyers unashamedly tried to ingratiate themselves with the celebrities, as often happens at such gatherings. During the breaks, the usual schmoozing went on.

After one of the meetings broke up, I had had enough of the conference for a while. I went to my room, put on a swimsuit and ballcap, and went down to the swimming pool with a book. I found a lounge chair poolside and sat down. As I settled in, my gaze wandered around. No big shots were visible. There was a scattering of couples, enjoying a warm, breezy afternoon in Hawaii. There was a young boy who was wading in chest-deep water under the watchful gaze of his mother, who sat up on the deck a few feet away. He might have been six years old. Nearby, a floating basketball hoop bobbed around alongside a bright orange miniature basketball. The kid apparently had no one to play with. Then I spied a big, bald head entering the picture. It was Jim Brosnahan. He picked up the ball, retreated a few steps, then shot the ball at the basket — swish. The boy, sensing an

invitation, picked up the ball. Brosnahan smiled at him, and the game was on. The boy and the lawyer took turns taking shots at the basket. When the boy missed, Brosnahan retrieved the ball and passed it back to him.

Somewhere else, lawyers and judges hobnobbed with one another, talking about business and who they knew. The kid and the lawyer seemed not to know or care.

*California Litigation* interviewed Jim Brosnahan on April 18, 2023. A few excerpts appear below.

*Q: On the weekend before a big trial, you would take your son fishing. On Saturdays during a trial you would knock off in the afternoon and then not look at the case again until 7 a.m. on Monday. When and how did you learn work-life balance while being a trial lawyer?*

*A: My wife caused me to make time for our lives and the kids. We had three kids. I give her a lot of credit for insisting that I be home. . . . I have a saying, good lawyers don’t work past midnight. What I meant was you need to be fresh. You’re gonna try a five-day week. How fresh are you gonna be on Thursday afternoon at 4:30? . . . At 1 p.m. Saturday I would finish and then just take a break, and be at home. We’d watch a movie, rest up, go for a walk, whatever. For me, that worked.*

About 35 years ago, I thought it’d be a nice hobby to paint. So I tried. We will not discuss the first painting I did. Somehow, I persevered. I have painted almost every Sunday since. I’ve been all over the Sierras painting. I actually painted with a real artist and took a lesson. I’ve got a huge collection of art books and an art room since the kids moved out. I painted yesterday. It’s very interesting to paint because you’re learning what you’re interested in.

*Q: Is remote work taking a toll on mentoring and training of young lawyers?*

*A: I don’t think good mentoring has vanished. Remote work is taking a toll on mentoring. But it is a balance. Lawyers have been talking about balance for twenty years. Now here’s a way to do it [remote work]. I rather doubt that it will just go back to what it was. There are things that are missing, like the conversations over coffee in the morning. I miss those things personally.*

*Q: How good, or how bad, is civility among lawyers today compared to during your first ten years in practice?*

A: I hate to admit such a basic thing, but there are people screaming in depositions, and I don't know what they're doing. I've been the recipient of a lot of it. What is it? Insecurity? They've never been to trial? What is it that makes them, looking at me, think I'm gonna fold? I adopted a rule. It smacks of being an Irish rule. The first time they yell at me I don't react. The second time, I don't react. The third time they yell at me, I put them down verbally in a way that causes them to pause the next time they think about it. I can do that. I've tried cases for a long time. If I have to, I'll take over the room.

Phone despots scream at you on the phone and are very nice in person. I don't know what that's about. Try to have your conversations with them in person. I think it's anxiety that comes out in an uncivil way.

Q: *If you could travel back in time and give your 25-year-old self some advice about career and life, what would it be?*

A: When I started, I was filled with, "Am I doing it right? Do I know enough? Am I saying it right?" It was all about me, "How am I doing?" But it's not about you. It's about the audience — the jury, the judge. You have to think about it. You have to appeal to this jury and tell them things that help them do their job. You have to think about other people. I would change that at [age] 25.

Q: *Let's talk about judges. The judge is against you. The rulings aren't going your way. You're feeling a hostile vibe from the bench. What do you do?*

A: You pretend that it's not happening, and you have to say, "Thank you," as you go along, especially when you don't really believe it. . . . You don't fight with the judge. There are people who do it. I don't. I came very close in the sanctuary trial to being in contempt, closest I ever came. My colleague was pulling on my coat and telling me to sit down, so I did.

Q: *Who was the best courtroom lawyer you ever saw, and what made him or her the best?*

A: John Flynn. I would put my witness on. John would tear him to shreds. I would sit there and marvel. He eviscerated my witness. I'd have to wake up and do a re-direct. He had wonderful poise, he took over the room. He was a great cross-examiner, a

compassionate man in his own way. I got to know him very well.

The two in California that I've tried cases against and tried cases with can also take over the room. They have all the skills. One is John Kecker, who is a great cross-examiner. And he has courage. He's not afraid. The other one is Joe Cotchett. He reminds me why I went to law school. He's devoted to a great many causes. When you're against somebody like John Flynn, or Joe, or John Kecker, and get to know their skills, you don't know how to deal with it.

Q: *Regrets. Do you have any?*

A: I think lawyers who are working at home at least a part of the time have an advantage I didn't have, and I regret it. There were too many times when I was not at home. . . . I think there were too many times when Carol, my wife, had to be judge and take care of the kids and I was in Pittsburgh. I'm not sure what the solution would be. I missed moments when the kids were doing cute things and all that and I was taking a deposition in Seattle.

Q: *When you see other lawyers today, do you feel they're having less fun than lawyers did when you were in your first decade of practice?*

A: I try to find the lawyers that are having fun. There's a lot of them.

Q: *Do you have superstitions in the courtroom, or during trials?*

A: When the jury is out, I don't know what's gonna happen in my case, which I've worked on for a year and a half. I would go out in the hall and pitch pennies, practice how close I could get to the wall without touching it. I used to do it in Phoenix. I brought it to San Francisco. Why? Because you're so nervous.

I'm showing you a two-dollar bill. [*pulls out wallet and displays bill*] I have a whole collection of those. My wife Carol, whenever she'd find a two-dollar bill, she'd give it to me. I've carried those from the Phoenix days all the way through. I'm eighty-nine, and I'm talking to you. Does it work? Must be powerful stuff.

I got more Irish as the years went by. From the Irish I get this idea: never give up. That's as strong for me today as it was back in the day.

**Q:** *When you were three, you were diagnosed with rheumatic fever, with a possible heart ailment, and confined to bed until you were six. How do you think that experience affects you today?*

**A:** Something like that affects you in a certain way. I didn't think about it consciously a whole lot.

I always wanted to be out in the world. That's law. I discovered at Boston College that I could talk. I just wanted to be involved in things. And what better way than to be involved in helping people, which is what you're doing when you're a lawyer.

The Jesuits taught me to be interested in life and trying to help other people and that kind of thing. Some people identify with the people on the top, some identify with the people on the bottom. I instinctively identify with the people on the bottom. Part of it is growing up the way I did. I can identify with someone who thinks the world is sort of against them. I get it.

*\*Dan Lawton is a shareholder of Klinedinst PC, where he practices intellectual property and appellate litigation in the California and federal courts.*

## GET AN EDGE IN YOUR PRACTICE THROUGH THE LITIGATION SECTION'S MCLE REPLAY LIBRARY

*As a Litigation Section Member, You Get 6 Hours of Free MCLE From the Replay Library*

Are you involved in a new area of the law, need a quick refresher on a California procedure, or the latest developments in the law? The Litigation Section offers outstanding MCLE through recordings of its past webinar programs, which are available 24-7 for purchase. Choose from over 2,000 official State Bar of California MCLE webinars, covering a wide range of topics, put on by leading lawyers and jurists in the state. Most are between 1 and 1.5 hours. As a Litigation Section member, you are entitled to 6 hours of free MCLE programs from the CLA replay library. For details, consult your online membership account.