

James W. McElhaney and What He Did

This is a collection of articles from Jim McElhaney's *American Bar Association Journal* column "Litigation." They ran in the *Journal* from 1994 to 2011. In that period, "Litigation" appeared 190 times. Minus reprints, duplication, and a few dated items (a 1997 discussion of technology in the courtroom did not make the cut), there are 134 articles.

After 35 years as America's premier source of advice on handling and trying lawsuits, Jim has stopped writing. Some thoughts on his accomplishments seem in order.

Begin with the sheer volume of Jim's work. "Litigation" appeared every month in the *Journal* for 25 years. His "Trial Notebook" column appeared 4 times a year for about 30 years in *Litigation* magazine. Not counting reprints, there were well over 350 articles (almost all available in books published by the ABA). In addition, Jim devoted many years to law school teaching, hundreds of CLE appearances, trial consulting, and more. He was also a founding editor of *Litigation* and for two years its Editor-in-Chief, helping create a magazine that was the best source of advice for litigators anywhere.

Quantity is impressive, but content is what counts. Each McElhaney article is a 1500 word nugget of useful, entertaining advice—a winning combination of clarity, simplicity, and common sense.

The McElhaney approach is now so familiar that it is easy to forget how novel it was. Before Jim—before about 1975—most practice advice (when it was offered at all) was an idealized, big city business: It consisted of examples of inspiring oral arguments or searing cross examinations by titans of the urban, mostly East Coast, bar. Lawyers were given Francis Wellman's book on cross examination, or told to read transcripts

of Clarence Darrow's interrogations and arguments, or advised to study Thomas Murphy's work in the Alger Hiss trial. The idea was to emulate the very best, at their very best, at moments of high drama.

This was sometimes entertaining, but not very useful. Most of us are not trial geniuses, most trial geniuses also stumble, and most litigation is not high drama. Pre-McElhane litigation advice often was like giving a Little Leaguer a film of Babe Ruth hitting a home run and telling him to go hit one, too—when what the kid really needed was advice on where to stand in the batter's box, or even how to find it.

This started to change with Irving Younger, who, before Jim, was the dominant figure in trial practice instruction. Younger, who died far too young in 1988, offered principles and dealt with basic trial tasks (most notably the application of the hearsay rule). And Younger was extraordinary—a formidable mix of intelligence, wit, and riveting presence. Reading or listening to him, a lawyer would learn but might be overwhelmed by the energy and brilliance of it all—and that was the problem. Few of us could actually be Irving Younger.

The first time I listened to tapes of Younger, I felt as I once had in college, hearing an English professor parse the obscurities of a Wallace Stevens poem. His erudition and command were stunning. He spoke continuously, without notes, in complete sentences and full paragraphs, for precisely 60 minutes. Sitting there, I thought I really understood the poem. But, within 30 minutes, my grasp on it was weak. Within a day, I couldn't explain Stevens at all. Only someone like the professor could get it.

Likewise with Younger: He addressed important topics and gave helpful advice, but there was always the nagging feeling that, if you weren't Irving Younger, you would never quite pull it off.

The advice Jim gave for over 35 years was different—because it seemed *possible* to readers. What he suggested, they could do. His instruction was based on long experience, insight, and sophistication, but it was clear and simple. It was broken down into easy-to-understand and—more important—easy-to-apply components. Jim provided principles an everyday lawyer in a real lawsuit could use. They made sense and could be adapted from case to case. Here are a few: The lawyer is the most important witness. Find the focus of judgment. Tell stories. Trash the calendar and avoid chronology. Create pictures. Give the jury a wrong to right. Don't tell people what to think; let them find it for themselves. Avoid the paradoxes of persuasion and preparation. Write to the ear and speak to the eye.

Much of the effectiveness of Jim's advice came from the way he wrote. Again, Jim was a pioneer. Legal writing today is still often turgid and graceless, but things were worse in the mid-seventies. Jim's writing was a departure. It was clear, direct, and entirely non-legal. It was so accessible that a reader could forget there was an author involved at all—and I think that was Jim's goal. Jim was not a stylistic show off. There are many moments of verbal cleverness in his work, but they underline points and do not call attention to the author.

Jim's prose is so clear that it might seem easy to write. Not true. Effective, compelling simplicity is elusive. Too stripped down, writing can be dull and flat. Jim worked hard to perfect his style, fussing over it word by word, worrying about the impact of punctuation choices, and above all caring about the rhythm and sound of what he wrote. He read all his articles aloud to others, trying to detect places where they were hard to follow, or where they bogged down.

This gave a Midwestern, conversational quality to Jim's work. As compared to his big city trial advice predecessors, Jim wrote in a simple, plainspoken, everyday way that everyone, regardless of residence, liked. His articles were like an engaging talk with a smart, generous, experienced friend.

In fact, by the mid-1990s, that is what most McElhaney articles (including virtually all in this volume) actually were. Jim created a cast of characters who inhabited various fictional lawyer hangouts and talked about problems and how to fix them. Prominent among them were Angus, the source of almost all wisdom, and Jimmy, his dutiful Boswell, who pulled out a legal pad and made lists whenever Angus started offering advice.

The McElhaney fictional world opened up the columns to additional purposes and possibilities. They became more entertaining. By varying the fictional set up, Jim could offer the same advice several times, but in ways that seemed fresh. He could (and surely did) use the characters for a running, slightly subversive commentary on his legal pet peeves: professional bar association politicians, pompous academics, hide-bound judges, big firm lawyers who could "litigate" but not try cases, new lawyers in the clutches of their law school education, and duplicity wherever it appeared. Readers loved these characters, often writing Jim to ask who they were in real life.

Embedded in Jim's cast was something of a sly joke: "Jimmy" had all the surface characteristics of McElhaney himself, but I think the real McElhaney was Angus. In a way, Jim wrote and directed his own movies

and gave himself two leading roles. It was an arrangement Woody Allen would envy.

Jim was a missionary for his approach to writing and trial practice. Over the years, he got many like-minded lawyers involved. I was one. I remember still a two-hour phone call from Jim in 1985 to go over every word in a short article I had submitted to *Litigation*. A few days later, he invited me to join the magazine's board. That was the beginning of over 25 years in ABA publications, one of the high points of my professional career. It has been a pleasure and a privilege to work with Jim, as an author and editor—and as a friend.

Readers can open this book at any point and browse, or read it straight through. Good, entertaining advice is everywhere. Read and enjoy—and then apply what you have learned to improve how you handle lawsuits. There is no more fitting way to honor the career and achievement of Jim McElhaney. It's what he (and Angus and Jimmy) would want.

As an editor, I think credit is due one more person: James Podgers was Jim McElhaney's long-time editor at the *ABA Journal*. That in itself is a lot. Jim McElhaney was particular about those with whom he worked. You had to have an immediate, instinctive sense of what mattered to him in writing, or he would move on to someone else. Jim Podgers spent hours with McElhaney, debating and re-debating word choice and style. What appears here is of course Jim McElhaney's work, but Jim Podgers for years got the articles from typescript to the printed page, helping Jim improve them in innumerable ways—and that is an accomplishment worth note.

In the October 2012 *ABA Journal*, Jim Podgers wrote a wonderful profile entitled "The World of McElhaney." If you want to know more about Jim McElhaney, you should read it.

—Chris Lutz