Will There Be A Next Generation Of Trial Lawyers?

John Pacenti, Daily Business Review

July 3, 2014

Miami attorney Robert C. Josefsberg cites one primary reason why he remains in practice at 75: The off chance he'll get to take a case to trial.

"I find trying a case to be so exhilarating, to be so much fun. I love it," said the Podhurst Orseck partner who once canceled a family ski vacation rather than postpone a date with a jury.

Trial opportunities for Josefsberg and other top litigators are rarer today than ever. The cable news network anchors like Nancy Grace may salivate over salacious real-life courtroom dramas, but such daytime fodder betrays the reality that the number of trials have been declining dramatically nationwide for decades.

The sad truth is that these are hard times for would-be Atticus Finches. The trend has left practitioners pondering where the next great generation of trial attorneys will be forged if not in the courtroom. Arbitration and mediation hearings?

Alternative dispute resolution is just one epitaph that may end up on the American trial's tombstone. Long criminal sentences, skyrocketing costs and even technology can share in its demise, according to trial attorneys.

An updated study due soon by legal scholar Marc Galanter, who has been charting trial declines for years, finds the trend unremitting. He noted only about 1 percent of federal cases go to trial now, and the number of state court trials also have fallen off the cliff.

"There is not much lower for it to go," said Galanter, a professor emeritus at the University of Wisconsin School of Law. "Whether we are coming to the end of the trial as an institution, that remains to be seen."

Galanter's newest article on the decreasing number of trials will appear in the magazine Daedalus, the Journal of the American Academy of Arts and Sciences, in the summer issue devoted to the topic of courts.

The most reliable data available comes from federal courts, he said.

In 2012, 3,211 civil cases went to trial nationally compared to 5,802 in 1962, a drop of 44

percent, despite increases in case filings.

"In other words, the ratio of trials to filings in 2012 is only about one-12th what it was 50 years earlier," Galanter wrote.

Trial Penalty

The Wilkie D. Ferguson Jr. Federal Courthouse in Miami is hardly bustling these days. U.S. District Judge Federico Moreno said it's all relative, noting he was in trial at the time.

Arbitration has indeed cut down on federal civil trials, and sentencing discretion has contributed to a similar decline on the criminal side, he said.

"The numbers have gone down since I started," said Moreno, who took the bench in 1990. "We probably had too many trials. The first year I had like 50 jury trials."

Data from state courts is less abundant, Galanter said. The National Center for State Courts assembled data on civil trials in the general jurisdiction courts of 22 states from 1976 to 2002. It found jury trials decreased by 32 percent and bench trials, which were far more numerous, decreased by 7 percent.

A series of studies of the nation's most populous counties conducted by the U.S. Bureau of Justice Statistics found a 52 percent decrease in civil trials from 1992 to 2005.

And then there are tailored rulings gnawing away at access to courts. Last month, the Texas Supreme Court limited the legal rights of minority investors. By a 6-3 vote, the court held Texas companies can no longer file suit to seek fair market value for their shares when management takes positions that dilute their interests.

Criminal trials have seen a remarkable decrease starting in the early 1980s. In 2011, guilty pleas resolved 97 percent of all federal cases that the Justice Department prosecuted to a conclusion. That was an increase from 84 percent in 1990.

Galanter said defendants are keenly aware of the trial penalty, a possible lengthier sentence for trying a case in front of a jury instead of taking a plea.

"There's been an ideological shift among judges and court administrators in the last 30 years or so," he said. "They have become convinced they are not in the trial business. They are in the dispute resolution business."

Dinosaurs?

Attorney Michael Pasano, a criminal defense specialist with Carlton Fields Jorden Burt in Miami, said he has been able to go to trial more than some of his colleagues because he has fostered a courtroom gunslinger reputation like Josefsberg.

"You want to make a deal? Hire someone who is really good at making deals. But if you want to fight, then hire me," he said. "We are dinosaurs, those of us who still try cases."

Josefsberg echoed that sentiment, saying there are some Wall Street litigation firms with

cadres of lawyers who have never picked a jury. Starting in the 1980s, he got calls to enter cases at the 11th hour because parties couldn't settle and the judge would no longer postpone trial.

"All you need is a law license to try the case, but if you want a good trial lawyer you need a specialist," he said.

And to see a great trial lawyer in his element is still something to behold.

Trial lawyers are still talking about the trial performance in 2012 by Eugene Stearns, a partner at Stearns Weaver Miller Weissler Alhadeff & Sitterson, in fighting a shareholder lawsuit against client BankAtlantic Bancorp. Others recall Miami litigator David Mandel's dissection of TD Bank for investors ripped off by lawyer-turned-con-artist Scott Rothstein, also in 2012.

During closing statements, Mandel produced three small ceramic monkeys to represent how bank officials adhered to the adage "see no evil, hear no evil, speak no evil." He then rang a bell for every time a money-laundering alert was produced at the bank for Rothstein's accounts. The jury returned a $67 million verdict in Mandel's favor. Mandel, who is still litigating the appeal, declined comment.

Cost Of Justice

Taking complex cases to trial requires experts of all types such as jury consultants and document administrators. Faced with the expense, many plaintiffs are willing to settle even for a low amount, said attorney Aaron Podhurst, co-founder of Podhurst Orseck.

"You have to have a mini-trial just to get an expert in," he said.

State courts are easier for plaintiffs to get a case to trial. The ever-increasing costs give new meaning to the phrase, "there's no need to make a federal case out of it," Podhurst said.

"Federal court is a great place for the relatively large personal injury or commercial matter" because of high-caliber judges, he said. "It is not as desirable for smaller cases because the rules with regard to qualification of experts, and required filings can make the costs too high for the smaller case."

These expenses also mean would-be plaintiffs with low-stakes but real claims often have no redress. Attorneys, especially those working on contingency, won't sign on.

"They just can't get a lawyer," Podhurst said.

The opposite also can be true: Cases are so large that both sides find it more economical to settle than risk going to trial. For the defendant, it's the fear of a jury returning with a devastatingly high verdict. For the plaintiff, it's the worry of ending up with a goose egg after potentially spending millions of dollars before trial.

"I had almost 50 trials the first two years I practiced. I had a trial almost every other week," said West Palm Beach attorney Theodore Babbitt, a partner at Babbitt, Johnson, Osborne & Le Clainche, which specializes in class action litigation. "These days the cases are so large, a trial is a risk that neither the plaintiff nor the defense wants to take."

Babbitt is a member of the Inner Circle of Advocates, a national group of renowned plaintiffs lawyers who address judicial trends. He said the declining in trials is an issue that comes up for discussion among group members, and he has turned to mock trials to keep his skills sharp.

Long-time Miami litigator Andrew Hall, a partner at Hall, Lamb and Hall, blames in part the rising cost of electronic discovery.

"You would think it would be more efficient, but that's not the way it works," he said. "You now have to search every laptop, every smart phone, every server in a company."

Bound by Arbitration

Other trial attorneys have a dire point of view about their profession.

"In federal court, summary judgments are used very aggressively, often depriving litigants from their day in court," said class action specialist Ervin Gonzalez, a partner at Colson Hicks Eidson in Coral Gables.

He said class action litigation keeps corporate malfeasance in check. The corporate life blood is money, and big jury awards always get their attention, he said.

But companies have shielded themselves from class actions with binding arbitration clauses in contracts. Many consumers if they want a product must sign or click their litigation rights away.

"A lot of claims that would have seen jury trial are now being heard by arbitration panels," Gonzalez said. "It's stealing justice from the people."

The U.S. Supreme Court has upheld arbitration clauses repeatedly—especially in class actions. The laws should protect the consumer not the companies hurting the consumers, he said.

Gonzalez pointed to class-action litigation over SUV rollovers that changed corporate behavior.

"Look at SUVs today. They got lower to the ground and wider, and now we have less and less people dying because the vehicles are being designed in the way trial lawyers said they should be," he said.

Arbitration is a creature of contracts. The parties can agree to the arbitration organization, the extent of discovery, the number of arbitrators, the selection process and the extent to which procedural rules and rules of evidence apply.

"Arbitrations do not give you the same experience because the rules of evidence don't apply," said attorney Joseph DeMaria, a partner at Fox Rothschild in Miami.

William E. Davis, managing partner of Foley & Lardner's Miami office and partner in the firm's business litigation and dispute resolution practice, said arbitration is the equivalent of "walking on a high wire without a net."

"The arbitrators decision is generally final with no right to appeal erroneous rulings. Most of the time you are thrust into a trial setting with little or no discovery and no protection of the rules of evidence," he said.

Mediation is sometimes a mandatory track in court and in alternative dispute resolution. Davis said it's attractive because it's confidential and nonbinding unless a settlement is reached.

Attorney Mitchell E. Widom, head of the litigation group at Bilzin Sumberg Baena Price & Axelrod, said he's finding clients are more willing to go to trial and eschew arbitration or mediation.

"In 2008 when the economy crashed, yes, clients were looking for alternative means to resolve the cases," he said. "But most of my clients, even though they have arbitration clauses in their contracts, still want a trial. They want to go before a jury or a judge."

Trial Risks

On the criminal defense side, attorneys say sentencing guidelines, with discounts for pleading guilty, have driven the plea bargain frenzy. In fraud cases, for example, when the amount of loss climbs to millions of dollars, recommended sentences quickly rise to the statutory maximums.

Since ill-gotten gains in fraud cases often pose a personal income tax issue, the threat of prosecuting a spouse is a powerful tool to force a plea bargain.

"I'm a trial lawyer. I love trying cases, but the client has to be willing to take that risk," said Miami defense attorney Jayne C. Weintraub, who is of counsel at Broad and Cassel in Miami.

She said the government is patient in working up cases, taking years to compile evidence.

"I have a case now that was investigated for four years. It has wiretap evidence and nine independent witnesses that don't have skin in the game," Weintraub said.

Attorney Khurrum Wahid, a criminal defense specialist with Wahid Vizcaino in Coral Gables, said the proliferation of jailhouse snitches also scares defendants away from trial.

"It really led to a default mentality to those in custody of 'I should be thinking plea not trial,' " Wahid said. "The ones who do go to trial are either standing on principle or feel that the plea consequences are so high they don't care about the consequences of going to trial."

Pasano of Carlton Fields Jorden Burt said the Supreme Court has poured gas on the plea bargain bonfire. A 2012 ruling expanded a defendant's plea bargain rights, underscoring the defense attorneys' obligation to inform their clients of their options.

Despite all this, U.S. Attorney Wifredo Ferrer says the Southern District of Florida tries more cases than any other federal district, partly because South Florida cases are so severe and potentially can produce lengthy sentences.

"They figure why not roll the dice," he said.

Trial Skills

DeMaria of Fox Rothschild said as a result of all the external pressures keeping cases from a jury, the furnace forging good trial attorneys has gone cold.

"When I was a prosecutor, we tried complex RICO cases, labor cases, fraud cases. They were complicated long trials that gave you tremendous training," said DeMaria, who left the Justice Department in 1989. "I think the danger is not right now. It's what's going to happen 15 years from now.

"You have to have someone out there taking care of people, the average little people who get crushed by corporations and the government," Josefsberg said. "You need brave trial lawyers, those who care about something other than money, who champion the underdog."

And carrying the partner's briefcase and watching from the gallery doesn't cut it, he said.

"You want to swim in the pool, you need to jump in the water. Maybe just the shallow end, but you need to jump in," Josefsberg said. "And today, you just don't get those opportunities. Firms are using younger lawyers instead for billable hours, to file motions."
