



the Vanishing Jury & TRIAL PHENOMENON Trial Preparation

BY ROSALIND R. GREENE & JAN MILLS SPAETH

The past decade has witnessed much controversy and media attention regarding the “vanishing jury trial phenomenon.” Statistics tell us that the trend is a real one.

In United States District Courts for 2008, of the 267,257 civil cases filed, only one percent (2,175) proceeded to trial. Of the 70,896 criminal charges filed in 2008, only four percent (3,150) were tried before a jury.¹ In fact, the number of federal civil jury trials nationwide in 2008 dropped four percent from the number in 2007. This reduction in federal criminal trials was two percent nationwide.

This phenomenon is not occurring just in the federal courts. According to the Research Division of the National Center for State Courts, between 1976 and 2002, the number of civil jury trials fell by two-thirds. The NCSC notes that not only has there been a significant reduction in the percentage of jury trials, but there has been an actual decrease in the absolute numbers as well.²

According to Marc Galanter, professor of law at the University of Wisconsin-Madison, the percentage of all civil case dispositions by trial in 2002 was less than one-sixth of what it was in 1962.³ This trend has not only continued, but it has become sharper and steeper in the last 20 years, up to and including the present.

What about in Arizona? The trend is undisputedly occurring here as well, especially in civil cases.

In 2001, of the total number of civil cases disposed of in Arizona, five percent were tried before a jury (2,331 versus 49,333, excluding appeals). This percentage has dropped consistently since then. In 2008, this percentage was one percent (346 jury trials versus 65,502 dispositions, excluding appeals).⁴

Statewide, in 2001, there were 36,529 criminal case dispositions (excluding appeals). Of these, 1,582 cases were tried before a jury. In contrast, in 2008, there were fewer actual jury trials (1,511), and there were 36 percent more case dispositions (57,461, excluding appeals).

County to county, there are differences. In 2008, the number of criminal cases being tried in Pima County (six percent) was higher than the number in Maricopa County (two percent). For civil cases in 2008, there was little difference. The number of cases disposed of that were tried before juries in Maricopa County was less than one percent (224 jury trials versus 45,771 dispositions). In Pima County, it was one percent (51 jury trials for 7,344 dispositions, excluding appeals).⁵

The magnitude of the shift is illustrated by the number of large research projects over the past decade devoted specifically to the vanishing jury trial.

In 2003 and 2004, the ABA Litigation Section undertook a major national project to verify the existence of this phenomenon and to identify its causes and consequences.

That was the largest single initiative the section had ever funded to that point, and it involved 16 different contributors, compiled into a book.⁶

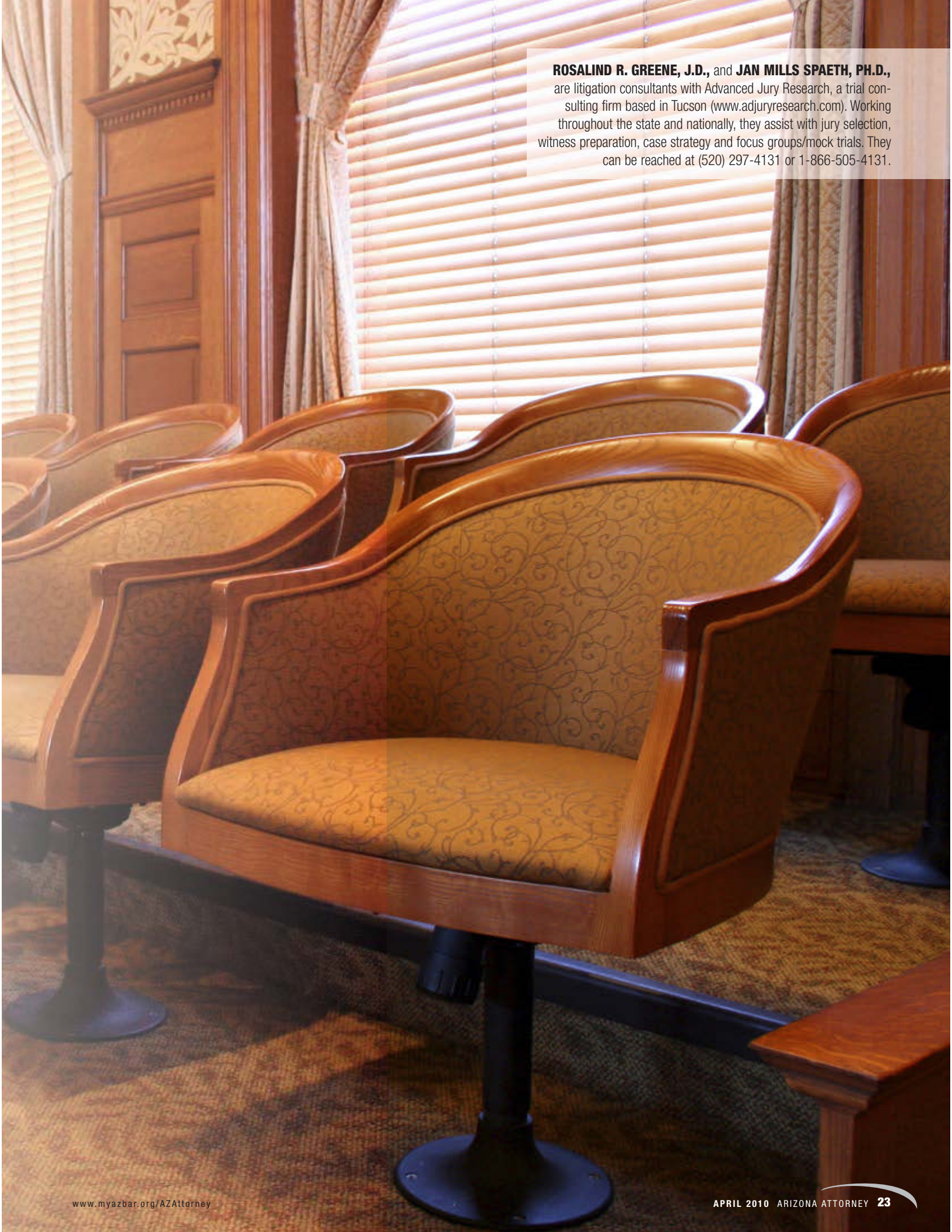
In 2006, the Boston Bar Association published the findings of its Task Force on the Vanishing Jury Trial after conducting an impressive local and nationwide study. One of the publication’s primary goals was to provide trial preparation training, such as in-house and CLE courses. It was aimed at young attorneys, because they were not getting the trial experience needed to learn skills required for jury trials.

Now that the “vanishing jury trial” has been shown to exist, what brought this about?

We interviewed three highly experienced attorneys in Arizona who have years of firsthand knowledge on the topic.

Patricia Lee Refo, a partner at Snell & Wilmer (Phoenix office), has been practicing law since 1983. She chaired the ABA Litigation Section in 2003-2004, during the time when the section undertook its project to study the vanishing jury phenomenon. In fact, she authored the study’s introduction in the *Journal of Empirical Legal Studies*.⁷ She received the ABA Jury System Impact Award in 2009.

D. Burr Udall, currently a partner in the Udall Law Firm, began practicing in 1954, primarily in civil defense. In 2001,

A photograph of a room with wood-paneled walls and a window with blinds. In the foreground, there is a row of wooden chairs with patterned upholstery. The chairs are arranged in a line, and the room appears to be a waiting area or a conference room. The lighting is warm, coming from the window.

ROSALIND R. GREENE, J.D., and **JAN MILLS SPAETH, PH.D.,**
are litigation consultants with Advanced Jury Research, a trial consulting firm based in Tucson (www.adjuryresearch.com). Working throughout the state and nationally, they assist with jury selection, witness preparation, case strategy and focus groups/mock trials. They can be reached at (520) 297-4131 or 1-866-505-4131.



he was named the Defense Lawyer of the Year by the Arizona Trial Lawyers Association. He has kept

statistics on the number of cases tried by his firm, by decades, since the 1960s. He has seen some surprising changes, which he has shared with us. He also has witnessed drawbacks of the disappearing jury trial.

Robert J. Hirsh has immersed himself in criminal defense for 50 years, 45 of them in private practice and 5 years as the administrator of the Pima County Public Defender's Office. He was given the Robert J. Hooker Criminal Justice Award

in 2009. He is in a unique position to address the extent, causes and effects of the vanishing jury trial on the criminal justice system.

Does the fact that only one percent to six percent of all cases proceed to trial make traditional trial preparation obsolete? Are attorneys less likely to investigate cases to the extent they did when 10 percent to 25 percent of their cases were tried before a jury panel? Are they less likely to hire experts, conduct focus groups, do witness preparation, or develop case strategy? We queried these experienced counsel regarding the impact of fewer jury trials on trial preparation.

A reduction in jury trials certainly may result in cost-saving measures for all par-

ties. But this phenomenon of the vanishing jury trial comes with substantial losses to the legal system, as well.

endnotes

1. www.uscourts.gov.
2. www.ncsc.org.
3. Marc Galanter, *An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL L. STUD. 459-570 (Nov. 2004).
4. See www.supreme.state.az.us/stats.
5. *Id.*
6. The extensive results were published in *Journal of Empirical Legal Studies*, November 2004, in a book format. See *supra* note 3.
7. *Id.* at v-vii.

Q&A Burr Udall

Q: To what extent have you seen a decrease in the number of cases going to trial, compared to past years?

BURR UDALL: I'm my father's kid, and I keep statistics. I started about 1960. We had five to six trial lawyers, and tried 24 to 40 cases a year in the 1960s. In the 1970s, we had six to eight trial lawyers, and tried 26 to 55 jury trials a year. In the 1980s, we tried 22 to 34 trials a year with the same number of attorneys. We had five to nine trial lawyers in the 1990s. Between 1990 and 1995, we tried 20 to 25 cases yearly. From 1995 to 2000, this dropped to 12 to 14 cases annually. In the 2000s, we have had five to seven trial lawyers, trying only six to eight jury trials a year.

We don't have that many trial lawyers. We've got "boring law department" lawyers now.

Back in the late 1960s it was not unusual to try a case on Tuesday, get it to the jury on Wednesday, start another case on Thursday, and have to take a recess to take the verdict on the case you tried on Tuesday. You don't do that anymore.

Q: Did most of your attorneys take cases to trial years ago?

UDALL: Yeah. Early on in the 1960s and 1970s, probably 90 percent of what this law firm did was trial work. Now it's probably closer to 25 percent to 30 percent. We've still got a bunch of cases, but the number of trials has changed dramatically.

Q: Why do you think there are fewer jury trials than there used to be?

UDALL: Part of the reason is more mediation. Mediation became a cottage industry. A lot of it may have to do with the fact that back then, you didn't have the mandatory arbitration that's now \$50,000 or less. You tried a lot of cases where you were arguing over \$3,500 versus \$4,000. Also, more and more contracts provide for arbitration now. People don't want to spend all that time and money on trials.

I also think the clients, more and more, don't want to have eight strangers listen to their problems. They want to get the thing settled.

Q: In your opinion, has cost had an impact on the number of jury trials?

UDALL: One of the reasons people settle cases is the cost. Years ago, a five-day trial was a long trial. This day and age, five days is probably pretty normal. Plaintiff lawyers in medical malpractice cases say to me, "Any medical mal case is going to cost \$60,000. That's the budget." That's a lot of money.

I remember a case quite awhile ago where a doctor in New York said, "I want \$4,000 an hour to testify, and I want it up front." When I started in 1954, I think an answer fee was \$5. It's close to \$200 now or more. Cost is a substantial problem for a lot of people going to trial.

Q: You mentioned that professors at the University of Arizona Law School have told you that fewer law students want to be trial attorneys. Why do you think this is so?

UDALL: Years ago, most of the people who



went to law school wanted to be a trial lawyer. They saw Perry Mason. But now, they think there is more money in doing what I call "the boring law department," sitting at desks and talking to people rather than going to trial. And trials are stressful and involve much work. You try a case, that's all you do. You don't have time to do anything else. You've got to spend whatever number of days it takes to get it ready, and while you're in trial you're consumed with it.

Q: Do you think attorneys in general cut back on trial preparation because they expect cases to settle?

UDALL: I think the bad lawyer does. A good lawyer never does that. You've got to handle every case as though this is the one case that's going to trial. If you don't, you're not going to do a good job for your client, and you're not going to get the right settlement. It's hard work, there's no question about that. If you

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don't do the work, you're going to decrease the value of the case.

Lawyers aren't necessarily smart, but they're not

dumb, and they can figure out real quickly whether the other side is prepared.

Q: What are some of the drawbacks of fewer jury trials?

UDALL: When you evaluate a case, your evaluation is based on verdicts. That's not true anymore. We don't have the verdicts we used to have, and it's difficult to say,

"OK, this case is worth \$100,000 because there have been 10 cases tried, and the average is close to \$100,000 for these injuries and facts." But now you don't have that.

Also, years ago, the legal community was not that big. The lawyers were all downtown [Tucson], and every day except Monday at the old Pioneer Hotel there were 18 to 20 lawyers who had coffee and sat and talked about the cases. So you knew what was going to trial. And you could talk to the judge afterwards, and they'd tell you what went good, what went bad, and what verdicts surprised them. You knew what the

juries were doing back then.

Q: Have you seen a difference in the competency of attorneys going to trial if there are fewer trials held?

UDALL: If you want to learn how to try a case anymore, you have to go to either the prosecutor or the public defender. They still try a ton of cases. Younger attorneys could say, "I've been a prosecutor for six years and have tried over 100 cases," where someone who came straight out of law school and worked for us for six years would say, "I haven't tried any cases. I've done arbitrations." Young lawyers don't get to go to trial.

Q&A Patricia Lee Refo

Q: Why is the jury trial vanishing?

PATRICIA REFO: One of the reasons is because the expense associated with litigation, such as electronic discovery, has mushroomed. Also, many of the jury verdicts that have received much publicity in the last decade or so are about "crazy results." As a consequence, we have created an inappropriate notion that juries don't do a good job. People have a perception, due to a handful of outlier verdicts, that a jury trial is a "roll of the dice."

Litigants have an interest in certainty of result, particularly corporate clients. We have taken some shortcuts in our jury system that have resulted in the lack of certainty. The empirical research is quite clear that reducing the number of jurors from 12 to a smaller number enhances the risk of outlying verdicts. So does not requiring unanimity among the jury. So to some extent, we have done this to ourselves.

Another factor in the vanishing jury trial is the number of cases that are disposed of in summary judgments, along with the increase in alternative dispute resolution. The other thing is that some judges have become hostile to the trial, and view trials as failure. [They believe that] if they do their job, and the lawyers do their job right, there would not have to be a trial. To the extent there are such judges out there, they operate to depress the number of jury trials.

Another reason we have fewer jury trials is because we have fewer lawyers who know

how to do them. If an attorney does not know how to try a case, he or she will be perhaps more interested in trying to settle it.

Q: What are the draw-

backs to the vanishing jury trial?

REFO: There is a very significant consequence to the loss of the jury trial, and that is a loss of part of our democracy. The American jury is the only place where we ask American citizens to come in and be part of a government decision, except for voting, which is much more passive. The whole point of the jury trial is to bring citizens into the courtroom with their common sense and their life experiences, and allow them to make decisions. It's a big loss if this goes away. The wisdom of the many is greater than the wisdom of the one. That's the theory behind the jury trial in the first place.

Q: Do you think that jury trial experience results in discovery that is more focused and less complicated?

REFO: Yes. One of the reasons why I think discovery has gotten to be so expensive beyond just the burdens of electronic discovery is that unless one has tried some cases, one thinks every fact is important. I learned to take a deposition the first time I had to use my own deposition to cross-examine somebody at trial. Good trial lawyers hone in fairly quickly on the important points, the important themes and the important issues. The notion that if a fact can be known it should be known is something we need to move away from if we're ever going to resurrect the jury system from decline.

Q: What can be done to restore the jury trial?



REFO: No one says every case needs a jury trial. But with a two percent trial rate, this may be too far in one direction. If the jury trial and discovery process could be improved and streamlined, there would probably be more trials. Steps to improve the reliability of jury verdicts are also important. These include steps that we have been doing in Arizona for years, such as allowing jurors to ask questions and take notes. The goal is to diminish the number of outlying verdicts and increase reliability.

Q: In your own practice, have you noticed any changes in the way you prepare trials, knowing that most cases do not go to trial?

REFO: No, because I cannot afford to pick wrong on the case that ends up being the one that does go to trial. There are still plenty of trials. And if you include arbitrations and other contested evidentiary proceedings, there is a need for preparation. The way you make a case settle favorably is to prepare as if it is going to trial because you have to understand what the facts are,

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what the law is, your strengths and weaknesses and the strengths and weaknesses of your opponent.

Q: Do you ever work with attorneys who may not prepare a case well because they anticipate it will settle?

REFO: I don't, personally. Most of my cases have another major law firm on the other

side, so this is not something I see or experience. Most of the attorneys I see in my firm, on the other side of my cases, and among my co-defendants treat the case from the beginning as if it could go to trial. You have to be thinking of the end game.

Q: Does the vanishing jury trial result in cases being valued either too high or too low as a result of settlements?

REFO: I do see this happening. I think most lawyers believe that it is happening from

time to time, that a party is either paying too much or paying too little because of the incentives associated with big discovery and a jury trial. If that's happening, that's damaging to our system of justice and to the litigants involved. You could argue right back that that's not damage at all. That's a litigant paying for certainty. I prefer to have a system where we could achieve a jury trial with less cost so that a litigant was not put in the position of having to pay for certainty.

Q&A Robert Hirsh

Q: Have you noticed a change in the number of criminal trials being pled over the years, versus going to trial?

ROBERT HIRSH: I've been a public defender for five years now, and have 40 years of private practice. In private practice, there was a huge difference in the number of jury trials. Mandatory sentencing eliminated trials from the start because the risk was so high. You don't want the risk of taking the case to trial when your client is going to get way more time than he ought to. Those cases were designed to result in plea bargains, and they did.

One thing that governed the reduction of trials in private practice was the cost to cover every base. To fully investigate a case was more and more expensive as the years went on. It was very difficult to charge people the kind of money that had to be charged in order to really do this sort of work. I hate to say I would plea bargain a case because the money dried up, but it definitely was a factor.

Q: Have there been fewer jury trials in the Public Defender's Office in recent years?

HIRSH: There was a trial rate the Pima County Attorney's Office had five years ago where 8.5 percent to 9 percent of all the cases filed went to trial. That rate has been reduced to about 7.5 percent now because there were a lot of complaints. It was expensive, and a lot of people were taken to trial that shouldn't have been taken to trial. The County Attorney is trying to reduce the number of cases they are trying. They are the ones that really make the demand in the cases that go to trial. We try to plea bargain

or have the cases dismissed.

Q: Has there been a reduction in trial preparation by attorneys in the Public Defender's Office because of fewer cases going to trial?

HIRSH: Theoretically, if we are going to plea bargain, do we do less work? No. From a principle here, we try to make sure that we really do know our facts and make sure we do the right thing. ... As an administrator, my responsibility is to ensure that we have done what we're professionally obligated to do, and that's to investigate the case ... to make sure the state does have a legitimate case before there's any resolution. I don't think that we cut corners here. If there's any corners cut, it's more likely to happen by the private bar, where there's less money to do investigations. I do see that happen from time to time.

Q: Have you seen any changes in trial preparation by the Public Defender's Office over the years?

HIRSH: We have moved forward in spending money in indigent defense where it wasn't spent in the past. ... When Bob Hooker and I came over here five years ago, we definitely tried to change the culture to ensure that lawyers put in more time preparing cases because the most critical part about trying any case is the preparation. You can't do a reasonable job without a full investigation, knowing your facts, being prepared for trial. I think there has been a change in the way we do trials in this office, borne out by some degree of success we've had, at least on the less serious cases. I think the lawyers are far more prepared than they used to be. The lawyers are working these cases up better. We haven't tolerated any diminution in preparation in this office. We're a public office. We have to maintain standards.

Q: With the decline of jury trials, have you noticed any decreased skill level among attorneys in trying cases?



HIRSH: I can't say that's true in this office. We have seminars every Friday, and trial practice statewide that everyone goes to. For example, we had a voir dire session last year for about 40 attorneys in our office. [In 2009, the second author, Dr. Spaeth, conducted a training session over a period of five Fridays for the attorneys, using focus groups to serve as jury panels.]

Q: You mentioned that aggravated assault and capital cases have a high probability of going to trial. What other factors affect trials versus plea bargains?

HIRSH: Our plea bargains are driven by the clients' desires and the offers of the County Attorney's Office.

We have two general categories. The first is people who say, "Look, I'm not guilty of this" and simply won't take a deal. The second is instances where the County Attorney is demanding a trial.

Q: Do you find that inexperienced attorneys are concerned about going to trial because of a lack of experience?

HIRSH: That hasn't been our experience, at least in the last couple of years. Here's why that doesn't happen. We operate this office with trial teams, and go over all the cases set for trial. Everyone gets information and experience. 