

Changes and Challenges in Law Practice in the Past Fifty Years

By *Tread Davis, J.D., LL.M.*



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—Stephen Jackson, M.D., Editor

To consider changes and challenges in law practice over the past 50 years is to some extent to consider the changes and challenges in our world over the same period. For in many ways one reflects the other. Some are obvious: globalization, increased opportunities for women and people of color, new technologies, and a tendency towards consolidation and larger enterprises. Some are more subtle, including the increased emphasis on law practice as a business, and mobility within the United States and the world. The principles of law as a profession and of our system of justice have remained constant. At the same time, the evolution of law practice has accelerated as new demands and capabilities have been placed on the system.

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The rule of law and, indeed, the practice of law, is a noble and essential part of our society and of civilization. Although lawyer jokes are standard fodder for both our conversations and nighttime comedy shows, the necessity of a rule of law is recognized throughout the civilized world for its preservation of human rights and the rights of the individual, the rights and duties of free people, and as a necessary framework for both free ideas and a healthy and free economic

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system. Lawyers, like it or not, are the ones who help make the system of justice and rule of law work, day in and day out.

The Client's Perspective

Let's examine what has changed from the standpoint of the *client*. First, our own expectations have changed. We assume our daughters and granddaughters will be able to practice any profession or business or other employment that they wish without restriction or discrimination because of gender. We assume that competition in our business enterprises will be global and, whether we are merchants, or financiers, or in any one of many professions, that the entire world will impact what we do and our success or failure much more than it did in 1960. Generally speaking, we expect instant communication, instant answers and instant gratification. Big business now tallies its efforts and transactions in billions instead of millions. Our nation has subtly added a layer of communitarianism to its base of individualism. Good healthcare is more and more recognized as a social right. All qualified persons should have the opportunity for a college education. As clients, we expect the law to be our partner in securing and allocating the new "rights." Alone among the nations of the world we sue at the drop of a hat and incarcerate criminals for longer sentences than any other free nation. In more homogenous nations, social mores set nationally recognized limits, and the laws, generally, deal only with the occasional maverick behavior. In a diverse nation such as ours, we increasingly have relied on the legal system to work things out—divorce, juvenile behavior, greed by corporate management, sharp practices against consumers, environmental behavior, employment rules, pension and profit-sharing plans, church disputes, access to medical care, product safety, and a host of other issues which, to the untrained eye, usually could be better resolved outside of the court system.

As clients, we have brought lawyers into this ever expanding web of legal rights and duties. Sometimes the experience relies on our Constitutional bedrock. A jury trial or impeachment or decision by the Supreme Court or passage of a law by the Congress is procedurally little changed in 50 years. The fact that all of the jurors have a TV screen showing the case documents and videos related to their case, the judge has a computer with all decisions at the judge's fingertips and can see a transcript of all courtroom testimony instantly, or that Congressional debate is available in real time throughout the country have little changed the process or effect upon each of us when we are personally involved. On the other hand, social tectonics have formed new and vast social continents in areas that were rarely "legal" areas in 1960.

Horse racing used to be the sport of kings. Now litigation is. The bubble of expensive litigation is partly caused by new "rights." But, the rise of an aggressive

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and hungry plaintiffs' tort bar has changed and distorted our system of justice. In the corporate area, "strike suits" are often filed as soon as a corporate stock drops in value, millions of dollars are spent pursuing and protecting the rights of shareholders, and when the smoke clears, it is often the plaintiffs' lawyers who have walked away with millions or hundreds of millions of dollars, while the shareholder receives a discount coupon. The same is too often true in tort litigation. A few years back I served as strategic counsel to a large corporation in defending 350 lawsuits in Texas growing out of a school bus accident. They were successfully resolved from the standpoint of the corporation and its insurers, but I have often thought of the social cost of giving 40 percent of each child's award to a plaintiffs' lawyer who had done little. There must be a better way. The United States is notorious among the nations of the world for such a distortion of the justice system. Don't get me wrong. I know the greed of some corporations and their tactics of simply wearing down less well financed persons. Our generation has made some reforms—from capping punitive damages, to requiring affidavits and evidence before a medical malpractice claim can be filed, to an increasing use of sanctions against the most egregious corporate abuses of the litigation system. By and large, our generation has left the litigation system in need of reform.

In 1910, the Woolworth Company entered into a lease for the Woolworth Building. The lease was contained on one single printed page. In 1964, our client asked that I help prepare a ground lease for The First National Bank Building, a 42-story building under construction in Atlanta. The lease ran 30 pages. In 2010, a lease for the same building would probably run 150 to 250 pages. As clients, we have become more aware of legal risks and have sought to encourage our legal counsel to try to reduce those risks, no matter how remote. The result has been added layers of complexity, legal costs, and, ultimately, social costs.

The Lawyer's Perspective

Let us now turn to the view of *lawyers* as to the change of the law and legal practice. Obviously, the changes of tectonic plates of society and the place of law have been reflected in changes in the practice of the law. Economically, despite some recent downturns, it has been a great half century for most lawyers. There are much larger legal firms with many more specialists in them. Specialization has brought us hundreds of new specialty areas of practice such as sports law, franchise law, domain name law, cultural resources law, hospital law, government contracts law, communications law, special education law and elder law. The geographic scope of law firms and the size of law firms have changed dramatically. Today, a vigorous legal press and blogs daily tout the economic or courtroom success of one law firm and lawyer or another with a

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breathless journalistic style. In 1960, a lawyer's prim and conservative ad could lead to disbarment. Today, billboards, phone book covers, TV and thousands of websites hawk the talents of particular lawyers. As business and nonprofit enterprises grew in size and geography, so did their law firms. When I started my practice in Atlanta in 1964, I joined what was then the largest law firm in the southeastern United States. I was about the 40th lawyer to join the firm. Today, our firm has about 400 lawyers who are located in many of the major cities of the United States and overseas. Our firm today would be considered one of moderate size. Oh, there are still plenty of good one-person and five-person law firms in communities small and large. But more and more lawyers, like doctors, practice in urban, large and increasingly specialized practices.

Another major change in the practice of law is speed. Time pressure—having time to think and reflect in a busy world—is measured in tenths of a billable hour. When I began practicing law, it was customary to prepare a draft of a document, mail it across town or across the country to the counsel for the other side, take a deep breath and think, and receive his comments back in a week or two. Today, I send contracts from my Blackberry or laptop wherever I am in the world and counsel for the other parties, who may immediately change those documents and return them to me. Often in a sophisticated merger, documents are “turned” several times a day. Like all improvements, this is a two-edged sword. Since lawyers and their clients have somehow fallen into the absurd trap of billing and paying by the hour, too often all of the lawyers involved in a merger or other transaction (and their clients with layers of corporate executives) delight in redrafting documents *ad nauseam*, rather than spending several hours early on reflecting and thinking about the key items from their side of the deal. Lawyers and clients together will wake up to the fact that the value of legal services is only partly related to time. Eventually, value-based fixed fees will be used for many legal matters, rather than billable hours spent.

A lawyer is an officer of the court. His or her duty is to vigorously represent the client, but always within the confines of legal ethics, civility and a duty to the system of justice. Law is a noble profession, but law firms have become a business and the professional emphasis has become muted. Ads for legal services blare at us in ways that would make the most hardened used car dealer blush. Clients shop for the lowest bid for particular legal work and switch lawyers often. The advent of the modern office of “General Counsel” in major corporations sometimes accelerated the rush away from professionalism and respect for a system of justice to a commoditization of many legal services. Too often the lawyer's professional watchdog role is muted either by the inside general counsel or by the outside firm anxious to curry favor and more business. Legal expenses do often reach absurd heights and clearly require some counterweight in order to maintain corporate profitability. In the 1960s, when I billed for a legal matter,

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I personally knew what each lawyer who worked on a matter had done, the value to the client, and the complexity of each component of the matter. I could adjust the bill to approximate the effort and value of the services. I still try to do that, but it is more difficult when a complex matter may represent the work of 20 separate lawyers located in three or four cities, and when their services are often in some arcane cranny of the law. Our medical brothers are struggling with similar dilemmas. Perhaps they will come up with an answer to help all professionals.

On a more positive side, the law has become much more accessible to both lawyers and clients. Minutes after a Supreme Court decision is rendered I have it on my desktop. For years, I prided myself on reading every “advance sheet” of federal and state law in the jurisdictions in which I am licensed. These paperbound volumes arrived 90 days or so after the decisions. Even the best firm law library had access to relatively few volumes. Today I can dial up an Internet site and essentially have access to all decisions and treatises anywhere in the world. Let’s take tax practice. From the 1960s to the 1990s, the inside federal tax moves underway in Congress or IRS were known in advance to a relative handful of insiders in Washington. Today, the drafts of each bill, the testimony at each hearing, the IRS officials’ speeches, the proposed regulations, and the general scuttlebutt of the tax bar is available to any lawyer or client in the country instantly and without significant cost. Tax advice is quicker, better and less time-consuming today.

Still, there is a chasm between the quality of legal help available to the poor, the indigent criminal defendant, the refugee, the old, the young, and a host of others. Most lawyers try in some way to address these needs by volunteering, or contributing or tithing some time to public service. There remains much to be done.

Where Do We Go From Here?

Where do we go from here in the law? I think that the practice of medicine, like the State of California, is 10 to 20 years ahead of most of us in many ways. I doubt that law will have the curse of significant third-party payers like medicine, but I do think that clients will take more responsibility for their own legal health. I believe that the Rule of Law will be a major export of the United States in the 21st century. The world will prize our basically predictable and fair system of justice and opt-in to it whenever possible. We will also learn from other legal systems in an increasingly flat world.

Major corporations—and many individuals—will rely more on mediation and arbitration than on the courts to resolve conflicts. These alternative dispute-

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resolution mechanisms, properly used, are often quicker, cheaper, and of better quality in many situations. Judges will manage their cases better, and procedures will be streamlined using electronic communications for documents, hearings and some trials. Legal fees for the plaintiff's bar will be capped in some way. The delivery of legal services is still just too cumbersome and too expensive. Para-professionals will undertake some of the more mundane tasks, on their own rather than under a lawyer's supervision, just as nurse practitioners are doing in medicine. The Internet will allow routine services to be performed remotely over long distances and at less cost, and for clients to analyze and diagnose their own legal issues and potential resolutions. These will be positive changes. The critical and cutting edge legal questions, the bet-the-company or life-changing legal situations will still demand bespoke legal services. The trick, as in medical practice, will be to keep enough excellent generalists who know their clients well and who can direct and engage increasingly narrowly focused and efficient specialists when needed, while exercising legal judgment and common sense to often give the legal equivalent of "take two aspirin and call back in three days." We will try to do a better job as a society of saving the courts for more important matters and adding concepts of "no fault" and alternative handling of matters which now dog our courts and require costly lawyers' services. Most vehicle accident settlements, medical malpractice claims, and personal injury claims will be "no fault."

The next 50 years in law and law practice will be exciting and challenging and rewarding. Lawyers, happily, will still have plenty to do. I, for one, would like to sign on for another 50 years.

ABA Numbers for Reporting CME credits!

CSA will report CME credits earned to the American Board of Anesthesiology. These credits will be counted as Lifelong Learning and Self-Assessment activities toward your Maintenance of Certification in Anesthesiology (MOCA) requirement. In order to report these credits, doctors need to provide their ABA number. To obtain an ABA number, visit **www.theABA.org** and create a personal portal account.