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Transformation

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COLUMNS

HEADNOTES

A 40-Year Retrospective on LITIGATION

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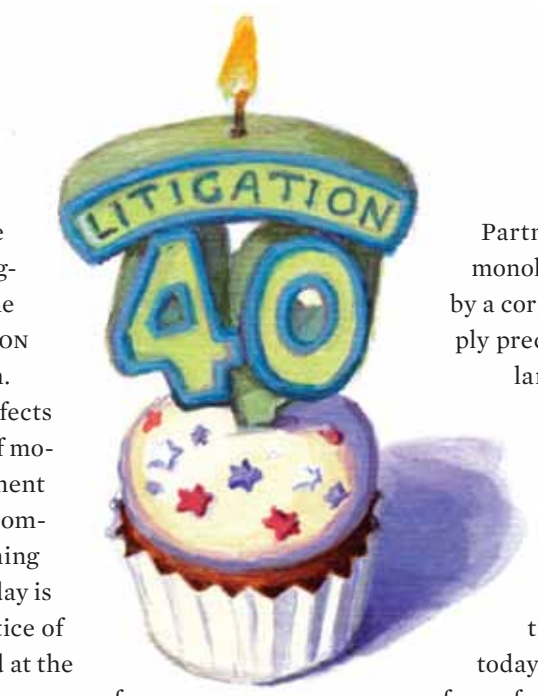

Anniversaries and birthdays are appropriate times to look back and reflect on the changes that time has wrought, while at the same time trying to predict the future. LITIGATION journal's 40th anniversary is no exception.

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

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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 diring 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 burgs, 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 competiveness 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. ■