

After the Millennium: Law Practice in the 21st Century

Ask five people for their vision of the future and you'll get five distinctly different answers. TRIAL asked three attorneys, a law librarian, and a recent law school graduate to consult their tea leaves and consider what lies ahead for civil law practice in the 21st century. Their predictions cover a lot of ground but share common themes, especially the growing influence of technology and a continuing need to fight to preserve the civil justice system.

New Technology May Boost the Jury's Role

Philip H. Corboy

Trial lawyers can already take a close look at the jurors of the 21st century. They are our children or grandchildren. The revolution in personal computers, only a little more than a decade old, has changed their lives immeasurably. The latest wave includes multimedia encyclopedias and other reference tools, computer simulations of everything from atoms to dinosaurs, and a host of interactive "edutainment" programs.

Many elementary school children are as adroit in hypertext as their parents were in the use of the card catalog. The gurus of the communications and computer industries confidently declare that this is only the beginning.

The legal profession has not been in the vanguard of this revolution. A recent *National Law Journal* survey indicates that in most law offices, particularly smaller ones, the computer is essentially a glorified typewriter. Computerized legal research has largely meant providing harder-to-read versions of the case reporters. Some adventurous firms have ventured into e-mail, online services, and even the Internet. Basically, however, law office computers are almost entirely occupied with creating, manipulating, moving, and storing text. (Wayne J. Lovett, *Survey Reveals Small Law Firms Hesitant to Automate*, Nat'l L.J., Oct. 10, 1994, at C4.)

The multimedia revolution will soon change all of this. But even more fascinating is what the future has in store for the jury.

For most jurors, particularly in civil cases, the courtroom is like a classroom. They are expected to sit quietly as passive receptacles for information. This has been changing. For example, some courts now allow jurors to take notes and ask questions.

Traditionally, information has been conveyed to jurors in oral form. This, too, has been changing. Trial lawyers have been in the forefront of using demonstrative evidence, clearly establishing that jurors understand and remember more when the words they hear in court have visual support. Recently, the litigants in the *Exxon Valdez* case and in the litigation between Microsoft and Stac Electronics constructed multimedia trial presentations.

Future trial lawyers may well make use of virtual reality. Consider a witness who can walk through an on-screen simulation of an accident scene or a manufacturing plant, operating a machine or picking up objects to explain their significance to jurors.

During deliberations, jurors may be able to call up the trial transcript with links to the appropriate exhibits or the judge's instructions. With a few keystrokes or mouse clicks, jurors might be able to compare side by side the testimony of different experts on a particular issue.

These are applications of existing capabilities. Technology will undoubtedly provide other methods of educating and persuading jurors that cannot yet be envisioned.

Lawyers and courts will face difficult issues in dealing with these innovations. Technology is expensive. Fortunately, costs have declined sharply as new innovations have gained wider use. A device to record data on CD-ROM, for example, sold for \$10,000 two years ago. Today the price is half that, and experts predict

that these devices will cost well under \$1,000 in a few years. Nevertheless, attorneys will continue to face the decision of whether expenditures for a high-tech trial presentation are warranted in a particular case.

Also, the trial lawyer will lose some control over the presentation of the case. Lawyers are trained in the use of language, and a skilled litigator can weave the testimonial evidence into a coherent and persuasive narrative for the jury. The attorney preparing a multimedia presentation must rely heavily on the skills and decisions of technicians and others to do this.

Courts will have to deal with thorny questions about the admissibility and reliability of new kinds of evidence. For example, how does a judge evaluate the trustworthiness of a virtual reality presentation?

Nevertheless, there is good reason for optimism that technological advances will help preserve the role of civil juries. Opponents of the right to trial by jury most often complain that ordinary citizens are incapable of understanding complex cases. This is not a defect in the jury system. Rather, it is a challenge to the trial lawyer, whose responsibility it is to present the issues in an understandable way. The use of advancements in technology that help educate jurors and judges will bolster confidence in the jury system.

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Preserving the Civil Justice System for the 21st Century

Gayle L. Troutwine

What will the civil practice of law be like in the 21st century? Perhaps a better question is, Will we still have a civil practice of law by the time we enter the next century? Unless we are able to turn around some disturbing trends, we may not have a civil justice system resembling anything close to what we have today.

We *can* turn things around and improve the world through our efforts.

For some time we have seen the civil justice system eroding. Recent changes in the law have diminished the right to a jury trial. For example, the courts' interpretations of *Daubert v. Merrell Dow Pharmaceuticals* have put a stranglehold on the presentation of scientific evidence. Also, judges have been given greater discretion to grant motions for summary judgment. Both developments limit the role a jury plays in dispute resolution.

Efforts are also being made to make it financially difficult, if not impossible, to run a plaintiffs' practice. Examples include moves to cap attorney fees-- already successful in some states--and to eliminate contingent fees or adopt the "loser pays" rule.

Another disturbing development is the trend toward more and more consolidated litigation, in which plaintiffs get only one chance to conduct discovery and go to trial. In a global marketplace, deceptive business practices and defective products rarely cause injury in isolation. Rather, there is more and more mass injury leading to mass litigation. This movement aims to eliminate individual trials and deliver one-size-fits-all justice. Moreover, a few unscrupulous lawyers have found the opportunity to turn mass litigation into big business, with big attorney fee awards and small payments for claims.

These and other troubling changes in our civil justice system are occurring at a time when public opinion does not necessarily support the system or the role that trial lawyers play. These days, virtually all settlements are confidential, so all the public knows is that our legal system delivers money. Many Americans have not seen it deliver justice.

If Congress did away with the civil jury system tomorrow, who besides us would even notice? Would anyone care? David Letterman and Jay Leno might add a few lawyer-bashing jokes to their repertoires, but that would probably be all the attention it would get.

If there is to be a civil law practice as we enter the next century, it will be up to us to preserve the right to trial by jury. Trial lawyers must get more involved. We realize, better than most, the potentially devastating results of these threats to the civil justice system.

The risks have become even more dire, given the current political backdrop. Deregulation generally means more injuries. For example, new genetically engineered products and miracle drugs, sold without FDA oversight, would likely lead to new and different diseases and injuries. And as Congress continues to give more and more power to big business, big institutions, and manufacturers of defective drugs and other

products, abuses will result. More than ever, as we enter the next century, the public is going to need the civil justice system--and us--to be there for them.

Helping Out

I believe we can do many things to make a significant difference. Here are three suggestions:

We can each take a more active role in policing our profession. For example, from our fellow plaintiffs' lawyers, we should not tolerate tacky ads and get-rich-quick tactics. When we see them, we should oppose them and bring them to light.

In our own conduct, we must always abide by the highest standards of professionalism, and we should mentor other lawyers so that civility in our profession stands a chance. By our own conduct, we can set "the high water mark."

We also need to be active in the bar associations that police our profession so that every defense lawyer who lies, cheats, steals, destroys documents, obfuscates, delays, and harasses is investigated. We must not allow defense lawyers to escape with impunity when they conduct themselves in despicable fashion.

We need to make sure the civil justice system delivers justice. All of us from time to time handle cases in which there is something other than money at stake--discrimination cases, for example. In these matters, we have an opportunity to teach the public about how the civil justice system can make the world a better place to live in.

When we expose or eliminate a dangerous product, we need to get the word to the press and the public so that all can see the importance of the civil justice system in improving the world we live in. In many cases, we make a difference beyond recompense for our clients' injuries: A stop sign is erected at a hazardous intersection, warning signs are posted at a beach with dangerous tides, a lighter is made childproof.

Where these opportunities exist, we should seize them; when we win, we should spread the word. After all, this is why we became plaintiffs' lawyers-- because we love justice.

We all should give more to ATLA. We need to support our association with both time and money.

ATLA gives us access to thousands of other attorneys who can share their expertise and experience. National College of Advocacy programs help us develop our skills and knowledge. ATLA fights our battles for us in Congress and helps us put our best face forward to the public.

Preserving the civil justice system is a top priority for ATLA. So by increasing our support of the association, we increase the chances that this system will survive.

If there is to be a civil law practice in the 21st century, we need to help make it happen by preserving the civil justice system.

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Winning with Plain Language

C. Edward Good

Myth has it that when lawyers write for other lawyers or judges, we must use the language handed down to us from centuries of wisdom and experience. But trial lawyers who succeed in the next century will quickly destroy that myth.

Crusty old legal writing fails to get the job done. This was shown clearly in three eye-opening surveys of trial judges and lawyers in Florida, Louisiana, and Michigan. Respondents received two versions of six paragraphs--one in traditional legal writing, the other in plain language --and were then asked to indicate their preferences.

Consider this example, a paragraph from a brief:

A. Petitioner's argument that exclusion of the press from the trial and subsequent suppression of the trial transcripts is, in effect, a prior restraint is contrary to the facts.

B. Petitioner argued that it is a prior restraint to exclude the press from the trial and later suppress the trial transcripts. This argument is contrary to the facts.

The results? In all three states, the judges overwhelmingly preferred the plain-language versions. In Florida, 86 percent preferred plain English; in Louisiana, 82 percent; in Michigan, 85 percent. (Joseph Kimble, *Strike Three for Legalese*, 69 Mich. B.J. 418 (1990).) The dramatic similarity in the numbers and their sheer size shredded any remnants of the myth that traditional legal language impresses, informs, or even begins to win arguments in trial or appellate documents.

Successful law firms in the next century will see the relationship between quality of writing and frequency of winning in court. To produce consistently superior, crystal-clear writing, attorneys must realize they have some *unlearning* to do. They must discard the writing habits that they picked up in law school and reinforce on the job when reading legal documents, court opinions, and other legal materials.

They must also realize they have some *learning* to do, a task that lasts a lifetime. The truly great legal writers, after all, continually look for new ways to say things clearly.

To ensure continual education in writing, many of the larger law firms in the next century will employ full-time writing consultants to provide training for associates and quality control of their written work. Some already do.

Smaller firms and even sole practitioners should launch their own efforts to ensure that education in clear writing takes place continually. Bar groups and private vendors provide an array of workshops. Trial lawyers who recognize the written word as a significant part of their arsenal will enroll in every course that comes their way.

Required Reading

Most practitioners include various style books on their bookshelves, but only rarely do attorneys truly set about the task of improving their writing by studying the literature. Here, with the briefest of reviews, is a list of books I consider "must reads":

Stephen Armstrong & Timothy Terrell, *Thinking Like a Writer* (Clark Boardman Callaghan 1992).

Armstrong and Terrell's discussion of organizational principles will turn on the lights of legal writers searching for explanations of why they should structure legal arguments in a particular way. (800) 221-9428.

William Strunk Jr. & E.B. White, *The Elements of Style* (MacMillan 3d ed. 1979). Anyone who writes for a living must read this classic. Available at all bookstores.

C. Edward Good, *Mightier Than the Sword: Powerful Writing in the Legal Profession* (LEL

Enterprises 1989). Yours truly provides a grammatical and sometimes humorous approach to breaking old habits and developing a potent legal style. (800) 662-9673.

Bryan A. Garner, *The Elements of Legal Style* (Oxford University Press 1991). Garner has taken the approach of Strunk & White's classic and applied it directly to the legal profession. (800) 451-7556.

Richard Wydick, *Plain English for Lawyers* (Carolina Academic Press 2d ed. 1985). The former dean of the University of California at Davis School of Law gives special insight into some of the weaknesses of traditional legal writing. (919) 489-7486.

Plain Language Pays

Picture the federal district judge. There she sits, facing yet another *Defendant's Reply to Plaintiff's Response to Defendant's Motion for Judgment as a Matter of Law Pursuant to Fed. R. Civ. P. 50(a)(1)*. She picks it up from the growing stack on her desk. As she begins to read, her mind goes numb at the compilation of nouns, verbs, and modifiers:

It is beyond cavil that the patent laws, the substance of which give to the patentee a state-supported monopoly on the "making, using, selling, or importing [of] the invention," are *in pari materia* with the federal antitrust laws and it is, therefore, to be noted that said patent laws modify such antitrust law *pro tanto*. Such

a result was the basis for the *ratio decidendi* of the *General Electric* case (hereinafter cited as "*General Electric*"). [Example drawn from Wydick at 56.]

Now suppose the judge had picked up the same motion and read this:

The patent laws, which give a monopoly on "making, using, selling, or importing the invention," concern the same general subject as the antitrust laws, and the two should be construed together. The patent laws modify the antitrust laws to some extent. That is why *General Electric* was decided as it was. [*Id.* at 85.]

In a close case, who do you think will win?

As that stack of motions grows even larger in the 21st century, judges--their mental energy taxed to the limit--will devote only so much time to cases before them.

Litigators who recognize the precious few minutes they have of the judge's undivided attention will get rid of traditional legal language imposed on them by the practitioners of the past. Instead, litigators in the future will go for the heart of the matter as succinctly as they can. They will be the ones who prevail in the 21st century.

Plain, straightforward language will point the way.

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Law Librarians: The New Information Specialists

Jill Anne Farmer

Many observers of law office management trends speculate that the increasing reliance on online services and materials in CD-ROM format heralds an end to the need for law librarians. On the contrary, because of the plethora of information now besieging us, librarians are needed more than ever to serve as organizers, catalogers, and guides to the information superhighway.

Massive computerized databases save time and effort in some respects but create new demands on time in others. For example, it is common for each database to have a unique and sophisticated searching protocol. Moreover, these databases are constantly changing and expanding. It would be difficult for attorneys to find the time both to master the necessary searching software and to keep up with innovations in a way ensuring optimal efficiency and expertise. Also, ordering and updating materials, as well as troubleshooting technical difficulties, consume a great deal of time. Librarians will save lawyers time and money by taking charge of information services.

In the next century, librarians will continue to ensure that cost-conscious clients stay satisfied. Law firms currently are struggling with how to bill for online and CD-ROM research. Increasingly, clients insist that these services should no more be billed separately than should law books. If a firm decides to absorb these costs as overhead, it is all the more critical that databases be selected by an information specialist who knows about different products and vendors and that searching be done as quickly and skillfully as possible.

Some firms now boast of being "bookless."¹ While it is possible to maintain a library of CD-ROMs, the start-up costs are formidable if lawyers are to have simultaneous access to any publication at any time. Licensing requirements for multiple users add to the CD subscription costs and may prevent lending, copying, or retaining the disks.² CD-ROM updates may not be as current as paper ones, and coverage may not be as thorough.³ Also, some CD-ROM sets are divided into multiple disks. Attorneys who want to conduct an exhaustive survey must repeat searches as many times as there are disks.⁴ For all these reasons, a knowledgeable librarian is an asset in CD-ROM libraries.

Another drawback of the bookless firm is that it will not provide attorneys with all the resources they need. Much research needed in firms today is not law-related in the traditional sense. The library, in whatever format, must contain a wealth of nonlegal information from a variety of books and online databases. The most intangible but valuable resource of all, however, is people who know how to start looking and whom to call for the obscure information needs that come up constantly for the good litigator.

So will law librarians still be necessary in the 21st century? Absolutely. In fact, it's fair to say that their role will be greatly expanded. They will analyze and select not only information but the products that generate it.

They will teach users techniques to search through different systems and help steer them to the best resources to meet their needs.

Attorneys who don't have their own librarians are charting the seas of information without a navigator. At the very least, they should take advantage of state court and county law librarians or law school librarians if possible.

The information age holds great promise. A wealth of data can be accessed, facilitating creativity and productivity for attorneys. What is essential is that both lawyers and librarians envision a new role for law librarians. They should be seen not merely as custodians but as information specialists; not merely as overhead items but as valuable assets.

As Robert Oakley, director of the law library at Georgetown University Law Center, writes, librarians of the future will be "navigators and cartographers, mapping out the islands of legal information and helping our users to get there."⁵

Notes

1. See, e.g., David B. Pudlin & John P. Lavelle Jr., *Now on CD: "Pageless in Philadelphia,"* NAT'L L.J., May 29, 1995, at C1.
2. On these and other restrictions of licensing, see Mary J. Koshollek, *Legal Resources on CD-ROM: Buyer Beware*, NETWORK 2D, Spring 1995, at 8.
3. *Id.*
4. See Jean O'Grady & William DeSalvo, *Meeting the CD-ROM Networking Challenge*, LAW TECH. PRODUCT NEWS, July 1995, at 35.
5. Robert L. Oakley, *Legal Information Policy and the Changing Nature of Law Libraries*, L. LIBR. LIGHTS, Jan.-Feb. 1995, at 1, 7.

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We Need to Educate for the Future

Jonathan P. Bricker

As the 21st century nears, a problem is emerging in law schools across America. At best, some law schools are ignoring the significance of personal injury law practice in their course offerings and career counseling. At worst, some schools are actively discouraging students from becoming plaintiff litigators.

Fortunately, steps can be taken to make the present law school climate much more amenable to the interests of personal injury attorneys and the citizens they work hard to represent.

There are some basic reasons why personal injury representation is not popular in law schools today. The campaign for tort "reform" at both the state and federal levels has influenced the perspective of the law school community. More important, it has had a substantial impact on what some law students think about personal injury litigation. Because the job market is so competitive, students are well aware of trends in the profession that may affect their careers. As a result, many students believe they must embrace the tort "reform" movement if they are to succeed.

The dominance of large defense firms during the fall interview season reinforces this anti-plaintiff climate. It is common knowledge among law students that voicing anything other than pro-defendant sentiments in interviews with these firms will reduce or perhaps eliminate the chance of getting a job offer. Often, students are advised by career counselors to answer all questions in the manner most likely to get them the job. So, many students swear allegiance to the mission of these firms.

Large defense firms are often welcomed by law faculty and administrators because their presence helps improve a school's ranking and reputation. Unfortunately, this can send students the message that any other kind of firm represents a less-than-desirable job opportunity. It is not uncommon for some professors and

administrators, when pressed, to characterize plaintiff lawyers as the rogues of the legal profession, best observed from a safe distance.

Other factors also contribute to the anti-plaintiff mood. In the tort "reform" era, it would be impolitic for a state-supported law school to encourage students to represent personal injury victims. Also, professors who have practiced at large firms convey to students the attitudes of their former employers.

ATLA members should be concerned that personal injury representation lacks popularity in law schools for two reasons. First, it means that students do not graduate with an appreciation of the importance of personal injury law. As a result, 21st-century lawyers will be more likely to support legislation that frustrates ATLA's efforts and limits the rights of injured people. Second, the current climate means that some students will not become plaintiff litigators merely because they were misinformed in law school.

Successful Response

Much can be done to change the present situation and create a law school environment that values the contributions of personal injury lawyers. ATLA has already responded to this need and has had great success.

First, the association has recognized that many students go to law school because they are drawn to the prospect of trial work. Yet, something strange happens to students during their three years of law school. Somewhere between Article 9 of the U.C.C. and an estate planning seminar, many forget why they came to law school in the first place. Most schools offer relatively little in the way of courses and assistance for students who want to be litigators.

ATLA has stepped in to fill the void. Since establishing the Law Student Services Committee (LSSC) in 1989, the association has exposed thousands of law students to its mission and the excitement of trial work. Currently, there are nearly 4,000 ATLA student members and more than 90 law student chapters at law schools across the country. The annual LSSC-sponsored Student Trial Advocacy Competition enables students to compete in an interscholastic trial tournament.

The LSSC's programs convey to law students that ATLA is genuinely interested in their professional development. Invariably, students who become involved in LSSC programs come to appreciate the role of personal injury attorneys. Most important, they start to challenge the anti-plaintiff mentality that pervades their educational environment.

Individual ATLA members and state trial lawyer associations can help by becoming more involved in law schools, capitalizing on student needs and interests. Members can present lectures and programs in conjunction with student chapters or coach and sponsor school trial teams.

State associations can create student programs to complement ATLA's, and they can permit ATLA student members to attend their seminars and conventions free of charge. Trial lawyers can cooperate with law school career centers and meet with students to discuss the virtues of personal injury work and offer summer jobs and permanent employment opportunities.

Worthwhile Work

Most important, through personal contact with law students, ATLA members can convey to students that what they do is both exciting and worthwhile. This kind of involvement can play a significant role in countervailing the anti-plaintiff mentality that is common in some law schools. As the 21st century approaches, the future of ATLA and of personal injury practice generally may depend on what individual members do to help law students today.

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