An Endangered Art

Can The Legal Industry Keep Trial Advocacy Alive?

By Erin Coe | March 13, 2017

Paul Moura, a Hunton & Williams LLP litigation associate, at the firm's New York City office. "Trial opportunities are few and far between for associates," he says. (Cara Salvatore | Law360)

Paul Moura was putting the final touches on the opening statement for his first-ever jury trial when the case met an oh-so-familiar fate.

It settled.

The Hunton & Williams LLP litigation associate had spent more than a year fighting on behalf of 18 tenants of a Hollywood apartment complex in a state suit against their landlord, taking depositions, conducting expert discovery and arguing motions on a pro bono basis.

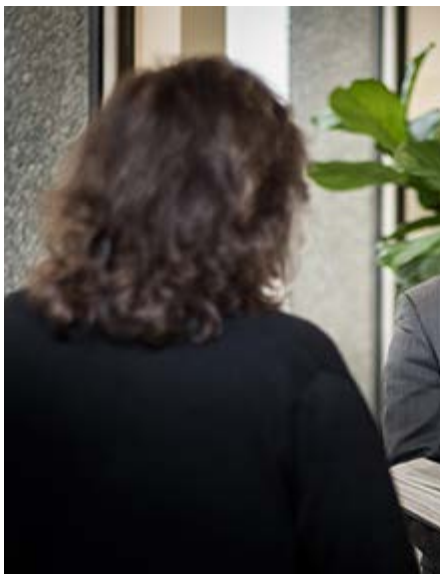
He secured a favorable deal for his clients, and that's what matters most, he told himself. But on tha day in August 2015, he was so close to bringing the case he had been living and breathing. He couldn't help but wonder: What if?

"It was bittersweet," said Moura, a third-year at Hunton who splits his time between its New York and Los Angeles offices. "Trial opportunities are few and far between for associates, and I would have loved to have a three-week jury trial where I played a leading role."

With aspirations to become a national trial lawyer, Moura has clocked more than 2,500 billable hours a year over the last several years. He's worked nights and weekends, and he's even started writing insurance-related articles to catch the attention of the firm's insurance team, which frequently goes to trial and arbitration.

Earlier this year, Moura was once again on the verge of trying a case — this time a multimillion-dollar insurance coverage dispute in federal court — but on Jan. 4, the eve of the trial, the judge reversed course and issued summary judgment in favor of Moura's client. It was a win, but it was also another lost opportunity.

"When you pour your heart and soul into a case ... and you feel like you have skin in the game, you want to take that case to trial, and you want to win that case," Moura said.



Hunton & Williams LLP third-year waiting to try his first case before a

Moura's struggle is a familiar one for young attorneys in BigLaw, who face massive challenges if they hope to get the chance to try a case in front of a jury. Civil jury trials are becoming increasingly rare as a result of tort reform efforts, expensive electronic discovery and other factors, shrinking the training ground for young litigators. At the same time, cost-conscious clients are increasingly wary of financing the education of young attorneys, and trial lawyers who enjoy the thrill of arguing before a jury sometimes hoard opportunities that do come their way.

Worried that courtroom advocacy could become a lost art, federal judges around the country are urging parties in cases before them to let young lawyers argue in court. Legal industry groups are looking at ways to raise the next generation of trial advocates, and a famed plaintiffs attorney has started an initiative to save the civil jury trial itself.

Despite these efforts, though, junior attorneys hungry for the courtroom spotlight face a difficult journey to center stage.

"There is a dearth of jury trials in general," said Richard Rivera, a fourth-year associate at Smith Gambrell & Russell LLP in Jacksonville, Florida, "and that was not something I expected coming ou of law school."

A Boost From the Bench

When junior lawyers tell U.S. District Judge Rebecca Pallmeyer that they will need to check with a senior lawyer before setting a trial date at a status conference, she likes to remind them of their credentials.

Judge Rebecca Pallmeyer

"I want the younger attorneys to know that they have a law license for a reason and that they can do this," she said.

While the tactic doesn't necessarily lead to junior attorneys trying the case, it's at least a way to get the notion in their head. When handling jury instruction conferences in her Chicago courtroom, Judge Pallmeyer makes it a point to address junior lawyers directly, because oftentimes they are the ones who have done the research backing the arguments thei senior colleagues are making.

"There's a general feeling on the bench that getting young lawyers comfortable and active in court is part of our responsibility," Judge Pallmeyer said. "Our first goal always is to do justice, and whether that means granting a summary judgment motion or settlement, so be it. But we do recognize the need and desirability of having an experienced trial bar, and that includes younger lawyers to be bar leaders of the future."

While they are wary of getting between an attorney and a client in choosing counsel, judges across the country are doing what they can to get young lawyers in the courtroom. U.S. District Judge William Alsup, for example, issued a notice on March 1 in a patent fight between Comcast Corp. and OpenTV Inc. in the Northern District of California advising the parties that the court will "particularly welcome" arguments from attorneys with up to four years' experience.

In February, Judge Alsup's colleague in California's Northern District, Judge Lucy Koh, took a scheduling issue in a patent case between Uber Technologies and X One Inc. as an opportunity to ge younger lawyers a taste of trial work. After X One's lead lawyer agreed to let a younger lawyer argue a motion, Judge Koh asked if Uber would consider doing the same to even out the playing field.

These suggestions from the bench have sometimes taken a harsher tone. In September, U.S. District Judge James Donato called out Morrison & Foerster LLP for offering only eighth-year associates to

argue an issue in a proposed class action over Fitbit Inc. heart rate monitors after he'd invited the parties to have counsel in their first six years of practice argue the matter. Lieff Cabraser Heimann & Bernstein LLP had offered up a fourth-year associate to represent the consumers in the case.


Judge James Donato

"Plaintiffs rose to the occasion by naming a fourth-year associate to handle their presentation," Judge Donato, also of the Northern District of California, wrote in a text-only order. "Counsel for defendant, Morrison & Foerster, could not propose a lawyer with less than eight years of practice."

Judge Donato added in the order that he might adjust the time allocated to each side during oral argument to account for "any disparity caused by defendant's selection of attorneys outside the court's specifications."

MoFo told Law360 that its choice of counsel was meant to give a young attorney who had long worked on the case some time to shine.

"We support Judge Donato's position in giving young attorneys the opportunity for professional development," said Radley Moss, a spokesman for the firm. "Consistent with that philosophy, we wanted to provide our eighth-year associate — who has worked on this matter from the beginning and drafted the motion — the opportunity to argue this case."

Friction with lawyers and their clients over this issue isn't uncommon for Judge Donato, who told Law360 that convincing parties to allow junior attorneys to play a bigger role in the courtroom remains a constant tug of war.

"I'd really prefer if it just weren't a struggle," Judge Donato said. "Do I really have to keep talking, cajoling, pleading and cutting deals? It's easier if firms just start saying they are going to do this so that I'm not having to ask in five different ways."

One tool available to the bench is the standing order, which Judge Donato and a number of his colleagues are using to help coax law firms into training the next generation. These orders are tracked by Next Generation Lawyers, a committee of the nonprofit ChIPs, which works to advance women in the law and other fields.

There were more than 15 standing orders as of June, the group noted. While the orders can be found around the country, many are in the Northern District of California. Judge Koh, for example, has a

standing order that permits younger attorneys to examine witnesses at trial and advises more senior counsel to be prepared to discuss such opportunities at pretrial conferences. Judge Alsup's standing order states that he welcomes turning a matter that would normally be decided on the briefs into a hearing as long as an attorney with up to four years of experience conducts the "lion's share" of oral arguments.

In Judge Donato's courtroom, a standing order encourages parties and senior attorneys to allow lawyers with up to five years of experience the opportunity to argue in court, and he will extend motion argument time for those lawyers.

Other standing orders, like those of Massachusetts federal Judges Dennis Saylor and Indira Talwani generally encourage the participation of younger attorneys in scheduling conferences and discovery motions, with the caveats that they be properly supervised and have certain powers.

Stephen Susman

One additional step a judge could take would be agreeing to prioritize a trial if a lawyer under 40 is going to serve as lead counsel, according to plaintiffs attorney Stephen Susman of Susman Godfrey LLP.

"Lawyers can go to their client and say, 'Listen, you can wait two years to go to trial on this case, or you can get a trial in six months if you will let my fourth- or fifth-year associate who is very accomplished make an opening statement and closing argument,'" he said. "It's a carrot offered t litigants to assign responsibility to young lawyers."

At the same time, judges are aware that their efforts to encourage junior practitioners to participate in the courtroom are somewhat limited.

"This is an area where judges can't force something down someone's throat," Judge Donato said. "I can ask lawyers to do it and look sad if they don't, but I can't get between the lawyer and the client. It's wrong, in my view, to step in too much and order a specific lawyer to do something."

Staving Off Extinction

About three years ago, Susman was reading through comments on an annual questionnaire put out by Susman Godfrey, the litigation boutique he founded, whe he came across a blunt response that changed his professional plans.

An associate wrote: “When are you going to stop lying to the attorneys you hire about giving them trial experience?”

The survey answer startled the Houston-based plaintiffs attorney and veteran of more than 100 trials, who believed that his firm had in fact been proactive with a variety of programs aimed at helping associates get in the trial game.

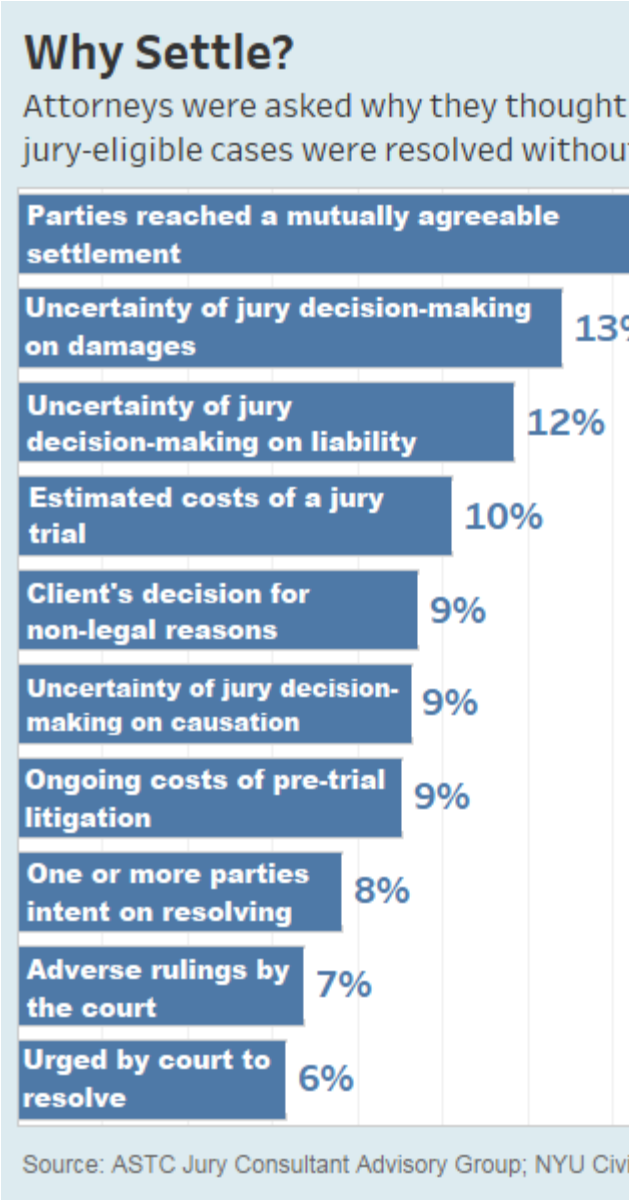
For example, the firm has a rule that if a lawyer writes an argument, direct examination or cross-examination, the attorney gets to argue it in court. The firm also encourages junior lawyers to get trial practice and feedback from senior lawyers through videotaped mock trials and depositions.

“I thought I was going to spend the senior years of my life at law school teaching trial advocacy,” Susman said. “But when I got that comment, I thought to myself: Teaching trial advocacy is like teaching dinosaur hunting. I’d be better off spending my energy on how to save trials from becoming extinct.”

Susman put up $2 million of his own money to found the Civil Jury Project at the New York University School of Law in July 2015, with the aim of keeping the institution of the civil jury trial from withering away. The project involves research on jury trial trends, and it sponsors forums to help kickstart dialogue on how to improve the system.

“The biggest problem for young attorneys is the vanishing trial,” Susman said. “Less than 1 percent of cases that are filed in this country are disposed of by trials. And if we don’t have trials, it’s hard to get people experience.”

The statistic Susman cites — the portion of civil cases that are resolved by a jury — has been in steady decline over the years. For federal civil cases, it was 1.8 percent in the 12-month period ending in late September 1997, 1 percent in the same period for 2006, and 0.7 percent for the 12 months ending in September 2016, according to the Administrative Office of the U.S. Courts. In that



time frame, the total number of cases resolved by a jury trial fell from 4,557 for the 12-month period ending in September 1997 to 1,965 for the same period for 2016, a 57 percent drop.

Data for 22 states collected by the National Center for State Courts shows similar trends.

While total civil dispositions doubled from nearly 1.5 million in 1976 to slightly more than 3 million in 2002, the number of jury trials dropped by 32 percent, from 26,018 to 17,617. Recent data from the center shows that the civil jury trial rate has dipped from 0.3 percent in 2012, with nearly 12,00(jury trials out of about 4.8 million dispositions, to 0.2 percent in 2015, with about 8,300 jury trials out of nearly 4.1 million dispositions. In contrast, the civil jury trial rate in 1976 was 1.8 percent.

This decline in jury trials is driven by a network of factors. The tort reform movement has brought about capped damages and limited causes of action, making cases like insurance defense disputes

much less profitable and increasingly commoditized. Judges also are more willing to narrow and dispose of a case before it reaches trial, with judgments on the pleadings, summary judgments and Daubert rulings that exclude testimony of a party's expert.

Parties are also more inclined to settle given the sheer cost of litigation. The cost and time spent on discovery in particular has been growing dramatically, in large part because of the vast troves of electronic data that companies must now wade through and catalogue.

"The rising costs associated with electronic discovery threaten to drive all but the largest cases out o the system," said John H. Beisner, a Skadden Arps Slate Meagher & Flom LLP partner who wrote a 2010 study on declining civil trials for the U.S. Chamber Institute for Legal Reform.

Discovery issues, as well as shrinking judicial resources, have also significantly lengthened the time it takes to go to court. And a large number of disputes are being steered away from courtrooms as more businesses encourage consumers and employees to sign agreements that call for any disputes to be handled in arbitration.

"In general, for anyone younger, the reality is there are fewer trials today than in the past," said Samuel Houston III, an appellate lawyer at Houston Dunn PLLC who assists lawyers in preparing for trial. "That's probably not going to change."

Nevertheless, the specter of the trial litigator's extinction has spurred some lawyer groups to launch initiatives to keep that from happening. Next Generation Lawyers pushes for more courtroom experience for young attorneys, a factor that it says helps promote gender diversity in the profession

The American Bar Association's section of litigation has a task force that is looking at potential best practices for courts and clients to give younger attorneys trial experience, according to the section's chair, Laurence Pulgram, who leads Fenwick & West LLP's commercial litigation practice.

And the National Institute for Trial Advocacy also trains lawyers in advocacy skills in a "learning by doing" format. In 2015, the group taught advocacy skills to more than 4,800 lawyers in 213 trial and deposition programs.

"We have a disappearing skill set," Houston said. "If attorneys aren't developing their trial skills, from presenting opening statements to effective examinations to closing arguments, the consequences are that our profession suffers and ultimately our clients suffer."

Fewer Trials, Slower Pace

The number of trials dropped more than 60 percent from the 12-month period ending in September 1997 to the same period ending in 2016, while the median time from filing to completed trial increased.

The Customer Is Always Right?

Despite a young attorney's training and experience in court, clients can still stand between associates and juries.

Laura Monaco, an eighth-year associate at Epstein Becker Green, says some of her best experience preparing for trials came from her five years as a clerk for federal judges in the Eastern District of New York. Monaco, who focuses on employment law, has also assisted on grievance arbitrations between a union and employer, which are run like mini-trials, complete with opening statements and the examination and cross-examination of witnesses.

For full-fledged trials, though, clients have turned to more senior attorneys to lead the case, she says

"I've been in situations where the client wants the partner to be the face [of the case]," Monaco said. "Sometimes partners will say no [to associates being part of a trial] not because they don't want them to get experience, but because they are managing client expectations."

She says she's talked to associates at other firms who have complained about being stuck on document review work and not achieving the career milestones they had hoped for.

"Associate morale is definitely a concern," she said. "Most of the people who I have known over my career who have felt that they were not getting the career development they thought they would tend to end up leaving private practice."

Smith Gambrell's Rivera, a commercial and intellectual property lawyer who co-chairs the ABA Young Lawyers Division's litigation committee, has also noticed that clients tend to balk at paying to send a junior attorney for a court hearing — a practice he views as shortsighted.

Richard Rivera, a fourth-year assoc LLP, co-chairs the ABA Young Law committee. (Morgan Lee | For Law3

"If the investment is not made in attorneys' future, clients will take a double hit," Rivera said. "Not only will they be paying higher billing rates throughout for senior attorneys to handle matters, but once senior attorneys retire, clients will be left with a newer generation of lawyers who are not as well equipped to provide the best representation."

While junior lawyers face obstacles to get trial work across all types of firms, client obstacles may be more pronounced at big firms with business models that rely on high billing and high stakes. Clients in a bet-the-company case, for example, are less likely than clients in lower-stakes matters to be open to relative newbies on their trial team, attorneys say.

High billing rates for associates can also play a role. If a third- or fourth-year associate bills at $400 per hour and a partner bills at $600 per hour, some clients are inclined to pay that difference for 10 more years of experience, said Michael Pappas, a principal at Lesnick Prince Pappas LLP. He said his firm, a Southern California-based bankruptcy and commercial litigation boutique, has a fifth-year associate billing at $250 per hour, which represents enough of a difference from partners' pricing that clients consider it worthwhile to hire her for certain smaller-stakes matters.

"A lot of the big firms, they price the younger people out of the market," Pappas said. "Then you couple it with fewer cases. ... It makes it difficult to get young attorneys experience."

Even the growth area of alternative dispute resolution has a tendency to leave young lawyers on the

sidelines, he says.

“When you have a case in arbitration, as opposed to the court system, the rules of discovery aren’t always fully applied and there’s no law and motion, so a lot of the routine work more junior people usually do gets cut,” Pappas said.

Making the Best of BigLaw

Anthony Miller has had some luck getting trial experience in BigLaw. When the former Vinson & Elkins LLP lawyer started out as an associate 13 years ago, he tool his first deposition within four months and argued at many court hearings. He credits his mentor, trial veteran William Simms Jr., for the opportunities.

Although Miller took the initiative by working on diet drug litigation that led to hearings, deposition and trials, it also helped that the firm offered several programs, including one where attorneys could pick up municipal court cases that had a greater chance of going to trial.

Miller has since moved on from Vinson and is working as a trial attorney at a boutique he co-founded, Miller Patti & Pershern PLLC in Dallas. While he is grateful for his time at Vinson & Elkins — where he was able to avoid the usual associate trap of “doing document review and research and rarely making it out of a conference room or office” — he sometimes wishes he had gone a different route.

“If I had to do it over again, I might try to seek out a plaintiffs firm or a smaller shop,” he said. “If there are smaller cases with smaller stakes, young lawyers are more likely to handle them.”

With limited opportunities at big firms, some say aspiring trial attorneys would be better served working as federal and state prosecutors or in other government roles. Those stuck as a cog in the wheels of BigLaw litigation work may also consider turning to litigation boutiques that can offer more opportunities.

But others note that BigLaw provides solid training in tasks like research and brief writing, which are essential

Escape the Sidelines

Have your heart set on getting trial experie Here are some tips experts say can make a difference for a young attorney:

◇ Develop niche expertise in a sought-after like white collar or intellectual property.

◇ Ace the grunt work of research. Coming u new arguments based on case law is a prize for trial attorneys.

◇ Consider taking a billable hour pay cut a

skills for trial attorneys.

“Some government roles make it easier for attorneys to get trial opportunities, but I prefer getting a solid foundation at a law firm before being thrown into the position of going to trial every day,” said Moura, the Hunton associate.

And while big firms may not always be the easiest venue for young attorneys to get before a jury, that doesn’t mean the model can’t provide opportunities.

into the boutique or government space, wh
opportunities for trial work are more num

◇ Look to make connections with partners
a steady stream of trial work.

◇ Lobby for dedicated trial experience prog
your firm, and look into its pro bono progr

Elizabeth Dalmut, a fourth-year associate at Kirkland & Ellis LLP in Washington, D.C., joined the firm to become a courtroom advocate, and within nine months, she was assisting on her first trial. It was a product liability case that settled during trial, but she was able to create a slide presentation for opening statements and watch how an attorney questioned a witness based on a cross-examination she helped draft. She also has been in the courtroom on several cases that have involve mini-trials, where she has prepared witnesses, put on a rebuttal case and offered an affirming case.

She says Kirkland provides trial experience in part through its pro bono program, which puts no cap on hours for attorneys to work on these cases, and through its deposition and trial training program which prepares associates for different components of litigation.

“Trial experience gives you context and perspective to help drive your day-to-day work,” she said. “Being able to be in the courtroom so often improves the quality of life as an attorney.”

In addition to providing these morale benefits, raw trial experience simply makes junior attorneys better, experts say. The process teaches them to overcome adversity and to harness the kind of confidence and poise that can’t be faked.

“When junior attorneys do these trials, they are going to get slammed, but that’s how they learn,” Judge Donato said. “There is no substitute for thinking on your feet before a live judge, a live jury and live opposing counsel.”

Erin Coe is a feature reporter at Law360. She ***previously wrote*** *about attorneys leaving BigLaw for second careers. Feature reporter Natalie Rodriguez contributed to this article.*