A Day in Palm Springs

Fifty years ago, a group of attorneys met in Palm Springs to form an outfit giving consumers a better say in the courts and the state Capitol. The rest is CAOC history.

By J.G. Preston

There was a time when the plaintiffs bar and the clients it represents did not have a voice at the state Capitol. A time when consumer attorneys were more likely to be competitors than colleagues working together to fight for justice. A time when defense lawyers routinely had the upper hand in the courtroom because of their superior training and experience.

It's hard to remember now that such a time ever existed. For that you can thank a group of visionary attorneys who came together 50 years ago this spring to create an organization that would raise the level of advocacy on behalf of consumers to the highest in the nation and protect consumers at the state capitol.

On April 8, 1961, at the Riviera Hotel in Palm Springs, those 36 attorneys formed the California Plaintiff Trial Lawyers Association, the group now known as Consumer Attorneys of California. And in the process Californians found the means to wage a fair fight when wronged by the moneyed and powerful.

There had been an organization for consumer attorneys before CAOC. The new group was launched by members of the western region of the National Association of Compensation Claimant Attorneys, the group now known as the American Association for Justice. San Francisco attorney Marvin E. Lewis was among those who felt the time had come to strengthen the California plaintiffs bar with a state organization, and he oversaw the birth of the California Trial Lawyers Association, becoming its first president.

50 Years of Fighting for Justice: A CAOC Timeline

1967: CTLA establishes full-time office in Sacramento

1975: MICRA signed into law, limiting non-economic damages in medical malpractice cases

1986: Despite CTLA opposition Proposition 51 is approved, ending joint and several liability

1961: California Trial Lawyers Association founded in Palm Springs

1972: CTLA defeats no-fault insurance bills

1979: CTLA News becomes FORUM magazine

1982: Passage of § 998 Prejudgment Interest Bill

1960 1970 1980

Lewis' son, Marvin K. Lewis, who followed his father's path and became a consumer attorney, said his father had two motivations for forming a state association.

"He didn't feel that law schools prepared lawyers to try cases," the younger Lewis said in an interview with Wesley J. Smith for the 1999 history of CAOC, *Commitment to Justice*, which was the source for many of the quotes in this story. "He wanted trial lawyers to have further education to improve the general verdicts, which he thought were low because of so much ineptitude. And he wanted to fight in Sacramento for legislation that would help trial lawyers. He felt that insurance companies and corporations were favored by the legislature and there was no voice of the people."

The elder Lewis, who died in 1991 at age 84, once said he wanted to establish "a unified trial bar for plaintiffs lawyers in California, with the prospect that someday such an organization would be needed in order to bind together the plaintiffs bar to hold the fort against assault by the insurance industry and others who for their economic interests would expend effort and money to fight against judges' decisions that support and make possible compensation for those injured by another's negligent, reckless or willful acts."

In the early years, what were known as "The Caravans" saw members travel the state to share their knowledge with other members. One of the leaders of that education effort was Jack Werchick, CAOC's third president, who had been a school teacher and elementary school principal before attending law school.

Arne Werchick, Jack's son who went on to become a president of CAOC himself, recalled those days. "On Saturdays, Dad would get three or four of his buddies from the Bay Area, and they would go to Stockton, Fresno or some other city where we had no chapter at the time. They would each give a one-hour lecture on some aspect of trial practice, and they would charge whatever it cost to pay for the meeting room."

While the emphasis in CAOC's early years was on education and camaraderie, it soon became apparent that trial lawyers and the consumers they represent needed a strong presence at the state capitol in Sacramento. In large part that was because of the success of the organization's education program. As trial skills improved within the plaintiffs bar, business and insurance interests decided to turn to legislation to accomplish what they were no longer able to win in the courtroom.

The first big test of CAOC's advocacy skills at the capitol came in 1972, when the insurance industry appeared on the verge of winning legislative approval of no-fault auto insurance.

"The State Bar supported no-fault," recalled Herb Hafif, who was CAOC's president at the time. "Most of the state's newspapers had editorialized in support of no-fault. More than 30 legislators co-sponsored the legislation. The bill was deemed a sure thing."

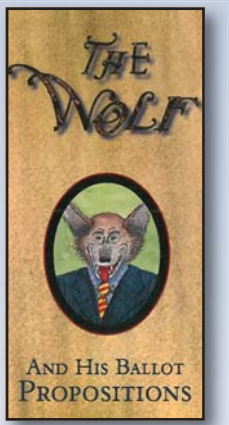
CAOC's efforts to fight the bill included testimony at legislative committee hearings ("It turned out none of the committee members really understood the small print that had been put in the bill," Hafif said) and appearances by association members in front of editorial boards around the state. Eventually 44 newspapers wound up flip-flopping and opposed no-fault. The bill never reached Governor Ronald Reagan's desk, dying in the state Senate. Another attempt at no-fault in 1974 was defeated in the Assembly by one vote with CAOC's help.

But the next major battle at the capitol did not go as well for CAOC – and it's still

1987: "Napkin Deal" signed, ending threat of damage caps in all tort cases

1988: No-fault and fee cap initiatives defeated, Prop. 103 passed

1995: CTLA changes its name

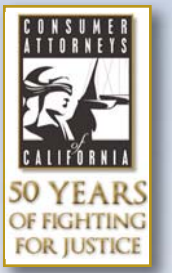


1996: CAOC defeats "Terrible 200s" – no fault, shareholder limits, contingency fee caps

2002: Gov. Davis signs SB 688 extending statute of limitations

2004: Prop. 64 sets restrictions on class action unfair competition claims

2007: For third time in three years, CAOC keeps tort-war initiative off ballot



2011: CAOC celebrates its first half century

1990 2000 2010

being fought today: the brawl over medical malpractice that led to the passage of the Medical Injury Compensation Reform Act (MICRA) in 1975. For the past 35 years, the law has limited compensation for human suffering in medical malpractice cases to $250,000 – an amount that hasn't changed in all those years because no adjustment for inflation was part of the law. It also limits contingency fees for plaintiffs' attorneys.

It was CAOC's first significant legislative defeat, and it made the association much more politically active. The passage of MICRA had an impact beyond medical malpractice. It encouraged the well-funded anti-consumer forces – insurance carriers, manufacturers, employers, toxic polluters and medical providers, among others – to ramp up a massive and unrelenting "tort reform" campaign.

With its increased emphasis on political advocacy, including the establishment of a political action committee in 1976, CAOC was largely successful in fighting back anti-consumer legislation in the years after MICRA. But then business and insurance interests changed tactics and began to bypass the legislative process, instead pushing their agenda through ballot initiatives. The first of those was Proposition 51 on the June primary ballot in 1986.

The ballot measure rescinded the law of joint and several liability for non-economic damages and shifted the burden of loss to the victim of harm. Each wrongdoer would be responsible only for the proportion of the damage it was determined to have caused.

As had been the case with MICRA, insurance companies used a phony insurance crisis as an excuse to limit consumer rights through Proposition 51. In both cases premiums had ballooned dramatically, not because of an abundance of verdicts but because of a troubled investment market that impacted insurers' bottom lines. Proposition 51 was introduced after public entities saw spikes in their liability insurance premiums that led to higher deductibles, lower levels of coverage, or both. Some insurers refused to insure what they called "poor risks," even if the entity involved had never filed a claim.

The insurance industry led voters to believe that, without Prop 51, lawsuits would lead to major reductions in public services: parks would close, public safety would be impacted, Little League baseball would disappear. The plaintiffs bar was cast as the enemy, preventing voters from seeing the real beneficiaries of the initiative would be insurance companies and corporate wrongdoers.

> The three dozen attorneys who came together in Palm Springs to form a unified plaintiff's bar could scarcely have imagined so much time would be spent battling corporate interests.

"We had no experience with initiatives at all," recalled Peter Hinton, who was CAOC's president in 1986. "We were just not ready for it. Proponents of 51 had been to all the media and all the editorial boards before we even got into the game."

After CAOC mounted an ineffective advertising campaign in an attempt to influence the public (Hinton went so far as to characterize the campaign as "a disaster"), Proposition 51 won easily, receiving more than 62 percent of the vote. Thus the insurance industry was able to accomplish at the ballot box what it had tried and failed to achieve numerous times in the Legislature, in the process getting voters to voluntarily yield their rights.

"We had our heads handed to us," said Gary Paul, who would later serve as CAOC president. "We just weren't politically savvy. We learned a lesson: from now on we would never allow ourselves to be caught flatfooted again."

The Prop 51 loss was compounded in November 1986 when voters removed California Supreme Court Chief Justice Rose Bird and associate justices Cruz Reynoso and Joseph Grodin, all Democratic appointees. With their replacements appointed by Republican Governor George Deukmejian, the high court swung from pro-consumer to pro-business.

Browne Greene took the CAOC presidency for 1987 with the association at a low point. "And it was going to get worse before it got better," he remembered. "I was told that 150 groups were forming to push the Personal Injury Compensation Reform Act (PICRA) that would have imposed MICRA limits [on non-economic damages and more] across the board [to all tort cases]. It would destroy consumer rights and the ability of the membership to serve the public."

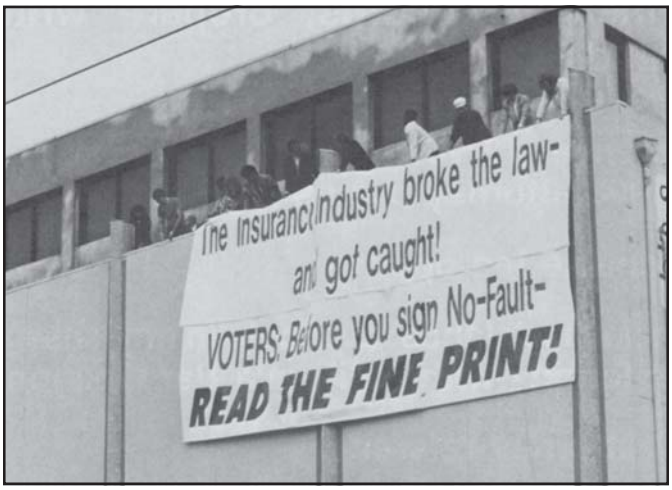
Greene and the CAOC team started the fight against PICRA by negotiating with the public entities, such as the League of California Cities and the Board of Supervisors Association. In the process CAOC made some concessions, such as providing communities with immunity from liability for injuries resulting from the natural conditions of beach properties and immunity from liability when third parties are injured in police pursuits. The concessions were far from ideal, but it kept public entities from being the public face of a PICRA initiative push as they had been with Proposition 51. "We did what had to be done to protect the civil justice system of California," Greene said.

Even after the truce was reached with public entities, the PICRA threat loomed large. "Our polls told us that PICRA was running way ahead," said Ian Herzog, who would later serve as CAOC president. "That would not only have destroyed consumer rights in California but probably would have swept the nation, undermining individual rights everywhere."

Negotiations with PICRA advocates continued for nearly nine months, involving, among others, the California Medical Association, California Chamber of Commerce, the Association of California Insurance Companies and the tobacco industry. The result was what gained fame as the "Napkin Deal." Struck on September 10, 1987, the deal was given that name because the main points were written on a napkin in the dim light of Frank Fat's restaurant, just a half-block from where CAOC's headquarters are now in Sacramento. (The framed napkin still hangs on a wall near the entrance to the restaurant.) Then-Assembly Speaker Willie Brown and then-state Senator (now state Treasurer) Bill Lockyer were present to sign off on the deal and shepherd it through the Legislature.

But the Napkin Deal, while destined to be enshrined as part of Sacramento lore, was controversial within CAOC. Browne Greene, who signed the agreement on

1982 – Gov. Jerry Brown hands CTLA 1981 President William Shernoff the pen he used to sign the Prejudgment Interest Bill.



1988 – CTLA staff hangs a banner during the successful campaign against the No-Fault initiative

1996 – CAOC President Mary Alexander and members celebrate the defeat of the Terrible 200's.

2002 – CAOC President Rob Cartwright, members and staff watch as Gov. Gray Davis signs SB 688 extending the statute of limitations

behalf of CAOC, found himself in "terrible screaming matches" over it with partners at his law firm. "They told me I was giving up too much and I needed to hear that," said Greene. "They were right. I went back and negotiated a better deal."

Among the concessions CAOC made in the final agreement was to allow the standard for punitive damages to be raised to clear and convincing evidence. And while it wasn't intended as a concession, an appellate court later ruled that the language of the deal exempted tobacco companies and alcohol manufacturers from product liability suits, although that provision was later rescinded by law.

What CAOC got in return was peace. The participants in the "Napkin Deal" agreed to a truce. Each of the bitter adversaries agreed to not sponsor or support ballot measures or legislation hostile to the other participants for five years. That meant there would be no PICRA. And that meant the final agreement spawned by the "Napkin Deal," in the words of Herzog, "saved our butt."

Of course, peace is relative in California's bare-knuckles political climate. In 1988 auto insurance companies, claiming they weren't part of the "Napkin Deal," sponsored three initiatives, including a no-fault insurance measure and a harsh reduction of contingency fees. But all were defeated in November with help from CAOC, whose leadership had learned from past mistakes and hired the political consultant its opponents had used to help Proposition 51 gain approval.

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Gary Gwilliam was president of CAOC at that time. "A lot of good happened for CAOC because of that election," he recalled. "We came together as an organization. We believed in ourselves again. It was a brand-new day." It was a tremendous victory for CAOC after insurance carriers spent nearly $80 million on campaigning for their initiatives.

CAOC's next major test came in 1996, when three initiatives qualified for the March primary ballot: Proposition 200, which would have created no-fault auto insurance and taken vehicle crashes out of the civil justice system; Proposition 201, which would have made it significantly more difficult for stockholders who felt they had been cheated to sue the company; and Proposition 202, which would have limited contingency fees and forced plaintiffs to turn over all their evidence in the demand letter. Mary Alexander, who was

CAOC's president that year, labeled them "The Terrible Two Hundreds."

That election is best remembered for the "Corporate Wolves" television commercial CAOC produced, with a narrator warning "corporate wolves" were coming to destroy consumer rights, while a wolf pack was shown running through woods. "That was the turning point," Alexander said. All three initiatives were defeated, with Props 200 and 201 losing by overwhelming margins.

Alexander explained how CAOC defeated the Terrible Two Hundreds: "Our ads were better [than the opposition's]. We started earlier than they did, which was a big part of our strategy. We had a unity of spirit, courage and commitment that was underestimated by the other side."

During the 1999-2000 legislative session, after Gray Davis was elected to give California a Democratic governor for the first time in 16 years, CAOC's efforts helped to enact more than 100 major pro-consumer bills. There would be more victories during Davis' tenure, but when voters recalled him in 2003 and elected Arnold Schwarzenegger to take his place, the pro-business legislative agenda found itself a popular actor as a pitchman.

With Schwarzenegger brandishing a veto pen, there was little hope of enacting laws to protect consumers. Instead, CAOC was forced to spend much of the seven years of his administration fighting off potentially harmful legislation and keeping damaging initiatives from going before voters. "Our strength has been keeping those initiatives off the ballot," CAOC CEO and Chief Lobbyist Nancy Drabble said of the past decade.

One initiative early in the Schwarzenegger era did make it through the electoral process: Proposition 64, limiting citizens' rights to sue under California's unfair competition laws, was approved in 2004 with significant financial backing from big business. For years afterward, the threat of initiative was in the air almost constantly. From 2005 to 2007, CAOC forced the withdrawal of five initiatives targeting the civil justice system – measures that would have capped contingency fee rates, eliminated Californians' right to file class actions, weakened the ability of juries to impose punitive damages, and made it more difficult to file disability and home construction defect suits.

As any athlete knows, playing defense is rarely as much fun as being on the offense. But when CAOC was continuously forced over the past decade to defend the legal rights of Californians, members and staff rallied to do an exceptional job.

The three dozen attorneys who came together in Palm Springs to form a unified plaintiff's bar could scarcely have imagined so much time would be spent battling corporate interests, both at the Legislature and at the ballot box. But those founding attorneys can take pride in building an organization that evolved as the political environment changed.

The next 50 years are as unpredictable in 2011 as they were in 1961. The experience of the past half century gives us confidence that CAOC will rise to meet all challenges to bringing justice for all. ■

J.G. Preston is CAOC press secretary.