

Litigation

AMERICAN BAR ASSOCIATION

THE JOURNAL OF THE SECTION OF LITIGATION



Transformation



Partners and Associates Discuss Each Other's Flaws

How Social Media Are Changing Litigation

A 40-Year Retrospective

Transformation

FEATURES



A 40-Year Retrospective on LITIGATION

14

MARK A. NEUBAUER

What has changed in law—and what has not—since the inception of this publication.



How Social Media Are Transforming Litigation

17

ANDY RADHAKANT AND MATTHEW DISKIN

From gathering evidence to jury behavior, few changes have affected trials as swiftly as social media.



Gossiping Agents and the Hearsay Rule

23

TIMOTHY S. TOMASIK

In high-stakes litigation, loose lips sink ships, and the rules around admissibility have been changing.

The Benefits of Mindfulness for Litigators

27

JAN L. JACOBOWITZ

The stress of litigation is not just unpleasant—it can cause attorneys to choose poorly. The practice of mindfulness offers help.



Tort Transformation in the Cultural Quicksand of Language and Values

30

CLAY CALVERT

The history of the tort of intentional infliction of emotional distress.

Sua Sponte

31

HON. LINDA QUINN

A judge offers her perspective on the tort.



From Trial Lawyer to Retired Lawyer

37

EDNA SELAN EPSTEIN

Stepping away from the law.



The Mask that Becomes You

40

ADDISON BRAENDEL

What would you choose: bored but happy, or stimulated but haggard with stress?

I Don't Feel Your Pain: A Partner's View of Associates

43

LEE STAPLETON

Being an associate isn't a journey of discovery; it's a high-pressure job.



Fire and Ice: An Associate's View of Partners

47

JOSEPH J. MAMOUNAS

Partners should deliver more mentoring and less attitude.



State Courts and the Transformation to Virtual Courts

50

JEFF ARESTY, DANIEL RAINEY, AND JAMES CORMIE

The difference between yesterday's and today's litigation practice could not be starker—and that includes the courtroom.

EDITOR-IN-CHIEF

Robin Page West
Cohan, West & Karpook PC
Baltimore, Maryland

EXECUTIVE EDITOR

Martin J. Siegel
Law Offices of Martin J. Siegel
Houston, Texas

SENIOR EDITORS

Hon. Jeffrey Cole
U.S. District Court
Chicago, Illinois

Kenneth P. Nolan
Speiser Krause Nolan &
Granito
New York, New York

Maria E. Rodriguez
Venable LLP
Baltimore, Maryland

Charles D. Tobin
Holland & Knight LLP
Washington, D.C.

Lawrence J. Vilardo
Connors & Vilardo
Buffalo, New York

ASSOCIATE EDITORS

Kevin Abel
Bryan Cave
St. Louis, Missouri

Hon. Elaine E. Bucklo
U.S. District Court
Chicago, Illinois

Edna Selan Epstein
Law Offices of Edna
Selan Epstein
Chicago, Illinois

T. Markus Funk
Perkins Coie LLP
Denver, Colorado

William T. Garcia
Washington, D.C.

Hon. Joseph A. Greenaway Jr.
Third Circuit U.S. Court
of Appeals
Newark, New Jersey

Ashish Joshi
Lorandos Joshi
Ann Arbor, Michigan

Stephanie Kane
Denver, Colorado

Robert E. Kohn
Kohn Law Group
Los Angeles, California

Alain Liebman
Fox Rothschild
Princeton, New Jersey

Leslie Machado
LeClair Ryan
Washington, D.C.

TiShaunda R. McPherson
U.S. Department of Education
Chicago, Illinois

Pamela Menaker
Clifford Law Offices
Chicago, Illinois

Yuri Mikulka
Stradling Yocca Carlson &
Rauth
Newport Beach, California

Steven J. Miller
Miller Goler Faeges Lapine LLP
Cleveland, Ohio

Robert E. Shapiro
Barack Ferrazzano
Kirschbaum & Nagelberg LLP
Chicago, Illinois

Frank Sommers IV
Sommers & Schwartz
San Francisco, California

Lee Stapleton
Baker & McKenzie
Miami, Florida

SECTION OF LITIGATION
William R. Bay, Chair
Thompson Coburn
St. Louis, Missouri

Don Bivens, Chair-Elect
Snell & Wilmer
Phoenix, Arizona

Nancy Scott Degan,
Vice Chair
Baker Donelson
New Orleans, Louisiana

PERIODICALS DIRECTOR
Monica Buckley
American Bar Association

MANAGING EDITORS
Scott Lewis
Anna Sachdeva
American Bar Association

ART DIRECTOR
Jill Tedhams
American Bar Association

STAFF EDITORS
Steven Gartland
Jonathan Haugen
Darhiana Mateo Tellez
American Bar Association

EDITORIAL PROJECT ASSOCIATE
Monica Larys
American Bar Association



Cover Illustration by Stuart Briers

Litigation (ISSN 0097-9813) is published quarterly by the Section of Litigation, American Bar Association, 321 N. Clark St., Chicago, IL 60654. Periodical postage paid at Chicago, IL, and additional mailing offices. Postmaster: Send address changes to Litigation Member Records, American Bar Association, ABA Service Center, 321 North Clark Street, Chicago, IL 60654-7598.

Annual subscription price for Section of Litigation members is \$10 and is included in Section membership dues. Any member of the ABA is eligible for Section membership. Institutions and individuals not eligible for ABA membership may subscribe for \$140 per year. Individual copies are \$40, plus postage and handling, and are available from the ABA Service Center at 800/285-2221. Issues published more than two years ago are available from William S. Hein & Co., www.wshein.com, 800/828-7571.

Material contained herein does not necessarily represent the position of the American Bar Association or the Section of Litigation. All material in Litigation is protected by copyright. No part of the text or images may be reproduced; stored in a retrieval system; or transmitted in any form or by any means, electronic, mechanical, photocopy, recording, or otherwise, without the prior and express permission of the publisher.

For permission to reprint articles, please go to americanbar.org/utility/reprint.html.

COLUMNS**OPENING STATEMENT**

Remembering Why 4

WILLIAM R. BAY

FROM THE BENCHObituary: The American Trial Lawyer,
Born 1641—Died 20?? 5

HON. MARK W. BENNETT

LETTER TO THE EDITOR

Lawsuits Are Not a War 11

JOE NICHOLS

ON THE PAPERSWho Done It? Controlling Agency in Legal Writing,
Part II 12

GEORGE D. GOPEN

iWITNESS

Winning the Internet 56

JASON BEAHM

ADVANCE SHEET

A Conservative by Any Other Name 57

ROBERT E. SHAPIRO

GLOBAL LITIGATORNeed Foreign Discovery? Consider Little-Known
Section 1782 60

MARK DOERR

SIDEBAR

Courage 62

KENNETH P. NOLAN

SCRUPLESEx Parte Contacts with an Adversary's
(Former) Employees 64

MICHAEL DOWNEY

HEADNOTES**LEGAL LORE**

Anatomy of an Attempted Army Murder 8

FRED L. BORCH

EXPERTS

Check, Please? 9

MARIA E. RODRIGUEZ

YOUNG LAWYER

Second Chairs Are Coaches, Not Bench Warmers 10

AMY JANE LONGO

A 40-Year Retrospective on LITIGATION

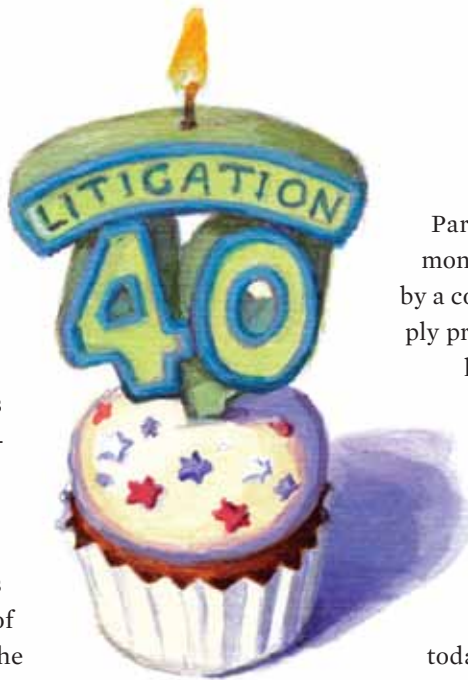
MARK A. NEUBAUER

The author is a partner with Steptoe & Johnson LLP, Los Angeles, and is a former editor-in-chief of LITIGATION.

Anniversaries and birthdays are appropriate times to look back and reflect on the changes that time has wrought, while at the same time trying to predict the future. LITIGATION journal's 40th anniversary is no exception.

Time tends to dim the memory of the defects of the "good old days," and the pressures of modernity tend to heighten our disappointment with the present. Yet, like all change, a comparison of the practice of law at the beginning of LITIGATION in 1975 with the practice today is a mixed bag. Many things in today's practice of law are an improvement over what existed at the onset of LITIGATION, but by the same token, some of the innocence of those earlier years has been sadly lost.

Most dramatic has been the change affecting trial lawyers and their professionalism. Forty years ago, a large law firm employed 30 to 75 lawyers and was located in a single city. The people who practiced together actually knew one another, their spouses, and their children. They were not only professional colleagues but also personal friends and so were their families. Today, law has followed the accounting profession and become not just nationalized but internationalized. Firms are now multi-office with thousands of lawyers, many of whose "partners" do not know each other by sight much less by name.



Partnership has become a misnomer. Large monolithic law firms are too often governed by a corporate structure the size of which simply precludes participatory democracy. Many large firms have adopted blind compensation systems, in which partners are not even allowed to know what their so-called equal partners are earning. These modern partners do not share clients or cases. It's each lawyer for himself or herself, and the theme is "What can you do for me today?" Standing by a partner in the downs of a professional or personal life is a rarity.

Business Before Profession

The challenge today is that our practice of law has become too often more of a business than a profession. One of the greatest negative influences in the 40 years of LITIGATION has been the AmLaw 100. Much like the colleges that manipulate the *U.S. News and World Report's* college rankings, law firms engage in playing the system by trying to pump up such misnomers as PPP (profits per partner) and RPL (revenue per lawyer). Somewhere

Illustration by Amy Young

in those rankings, just being a good trial lawyer, serving your client, and being respected by judges and opposing counsel have been discarded as measuring sticks of success.

But don't mistake me. These changes have provided a benefit. Millions and millions of benefits. The partners of 40 years ago would count a low six-figure income as financial success, while they now look at making a minimum of seven figures. Associates back in 1975 started at salaries of between \$12,000 and \$17,000. Now a young novice out of law school with few useful skills commands \$160,000 at most large urban firms. Clerkships—once a position of just honor and prestige—have become stepping stones to riches. Supreme Court clerks get law firm signing bonuses of \$250,000.

The competition for these riches brings the rise and fall of great law firms. Now extinct are prestigious firms that once graced the halls of justice and the pages of this magazine. Firms with names like Brobeck, Dewey, Howrey, Coudert, Hiller, and Thelen all litter the law firm graveyard. Some were the victims of greed. Others were the victims of failing to compete or mismanagement. In the latter case, those firms lost their most successful rainmakers because the opportunity cost of staying with a less economically focused firm became too great. In short, law firm Darwinism: Adapt or die.

With the increase in size, practicing in a law firm has become more of a silo. Each partner is only as good as his or her book. Notions of mentoring young lawyers often perish with the need for maintaining the high incomes we all enjoy. Public service is something you do only to gain more client contacts.

Back in the egalitarian 1970s, firms such as Irell & Manella and Munger, Tolles & Olson bragged about sabbatical programs. These programs allowed partners to take a break from their practice for as much as six months by doing charitable work, volunteering to work for government agencies, or just traveling the world. Such programs are dead. As one friend of mine said about the termination of his firm's sabbatical program, the only partners who could afford to take a sabbatical were those who had no clients. The lawyers who provided the grease of clients for a law firm never could risk abandoning a client by taking a sabbatical; so they resented the poorer-performing partners who could.

With the pressure to make more and more profits, participation in professional associations such as this organization and local bar associations has declined. Being a member of a bar association such as the ABA was once considered a mandatory duty, but it is now considered a needless expense. Where law firms once encouraged and financed professionalism, they now ask, "What's in it for us?"

One of the lost joys has been the camaraderie of the practice. Lawyers—even opposing counsel—would gather at bar dinners to build bonds that led to greater service and professionalism.

Now they just stay on the computer and bill hours.

Associates too have become trapped by these high dollars. Forty years ago, most large firm litigators cut their teeth by trying dog cases for large clients. No more. Today's associates spend as much as a half a decade or more at a law firm, earning hundreds of thousands of dollars a year, only to find they really do not know how to actually practice law. They are great for examining documents, preparing onerous requests for admission or interrogatories, or writing lengthy legal research memos. But cross-examining a witness or—heaven forbid—voir dire a jury are skills still well beyond their level.

Changed Courts

Courts too have joined in this change. Forty years ago, even in large cities, judges often knew all of the lawyers. They still do in smaller burghs, but now there is a rapid turnover of judges. Successful judges often opt for the more lucrative work of private judging in mediation and arbitration. Pressure is placed on courts with ever-diminishing resources to play number games. How many cases can you process each day, each month, and each year? Whether justice is done gets lost in bean counting.

Forty years ago, the "master calendar" was common. Lawyers would go to a general department and wait for hours or even days in a cattle call to be assigned to a hearing as trial courts opened up. Now the vogue is individual calendaring, which is a substantial improvement. Judges now "own" cases. Individual responsibility for the case fights the natural human urge to avoid decisions. Under master calendaring, if the judge avoided a determination, final decisions were someone else's problem. Now, with individual calendaring, the judge cannot avoid a decision. If the judge denies summary judgment, he or she faces the alternative of weeks of boredom listening to a time-wasting and dull trial. With today's individual calendaring, judges intervene more to try to settle cases because that case remains with them, not on someone else's docket.

One unfortunate change over the 40 years of LITIGATION is the salary gap between judges and practitioners. Forty years ago, judges made relatively the same as senior partners in large law firms. Indeed, often when a law firm wanted to get rid of a senior partner, it politely arranged for his or her appointment as a judge as a graceful exit.

Now, however, most state and federal judges make the same or even less than a fledgling associate. With dramatic cutbacks in court funds, the ability to deliver justice is being strained, and only the most dedicated assume the black robe.

Another evolution over the last 40 years is that our practice is correctly called today "litigation" rather than "trial." It is not uncommon to find lawyers in their 50s who have yet to

try a single case—bench or jury. Instead of being the venue for the glory of examination and cross-examination, courts have become focused on motions. Not just summary judgment motions, but pleading motions and, the quintessential time-waster, discovery motions: an avalanche of electronic paper increasing the cost of litigation but not necessarily improving the administration of justice.

One of the great watersheds of change in recent times has been electronic discovery. No longer do you need to depose witnesses. People don't talk to each other. They just text or email each other. Accordingly, everyone asks for each side's electronic text messages and emails. It unleashes a deluge of data. Even worse, parties reflexively ask for metadata when there is rarely an issue of defalcation.

The result is that an industry has arisen in retrieving, analyzing, sorting, and reviewing electronic evidence not just for evidence but for privilege issues and privacy issues. The advantage of this electronic evidence is it contains admissions and spontaneity that would never occur in the formality of a deposition or in the exchange of correspondence. People put things in emails that make them later cringe and fidget as witnesses on the stand when they are confronted with those casual electronic exchanges.

Laws have changed too. Simple claims for breach of contract, fraud, and negligence have now been overwhelmed by a plethora of statutes pertaining to consumer rights, employment rights, and whistleblower claims, among others. Class actions—just starting to be the vogue at the birth of *LITIGATION*—are now a mainstay of many litigators.

The computer has also dramatically altered the approach to legal research. At the start of *LITIGATION*, people went to weird books called “Shepards” and looked at long lists of where a particular case or statute was cited. I remember in my early, more insecure days I would look periodically at Shepards to see how many times my law review article had been cited in opinions. (Who cites law review articles in briefs these days?)

As young lawyers, we would start our research by familiarizing ourselves with the area of law. We would read the annotated code and the various digests. We would look at treatises. Only after getting a sense for the body of law would we start reading the cases and crafting our argument and our legal analysis. No more.

Instead, law schools have trained legions of automatons. They pump search terms into Lexis or Westlaw, run up millions of dollars of legal research, ferreting out cases that have keywords. The problem is that this approach rarely crafts creative arguments. It just regurgitates.

Law libraries are now dinosaurs. The stacks and stacks of Federal Reporters are mere paperweights. Instead, after rent and personnel, the largest cost for most law firms is their payments for computerized research. Judges can publish opinions

at whim carried on the Internet and flooding the body of law without discretion, as opposed to the old days of waiting for opinions that they designate as important enough to be marked for publication.

Computerized research does, however, provide tremendous advantages that did not exist in those early days of this journal. Want that “needle in the haystack” case? Just search “breach/contract/avocado” and you have a case factually similar to yours. Want to know Judge Smith's history of deciding summary judgments? Computers provide quick lists of Judge Smith's similar cases and give you the strong advantage of quoting his own words or—if you are brave—the words of a court of appeal that reversed him.

Equally changed are the mechanics of the practice of law. At the onset of *LITIGATION*, there was a thing called “shorthand.” Secretaries would carry notebooks into partners' offices and carefully take down a senior partner's words. Pleadings were typed on carbon paper, rarely allowing a mistake, which would have to be confronted with “white out” or careful erasure. Faxes. Teletypes. All dying or long since dead. Indeed, the secretary is a dinosaur, as is the word processor. Young lawyers input everything themselves. The art of dictation is a rapidly disappearing one.

Such computer approaches allow sloppiness in writing. People rarely organize their thoughts. They just throw it up on the screen and cut and paste, hoping a good product arrives at the end.

Is this truly progress? Generally it is. We can do more; we have more access to evidence and we have greater access to the law. These are all positive things. And those of us fortunate enough to be employed enjoy the bounty of compensation riches of today.

However, as *LITIGATION* commences its fifth decade, we must also focus on the cost of progress. We need to regain the camaraderie and professionalism of those older days. We need to consider reforming our rules of civil procedure to rid our practice of time-wasting and needless discovery and paperwork. The old days of trial by jury have been the focus of this journal for 40 years. Trial is truly the greatest part of our craft. Just look at the movies, plays, and books that focus on trial as the greatest form of human drama. We need to regain the art of trial among lawyers young and old.

Being a trial lawyer is singularly one of the greatest professions of the world. It provides tremendous intellectual challenge, the competitiveness of a chess game, legal theory, human drama, and greater remuneration than ever before. As we enter into the fifth decade of *LITIGATION*, let us regain what was good about the past and look forward to what we will achieve in the future. ■