When Honesty *Really* is the Best Policy

by: Brett Schreiber, CASD President

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Many of us read with dismay the news reports of the disastrous outcome in the first trial of the GM Ignition Switch litigation. The trial, which was supposed to help settle hundreds of lawsuits stemming from General Motors' faulty ignition switches, abruptly ended after evidence surfaced that the plaintiff proffered fraudulent documents and testimony to bolster his story of having lost his "dream home" as a consequence of his injuries. The case was dismissed "voluntarily" and the plaintiff has since retained criminal defense counsel to manage the fall-out.

The questions raised by many in the auto products liability bar is "how could this happen?" and "who selected *this* case to go to trial?" While those answers are long, complex, political in nature, and would take up far more copy space than this column allows, clearly there was a problem in case selection. For many who regularly litigate and try auto products cases, one of the glaring problems was that leadership appointed two class action attorneys to select and try the first case to verdict. While this is no knock on class action counsel, the reality is that class action cases rarely, if ever, go to trial. And one recurring theme in the post-mortem discussion is whether more experienced auto products liability counsel who regularly tries auto products cases would have ever selected *this* plaintiff as a lead case? Having been involved in some of those discussions, I can attest that none of the leading auto products trial lawyers I know would have ever selected this plaintiff. And in fact, months ago, many were part of a very vocal minority in the MDL litigation arguing against selection of this plaintiff.

So, if poor case selection – in part caused by a lack of actual real world trial experience in the subject matter at hand – can cause a trial of national import to implode during plaintiff's case-in-chief, how does a lack of trial experience impact the garden variety, bread and butter cases of most plaintiffs' attorneys? The potential harm to clients, the impact on the discovery process, and the effect on mediated settlements (for better or for worse) cannot be understated. Against that backdrop, I encourage anyone who reads this to look at your own real world trial experience – or lack thereof – and to asses, with brutal honesty, how it impacts your practice and your clients.

For many, the term "litigator" conjures up images of an attorney who tries cases in court. However, as empirical studies have shown, going to court to try a case is actually a very atypical activity of the modern litigator.[1] Survey data, published in theGeorgetown *Journal of Legal Ethics*, indicates that litigators have had substantially more experience in resolving disputes through mediation and negotiations than by trying them to a jury.[2] Of respondents with five years of litigation experience, only 30 percent had tried even one case to jury and only 8 percent had tried two or more cases. However, 93 percent of these litigators had settled at least one case through mediation and 38 percent had settled 10 or more cases in this manner in their first five years of practice. This phenomenon is not limited to "new lawyers" either. Within this national survey of responding litigators with 10 years of experience, 30 percent had still not tried

1 Mark Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Studies 459, 459-61 (2004).

2 Tracy McCormack & Christopher Bodnar, *Honesty is the Best Policy: Its time to disclose lack of jury trial experience*, Georgetown J. of Legal Ethics, Vol. 23, Issue 1, p. 151 (2010).

Continued on page 4

a case to verdict and only 36 percent had tried two or more, however all had settled a case through mediation or negotiation. For a majority of responding litigators, they hadn't tried their first case until they were in practice for seven years. However, even after a decade of practice, approximately one third of all responding litigators had never tried a single case to jury.

Potential Harm to Clients and the Jury System

I trust you're as shocked by these statistics as I was when I first read them. An attorney lacking jury trial experience lacks the ability to accurately assess their choices if various options – like ADR – are being overvalued or trials are being undervalued. Unfortunately, the client is rarely in the position to know that the balanced, objective assessment they are paying for may not be provided. Therefore, when a client is making a "settlement v. trial" decision on the basis of an attorney's advice who has little to no trial experience, the client is making this decision without the benefit of being fully informed. When an attorney ceases to view trial as a viable alternative, settlement becomes the most likely, and sometimes only option.

I reached out to several prominent mediators in-town to get their insights on how an attorneys lack of trial experience impacts a typical mediation. "The lack of trial experience to an attorney in the setting of mediation is like the difference between high school and major league baseball. While you might know the rules and, from all outward appearances, the game looks the same it is really different when you have participated and know it from the inside. The experience of having participated at the upper level gives you insights that you can never understand until you have been there," said Hon. Leo Papas (Ret.).

The potential harm to a client in this situation is real: they may have to hire – at additional expense - new, experienced counsel to take the matter to trial, or they face the risk of having their case tried to a jury by inexperienced counsel. Or more likely this fear of the unknown will result in the client taking – and the attorney recommending – a low-ball settlement.

However, the issue is larger than that. When I tried my first solo personal injury trial my second year out, the experience was eye-opening. Not just from the practical experience of the nuts and bolts of the trial but rather the perspective it provided going forward in *all* other aspects of litigation. It was like that moment in the *Wizard of Oz* when the screen went from black and white to vivid color. Suddenly, I saw things clearer. I realized how little of what we do in the day-to-day of litigation actually matters at trial. Yet it further crystallized how some of those "little things" can become very "big things" if not managed properly in the work-up of the case.

Unfortunately, for those who go many years without trying any cases an aversion to jury trials is likely to reinforce itself. Litigators will not risk a jury trial because they lack previous jury trial experience. Without trying any cases, they never gain real world trial experience. That lack of experience influences further decisions not to pursue trials and round and round it goes. Over time, this tends to not get better. As the monetary and reputational stakes increase, the stronger the bias becomes against risking it all in the foreign land of trial.

The real-world examples of this are everywhere and exist on both sides of the "v". We can all think of plaintiffs' attorneys in this town who advertise heavily touting their skills as a "trial lawyer" when many of us know that those same individuals couldn't find the Hall of Justice without a map. Similarly, I recall my surprise when I learned from one of our associates, a recent hire from a Big Law firm, that the senior partner in the "litigation department" he had toiled under had never actually tried a case to a jury.

While most clients will assume their counsel has extensive jury trial experience, for those who don't honesty is truly the best policy. Experience matters. But so does preparation. According to mediator Denise Asher, "Preparation is key. If a young attorney comes to mediation prepared, knows his or her case, has done the work and is prepared to take the case all the way, the other side will know it. After all, everyone has to try their first case someday." Thanks to CASD member benefits like our listserve, educational programs, Trial Masters Committee and the networking amongst our members the defense bar knows that our members will try their cases, and/or associate in more experienced lawyers for trial. Because we are a largely self-regulating industry we must be willing to confront our own shortcomings, admit to our clients and ourselves what our experience is (and what it isn't) and always lead with our better nature as guardians of democracy and the justice system. As the great Vince Lombardi reminds us, "the only place where success comes before work is in the dictionary." **TBN**