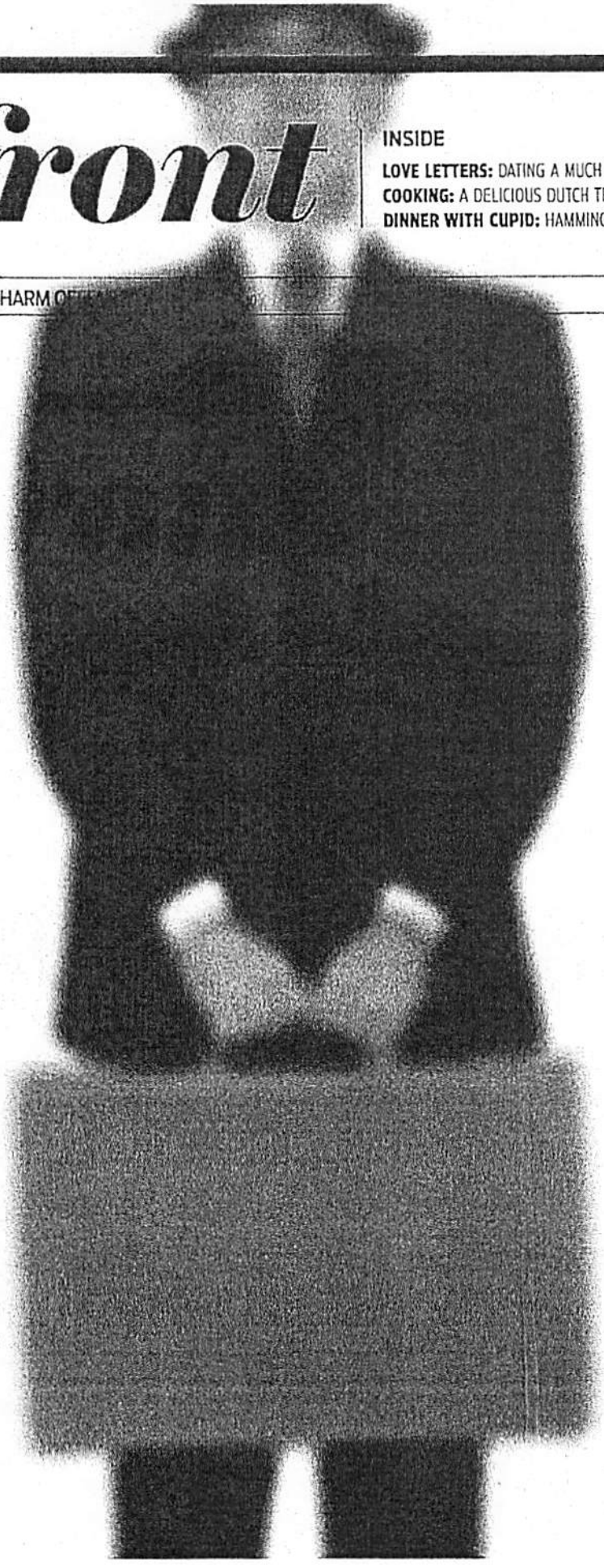
Upfront

"YOU'RE THE ONE WHO NEEDS TO GO ON THE CHARM O



PERSPECTIVE

The Case of the Vanishing Trial Lawyer

BY EDWARD D. MCCARTHY

I tried my first case in front of a jury a few months after passing the bar. I was defending the owner of a Watertown taxi, who had been in a collision and was sued for property damage by the other driver. I was 23, and I'd never even seen a jury case. I had no idea what I was doing.

Everyone — my client, the opposing counsel, and the judge — recognized this, but they were all very kind to me. The judge offered quiet instructions. When I was asked a question I didn't understand, I just paused until someone offered guidance. The trial lasted a few hours. The jury deliberated for a day before finding in favor of my client. I'm convinced the jury was sympathetic to a client whose lawyer was so obviously inexperienced. My fee for the case was $50.

The next week, I tried another case, and then another. Slowly, I learned what I was supposed to do in a courtroom. Representing a client in a civil trial, which in the last 55 years I've done literally hundreds of times, is like many other activities in life: You can read about it in books or learn about it in school, but the only way to become really skilled is by doing it.

Today, most trial lawyers can't learn by doing. A young lawyer couldn't start out the way I did because most minor cases now are in small claims court or have been eliminated by "no fault" clauses (not a bad thing). My

rm, which specializes in medical malprac-
ce defense, has three talented associates
ho've been with us almost five years. Each
ants to be a trial attorney, and this job
ıould be an apprenticeship — but so far,
ɔne has actually tried a civil malpractice
ıry trial solo. Medical negligence cases are
r higher stakes than my old taxi case, and
ıey make up a large percentage of actual
ıry trials these days. But only 1.5 percent
civil cases in Massachusetts make it to
ial, a sharp drop since I was a young law-
r. Criminal trials have also fallen off, due
plea bargaining and the great expense of
ɔing to court. Judges push parties to set-
e, and many contracts now call for dis-
ıtes to go to arbitration instead of court. I
ıow lawyers who've made partner in the
ial departments at large Boston law firms
ithout once arguing a jury
ial all the way to a verdict.

When cases do go to tri-
, junior lawyers are typi-
ılly left back at the office.
ınce the 1990s, some in-
ıurance companies have re-
sted paying for a junior at-
rney to be the "second
at" at counsel's table in
ıe courtroom, helping with
search and making sug-
stions. And insurers gen-
ally insist that senior at-
rneys try the cases.

The result is that part of the legal pro-
ssion's apprentice system is disappearing
and that's a problem. I recognize that
wyer is not the most popular profession,
ıd few people will be upset by less fre-
ıent jury duty. But look at the stories we
ep seeing about habitual offensive behav-
r by individuals and companies that were
pt out of public view, sometimes for de-
ıdes. Whatever you think of the jury sys-
m, it is *public* for one and all. No sealed
ttlements, no confidential arbitration
ıd mediation agreements. As federal
ıdge Jed S. Rakoff told the *New York*
mes a couple of years ago, "A trial is the
ly place where the system gets tested. Ev-
ything else is done behind closed doors."

Every profession needs to train new-
comers in the hands-on practice of the craft
— the vital parts of the job that can't be
taught in school. If you hire a plumber to
fix your hot water heater, a young appren-
tice likely comes along. If you go in for sur-
gery at one of Boston's teaching hospitals,
interns or residents will likely hold some of
the instruments that go inside your body
(under the close supervision of an experi-
enced surgeon). If you hire a lawyer, well,
the system has dwindled to the point
where in December, the judges of the Mas-
sachusetts Superior Court called on firms
to let less experienced lawyers do some-
thing — argue a motion, examine a witness
— at trial. "Without the chance to speak in
a courtroom . . . future generations of litiga-
tors will be less equipped to represent their
clients effectively," the judges wrote. It's a
good call.

Look at the stories we keep seeing about habitual offensive behavior by individuals and companies that were kept out of public view . . . Whatever you think of the jury system, it is *public* for one and all. No sealed settlements, no confidential arbitration and mediation agreements.

Firms need to find cre-
ative ways to get young
lawyers more experience.
Our firm has associates
take depositions, argue
motions, and question
some witnesses. When
they aren't able to second
seat a trial, we have them
help prepare for the trial
and, when possible, come
to court to observe certain
witnesses. Other firms are
giving young lawyers more time to try pro
bono cases.

The United States is the only country
that regularly offers citizens a constitution-
al right to a civil jury trial, and leaving mat-
ters of law in the hands of the citizenry is
an important element in our participatory
democracy. Think about it: If your loved
one is injured as a result of a poorly de-
signed product or an incident of malprac-
tice or some form of abuse, don't you want
an experienced lawyer to handle your case?

Edward D. McCarthy, a partner at McCarthy Bouley Barry & Morgan in Waltham, is writing a book about his career as a trial lawyer. Send comments to magazine@globe.com.