

THE EXPECTATION GAP

WHAT YOU LEARN IN LAW SCHOOL V. WHAT LITIGATION ACTUALLY LOOKS LIKE

BY JORDAN ELLIOTT

I often tell people that I learned more in my first three months of practice than I did in three years of law school. In those three years, there's no doubting that I learned a lot: how to read a legal opinion, how to conduct legal research, how to think like a lawyer (read: be skeptical), how to write a legal memo, and a host of other valuable legal skills. But those first few months practicing taught me so many things that I was unfamiliar with, but play a large role in the practice of litigation: the discovery process, client management and communication, how many different types

of motions there are, and just how hard it can be to balance a dozen cases that are all in various stages of litigation.

The Oral Advocacy Myth

Law school tends to focus on oral advocacy skills: law students get cold-called, have oral argument simulations, participate in moot court or mock trial, and listen to guest speakers in class. It gives us the idea that oral advocacy is the center of litigation. The reality, however, is that written advocacy is the cornerstone of everything a litigator does. Complaints, answers, counterclaims, motions to dismiss, discovery requests, discovery responses, motions for summary judgment, briefs in opposition, replies in support, and motions in limine are all the foundation of your case. Persuading a judge and making your case starts on paper, long before you ever step into a courtroom.

Oral argument, on the other hand, doesn't happen as often as one might think. Many common pleas court judges decide matters on the pleadings, and for cases that aren't resolved on the pleadings, many are settled or resolved in mediation. At the appellate level, oral arguments are more likely, but brief, as you've already fully briefed the court with appellate briefs and replies.

The Life Cycle of a Case

Law school teaches you about the elements of claims and defenses. What it doesn't teach you is the life cycle of a case as a living, breathing procedural organism.

Everything starts with the complaint. You lay out your claims and your elements in the complaint, of course, but what you're really doing is telling a story. Here's what happened to my client, here's why what happened to my client fits this claim, here's why all of the elements of this claim are met, and here's what I'm asking for. It's what you thought you would have to do orally in front of the court, just written instead.

The defendant then answers your complaint and possibly counterclaims your client. Sometimes the counterclaim will reveal more information about the story that your client hadn't originally shared with you, so you might have to talk to your client, get a bigger picture of the story, and revise your strategy.

If the case survives the pleading stage, the judge or their staff attorney will hold a case management conference with counsel for both parties and set a schedule for the entire litigation: discovery deadlines, pre-trials, dispositive motion deadlines, a final pre-trial, and a trial date that will probably be continued at least once. This scheduling order guides your work on the case for the next one to three years.

Discovery: The Part They Don't Tell You About

Discovery is where the education gap becomes a canyon. One of the least discussed topics in law school, you might have been told that discovery exists, but not much more. Civil procedure covers the rules and timing. Evidence covers what can come in at trial. But there's no class that covers requesting documents and information from the other side, producing documents of your own, and sorting through hundreds, if not thousands, of documents, often looking for a needle in a haystack. Discovery is the driving factor in litigation. Without it, most parties don't have the evidence they need to prove their case on the pleadings or at trial. It's expensive, time-consuming, and strategic in ways that dwarf anything that happens at trial.

Depositions are also an important component of the discovery process. If you were lucky, you may have engaged in a deposition simulation or exercise in law school. Extracting testimony from a party or witness in a deposition requires extensive document review and preparation to ensure you know what you're talking about and what questions to ask to elicit responses that may

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be favorable to you. Defending a deposition requires the same extensive document review, plus preparing your witness so they have an idea of what might be coming at them.

Beyond the time-consuming work of document review, there are also discovery disputes. Sometimes, the opposing party fails to timely produce documents, provides vague or evasive interrogatory answers, or claims overbroad privilege. If the parties can't work it out, they file a motion to compel, asking the judge to force the other side to comply with the discovery requests. Judges, however, are not fans of discovery disputes and often require counsel to attempt to resolve the dispute themselves.

Dispositive Motions

The next major step is typically a motion for summary judgment under Civ.R. 56. Law school certainly taught us that a party can move for summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, and if you're really lucky, you had to write one for your legal writing class. Motions for summary judgment are significant. If well-crafted, they can dispose of the case entirely — hence the name, “dispositive.”

Writing a motion for summary judgment is no easy feat. It takes time to lay out the facts, supported by deposition testimony or answers to interrogatories, and go through each and every element of each and every claim and explain why that element has been met (or, if you're the defendant, why that element hasn't been met). You have to research, write, revise, rewrite, and re-research, and just when you think you're done, you might catch something you overlooked.

For me, dispositive motions feel like the turning point where hard work can turn into results. The brief itself may run fifty or sixty pages with exhibits. Writing a dispositive motion is one of the most intellectually stimulating and demanding things that I do as a litigator, but it's also one of the most rewarding. Knowing a case well enough to give the court an intelligent analysis of the facts and the law and make a persuasive argument as to why your client should win is the whole point, and being able to do it is an accomplishment.

Trial is the Exception, Not the Rule

There are many mechanisms for the disposal or resolution of a case before trial, and because

of those mechanisms, the vast majority of civil cases never go to trial. Many settle, some get dismissed (voluntarily or otherwise), and others are decided on summary judgment. By no means does this mean that trial and oral advocacy skills are not important. Being able to advocate for your client, written or oral, is paramount to being a litigator, but oral advocacy muscles are just not exercised as often as written advocacy muscles in litigation. Oral advocacy skills also come with time, experience, and the knowledge that it's much easier to stand up in court and make an argument in your client's favor when you know the facts and claims of the case like the back of your hand.

What I Wish I Knew

What I wish I knew when I first started is that litigation is project management as much as it is legal analysis and persuasion. It's deadlines, docketing, client communication, research, emails with opposing counsel, and calls with the court. It's knowing where your case is in its lifecycle and anticipating what comes next. It's doing your best to stay organized and on

top of things and then forgiving yourself when something manages to slip through the cracks. It's asking questions and talking through complex legal issues with another associate or a partner.

What I wish I knew is that the daily reality of litigation is quieter, more methodical, and in its own way, more demanding than anything I expected. Being a litigator is, at times, thoroughly exhausting, but always intellectually stimulating.



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