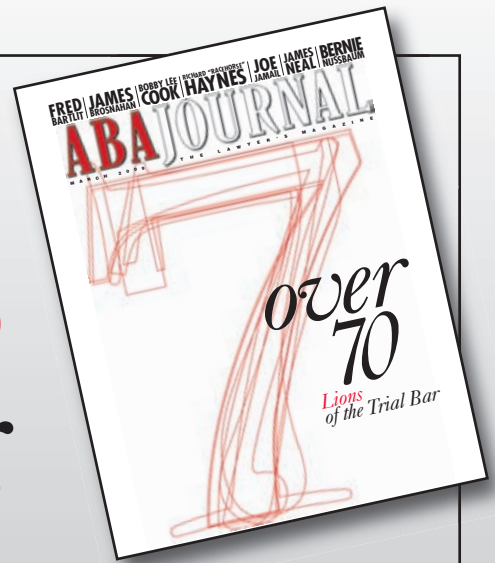


Lions of the Trial Bar



By Mark Curriden

THEIR NAMES CAN BE FOUND IN THE PAGES OF casebooks and on the sides of law school buildings. They've tried some of the most important cases of the last 50 years, dazzling juries and swaying judges. They've won—or saved—billions of dollars for their clients, and become wealthy men in the process.

They've also represented the guilty and unpopular because they thought it was the right thing to do. They are the lawyers most of us secretly wish we could be, if only for a day.

And now they're in the autumn of their careers.

Fred Bartlit. James Brosnahan. Bobby Lee Cook. Richard "Racehorse" Haynes. Joe Jamail. James Neal. Bernie Nussbaum.

These seven lawyers are among the best litigators in America. Strike that. Most of them consider the word *litigator* an insult. They're trial lawyers.

They're all past—in some cases, well past—70 years of age, but when the nation's largest corporations and most important people face serious trouble, they still turn to these seven old-timers.

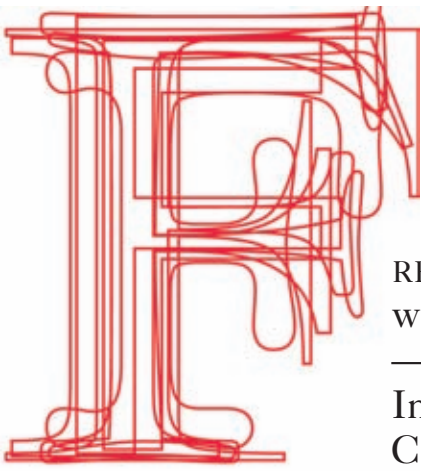
That's because, as the number of trials in the United States seems to be approaching zero, there are fewer and fewer trial lawyers with the experience to take their place.

Says U.S. District Judge Royal Furgeson, who's seen several at work in his San Antonio courtroom: "They represent a breed of lawyer that I fear is on the verge of extinction."

But before they go, they've got some tales to tell—stories that are timeless, provocative, profane and laugh-out-loud funny. And most of them are even true.

Sit back, pour yourself a drink, and learn how it was done back in the day. Class is in session.

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is a freelance writer based in Dallas.*



RED BARTLIT WAS TOLD IT was a case he could not win—that no lawyer could win. In 1996, jet engine supplier Chromalloy sued Pratt &

Whitney, a unit of United Technologies Corp., claiming the defendant illegally monopolized the jet engine parts market. ¶ The smoking-gun evidence in the 16-week state court trial in San Antonio was an internal, C-level Pratt & Whitney memo stating that its goal was to “destroy the opposition” and “put them out of business.”

The memo was accompanied by a drawing of a Chromalloy factory exploding, which was followed by the words “and we will.”

When it became clear that the case was going to trial, Pratt & Whitney hired Bartlit.

“Let’s put it this way,” Bartlit says. “As facts go in antitrust cases, this one didn’t look good.”

Bartlit told jurors that the memo was nothing more than his client trying to be enthusiastic about the fight ahead, the same way a football team tries to build excitement in the locker room before taking the field.

“I told the jury that the memo was just a bit of bravado and that’s it,” Bartlit says. “I knew I had to keep my argument simple, but I wasn’t sure it was working.”

Until ...

The plaintiff’s star witness was a renowned antitrust expert who had been in court for much of the trial. Under cross-examination, Bartlit asked the expert how much he was being paid by the plaintiff.

The expert responded: \$550 a day. Realizing that Texas jurors were paid a mere \$6 a day—the lowest juror pay in the nation at the time—Bartlit decided to make some hay out of it.

“So, when the jurors and I see you sipping coffee during breaks in the hallway, are you getting paid \$550 then?”

“Yes, I am,” the witness responded.

“Well, when we see you sitting in the back of the courtroom reading the newspaper, surely you aren’t really being paid then, are you?”

“Why, yes, I am,” the expert replied. “But I am losing money on this trial because I’ve raised my rate to \$600 a day. So every day that I am here, I am actually losing \$50 a day.”

That evening, after court had ended, the jurors told the judge that they had voted to donate their \$6 a day to the expert because they felt sorry for him.

“At that point, I figured I was in pretty good shape,” Bartlit says.

The four-month trial ended with the jury finding for the defendant on all counts.

HIGH-STAKES LEADER

NOW 76, BARTLIT HAS TRIED SCORES and scores of bench and jury trials. His 16-page online resumé lists more than 50 major trials since 1970 in which the futures of General Motors, United Technologies, Bayer, Amoco and DuPont were at stake. Oh yeah, there’s that one little Florida case from November 2000 in which the presidency of the United States was in question.

“It is amazing how many lawyers have never tried a case,” he says. “Litigators think about lawsuits. Trial lawyers try them. And I fear that we are witnessing a great decline in the number of trial

FRED H. BARTLIT JR.

Born 1932 in Harvey, Ill.

Firm Bartlit Beck Herman Palenchar & Scott in Chicago and Denver.

Law school University of Illinois.

Significant cases

1976—Successfully defended General Motors in a \$2 billion price-fixing antitrust case in Connecticut.

1981—Defended chemical giant Monsanto in a lawsuit brought by SuperTurf claiming treble damages for price fixing on artificial turf products. Monsanto won at trial and on appeal.

1996—Represented United Technologies on claims brought by Chromalloy that UT’s Pratt & Whitney unit monopolized the sale of jet engine parts. He won.

2002—Was victorious in appeals of two lawsuits defending Bayer’s patent on the antibiotic drug Cipro. Also won trials of both in lower courts.

2004—Successfully defended investment fund Forstmann Little & Co. from \$1 billion in claims by the state of Connecticut in state court.

Other career highlights—Trial counsel (with partner Phil Beck) to George W. Bush against Al Gore in 2000 Florida state court election litigation.

lawyers who have had these great courtroom experiences to tell about.”

There’s one reason for this, he says: “Very few cases actually go to trial today. It is a disturbing and unhealthy trend.”

Bartlit remembers the day he decided to become a trial lawyer. He was a first-year associate at Kirkland & Ellis in Chicago in 1963. He was being paid \$1,000 less per year than his fellow first-years because he went to “the rinky-dink University of Illinois,” while the others had law degrees from Harvard, Yale and the University of Chicago.

He asked his father, a small-town Illinois lawyer, for advice on how he could stand out and succeed amid

such overachievers. Simple, his father responded: Find something you can do that no one else wants to do. Bartlit knew immediately what that would be: trying cases.

“Sure, all lawyers say they wanted to try cases,” he says. “But I realized that, when push came to shove, not one of them really wanted to actually go to court and try cases to a jury. I think it’s because a lot of lawyers probably got the shit beat out of them in high school, so they have this fear of losing. They do whatever it takes to avoid going to trial.”

Bartlit tried his first case as lead counsel in the mid-1960s. Kirkland & Ellis client Amoco faced an antitrust lawsuit in Salt Lake City filed by dozens of service station dealers who claimed Amoco was doing things improperly to control prices. In 2009 dollars, he says, more than \$100 million was at stake.

Even though Bartlit wasn’t a partner, he was determined from the start of the case to position himself as the lawyer to try it. He took every deposition. He reviewed every document. He attended every court hearing. When the case didn’t settle, it was clear to the client and K&E partners that Bartlit knew everything about this case and should lead the trial team.

“Besides, no one else wanted to try it,” he says.

John Wayne in a pinstripe suit

Bartlit started his opening statement by telling jurors that the service station owners were nice people.

“I see them all here in the courtroom. There’s Mr. and Mrs. Thornton. Will you please stand? Good to see you here,” Bartlit said, before turning toward the jurors. “Now, Mr. and Mrs. Thornton are very good people, and I hate to say this, but Mr. Thornton hasn’t told the truth.

“I feel bad that I have to be the person to show you this, but for some reason—maybe because their lawyers have told them they have to do this, I don’t know—but they aren’t telling you the truth,” he said.

Bartlit repeated this with each service station owner in the courtroom. Then, over the next month, he used cross-examination and the plaintiffs’ own documents to show jurors how the plaintiffs’ case was false.

When closing arguments came, Bartlit started by pointing out that Mr. and Mrs. Thornton and the other owners were now absent from the courtroom.

“Where are they? Why aren’t they here today?” he asked, watching the

jurors scan the courtroom looking for the absent plaintiffs. “I wonder if they didn’t come because they didn’t want to face you and because they knew you caught them in their lies. I guess they couldn’t hold their heads up.”

The jury found in Amoco’s favor on all counts.

TROOP TACTICS

BARTLIT WAKES EVERY MORNING BY 4— even earlier when he’s in trial. He exercises for two hours and plays basketball regularly. He says the physical energy it takes to be a successful trial lawyer is underestimated.

“Most trials are not sprints, but are marathons,” says Bartlit, who spent eight years in the U.S. Army as a Ranger after graduating from West Point and before law school.

“I’ve tried several cases that lasted three or four months. So you must remain fit and have the strength and energy to handle it.”

One of Bartlit’s biggest wins came in 1974 when he represented General Motors in a criminal antitrust case. GM and Ford had been indicted on charges that the two automakers had conspired to fix prices and maintain a monopoly in



PHOTOGRAPH COURTESY OF FRED BARTLIT

Date February 2007.

Location Blue River, British Columbia, Canada.

Who Fred Bartlit.

What Helicopter skiing in the Cariboo and Monashee mountain ranges.

Notes Bartlit and his colleagues have gone heli skiing several times. The group of skiers varies—but one constant is Glen Summers, a partner in the firm’s Denver office. The trip didn’t happen last year, however, because Bartlit was sidelined by a long trial in California. Bartlit believes that physical fitness contributes to his success in the courtroom.

the sale of large fleets of cars sold to governmental agencies and large private customers.

If found guilty, GM faced a modest maximum of \$100,000 in criminal fines. However, a conviction would have banned the world's largest car manufacturer from doing business with the government and made it

ratings unit to control and monopolize the data it needed to develop business lists.

NBL sought \$7.5 million in damages and demanded that D&B be required to divest its lucrative mailing list business.

In preparing for trial, Bartlit learned that for 25 years NBL had

matter for years, only to realize it will not be dismissed and is headed for trial. So the letter recommends cutting a deal.

"I get so many calls from corporate executives and general counsel telling me that their outside lawyers want them to settle just to avoid trial," he says. "But these companies

"Most trials are not sprints, but are marathons." —Fred Bartlit

much easier for other criminal prosecutions and private civil lawsuits to move forward.

"It was one of the most incredible trials of its time," he says. Henry Ford and John DeLorean were witnesses. "We estimated total damages to General Motors could have been in the \$4 billion range, which is about \$60 billion today."

SEARCHING FOR UNDERSTANDING

IN PUTTING TOGETHER HIS DEFENSE, BARTLIT SIFTED through every single document in the case and every set of minutes from every GM board meeting.

"I identified every time the GM board and its executives displayed uncertainty," he says. "Because if there's uncertainty, it shows there's no conspiracy."

Then he found the document that would be the foundation of his defense. It came in the form of minutes from a key board of directors meeting at which fleet sales were discussed. The minutes showed the General Motors board and executives pondering a single question over and over: "What will Ford do?"

The four-month trial ended with the jury acquitting GM of all charges.

"Jurors are like us: They hate not understanding things," says Bartlit. "They appreciate and trust the people—be it lawyers or witnesses—who help them better understand the facts and the meaning of the case."

He points to a 1980 trial in which he defended Dun & Bradstreet against an antitrust lawsuit filed by National Business Lists. NBL accused D&B of using its credit

been developing its lists from information taken from D&B's credit reference books in violation of the copyright infringement agreement.

In her 1988 book, *The Trial Lawyers*, Emily Couric quotes Bartlit's reaction: "Do you mean to tell me these guys ran their business on information they stole from us?" National Business Lists "had been stealing from us for years—and now they're complaining that they can't steal more."

Bartlit had found his defense, and it was a solid offense. Not only did the jury decide against NBL's claims; it found the plaintiff infringed Dun & Bradstreet's copyrights and awarded \$3.85 million to D&B.

RIDING TO THE RESCUE

BARTLIT SAYS HE'S LEARNED A KEY TO SUCCESS IN court is being one's self or at least not trying to be someone else.

"I tell our young lawyers the one thing we know jurors do is evaluate everyone in court, and they don't trust phonies," he says. "So always be yourself. If you can't figure out how you should act, I always say you should act like John Wayne. John Wayne wouldn't whine to the judge with objections. He wouldn't be arrogant. John Wayne was strong but quiet. He was a leader who focused on getting the job done."

Bartlit likes playing Wayne, riding to the rescue of his big corporate clients who have received what he calls "the letter." The letter, he says, is written by a company's main outside counsel who litigated a

don't want to settle. So they call me. I love getting that call."

Bartlit was at his daughter's wedding when he received a call from the office of Houston lawyer James Baker, the former secretary of state. Baker needed him to fly immediately to Tallahassee, Fla., to represent George W. Bush in the election dispute against Al Gore.

Bartlit waited until the wedding party was well under way, and then he slipped off to catch a private jet.

"I told my partner that us representing Bush in this was a no-win situation," he says. "If we lost, we would be called incompetent. If we won, no one would realize it because they don't know about trying cases."

Bartlit says the jury box was filled with television cameras. There were more reporters from more places than he thought possible. Bartlit says people think he represented Bush because of his politics.

"No one from the Bush camp ever asked me if I was a Republican," he says. "I hadn't even contributed to Bush's campaign. In fact, I gave money to Joe Lieberman because I thought he was a smart and reasonable guy."

"But I wasn't in this case because I thought the country would die if my client lost; I just thought it would be a great case to try," he says.

Then Bartlit pauses, as if he is thinking about whether he truly wants to say what's on his mind. Then, he just says it.

"You know, if I were to rate my most important cases, I wouldn't even put *Bush v. Gore* in the top 10." ■