The Disappearing Civil Trial and an Uncertain Future

by Graham K. Bryant

The Special Committee on the Future of Law Practice exists to study how various disruptive forces will affect the practice of law going forward. Although much of the committee's work addresses cutting-edge developments, it also studies other long-standing trends — such as the justice gap — that continue to have profound implications for our profession's future.[1]

Much like the justice gap, lawyers have long known that traditional civil trials are becoming less common. And although much has been written about *why* civil trials are declining, less attention has been given to what this trend means for the future of law practice.

In a recent law review article titled *The Disappearing Civil Trial: Implications for the Future of Law Practice*, Kristopher McClellan of the Young Lawyers Conference board of governors and I sought to fill this void.[2] We believe that the consequences of the disappearing civil trial are contributing to an unprecedented period of legal uncertainty to which all lawyers, not just civil litigators, must adapt in order to thrive.

Reevaluating the Accepted Narrative

Consider the accepted explanation for civil trial decline. From their origins until the early twentieth century, trials served as the primary investigative engine of the common law. This was because the common law had no provision for discovery — no mechanism for documenting disclosure or examining nonconsenting witnesses existed outside the courtroom. In order to figure out how the law applied to a given case, a trial was necessary to determine the facts.

All that changed in 1938 with the advent of the Federal Rules of Civil Procedure and their organized system of discovery, some form of which most states soon adopted for themselves. Litigators for the first time could compel adversaries to turn over relevant documents and interrogate hostile witnesses in depositions.

Doing so gave both parties an accurate estimate of what to expect at trial, and from there it was not hard to figure out whose side the law was on. Both parties then had an incentive to settle without the hassle and expense of trial. As legal historian John Langbein put it: "Having seen the dress rehearsal, today's litigants often find that they can dispense with the scheduled performance."[3]

The advent of discovery thus instigated the civil trial's decline. But this narrative has a flaw — it assumes that the law itself is known. One consequence of the decline, however, is that the law is becoming less certain.

An unintended result of more settled cases is less binding precedent in a time of proliferating statutes, regulations, and other legal literature in need of authoritative interpretation. Moreover, fewer trials means that fewer lawyers (and, eventually, judges) will have significant trial experience, leading to a self-enforcing norm of trial avoidance. All the while, the legal profession is undergoing the most disruptive period of technological upheaval since the advent of the common law.

Resolution of all legal problems requires application of governing law to specific facts to reach a conclusion.[4] At common law, all parties knew the law but not the facts. We expect that in the future litigators will know the facts better than ever — but the law itself will become increasingly uncertain.

Lessons for Lawyers

Like the more sensational disruptive forces affecting law practice — artificial intelligence, blockchain technology, and online dispute resolution, among others — the disappearing civil trial provides an opportunity for innovation. How can lawyers best prepare themselves for an uncertain future, and perhaps even thrive despite relentless change?

First, lawyers should take on more pro bono litigation cases, and their partners or supervisors should encourage them to do so. A recent study of Virginia civil caseloads revealed that both parties have legal representation in only one percent of general district court cases, six percent of adult juvenile and domestic relations district court cases, and 38 percent of circuit court cases.[5] As these figures indicate, trying a case in state court is economically unsound for most litigants unless they represent themselves.[6]

Encouraging newer attorneys to take pro bono cases through trial allows them to gain trial experience, making them more valuable to an employer and to their clients. Doing so will also help mitigate the problem of trial-averse attorneys ascending to the bench. More broadly, serving underprivileged citizens reinforces the legitimacy of the legal system as a whole and improves lawyers' standing in society.

Second, the disappearing civil trial provides litigators an opportunity to embrace alternative dispute resolution and develop new, more versatile practices focused on solving problems holistically. ADR permits professionals with other areas of expertise, such as counselors and financial advisors, to assist with problem solving in a way that traditional ligation usually does not.[7]

A lawyer who embraces his or her licensure as an "attorney *and counselor* at law" in this fashion may be able to build a practice that is more personally satisfying and better serves clients than another who ignores the myriad possible dispute resolution options.

Finally, and perhaps unintuitively, lawyers should cultivate a knowledge of legal history to prepare themselves for an uncertain future. In a time where new laws are passed faster than courts can interpret them, lawyers who have a nuanced understanding of the American common law system's origins and evolution are best suited to contextualize novel issues within the common law fabric that underpins our entire legal system.

This is especially true in Virginia, where the common law of England is incorporated into the Code,[8] and where the courts have not hesitated to rely on that common law tradition to decide cases.[9]

As the disappearing civil trial indicates, trends both old and new will play key roles in shaping the future of law. By studying how we arrived at this point and what challenges lie ahead, we can better prepare for what the future will bring. Although much is uncertain, one truth is clear: the legal profession must be willing to adapt and innovate to remain relevant.

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Endnotes:

1 *See* Chris Fortier, *The Legal Checkup — A Tool for All*, Va. Law., Apr. 2018, at 49–50, http://www.vsb.org/docs/valawyermagazine/vl0418-legalcheckups.pdf (discussing legal checkups as one of the latest efforts to address access to justice concerns).

2 Graham K. Bryant and Kristopher R. McClellan, *The Disappearing Civil Trial: Implications for the Future of Law Practice*, 30 Regent U. L. Rev. 287 (2018).

3 John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 551 (2012).

4 *See* Antonin Scalia & Bryan A. Garner, Making Your Case: the Art of Persuading Judges 41 (2008).

5 Shauna Strickland et al., NCSC, Virginia Self-Represented Litigant Study: Outcomes of Civil Cases in General District Court, Juvenile & Domestic Relations Court, and Circuit Court i (2017), http://brls.org/wp-content/uploads/2018/03/Outcome-Report.pdf.

6 Paula Hannaford-Agor et al., NCSC, Civil Justice Initiative: The Landscape of Civil Litigation in State Courts 35 (2015), https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx.

7 *See* Pauline H. Tesler, Collaborative Law: Achieving Effective Resolution In Divorce Without Litigation 3–5 (2d ed., 2008).

8 Va. Code § 1-200.

9 *See, e.g.*, *Cherry v. Lawson Realty Corp.*, No. 170718, slip op. at 6–7 (Va. May 3., 2018); *Cline v. Dunlora South, LLC,* 284 Va. 102, 105–10, 726 S.E.2d 14, 16–19 (2012), *Commonwealth v. Morris*, 281 Va. 70, 79, 705 S.E.2d 503, 508 (2011); *Taylor v. Commonwealth*, 58 Va. App. 435, 443, 710 S.E.2d 518, 522 (2011).