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The Young Lawyer's Dilemma

A FEW WEEKS ago, I sent an e-mail around to a number of my colleagues in other firms who practice civil litigation in federal courts in Virginia (primarily in the Eastern District of Virginia, the infamous "Rocket Docket") and who are under the age of 40. I told them that I was writing a column for the *The Federal Lawyer* and that I wanted their input on unique issues or perspectives that they faced as younger lawyers in federal courts. The response that stood out the most was that it is nearly impossible for younger lawyers who spend most of their time in federal court to gain any trial experience. During roughly the same time period, I attended several bar functions and court proceedings at which federal judges—either from the podium or the bench—also pointed to the almost complete extinction of civil jury trials.

As anyone who has been paying attention knows, this issue is not isolated to the Eastern District of Virginia. In its March 2009 issue, the *ABA Journal* featured a cover story on seven lions of the trial bar—famous trial lawyers who are over the age of 70. Like my peers and the federal judges, the American Bar Association's story focused, in part, on the fact that these "seven over 70" were a dying breed. As U.S. District Judge Royal Furgeson of San Antonio observed, "[t]hey represent a breed of lawyer that I fear is on the verge of extinction." And the ABA published a short sidebar titled "The Endangered Trial Lawyer," which asked the following question: "In the age of the vanishing trial, how can the young lawyers of today develop the kind of art and skill their elders wield so well in the courtroom?"

This phenomenon, of course, is not new to 2009. In 2004, the American College of Trial Lawyers published "The 'Vanishing Trial:' The College, the Profession, the Civil Justice System," which identified "many factors" contributing to the diminishing number of civil trials. (The report noted that, in 2002, only 1.8 percent of federal civil cases went to trial; in 1962, 11.5 percent did so.) The factors listed in the report included "the advent of managerial judging," "summary judgment and other procedural reforms," and "litigation costs." One factor that made the first page of the report was "lack of trial skills and experience among younger lawyers." According to the American College of Trial Lawyers, "For more experienced counsel, the problem can be characterized as one of decreasing opportunities to get into the courtroom. For many young lawyers, it becomes more of a matter of: 'Will I ever get into the courtroom?'" The authors of the report also observed that a young lawyer's lack of trial experience actually feeds on itself: Without experience, the young lawyer is intimidated by the prospect of trial and comes to avoid it, thus precipitating the problem.

Given this state of affairs, the first question is: Why does this matter? There may be a number of answers to this question, but I will provide three. Admittedly, my list is biased, in part because, as a 36-year-old lawyer, it is more than a little depressing for me to think that I face, potentially, another 30 years of federal practice that consists of nothing more than document review, witness depositions, and mountains of summary judgment briefings. My list is also subjective. With some notable exceptions, I will not refer to those portions of the record that support my reasons, nor am I going to provide any citations to precedents. Much like a juror, I will give my impressions, which are based on several years of practice and the informal polling of my peers.

The first reason it matters is that jury trials are an integral part of our history and culture. Juries in any given case don't just decide the matter in front of them; in many respects, they provide a barometer of the community's mores and ethics—a reality check, if you will, on the sometimes narrow perspective that lawyers as well as judges can develop after years of legal training and experience have, to some extent, caused them to focus on the trees instead of the forest. Losing this check risks our profession becoming too incestuous: basically, without juries, we become an echo chamber, and our profession loses its relevance to and connection with society as a whole. The report that was published by the American College of Trial Lawyers summed up this point by quoting the late Chief Justice William H. Rehnquist, who once observed that "juries represent the layman's common sense and thus keep the administration of law in accord with the wishes and feelings of the community." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343–344 (1979) (Rehnquist, J., dissenting).

The second reason is that sometimes, in very important cases, federal litigation actually results in a jury trial. And when that happens, it is important that the lawyers and the judges involved in the case—some of whom may have little trial experience of their own—know what they're doing.

The third reason I consider the issue important is based on my belief that lawyers who have not tried cases are much harder to deal with in litigation than those who have trial experience. Try a few cases and you realize that much of what federal civil litigators fight over is pointless.

Assuming, then, that we should care about the looming extinction of the civil jury trial, what, if anything, can be done not only to reverse the trend but also to provide opportunities to young lawyers so that they can avoid the vicious cycle of lack of experience leading to avoidance of experience? It may be that there is no remedy; our profession may just be evolving in a different direction—one that some of us resist but one that business realities (and electronic discovery) have made inevitable. But assuming the trend can be reversed, here are a few suggestions.

First—and at the risk of drawing the ire of the judges who preside over my cases—I believe that judges can make a difference. Among other things, judges can provide more opportunities for lawyers, including young lawyers, to actually appear in court, even if their appearance is not for trial. By way of example, in the Eastern District of Virginia, many—if not most—motions are decided on the briefs, without a hearing, even when the lawyers ask for a hearing. Judges have busy dockets. And, certainly, there are motions that do not merit a hearing. But giving lawyers—including young lawyers—opportunities to appear in court more frequently could reduce any intimidation factor that exists, could help the lawyers become more comfortable with the court's practices and procedures, and could reduce their fear of trial. Without doubt, there is no replacement for actually trying a case, and giving more opportunities to appear in court through motions practice is by no means a substitute for trial experience. But it is a start, and it is a concrete step that judges can take in the direction of helping young lawyers gain experience that can only help the judiciary in the long run, because it goes without saying that lawyers who are familiar with the system on a firsthand basis can be more efficient and helpful to the courts than lawyers who are not.

Second, lawyers and judges both can work together to rein in abusive discovery. Without repeating it here, a column that ran in this space in the May 2009 issue discussed the efforts of The Sedona Conference® to promote more reasonable discovery practices. This effort and others like it can reduce the cost of litigation (one of the primary reasons cited for the decline in jury trials) and, perhaps just as important, can signal to young lawyers that discovery is a means to an end—that is, trial—and not merely an end in itself.

Third, lawyers and judges can both take on a mentoring role. As the lions of the trial bar move into the final phases of their careers, they can turn their focus to mentoring the next generation, both by providing hands-on opportunities in their own trials and by providing access and feedback to young lawyers who face issues that require a trial lawyer's seasoned perspective.

For their part, judges can be careful to view themselves as vital teaching members of the profession, and not merely referees. Certainly, it is not appropriate for a judge to take sides in a dispute to the prejudice of a party. But judges have numerous opportunities to participate in seminars outside the courtroom—and many already do so—and they also experience teaching moments inside the courtroom, when they can provide constructive criticism in a way that does not favor one side over another.

In the end, civil trial practice may simply have evolved into a new era. But young lawyers will bear the brunt of this evolution, as their practice becomes a commodity and their courtroom experiences vanish. If that happens, the profession as a whole could suffer irreparable harm. **TFL**

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