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THE CAVEAT

VOLUME XVII

ISSUE 4



EDITOR'S PREAMBLE

"In some countries, the course of the courts is so tedious, and the expense so high, that the remedy, Justice, is worse than injustice, the disease"

— Benjamin Franklin

How will our legal system look twenty years from now? Will the expensive and time consuming courtroom theater be replaced by ADR and private judges rendering faster and less expensive results?

In this month's "Profiles" interview, Professor Segal tells us that only 12% of lawyers go to court. Of this 12% most are not trial lawyers but litigators. "These [litigators] are lawyers who do their work in the context of a law suit that has already been filed. They spend a year or two sending paper back and forth between them and the lawyer on the other side. At some point, these cases go before a judge, usually in the context of a settlement conference. The litigator is then told if he doesn't settle in one month the case is going to trial. At this point the litigator settles. These lawyers don't go to trial. They are employed in the continuing discovery process, the endless challenges by motions on both sides."

Mr. Edwin W. Green, a partner in the firm of Bronson, Bronson & McKinnon in San Francisco and chairman of the firm's Specialized Litigation Department, concurs with Professor Segal and states, "We have replaced the "trial lawyer" with the "litigator" who uses the expense of litigation as an offensive weapon... This litigator has usually never tried a case to verdict, or perhaps to a jury at all. The litigators idea of the adversary process is to conduct meaningless, often obstructive, discovery in an attempt to win a battle, with little or no thought being given to the war."

As the cost of litigation means that only the largest cases reach the courtroom, big cases such as toxic waste litigation, disaster suits and large commercial cases may continue to flourish.

However, small cases have been driven out of the litigation system. As Professor Segal notes, "They are all settled because there is an unyielding pressure from the courts to settle them. Insurance companies have adopted an unfortunate policy in that they look at how much it is to settle and how much to try the case, even if there is no merit; because its cheaper for them in the short run."

Skyrocketing costs and backlogged court calendars have left the legal system at a crossroads. One path avoids litigation altogether and points towards increased ADR. On this path negotiating skills will be more valuable than courtroom experience. The other path requires a streamlined approach to litigation and emphasizes trial skills rather than trial avoidance. Optimally, however, a bridge joining both paths, encompassing alternative dispute resolution and streamlined litigation provides the best solution.

In this issue **Focus On: The Costs of Trial Practice** examines the current state of our legal system and alternatives which may make it viable once again. ■

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The Costs of Trial Practice



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Getting and Keeping Clients

By Jay Foonberg

How to Handle Friends and Relatives: It is a fact that many of the new lawyer's clients and sources of clients will be friends and relatives. If the new lawyer can't be trusted by friends and relatives to handle a legal matter then who will trust him or her? Most lawyers have unhappy experiences representing their friends and family. No matter how hard the new lawyer works on the case, no matter how fantastic a job the new lawyer does, no matter how successful the result, friends or relatives honestly believe that they did the new lawyer a favor by giving him or her the case "for experience." Regardless of the fee, friends or relatives think they are being overcharged.

There are several things you can do to improve your image with them: 1) *Be Friendly* when they seek free legal advice at social events and on the telephone at night. 2) *Get them into the office.* Don't conduct your law practice in an atmosphere of blaring televisions, screaming children, or orchestras at weddings. Tell them the case sounds very interesting and if they can please come to your office, you'll be able to concentrate on their problem and get the facts down correctly. 3) *Don't reveal confidences.* Go out of your way to tell the client that you won't discuss the case with mutual friends or relatives. 4) *Billing friends and relatives.* It is very important that you bill friends and relatives properly. Suppose \$450 is a reasonable fee for your services, but your friend or relative only has \$150 to pay you, and you are willing to take this case for \$150 because you do need the experience and you're tired of playing solitaire in your office. Show the \$300 discount in your bill to ensure that friend or relative knows the value of what was received. He or she has no way of knowing your services are worth \$450 unless you say so. Additionally, you want relatives and friends to refer you \$450 cases, not \$150 cases. If they don't know the value of the services, they'll recommend people to you telling them you only charge \$150.

Importance of Accepting and Returning Phone Calls: In terms of good public relations this can't be emphasized enough. Unless you are clairvoyant, you won't know in advance why people call. Most clients feel that lawyer's telephone calls are excessively screened. Failure to maintain communications with clients is the single most common complaint to bar associations. Increasingly, lawyers are being disciplined for ignoring clients' calls and letters. Your telephone is your lifeline to new clients. If you can't return a call, have your secretary or another lawyer return the call for you so you won't lose that client.

How to Get More Work From Existing Clients: A satisfied client will produce more clients and generate more business than any other single source. There are two ways in which existing clients can generate business:

1) *They can bring in new clients.* A satisfied client is your most likely and probable source of new clients. Clients who have been well served have all the zeal of missionaries. They can't wait to brag to friends and relatives and co-workers about what a great lawyer they have. They will recommend many clients to you over the years. 2) *They can bring you their own repeat business.* As a general rule, clients want more attention, not less attention from their lawyer. They are willing to pay for legal work if only the attorney is available to do it.

The attorney who stays in close touch with clients will get a telephone call from the client ("Before I sign this lease, I want you to look at it"), which will not happen if the attorney is inaccessible to the client.

How To Keep Clients: What do clients want from you? There is often a difference between what people want and will pay for as opposed to what they need. Often a person will happily pay for what is wanted, but resents paying for what is needed, if the two differ. Think of your own situation when you are sick. You'd pay anything within reason for a physician to make a house call. It is much more efficient and economical for you to go to the physician's office, but you'd still prefer a house call. You *need* a \$65 visit, but you *want* a \$100 house call. The supply-and-demand situation between physicians and patients is such that physicians can turn down business. Unfortunately for you, the supply-and-demand situation between new lawyers and the need for legal services is in a different balance, you must give the client what they want. Clients want: **Efforts vs. Results:** New lawyers think that clients want results more than they want effort. Believe it or not, the reverse is true. Clients need favorable results; they want effort. I'm not saying that clients don't care whether they win or lose, they care very much. I am saying that whether they come back to you when a matter is over with, or whether they recommend clients to you or pay your fee willingly, or not at all, is determined more by their opinion of your efforts than their opinion of the results. **Projecting Effort:** Let the client know the effort you are putting forth by sending a copy of EVERY document you produce and all incoming documents. Return your client's calls immediately. Visit your client's place of business to understand that business. Don't charge for the time you spend going through the factory, but do charge for conferences at the place of business. They will appreciate your concern and will feel you care about them and are putting forth effort.

Why Do Clients Leave? 1% die; 3% move; 5% dislike the product; 24% have some dispute that does not get adjusted; 67% leave because they feel they were treated discourteously, indifferently, or simply were not given good service.

(Reprinted from ABA Career Series: How to Start & Build a Law Practice)

PUBLIC INTEREST PROFILE: APPORTIONMENT EQUALITY

by Mike Herald

Last spring I was selected by the GGU chapter of the Public Interest Law Foundation (PILF) for a fellowship provided by the National Association of Public Interest Law (NAPIL). As my penance for such fortune I was asked to write about my experience.

I worked for the Mexican American Legal Defense and Education Fund (MALDEF). MALDEF is a national civil rights organization which advocates for Latino rights in the areas of education, voting rights and employment discrimination. MALDEF's primary focus at present is reapportionment. Latinos suffer from a history of official discrimination and are underrepresented statistically in local, state and Congressional positions. MALDEF waged a legal strategy (along with a lobbying campaign in which I wasn't involved) in an attempt to give Latinos a larger share of the seats in local, state and national government. The principal legal tool used was Section 2 of the Voting Rights Act which requires not only that state and local governments abide by the "one person, one vote" doctrine, but additionally provides remedies for minorities who can demonstrate that voting practices are discriminating in their effects.

MALDEF challenged the census data on which reapportionment would be based, as minorities are traditionally undercounted in much higher numbers than are Anglos. The Census Bureau admitted it missed more than 1 million people in California, 60% of whom are Latinos. However, it refused to adjust the undercount. MALDEF brought suit under the U.S. and California Equal Protection clauses and the Voting Rights Act asserting that Latinos, African-Americans and Asian/Pacific Islanders would have their voting power diluted and their right to equal representation denied if the state and its political subdivisions were not enjoined from using unadjusted census figures to redistrict.

The case was put together by one attorney and three law clerks and took six weeks. I did research, wrote parts of the Memo of Points and Authorities, and drafted orders and motions. Our motion for a preliminary injunction was denied, however, and the case is waiting to be heard on the merits. I am still working for MALDEF and continue to gain valuable legal skills while contributing to an effort which is critical to helping all segments of our society have a voice in the decisions which affect their lives.

PILF's hard work has finally crystallized into a viable Public Interest Loan Forgiveness Program, which will help make public interest work viable for GGU law grads burdened by expensive student loan payments. We appreciate your past support of the program, and encourage you to continue to help public interest lawyers like those at MALDEF fight the good fight on behalf of the underrepresented.

FIGHT OR FLIGHT

by Brodie Stephens

It's happening again. I can't seem to relax anymore. There's that tension in my stomach, and I'm beginning to feel guilty if I sleep more than six and a half hours at night. This morning the smoke alarm in our house went off because I burned a piece of toast, so I beat it off the wall with a hammer. The noise was really bothering me, see? PMS? (I'd like to say that, but I'm the wrong gender). Male menopause? (Not old enough). Flashbacks from the 'Nam? (Too young). No gentle reader, it's EXAM TIME AGAIN!

For those of you of the first year persuasion, you're getting your first taste of a new and probably disconcerting phenomenon, the "getting close to the end of semester" stress. The good news is that there are plenty of others who have weathered these days successfully who have gone on to greater law school glory. The bad news is that they still go through them, and so will you. For the moment consider the following suggestions:

1. Start your outlines now if your haven't already. The old saw that the semester will all make sense in the final week of class is only true because that's when most people take their first "overview" look at the class material. Force yourself to look at the "forest" of your class; the "why" behind all of your reams of case briefs and class notes. It will help to make sense of it all.
2. Remember that it's an examination of the substantive law you're preparing for; not a, like, totally free and easy discussion of Torts and the human condition. Take practice tests which cover the material you've studied this semester, preferably one of your professor's prior examinations. Gear your study to help you to analyze the issues raised by the call of the question on those exams.
3. Identify those subject areas of the course you either slept through or are otherwise clue-less in, and focus on them for your review. Try to fill in the gaps with whatever information makes the most sense to you and then pass that by your professor. (You will find a helpful professor if you prepare discrete questions, as opposed to desperate claims of total confusion.)

But Uncle Brodie, you say, I've blown off 25% of my classes entirely and slept through 50% of the rest. Most of the discussions in class in english make about as much sense to me as the phrase "Res Ipsa Loquitor", which is in Latin. My class notes are nothing but doodles of jet fighters and tanks engaged in battle, and I lost my casebook back in August and still haven't bought a replacement. If this is your story, I suggest you immediately buy yourself a plane ticket to Hawaii and lay out in the tropical sun while the rest of us continue to sweat out exams. Better to burn out in a magnificent blaze of final glory than to fizzle out quietly. Besides, there's always medical school. :)

SOLICITORS AND BARRISTERS IN GREAT BRITAIN

by Adam Miller

In Great Britain, lawyers are divided into two types: solicitors and barristers. Solicitors typically perform as a sort of legal general practitioner, but do not have "right of audience" (i.e. they cannot argue before most courts). In contrast are barristers, the imposing figures in black robes and white wigs who figure only too prominently in the courtroom.

The difference is more than just a separation of duties and dress. They have separate legal training and they take different bar exams. They even have different pay scales. Solicitors bill for their services at hourly rates, while barristers charge "on the brief" for each day in court. In addition, many barristers (and some solicitors) if asked, would paint the image of barristers as first class citizens, while characterizing solicitors as slightly above dog catchers (no offense intended towards dog catchers). Such tongue-in-cheek sentiments reflect how this system, essentially a historical remnant of a dying empire, still exists in almost the same condition as hundreds of years ago.

A client with a legal problem sets the dual-lawyer system in motion by contacting a solicitor. That clients must first go through a solicitor stems from the historical fact that barristers were well-to-do gentlemen, giving themselves up to perform the noble task of learned discourse before a judge. It is considered unseemly for a barrister to stoop so low as to talk to the client, or worse, to talk about money, and so barristers are not allowed to deal with clients directly. In most cases the solicitor is able to solve the transactional problems that confront him. However, when a problem arises which requires litigation and trial work, the solicitor must go to a barrister. Thus a client who has a legal problem with potential for trial must pay for at least two lawyers; one to talk, and one to keep his mouth shut.

This separation permeates their work environ-

ments. Barristers work in "chambers" while solicitors work in offices, but this distinction is not merely a semantic one. It also reflects differences in their employment relationships. While a solicitor may work as a partner in a firm, with a commensurate sharing of profit, each barrister is essentially a solo practitioner, paying a percentage of income or a fixed amount per year for the shared resources of his chamber. For the barrister, there is interplay and cooperation within the chamber, but ultimately he is independent.

Barristers pay a percentage of their yearly income to the senior clerk of the chamber. The clerk is not a typical clerical worker but has significant administrative authority over the chambers. The clerk acts like an agent for the chamber; talking to solicitors and pressing flesh to "sell" his chambers. This is essential because barristers are prohibited from such talk of fees and deals. A clerk starts working in a chamber in his late teens as a junior clerk. Through his exposure (and despite no advanced education) he may reach a point where he has more power than even the most senior barrister in the chamber, and can make up to 10% of each barrister's income.

Although this two-tiered system still remains, legislation to break down the solicitor\barrister distinction seems inevitable. The Thatcher Administration considered the legal system to be inefficient, and hoped to make English lawyers more competitive within the emerging European Community. Soon solicitors will be able to argue in all courts and many forecast the disappearance of the separationist system. Others see barristers remaining as trial specialists, perhaps more integrated into a traditional firm. It remains to be seen whether barristers will retain their historical glory, or fall to the waysides, victims of a modern legal system.

FORMER CALIF. CHIEF JUSTICE ROSE BIRD TO TEACH AT GGU

by Brodie Stephens

Former Chief Justice Rose Elizabeth Bird of the California Supreme Court will be a visiting instructor at Golden Gate School of Law next semester. She will be teaching a seminar on constitutional law which will be open to about 18 students, and she will also be giving a limited number of lectures on subjects of her interest.

Bird has kept out of the limelight since California voters removed her and former Justices Reynoso and Grodin on election day November 4th, 1986, after a bitter campaign which focused primarily on her attitudes regarding the death penalty. (She was/is against it.) Her most recent local exposure came as a political commentator for KGO-TV in San Francisco in 1988.

Bird graduated from Boalt Hall School of Law in Berkeley, CA in 1965, and after a short clerkship worked for the Santa Clara County Public Defender from 1966 to 1974. While at the Public Defender's, she rose to the position of Chief of the Appellate Division of that office. She then joined the gubernatorial administration of Jerry Brown as Secretary of the Agriculture and Services agency in 1975. It was from this position in 1977 that Governor Brown appointed her to head the California Supreme Court. She served as Chief Justice until 1986 when her reign on the court was terminated by California voters.

STUDENT BAR ASSOCIATION UPDATE

by Miles Dolinger

Trial Advocacy Enrollment - Some of you may know of the recent controversy surrounding Professor Bernie Segal and Trial Advocacy. Students were concerned with being denied a fair opportunity to take Professor Segal's popular class. In most classes seats are filled by pre-enrollment which favors senior students who get to pre-enroll first. Lawyering skills classes, on the other hand, have not required pre-enrollment. Instead, instructors have been allowed to hand-pick their students. The SBA took this concern to the Administration which issued the following enrollment changes: Beginning next semester, all litigation and lawyering skills classes will require pre-enrollment. As to Professor Segal's Trial Ad. class next fall, he might still reserve one of his two sections for his concurrently enrolled Mock Trial students, but the issue is not yet resolved. This change in policy conforms to the fair enrollment procedures used for the other classes which favors senior students who pre-enroll first, and should put students on notice of their limited chances of getting into Professor Segal's class. Remember, you must pre-enroll to maintain priority, and wait-listed students must attend the first class!

Limits on Food for Club Parties - The SBA has just memorialized their policy of limiting club pizza parties at student expense by amending the SBA Bylaws to limit club expenditures of SBA funds for food and drinks to \$50.00/semester. However, clubs may still get more than \$50.00 for special events with approval of the SBA Budget Committee, which will base its decision on a balancing of certain criteria such as the number of people expected, educational benefit, tradition of the event and proximity to school.

Funding for Conferences - Past SBA policy has been not to fund any students to attend conferences of any kind. Recent controversy surrounding a student's request for SBA funding to fly to New Orleans to participate in a national election of her group has again raised the issue. That student's request was denied, but a special committee of the SBA will convene in February to debate the more general policy. Student input is welcome.

Thanksgiving for the Homeless - The SBA put on a special Thanksgiving dinner for about 200 homeless people at the Cadillac Hotel in the Tenderloin on November 21. Food was donated by GGU law students and a variety of local businesses.

Fire Fund - The East Bay fire destroyed the homes and possessions of several people affiliated with GGU, including one professor and two law students. To help

ease the economic burden, the SBA and Law School Administration have created a special fire relief fund. Any and all donations are appreciated and checks can be made payable to GGU c/o "Law Student Fire Fund." See Robyn Gray at 49 Stevenson, 15th Floor.

GGU Board Meeting - SBA President Jennifer Martin reports these highlights from October's meeting of the GGU Board of Trustees:

Seismic repairs were begun this November and should be completed by March of 1993. Among the renovations planned are: a new law student lounge, new law faculty offices, added benches and tables on the plaza level, handicap-accessible restrooms on every floor and a complete renovation of the University's main library. Detailed exhibits of the planned renovations are on display in the first floor lobby.

Other exciting news is that Dean Pagano requested that four additional tenure-track slots be created for the Law School. Of the Law School's 33 full-time faculty, 16 are tenured, 3 are non-tenured faculty on the tenure track, 3 are skills professors not eligible for tenure and the remaining 11 faculty members are visitors. The Dean reasoned that having one-third of the faculty classified as visitors is detrimental to a consistently strong academic program, as supported by a recent ABA inspection report criticizing GGU for employing too many visiting faculty. The Board approved the additional tenured positions.

CLUB NEWS

The **Environmental Law Society (ELS)** has been meeting regularly for Thursday event/meetings. Highlights of the last few weeks include a discussion with Michael Herz, President of the San Francisco BayKeeper, an environmental watchdog group, a slide presentation on the history of the City's water supply by Assistant S.F. City Attorney Josh Millstein, and a video on the water controversy surrounding Mono Lake. The **National Lawyers Guild (NLG)**, in association with the **Womens Law Association**, hosted a round table discussion of students and faculty on the sexual harassment issue. These two groups and also **BLSA** hosted a panel, "Lessons From Anita Hill," on November 15 as part of their feminist jurisprudence lecture series. GGU members of the legal fraternity **Phi Delta Phi** spent a day entertaining boys and girls from a local youth club at the zoo. Finally, **LEGALS'** activities included the promotion of events and information as part of "coming out week." - MJD

INCREASING LAW STUDENT DIVERSITY: THE SUMMER CONDITIONAL ADMIT PROGRAM

by Ed Taylor

When Dean Tony Pagano determined Golden Gate University School of law was experiencing a decrease in the percentage of minorities, he asked Professor Mike DeVito to help create a program to rectify the situation.

Professor DeVito responded that not only would he help, but he had already designed and ran such a program at Emory University years ago and it had been one of the most successful programs of its kind. Thus, the Golden Gate University School of law conditional admissions program came into existence.

Professor DeVito based the Golden Gate program on the premise that there existed a significant number of students whose ability to perform well in law school was not revealed via the standard indices of LSAT and GPA. He felt these "missed" students could be discovered through more careful screening.

Pursuant to this end, he examined all the minorities and non-traditional white students who had been rejected or wait-listed by the admissions committee. From this pool of 300, he identified 40 people he believed had a chance of success and invited them to participate. 23 accepted, with 3 dropping out in the initial phases of the program.

In keeping with the main purpose of the program, many of the participating students were minorities, but the students also included many for whom English was a second language or who had gone to school abroad. For example, three of the students were from mainland China; one, from Haiti; and one, from Korea. Professor DeVito felt these foreign student's aptitudes for law school might not have been adequately represented because of distortions in LSAT performance created by the language barrier. The program also included individuals who had worked heavily in school or had done poorly as undergraduates, but were now "older and wiser".

The program consisted of two substantive classes: a class in Torts which Professor DeVito taught himself, and a class in discretionary abstention taught by Professor Philip Jimenez of Santa Clara. Professor Frank Valdes taught the legal writing and analysis class, which stressed exam writing techniques.

At the end of six weeks, the students took finals in the two substantive law classes. To Professor DeVito's surprise, the students did so well it was decided to invite them all to attend the school of law as regular students.

Based on his past experience with similar programs, Professor DeVito expects Golden Gate's program will be very successful. In the three years he ran the Emory program, only one student failed for academic reasons and the winners of the moot court competition came out of the program.

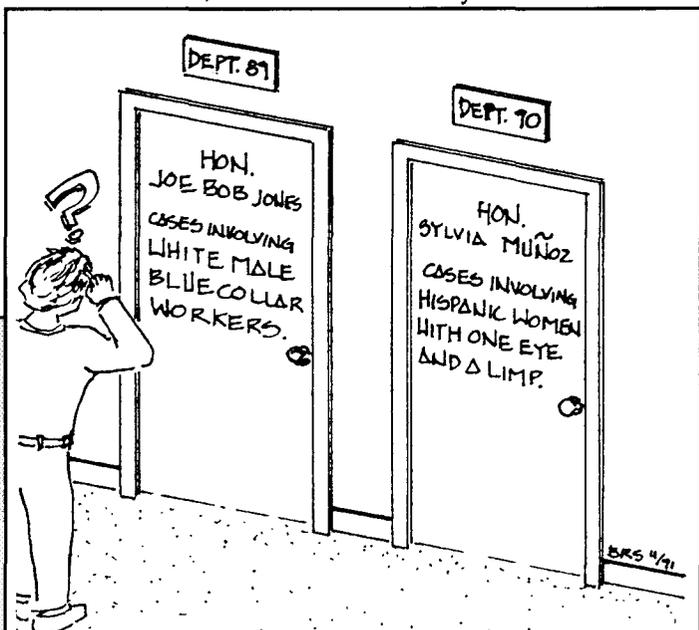
Professor DeVito thinks most of the "skill advantages" provided by the program will disappear in the first semester. The real advantage of the program may be psychological. Unlike the regular freshman law students, he believes, the students who have gone through the program have the psychological advantage of knowing they can deal with the kinds of challenges law school has to offer (such as briefing cases, writing outlines and taking exams) because they have already dealt with them, and what is more they have succeeded.

RECYCLING IS HERE

With open arms we welcome those beautiful baby blue bins which symbolize the end of ugliness and waste in favor of a new age of harmony and earthen responsibility here at GGU. The strategically-placed bins are for aluminum and glass containers and for white paper only. (Colored paper mixed in will "infect" the white paper, significantly reducing its marketability).

USE THE BINS !!!

Please carry your empty Jolt cans and Calistoga bottles with you out of the classrooms and deposit them a few steps away in your nearest bin. And please encourage others to do likewise. ("You know, Homer, you can recycle that Colt 45 twelve-pack right down the hall"). You'll be amazed at how good it makes you feel.



NEWS ITEM: THE 9TH CIRCUIT REJECTS THE MORE INCLUSIVE "REASONABLE PERSON" STANDARD IN FAVOR OF A "REASONABLE WOMAN" STANDARD TO DEFINE SEXUAL HARASSMENT IN THE WORKPLACE.

Imagine a world in which a lawyer cross-examines a witness without a 300-page deposition in hand, costing \$7,000 to create. All cases are tried from within three days to one week, save only the most complicated. The average case costs \$15,000, start to finish. In this world, rather than endless depositions, an investigator merely takes written statements from potential witnesses to control them on the stand. Does this sound like a dream world? Maybe, but this was life as I knew it as a young trial lawyer in 1960. I think this world is one which we can, and must restore in order to relieve the burden of a massively inefficient legal system, regain the confidence of a cynical public and protect the integrity of the legal profession.

Over the past 30 years law has become big business, where maximizing profits may compromise top-flight representation. We have replaced the "trial lawyer" with the litigator, who uses the expense of litigation as an offensive weapon in a battle of attrition. This litigator has usually never tried a case to verdict, or perhaps to a jury trial at all. The litigator's idea of the adversary process is to conduct meaningless, often obstructive, discovery in an attempt to win a battle, with little of no thought being given to the war. The worst victim of the current state of affairs is, of course, the public. And they know it. The public's view of our profession has

never been worse. Clients are justifiably outraged that law firms have been hiring law school graduates at salaries in excess of \$75,000 a year so that they can be taught how to practice law at the expense of the client. Above all, they are angry that law firm cash-flow is more important to some lawyers than a quality product, and the more inefficient a lawyer is, the more he charges. Unless this trend towards enlarging pretrial procedures (at an astounding cost to litigants and society) is reversed, the law profession will quickly become extinct-- and probably should. The law is at a crossroads, as is the adversary system of justice. Our course of action over the next decade will dramatically affect the way law is practiced in this country.

Cost of Information: In deciding whether to litigate, there are only two decisions that a lawyer and his client must make: 1) what is my exposure, 2) must I try this case or can I settle it for less than the exposure that it presents? The process of pretrial discovery, or obtaining information, is used to evaluate ultimate exposure and overall value of the case. Once there is sufficient information as to these two elements, the case can be settled or, if there is not a meeting of the minds, tried. Most lawyers believe that they must engage in extensive discovery and ask every possible question in order to best represent their client. Research clearly shows that this is not the case.

Jury research indicates that the attention span of the average juror is seven minutes. The average juror can retain no more than five concepts. Thus the most effective trial lawyer is one who makes things simple, who doesn't get lost in the "trees", who can paint a clear, entertaining picture that will sell. More focus on these points and less on the need to obtain every tidbit of information will bring a trial lawyer and his client increased rewards. Unfortunately, discovery is rarely motivated by such straight forward concerns. Much of the information obtained by modern-day discovery is either obtained because the litigator has cash-flow requirements to satisfy or because he fears criticism by the client in the event of a bad result (or worse yet, a malpractice claim). Many litigators have been brought into the current milieu from the beginning of their professional life and don't know any better way to

prepare a case. The system is further confounded by the fact that very few litigators have significant trial experience. For those who don't have confidence in their trial skills, the trial option is not open. It is fraught with risk. As a result, the client is never really given a chance to evaluate the trial card. Rather, he is subject to an endless parade of horrors which lead him to settlement--of course only after a small fortune has been spent

preparing for a trial which his lawyer was never really able to perform in the first place.

Alternative Suggestions: Years in the courtroom have taught me that the case one tries is never the case one prepares. The perfect witness blows up. The witness that was destroyed in his deposition rises to the occasion and is loved by the jury. In other words, no matter how much money you spend on discovery and preparation, you cannot do away with risk. The best you can hope for is management of risk, and management isn't necessarily accomplished by massive discovery. The alternative is investigation. In a very short time you can meet with a witness and, if you are lucky, maybe even get a recorded or written statement. This statement is just as useful as the \$7000 deposition you had to sit through for two days while opposing counsel asked inane questions from their checklist in the name of thoroughness. Lawyers should use careful investigation which is not lawyer intensive. Do not attend depositions unless there is a reason, and most assuredly, do not take them if there is some other way to obtain the information. One thing we have learned from history is that the attempt to reduce litigation through expanded federal and state discovery has failed dismally. The pendulum must swing back. *Mr. Green is a partner with Bronson, Bronson & McKinnon. Article appeared in S.F. Chronicle, 6/17/91*





PROFILES:

Professor Segal enjoys national renown as a teacher in trial advocacy programs for lawyers. He teaches at Golden Gate and at the Hastings College of Trail Advocacy, the National Institute of Trail Advocacy (NITA) program and CEB programs from Hawaii to New York. He served as counsel for Dr. Jeffrey MacDonald, in the famous Green Beret murder case. He authored The Defense Manual for Consensual Crimes.

Caveat: What should students take away from law school?

Segal: No law school should graduate any student who hasn't been required to take four subjects: Every student needs to have a course in counseling, interviewing & negotiating; every student must have a course in oral advocacy, which is basically how to argue in Law & Motion court and how to argue in an Appellate court; every student must have a course in what I call pre-trial litigation, which is the theorizing that is done around litigation, once you decide the case should go to litigation. This includes the planning process and the thinking process. Fourthly, every student should have a course in trial advocacy. I don't mean that I think every student will do these things in their career. For instance, only 12% of all lawyers ever go to court. I don't mean the occasional Law & Motion argument, but to really go to court for the purpose of litigation. 88% of the Bar never sees the courtroom for litigation purposes. But, that 88% of the Bar is making decisions all of the time, including advising their clients whether to consider litigation or settlement, including designing situations for their clients; that is, planning transactional situations with a view toward what the litigation circumstances might be. Most attorneys have such an imperfect understanding of each of these areas, that I think the advice is very dubious because the lawyer didn't understand the litigation process. So I would like to see every law student in every law school be required to take these four subjects.

Caveat: How would these classes help the student or firm?

Segal: The general theory about new lawyers is that for the first six months, and perhaps even up to a year, they are a drain on the law firm. They cost money. They don't earn their keep and they certainly don't make a profit for the firm. That is because they arrive so untrained in anything except theories of law, that they don't have any idea what the practice of law requires of them nor how to do the various things that are required of them as lawyers. So that a law firm spends a half a year to a full year trying to train associates to be useful, and the training time is not billable to anybody. It is only in the second year of an associate's tenure that he or she begins to acquire some actual hands-on

experience and begins to demonstrate that they can actually do some of those things. They are probably "break- evens" for the law firm in their second year. They don't make much money, if at all, and they take much longer to do things than an experienced lawyer, so the client cannot truthfully be billed for the time that a learner spends on a project. They might take 8 or 10 or 12 hours to do a very simple civil procedure problem that an experienced lawyer would do in 3 or 4 hours. Bills to the client have to be reduced. That is why the most desirable commodity in the legal job market today is the two year lawyer. If you look at the ads in the Recorder, you will see that there are, in fact, a large number of jobs for a lawyer with two years or so of experience. That means that somebody else has borne the cost of training this person and now a new employer wants to take advantage of that and says, "I want to hire a lawyer who will be able to hit the ground running." My own feeling is that there are too many Bar required courses necessary for passing the California State Bar. A number of other states have reduced the number of required courses. If they reduced the number of required courses and therefore the number of courses that were tested on the Bar, and emphasized the skill training I have been talking about, then you would be sending out people who can do the job and reduce the costs of these services.

Caveat: Changes in trial practice?

Segal: I think the largest thing that is happening is that there are no longer any small cases for young lawyers to practice. There used to be small civil cases, cases in which the potential recovery was rather limited. A law firm could in good conscience go to the client and say, "We would like to assign a young lawyer to try this case." Knowing what the young lawyer lacked in experience, he made up for in enthusiasm. ■



THE CAVEAT

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