THE LITIGATION NEWSLETTER

Summer *1998*

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CHAIR'S LETTER

Wallace R. Haley

When I took office almost one year ago, I faced a unique and wonderful challenge. Our section had grown to over 1500 members and our treasury contained enough funds to spend money on quality programs. A section colleague joked (at least I think it was a joke) that I had taken on my official mandate as spend the money. Well, my year at the helm is about to conclude and I take great personal satisfaction in that not only was the money spent, but it was spent on high quality programs which were attended in record numbers.

We have all just returned from our summer conference at Mackinac Island, where our program was better than ever. Professor Faust Rossi of Cornell provided a very hands on look at the current issues surrounding the use of expert witnesses. Grand Rapids Circuit Court Judge Don Johnston followed up with a look at how Michigan law differed from the federal rules. Unfortunately for those practicing on the sunset side of the state, Judge Johnston also listened to Professor Rossi. Judge Johnston's new buzzword in dealing with objections during trial is specificity and we await reports from Grand Rapids as to how it is working.

Federal District Judge Avern Cohn then spoke about effective advocacy in his courtroom. As the post session comment sheets noted, his keen intellect and sage experience were well received. Last, but definitely not least, Professor James J. White spent the afternoon discussing negotiation tactics--a fundamental skill critical to a successful litigator's bag of tricks. Our dinner speaker, Lou Kasischke, wowed our audience with his story of his climb to the top of Mt. Everest. Lou's story provided us a somber reminder of how at times in our life sound judgment should be our best attribute.

We thank all of our speakers and all of our attendees who truly made the conference the best ever. A special thanks to John Mucha, Rick Paul and Arlene Rubenstein for all the work and time they put into the conference.

In This Issue

In closing I would like to say how much I have appreciated my time as your chairman. In other words I look forward to being around and helping our section continue its growth. Best wishes to all and let us all try to continue to make this section the best in the Bar.

WHAT YOU MISSED AT THE LITIGATION SECTION'S SUMMER CONFERENCE

Lori Stich, Miller, Johnson, Snell & Cummiskey, P.L.C.

Over 50 members attended the Litigation Section's Third Annual Summer Conference at Mission Point Resort on Mackinac Island, August 7 and 8.

Faust Rossi, a professor at Cornell Law School who has taught and lectured across the country and around the world, spoke about these topics: evidentiary objections and procedural considerations, experts and hearsay. Judge Donald A. Johnston III added judicial perspective to Rossi's presentation by providing practice pointers based on issues specific to Michigan. He commented that it is essential for everyone to have the Court Rules at hand, noting that all judges have a copy within reach at the bench. He described an experiment conducted in his courtroom to determine lawyers' familiarity with the rules. By pushing lawyers about specific points, he learned that objections often evaporated due to attorneys' unfamiliarity with evidentiary rules.

Judge Avern Cohn, United States District Judge for the Eastern District of Michigan, spoke about Effective Litigation X Observations from the Bench. The full text of his speech is reprinted at pages 5-11.

The final speaker at the conference was University of Michigan Professor James J. White, who covered the topic of negotiation. He began by noting that trial is a rule-bound process, whereas negotiating is much broader; the rules governing negotiation behavior are not as precise or as carefully kept. Much negotiation stems from instinctive techniques learned as a child; he reminded us that any two-year-old knows how to get his or her way by stomping feet, crying, or shouting in a crowded shopping mall; we all have built-in negotiating ideas and techniques. The key to effective negotiating is to bring to the conscious those things we already know instinctively.

Evidentiary Offers and the Doctrine of Completeness

In addressing objections, offers of proof, and basic procedural motions, Rossi specifically discussed Rules 103 and 106. He noted that objections and offers of proof must be timely and specific. He observed that a motion to strike an answer on the grounds of non-responsiveness may be made only by the examining attorney, a nuance that many practitioners fail to grasp.

The Doctrine of Completeness provides that, when part of a writing is introduced, the

adverse party may request admission of the rest. This concept is clear in the area of deposition transcripts, but outside that realm, it becomes less clear. Rossi propounded three rules to keep in mind in seeking to admit documents or statements under Rule 106:

(1) even otherwise inadmissible hearsay becomes admissible if fairness requires admission because the offered evidence would be misleading without the other portion;

(2) evidence does not have to be part of the same document or recording to be admissible under Rule 106; and

(3) Rule 106 allows a party to offer the explanatory portion immediately; there is no need to wait until cross-examination.

Appellate Pointers

With regard to preserving offers of proof for appeal if evidence is excluded, Rule 103 requires only that the offering party make a record of the type of evidence and why it is being excluded. Case law indicates that the theory of admissibility also must be reflected. Rossi warned that motions in limine do not preserve an issue on appeal. Although an amendment has been proposed that would make rulings in limine final, a trial court' s rulings in limine currently are presumed to be tentative and preliminary. If the point is significant, raise it again during the course of trial.

Expert Witnesses

In modern litigation, expert witnesses have become as much a part of trial as the trial lawyer; the modern rules have liberally welcomed experts. But the 1993 Supreme Court decision in *Daubert* indicates the transition in attitudes toward expert witnesses from permissive to restrictive. Rossi sees three stages in the development of our system' s outlook on expert witness testimony, dating back about 20 years. During the first and longest period, the federal rules promoted liberality and accommodation, expanding the permissive use of expert testimony. The second phase saw a backlash X almost a counter-revolutionary period of strict scrutiny in certain cases or certain issues such as cases involving scientific evidence about causation, toxic torts, and chemical waste issues.

The third and current era could be called the Era of Uncertainty. The *Daubert* decision left many questions unanswered. For instance, *Daubert* addressed scientific evidence. Does the same standard apply to all kinds of expert testimony? At any rate, Rossi concluded that the days of easy admissibility are over. The open federal rules have been replaced by judges' discretion; judges now must act as gatekeepers exercising scrutiny in determining the admissibility of expert testimony.

Michigan Rules of Evidence

Since the Michigan Rules of Evidence are derivations of the Federal Rules of Evidence, with many parallel rules, it is possible to refer to case law from other jurisdictions X but it is important to be aware of differences between the Michigan and Federal rules. For example, Federal Rule 803(8)(c) renders government investigative reports admissible as trustworthy evidence, but the Michigan rules end at 803(8)(b). Similarly, the last sentence of FRE 703 is not present in MRE 703, rendering Michigan testimony standards different because there is no requirement of reasonable reliance. And MRE 702 contains the word recognized, which is not present in the FRE. Because Michigan is not entertaining the amendments that are being entertained at the federal level, Judge Johnston predicted that as time goes by, differences between the Michigan and the federal rules may grow. He cautioned lawyers to be alert and aware of how the differences might affect litigation.

Judge Johnston agreed with Rossi that the area of expert testimony currently could correctly be termed as an era of uncertainty. He noted that the tort reform movement has, in at least one instance, resulted in the *Daubert* standards being written into the state statute. This raises the interesting question of what the correct standard should be. Is it permissible for the state legislature to adopt an evidentiary rule not adopted by the Michigan Supreme Court, given that the rules of evidence are not rules of procedure? Cases so far

tend to favor legislation rather than the MRE, but at this point it is hard to know the end result, and, observing the judiciary's displeasure with recent legislative actions, Judge Johnson predicted that this might just be the judiciary's opportunity to bite back.

Familiarity with Specific Judges

Judge Cohn emphasized the importance of familiarity with each judge's personal practices. He believes it is helpful to print all of a judge's opinions to familiarize oneself with a particular judge. He suggested that the Almanac of the Federal Judiciary, which profiles each judge and each chamber's trial practices, is a helpful resource. He advised that courtroom deputies also are repositories of information, and he further suggested that attorneys read the Civil Practice Standards by the ABA Litigation Section issued in February 1998.

Some unique features of Judge Cohn's courtroom practice include:

1) Availability to assist in resolving disputes by telephone. He does not permit motions to be filed without a telephone conference first. He makes no rulings without a court reporter; he abhors arguments about matters not on the record.

2) Early discovery is encouraged. He believes that reliable evidence will make settlement more likely because all parties can evaluate the strengths and weaknesses of their own and their opponent's case.

3) Flexible limitation of interrogatories, witnesses, or deposition length. He noted that his deputy feels that he is not strict enough in limiting discovery, but his view is that more discovery may lead to better evidence and understanding of a case. He abhors rigid time limits that prevent parties from fully developing a case.

4) Insistence on providing trial exhibits in a notebook for each juror.

In assisting juries, Judge Cohn suggested using multiple verdict forms and special questions, responding aggressively to jury questions, and submitting agreed written jury questionnaires. He suggested submitting direct testimony in written narrative form, allowing a witness to read it and then to be cross examined. He feels that the rules should provide guidance, not tripwires, although he noted that this is a hard sell in the federal system.

Negotiation Techniques

Professor White focused on specific negotiating techniques and non-verbal cues that are available to supplement oral communication but do not appear in transcripts. He recommended Paul Eckman's book and videotape, *Lying*, as providing helpful information on detecting X or getting away with X lies, and he walked through a number of scenarios detailing tell-tale signs of concealment or anxiety. He cautioned lawyers to be aware of stereotypes and to recognize when we are responding to our own racial, ethnic, and gender biases. Specifically, he advised us to use formal addresses and to be careful in making assumptions about who is in charge on the other side.

Finally, White addressed certain ethical dilemmas unique to negotiation. Two major ethical issues involved in negotiations are lying or misleading another party about settlement authority and the use of power beyond the case to intimidate another party. Professor White emphasized that he does not have answers to these questions, but urged us to be conscious of these potential problems and to raise our perception of our own biases and negotiation techniques in approaching future negotiations.

Judge Cohn's Address To The Litigation Section

The Honorable Avern Cohn
United States District Court, Eastern District of Michigan

Mackinac Island
August 8, 1998

I see by the schedule I have 45 minutes. I want to leave time for questions and I know the pain of long talks. Carl Levin, when he gives a speech, reminds his audience of the school boy asked to write a brief essay on Socrates. The boy wrote:

Socrates was a philosopher. He talked a lot. He was poisoned.

I.

I appreciate the invitation to speak to you this morning. Occasions such as this give me the opportunity to collect my thoughts as to what I do as a trial judge X what I have been doing; what the future holds for me in my day-to-day work; what I expect of myself; and what I expect of the lawyers who appear in front of me.

Today I want to talk about the civil side of my docket X pretrial and trial X non-jury and jury. The criminal side of my docket, while involving some of the same considerations, also has distinct differences and warrants a separate talk.

What I hope will come of our get-together is a better understanding by you of the United States District Court for the Eastern District of Michigan and what you can expect and particularly in my courtroom and chambers. Judges do differ -- more about that later.

In preparation for today, I re-read the articles I wrote in the State Bar Journal in 1982, 1983 and 1990 on trial practice and on effective brief writing. Much of what I said then is still relevant today. Indeed, I am surprised at how little my views have changed over the years and how little the way lawyers do things have changed over the years.

The most dramatic change is that in 1982 there were 32 of my cases available to you in LEXIS. Today there are, at last count, 295 cases. The 295 does not include the cases in which I have participated as an appellate judge. Twice a year I sit with the Court of Appeals in Cincinnati and twice I have sat with the Court of Appeals for the Federal Circuit. There are perhaps 20 to 25 cases in the reports in which I was the writing judge or in which I dissented.

If I had an important case in front of me and my client could afford the time, I would boot up these cases to get a perspective of me as a judge. I would also pay particular attention to cases in the Court of Appeals, reported and unreported, in which my decisions were reviewed. I would especially look at the decisions in which I was reversed.

In preparation for today I have talked to members of the Section. I have read your Section newsletter. The newsletter is lively and informative. The editors do a good job. I am of the view that section newsletters are important to the well being of lawyers. They perhaps should be a bit more candid X more critical of judges who do not do a good job. We learn a lot from those who disagree with us

I must tell you I find participation in bar activities especially helpful. For example, I recently signed on as a member of the Committee on Pretrial Practice and Discovery of the American Bar Association Section of Litigation. It has as lively and informative newsletter as I have seen in this area.

Also, I have just sat and thought X mostly during a couple of rainy days in early July in Charlevoix where I put the basics of this talk together.

II.

Let me begin by making a couple of broad observations about litigation X about going to court to resolve a civil dispute. It has always been a problematic thing and an expensive enterprise. Let me read to you a passage from George Elliot's 1875 novel X *Daniel Deronda*. A mother and daughter are talking about a sudden loss of the family fortune caused by an imprudent investment by the family's financial advisor.

The mother says to the daughter:

> No dear, you don't understand. There were great speculations: he meant to gain. It was all about mines and things of that sort. He risked too much.

The daughter responds:

> I don't call that Providence: it was his improvidence with our money, and he ought to be punished. Can't we go to law and recover our fortune? My uncle ought to take measures, and not sit down by such wrongs. We ought to go to law.

The mother replies:

> My dear child, law can never bring back money lost in that way. Your uncle says it is milk spilt upon the ground. Besides, one must have a fortune to get any law: there is no law for people who are ruined. And our money has only gone along with other people's. We are not the only sufferers: others have to resign themselves besides us.

Second, understand that there is no such thing as truth. Truth is a relative matter. In final argument recently a lawyer said to a jury in my courtroom:

> . . . it doesn't matter if you are under oath in a deposition or you are under oath in a federal courtroom, if you are under oath, you are under oath, and that means you tell the truth; and the truth of what happened is not a variable thing. The truth is the truth, and the truth is the truth from the moment the event happens until the end of time.

That's malarkey; that is simply not true. Reconstruction of events which occurred in the past X the essence of most trials X is one of the most difficult intellectual exercises I know. It is your job as litigator to simplify that task for the fact finder X be it judge or be it jury. It is the fact finder who ultimately decides what occurred X most often, what likely occurred. Professor James Boyd White has been quoted as saying:

> A legal verdict is not a judgment about what really happened in the world but about what happened in court.

Also remember a trial is not a search for truth; it is a device to resolve a dispute. In resolving the dispute you can only hope to approach truth.

As I mentioned a moment ago, judges do differ. It has been said that the two most important influences on a judge's decision making are the judge's life experiences and the judge's world outlook. Life experiences differ and world outlook differs. There are now 15 judges in regular service

in the Eastern District and three senior judges. Ninety to 95% of the time each of them will decide the exact same way in a particular case; five percent of the time each will differ from one another X sometimes widely differ.

It is that five percent with which you must concern yourself; and the luck of the draw will likely determine the outcome of your case when it falls in the five percent. I recently asked a lawyer what is likely to be the outcome of the constitutional challenge to medical malpractice reform. He responded, AI'll tell you after the November election.≅

Also remember a trial is not a search for truth; it is a device to resolve a dispute. In resolving the dispute you can only hope to approach truth.

There are three general resources for you to look at to get a grip on the judge on your case and the judge's way of doing things.

1) The Almanac of the Federal Judiciary.

This gives a subjective description X sometimes accurate X sometimes off-the-mark of individual judges. The Federal Bar Association and Oakland County Bar Association each publish a book profiling the several judges X describing for each particular chambers and trial practices. These profiles are worth a read each time you file a case and get assigned a judge in the Eastern District with whom you are not particularly familiar.

Lastly and importantly, there is curbstone conversation with other lawyers as well as invitations to a judge to speak at an organizational setting. I am surprised how little exchange of information there is about judges in informal chit-chats and the like. When I was in practice I was always talking to colleagues about judges. The more you know of the idiosyncrasies and peculiarities of the judge you are in front of the better equipped you are to do a good job for your client. And always remember, it is your client who wins or loses, not you.

III.

Now I am sure you are generally familiar with our civil workload. But let me take a minute to better describe it to you. For the year ended September 30, 1996 each judge was assigned about 400 civil cases and each disposed of a like amount. These cases were spread among tort; contract; civil rights, including prisoner and police brutality; discrimination, including sex, race and age and disability; government collections; anti-trust; intellectual property including patent, trademark and copyright; and social security. Obviously each type of case does not require the same effort or offer the same challenge. Ninety-five percent of these cases settled before trial. About 40% involved no judicial activity at all.

As to jury trials, there are relatively few. For the 12 months ended September 30, 1996, 103 jury trials commenced overall. Seventy-six went to verdict. The rest resulted in mistrial, hung jury, directed verdict, settled or were continued. The median was 4 per judge. Several judges tried only one or two; one judge tried nine. Thus you can see that trial by jury on the civil side is a rare phenomenon in the Eastern District.

IV.

Let me turn for a few minutes to the manner in which cases go through our court are regulated. You have to have a familiarity with :

1) The Federal Rules Of Civil Procedure.

2) The Local Rules.

3) Administrative Orders. These are admittedly difficult to come by, but they do exist and on occasion govern a case in some fashion.

4) Plan For The Reduction And Delay In Civil Cases/Civil Justice Reform Act of 1990. This is largely outdated.

5) Plans - Plan For The Reimbursement Of Pro Bono Attorney Expenses In Civil Cases.

6) Procedural Outlines are available covering, for example:

* Prisoner Civil Rights Cases.

* Non-Prisoner IFP Cases.

7) Chambers Practices - each judge has his or her own mini-set of rules which must be respected.

* Scheduling Orders.
* Motion Practice Guidelines. (See Federal Bar Association Practice Manual)
* 1998 Court Guidelines - Oakland County Bar Association.

V.

Again, to shift gears, let me describe to you areas of concern currently active which impact your cases in the Eastern District.

1) Rule 11, Federal Rules Civil Procedure.

2) Chapter II, Venue Choice by large Public Corporation.

3) Disunion caused by varying local rules.

4) Scope of Discovery.

5) Rule 68 FRCP - Offer of Judgment.

6) Delay - Trial Judge=s Role - Eastern District of Virginia - Civil Justice Reform Act - Rand Study.

7) Summary Judgment.

8) Alternate Dispute Resolution.

9) Punitive Damages.

10) Workload - Allocation.

11) Special Masters.

12) Court-Appointed Experts.

13) Expert Testimony - Reference Manual on Scientific Evidence - FJC.

14) Complex Litigation - Manual For Complex Litigation - FJC.

15) Pro Se Litigation.

16) Prisoner Civil Rights Litigation.

17) The Jury System.

VI.

Today there is a real emphasis on improving the quality of decision making particularly in complex cases X that is a case that may or does result in a trial lasting longer than a day or two, whether before the judge or by a jury. Importantly, the judges X at least most of them X try to understand early on whether a case is a simple fender-bender X or a complex patent case X to go to the polar ends of the kinds of cases we get. Also, early on, our judges are conscious of whether he or she is to decide it or it is a jury's job to make the decision.

Now this effort to improve the quality of the path the case takes to trial X if it goes to trial X and the quality of the decision making involves a number of innovations. For these innovations I recommend each of you read the newly published Civil Practice Trial Standards of the American Bar Association.

I want to talk about some of these innovations, roughly dividing them between pretrial, trial, and jury and non-jury, remembering that they frequently cross over. I am constrained to say that many times I am the one to suggest an innovation. I am continually puzzled by the infrequency with which litigators come up with innovative suggestions to simplify the trial process and improve the quality of the information available to the fact finder.

In no particular order of importance, let me suggest some of the innovations, pretrial first. They are:

* Strong case management - bringing the lawyers into chambers early on to discuss the course of discovery, likely motions, and probable trial date and then strongly monitoring the progress of the case thereafter.

* Encouraging early disclosure of relevant evidence. Experience tells us that settlement or resolution of a case is more likely to occur as soon as each side can compare the strength and weakness of the opponent's case. This is what I try to do when I mediate a case on my docket or at the request of a colleague.

* Limit the number of interrogatories and also limit the deposition time for witnesses.

* Limit discovery time. This I do poorly. My deputy clerk is constantly critical of me for my willingness to extend discovery. I do so because I believe the rectitude of decision, as Jeremy Bentham believed, is the most important object of a judge's work.

* Hands-on management of discovery. I do this by my availability by telephone to the parties to decide -- or more properly, to suggest, resolution of discovery disputes, particularly in the course of a deposition.

* Use of a special master or court-appointed expert or technical advisor to assist in dealing with complex questions. Judges are generalists and not expected to have technical expertise in the variety of areas they are called on to deal with. I have gotten parties to agree, and to pay for, my access to an academic in particularly arcane areas of the law. This, I believe, is to the advantage of the parties. The better I understand the esoteric aspects of a case the better job I do as a judge.

As to jury trials, the latest thinking suggests a variety of innovations such as:

- questions by the jury
- note taking by the jury
- juror notebooks

- multiple sets of exhibits - one set for each juror
- preliminary instruction on the law of the case
- written or recorded instructions in the jury room during deliberations
- multiple verdicts on the various issues in the case and special questions directed to determine events.
- aggressive response to questions from the jury during deliberations
- written questionnaires during the voir dire

As to the trial itself, I consider:

- bifurcation of issues
- time limits on each witness and overall presentation
- submission of direct testimony in narrative form

In reviewing these innovations, I am always careful to take note of the type of case, the expense to the parties, and the ability of the lawyers to handle the case at hand.

VII.

Let me move on. I recently read an essay by Michael J. Zander, a law professor at the London School of Economics, in the Israel Law Review entitled *What Can Be Done About Cost And Delay In Civil Litigation*. Zander is talking of the English experience and recommendations akin to our Civil Reform Justice Act (of blessed memory) requirements. Zander makes a couple of points worth repeating.

He cautions that there is a large gap between theory on the one hand and practice on the other. I fear much of what I have said today is theory. The effort to put theory into practice is a formidable one.

Zander notes that the concern for efficient handling of cases is a public concern. Delay is a matter in which the public has an interest. The reliability of evidence diminishes with the passage of time. Delay causes personal stress and hardship, particularly to plaintiffs. Delays lead to inefficiency and lower public estimation of the legal system. Therefore, whether the parties care or not, the judge must always be concerned with delay in the progress of a case.

I found Zander's most profound observation is his view on the role of sanctions -- the pet of so many judges these days. Of sanctions Zander says, quoting another English scholar:

> Courts do not exist for the sake of discipline. Rules should not be framed on the basis of imposing penalties or producing automatic consequences for non-compliance. The function of rules is to provide guidelines, not trip wires, and then fulfill their functions most where they intrude least in the course of litigation.

VIII.

No presentation of this kind would be complete without some personal ventilation X some description of pet peeves.

First, I am continually amazed when I confront the failure of lawyers appearing before me to read my pretrial and scheduling order and I find non-compliance with its requirements. I think it reasonable to expect that a lawyer with a case on my docket will do it my way.

Second, I bristle at the shotgun approach to issues and the failure to focus on the issues of a case.

Third, I am always concerned with the failure of lawyers in a multi-defendant case to cooperate in order to simplify the presentation and reduce the expense.

Fourth, I cannot abide pettiness in discovery, which frequently is caused either by inattentiveness or by confusion between acting the role of the advocate and acting the role of the principle.

IX.

I am reading the new biography of Benjamin Cardozo who began his legal life as a practicing lawyer and went on to have an admirable career in the New York Court of Appeals and for a short time as a Supreme Court Justice. The author's description of Cardozo as a lawyer is a good choice.

> He was a prodigious worker and a persuasive advocate. He wrote powerful briefs, tailoring them to the needs of the case. He argued the facts when they were helpful to his cause, and he argued the law when precedent or principle favored his client. If he could appeal to moral justice he did so in eloquent fashion. If a technical argument was his only salvation, he would turn in that direction. He never got distracted from the client's goal. His briefs bore the mark of considerable effort spent thinking about the best way to present his client's cause. Finally, he did not shrink from personal attack on the opposition or its counsel if the needs of the case called for it.
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> . . . . .
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> The scholarship in his briefs was always a means to an end. Frequently, he rejected academic abstraction in favor of "common sense" analysis or arguments based on the "justice" or "fairness" of the situation.
>
> . . . . .
>
> A good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery and deceit. A good litigator also learns a great deal about the subject matter of his cases. Cardozo read widely and was more familiar with new ideas than most practicing lawyers.

X.

Again, I thank you for the opportunity to speak and hopefully you have been informed -- not bored, here this morning.

Did You Miss the Summer Conference?

Materials are available upon request until October 15, 1998, for a charge of $75.

Contact **Arlene Rubinstein**, Summer Conference Administrator, to order your materials.
248-644-7378
248-540-2771 (fax)

Nominations

The Section' s Nominating Committee has advanced the names of the following attorneys for Officer and Council Member positions for the upcoming year:

Officers

Ted C. Farmer, Chair - Elect
David C. Sarnacki, Secretary
Richard J. Paul, Treasurer

Council Members

Anne Warren Bagno
Mark W. McInerney
Jerome P. Pesick
C. Robert Wartell
Kevin O' Dowd

John Mucha III, as current Chair-Elect, will become the Section Chair.

If you wish to nominate any currently active member of the Litigation Section, please contact any current officer with your nomination.

Litigation Section
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