

## 2001: A Case Odyssey - From Snail Mail to Email

By James S Bostwick

President Bob Parks, First Spouse Lynn Parks, Fellows of the Academy and Honored Guests:

It is a challenging process deciding what to say to such an exceptional group of people. It reminds me of what Elizabeth Taylor's 5' husband said when they were about to get married - "I know *what* to do - I'm just not sure whether I can make it sufficiently *interesting!*"

In 2001, we stand on the cusp of the new Millennium, with modern advances propelling us forward at an ever-accelerating velocity. All around us new ideas and new technologies explode - constantly changing our lives, our profession and our society. This is a unique moment in time to look both forward and back at these remarkable changes, look at how their benefits and burdens impact us - personally and professionally - and give some thought as to how we might deal with them in the future

As I look out at this sea of faces, I see a mixed generation of individuals and professionals. Many of you remember what life and the practice of law was like thirty or forty years, some fifteen or twenty years. Today, trial law and society have been altered dramatically. Many of us are frightened by these changes - some unwilling to embrace them or even try. Some have reluctantly put a toe into these dark, roiling waters. A few have joyfully immersed themselves.

We are all affected by this dramatic new landscape. Our law practices would look very different to a visitor from the fifties! Look at technology for example. We expected its development would gain us more time and facilitate personal interaction. We expected the Internet to give us enlightenment. In reality, we have been thrust into a world that is more complicated and for some more intimidating.

Many feel they have less time, more intrusion and less opportunity for introspection. Some of us are over-whelmed with the speed and the pressures of the information age. I know that personally, I feel technology changes faster than I can learn it! Many of us, perhaps wistfully, wish for a few blessed moments - in practice or at home - unencumbered by the ubiquitous cell phone; the instantaneous fax and the insistent world of email. Well, the bottom-line is - for most of us anyway it's a love-hate relationship. But, as my wife loves to say, we simply can't afford the divorce!

Let's put the last few decades in perspective:

Just over five hundred years ago the Gutenberg press was invented. Before that moment in time, there were a total of only three hundred bibles in existence. A bare two years later, there were twenty million!

In the eighteen hundreds the mail was delivered across America by the Pony Express. That romanticized institution lasted just one year, until it was bankrupted - by a thin wire hung on a pole. The telegraph spread faster than the Gutenberg bible. In the late eighteen hundreds the telephone was invented. As usual, lawyers, ever quick to leap on the bandwagon of change, refused to embrace the possibilities. Alexander Graham Bell's father-in-law, a lawyer, reportedly told him to "stop messing with that useless toy - and do something productive for a change".

Just five hundred years after the invention of the printing press, another remarkable new device was developed - one that would create more accelerated change in the arena of communication than anything that has gone before. I am speaking of the Transistor - and its progeny the Silicon Chip. Talk about profound changes! Messy sheets of carbon gave way to Mag cards - then the Xerox machine. Computers went from room size to desk size. Then we got faxes and finally instantaneous e-mail, voice mail, cell phones and PalmPilots. I heard a news piece the other day that the last company that maintained and produced pay phones was going out of business. There are now less than 5% of the pay phones that existed in 1980. Apparently, cell phones have killed them!

Let's take a look at a few of the ways trial practice has changed. Is the typical juror of today the same as in years past - are the judges? Do we have the same relationship with our clients or our adversaries? What have we accomplished and what are we in danger of losing?

When most of us started practice, the public only saw a trial when they sat on a jury! Today most jurors will have seen Court TV, they will have watched Judge Judy and seen innumerable law programs (all trials last about fifteen minutes -right?). These same jurors have watched portions or much of the O.J. case. They got liberal doses of legal commentary. Today's jury thinks it knows a lot more, and certainly arrives with a substantially greater mind-set. Add to this the pervasive propaganda effort of the insurance industry - designed to create a malignant jury attitude about the civil legal process.

In the mid eighties to mid nineties, while the population of California increased by fifteen percent, filings of tort lawsuits decreased by 49%! Experts have become so expensive that it can easily and quickly become impractical to take your case to trial. Alternative Dispute Resolution had not been invented 20 years ago. Today most courts require ADR and many of the best trial judges have left the bench for this lucrative field. In many areas there is huge pressure by the court to settle every case. Mediators pride themselves on their "batting averages". The negotiating skills of an attorney are becoming more important than his or her trial skills.

While there are still some extraordinary jurists, many newer judges today seem less capable. In many jurisdictions judges must stand for election, which politicizes the process. Where judges are appointed, there is pressure to appoint more prosecutors and fewer lawyers from the civil side of the bar. Salaries are inadequate to attract successful and experienced applicants. In San Francisco, a baby lawyer may well be making fifty thousand more a year than the judges they appear before! Speed is more important than the quality of the jury to many judges. Recently, I had an otherwise very fine trial judge limit my entire voir dire to just thirty minutes.

The relationship between insurance defense counsel and claims personnel used to be one of symbiosis. Now it frequently seems more adversarial. Shortsighted claims practices and inadequate funding hamstring defense attorneys. Hourly fees in casualty defense are far under what is reasonable. Inexperienced lawyers are given business at ridiculously low rates to foster competition. House counsel is used more extensively. Capitation is "in".

On the plaintiff's side, the insurance industry's powerful resources and negative campaigns make it more and more difficult for most plain tiff practitioners to try cases. All over the country we are battling tort reform, limits on fees and damages and other inroads on accepted principles of tort practice. The plaintiff's attorney has been painted with a public image of greed. Carefully orchestrated claims of "frivolous suits" and "litigation explosions" taint the jury pool with toxic effect.

A wedge is being driven between the trial lawyer and their clients and between formerly respectful adversaries. Things move faster, more has to be in writing, more motions are filed, there is more anger and more lack of respect - like too many rats in a cage -we turn on each other. Pressure, expense, competition and lack of experience have made dignity and civility an endangered species.

On the other hand, with all these changes and difficulties, the trial bar has accomplished more in the last thirty years than in the entire two centuries before. Trial lawyers have taken the place of government. Today we police the people's interaction with the commercial establishment. We - in our role as trial lawyers - have become guardians of the public institutions of commerce and health.

In the fifties and sixties we drove without seatbelts, in dangerous cars and everyone smoked. The world is different today because trial lawyers have challenged traditional manufacturing and marketing techniques and demanded that the world be a safer place in which to live and raise our children. We have raised the bar for American commerce by demanding they meet reasonable standards for consumer expectations of safety and reliability. Today our children don't go to school in buildings leaking deadly asbestos fibers.

Thousands have been, and continue to be compensated for the harm it caused. At the behest of governments unwilling to take the political and financial risk, trial lawyers banded together and took on big tobacco. Today, in many areas, we have funds to reimburse and bans on aggressive add campaigns that were designed to entrap and addict our children. We have funds to educate and force the industry to be responsible.

The Firestone tire story is well known. It was not government watch dogs or a safety agency that sounded the warning. It was one dogged, tenacious attorney that turned over that particular corporate rock.

At the start of the twenty-first century we have safer, more stable and crashworthy cars. Our drugs are tested more carefully and most products have more comprehensive warnings. Millions of dollars are put into cleaning up toxic sites. There are

disclaimers and warnings on everything from baby car seats to home sales and initial public offerings. Even our hot coffee is safer.

While plaintiff attorneys have pushed the envelope and demanded ever more, the defense bar has protected the commercial institutions that continue to drive our economy and maintain us in the forefront of the global markets. They have held up a mirror of rationalism and common sense to an army of putative victims - denying compensation to all but those with claims of true merit. They have stemmed the tide of innovative claims and required that any new theory meet an exacting test of law and evidence. They have protected business, medicine and public institutions with the energy and passion of road warriors - ensuring the economic vitality of the most productive nation in the world.

Together- as trial advocates - we have made the nation and the world a better place for our children and at the same time preserved the right of industrial innovation and commercial success.

Today technology has altered the face of trial practice as well. I started in the sixties dictating to a secretary who took shorthand. I left a message with a real person. It took time for a letter to be transcribed (maybe even enough time to rethink an angry letter. Pleadings were crafted artfully. There was humanity and true social interaction in the entire process. I seem to remember having plenty of time for thoughtful introspection and even strategizing. When I left the office, the drive was a pleasant interlude.

Well, things are certainly different now. At first I couldn't stand voice mail. Now if I have a thought in the middle of the night I can call and leave a message as long as I want - to be picked up - whenever! Everywhere I see lawyers I see cell phones in use, at meetings, in the car, at lunch, on the way into or out of court. This tool has changed the way we practice and the nature of our relationship with our clients, our office and other lawyers. People expect to be able, to get a hold of us anytime, anywhere.

Oh, and what happened to our books? In my office in 1990, close to 2000 sq. ft. of expensive space was devoted to our library. We were proud of it. We spent thousands to update it constantly. We had a librarian. By 1997, when my firm split up, we had to pay someone to haul it away - it had become worthless. Now we do legal research on line.

I know when I started I could work on 75 cases and still have time to think. Things didn't happen so fast. There weren't so many court rules, not as much discovery and not as much access to data. Today most young lawyers are in-putting and e-mailing or faxing on their own. It's nothing to have four or five exchanges of letters or pleadings in a single day! Email allows immediate, current thought to be instantaneously transmitted.

Unfortunately however, there is a whole new culture in this email process. Things are often written "as thought", with little filtering of content. These communications are usually abrupt, poorly constructed and then vanish into cyberspace with a simple click of the mouse. Sometimes I receive replies to my e-mails meant to go to someone else. Recently, a friend e-mailed his new medical expert in a plaintiff's medical malpractice case. He got an immediate reply from the expert but it was addressed to the expert's old friend the defendant doctor in the case telling him not to worry - he'd take care of everything! If you hit reply watch out, it's gone - there's no later pulling it out of the mail pouch.

While the new innovations are important, and improve our production immensely, we need to find a way to keep them in perspective and in harmony with our personal interactions. We need to back away from the data, from the pressure, from the toys and from the insidious trap of speed. We need to remember how to think, plan, maintain relationships and enjoy the process. We need to hone our skills of personal communication in this electronic world. We need to help teach the young people how to keep the humanity in the practice of law.

I have to keep reminding myself that the young lawyers of the twenty-first century grew up differently. A huge change in my life in the early fifties was when radio gave way to TV with 2 or 3 channels! Our toys were cap pistols, bikes and dolls. I spent summers reading a couple of books a day (of course it was 125 degrees outside). We helped Dad dig a bomb shelter and learned how to crawl under our desks at school (to protect ourselves from the nuclear blast and radiation, of course). When I was eleven I worked for the Civil Defense Network for two years. We lived near the Mexican border and two hours a week I manned an observation tower peering at all planes with high-powered binoculars - recording all observed flights and calling in all planes that looked anything like the outlines we were given of the big Russian bombers. Visualize - little Jimmy Bostwick - single handedly saving the world from the communist peril. We got Boy Scout merit badges too. The powers that be actually thought the Russians would come over the Mexican border and bomb us. Pearl Harbor had only been just over ten years before.

The kids of today can't relate to that. They have 200 channels, video games, interactive toys instead of dolls - and the Web -the Lord only knows what they learn on the Internet. In the third grade now my daughter does research projects on line. Today's kids barely gave a passing glance to the recent addition on the International space station - if they noticed at all. These are the new trial lawyers of today and tomorrow. They understand electronics in the office and they use it like we used our bikes. They prepare for trial thinking technology.

Have you seen a lawyer try a case using all these new toys? It's fascinating - but I sometimes think there's something missing. A modern electronic trial is like the movie version of a novel. Invariably people come out of the movie version complaining that it wasn't as good as the book. Why? Because watching rather than reading or listening, has the potential to lose the human interaction, the dimension of imagination. It can be the same with trial. To paraphrase Thomas Wolfe's newest book, "Hooking Up":

"The professional revolution of the twenty-first century, if true trial practice is to survive, will need to have "content". It must retain life, reality, and the pulse of the human beast. In short, it will need to retain its humanity."

In the modern legal case there is so much data the uninitiated are tempted to think that technological tools provide the necessary elements to win. Many young lawyers don't realize to be winnable a case should be reduced to a concise theory and no more than 5 pieces of paper. As seasoned trial advocates we understand it is important to winnow your case down to its essence and develop a theme. You have to watch the jury, *connect* with them. These were the skills of a great trial lawyer before the new millennium, and remain the skills of a great trial lawyer today.

It's not that these new devices are not useful. If used judiciously they can greatly enhance presentation. One of the most important things we have all learned about the courtroom is that it has rhythm, it has spontaneity and it has a life of its own. All of us have been in trial and experienced that searing instant when the psychology of a case changes irreversibly. We know that a trial has a spirit. That spirit can be lost. Misused or over-used, technology has no soul, and it has the capability to destroy the personality of a trial.

I believe it is essential for all of us assure that the skills we brought with us into this new age are passed on, at every level. Our children/grandchildren should be taught interpersonal skills to balance with the technology they take for granted. We must maintain the personal culture of office and home, using technology in moderation solving problems as a team - interacting with clients, experts and other lawyers on a person-to-person level. Young lawyers must be taught simplification of theme the benefits of carefully using and blending technology to enhance.

Let's take a look at what is happening right now in technological trends in the Law. These trends apply more broadly as well:

Soon "paper lawyers" will be outside the mainstream. Electronic documents and online data are going to be the rule (Colorado became the first state to allow civil e-filing not long ago - many areas are following suit). More and more law offices are using internal electronic documents, email, electronic folders for faxes instead of printing them out, and scanning mail for distribution, filing and calendaring. We are sharing evidence and pleadings on line. Today depositions can be obtained by email, read on computer and sent to the expert by email attachment.

Many firms are using on-line billing and payments. Mobile computing is becoming wide spread. Speech recognition is fast becoming a practical reality (even my car has voice activated phoning!). You can meet clients, experts and take depositions without leaving the office using high-end video conferencing. New technology is allowing video and voice-interaction with real-time electronic sharing of documents. Today, if the case supports the investment, we can do virtual reality - a 3-D reconstruction of a scene or event. We will soon maintain case notes and client data in an online database. No paper! With proper "fire-walling" client information should be kept confidential. That, by the way, is a subject for an entirely separate discussion. Even good firewalls can't prevent an accomplished "hacker" with the newest software from invading your database, stealing your secrets and even using microphones on your computers to listen to conversations in your office - I saw that discussed on a CNN news report just last week!

The usual online Website is not enough anymore; the best sites now have content that offers self-help resources to clients and gives basic information about areas of law in which the host specializes. There is a new world of clients out there; many are connected and they know a lot more than the typical client of a few years ago. One brief example is interesting. This father had a new baby with a complicated case of hyperbilirubinemia (jaundice at birth causing serious brain injury if not promptly diagnosed and treated). After exchanging a few emails, with scanned medical record attachments, I knew I was interested and

called him. He had researched the medicine on the Web and was very conversant with the medical condition. When I mentioned experts I proposed retaining, he already knew their names and had obtained and read papers they had written on the subject. This is more and more common.

Many of you don't have websites. Many who have them don't have them up-dated every few months so the search engines don't dump you for lack of activity. Some don't have Email and many who have it don't use it regularly.

Many of you have an active website, now we are all going to be hyperlinked in the new Academy website! Any of us can easily do a search and find out things about each other that we would not mention in polite conversation. Pick a geographical area and do a search for an Academy expert in neonatal malpractice or mass torts, find out who is collecting the most recent product or drug litigation in a certain area.

How and where we work and live is about to change more than at any time in our history. We are as a profession - as a society - poised at the brink. The baby boomers are moving into their peak. In just the last century, the population of the world has almost quadrupled, the world economy is growing rapidly, the third world is industrializing and bringing middle-class standards to billions with a true world economy developing rapidly. This is enhanced and indeed driven by powerful communication technology. There will be unprecedented opportunities and a wealth of high quality choices for the savvy people who anticipate these changes instead of dreading them.

If we were to look a decade into the future what are a few of the changes we will be likely to see?

Smart cards are definitely on the horizon. These will be portable, credit-card size data storage and retrieval systems capable of interacting with the digital world concerning financial and medical information, insurance, travel preferences and so on. This will be akin to having a private secretary and accountant on duty 24 hours a day. There will be portable "smart" phones that combine the best features of your cell phone with the PalmPilot featuring voice activation and video capability "Blue Tooth" wireless technology will develop far beyond its present vision. Wireless chips will be everywhere, interacting with other chips automatically. There will be hidden "smart" stationary computers in homes, airports, hotel, office buildings and courthouses that will automatically interact with your own portable devices without prompting. As you walk off the plane, the PalmPilot/phone senses the other chip, turns itself on automatically, downloads your emails and receives incoming. At home these chips will communicate with each other, collecting data on needed repairs before costly breakdowns, making shopping lists for automatic shopping on line. The Internet will be video driven, facilitating ever more rich levels of human interaction.

Many of us have a fear that our society's creation, this technological Frankenstein's "monster", will surpass us - make us useless - make us passe - leave us behind. There is also a fear that as each younger person becomes more natural and one with technology - we as a society of lawyers will lose the culture of professionalism - of personal commerce of accomplishment by humanistic interaction.

Bridging this era of incredible change is our generation of trial lawyers. The Academy is international in nature and scope, diverse in mind and culture, peopled with accomplished warriors from all fields of justice. We know the system better than most it - we use it - we respect it- we understand it and hope for its future. However - we are also responsible for its future. We need to get involved with this change, guide it, moderate it and ensure that it enhances our system of justice and professionalism. In the words of one of the most distinguished American jurists, Justice Learned Hand:

"We accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."

We are at a pivotal point in history. We need to teach our children and grandchildren the things we took for granted in a less complicated world. We need to make ourselves available to mentor young lawyers, in our offices, in local trial bar groups and throughout the world. We need to teach them how to use what this brave new world has to offer and meld it with what has made our advocacy great - so they never lose sight of the essential humanity of the process. We must use our skills and our position of leadership in the community as a bully pulpit to educate the public about what the advocacy system of justice has wrought and will accomplish in the future - a future that may yet see it torn asunder by the politics of big money, big business and the Far Right (President Bush wants Patient's Rights he says - his idea of " rights" is - you have no right to sue!).

The post modern world is intrinsically tied to the universal use of the digital computer. Whether one is morphing illustrations for use in court, researching complex medical issues or sending rocket probes into space, all of this involves instantaneous

communication and information retrieval among people everywhere. The world has shrunk, shrinkwrapped in an electronic membrane. Only a click separates us from people across the globe. This communication revolution is fast rendering national boundaries and other geographical notions obsolete. The Academy has responsibilities that are not just local but international in scope. We need to continue and expand our extraordinary efforts to mediate and give aid to emerging or changing systems. In the past, the Academy had a very productive program working with the ABA when the emerging Eastern Bloc countries asked for help developing new systems of law and justice. Our friends and Fellows of the Academy, George Bizos, Ditkang Moseneke and Ish Semenea have asked us to help them further develop the jury system in South Africa. We are looking into how we can best be of aid to them.

Our most cherished accomplishment as an organization is our six year old, developing relationship with our good friends in China. Through the remarkable efforts of Ray and Audrey Tam, and with the extremely generous help of the Academy Foundation and our friends at Phillips Petroleum, we have had an opportunity to learn and exchange ideas with one of the most interesting and populous nations on earth. We have developed a wonderful dialogue and on going legal interaction with the people of China, whose forefathers established an extraordinary civilization long before the West had even entered the Dark Ages. Through this project we have found a way to express our love and respect for the rule of law by sharing our own systems and experience as China undertakes a massive effort to innovate and evolve its own legal and legislative infrastructure. This is the perfect example of seizing opportunities presented by an ever shrinking and interactive world, in this case, to be at the nadir of China's international metamorphosis. In exposing young Chinese lawyers to our version of the rule of law we reveal it anew to ourselves. In their interest, in their questions, indeed, in their challenges - we renew cherished principals we have come to take for granted.

In closing I would leave you with these thoughts:

Take time in the midst of the pressure and pace of a new world filled with electronic marvels - Turn off your cell phone more often. Seek out more opportunity to stop and enjoy your family and your practice. Remember to give yourself opportunity for strategy and yes - even meditation.

Give of your rich knowledge, wisdom and experience to the young people of today, at home and at work, in and out of the trial bar. Help assure, as we become more and more a technological world, that we do not lose any of the essential elements of humanity that have made us successful as trial lawyers and allowed us to accomplish so much for society.

Speak out to the widest possible community about the accomplishments of and the need for a healthy continuing system of jury advocacy in this and other countries.

Become ever more involved in the Academy's fascinating interaction with one of the most important nations in the world today. The social, professional and personal dividends from the Academy's China experience far outweigh the modest investment of time and energy involved.

Finally, for those, like myself, who admit to some trepidation about the burgeoning array of bewildering new technology, accept that these changes are inevitable. Do not fear, but try to embrace this new world. It is just equipment, learn it, use it - then turn it off. Make it work for you, not own you - your practice -or your life.

Remember that Robert F. Kennedy said: "Just because we cannot see clearly the end of the road, that is no reason for not setting out on the essential journey. On the contrary, great change dominates the world, and unless we move with change we will become its victims."

**THANK YOU**