

Litigation

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avoided: Computer information starts out as coded bits and bytes. That's the e-discovery prime principle. ■

TRIAL PRACTICE

Women Lawyers at Trial and on Appeal

CHARLES L. BABCOCK

The author is with Jackson Walker LLP, Houston.

I have long thought that women and men often (not always) see things differently in the real world. But the following is a stark example of how those differences can come into play in the courtroom.

I was getting ready to argue an important case on appeal and assembled a group of appellate lawyers from my firm to act as judges in a mock argument. My only criteria for choosing them were that they were available and good appellate attorneys. One was the chairman emeritus of Jackson Walker's appellate section, a man who has argued hundreds of cases and is revered by the appellate bench in our state. The other two gentlemen were former law clerks to judges on the U.S. Court of Appeals for the Fifth Circuit and experienced appellate practitioners in their own right. During our mock argument, it became apparent that none of the three cared for one of our main arguments, which had been crafted and written by my partner (and wife), Nancy Hamilton. They counseled that I deemphasize that point when I got to the real argument, which I did with Nancy's concurrence.

At the oral argument, however, when opposing counsel started to argue his case, a curious thing happened. The two women judges on the panel (one of whom ultimately wrote the opinion) peppered him with questions on the very point my

mock panel had advised that I downplay and I nearly ignored in my opening. When it came time for rebuttal, I smoothly started by saying, "I am glad the court has focused on this point (barely mentioned by me) and let me expand. . . ." We won the appeal, and Nancy's argument played a prominent role in the opinion.

This experience taught me that if I know the identity of my panel at the time of mock argument and if it includes one or more women judges, I will, for sure, include one or more women on my mock panel. This is no criticism of my male appellate colleagues, whom I have practiced with for more than 30 years and who are right most of the time, but having a female perspective can be immensely helpful.

Having an experienced woman trial lawyer on your team isn't a bad idea either. Recently, I tried a federal court case against a prominent, very successful lawyer who was old school. He was likely practicing when Justice John M. Harlan II wrote for a unanimous U.S. Supreme Court that a state law excluding women who did not volunteer for jury duty was constitutional, saying that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

My opponent, in closing argument, referred to our two key defense witnesses (one a former manager since retired and the other the current general counsel of the public company defendant) as "nice girls" who didn't really know anything about the facts of the case. He questioned why our side had not brought any of the male executives to testify. My co-counsel (a woman) wrote me a note before I got up to argue. "Make him pay for that," was all it said.

The eight-person jury consisted of six women (all of whom worked full time)

and two men. I don't know whether or not I succeeded in making opposing counsel pay, but I sure tried. We won the case.

One final story. I had a case that went on for years, and early in the case, I felt that the male trial judge and I were on the same page. I was winning most of the motions, especially the important ones. Then our judge was reassigned and a new judge came onto the bench. She had not served on that court previously but had good credentials and was well regarded. Suddenly, just about every motion we presented was denied until my female co-counsel started framing the issues and arguing the motions. Complete turnaround.

These are all anecdotal stories, but I think they reveal some truths or at least raise some things to consider:

- First, on many (not all) issues that arise during litigation, men and women see things differently.
- Second, since 1975, when the Supreme Court held that "it is no longer tenable to hold that women as a class may be excluded or given automatic exemptions [from jury service] based solely on sex . . .," *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) (reversing Justice Harlan), we see many more women serving as jurors. In fact, it is rare, in my experience, when women do not outnumber men on jury panels.
- Third, many more women are serving at all levels on the bench than was the case just 20 years ago.
- Fourth, to have a robust and well-rounded trial team in important cases (large and small), it is prudent to have one or more experienced female trial and/or appellate lawyers as members. They may be lead or second chair, but they should be there.
- Fifth, law firms of whatever size should ensure that they have experienced women litigators and appellate

lawyers to call upon in the future by getting them into the courtrooms—both trial and appellate—now. ■

SPECIAL THANKS

Thank You, Will Park

HON. JEFFREY COLE

The author is a U.S. Magistrate Judge in Chicago and a senior editor for *LITIGATION*. He is a former editor-in-chief of *LITIGATION*.

The inaugural edition of *LITIGATION* appeared in 1975. As the first editorial board recognized, it was “an ambitious experiment in legal publication.” 1 *LITIGATION*, 2 (Winter 1975). While opinions may have differed on a number of things about the magazine, there was a consensus that “neither the editors nor the Section [of *Litigation*] wanted to produce just another law journal that would collect dust on a bookshelf.” The avowed objective was to create a journal that would “be distinctive in its appearance, style, and content.” The theme of the first issue was Manners and Morals at the Bar: The Bar, Lawyers and Accountants On Trial. On the cover was a caricature of a scowling judge, sitting in front of what appeared to be part of a tattered American flag. It was a fearsome and ferocious image. There followed nine more issues with covers by different artists or with woodcuts in the public domain. *LITIGATION* had not yet found the distinctive appearance that would set it apart from other journals.

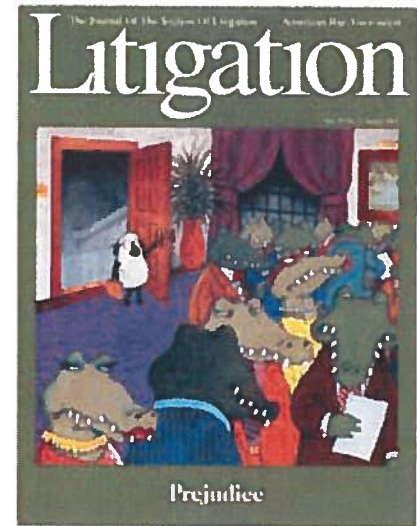
Then came the Fall 1977 issue, with a cover by a young artist named Will Park. It was fresh and light and charming. In Will, *LITIGATION* had found the person who would give the magazine the unique appearance and style its founders insisted on from the beginning. And so for the next 33 years, with only a handful of

interruptions, every cover of *LITIGATION* was enlivened by Will’s creative genius. The covers were colorful, whimsical, inspired, and ever so smart. No other magazine had the look and feel of *LITIGATION*, and when combined with a consistently matchless content, the magazine fulfilled its creators’ fondest hopes.

Thought provoking, and always faithful to the theme of the particular issue, it was impossible to resist picking up the current issue of *LITIGATION* when it came in the mail. And once picked up, one could not resist actually reading at least some of the articles immediately. The inside art, which Will also drew, illuminated the articles and always brought a smile or a laugh. The issues of *LITIGATION* truly had become treasures to be savored. Each time you looked at a cover, you saw something you had not seen before. There are thousands upon thousands of lawyers and judges who have saved every issue of *LITIGATION* from the date they became members of the Section.

Everyone has his or her own favorite. Mine is the Spring 2003 issue, which was drawn when I was editor-in-chief. The theme was Prejudice. How brilliantly and poignantly Will brought that theme to life. In the background, there is an angelic-looking, little sheep, standing on its hind legs about to enter a room. The sheep is wearing large glasses and carrying a small briefcase. In the foreground, are 12 large alligators, male and female, with their backs to the sheep, refusing to acknowledge its presence. They look alternately smug, menacing, or pretentious. And on the innocent-looking face of the little sheep is a look of inexpressible and uncomprehending sadness. The genius so visible on the cover of *Prejudice* is apparent in every one of the wonderful and whimsical and thought-provoking covers he created for *LITIGATION*.

His art has been published by, among others: Houghton Mifflin, G.P. Putnam & Sons, Little Brown, Harcourt Brace,



LOOK, and *Sports Illustrated*, and he is a frequent contributor to the *New Yorker*. He has authored and illustrated six children’s books. But perhaps more important than his professional achievements are Will’s personal qualities. He is as kind and gentle a soul as anyone can imagine. I have never heard him utter an unkind word about anyone. It’s actually quite maddening.

But for everything, there is a season. Will’s last cover was for the Spring 2011 issue. And so as Will moves on to other triumphs and adventures in art and life, we wish him well—and so much more. And for helping to make *LITIGATION* the magazine that its creators hoped it would become, we say thank you, Will Park. ■