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## Of Counsel Interview ...

# Master Litigator Manages California Firm While Maintaining Vibrant Practice

In a Napa County, CA, courtroom in September 2011, Jeff Essner launched a blistering but strategic attack against a defendant on the witness stand. He had been asked by his partner at San Jose-based Hopkins & Carley to do one thing in this lawsuit brought by his client, litigation that was related to a previous breach of contract case Essner and his team had won two years earlier. Essner delivered on that request—with gusto.

“When we were preparing for that trial, we were deciding who was going to do what,” says Essner’s partner Allonn Levy. “Jeff had another huge trial at the same time, so I said to him at one point, ‘I’ll tell you what. I’ll ask you to do one thing in this trial, and I will do everything else.’ Jeff said, ‘That sounds like a good deal. What do I have to do?’ I said, ‘Go get the big man.’”

The “big man” was co-defendant Gregory Cutuli, and by “get” Levy meant he wanted

Essner to show the judge and jury that Cutuli was lying regarding a claim about a fraudulent transfer of funds, a task that was very difficult to do, Levy says. But Essner pulled it off. In fact, his cross examination of Cutuli was so well played that the judge had to step in, temporarily suspend the trial, direct the defendant’s attorney to take Cutuli off the stand and advise him of his Fifth Amendment rights to remain silent.

“It was one of the most devastating cross examinations that I’ve seen in 20 years of practice, and the most devastating I’ll probably ever see,” Levy says.

That’s not the only superlative served up about that trial. Superior Court Judge Philip Champlin said that “...Mr. Cutuli appeared to be one of the greatest prevaricators the court has seen in over 30 years of experience.” What’s more the \$14.8 million

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judgment handed down against Cutuli and his wife and for the plaintiff was said to be historic. “We were told it was the largest judgment ever to come out of Napa Superior Court,” Levy says.

Essner’s litigation skills are very well-regarded and produce many victories for his clients. “Jeff is one of the best strategists I’ve ever worked with,” Levy says.

But as a man outside of the courtroom, Essner is charming, and as the managing partner of 73-attorney Hopkins & Carley, he’s inclusive and collaborative. “He really listens to others and considers the feelings and ideas of a lot of different people,” says Levy, co-chair of the firm’s diversity committee, adding that Essner has been a true champion for diversity. “Our firm has always had an interest in being inclusive. But Jeff has taken a more aggressive and proactive approach with respect to diversity issues.”

Recently, *Of Counsel* spoke to Essner about his career, his firm, and some of his important cases, including the one mentioned above. What follows is that edited interview.

### From Tax Law to Litigation

**Of Counsel:** Jeff, what got you interested in becoming a lawyer?

**Jeff Essner:** You’re taking me back a long time. I was a psychology major in college and after doing that for four years, it became just too soft of a science for me. I was looking for something a little more concrete in terms of going on to study in graduate school. Like a lot of kids, I thought that law school seemed like a good thing to do. I wish there

were some magical moment in my life that I could point to, like maybe some terrific trial I saw, but it wasn’t like that. It just seemed like the right thing to do with my life and my career.

**OC:** So it was more of an evolution than a revelation.

**JE:** Yes, that’s right.

**OC:** After you got your law degree from University of California, what did you do?

**JE:** I started working at a small law firm in San Jose. I was doing tax work and estate planning work, and I started to do a little bit of overflow work for one of the litigation partners. I got excited about the idea of going to court. Going to court for me was like a kid going on a field trip. It was a lot of fun getting out and into the courtroom and making arguments in court as opposed to reading the IRS code. It was an eye-opening career experience. I started doing more and more litigation and caught the bug.

**OC:** I like the field trip metaphor. Did you go from the small firm to Hopkins & Carley?

**JE:** Our small firm merged with Hopkins & Carley in 1989. I came over as probably the most junior person in that merger. I think of myself as the player to be named later. They were more interested in the more established lawyers and those who had books of business. But I was lucky enough to get an offer as well. Joining Hopkins & Carley launched my career in the trajectory that it went.

**OC:** When you think about your career, Jeff, is there a case or a series of cases or types of cases that stand out as being either really important or very satisfying or perhaps unusual and challenging? What one or two cases come to mind?

**JE:** There are a couple of cases early in my career, and I’m talking more than 20 years ago, that were both challenging and

satisfying and helped shape my ability to practice law. One of them was a case where I was, maybe, three years out as a lawyer. I was handling a case against a large law firm. They had the typical large law firm presence in the case with multiple partners and multiple associates. It ended up being a jury trial. For me, it was not only my first trial but also my first jury trial. It was a case where during the mandatory settlement conference the judge said I had absolutely no chance of winning that case and I needed to settle.

I was scared like any other lawyer would be scared. I kind of wanted to settle, but the client wouldn't settle so we went trial. It was a three-week trial, and I ended up getting a jury verdict and won the case. We got a sizable award. Back then it was multiples of hundreds of thousands of dollars as well as an award of attorneys' fees. For me, it was interesting because I was the young kid beating the veteran partner of a large law firm.

I experienced that underdog feeling, as I represented an underdog tenant, a small-time restaurateur, against a large company called Club Corporation. The partner I was up against lost his voice in the courtroom, not literally but figuratively lost his voice. I found mine. That case gave me a lot of confidence as a young lawyer. I don't think I was even 30 years old. I found my voice in the cross examination and brought the jury to laughter as I cross-examined the other side's expert. It was a fun experience.

**OC:** That sounds like a very seminal case in your career. You mentioned another one that was important to you early in your career.

**JE:** Yes, it was pretty meaningful to me. Again, I'm talking more than 20 years ago. I was representing a nonprofit, Sempervirens Fund, which purchased property to build Big Basin Redwood Forest in Santa Cruz County. I got involved in a partition litigation, which normally are pretty boring cases, but this one wasn't. What we ended up doing in that case was separating out the interests

of Sempervirens Fund and the interests of an owner who wanted to log property, and help shape what is now known as Butano State Park. The shape of that park today is the outcome of that litigation. It created a certain look and feel of the park and protected endangered species and other sensitive environmental areas.

**OC:** I think I know the answer to this question, but I'd rather that you frame it in your own words: Why was that particular satisfying for you?

**JE:** It was satisfying because we were able to create a lot of public benefit that everybody in the state could enjoy.

## The Mortgage Meltdown

**OC:** Thank you. Let's move forward many, many years from those two cases to the one that you worked with your partner Allonn Levy in which you obtained a judgment for your client of close to \$15 million.

**JE:** That was actually two cases. The litigation started out as a highly contested breach of contract case [in 2009 called *Elie v. Smith* in San Mateo, CA] between two high-net worth individuals who founded, ran, and eventually sold one of the largest mortgage banking businesses in the United States. They ended up selling the business to a hedge fund in New York for more than \$100 million. Part of what they did in their business [resembled what was depicted in the movie] *The Big Short*. In their business model, they would write loans and then fund those loans and sell those loans to companies like Lehman Brothers, who would then bundle the loans and sell them as collateralized mortgages in the secondary market. Thus, you had mutual funds in different countries buying very safe bets. What could go wrong with a bunch of secured mortgages in California?

Well, we all know what went wrong. A lot of the mortgages defaulted. My client

and the other party in the case, the defendant, ended up having to buy back many of these mortgages. When it came time to buy the mortgages back, my client advanced about \$14 million on behalf of his former business partner, Kathleen Smith, to purchase back roughly \$28 million of defaulted mortgages. He did it without a written contract, without any kind of memorandum of agreement, without so much as an email confirming that he was advancing these funds.

The long story short is: She disavowed any obligation to pay him back and claimed that he owed her money. So we had a three-week jury trial and the jury came back and gave us a \$6 million verdict. It netted out some money that he owed her versus what she owed him. It was the exact dollar amount that we requested.

**OC:** So that was the initial case.

**JE:** Yes, that's when things started getting really interesting. This should be a lesson to anyone who holds himself out to be an asset planner or an asset protector. What happened after that trial was really a series of terrible missteps on the part of lawyers and debtors that resulted in a second judgment for \$14.8 million.

The defendants in that case engaged in very sophisticated asset avoidance techniques by transferring assets into the names of LLCs, by creating bogus lawsuits where the husband would sue the wife and tie up each other's assets just to make it difficult for creditors to force their judgments against debtors. They would go offshore to meet with bankers and explore the possibility of opening up offshore bank accounts and tax havens. They made it very, very difficult for us to enforce our judgment.

So we ended up filing a lawsuit [in 2011] against the husband, Greg Cutuli, who was not a party to the original case, for aiding and abetting a fraudulent transport. The wife already had a \$6 million judgment

against her. During the course of the trial—and my partner Allonn Levy really deserves the credit for this—we subpoenaed certain records from the bank, and the other side never realized that we got those documents showing that millions of dollars had been transferred from the wife into the husband's bank account.

When he was asked about this on the stand in trial, Cutuli professed not to know anything about it. [Essner was the one cross-examining the defendant.] He was impeached on the stand, and he ended up being admonished by the judge for his rights against self-incrimination. We all took a break, and he didn't come back to the courtroom after that. The court issued a bench warrant for his arrest and eventually the judge entered a compensatory damage award for more than \$4 million and a punitive award for more than \$10 million.

**OC:** What a case. That's quite a sordid tale.

**JE:** Yes, and I guess it's a multi-part story and I've only told you two parts of it. Let me try to summarize the rest of it for you. Smith, the original judgment debtor, ended up filing bankruptcy in Miami. We came to learn that they had taken a couple of million dollars of what they had received in the form of tax refunds and purchased oceanfront property in the Florida Keys. They purchased it in the name of a Bahaman corporation to try to keep it judgment-proof. They didn't disclose virtually all of their assets on the bankruptcy filing.

The long story short is that the bankruptcy trustees ended up getting a seizure warrant. Federal marshals entered their house, found hundreds of thousands of dollars of cash and jewelry, and seized all their assets. We were able to recover several million dollars in the bankruptcy court. We were able to recover about \$8 million in different levies, in different pieces of property that we were eventually able to find and pierce through the corporate veil.

Just recently, both Smith and Cutuli had been arrested for bankruptcy fraud by the federal authorities out there.

**OC:** The couple sure went to great lengths to hide their assets.

**JE:** Yes, they used offshore holding companies to hold real property. They flew to Isle of Man and other offshore locations to meet with bankers. But I was never able to show that they actually opened up bank accounts. I couldn't pierce through the veil of secrecy that exists within that banking system. I have copies of airplane tickets they used to fly to these offshore tax havens with their lawyers. I have copies of trusts that were drafted. But I haven't been able to show the bank accounts opened offshore, and I don't know if I ever will be able to. That's part of that chicanery that goes on with Panama Papers-style offshore accounts.

## Growing with Diversity

**OC:** Let's shift gears here and talk about your leadership of the firm. You've been the managing partner for two years. In that time, what has been the most satisfying part of leading the firm?

**JE:** I don't think I can narrow it down to one thing. But since I became managing shareholder, we've grown the firm by roughly 20 percent. We've added several new women partners. We have focused on and been able to create more diversity in the firm. We have added a more robust presence to our office in Palo Alto. We were able to get the former

mayor of San Jose to join us, about a year ago. That was a nice coup for the firm. It was exciting. We were also able to get the current mayor of Gilroy to join us. So we have one current mayor and one former mayor and one city planning commissioner, a former planning commissioner, and a former city attorney who all work in our firm.

**OC:** Very good. Now let's look at the flip side of that question. What's been the most challenging aspect of leading the firm? What do you stay awake at night worrying about?

**JE:** Only my partners get to ask me that question. [Laughter] I would say the most challenging thing, when you have a fair amount of growth and you add new people, is making sure that you retain a culture that is valued by the firm—being able to bring in a large amount of people and maintain a rich culture of collegiality.

**OC:** When you look into the future, the rest of 2016 and into 2017, where do you see the firm headed? What does the horizon look like for Hopkins & Carley?

**JE:** I think we'll grow. I think we have to keep growing. We have senior shareholders who will eventually retire and we have to make sure the younger lawyers can retain the practice in the business. And, we have to add new lawyers to fill in the practice areas that we think would be supportive of our current business model. We also need to look, potentially, at growing in certain geographic areas where we think we have opportunities. ■

—Steven T. Taylor