Twenty Years of Litigation

by Mitchell F. Dolin and Robert N. Sayler

The Section of Litigation is twenty years old. Litigation itself begins its twentieth volume with this issue. Even after two decades, the magazine looks and reads much as it did when it began, and the Section, though much bigger, has similar aims and activities. But appearances are misleading: Around these islands of constancy, the practice of litigation has changed almost beyond recognition.

Consider this: In 1973, a litigator (a man who then probably called himself a trial lawyer) preparing to file a lawsuit would have done preliminary research in actual books. By hand, he would have drafted a complaint on a long yellow pad. The text likely would have been typed on a stand-alone electric typewriter, or maybe even on a manual model. Corrections and changes would have required scotch tape, scissors, and correction fluid. Service copies—perhaps xerox copies but maybe carbon copies—would have been carried to their addresses by the United States Post Office. The judge, almost certainly a white male, would have set a trial date not far in the future, and the case probably would have been tried or settled by then.

The vignette seems almost quaint—closer to Clarence Darrow's time than today's. All the details mentioned (and many others) would be different now. The change in litigation during the life of this Section and this magazine has been revolutionary. It deserves systematic examination.

The greatest differences are human. The segment of the legal profession that litigates and the people who constitute that segment have changed radically. Twenty years ago, the litigating profession was small, insular, homogeneous, and relatively collegial. None of that is true today.

Easiest to measure is the explosion in size. The Litigation Section, formed only twenty years ago, is now the largest of the American Bar Association's 21 sections. It has 65,000 active members, up from 38,000 members just ten years ago. Membership in the American Trial Lawyers Association—now at 57,000—illustrates the same rapid growth.

Law firms do more than litigate, of course, but the emergence of large law firms reflects the same rapid growth. This growth has altered how litigation is staffed and handled. In 1977, only 11 law firms had 200 or more lawyers; today, there are 150 law firms with 200 or more lawyers.

Those who litigate on behalf of private parties do not work only in law firms. Many other organizations that provide litigation services have also experienced rapid growth. Corporations handle much more litigation themselves, and today in-house law departments are an important sector of the litigating profession.

The Litigating Profession

The growth in the number of litigators employed by government agencies has been especially dramatic. In the last dozen years alone, the budget of the Department of Justice has quadrupled. Since 1980, the number of lawyers employed in United States Attorneys' offices throughout the country grew from 1,680 to 4,400.

With this growth has come at least one unmixed blessing—a litigating profession that better reflects the nation it serves. Twenty years ago (and before), the typical litigator, in fact and fiction, from Edward Bennett Williams to Atticus Finch, was a white man. That has changed, though the change has been slow. Janet Reno rose to become a big-city district attorney and then Attorney General—the country's top litigator. The Litigation Section's membership today includes nearly 12,000 women. And, though progress has been slower, members of racial and ethnic minority groups have joined the ranks of the litigating profession in larger and larger numbers.

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*Mr. Sayler is Chair of the American Bar Association's Section of Litigation, and Mr. Dolin is Co-Chair of the Section's Committee on Federal Legislation; both are partners at Covington & Burling in Washington, D.C. The authors acknowledge the valuable comments and assistance of Anna P. Engh and Helgi C. Walker, who helped prepare this article.*
What it means to be a litigator also has changed. In 1973, a litigator was likely to be someone who could work—and had worked—in many forums on any type of case. Those who litigated called themselves “trial lawyers.” Today, many lawyers who have never stood in a courtroom (much less tried to persuade a jury) call themselves “litigators” because they are involved in some aspect of litigation, be it writing briefs or defending depositions. The era of the generalist, the jack-of-all-trades, is ending. Instead of the general trial lawyer, we now have the white-collar crime specialist, the antitrust litigator, the appellate advocate, the personal injury lawyer.

Twenty years ago, what the public knew about litigation and litigators came mostly through television dramas and movies. Today, litigators and their work are covered more widely in the popular press. The legal press, particularly at the national level, was born and has thrived during the past twenty years. The National Law Journal and the American Lawyer were both first published in 1978. Major daily newspapers and weekly news magazines now provide regular features on litigation and the courts. The Court TV channel, launched two years ago, provides live coverage of trials.

And there is advertising: In 1973, there basically was none. But, since the Supreme Court’s 1977 decision in Bates v. Arizona, information about litigators has reached the public through an increasing torrent of commercial advertising. Today, billboards and television and radio airwaves are blanketed with advertising, particularly for the services of personal injury lawyers.

One of the more unfortunate changes during the last two decades is in the public view of litigators. Despite perennial complaints about the shyster and the ambulance chaser, the popular image of the litigator twenty years ago was fairly positive. During the 1992 campaign, however, George Bush used the phrase “trial lawyer” as a synonym for sleaze and avarice. Although such jibes did not secure his re-election, the President’s sneers at tassel-loafered litigators were surefire applause lines.

Reality is not much better than the rhetoric. Litigators have always been battlers, but mutual respect, integrity, and civility once were the foundation on which professional relationships were built. Today, unfortunately, what we see are hardball tactics, sanctionable conduct, and an overall lack of professionalism. Increased economic competition among litigators, another development in the past twenty years, has increased efficiency somewhat, but it also has degraded the ways litigators deal with one another.

The Judiciary

State and federal courts—the places where litigations occur and are resolved—have also changed. They are not the same institutions they were twenty years ago. Like the profession itself, courts have expanded in size and output at a tremendous pace. And, again like the rest of the legal profession, the contemporary bench is culturally more diverse than it was twenty years ago.

In the early 1970’s, the legal community first began to concentrate on what was perceived as a crisis of volume, an exponential increase in the amount of litigation. Congress’s first response was to add more judges to the federal courts. In 1973, there were 93 active circuit court judges and 388 active district court judges. By 1990, the judicial ranks had increased to 154 circuit judges and 535 district judges.

Personnel developments, such as the changing role of law clerks and the emergence of central staff attorneys, have also altered the courts. Law clerks are not new; they have existed for at least a century and were well-established by the 1930’s. But, with the pressure of ever-growing caseloads, clerks have increased in number, and their functions have changed since 1973. Law clerks now take on traditional judicial functions—such as opinion writing. The “polite fiction” (as Judge Posner put it) that clerks are just sounding boards has been largely dispelled in recent decades. The widely based perception today is that law clerks exercise real influence over the outcome of cases.

The growth of central court staffs is another response to the crisis of volume. In the early 1970’s, the use of central staff attorneys to alleviate caseload pressures was experimental. In 1982, Congress formally authorized the circuit courts to appoint staff attorneys. Today, central staff attorneys are a well-established component of the vast majority of state and federal courts, particularly at the appellate level.

In conjunction with the increase in judges and their staffs, the number of different courts surged upward in the 1970’s and 1980’s. Since 1973, Congress has created at least six new judicial bodies to deal with the volume and complexity of federal cases: the Court of Appeals for the Eleventh Circuit, the Court of Appeals for the Federal Circuit, the Claims Court (now the Court of Federal Claims), the Court of Veterans Appeals, the Court of International Trade, and the Regional Rail Reorganization Court. Many states have followed this pattern.

An unsurprising by-product of the crisis of volume is a huge increase in the number of decisions rendered by the courts. In 1973, the federal court system was the forum for conclusion of 322,182 cases. In 1990, the number was 917,386. From the 1920’s to 1973, the decisions of the federal circuit courts occupied the first 473 volumes of F2d. In just the last twenty years, case law has expanded to fill over 525 more volumes, and—mindboggling as it is for senior litigators—F3d is now here.

The numerical changes—more judges, more courts, and more opinions—are the most obvious. But other, less visible
changes have profoundly affected the way the courts work, especially the appellate courts.

In the early 1970’s, courts first began to change their adjudicatory processes in response to burgeoning caseloads. The first step was screening procedures. The Fifth Circuit—a leader of administrative change in the federal courts—instituted such procedures in 1970. The change in the traditional process was stunning. Before screening systems, every case received the full-blown appellate process, unless the parties waived oral argument. Within two years, over half of all appeals in the Fifth Circuit were decided without oral argument and were accompanied by only a short summary opinion. The New Mexico Court of Appeals instituted an even more radical program in 1975; in that court, most appeals are resolved based on docketing statements and portions of the record, but without oral argument, briefs, or transcripts of testimony.

Today, almost all appellate courts, state and federal, screen their cases. That has changed what it means to have an appeal—especially when it comes to oral argument: In 1973, oral argument was the rule; by 1990, 55 percent of federal appeals were resolved on the briefs alone.

Appellate courts also dispose of a higher percentage of cases without issuing full-length opinions, instead using memorandum opinions or no opinions at all. The Third Circuit, for instance, has adopted local rules under which it disposes of a large proportion of its cases by “judgment orders” that provide no explanation whatever of the basis for decision. This practice, unsurprising to today’s litigators, would have troubled many in 1973.

In addition to writing fewer full opinions, appellate courts also publish a lower percentage of the opinions they do write. In 1990, almost 70 percent of the decisions rendered by the federal courts of appeals were unpublished, as compared to the early 1970’s when less than half of all opinions were unpublished. State appellate courts do the same thing. In Texas, for instance, 24 percent of opinions were unpublished in 1974. By 1984, 74 percent were unpublished; the number has surely stayed at that level, if not increased, since then.

Just as important as changes in size and output is the slowly growing diversity of the bench over the last twenty years. Much remains to be done, but substantial headway has been made.

In 1973, members of the Supreme Court were known as “Mr. Justice,” a form of address the Court quietly abandoned in 1980, the year before Justice O’Connor was appointed. There are now two women on the Supreme Court; in all likelihood, the number will increase in the years to come. The representation of women on the lower federal courts has also increased substantially. In the early 1970’s, Judge Hufstedtler of the Ninth Circuit was the only female judge on any federal appeals court. Only a handful of women were district court judges. As of 1992, there were 24 female court of appeals judges and 65 female district court judges. Including bankruptcy judges and magistrate judges, women currently make up about 13 percent of the federal bench, with the percentage likely to increase in the near future.

The proportion of African-American judges has also increased. In 1973, African Americans constituted only 1.3 percent of the judges nationwide. Presidents Nixon and Ford together appointed nine African Americans. Then, in a burst of activity between 1977 and 1980, President Carter appointed 38 African Americans to the federal bench. This is almost twice the combined 20 appointments of Presidents Reagan and Bush. The current administration will surely improve on all of these numbers.

African Americans have also made inroads into the state dockets. The Mississippi Supreme Court Justice Reuben Anderson is a powerful symbol of the change that has taken place. Appointed in 1985, Justice Anderson was the first black to serve on Mississippi’s highest court. In 1987, Justice Anderson retained his seat by winning in a general election.

The 1991 Supreme Court decision in Chisom v. Roemer aided this trend in holding that the Voting Rights Act applies to judicial as well as legislative elections. Minority group members may now seek relief under the Voting Rights Act from at-large judicial election schemes that deny them an equal opportunity to elect judges of their choice. Slowly but surely, and mostly over the course of the last two decades, the cultural and racial composition of the courts has begun to change.

The courts—and particularly individual judges—are different in other ways. Contemporary jurists take a much different approach to their careers than they did in the early 1970’s. The typical judge prior to 1973 would probably have viewed a place on the bench as the crowning achievement of a long career. As Chief Justice Rehnquist recently reminded, being a judge “was considered by some practitioners as a dignified form of semi-retirement.” Given what were then the perks, prestige, and challenges of a judgeship, it was unusual for a judge to resign before reaching retirement age.

Today, lawyers become judges earlier in their legal careers than they did twenty years ago—and the bench is no longer considered the last stop on a lawyer’s professional journey. Recently, more and more judges have resigned in favor of private law practice or even private judging.

Departures from the Bench

Why the rise in early departures from the bench? The caseload crisis may be partly responsible. In 1973, the national average for annual case terminations per judge in the federal courts of appeals was 156 per year; in 1990, the annual rate was 247 terminations per judge. Judges work hard and are working harder; the job is no longer akin to semi-retirement. In addition, some judges say they are dissatisfied with the work itself, citing, among other factors, the monotony of their dockets and—at least in the federal courts—frustration with the limits placed on them by the sentencing guidelines. Others speculate that because many new judges are much younger than were their senior colleagues at the time of appointment, they have more time to burn out on the work before retirement age.

Another factor is money. The gap between judicial salaries
and private sector incomes has widened over the last twenty years. Since the early 1970’s, federal judicial salaries have plummeted in real dollar terms; between 1969 and 1985, for instance, the real income of a Supreme Court Justice dropped 40 percent. The salaries of district and circuit court judges have followed the same general pattern. Moving from the bench to the bar today can more than double a judge’s income. The economic realities can be compelling for even the most committed judge.

The rules governing litigation have changed along with the courts during the past two decades, and the rules continue to change at a rapid pace. Since 1973, civil practice has become more costly, burdensome, time consuming, and acrimonious. The rules affecting pretrial practice have evolved with a view toward curbing those tendencies. The rules governing trial practice itself also have changed in noteworthy ways.

Before 1973, civil cases usually moved quickly through the courts. Discovery tended to be limited. That began to change, however, and during the 1970’s and early 1980’s federal courts realized that the expense and delay of civil litigation had to be addressed. Two important responses during the mid-1980’s involved sanctions and summary judgment. Despite those steps, mounting concern and frustration later prompted systematic changes in pretrial procedural rules.

A tougher approach toward sanctions—principally the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure—was the most direct response. Meant to deter and punish abusive, frivolous litigation, Rule 11 now requires that every pleading, motion, or paper be based on the signer’s “knowledge, information, and belief formed after reasonable inquiry [that] it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” The price of failure to comply with Rule 11 is mandatory sanctions.

Such sanctions, particularly money sanctions, had been rare in civil practice before 1973. The 1983 amendment changed that. Rule 11 is now used by courts to control attorney conduct and by parties as an adversarial weapon. Sanctions practice has become a litigation subspecialty about which treatises are written. While sanctions are most frequently imposed in civil rights and tax cases, the sanctions sideshow (or the threat of it) has become a staple of civil practice.

The Rules

We will never return to the almost sanction-free days before 1973, but dissatisfaction with the current rule has led to yet another rule change, scheduled to become effective on December 1, 1993. It will make the imposition of Rule 11 sanctions discretionary and give litigants a “safe harbor” period to cure potentially sanctionable conduct.

Changes in summary judgment rulings during the mid-1980’s were another response to frivolous litigation and jammed dockets. In 1973, trial courts, burned by appellate reversals, frequently adopted the line that summary judgment is disfavored. A district court in Louisiana is said to have posted a warning sign that read: “No Spitting, No Summary Judgments.”

In 1986, judicial antipathy to summary judgment began to diminish. In three related decisions, the Supreme Court told the lower courts that summary judgment should be more freely granted, thereby reducing the cost and delay of civil litigation. As the Court put it in Celotex v. Catrett, “[s]ummary judgment is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal rules as a whole.”

Although the sanctions and summary judgment developments were significant, wholesale changes were to follow. Congress entered the fray with the Civil Justice Reform Act of 1990. The Act was designed to reorient how the courts handle civil cases. It encouraged local federal districts to develop innovative ways of dealing with their backlogs and required each district to promulgate an “expense and delay reduction plan.”

While the expense and delay reduction plans were being developed, the push for even greater change gained force. Judges Sam Pointer and William Schwarzer, who had contributed significantly to the summary judgment and related reforms of the 1980’s, joined with others in urging that the civil discovery process be overhauled.

The result was the recent announcement of amendments to the Federal Rules of Civil Procedure; they are scheduled to become effective—absent congressional disapproval—on December 1, 1993. These sweeping changes include a new “disclosure” approach to discovery, by which litigants would be required—under threat of sanctions—to disclose relevant information to their adversaries without ever receiving a discovery request. Other changes include a presumptive limit of ten depositions per side.

As this article is being written, it is impossible to know
whether the new rule changes will be the law. They are highly controversial and are opposed by the Justice Department and large segments of the organized bar. Justice Scalia, who dissented from the Supreme Court’s approval of the rule changes, has labelled them “potentially disastrous.” But even if the rule changes are not adopted, this much is clear: Radical reform of the civil discovery process—either through the proposed rule changes, other rule changes, local expense and delay reduction plan experiments, or further congressional action—will come soon.

Changes in the rules governing pretrial practice in civil cases have perhaps attracted the most recent attention and comment, but there have been significant changes in the rules governing trial practice as well. Two examples are the Federal Rules of Evidence and judicial limitation of peremptory challenges.

The Federal Rules of Evidence became effective in 1975. For the first time, evidence questions in the federal courts were governed by a code rather than by the common law. The majority of states have also codified evidence rules since 1975.

A key change—perhaps the critical change—brought about by the Federal Rules of Evidence is the treatment of expert testimony. When our twenty-year period began, a party could use an expert only if the subject of the expert’s opinion testimony was a specialized topic beyond the knowledge of laypeople—and then only if the expert’s opinion was based on either first-hand factual knowledge or facts in the trial record.

The new federal rules implemented different and much broader standards. Rule 702 permits an expert with specialized knowledge to testify as long as the witness can “assist the trier of fact to understand the evidence”—an invitation to greater discretion if there ever was one. And Rule 703 allows an expert to testify based on facts not admissible in evidence if the data are of a kind reasonably relied on by experts in the particular field. From being true specialists with narrowly confined testimony twenty years ago, expert witnesses have become almost ubiquitous. They advertize their services and sometimes seem apt to testify on almost any topic. Many lawsuits have become battles between experts.

Another change in trial conduct: In 1973, trial lawyers had unfettered discretion to exercise peremptory challenges on any basis—including their assumptions about the predilections of members of racial and other groups. This changed in 1986, when the Supreme Court ruled in Batson v. Kentucky that it is unconstitutional for a prosecutor to use peremptory challenges to reject black jurors on the basis of race. The Batson principle expands daily; it now covers private litigants in civil cases, and the Supreme Court will soon decide whether Batson applies to gender-based challenges. Some foresee the virtual extinction of peremptory challenges.

The Docket

Equally significant are changes in the size and composition of the litigation docket itself. One aspect of this change is easily touched on: During the past twenty years, filings have skyrocketed. In addition, the types of cases we litigate have been altered dramatically.

Although the extent and nature of any recent litigation explosion has been hotly debated, there is no doubt we have become (if we were not already) a litigious society. In 1973, there were roughly 98,000 civil cases filed in the federal courts; in 1991, civil filings approached 218,000. In that same period, annual terminations of all cases—civil and criminal—increased from 322,182 to 917,386.

One docket, however, has not increased in size. Despite an increase in the number of certiorari petitions annually from 3,600 during the early 1970’s to more than 5,000 in recent years, the number of cases on the Supreme Court’s oral argument docket has actually decreased in recent years. Riding atop an ever-growing and more contentious sea of litigation, the nation’s highest court has become more selective; in the entire system, only it can set its own pace.

Numbers are only part of the story. The nature of cases on the civil and criminal dockets has significantly changed.

One example is the development of mass tort litigation. Although there had been mass tort situations in years past, including the black lung cases, the size and scope of current mass tort claims are unprecedented. These include claims about DES, automobile design, Agent Orange, intrauterine devices, HIV-infected blood, and now breast implants. The paradigm, however, is asbestos litigation—a type of suit that alone has caused great civil caseload problems for many courts.

A handful of asbestos cases were around before 1973, but that year, in retrospect, was a turning point. The Fifth Circuit, through Judge Wisdom’s pathbreaking opinion in Borel v. Fibreboard, dramatically expanded the scope of liability for asbestos-related injuries. Case filings grew steadily during the late 1970’s and early 1980’s, and then they mushroomed in the last decade. Published reports indicate that, all told, 200,000 asbestos personal injury claims have been filed, half of which are still pending in the state and federal courts. In an effort to cope with these filings, courts and litigants have experimented with various techniques to reduce costs and expedite processing.

The asbestos litigation explosion, like other mass tort problems, has produced a cottage industry of collateral litigation. Over a dozen former asbestos producers, including Johns-Manville, have gone into bankruptcy, bringing many additional parties into litigation. Coverage lawsuits between former asbestos producers and their insurance carriers have themselves turned into megacases; during the 1980’s, California Superior Court Judge Ira Brown presided over an asbestos insurance coverage trial in San Francisco that was
reported to be the largest, most-lawyered civil case ever.

In fact, during the past decade, large insurance coverage disputes of all varieties have become one of the most significant areas of complex commercial litigation. Twenty years ago, it could not have been predicted: Litigation between Fortune 500 companies and their insurers was rare. Today, such litigation is routine, pitting corporate policyholders against insurers in fiercely fought lawsuits concerning coverage for mass torts, environmental problems, business torts, and all manner of other liabilities and losses.

There are losers as well as winners: The growth of high-stakes insurance coverage disputes contrasts with the fate of antitrust litigation. From the 1960’s until the early 1980’s, antitrust was where the action was. Private treble damage actions, including class-action litigation, and major government actions, such as the structural challenges against IBM and AT&T, held the stage. Changes in the law and in enforcement priorities reduced antitrust litigation during the 1980’s, though it has by no means disappeared.

Treble damage litigation persists, though it is no longer the exclusive preserve of antitrust. The Racketeer Influenced and Corrupt Organizations statute, known as RICO, was enacted in 1970. Although initially thought to focus on organized crime, by the 1980’s RICO treble damage actions increasingly attacked the practices of legitimate corporate defendants.

One of the most important additions to the business litigation docket has been the environmental lawsuit. Following the passage of Superfund in 1980 and the heightened enforcement of state environmental laws, businesses of all types have found themselves the targets of government cleanup actions and private damage lawsuits. Criminal investigations into environmental misconduct have proceeded aggressively. Environmental crimes are part of the growing list of new areas of white-collar criminal practice.

The civil rights and civil liberties dockets have changed as well. Institutional litigation concerning schools and prisons has continued, but new areas have opened up. The Americans with Disabilities Act, effective in 1992, is the most recent civil rights law to prompt litigation. Voting rights litigation has expanded, spurred by the 1982 amendments to the Voting Rights Act. Although so-called reverse discrimination claims were on the horizon in 1973, with DeFunis v. Odegaard wending its way to the Supreme Court, the key event was the Court’s 1978 ruling in Bakke v. Regents; much litigation followed on the heels of Bakke, and it will be with us for the foreseeable future.

Civil Rights and Civil Liberties

In a 1973 decision that became the first rather than the last word on the topic, Roe v. Wade recognized abortion rights. Since 1973, numerous cases have followed, either attacking Roe itself or challenging a myriad of restrictions on abortion rights. Collateral litigation has ensued, dealing with everything from abortion funding, to abortion counseling, to anti-abortion protests.

Civil rights and civil liberties cases generally came to occupy a significant portion of the federal civil docket during the past two decades. The Bivens action, recognized in 1971, and its state-conduct analogue, the Section 1983 action, are major factors in the federal case load. Title VII and other types of employment discrimination actions con-
tinue to be filed in large numbers as well, although class action filings in this field—a major area of activity in the 1970’s—began to decline in the early 1980’s.

The criminal docket has changed dramatically since 1973. In fact, it has changed almost everything in the courts. Drug cases now stretch the resources of the state and federal courts to the breaking point. The criminal caseload in the federal courts increased almost 70 percent between 1980 and 1990. Drug cases rose 294 percent during the same period; they were 11 percent of the criminal caseload in 1980 and 26 percent in 1990.

Criminal prosecutions involving political corruption and misconduct have become familiar in the past twenty years. The period began with the Watergate prosecutions, which led to the independent counsel legislation, which in turn led to a series of criminal investigations and trials of executive branch officials at the highest levels. Many investigations of political corruption have relied on variants of the “sting” operation. The Abscam investigation of congressional corruption and the Operation Greylord investigation of malfeasance by Cook County judges are prominent examples.

In the last twenty years, public officials—from cabinet officers to federal judges to officials at the state and local levels—have been prosecuted in increasing numbers. A further addition to the high-profile white-collar criminal docket was the prosecution during the 1980’s, on insider trading and other charges, of leading members of the country’s securities industry. Not since the 1930’s had the leaders of the world of finance been so successfully subjected to criminal scrutiny.

The death penalty, thought to be on the wane in 1973, has come back with a vengeance in the last twenty years. Between 1967 and 1977, there were no executions in the United States. In 1972, the Supreme Court ruled in Furman v. Georgia that the death penalty, as then applied, constituted cruel and unusual punishment. That changed with the Court’s 1976 decision in Gregg v. Georgia.

Since Gary Gilmore’s 1977 execution, death penalty cases have become a growing preoccupation of the state and federal courts. As of the middle of 1993, there had been more than 200 post-Furman executions, and there were approximately 2,700 men and women on death row. Death penalty cases now consume huge amounts of litigation and judicial resources, leading many to push for changes in the federal habeas procedures. These cases have challenged many civil litigators who have stepped in on a pro bono basis to handle post-conviction proceedings in death penalty cases, joining the groups of committed lawyers who handle them full time.

Few of the changes described thus far have been as dramatic as those driven by technology. Though only twenty
years ago, 1973 might as well have been in another century, from a technological standpoint. Consider: In 1973, a lawyer who wanted to make a phone call picked up the handset and dialed a number on his trusty rotary telephone. Conference calls—which were rare—were placed by the telephone company. Answering machines and portable telephones were not available. There was no voice mail. Telephones could not be programmed.

In 1973, briefs were pounded out on manual or electric typewriters. "White-out" correction fluid and correction tape were the cutting edge alternatives to the traditional typewriter eraser. Carbon paper was used to make copies; if errors were made on the original, each carbon also had to be hand corrected. Fewer drafts of briefs were produced because retyping was tedious and time-consuming. Lawyers often would "cut and paste" documents—with scissors and Scotch tape—and then copy the pasted version to avoid retyping another draft. Appellate briefs were set on a linotype machine and printed by commercial printers.

Basic, even crude, as they now seem, electric typewriters with correction keys were an innovation of the 1970’s. The "mag-card," a typewriter with a memory or punch card, also became available in the 1970’s. Typewriters with more extensive memory capacities followed.

But the revolution really came with computer-based word processing. In the 1980’s, law offices began to make widespread use of computers for generating documents. By 1992, a poll of mid-sized law firms showed that approximately two-thirds of lawyers personally used computers in their practice, and many of the remaining one-third expected to begin using a computer soon. Today, the innovations tumble out monthly, facilitating litigation, bringing it closer, and making it faster all the time; portable lap-top computers, instant data transfer by modem; electronic mail; CD-ROM; and more.

Similar innovation has made it much easier to copy the documents that now can be created and transferred so quickly. In the 1970’s, documents could be duplicated only by photocopying one page at a time. They had to be collated by hand. Duplicating machines that automatically copy and collate a stack of documents are now available. Even appellate briefs can be produced in-house.

And the many copies of these quickly produced documents can now be sent to their many destinations more rapidly. Twenty years ago, lawyers relied principally on the United States mail for delivering documents. Western Union telegrams and cables were occasionally used for faster communication. Briefs could be sent in the parcel sections of airplanes to meet an overnight deadline, but someone at the receiving end had to arrange to pick up the package at the airport. Overnight door-to-door delivery services, unheard of before the 1970’s, are common today. Federal Express first offered overnight service for packages in 1973. Many lawyers began chronic reliance on Federal Express during the 1980’s, when the company introduced the overnight letter service.

The facsimile machine is even faster. With it, the giving of notice, the service of a pleading, the acceptance of a settlement, or the delivery of an angry letter is almost instantaneous. Lawyers began to make widespread use of the facsimile machine in the late 1970’s, but poor image and paper quality left much to be desired. With technological improvements during the 1980’s, facsimiles became a workable substitute for original documents. Now, facsimiles are so routine that many courts accept them for filing.

As a result of all this, documents are much easier to create. They can be duplicated more readily and in mass quantities. And they can be sent anywhere at the push of a button. It should come as no surprise that there are simply more documents in general. The amount of paper in the workplace has mushroomed in the last twenty years. In part because there are more documents, and in part because of the ease of duplicating them, document productions in commercial litigation have exploded in volume. In complex cases, lawyers must rely on computer data bases to organize these masses of paper, and they may retain outside companies for sophisticated computerized document filing and retrieval systems just to get the documents back once they are organized and filed.

Technology has taken hold of the semi-official aspects of litigation as well. In the 1970’s, court reporters used phonetic stenography or stenotype machines to record depositions. (True shorthand reporting was just then dying.) Although such stenography is still used, new technologies are superseding it. Deposition transcripts may now be produced almost immediately with a process called computer-assisted transcription. Transcripts are now available on disc, allowing lawyers to research them on computer. Computer technology also makes compressed versions of transcripts possible, condensing a number of pages of transcript onto one sheet of paper. Then there is videotape. Almost unheard of twenty years ago, videotaped depositions have become routine.

The Technological Revolution

The technological revolution also has brought a huge change in research and information retrieval. In 1973, lawyers relied on case law digests and standard treatises in their libraries for legal research. Cases were cite checked manually in the maroon volumes of Shepard’s. Deft use of these tools was highly prized; it was something between a craft and an art.

The computer has swept much of this away. In 1973, LEXIS was first available; Westlaw was on line by 1975. The use of these computerized services by lawyers escalated in the 1980’s. Lawyers can now obtain access to more than 4,700 different data bases on LEXIS and Nexis. Roughly 188 million documents are available online on LEXIS; over half a million are added each week. A myriad of information, such as unpublished opinions, newspaper and law review articles, and even fact research, is retrievable. Cases can be Shepardized instantly by computer. Sometime, in an idle moment, look at the check-out card in a volume of a law library’s set of West’s Seventh Decennial Digest. It will have

Technological change may be the most dramatic: Some young lawyers rarely use a book to find a case.
many borrowing dates in the 1970's, but few, if any, after about 1989. Some young lawyers may never have used a book to find a case.

An emerging technology for computer-assisted research is the CD-ROM, or compact-disc read-only-memory. The same technology used for audio CDs is used to store information that can be read on computers. One disc can hold up to 200,000 pages of single-spaced information. Many publications are now available in CD-ROM format, including the Code of Federal Regulations and the Index to Legal Periodicals. The rows of stately, gold-stamped volumes that have served as backdrops for generations of lawyer portraits are gradually being replaced by small silvery discs in plastic sleeves whose only aesthetic virtue is a tendency, if held just so, to split white light into a spectrum.

Technology has also affected trials. Twenty years ago, lawyers relied exclusively on oral testimony and written exhibits to present their cases, making occasional use of overhead projectors and charts.

Now, a wide array of presentation formats is available: videotape, audiotape, computer-generated graphics, document imaging and retrieval, models, and computerized animation. Much of this has replaced traditional courtroom lectures on physics, optics, or chemistry presented by learned experts with pointers, charts, and blackboards. Hearing someone's opinion of a plane crash is one thing; seeing it happen again in animation is quite another.

The "computer integrated courtroom" is a recent and remarkable bundling of all this innovation. In 1992, about a dozen courtrooms were equipped with computer terminals at the bench, counsel tables, and the reporter's station. The trial transcript is instantly available on the terminals. Daily unofficial transcripts are available on computer discs at the end of each day. Imaged documents can be displayed on each terminal blown up, highlighted, or emphasized with instant access to almost any page of a multi-page document. Videotapes, depositions or anything else, can be played on the terminals.

Economics

Money, in all its manifestations, also has been a driving force of litigation change since 1973. The costs of litigation have soared in the last twenty years. The civil justice system consumes between $29 and $36 billion per year, including court costs, legal fees, the value of lost work, insurance claims processing, and total tort compensation payments estimated at $14 to $16 billion. One study concluded that damage awards and insurance settlements in personal injury cases increased twice as rapidly as inflation between 1981 and 1986.

The high cost of litigation has led an increasing number of businesses to handle at least some of their litigation in-house. In 1983, less than 40 percent of corporate legal departments did that. In just four years, the percentage rose to 75 percent. A 1992 poll of Fortune 500 companies showed a decline in payments to outside counsel.

High costs have also spurred clients to seek alternatives to the traditional hourly method of billing. One alternative is value billing, with fees based on the value of a service to a client. Measuring "value," however, has proven to be a challenge, especially for defense representations.

Jury verdicts have increased sharply in the last twenty years. The first million dollar verdict was awarded by a New York jury in 1958, when a rotting sign over a candy store struck and seriously injured a Long Island boy. Million dollar verdicts, even multimillion dollar verdicts, are now old hat. In 1985, verdicts of one million dollars or more were awarded 488 times—an average of nine per week, compared to only two per year in the 1960's and fewer than 50 per year in 1973. Multimillion dollar awards to individuals are no longer news; it takes a $100 million verdict of the sort recently rendered against General Motors in Atlanta to attract attention.

When corporate giants clash in commercial litigation, it takes even more. The $11 billion verdict in the Texaco/Pennzoil litigation during the 1980's sent shock waves through the corporate legal world. In 1992, the number of big verdicts was up significantly. Eight verdicts that year were over $100 million (compared to two in 1991), including one for $5 billion and another for $3.5 billion.

Litigators' Education

The way litigators are taught has changed, too. As of 1973, it was all on-the-job training. The most salient feature of legal education at that time was its hidebound reliance on the case method. In law school, the only activity even remotely related to actual litigation was moot court, but it was more like debate club than a lawsuit. The trial process was all but ignored, except in evidence and civil procedure courses, which focused on theoretics rather than advocacy skills.

Today, law school education is both more varied and more practical than it was twenty years ago. Law schools have moved away, somewhat, from pure doctrinal analysis; many now place more emphasis on the basics of law practice. Clinical programs and courses in trial advocacy focus on the realities of litigation.

Continuing legal education courses have proliferated. In many states, participation in CLE courses is mandatory. The National Institute of Trial Advocacy is a particularly well-known vendor of litigation skills courses. More and more law firms provide in-house litigation skills programs for their attorneys. While litigators of all eras have had to learn about the practice over the course of their careers, such education has evolved from "learning by doing" into a structured and self-conscious endeavor.

Whether or not the litigation education industry has produced better litigators, it has become essential. As noted, litigation now involves bigger and more complicated cases, with higher dollar amounts at stake. A side effect of this growth is that the opportunities that once existed for a young lawyer to receive on-the-job training have diminished. Document sorting and objection drafting do not build courtroom skills. Add to this clients' growing refusal to pay for "learning curves" (much less mentoring), and the constrictions are apparent. By providing simulated opportunities to conduct trials, continuing legal education tries to pick up where the apprenticeship model of earlier years has left off.

Faced with increasingly expensive litigation and more of it, clients want something else. One of the most significant "litigation" developments has been the rapid growth in the area of non-litigation alternatives to dispute resolution. By whatever name—ADR, arbitration, mediation, mini-trial, or

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incorrigible, and altogether unworthy of the mercy we have shewn her. I call for her excommunication.

**The Chaplain [to the Executioner]:** Light your fire, man. To the stake with her.

**The Executioner and his assistants hurry out through the courtyard.**

**Ladvenu:** You wicked girl: if your counsel were of God would He not deliver you?

**Joan:** His ways are not your ways. He wills that I go through the fire to His bosom; for I am His child, and you are not fit that I should live among you. That is my last word to you.

**The soldiers seize her.**

**Cauchon [rising]:** Not yet.

They wait. There is a dead silence. Cauchon turns to the Inquisitor with an inquiring look. The Inquisitor nods affirmatively. They rise solemnly, and intone the sentences antiphonally.

**Cauchon:** We decree that thou art a relapsed heretic.

**The Inquisitor:** Cast out from the unity of the Church.

**Cauchon:** Sundered from her body.

**The Inquisitor:** Infected with the leprosy of heresy.

**Cauchon:** A member of Satan.

**The Inquisitor:** We declare that thou must be excommunicated.

**Cauchon:** And now we do cast thee out, segregate thee, and abandon thee to the secular power.

**The Inquisitor:** Admonishing the same secular power that it moderate its judgment of thee in respect of death and division of the limbs. [He resums his seat.]

**Cauchon:** And if any true sign of penitence appear in thee, to permit our Brother Martin to administer to thee the sacrament of penance.

**The Chaplain:** Into the fire with the witch [he rushes at her, and helps the soldiers to push her out].

Joan is taken away through the courtyard. The assessors rise in disorder, and follow the soldiers, except Ladvenu, who has hidden his face in his hands.

**Cauchon [rising again in the act of sitting down]:** No no: this is irregular. The representative of the secular arm should be here to receive her from us.

**The Inquisitor [also on his feet again]:** That man is an incorrigible fool.

**Cauchon:** Brother Martin: see that everything is done in order.

**Ladvenu:** My place is at her side, my lord. You must exercise your own authority. [He hurries out.]

**Cauchon:** These English are impossible: they will thrust her straight into the fire. Look!

He points to the courtyard, in which the glow and flicker of fire can now be seen reddening the May daylight. Only the Bishop and the Inquisitor are left in the court.

**Cauchon [turning to go]:** We must stop that—

**The Inquisitor [calmly]:** Yes; but not too fast, my lord.

**Cauchon [halting]:** But there is not a moment to lose.

**The Inquisitor:** We have proceeded in perfect order. If the English choose to put themselves in the wrong, it is not our business to put them in the right. A flaw in the procedure may be useful later on: one never knows. And the sooner it is over, the better for that poor girl.

**Cauchon [relaxing]:** That is true. But I suppose we must see this dreadful thing through.

**The Inquisitor:** One gets used to it. Habit is everything. I am accustomed to the fire; it is soon over. But it is a terrible thing to see a young and innocent creature crushed between these mighty forces, The Church and the Law.

**Cauchon:** You call her innocent!

**The Inquisitor:** Oh, quite innocent. What does she know of The Church and the Law? She did not understand a word we were saying. It is the ignorant who suffer. Come, or we shall be late for the end.

**Cauchon [going with him]:** I shall not be sorry if we are: I am not so accustomed to you.

They are going out when Warwick comes in, meeting them.

**Warwick:** Oh, I am intruding. I thought it was all over. [He makes a feint of retiring.]

**Cauchon:** Do not go, my lord. It is all over.

**The Inquisitor:** The execution is not in our hands, my lord; but it is desirable that we should witness the end. So by your leave—[He bows, and goes out through the courtyard.]

**Cauchon:** There is some doubt whether your people have observed the forms of law, my lord.

**Warwick:** I am told that there is some doubt whether your authority runs in this city, my lord. It is not in your diocese. However, if you will answer for that I will answer for the rest.

**Cauchon:** It is to God that we both must answer. Good morning, my lord.

**Warwick:** My lord: good morning.

They look at one another for a moment with un concealed hostility. Then Cauchon follows the Inquisitor out. Warwick looks round. Finding himself alone, he calls for attendance.

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**Twenty Years**

(Continued from page 13)

private judging—courts and would-be litigants have promoted or resorted to dispute resolution by means other than judicial decree.

The courts have themselves facilitated this development—in both negative and positive ways. On the one hand, frustration with formal litigation, with its attendant costs, delays, and uncertainties, has pushed parties to seek ways of resolving disputes outside of the judicial framework. To put it bluntly, when the courts don’t work, litigants leave.

On the more positive side, courts during the last two decades have been more aggressively enforcing agreements to arbitrate. The Supreme Court has taken the lead in this area, with a series of 1980’s decisions—such as Moses Cone, Mitsubishi, and Gilmer—that rigorously enforce agreements to arbitrate all manner of disputes.

Even when arbitration is not a factor, the courts have encouraged or even required nonjudicial resolution of properly filed cases. The techniques include court-sponsored ADR and mediation programs, which have been made mandatory for certain kinds of cases. Efforts to induce consensual resolution of disputes do not end at the trial court level; numerous appellate courts, both state and federal, are trying to require litigants to resolve their cases through court-sponsored mediation programs.

Twenty years ago, the best known names in arbitration were the International Chamber of Commerce and the
American Arbitration Association. Today, there is more competition. The Judicial Arbitration and Mediation Services, Inc., known as JAMS, maintains a staff of retired judges and offers speedy, economical, and professional mediation and arbitration assistance. The Center for Public Resources, a non-profit organization in New York, is well known for innovative approaches to dispute resolution. The field is expanding rapidly.

Inevitable Radical Changes

The past twenty years have seen radical changes in litigation, but many were inevitable. Litigation is part of, a manifestation of, society; and society has changed at least as much. Social and technological changes have affected lawsuits no more or less than they have affected the lives of all. Inflation, incivility, and increased drug use have hurt most Americans; the difficulties they have brought to litigation are simply part of broader problems.

Are the litigation changes good? Litigation and those involved in it are freer from past prejudices and can do more because of technological advances. But many positive changes have a dark side. ADR is a good thing— it would be a useful adjunct in a perfect system. But its main impetus has been frustration with a seriously flawed system; it is mostly a symptom of a problem. Technological changes are stunning and often helpful, but they also facilitate the less attractive aspects of litigation—more paper; more argument; last minute late-Friday-before-a-holiday ambushes; more artificial pressure.

Seemingly positive litigation-related changes, in our view, either pale in comparison to the negatives or are actually symptomatic of serious flaws. The system has developed big problems in the last two decades: There is too much law, too much litigation, too much acrimony, too much cost, and too much delay. The courts are left to cope with symptoms and side effects of broader problems that must be dealt with (if they are to be solved) by the politically accountable branches of government.

During the past two decades, the courts have tried to cope with drug cases, mass torts, clogged dockets, and the burdens of civil litigation. The next twenty years promise more of the same. But even more will be required. There must be a greater effort to get at the underlying social and economic problems that have hurt litigation and the judicial system. There should be a recognition that individual judges and lawyers can only do so much. Effective reform of the civil justice system will come not merely through the docket control efforts of individual judges, but through legislative initiatives. Reforms in the tort system, to the extent necessary and desirable, will come from legislative action as well.

The changes during the past twenty years should at least provide a blueprint for what needs to be done over the next twenty. Litigators have accepted certain changes with grace— particularly changes that meant more litigation. The future challenge is for the same lawyers to promote and accept changes that get at the root of problems and do more than offer more of the same.

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Opening Statement

(Continued from page 2)

years ago Lou Harris reported that 24 percent of those surveyed had a "high regard" for law firms; now that figure is down to 8 percent. Just focusing on that one point, we have lost two-thirds of previously weak support in only two decades. More recently, we have been at the center of intensive bashing in the advertising and political arenas. Perhaps some of this distrust, even disdain, will fade as the attack does. Even so, we have much work to do to convince the public that our system is not only worth saving, but worth funding at much higher levels.

• Lawyer Dissatisfaction

The polls say one more thing: In sharply heightened numbers, lawyers themselves report dissatisfaction with their jobs. A poll of the California Bar in January 1992 indicated that 70 percent of the respondents would start a new career if they had an opportunity and that three-quarters would advise their children not to become lawyers. And the ABA's 1991 State of the Legal Profession Report showed a 20 percent decline from 1984-1990 in the percentage of lawyers who were very satisfied with their jobs. That is disturbing on many grounds—not the least of which is the difficulty of calling on dispirited troops to wage the battle necessary to solve the profession's daunting problems.

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Fixing all these problems is a mighty tall order. It cannot be done in a day— or fully in a decade. But prodigious work is well underway. The Litigation Section has been, and increasingly will be, centrally involved. I conceive our mission for this and coming years as grappling with, and starting to solve, these big picture problems.

This year and next we will co-sponsor National Symposia, with a broad base of support, for important civil justice and criminal justice reforms. We will conduct a National Conference for Federal Judges on the effective use and implementation of alternative dispute mechanisms. We will be involved in monitoring plans implementing the Civil Justice Reform Act and assisting in the preparation of revisions to those plans. We will participate in the revival of the Pound Conference of 1976 dealing with the causes of dissatisfaction with the system.

We will sponsor pilot programs throughout the country looking toward the provision of legal services to children and enhanced educational opportunities for very young children, especially those crack-addicted at birth. We will host conferences on women advocates and problems they confront in achieving an equal role in our profession. We will direct programs and reports on means to assure the eradication of racial bias in the courts. We will be active in efforts to target more funding for treatment, rehabilitation, and education as a means of dealing with the drug epidemic. We will do everything we can to assist in the provision of more legal services to the poor. And, as advocates, we will do what advocates should do: a better job of making the case that the system, while needing improvement, deserves the effort to achieve that change.

In these pages in coming months, I propose to describe how many of us think the system can be improved, and the ways in which this Section is contributing to those solutions. I will solicit suggestions from everyone on approaches and opportunities that we may miss.