

Litigation Support A Special Report

Searching in the Past

Dusty documents that may prove the case can be found by historians.



BY MICHAEL REIS

A WINNING HISTORY

Why hire historians to join your team of fact-finders and experts? When complex litigation depends on uncovering historical evidence, turning to a professional historian for assistance can make all the difference. Here are some true scenarios that illustrate what can happen when historical research is done improperly—or not at all:

- A 1908 deed that could bring an entirely new, “deep pocket” defendant into an environmental mediation gathered dust in a New England courthouse. Its importance was unrecognized because the clerks who did the title search did not realize that the town’s street address numbering system was different in the horse-and-buggy era.
- A late-19th century gas company bankruptcy proceeding could have extinguished liability for the bankrupt company’s successor, but the papers languished in a corporate vault in a fraying pasteboard box marked “Miscellaneous—Old Files.”
- A list of looted World War II assets, with the potential to provide crucial assistance in a current restitution proceeding, is found too late because untrained researchers dismissed it as just one of many “property related” attachments to a mundane letter in a German City Hall.

In contrast to those disasters, these happier endings, also drawn from actual experience, illustrate the special value historians can bring to cases where “ancient documents” are crucial:

- Forgotten memos documenting key 1970s rule-making decisions by a federal agency lay dormant for 25 years in a government warehouse in a Washington suburb, but were found in time by a team of historical researchers with knowledge of federal record-keeping practices.
- In a water-rights case, a brief but cogent history, supported by documentation, chronicling an Indian tribe’s relationship to the federal government was cited by the judge as critical evidence in deciding in favor of the plaintiff.
- Research at the National Archives turned up old military maps and photographs that helped to identify the likely locations of long-buried World War I and World War II munitions, to the relief of officials and dozens of U.S. communities.

Consulting historians have helped many litigators win their cases (two out of three of the worst-case scenarios above were eventually rectified when the attorneys turned to historians to review the record). While no one can guard against all evidentiary surprises, professional historians have the special skills to locate “smoking guns” when others can’t. Historians can also determine conclusively whether any “guns” exist, smoking or not, because they know how to ask the right questions about who held the records, how they were created and filed, and what may have become of them.

A growing number of litigators, corporate counsel, and public defenders have come to recognize that historians can find key evidence and synthesize the significant story lines of the past.

John Vorhees, a Denver partner in the environmental group at D.C.’s Patton Boggs and a client of my firm, considers the historian an important member of the litigation team: “In legal settings where retroactive statutes such as CERCLA apply, historical research is essential in documenting what has occurred and in reconstructing key events.”

Vorhees notes that when historians work closely with lawyers and clients, they can determine where and how to look for the facts, find them, and then recommend “next step” research and analytical strategies to fill remaining gaps and interpret and clarify the record.

Where do historians do their research? Any place that might have potentially relevant materials: private storage rooms, government offices, libraries, and archives.

Tracking down pertinent records often requires understanding the complex history of federal, state, and local government regulation from the inside out—to determine which agencies oversaw what activities and how this changed over time. This organizational context is frequently essential to identifying where surviving records are and what they are likely to reveal. Armed with such knowledge and sensitive to the legal issues at hand, historians can home in on caches of responsive records that may not have seen the light of day since they were created.

INTERPRETATION OF EVIDENCE

When attorneys need to establish the historical facts at issue, professional historians can provide crucial assistance in collecting as well as interpreting evidence. In recent years, the need for accurate historical research and analysis has arisen in a surprisingly wide variety of legal settings.

Environmental litigation. Reviewing corporate and public records, historians can determine the operational and ownership history of former industrial sites. They can unearth waste-disposal data, compile site-specific chronologies tracing the factual evolution over time of an issue or site, and develop databases for retrieval of key documents. Historians have made a crucial difference, for instance, in quickly finding and assembling relevant internal corporate records to help utility companies and other industries respond to the Environmental Protection Agency's 104(e) requests for information about waste disposal practices. When contamination contributors to an entire watershed or affected area need to be accurately pinpointed over a period of time, historians can find the site-specific records and make them accessible via detailed chronologies, databases, and maps keyed to sites.

Freedom of information. Historians can break the information logjam, using surviving records lists and transmittal forms to identify potentially relevant files withheld due to agency inaction or lack of knowledge. They can work with clients to draft targeted FOIA requests that stand a significantly better chance of yielding responsive documents, and can review and collect such documents under legal protocols.

Contract search and reconstruction. When a case turns upon finding a contract or insurance policy—or, alternatively, demonstrating that a contract or policy existed and what the relevant terms were—historians can dig deep to locate surviving agreements and policies in corporate or public files. Even when the contract itself has been destroyed, historians can uncover related documents, including contract correspondence, procurement manuals, contract regulations, and specifications, that courts may accept as evidence of the contractual terms and conditions crucial to liability determinations.

Corporate succession. Historians who know their way around business records, including articles of incorporation, Securities and Exchange Commission filings, deeds, and trade directories, can trace corporate succession when liability depends on piercing the corporate veil. Many successor firms to old industrial manufacturers have turned to historians to unravel who was who and when at which sites, when there are complex histories of ownership, operation, and control. Professional historians also perform targeted research in the public utility arena to determine whether holding companies or engineering service firms may have played significant roles at former manufactured gas plants.

Products and intellectual property. In toxic tort cases, historians can tap trade and public health literature to determine “standard practices” and accurately gauge past industry awareness of occupational and health hazards. On the products and processes front, professional historians can effectively and efficiently navigate through patent and trademark registrations, government specifications, and SEC filings to determine whether antecedents of present designs and ideas existed and whether they were in the public domain.

Statute of limitation and public awareness issues. When past

public awareness of a certain condition or hazard is at issue due to statute of limitation concerns, historians are perfectly poised to review volumes of microfilmed newspapers or journals for relevant articles and editorials. In addition to an approach that builds on findings as the search proceeds, historians bring to this task an understanding of the range of public settings where opinions may have been expressed or knowledge shared.

Legislative history. Trained to conduct thorough searches and spot key differences among similar official documents, historians can find out what Congress or a state legislature originally intended by key phrases or concepts, based on reviews of bills, committee reports, executive communications, hearings, and related legislative documents.

Restitution and reparations. Beginning in the late 1990s, public historians uncovered important, World War II-era governmental files concerning slave labor and looted art collections and other private assets under the Nazi regime. Today, historians continue to assist in official and private efforts involving issues of restitution, reparations, and truth and reconciliation. Consulting historians have worked with the U.S. Treasury Department to locate financial records regarding looted gold and with the Presidential Commission on Holocaust Assets to document U.S. reparations policy from the 1940s through the 1960s.

Post-traumatic stress syndrome and veterans benefits. Public defenders and court-appointed attorneys looking for military personnel files and after-action reports have hired historians to find them at the National Archives and at off-the-beaten-track records centers maintained by the government. Veterans seeking to file claims or appeal administrative rulings also turn to historians to unearth records that can justify new or increased benefits.

As generalists steeped in a broad knowledge of records collections and research techniques, professional historians are particularly well-suited to address these and other matters of historical fact.

Corporate or organizational files often hold a treasure trove of information. A critical first step may be simply determining the range and location of any older records, in the custody of the client, prior counsel, or other consultants, that could yield valuable historical data. Here, knowledgeable paralegals and information specialists can help by contacting employees in charge of records rooms, and saving or creating box and folder lists, card indices, and other finding aids. When a systematic search is performed, many clients find to their amazement that they have more legally important information in their old records than they realized.

For large volumes of in-house records, trained archivists from historical and records management firms can also assess control and preservation needs, working with the lawyers and historians.

Whether or not client warehouses yield fruitful paper trails, professional historians can help craft creative strategies to exploit the full range of likely outside resources. Historians have also qualified as expert witnesses.

Attorneys who confront historical records challenges know that history isn't “just one damned thing after another.” Historians unearth and make sense of the relevant past in the hunt for the evidence that shapes and sometimes makes the case.

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