

From the Bench

# OBITUARY: THE AMERICAN TRIAL LAWYER, BORN 1641—DIED 20??

HON. MARK W. BENNETT

The author is in his 19th year as a U.S. district judge for the Northern District of Iowa.

The American trial lawyer (ATL), who, in innumerable ways, enhanced the lives of so many Americans and made the United States a fairer, healthier, safer, more egalitarian, and just nation, passed away recently. Although a precise age is uncertain, ATL is believed to have been at least 371 years old at the time of death.

The cause of death is uncertain. A blue-ribbon panel of forensic coroners performed one of the most extensive autopsies in history. They were unable to determine the precise cause or time of death. However, they were unanimous in their conclusion that death was not sudden. In fact, ATL had been placed on the Endangered Species List a decade or so before death. The autopsy determined that ATL most likely died from a long-term, progressive illness that began more than 40 years ago and was exacerbated by a slow, debilitating virus related to multifocal leukoencephalopathy—more commonly known as *Celotex-Anderson-Matsushita*

Syndrome—a disease of the central nervous system. The death certificate also lists the following probable causes of death: a strange autoimmune disease known as *Iqbal & Twombly*; a surge of “litigation industry” lymphoblastic cancer cells—replacing healthy trial-lawyer-skill cells; the vanishing civil jury trial—causing a massive drain of healthy red blood cells that were the lifeblood of ATL; a genetic mutation of the civil justice system that came to be known as “ADR”; the tragic inability of young offspring of ATL to obtain an essential growth hormone—trial experience; the inability of courts to implement reforms that would have reduced the enormous costs of getting cases to trial and enabled ATL to go off life support; a persistent metastasizing growth of the parasitic belief that trial judges should be “litigation managers” and that jury trials are a “failure of the system”; and the media, which, with the speed of an aggressive glioblastoma,

spread inaccurate information about allegedly frivolous lawsuits and verdicts like the McDonald’s “hot coffee” case.

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## Developing America

ATL was preceded in death by great-grandparents born in England, Scotland, and Wales, who were called to the bar as barristers, and by grandparents born of the colonial struggle for enduring freedom. The first colonial charter, enacted on December 10, 1641, the Massachusetts Body of Liberties was the first to provide, by name, for trial by jury in civil cases. The colonists prized the right to trial by jury as indispensable to their liberty. After that, trial by jury was mentioned in virtually every major document and speech delivered before the Revolution.

ATL reproduced plentifully and moved quickly through the developing America. At first, ATL was educated primarily through apprenticeships and “reading law.” Early revolutionary heroes who learned law through apprenticeships included John Adams, Alexander Hamilton, John Jay, Thomas Jefferson, and John Marshall. In 1799, the College of William and Mary appointed Jefferson’s former tutor and signer of the Declaration of Independence, George Wythe, as the first law professor in the United States. As a Virginia judge in 1806, Wythe tried to end slavery in that state by judicial interpretation. In a twist of fate, Wythe’s grandnephew, charged with Wythe’s murder, was acquitted because a Virginia law prohibited the only eyewitness, an African American, from testifying in the Virginia courts because of her race.

ATL had some famous siblings, among them Abraham Lincoln, the sixteenth president of the United States. Lincoln’s most famous criminal case occurred in 1852, when he defended William “Duff” Armstrong, who was accused of murder. Armstrong was acquitted when Lincoln used judicial notice of the *Farmer’s*

*Almanac* to demonstrate that the moon was too low in the sky for the eyewitnesses to see what they claimed they saw. Clarence Darrow, born in 1857, was one of the greatest progeny of ATL. Darrow defended Leopold and Loeb, the Scottsboro Boys, and, of course, John T. Scopes, accused of teaching the evolutionary origin of humans. In the Scopes trial, Darrow's opponent was a former presidential candidate, Williams Jennings Bryan.

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## American Trial Lawyers fought oppression, illegality, fraud, discrimination, and injustices.

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In 1869, ATL's first sister, Arabella Mansfield, from Burlington, Iowa, became the first woman admitted to the bar in the United States. Mansfield never practiced law, but she was an educator and was active in the women's suffrage movement, working closely with Susan B. Anthony.

ATL's progeny spread rapidly across the expanding United States, reaching every state and territory. By the mid-1900s, there were terrific trial lawyers in every major city. Here, in Iowa, while there were many great trial lawyers in the larger cities like Des Moines and Cedar Rapids, there were also great trial lawyers in smaller communities such as Sioux City, Waterloo, and Council Bluffs. Some of the best trial lawyer legends come from small towns like Spencer and Primghar, Iowa. These trial lawyers were in trial several times a month, trying an auto injury case one week and a will contest, land dispute, or commercial case the next. Unlike their "litigator" half brothers and sisters, the old school trial lawyers were feared—not for their overly burdensome

discovery acumen but for their uncanny ability to cross-examine a witness, like a saber slicing through butter, without the need for a prior deposition. They were world-class raconteurs and would hold the jurors in rapture with their spellbinding closing arguments. They had no need for notes and would never read their closings from a script. They tried cases solo, without an entourage of partners, associates, or legal assistants. Their lifeblood was trying cases in the courtroom.

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## Criticisms and Successes

ATL had critics. ATL was accused of filing too many frivolous lawsuits, driving up the price of goods and services, and making our society too litigious. However, others praised ATL for ably defending the U.S. Constitution and its Bill of Rights. ATL is, perhaps, more responsible for our enduring freedoms and the enforcement of our nation's laws than any other. American products, from airplanes to scalding coffee, pharmaceutical drugs, and scores of others, are safer and kill and maim far fewer Americans. Hundreds of thousands of lives have been spared from tobacco-related deaths, and billions have been saved in health care costs. Civil rights and liberties are more fully enjoyed. Minorities are more fully integrated into our nation's government, schools, jobs, and public accommodations. Air and water are cleaner. Roads, highways, hospitals, doctors' offices, and facilities for the aged and mentally and physically disabled are much safer. Individuals who have been bilked out of billions of their life savings in fraud schemes have obtained significant relief, as have stock holders in massive securities fraud cases. Corporations and individuals falsely accused of negligence, defamation, infringing others' intellectual property, and harming others in untold ways have been vindicated. Hundreds on death row have been exonerated. Law enforcement, jails,

and prisons are more humane. ATL aided thousands in the free exercise of their religion and prevented government from favoring any particular establishment of religion. ATL liberated the mentally ill from often horrid institutional conditions and gave the disabled access to employment and public accommodations. In short, ATL fought oppression, unfairness, illegality, fraud, discrimination, and injustices, both small and large, at every turn. ATL often left the practice of law to go into public service to make America a better place. President Abraham Lincoln is a classic example, leaving his work as a circuit-riding trial lawyer to guide the nation through one of its most difficult times. Less well publicized are the hundreds of thousands of progeny who were role models in their communities and served in every imaginable civic activity. They donated millions of hours to serve their communities. ATL was always a leader and a doer. ATL and progeny advised and counseled presidents and paupers and served on school boards and in Congress, and several have been awarded the Medal of Honor. They have worked pro bono in hundreds of thousands of cases and worked for low wages for countless nonprofit and public interest groups.

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## Survivors

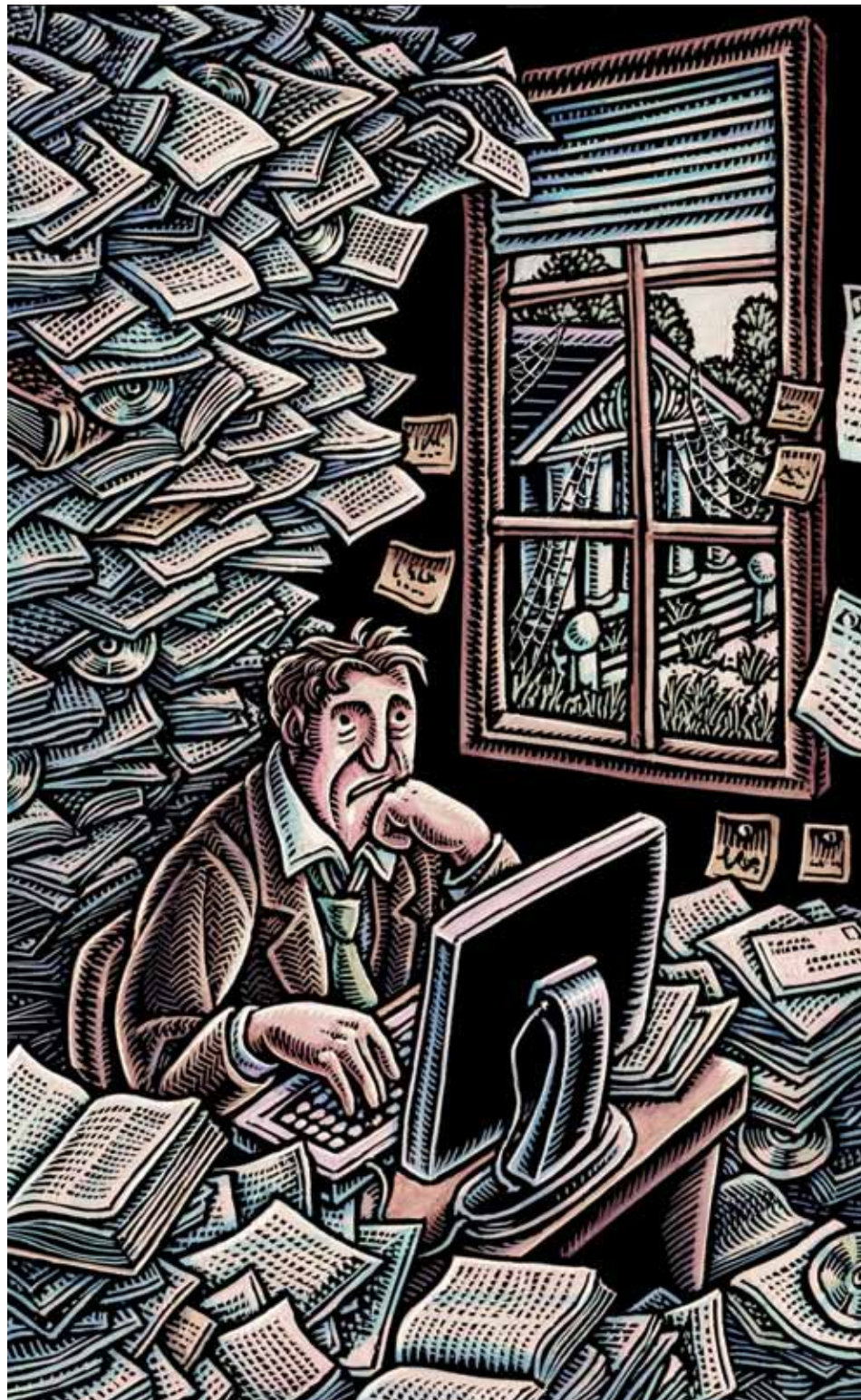
ATL is survived by offspring known as American litigators (ALs). Legend has it that the first litigator was the bastard child of ATL and ADR. Genetic sequencing reveals that ALs have specific DNA nucleotides: ALs do not try cases; ALs "litigate" them. ALs populate large and small firms alike. Most importantly, ALs are defined by their lack of real jury trial experience. They spew courtroom jargon to clients and opposing counsel as if they were real trial lawyers. However, ALs are a fraud. Even uninitiated associates, after hearing the same few war stories over and over, sense the truth that ALs are not the

true progeny of ATL. ALs prance around their law firms espousing how they routinely pound opponents into the ground in the courtroom. They don't. The closest they get to trial is as office Clarence Darrows. They file motions as if they are preparing to go to trial and bill endless hours for developing untested and unrealistic trial strategies—knowing they will never be used. ALs earn a living by generating Everest-like mountains of paper. They are paper tigers. They never work alone, always traveling in packs. As trial dates approach, their relentless bravado evaporates into unlimited excuses to settle. They will do virtually anything to avoid trial.

At a recent meeting of the American Litigators Association, the largest bar group in the country, the well-known fierce litigator, Benjamin Rambo, whose mother, grandfather, and great-grandfather were trial lawyers, gave the keynote speech. Rambo had the audience spellbound as he regaled them with his most famous war story. Rambo worked the crowd as he reached his crescendo: "I looked the mediator directly into her eyes and said . . ." A stunned silence followed, and then a single voice could be heard, murmuring, "He really showed that mediator!" A chorus of awed whispers joined in: "Unbelievable!" The offspring of the American Litigator jumped to their feet for a standing ovation.

Ironically, Benjamin Rambo has in his office a framed quote that belonged to his great-grandfather, a Tennessee country trial lawyer and southern raconteur of great renown. In faded, barely legible calligraphy are words from the commencement address by Charles May at Rambo's great-grandfather's 1875 University of Michigan Law School graduation:

The jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. Rome, Sparta and



Carthage fell because they did not know it, let not England and America fall because they threw it away.

Services for the American Trial Lawyer will be held at federal and state

courthouses across the United States. Honorary pallbearers include Gerry Spence, David Boies, Daniel Petrocelli, and Roxanne Conlin. In lieu of flowers, memorial contributions may be sent to the ABA. ■

Illustration by Lisa Haney