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HARDLY TRYING

THE DECLINING USE OF CIVIL TRIALS IN WISCONSIN

By Larry Sandler

The halls of justice are less important than the conference rooms of justice.

Even as laws multiply, civil trials are playing a shrinking role in both state and federal courts. The vast majority of civil disputes are settled out of court or otherwise resolved without ever reaching trial.

While resolutions after trials may never have characterized a majority of cases, attorneys and legal scholars see developments in recent decades as a fundamental change in how justice is administered. In Wisconsin alone, the number of civil cases tried by juries fell by almost 50 percent, from 536 in 2004 (the first year for which detailed disposition figures are available) to 269 in 2016, according to statistics compiled by the Office of State Courts. During the same period, the number of civil bench trials dropped even more precipitously—by more than 60 percent, from 923 in 2004 to 368 in 2016.

That's a steep drop in a number that wasn't all that large even at the beginning of the period. In 2004, trials resolved fewer than 2.6 percent of Wisconsin civil cases. By 2016, the share of civil cases decided by trials had dropped to fewer than 1.4 percent.

The decline is part of a long-term national trend. Marc Galanter, now a professor emeritus at the University of Wisconsin Law School in Madison, documented that trend in "The Vanishing Trial: An Examination of Trials and

"I think it's essential for the defense bar and potential defendants to have that fear of going before a jury. You take that away, and you take away the incentive to do the right thing."

Attorney Robert Habush

This article follows up on an invitation on the back cover of the summer 2017 *Marquette Lawyer*, especially to the Wisconsin legal community, to weigh in on the decline of the civil jury trial. It is supported by the Law School's Adrian P. Schoone Fund for the Study of Wisconsin Law and Legal Institutions. Larry Sandler is a freelance journalist in Milwaukee, Wis.

Related Matters in Federal and State Courts,” a study commissioned by the American Bar Association’s Litigation Section and first presented as a working paper for the section’s December 2003 Symposium on the Vanishing Trial. Using statistics compiled

by the Administrative Office of the U.S. Courts, Galanter found that the number of federal civil trials nationwide dropped more than 63 percent from 1985 to 2002, a period when all types of federal trials declined to varying degrees. More-recent figures show federal civil trials falling another 31 percent from 2003 to 2015.

The National Center for State Courts also documented declines for all types of state trials in a 2004 study of 21 states and the District of Columbia from 1976 to 2002, and in a follow-up 2013 study of 15 states from 1976 to 2009.

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Professor Andrea Schneider

Why Is This Happening?

Attorneys and legal scholars point to several interconnected reasons why civil trials are on the decline.

Cost of litigation: As the cost of litigation has risen, attorneys say, pressure has grown to resolve disputes by less-expensive means. The mounting expenditures reflect not just inflation in legal fees but also higher costs for discovery, including expert testimony.

Nationwide, spending on legal services increased from 0.6 percent of gross domestic product in 1960 to 1.6 percent in 2010, Galanter said in a 2015 lecture at Valparaiso University in Indiana. During the same period, total GDP grew from \$3.1 trillion to \$14.8 trillion in 2009 inflation-adjusted dollars, according to figures from the federal Bureau of Economic Analysis. That means the legal sector expanded from \$18.6 billion to \$236.8 billion, adjusted for inflation, in that period.

“The cost of litigation has grown substantially,” said Janine Geske, L’75, a former Wisconsin Supreme Court justice and retired Marquette Law School faculty member (and a former trial judge). “It’s much cheaper and easier to settle a case.”

One factor has been the cost of expert witnesses, said Beth Osowski, an attorney at Kindt Phillips in Oshkosh and chair of the State Bar of Wisconsin’s Litigation Section. In a personal injury or medical malpractice case, for example, it could cost thousands of dollars to have a doctor waiting for hours to testify. Witnesses also spend hours in depositions, and responses to written interrogatories eat up valuable time for highly paid corporate executives, added James Murray Jr., L’74, a founding partner at Peterson, Johnson & Murray in Milwaukee.

The rise of electronic discovery also has been costly, said Murray and John Rothstein, L’79, a partner at Quarles & Brady in Milwaukee. Starting in the 1980s and accelerating since the start of the 21st century, electronic discovery “just has exploded,” Rothstein said, as attorneys comb through emails, texts, and social media postings for relevant evidence. It is not unusual for 100,000 documents to be produced in discovery, Rothstein said.

Change in mindset: Over time, increasing numbers of judges, attorneys, and potential jurors have changed their attitudes toward trials.

The shift in judicial mindset could be glimpsed even several decades ago. “In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation,” Judith Resnik, now a Yale University professor of law, wrote in “Managerial Judges,” a 1982 article in the *Harvard Law Review*.

That managerial role has expanded so much that “the whole ideology of what it means to be a judge has changed,” Galanter said in an interview. Judges now see their primary mission as mediating interactions between the parties in a case, rather than presiding over trials, he said.

The change in judicial mindset has raised eyebrows. In a published speech a few years ago, Marquette Law School Dean Joseph D. Kearney attributed some changes in litigation “to the evolving view that judges

have of themselves—over, say, the past thirty years—as case managers.” A case that goes away, he said, “is a case managed, a case processed, a case closed. It goes on the ‘resolved’ side of the judge’s periodic report.”

Changes among lawyers have been consequential also. More lawyers are practicing in large, specialized firms that emphasize processing a high volume of cases, said Galanter; Patrick Dunphy, L’76, of Cannon & Dunphy in Brookfield; and Robert Habush, of Habush Habush & Rottier in Milwaukee.

“The economic incentive in a high-volume practice is quick turnover,” which leads to more settlements and fewer trials, Dunphy said. That has given rise to “a new generation of personal-injury lawyers who couldn’t care less if they go to trial,” Habush said.

By contrast, Habush said, “A lot of people in my generation, and afterward, really wanted to try cases and enjoyed trying cases and were concerned about their reputation for trying cases.” ▶▶

Trends in Wisconsin Civil Case Disposition

Year	Civil dispositions	Civil jury trials	Civil bench trials	Civil settlements	Civil defaults/ uncontested judgments	Civil dismissals	Other civil dispositions
2004	57,096	536	923	2,893	25,405	24,650	2,680
2005	58,546	512	795	2,743	25,845	26,026	2,543
2006	60,810	430	825	2,835	28,897	25,351	2,123
2007	70,995	444	804	3,184	36,023	28,172	2,022
2008	83,194	396	785	4,075	44,957	30,678	2,303
2009	88,777	356	732	4,138	49,656	31,771	2,124
2010	94,156	353	706	3,937	51,443	35,578	2,139
2011	88,168	366	773	5,907	46,011	30,596	4,515
2012	71,926	305	635	5,419	38,128	24,410	3,029
2013	59,977	256	477	4,724	30,202	21,946	2,372
2014	52,636	269	404	4,345	25,716	19,806	2,096
2015	48,493	265	325	4,316	23,051	18,539	1,997
2016	46,388	269	368	3,747	21,090	18,974	1,940
'04 to '16	-18.8%	-49.8%	-60.1%	29.5%	-17.0%	-23.0%	-27.6%

While the total number of civil dispositions in Wisconsin has declined since 2004, the decline is particularly noteworthy for civil jury trials (down 49.8 percent from 2004 through 2016) and civil bench trials (down 60.1 percent). Source: Wisconsin Office of State Courts.

The Vanishing Trial Lawyer?

COMMENT by Daniel D. Blinka, Professor of Law



[T]he decline may mark a shift in law culture, featuring a pervasive, deep reluctance to try cases. Better to settle than to take a chance and lose?

The phrase “vanishing trial,” which once seemed hyperbole, is now eerily prescient. The numbers are clear, as shown in the table accompanying Larry Sandler’s article. In Wisconsin, starting from already low numbers in 2004, civil jury trials declined by 50 percent and bench trials plunged by 60 percent through 2016. But why? Is change in the legal climate speeding the trial to its extinction, much like the comet that wiped out the dinosaurs? Observers point to myriad factors, but maybe the most significant one involves us, the lawyers.

One learns very quickly that there are no second-place trophies at trial. One party wins; one party loses. Trials are demanding in every way: intellectually, emotionally, and physically. Not all lawyers have the combination of skills and personality (probably a good thing) necessary for trial practice.

To be sure, some perspective is in order. There never was some halcyon period where most cases were tried to a jury or the bench. Settlements frequently produce good outcomes that both parties sign off on, however begrudgingly. Trials are less predictable and more difficult for parties to control. But this has always been true. What then explains the decades-long decline of late?

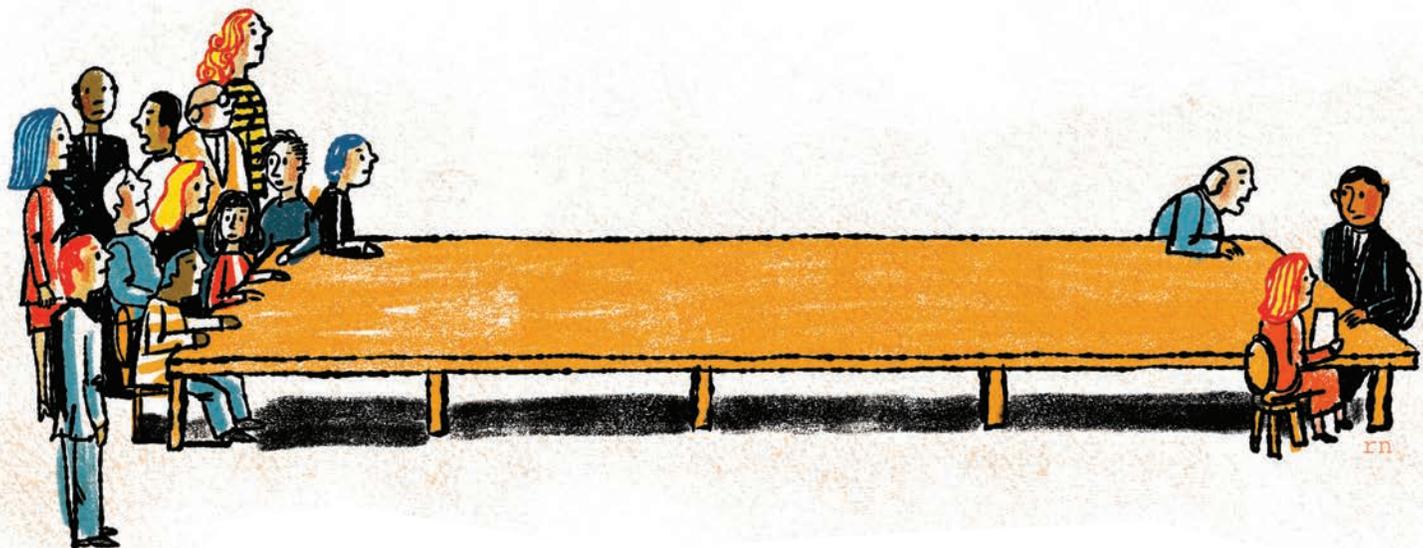
The factors usually cited are the uncertainty, expense, time, and increasing complexity of trials, along with declining faith in juries. Yet these factors are difficult to reconcile with the even greater drop in bench trials, which are often less expensive and less technically complex than jury trials.

Perhaps we need to look beyond money, time, and complex rules and ask ourselves whether the trial bar is itself vanishing. Put

differently, the decline may mark a shift in law culture, featuring a pervasive, deep reluctance to try cases. Better to settle than to take a chance and lose?

The declining number of trials warps the adjudicative process. Fewer trials mean a shrinking number of lawyers with the skills and experience to try cases. What sense does it make to talk about “pretrial” procedure if there is no serious intent to try a case? What sense does it make to speak of “alternative” dispute resolution (ADR) if a trial is not seriously considered among the alternatives? Discovery and motion practice, the lifeblood of pretrial practice, are based on the adversary trial. One takes depositions and demands documents to learn (“discover”) the facts and evaluate the case’s strengths and weaknesses, an undertaking difficult under the best of circumstances but that becomes chimerical without some trial experience and an inclination to try cases. Settlement is also affected. A client’s options are circumscribed by a lawyer lacking the willingness or skills to try the case, whether the settlement is laundered through mediation or other negotiation.

In sum, the stark decline in trials suggests we need to rethink a wide range of issues: the contours of pretrial practice, dispute resolution, and, of course, the trial itself. Within the profession, we need to assess how much of the decline is attributable to external factors (e.g., time and money) and, frankly, how much of it stems from lawyers who are reluctant or, worse, unable to try cases. And maybe some of the blame falls on legal education. One wonders whether 20 years from now the “alternative” in ADR will refer to trials, not mediation or negotiation. There’s much to ponder.



Jurors and potential litigants also have grown skeptical of trials, Osowski said. Publicity about large verdicts for cases that seemed frivolous to some in the public has led attorneys to consider “how many of the jurors are going to think our clients are greedy and lazy for being there,” she said.

John Becker, of Becker, French & Durkin in Racine, said that as a plaintiff’s attorney, he had encountered what he called “jury bias” against larger awards in civil cases. There is “a general perception in the population that people are getting too much money from lawsuits,” Becker said. “Because of that, verdicts do not seem to be as favorable as in the past, and plaintiffs are more cautious about going to trial.”

But few plaintiffs are really abusing the system, Osowski and Becker said. On the defense side, many insurance companies believe that settlements are less expensive than trials, in Habush’s estimation. Charles Stern, L’76, recently retired general counsel of Wisconsin Mutual Insurance, said, “In the good old days, we could try a run-of-the-mill auto case with little discovery, just with a small file of medical records, in less than two days. Now hundreds of pages of medical records, and seven or more (depositions) later, we have a four-day trial. . . . If I can get a case settled for somewhere near its midpoint value at arbitration, why would I risk a jury and costs?”

Rise of other methods: As trials have fallen out of favor, various forms of alternative dispute resolution have become more prevalent.

At a 1976 conference in St. Paul, Minn., Warren Burger, chief justice of the United States, called for more informal means of resolving disputes. Another speaker at the conference, Harvard Law Professor Frank Sander, is widely credited with laying the foundation for alternative dispute resolution, or ADR.

That vision has largely been realized, as judges in Wisconsin and elsewhere routinely steer litigants toward mediation, often before retired judges, before allowing their cases to proceed to trial. Although Wisconsin rules (Wis. Stat. § 802.12) empower, rather than require, judges to order mediation, Rothstein said, “In practice, I don’t know any judge who doesn’t.”

An overwhelming majority of cases referred to mediation are settled. From 2004 to 2016, the number of Wisconsin civil settlements jumped almost 30 percent, from 2,893 to 3,747, according to the Office of State Courts.

But that number reflects only the settlements that are formally approved by a judge, Murray noted. Far more cases are settled out of court, and many of those out-of-court settlements are recorded in official statistics as among “dismissals,” he said. The 18,974 civil cases dismissed in 2016 constituted almost 41 percent of the 46,388 civil cases resolved by Wisconsin courts that year. The remainder were resolved by default, uncontested judgments, or other means.

At the same time, a growing number of disputes never reach the courthouse steps in the first place. Numerous businesses and other organizations ►►

have written clauses into their contracts that mandate customers, employees, vendors, and other parties to resolve any differences through arbitration rather than litigation.

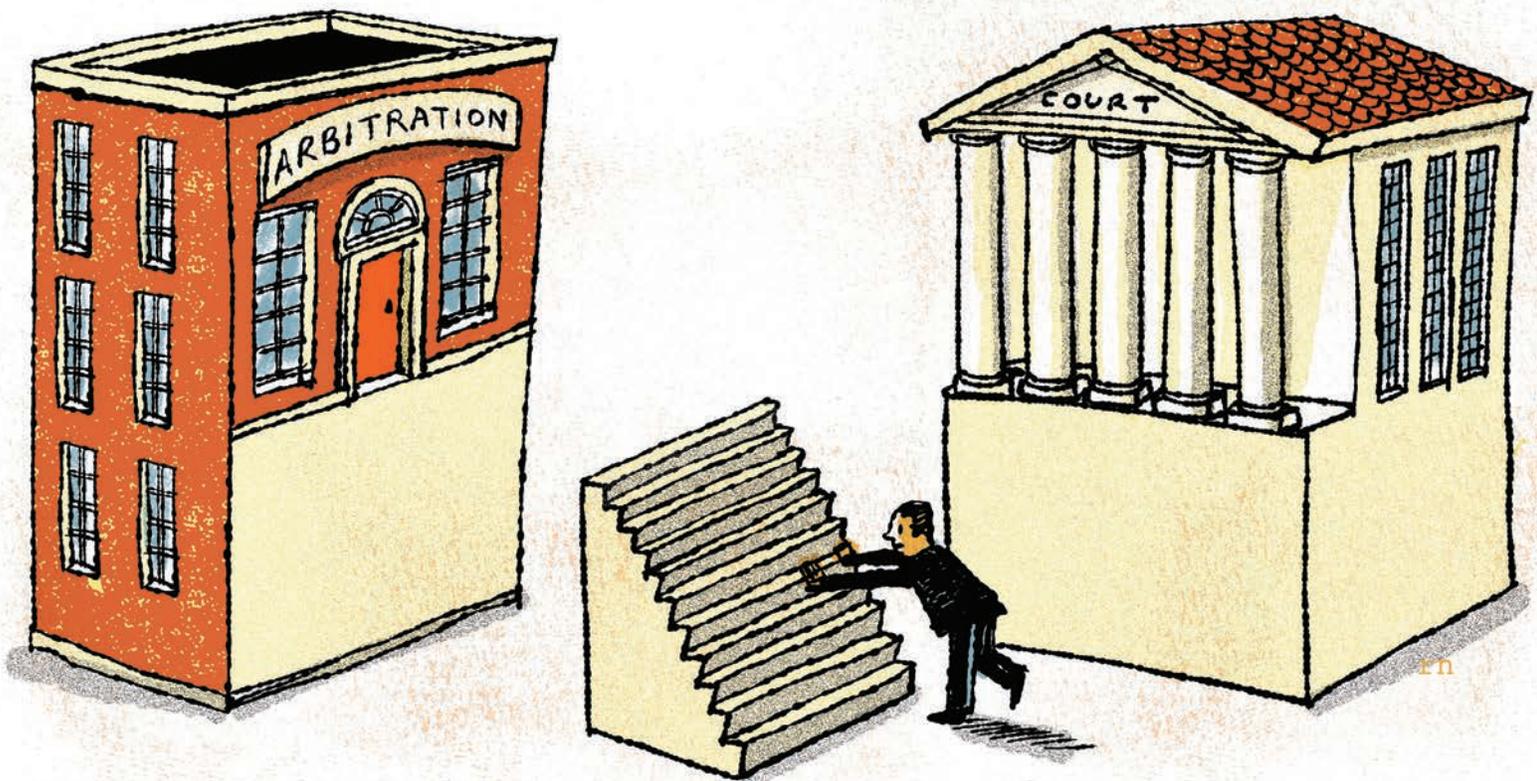
The effects have been widespread. “By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices,” *New York Times* reporters Jessica Silver-Greenberg and Robert Gebeloff wrote in the first part of “Beware the Fine Print,” a three-part series in 2015. “Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.”

In recent decades, the Supreme Court of the United States has consistently upheld or required application of arbitration clauses under the Federal Arbitration Act.

Congress passed the act in 1925, but only in the 1980s did the Court begin to hold that it preempts state law even in state court litigation.

Whatever the causes—arbitration, other forms of alternative dispute resolution, or something else altogether—the number of civil cases resolved in Wisconsin courts has declined steadily over the past half decade or more, even apart from the number of trials. Whereas 2010 saw the resolution of 94,156 civil cases, according to the Office of State Courts, by 2016 that figure had dropped almost 51 percent, to 46,388.

And other cases are being decided in government forums apart from the courts. “In 2010, when the federal courts held trials in fewer than 14,000 cases, the Immigration Courts heard 122,465 cases with representation and 164,742 without, the Board of Veterans Appeals heard over 13,000 cases, and the Social Security Administration’s Office of Disability Adjudication and Review heard over 700,000,” Galanter said in his Valparaiso lecture. “There is a lot of adjudication going on, but it occurs in institutions



that enjoy a less distinguished ceremonial pedigree than courts—absent the robes, elevated benches, honorific titles, deferential retainers, and the distinctive etiquette that distinguishes a court from more pedestrian decision-making bodies.”

Tort reform: Changes in tort laws, and particularly Wisconsin’s cap on medical malpractice awards, have reduced the financial incentive for bringing some cases to the point that they have become financially infeasible, said Osowski, Dunphy, and attorney Robert Menard, of Menard & Menard in Milwaukee. Dunphy also pointed to an insurance-industry survey that found doctors won more than 90 percent of medical malpractice cases nationwide from 2008 to 2012.

Indeed, the number of medical malpractice cases filed in Wisconsin fell more than 50 percent from 1999 to 2013, *Milwaukee Journal Sentinel* reporter Cary Spivak wrote in “No Relief,” a two-part series in 2014. In a 2015 follow-up article, Spivak and reporter Kevin Crowe found that Wisconsin was last among all states in the number of medical malpractice claims.

“Malpractice lawyers blame the decline on state laws that they say are skewed in favor of doctors and hospitals; medical groups contend that malpractice suits have declined because health care professionals have gotten better at their jobs,” Spivak wrote in the 2014 series.

Wisconsin’s medical malpractice cap has been controversial. A 1995 cap of \$350,000 on noneconomic damages, such as pain and suffering, was ruled unconstitutional by the state Supreme Court in 2005. A \$750,000 cap replaced it in 2006, but in July of this year, the state Court of Appeals ruled that cap unconstitutional as well. The latest ruling is expected to be challenged in the state high court.

Looming larger than the cap, however, Spivak wrote in his series, is the state’s Injured Patients and Families Compensation Fund, which pays the portion of verdicts exceeding \$1 million. (The fund had total assets of \$1.3 billion, as of June 30, 2016, according to its website.)

“Fund officials argue the money is needed in case a series of medical mistakes results in major payouts,” Spivak wrote. “But malpractice lawyers

say the huge treasury instead enables private insurance companies to dig in and fight claims even when malpractice is obvious, because the most a private insurer would have to pay out if it lost a multimillion-dollar verdict is \$1 million.”

Other factors:

Dunphy cited additional factors contributing to the decline of civil trials. “Because of decades of product litigation, products became safer,” reducing the number of product liability cases, he said. Similarly, as industrial machinery became safer and the number of manufacturing workers fell, the number of cases involving industrial accidents also declined.

What Does This Mean?

The increasing rarity of civil trials has broad implications for the practice of law, the court system, and even the concept of justice in American society, attorneys and legal scholars said. Among those implications are:

Less experienced lawyers: As trials become scarcer, so do attorneys who know how to handle them—and to do so well. “A whole generation of lawyers is going to mature without having the kind of trial experience their predecessors had,” Murray said.

When civil trials were more prevalent, it would be common for law firms to assign younger lawyers to smaller cases to build their experience, but “at least in the civil arena, that’s going away,” Geske said. “Some lawyers have gone years and years and years without a trial.”

As a result, “even the old hands . . . get rusty,” said Milwaukee County Circuit Court Judge Richard Sankovitz.

The lack of practice shows when a case does reach trial, Rothstein and Sankovitz said.

“If you want to be good at golfing, you have to play a lot of golf,” Rothstein said. “It’s the same with a trial attorney.” ▶▶

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Attorney James Murray Jr.

From the bench, Sankovitz sees the impact in the way attorneys ask questions. Voir dire is often “wooden and fruitless” for attorneys unfamiliar with the complexities of juror selection, he said. And disastrously for their clients, the judge added, inexperienced attorneys will conduct cross-examinations like depositions, asking questions to which they don’t know the answers, instead of

guiding witnesses toward responses that will help the attorneys make their cases to juries.

Meanwhile, law schools have also changed the way they educate lawyers, said Andrea Schneider, professor of law at Marquette University. “For 20 years now, lawyers have known they are as likely to be mediating a case as trying a case,” said Schneider, who directs the Law School’s ADR program. “We have to be sure our lawyers are ready for the actual

practice of law and not the way it was in the 1950s.”

In addition to a separate litigation certificate, Marquette makes an ADR certificate available to law students whose coursework includes mediation, arbitration, and negotiation, along with internships and other fieldwork to give students practical experience in using those skills.

“Lawyers are still busy,” Murray said. “They’re just not as busy with trials.”

Less experienced judges: As with lawyers, judges also are getting less trial experience as trials occupy less of their time. Sankovitz said he saw the contrast

during his two tours of duty in the civil division of the Milwaukee County Circuit Court, first from 2004 to 2008 and then from 2012 to 2016. “On my first tour, I presided over 50 jury trials that went to verdict,” he said. “On my second tour, only 19 went the distance, a drop of more than 60 percent.”

The practice in larger Wisconsin counties of rotating judges so that they handle different kinds of cases over the years has been both praised and criticized in light of the trend toward fewer trials. Some said it helps judges keep courtroom skills current because they end up presiding over trials in criminal courts. Others said that judicial rotation means that judges with little and sometimes even no experience with civil trials end up doing subpar work when the occasion arises and that lawyers consequently avoid trials.

Less knowledgeable jurors: With fewer trials, fewer citizens have experience sitting on civil juries. And those who end up on a jury may have unrealistic ideas about attorneys’ skills, based on how lawyers are portrayed in popular television courtroom dramas. Sankovitz said. “I warn jurors: ‘You can try 200 trials and not make it look as good as it looks on *Law & Order*.’ Jurors come in with this expectation about how good the lawyers are going to be, and they are routinely disappointed.”

Less visible decisions: As disputes move out of courtrooms, they move from public forums to situations whose results may never be known by anyone other than the parties involved. In previous decades, attorneys deciding whether to settle or try a case could factor in the size of verdicts in similar cases, Osowski said. Now they can base their calculations only on other settlements of which they know. She said, “I don’t think that’s as valid a way of deciphering the value of a case.”

Also, keeping a product liability settlement secret could endanger public safety if the settlement doesn’t lead to correcting a dangerous condition, Geske said.

And because settlements and arbitration awards don’t set legal precedents, Geske added, “The major impact of the reduction in cases going to judgment and appeals is that the law doesn’t get a chance to develop. That’s where our law comes from. . . . A lot less law is being developed.”

“There is a lot of adjudication going on, but it occurs in institutions that enjoy a less distinguished ceremonial pedigree than courts—absent the robes, elevated benches, honorific titles, deferential retainers, and the distinctive etiquette that distinguishes a court from more pedestrian decision-making bodies.”

Professor Marc Galanter



Is This Positive or Negative?

Attorneys and legal scholars see some advantages, but perhaps more disadvantages, to the reduction in trials.

Chief among the advantages is that arbitration and mediation can be quicker, more accessible, and more affordable ways to fairly resolve certain types of disputes, Schneider and Geske said. Schneider points to neighborhood disputes and divorces, among others, and says more generally that ADR “makes a ton of sense when you have two equal parties.”

But “that’s not the case in consumer and employment cases,” Schneider said. “Much of the world prohibits” arbitration in such cases, because of the differential in power between individuals and corporations.

“Our court systems cannot simply be for individuals who have money,” Rothstein said. “That’s a society that I don’t think any of us would want to live in. . . . We need to ensure that all levels of our society have their rights protected.”

The trends led the New York University (NYU)

School of Law to launch the Civil Jury Project in 2015. Funded by a \$2 million grant from trial attorney Stephen Susman, the four-year project is researching why civil jury trials are declining—and trying to figure out what, if anything, can or should be done about it. Susman, an adjunct professor of law at NYU and managing partner of Susman Godfrey in New York and Houston, is leading the project as executive director.

“We should not let this institution [of the jury trial] die quietly without asking questions,” Susman told *The Wall Street Journal’s Law Blog* in July 2015.

Yet there is no question, Sankovitz said, that the pool is shrinking of “the people we count on to shepherd trials and season jury panels, especially in high-profile, societally significant cases.”

Even when a case is going to be settled, the possibility of a trial is needed to ensure the settlement is fair, Habush and Dunphy said. “I think it’s essential for the defense bar and potential defendants to have that fear of going before a jury,” Habush said. “You take that away, and you take away the incentive to do the right thing.” ■