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Vanishing Trials In Federal, State Courts: What Should The Legal Community Do?

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The Litigation Section of the American Bar Association initiated a study in 2003 to examine the perceived decline in trials in both federal and state courts. Data was collected which served as the predicate for a number of papers presented at an ABAconference in December 2003, and thereafter they were published in the *Journal of Empirical Legal Studies*, volume I, no. 3, November 2004. Many of the articles provide some enlightening insights into the decline of trials and the possible causes for it.

During the 40-year period from 1962 through 2002, the number of filings in U.S. district courts in the country increased from the 1962 level of 54,615 to the 2002 level of 274,711. Despite the five-fold increase in filings, the number of trials of civil cases actually declined from 5,802 trials in 1962 to 4,569 trials in 2002.

In 1962, 11.5 percent of federal civil cases were disposed of by trial and, by 2002, that figure had plummeted to 1.8 percent. This decline occurred while the number of lawyers tripled and the number of federal judges doubled. Despite the fact that in 1962 there were fewer judges, personnel and far less money, the federal courts 40 years ago were conducting more than twice as many civil trials than they are today.

There was also a steep decrease in the number of criminal trials which dropped from the 1962 level of 5,097 trials, to the 2002 total of 3,574 trials.

The decline in trials was not limited to federal courts, since state courts also experienced a drop off in both civil and criminal trials.

There are a myriad of reasons given for the decline in the number of trials. In the civil area, more cases are being settled in proportion to the number of filings as compared to 1962 and that is due, in part, to the increased use of alternative dispute resolution forums, the increased cost of trials, and the interest of parties to limit the risks of adverse verdicts. Some would also suggest that there are judges who believe they have failed in their mission if the case proceeds to trial. The pressure to settle from courts can inevitably reduce the number of trials.

In the criminal area, there is no doubt that the Federal Sentencing Guidelines are largely responsible for the decline in criminal trials in federal courts in view of the substantial penalties imposed upon a defendant who chooses to exercise his or her right to a trial and loses.

In light of the decline in trials, there must also necessarily be a corresponding decline in the trial skills of both judges and lawyers. As a legal community, we should be aware of this consequence, and consider developing plans to address it.

If one draws an analogy to the health care profession, few patients would be anxious to undergo major surgery if the operating surgeon had not operated on a patient in over a year. Likewise, a client who is about to go to trial would most likely be apprehensive if advised that the designated trial attorney has not been before a jury in over a year. Unfortunately, that is becoming more the rule than the exception.

Although we cannot force clients to agree to more trials or require judges to try more cases, we can attempt to compensate for this decline by instituting programs that will hopefully assist lawyers in both developing and honing their trial skills.

We should encourage the Monroe County Bar Association to develop a plan, and among my suggestions are the following:

1. Since it has been approximately 10 years since we had a National Institute of Trial Advocacy (NITA) program in Rochester, we should consider presenting another such

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program. It is a very expensive undertaking to take the two week NITA course in Colorado or elsewhere, and it is much more economical to arrange an abbreviated program here in the Rochester area. It can be presented over a two or three day period, and it can bring together experienced trial lawyers who can serve as instructors.

2. In my review of the continuing legal education programs sponsored by MCBA during the past two years, there are very few programs dealing with trial skills. Although there are many worthwhile CLE programs in both substantive and procedural areas, there are very few, if any, dealing with jury selection, presenting opening and closing arguments, cross-examination and direct examination of witnesses. We need to increase the number of trial skill programs.

3. A few years ago the Rochester Chapter of the American Board of Trial Advocates (ABOTA) instituted a program in cooperation with the U.S. district court to handle prisoner civil rights cases with ABOTA members and younger attorneys. A number of experienced litigators with ABOTA handled these cases, and some of these cases proceeded to trial. There are other trial lawyer groups who could organize similar projects.

4. The more seasoned trial attorneys should be willing to share their insights in trial practice at both CLE programs and in written articles for *The Daily Record*. In the "good old days," there were many jury trials of civil cases in City Court up through Supreme Court, and younger attorneys had the opportunity to witness the finest trial lawyers on a regular basis. Those days have passed, but we should not lose the opportunity of providing other opportunities to gain insight into those who have acquired trial skills over the decades.

5. ABOTA has presented a Masters in Trial Program in the Rochester area on two occasions over the last few years, and this all-day program presents experienced trial attorneys engaged in a mock trial with a live jury. Other organizations such as the American College of Trial Lawyers and the American Trial Lawyers Association should also present such programs on a regular basis. However, one usually learns by doing and, therefore, it is preferred that younger attorneys actually be involved in the process rather than simply sitting and watching.

6. Every law firm with a trial practice group should make the effort to bring the younger attorneys into the trial process by giving them opportunities to examine witnesses at hearings, arbitrations, etc.

Although it is often beneficial to both the parties and the system of justice to settle cases, we cannot lose sight of the consequence of the vanishing trial, and we need to take steps now to provide our younger attorneys with the opportunities to develop their trial skills before it is too late.

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