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Is the Golden Age of Trial Attorneys Over?

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Analysis

With a greater number of cases being resolved outside of court, some attorneys say that there are fewer opportunities for civil trial lawyers to achieve their full potential.

Attorneys have expressed concerns that the reduced number of personal injury, medical malpractice and other cases going to trial has impacted trial attorneys by either dulling the skills of experienced litigators or by not providing enough courtroom experience for newer ones.

"I see this as a disturbing trend," said Dennis R. Suplee of Philadelphia-based Schnader Harrison Segal & Lewis. "Because people haven't tried cases in recent memory or they haven't had a chance to start, they get gun-shy about going into a courtroom and there's more pressure to settle a case."

While settling cases through mediation or alternative dispute resolution has its place, Suplee said, the idea of a trial should not be immediately cast to the side once settlement is brought up.

"I don't think that resolving a dispute through a trial should be viewed as a failure of the system. We all pay lip service to the role of the trial in the American jury system, but in reality the trial is being used less and less as a means of resolving disputes between people."

Thomas R. Kline of Kline & Specter said that the chances for newer attorneys to gain firsthand trial experience have decreased.

"There was once a day when young lawyers cut their teeth on smaller cases. Today, stats show that in Pennsylvania more cases are settled and fewer cases are tried. That by definition has a significant impact on developmental skills for lawyers who are making their way up the ranks. There are fewer opportunities for being second chair, let alone first chair. That results in a less robust trial bar at the end of the day."

Kline added that there is a definite impetus by the state's courts to push cases toward mediation and settlement.

Slade McLaughlin of McLaughlin & Lauricella in Philadelphia

also said that trying smaller cases is a crucial learning experience for young attorneys, but they are currently in short supply.

Many cases that go to trial, McLaughlin said, involve complex litigation, something that even a five-year associate may have difficulty with.

In his office, McLaughlin said, he's "trying to find roles for [associates] to fill; it's not like the old days. Most of the trials now are with big complex cases, and that's not a good place for a new associate to cut their teeth."

Lawrence R. Cohan, an attorney at Anapol Schwartz and president-elect of the Philadelphia Trial Lawyers Association, said that while more settlements may be a good thing in that it indicates that defendants are willing to compensate deserving plaintiffs, he noted that it can be detrimental to newer attorneys.

"Young lawyers do have a harder time getting trial experience," Cohan said.

He added, "I do believe that jury trials are fundamental and still

the best way for a victim to be compensated appropriately."

But young lawyers aren't the only ones feeling the sting of reduced trial time. According to Kline, established litigators are exhibiting the adverse symptoms of being out of the courtroom for extended periods.

"Even at the highest levels when you go from state to state, there are fewer lawyers who have very high credentials; that is to say many multimillion-dollar jury verdicts. That's not a coincidence, that has to do with a diminished opportunity to obtain jury verdicts," Kline said.

McLaughlin opined that many lawyers don't want the pressure or risk of losing a case that comes with trial, and in some cases defendants capitalize off of that aversion.

"A lot of insurance companies want to play chicken with" plaintiffs attorneys, McLaughlin said. "They say, 'Can your client really take the risk and possibly not get this money?' There are a lot of aggressive defense tactics in play, not that that's wrong, but that's the reality of the situation."

In terms of attorneys keeping their skills sharp, Larry Coben of Anapol Schwartz said continuing legal education is helpful, but nothing compares to learning through going to court.

"It can't be duplicated by mock trials. It's not like riding a bicycle," Coben said. "The skills change, and the needs change in effectively trying a case."

In order for trial lawyers to be successful, according to Coben, consistent courtroom experience is essential.

"From a financial standpoint, if a person who is a litigator gets a reputation for going to mediation, people will look at him and say, 'When's the last time you went to trial in a case?' If the reputation is one where you try cases, you are much more successful. If your reputation is that you haven't tried in eight or 10 years, your opponents don't have the same concern for facing you as an adversary."

Coben noted, however, that in some cases clients are the ones who want to avoid the risk of going to trial because they are in need of prompt settlement.

Stewart J. Eisenberg of Philadelphia-based Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck said the simple economics of litigation also prevents many cases from going to trial.

"It's very expensive to try a case, more so today than ever before. Financing a case through trial has always been an issue, but costs today are definitely higher," Eisenberg said.

The trial lawyer, however, is in no danger of vanishing, according to Eisenberg. "Trial attorneys are needed and desired in personal injury and complex matters," he said.

Coben also said that the need for the trial attorney will be ever-present in the most serious matters.

"I think that there's always going to be a role for litigators in the civil practice, relegated to cases that are much more substantial and valuable. The less substantial ones will be resolved without trials. With cases involving catastrophic injuries, **huge financial** loss, trial lawyers will always be there," Coben said.

Suplee, however, posited that the current trend indicates a shift in the way civil cases are being handled across the country.

"We're moving closer to the English system where you have barristers who go to court and you have solicitors who prepare them," Suplee said. "The barristers tend to be a comparatively small portion of the population. I think, de facto, that's what's happening in the U.S."

In terms of a potential thinning of the herd, Kline noted that in the future there may be fewer trial attorneys with even fewer big cases to their names; however, they are not facing extinction.

"There will always be great trial lawyers who will rise above and refuse to settle by having conviction, perseverance and determination to obtain a verdict."