

Where have all the trials gone?

Civil disputes rarely get heard before a jury these days

[Jason Krause](#) on Thursday 05/30/2013

Daniel Moeser retired in 2011 as the longest-serving judge in Dane County history. He says that in his time on the bench, which spanned 32 years, there was a dramatic change in the types of cases that came to trial.

"We've had an obvious increase in the number of juvenile, criminal and family law cases, while the personal injury and civil cases have almost dried up," he says. "Some day soon you may see no more civil cases; they will all be handled out of the courtroom."

Moeser himself is part of this trend. Since retiring, he has gone to work for Midwest Mediation LLC, where he often arbitrates or mediates civil cases. According to the most recent statistics from the Wisconsin Court System, the number of cases in medical malpractice, product liability and other areas of injury law has been falling over the past decade, even collapsing in some places.

"If you look at the [number of civil cases filed](#) in Wisconsin, there has been a long and clear downward trend in most major areas," says Ruth Simpson, research director at Wisconsin Association for Justice, which represents trial lawyers. "In most counties last year, there was not a single civil trial, or maybe one or two for the entire year."

Why should we care? Supporters argue that jury trials play an essential role in a democracy, so much so that a right to a jury trial is guaranteed by the U.S. and Wisconsin constitutions. They give ordinary citizens the opportunity to have their peers decide the merits of their cases.

As trials disappear, lawyers have no chance to gain courtroom experience, which only encourages more settlements as attorneys fail to build confidence in the litigation arena.

"The challenge we're facing is how to teach young attorneys the skills they need to go to trial," says Simpson. "We're seeing more efforts to teach those skills outside of the courtroom, because it's so hard to get that experience in the real world."

PR problem

Americans love a good trial — in theory. Think of every episode of *Law & Order*, movies like *A Few Good Men* or *To Kill a Mockingbird*, or the Jodi Arias coverage on cable. But in real life, surveys put lawyers at or near the top of the list of least respected professionals — somewhere near journalists.

If you ask Milwaukee attorney Mike End why the number of medical malpractice cases has dried up, he'll tell you it's because the legal system has a public relations problem. "Whenever I do get in front of a jury, I face an uphill battle because most people have been conditioned to think the system is giving greedy, lazy people too much money," he says.

Of course, not all types of civil trials are in decline. In the wake of the economic downturn and housing collapse, the number of Wisconsin cases related to mortgage and foreclosures more than doubled, increasing from 11,581 in 2003 to 24,309 in 2012.

However, foreclosure lawsuits primarily benefit the large banks and servicing companies that finance the loans. Meanwhile, product liability, medical malpractice and personal injury cases — those filed mostly by individuals — have been dropping year after year.

There is no single reason why jury trials are increasingly rare. Lawyers in different practice areas all have different stories as to why their cases never get to a judge or jury. The most commonly cited reason is simply that many litigants prefer to see

cases settled through mediation and arbitration because it is cheaper than a jury trial. Many types of litigation, such as business dissolution matters, have nearly disappeared because business contracts typically mandate mediation.

"I am a big believer in 12 people in a jury room deciding a case, but it takes a lot of money to get information and explain it to the average person sitting on a jury," says Moeser. "It's just a lot easier to get to a lawyer or retired judge, because when you face a panel you don't have to explain all of the things you have to explain to a jury."

The benefits of arbitration and mediation are that disputes are more affordable and manageable for all parties. However, these proceedings keep the public from learning about accidents and damages awarded. In addition, parties lose the right to appeal unfair decisions.

Obstacles

Republican-pushed "tort reform" efforts on behalf of business interests have ushered in several changes that also make it harder to bring cases to court. It is now more difficult, for instance, to gain internal records from nursing homes and therefore to prove negligence. And higher standards for the admission of expert-opinion evidence means that hiring an expert witness is often prohibitively expensive.

Moreover, the cost of discovery — obtaining records from parties in litigation — has exploded with the complications associated with electronic evidence. Moeser says lawyers tell him they can't start a medical malpractice suit for less than \$50,000.

Attorney Mike End says that as insurance companies have vigorously defended these suits, it has become increasingly rare that patients ever win a judgment. At the end of fiscal year 2012, the Wisconsin Injured Patients and Families Compensation Fund, which pays settlements or judgments over \$1 million, paid out just three claims for a total of \$1.3 million. That is well below the number of expected payouts, leaving the fund with a surplus of \$361 million at the end of fiscal year 2012.

Too risky

Another deterrent to going to trial is that the Wisconsin court system is marked by increasing partisan rancor and dysfunction — most colorfully illustrated by the recent ethics complaint against a Supreme Court justice for allegedly choking a colleague.

"I was just on the phone with a client discussing possibly settling a case that probably has a fifty-fifty chance to win," says Jeff Spitzer-Resnick, an experienced Madison civil rights, education and disability attorney. "I warned them that a settlement will not get them the verdict they hoped for, but it might be safer because I don't have confidence to spend the money on the appeals process if we lose in court."

The result is that even tort reform advocates acknowledge that Wisconsin is a relatively safe legal environment for businesses. The U.S. Chamber Institute for Legal Reform moved Wisconsin up seven spots, from 22 to 15, in the group's latest survey of best legal environments for business.

Despite ongoing efforts in the Legislature to further limit liability in civil lawsuits, observers believe a correction is possible.

"I think people who have a legitimate claim no longer go to court. It's just too difficult and too expensive, and that is harmful to society," says Moeser. "But I have to believe that once people see the potential harm, the pendulum will swing back the other way, eventually."