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Eastern District

## The Important Role of a Trial Lawyer

Peter F. Vaira, The Legal Intelligencer

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### Upon Further Review

My late uncle, Louis Vaira, was an experienced trial and appellate lawyer in Pittsburgh. When asked his opinion of another practicing lawyer he would often respond, "He never tried a case." That was his first critical observation; did that lawyer ever try a case? If Uncle Lou were alive today, he would make that remark many more times. Civil trials have diminished drastically and, because of that, the number of skilled trial lawyers has declined. Note that I am not talking about litigators. There are more than enough litigators. I refer to trial lawyers who can present a contested case before a judge or jury, exam and cross exam witnesses, submit documents, and make an argument.

In 2004, The American College of Trial Lawyers published a white paper, "The Vanishing Trial," which discussed the diminishing number of civil trials. The paper concluded that one byproduct of the diminishing number of trials was the dwindling number of trial lawyers who could effectively prepare and take a case to trial. I will not discuss the reasons for the decline of the civil trials except to note that civil trials are certainly near extinction in federal court. The purpose of today's article is to suggest methods of how to maintain a group of attorneys at the bar who are trained for and can try a civil case before a judge or jury.

The Anglo-Saxon legal system of this country, and England, were formed with trial lawyers in mind. The American legal system needs trial lawyers to maintain its existence. Without trial lawyers we become a European civil law society which is not concerned with discovering the truth, but is concerned with getting agreed upon results. The late Federal District Court Judge William Dwyer (W.D. Wash) is reported to have said, "The jury trial is the canary in the mine shaft of our democracy. Without it our people lose their right to do justice in court." Judge Damon Keith said, "Democracy dies behind closed doors." ([Detroit Free Press v. Ashcroft](#) 303 F.3d 611, 6th Cir, 2002). U.S. Attorney Preet Bharara of the Southern District of New York said, "Trials are the showcase of our democracy, they fulfill the requirement that democracy must be done but it must be seen as being done."

The decline of the civil trials has the following effect on the bar and law firms involved in civil litigation: the less trials there are, the less young attorneys get to try cases. After some years, these young lawyers make their way up the ladder in the firm's litigation department. At some point, they gain supervisory positions and must make choices as to advising a client to go to trial. They often lack the actual courtroom experience to make those decisions and settlement becomes the easiest choice, especially if opposing counsel is in the same boat. "The truth is that the parties and judges expect that the case will settle—an expectation largely fulfilled by the new class of lawyers, called litigators, few with substantial trial experience. As trials disappear, discovery is the only path to settlement," said Judge Patrick Higgenbotham, U.S. Court of Appeals for the Fifth Circuit. There are many senior lawyers in large firm litigation departments who have never faced a jury. Judge Patrick Higgenbotham also said, "There are fewer lawyers with trial experience and thus fewer judges on the bench with trial experience."

What must be done to recruit and train young trial lawyers, young men and women, who will try cases before judges and juries? Such training requires more than classroom sessions. The student must eventually accompany an experienced lawyer to court and share some of the trial duties. Training required for this skill can't happen in a few months. The trial lawyer must learn his or her skills in the actual courtroom, usually under the guidance of a skilled trial lawyer.

Michael J. Engle, a skilled trial lawyer and a past president of PACDL, commented, "There is no substitute for actually being in the heat of battle during a trial before a judge or a jury. I was fortunate as a young lawyer to have more experienced attorneys assign me the second chair position and allow me to handle motions, direct examinations, jury selection, and, eventually, cross examinations. No book, video, or law school class can really teach you to be a trial lawyer. We learn by doing it. The difficulty for young attorneys, who are not either prosecutors or public defenders, is to find the chance to get actual experience in the courtroom. Firms need to develop more opportunities for their associates to experience depositions, arbitrations, and courtroom litigation alongside of seasoned trial attorneys. I have been fortunate to have mentors who have guided me in learning to become a true trial lawyer. The bar, law firms, and each individual trial attorney must make it a priority to learn the art of trial work. Law schools must encourage participation in legal clinics taught by trial lawyers. Law firms should be willing to loan their associates out to the District Attorney's Office or the Defender Association for pro bono work. Programs such as NITA should be on the agenda for the training of young lawyers in litigation departments. It is the duty of each generation of trial lawyer to identify, instruct, mentor, and develop the talents of those who will become the next generation of trial lawyer."

A good mentor is invaluable for the training process. I arrived at the U.S. Attorney's Office in Chicago after five years as a Navy Judge Advocate. I thought I had good experience, but nothing like I was to receive in the U.S. Attorney's Office. On my second day, the lawyer in charge of the criminal division introduced me to Sheldon Davidson, who was scheduled to start a two-week jury trial in a few weeks. I was to be his trial partner. Davidson, without any further introduction, assigned me the direct examination of seven witnesses, who would submit into evidence a number of

relevant documents. He explained that he would help me prepare the witnesses for trial. He indicated that he would make the opening statement, I would make the closing argument, and he would handle the rebuttal argument. And that turned out to be the manner of operation for Davidson and me for the next two years. There is no substitute for this type of training.

Stephen Scheuerle of Hohn & Scheuerle Law Offices in Philadelphia said that a major problem with large firms' programs for training trial lawyers is that the young lawyers get little or no exposure to the clients. They cannot establish a rapport with the client, thus gaining the power to advise clients and eventually are in a position to handle trial matters. He recently hired a lateral attorney who spent four years at a larger firm but had never examined or cross examined a witness in a contested case in a courtroom. In less than a month in Scheurle's firm, he successfully defended a contract dispute case in the Municipal Court of Philadelphia County.

Law firms should be on the lookout for potential trial lawyers in their new hires. A firm with a litigation department that can't field a skilled trial lawyer is never going to compete for the big cases when there must be a trial. Eventually the firm will become known for (to use a sports lingo) "only being able to talk good game." Firms must take the time to train the young lawyers. They should take on cases that won't produce big fees, but will be a great training tool. The young lawyers should be permitted to intern for some government service where they will get trial experience. The public defender's office is usually receptive to taking on young people.

I suggest that this kind of training is the responsibility of the entire bench and bar, not only the law firms. There is more at stake here than a decline of trial skills. It is the disappearance of a forum for leadership. "At the highest level, the practice of law exalts and rewards not just craft but common sense and wise judgment and good character. ... The courtroom is of all things an incubator of leaders. History has shown us this time and time again," said United States Attorney Preet Bahara. Judge John Padova of the Eastern District of Pennsylvania said, "It is essential that the bench serve an activist role in the preservation and development of the trial bar." He said that for the past ten years the judges were instructed, by the civil rules of procedure and internal court procedure, to concentrate on case management with the goal of a greater number of settlements. He said that while this is a good goal, there are cases that must be tried, cases that need issues decided by a court or jury. That must be accomplished by experienced trial lawyers. He said that law schools have finally begun to teach trial practice, which is a good beginning, but that more actual on-the-job-training is essential after graduation. He said that some of the best training should include taking students to watch experienced lawyers at work. The court should notify the schools of an important session before the court, so that students may attend. He added that courts have the responsibility to recognize skilled young trial lawyers and take the opportunity to appoint them to pro bono assignments. He said that after a young attorney appears in his courtroom in a civil pro bono case, he holds an evaluation session with that lawyer.

Bart Dalton, president of the American College of Trial Lawyers, said his organization is dedicated to recognizing and preserving the trial lawyer, and will continue to seek them out for fellowship in his organization.

I close with this: fellow bar members, do not let this great feature of the law practice wither away for the sake of economy in discovery or reducing training costs. •

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