



## Scott E. Hennigh

### Partner

Scott is a first chair trial attorney who has consistently produced victories in a multitude of jury trials, bench trials, and arbitrations in high stakes, crisis level or bet-the-company complex commercial matters. He has particular practice emphasis in heavy civil construction, mass residential and commercial construction, public works, government contracts, land use and major infrastructure projects. He handles cases involving some of the nation's largest contractors on some of the largest infrastructure projects.

Scott has been recognized by Chambers USA, The Legal 500, and SuperLawyers, for his practice in construction law. Chambers USA writes that Scott "is a prominent construction trial lawyer" whom their sources say is "extremely well known and well respected."

Here are comments from clients and peers, each on separate matters:  
"We bet the company on you, and we won." (BW.) "There are few attorneys alive that could have made that argument." (JC.) "You pulled off a miracle." (MM.) "Scott is a fearless warrior." (DB.) "Looks like you can pull a rabbit out of a hat. Well done! This is an amazing result for us." (MR) "You are the best! Thank you so much for all the hard work, timeliness, splendid results and closing a chapter that took a lot out of all of us!" (LT.) "He and his team hit the leather off the ball. There is no other way to describe it." (TT.) "Scott - you are amazing. You have been a calm voice of reason throughout this entire challenging ordeal. We are most grateful." (LB.) "I've been doing this a long time and Scott is one of the best attorneys that I have worked with." (WC). "Scott Hennigh is a phenomenal lawyer." (JW.)

#### Representative Work

Lead trial attorney in \$90,000,000 five week jury trial for prominent San Francisco luxury hotel. The five defendants included a top ENR contractor, and two major national manufacturers. The matter concerned construction of the curtainwall system and property damage caused by a defective grey polyisobutylene window sealant. Scott devised and executed a strategy to defeat aggressive pretrial defenses, and led a team of attorneys into trial, against defendants represented at times by more than 13 defense trial attorneys. After presenting opening statements and witnesses, defeating vigorous opposition to admission of evidence under novel case theories, and resting plaintiff's case, the defense pressed half-way through their case. With the matter on the verge of submission to the jury, the defendants settled in a manner the

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#### Practices/Industries

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Construction

self-described "pleased" client called "excellent". The court granted the defense request to seal the settlement terms.

Lead trial attorney in breach of warranty trial against a Fortune 500 microchip manufacturer of SDRAM microchips used in plaintiff's Ethernet platforms. The dispute concerned whether the chips had a design defect that was covered by warranty and necessitated mass repairs. Defendants fought a three-year scorched-earth war of attrition with a crescendo of multiple maneuvers to delay the trial, create discovery disputes, and add company shareholders as defendants. Scott defeated all maneuvers and took the matter to trial, wherein the opponent capitulated and settled for the full damages amount during trial.

Lead trial attorney in a multi-million dollar claim against one of the nation's top 10 largest contractors on a federal project involving claims of extra costs due to highly technical differing site conditions, delay and disruption. Scott built a case turning the contractor's own evidence against it, persuaded the court to hold a trial by jury notwithstanding opposing arguments that the matter was subject to a different contract process, and created avenues for attorneys' fee recovery despite the absence of a traditional prevailing party fee shifting contract clause. After months of refusing to make meaningful settlement offers, at the final pre-trial conference on the first day of trial the opponent offered entry of judgment of one hundred percent of the principal amount of the claim and payment of all attorney's fees.

Lead appellate attorney in *Picerne Construction Corp. v. Castellino Villas* (2016) 244 Cal App.4th 1201.

Lead trial attorney in a jury trial for the owner of a heavy engineering construction project at a shipping container facility at a major California maritime port. The contractor sued the client, alleging multiple millions of dollars in damages due to delay, disruption, and differing site conditions, and the owner claimed damages for diversion of construction funds and failure to pay subcontractors. After years of back and forth litigation guided by another firm, and with only several weeks before a jury trial, the client engaged Scott to try the case. He refocused the trial preparation, formulated a strategy that would posture the client as the plaintiff, and obtained an order bifurcating the jury trial. This allowed control of the case theme and the sequence of presentation of evidence. Scott prevailed in phase one after six days of trial with the court finding that the contractor's principals had alter ego liability. Just as the jury was being empanelled at phase two, the contractor settled confidentially in a fashion exceeding the client's expectations.

Lead trial attorney in defense of a major medical clinic in a state court jury trial. The case concerned a dispute over mixed issues of real estate obligations and construction defect liability, in which the plaintiff sought on the day of trial a judgment well into seven figures plus interest, costs, and attorney's fees. At trial Scott devised and executed a strategy that leveraged the plaintiff's own motions in limine to obtain key evidentiary rulings, and in the oral argument on those motions he previewed for the plaintiff's decision maker a case theme that would rely on evidence exposing questionable billing practices. As the jury was being empanelled, the plaintiff dismissed with prejudice its entire case and another one it filed on the eve of trial in exchange for an agreement to release the plaintiff from liability for malicious prosecution.

Lead trial attorney in *International Church of the Foursquare Gospel v. City of San Leandro*, a land use litigation involving the Religious Land Use and Institutionalized Persons Act (RLUIPA). The church hired Scott to try the case after the Ninth Circuit reversed an adverse summary judgment. He developed an aggressive strategy to quickly press the case to trial despite numerous obstacles. The approach produced a multi-million dollar pre-trial settlement in favor of the client.

Lead trial attorney in a two week trial resulting in a multi-million dollar judgment that was nearly twice the amount originally sought, and ten times greater than the defendant's best settlement offer. The case concerned a multitude of issues centering around lien rights stemming from the construction of a large apartment complex, whether it was complete within the statute of limitations to record a mechanic's lien, and whether the lien had priority over the

lender's deed of trust. In her opinion issuing the judgment, the Judge singled out the cross-examination of the defendant's key witness which left her with the impression that he lacked credibility.

Lead trial attorney in a bet-the-company case for a major general contractor whose default-terminated construction contract developed into brutal battle with shifting white collar criminal accusations against the client and its principals. The contractor was hired by a powerful and politically entrenched owner to build a new facility. But the project was delayed, and had design errors that the architect denied to the owner and blamed on the contractor. The owner began withholding payment, claimed that the contractor had been massively overpaid, and then on the advice of the architect it terminated the contract for default. The owner developed a theory that the timing of subcontractor payments constituted a criminal embezzlement of project funds, and then used its connections to politically pressure the district attorney to open an investigation. Next the owner opened battlefronts in two state court actions and one arbitration, and named the individual principals as personally liable defendants, seeking a multi-million dollar pre-judgment writ of attachment to seize the client's and principals' assets. Scott turned the opponent's writ of attachment application against them, making it into a three hearing evidentiary bench trial that was resolved in the client's favor. This interim court win was presented to the arbitrator as a foreshadowing of the merits of key issues, enabled a stay of the state court litigation, and forced the owner into a single arbitration where the client was the plaintiff. With arbitration five weeks away, Scott set up an electronic discovery team that scoured terabytes of project information, uncovering damaging internal correspondence from the architect that showed a knowledge of the design defects and efforts scapegoat the contractor for the delay and cost overruns. The contractor then took the offensive, seeking complete payment, and charging the owner with defamation and slander per se by falsely stating to others in the industry that the contractor had committed a crime. The owner was now faced with the attachment loss, the internal evidence, and defending a looming arbitration. The owner entered a confidential settlement agreement. The contractor's termination for default was converted to a termination for convenience. Independent of the settlement, the district attorney confirmed that it would close the investigation and would not prosecute.

Lead trial attorney in arbitration concerning a 120-unit and a 328-unit apartment complex, neither of which were completed on time. The owner withheld progress and retention payments as liquidated damages, argued that the contractor had fraudulently misrepresented the project schedule, impacted project financing, and was not properly licensed. At various times the owner's claims approached \$40 million. Representing the contractor, Scott defeated all claims, and successfully argued that the owner was liable for the contractor's extended duration costs, and its progress and retention payments. The award also included statutory prompt payment penalties for owner withholding project funds bad faith. The client was awarded approximately \$4.5 million and awarded its attorney fees and litigation costs expended.

Lead attorney representing the Golden Gate Bridge's seismic retrofit contractor against its steel fabricator in competing claims of delay and disruption. Case settled before trial.

Lead trial attorney representing a payment and performance bond surety in defense of contractor claims on a hospital project. The contractor sued under California's prompt payment statutes claiming that project retention was due and owing. Scott developed a theory of defense that allowed him to obtain a non-suit on the first day of trial, resulting in a complete defense judgment and award of all litigation costs.

Representing an international contractor against a power company, Scott obtained an ex parte \$48M contract attachment lien. The opponents appeared at court with a "fool proof" maneuver to oust the court of jurisdiction. Scott's oral argument persuaded the court to rule in the client's favor. Renowned construction trial attorney and co-counsel John B. Clark stated "There are few attorneys alive that could have made that argument." Scott later created a maneuver allowing the lien to be levied against California pollution reduction credits, which are traded on a private market, and for which there was no specific statutory levy method.

Lead trial counsel in a defense of claims concerning a real estate transaction. The plaintiff claimed that the

documents memorializing the transaction, which included a ground lease and a promissory note, required further payment. Scott developed an aggressive defense theory, derived from mortgage foreclosure law, that the plaintiff was entitled to nothing. He tried the case to a Federal jury, where cross-examination of the plaintiff's principal witness yielded several key admissions, and the jury returned a verdict in favor of the client.

Lead appellate attorney in *Levitz Furniture Company of the Pacific, Inc. v. Wingtip Communications, Inc.* (2001) 86 Cal.App.4th 1035.

Lead trial counsel representing a contractor in a public works construction dispute. The contractor's claims for increased costs due to defective plans and specifications, were set for jury trial in state court. The public entity counterclaimed for allegedly defective work. Three weeks in, the parties suspended the trial and ultimately settled. The case produced tangential claims of bad faith against insurance carriers through which Scott obtained a substantial settlement.

Lead counsel in a dispute with a masonry contractor constructing the Federal Court in Sacramento. The contractor sought compensation under the Miller Act for alleged extra work authorized in the field, and additional mobilization and demobilization costs. Scott tried the case in Federal court resulting in a judgment reducing the contractor's claim.

Lead trial counsel in a jury trial defense against a commercial contractor's claim that the plans and specifications were defective and ambiguous regarding the type of work at a commercial complex, and that the contractor had estimated the work at a lower price before signing the contract. Under threat of non-performance, the contractor secured a written amendment clarifying the work and for a higher price, performed, sued for non-payment, and set the matter for trial before a hopefully sympathetic jury. At trial after several days of witness testimony and argument Scott convinced the court to eliminate the jury, that the amendment was unenforceable, and to enter judgment against the contractor. The judgment included recovery of all litigation costs. Scott also successfully defended the contractor's appeal.

Lead trial counsel in a dispute involving a steel fabricator claiming that the project critical path schedule was commercially impracticable, and that there were multiple misrepresentations before and during the project. The fabricator refused to perform, and the client terminated the contract hired a replacement fabricator. Both sides had competing claims and counter-claims seeking affirmative recovery. Scott tried the case in state superior court. The fabricator's principal made several key admissions on cross-examination. The trial resulted in a judgment for the client, elimination of counter-claims, and award of all attorneys' fees, expert fees and costs. Subsequently the fabricator attempted to evade payment of the judgment by shifting assets to a third party and declaring bankruptcy. Scott oversaw a strategy, unexpected by the debtor, that inserted the client as trustee for the bankruptcy and resulted in clawing back all hidden assets from third party sources.

Lead trial counsel for a contractor on a competitively bid project to dredge Chula Vista and Newport harbors for a public entity. The actual quantities of dredge material differed from the amount depicted by the depth soundings in the plans and specifications, causing additional costs for extended onsite project duration and extra work to the contractor. The public entity argued for a different interpretation and calculation of the soundings, and launched a counter-claim arguing that the compensation requests and payroll records for past payment violated California's False Claims Act. Scott defeated the false claims allegations, tried the case in private arbitration, and obtained an award for the contractor as prevailing party.

## **Presentations**

"Fundamentals of Construction Contracts: Understanding the Issues in California," Lorman Education Services

(February 2013-2014)

"2012 Revision of the Mechanics Lien Act and New Developments in Construction Law and Insurance Markets," co-presenter (April 2012)

"Pitfalls of Public Works Projects (And How to Avoid Them)," co-presenter (May 2009)

"Comparison between AIA Forms and Consensus Docs," CLE International's - Construction Claims in Public Works, (January 2009)

"Construction Payment Remedies," Lorman Education Services'-Nationwide Telephonic Presentation, (November 2005-2006)

"Construction Law: Payment Remedies," Lorman (October 2005)

"Top Five Topics in California Construction," Acret and Lorman (March 2005)

"Change Orders: How And When To Use Them in California," Lorman (July 2004)

### **Honors & Awards**

Chambers and Partners, Construction – California (2018-2019)

Northern California Super Lawyer, SuperLawyers (2011-2019)

Recommended Lawyer, The Legal 500 (2019)

Real Estate and Construction, The Legal 500 (2012-2018)

All Conference Award, *Front Range Conference*, Football (1985)

### **Education**

J.D., University of California, Hastings College of the Law (1996)

B.A., University of Colorado, Boulder (1990)

### **Admissions and Courts**

U.S. District Court for the District of Columbia

California State Courts

U.S. District Court for the Central District of California

U.S. District Court for the Eastern District of California

Scott E. Hennigh  
Partner



U.S. District Court for the Northern District of California

U.S. District Court for the Southern District of California

U.S. Court of Appeals for the Ninth Circuit