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What the Vanishing Trial Lawyer Means for In-House Counsel, and 5 Things They Can Do

From the Experts

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The phenomenon known as the “vanishing trial,” a term first coined more than a decade ago, shows no sign of abating. Since the mid-1980s, the number of federal trials has been falling steadily. Last year was no exception, as civil and criminal trials completed in the federal district courts fell 5 percent, according to a report by the Administrative Office of the U.S. Courts. Similar trends can be found at the state level.

The decline in trials, at both the federal and state levels, has been driven in large part by disputing parties concerned with the risks, costs and public scrutiny of going to trial, and increasingly relying instead on alternative dispute resolution.

Notwithstanding the “vanishing trial,” in-house counsel should not be complacent about being trial-ready. Trials may be on the decline, but they’re still used to resolve thousands of disputes every year. And, as you can expect,



litigants that do go to trial go to trial as a last resort with matters where the stakes are often high and sometimes “bet the company.” The top 10 verdicts last year averaged more than \$357 million, according to Corporate Counsel affiliate VerdictSearch. The year before that, the average was close to \$360 million. And those average settlement numbers do not even include the costs of trying the cases.

While many may think that the fewer the trials the better, there is a negative. As the number of trials has been declining, so, too, has the number of lawyers with experience trying cases. Amid debate about the vanishing trial—what it means for our democracy and our justice system—the corollary of the vanishing trial lawyer often gets overlooked.

Once upon a time, of course, trial lawyers featured prominently

not just in the legal profession, but in the broader culture. They inspired many of us to get into the field. There was plenty of work to go around. From 1962 through 1985 (the year I graduated from law school), federal civil trials doubled, increasing every year. It was a golden era for trial lawyers who wanted to perfect their craft.

But many of the attorneys who benefited from that wave have retired or are nearing retirement. A younger generation of lawyers simply has not been afforded the same opportunities. As a result, we now have far more litigators than trial lawyers.

Trials began declining in 1986, and precipitously so starting in 1990. In 2006 there were only half the number of federal civil trials that there were in 1962. Since 2006, civil trials have continued to decline, albeit at a slower pace.

Criminal trials have not been immune, having dropped 19 percent between 2010 and 2015. This means that even places such as U.S. attorney's offices, which have served an important role as a training ground for young attorneys looking to gain courtroom experience, are producing fewer experienced trial lawyers than before.

This is not an academic issue. Companies that want to retain the best trial lawyers for their most important cases are picking

over fewer qualified choices than were available 10 or 15 years ago. This problem won't be alleviated anytime soon, as the number of trials keep dropping, and the cases that do go to trial are usually tried by the guys with the gray hair—many of whom will not be practicing five or 10 years from now.

The shortage of trials has not gone unnoticed among federal judges. I had the privilege of trying two cases to juries before the Honorable Oliver Wanger in the Eastern District of California. He lamented about how frequently cases settled and once asked me, "Who will be trying these cases 10 years from now?"

The talent pool shortage is exacerbated when you consider the increasing importance of finding trial lawyers who reflect the changing demographics of our country. Given that the pool of qualified trial lawyers is small, it should not come as a surprise that the pool of qualified women and trial lawyers of color is even smaller. But companies that field a trial team today without women or attorneys of color do so at their own peril.

I recall attending a trial involving the NFL and the Oakland Raiders 10 or so years ago in Los Angeles County Superior Court. My firm represented the city of Oakland in a related lawsuit involving the

Oakland Raiders, and I wanted to watch the late Al Davis testify. What caught my attention was that, of the 16 jurors and alternates, a dozen appeared to be people of color. Yet all of the lawyers at counsel table were white men. I wondered how sophisticated parties (and lawyers) could allow that to happen.

Bottom line: The age of the vanishing trial and our increasingly diverse society requires in-house counsel to start considering how to staff and develop their teams for their most important cases. Here are five suggestions for staffing your matters and strengthening your trial lawyer bench:

1. Don't wait to find a trial lawyer for high-priority matters.

It's certainly true that most cases settle or are resolved at the motion stage. But far too often companies expecting a case to settle wait until discovery is over and settlement talks fail before deciding that they need a trial lawyer. If the case is important to a company, the trial lawyer should be retained at the outset to help develop trial themes, identify and prepare key witnesses and work with experts. A good trial lawyer may help prevent costly admissions and be more likely to gather the right evidence needed at trial. The value of a trial lawyer is not simply arguing before a jury

or judge; it's also being able to shape the story before it's told.

2. Vet the second chair.

When selecting trial lawyers, make sure that the second chair is capable of taking the lead, and demand that she play a significant role at the trial. Let's face it, the best trial lawyers are not sitting around waiting for you to call. They are busy, moving from case to case. It's also true that trials involving complex business disputes often last for several weeks and require significant contributions from multiple attorneys. So take a hard look at the second chair. She is likely to run the case day-to-day.

3. Demand diversity.

If a trial is, metaphorically speaking, combat, then you need every advantage. One advantage could be having a team that looks like the jury. The latest census showed black, Latino and Asian populations growing faster than the overall population, which should be evident to anyone who spends any time in courts in places such as Miami, San Antonio, Los Angeles or New York. It's a critical development for trial practitioners. If a jury is torn between two sides in a case, but likes your trial team, that fact could be the difference. This is not to suggest that any juror will vote for one side or the other solely on the basis of how

much they like (or dislike) the lawyers, but does anyone doubt that Johnnie Cochran's race was a factor in O.J. Simpson's acquittal, or that other lawyers may have had a more difficult time credibly telling that jury that "if it don't fit, you must acquit"?

4. Be willing to switch horses.

Ideally, every trial team should have at least one woman or lawyer of color examine witnesses during trial. If the law firms you use cannot present you with a woman or lawyer of color who is a legitimate trial lawyer, ask why, and consider looking elsewhere (including smaller firms) for your trial needs. There are strong trial lawyers out there; you just need to find them.

5. Help foster future trial lawyers.

Creating professional opportunities for young attorneys is a responsibility that we should all share. Given the declining number of opportunities available today, it's especially critical that we get creative. In-house counsel can play an important role. If you identify a younger lawyer who is a star with your outside firm, let the firm know that you want him or her to get "on-your-feet" experience, including depositions and court arguments. Don't rely on law firms to groom the young ones. You have to let the

firms know that such opportunities matter to you. Fortunately, many judges around the country have drafted orders encouraging opportunities for young lawyers to argue motions. Make it a point to know which ones.

After identifying your future trial lawyers, consider giving them smaller cases on a reduced-fee basis that may give them trial or arbitration experience. There are simply not enough "bet-the-company" trials available to attorneys at large law firms. Our profession, including in-house counsel, should be proactive in ensuring that we do what we can to develop the next generation of trial lawyers.

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