

Are *trial* lawyers becoming extinct?

What happens if trial lawyers don't try cases to a jury anymore?


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By J. Gary Gwilliam

In 1999, I wrote an article for the American Board of Trial Advocates Journal which began as follows:

> I sometimes feel like I am a dying breed – soon to become extinct. I am a trial lawyer who has spent 37 years in the courtroom. I have tried over 150 jury trials to verdict. I have been in ABOTA since 1976 when I certified that I tried 100 jury trials after about 15 years of practice. But times are changing. Good trial lawyers today who have been in practice for as long as twenty or twenty-five years will have tried significantly less cases than those of us who started our practices in the 60s and early 70s. There are simply less jury trials being tried. More cases are being arbitrated. Everything goes to mediation. Our negotiation skills are becoming more important than our trial skills. I am not suggesting this is a bad thing. It is just different. The new millennium will bring us a new way of resolving disputes – especially in traditional civil litigation.

The concerns I raised ten years ago are even more acute now. Study after study indicates that we are trying fewer cases. Anecdotal evidence is overwhelming to that effect – lawyers with even 20 or 30 years of experience will not have tried a fraction of the cases that those of us did who practiced in the 60s and 70s.

With a lack of trial experience comes a lack of ability to easily and competently try a case before a jury. Judges complain frequently that lawyers are not only inexperienced, but frankly ineffective and sometimes woefully inept in the courtroom. A byproduct of this problem is the lack of civility between lawyers. One factor in this civility problem is that younger lawyers don't have the experience of really understanding what a jury trial is like and hence have a great fear of going to trial. They mask this fear by aggressive litigation tactics in the hope that they can bluff their way out of actually going to trial.

The proliferation of mediators and mediations is obvious. Any case that doesn't settle is a "failure." The pressure to settle cases is so intense that there is almost a sense of guilt when we have to go to trial. Yet, we continue to evaluate plaintiffs' PI and employment cases on the basis of what a jury will award. How can we make such an evaluation if there are so few trials anymore?

Are we trial lawyers, or are we simply becoming negotiators? And this negotiation, is it like poker? Is bluffing one's way through a mediation with misstatements and outright lies the way we properly resolve cases? I sometimes tell mediators that some cases need to be tried and there is nothing wrong with a mediation that ends with a decision to proceed to trial. Rarely does a mediator agree with this. They "failed" because we are going to have a jury trial to resolve the case.

The increasing expense of trial is well-known. Trial requires expert testimony, and experts are becoming increasingly expensive and are often treated with hostility by judges who see them as nothing more than paid advocates. In addition to experts, lawyers now bear the expenses of court costs including reporters' fees and other fees that traditionally were borne by the courts.

Another factor that is changing our profession as trial lawyers is advertising, especially when it leads to treating the law as a business and not a profession. Lawyers who are in the "personal injury business" for the sole purpose of making money will never step foot in the courtroom. If we judge our success solely by how much money we make, then who cares about a trial? We are perhaps more interested in how much money we make than whether we're doing right by our clients or even chasing that elusive concept of "justice."

Politics, particularly the advent of tort reform, has become an increasingly serious problem for plaintiffs' lawyers. It's become worse in the last 10 years. Conservative court rulings and the failure to make fundamental changes in our medial malpractice laws make it increasingly difficult to try cases:

- It is outrageous that we haven't changed the medical malpractice tort reform laws passed 35 years ago. With a $250,000 MICRA cap on general damages and a cap on our attorneys'

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fees, who is going to try medical malpractice cases anymore?

•Products liability laws have been cut back.

•It is much more difficult to try insurance bad-faith cases since third-party bad faith was abolished by Royal Globe some 30 years ago.

•Even general personal injury cases have more barriers to getting good results in trial: In auto cases, you can't get pain and suffering damages if your client doesn't have insurance. And our collateral source rules have made it more difficult for us to present our economic losses in some cases (although I've just heard we are getting some help on collateral source with the *Howell v. Hamilton Meats* decision).

•In most cases the defense makes a bunch of motions in limine to keep us from proving our cases.

In short, cases are harder to get to trial on the merits and harder to win once we get there.

I would like to get hear from you on the issue of how we can continue to be viable *trial* lawyers if we are not trying cases anymore. Let me know if we can print your comments. Contact me at ggwilliam@plaintiffmagazine.com.

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