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Cooley's Mikes—Rhodes and Attanasio—on the 'Barristerization' of the Big Firm Trial Bar and What to Do About It

"I think if you had more lawyers who understood the trial dynamic and could really meaningfully assess risk at trial and were willing to do that, you'd have more clients willing to go to trial," says Attanasio, the chair of the firm's global litigation department.

By Ross Todd
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As I've started reporting about what the dearth of civil jury trials means to Big Law firm litigation practices, two of the first lawyers I've spoken with are **Michael Rhodes** and **Michael Attanasio**, the past and present chairs of the global litigation department at **Cooley** respectively.

For one, both have actually tried cases in the past few months, masked jurors and all.

But what put Rhodes, in particular, top of mind on the topic was a podcast interview he gave late last year to **Jay Edelson**, the founder of **Edelson PC** and his longtime adversary in privacy class actions. Although Rhodes has a solid record against Edelson, the two were on opposite sides of the $650 million settlement that Facebook reached to settle claims one of its photo-tagging features violated the Illinois Biometric Information Privacy Act. Edelson represented class members and Rhodes the company. Naturally.

With potential liabilities for Facebook of $45 billion, the case somehow yielded the largest privacy class action settlement in history while at the same time legitimately warranting inclusion in the slate of cases Cooley put forward in The American Lawyer's most recent Litigation Department of the Year competition.

In the podcast conversation, Edelson told Rhodes he's "a really interesting mix of someone who actually tries cases, but also isn't looking just to bill hours."

Courtesy photos

(L-R)Michael Rhodes and Michael Attanasio of Cooley.

"Your view seems to be, 'I'm going to make a rational decision at the beginning. What is the value of the case? I will talk about that with the plaintiff's attorney. I will make a recommendation. If it works, great. If not, I'm happy to try the case." Edelson said. "There are very few people like that. Usually, you have either people who are scared to try cases and they want to settle everything, or their view is 'I just want to try every case.'"

For his part, Rhodes told Edelson, "I think you've got to take a bespoke approach where every matter

is treated differently and you look at the whole thing and figure out what's the best strategy for this case and not just adopt a playbook."

Exactly. But I think that's probably an approach that's easier to sell to clients when you grew up regularly trying cases as an associate 40 years ago.

When I caught up with Rhodes by phone last week, he agreed that the lack of jury trials is causing some problems for firms. He described what he sees as the "barristerization" at the high end of big firm trial practice: Firms are becoming increasingly dependent on a small cadre of partners–often senior partners–to handle civil jury trials in business cases. "This so-called barrister class has sufficient numbers of first chair jury trials under their belt that they are seen as the safe, go-to choices. But their numbers are dwindling as they age out," Rhodes said. "The profession needs to redouble efforts to ensure that younger and diverse lawyers get meaningful jury trial experience so that we don't go the way of the dodo."

Attanasio, when I caught up with him earlier this week, shared many of the same concerns as his partner. He said you could look at the current situation as "a crisis or just reality."

"We're in a place where there's a dearth of jury trials," Attanasio said. Part of what's behind that, he said, is a cultural shift in the courts. "We've created a culture of mediation and settlement that far outweighs any culture of advocacy or culture of jury trial work," he said. "We've had it ingrained, with young lawyers in particular, that basically no case should go to trial. Start with that presumption: Your case should not go to trial," he said.

Attanasio said he wonders in some sense if it's "a chicken or the egg thing."

"I think if you had more lawyers who understood the trial dynamic and could really meaningfully assess risk at trial and were willing to do that, you'd have more clients willing to go to trial," he said. "If you had more judges, who didn't as a first response and first instinct push everyone to mediation or settlement negotiations, you might have more trials. But the whole but the culture right now is not that. It's the opposite."

Like many large law firms, Cooley has looked to former government lawyers to bolster its trial capacity of late. Recent hires include **Russell Capone**, the former chief counsel to U.S. Attorney for the Southern District of New York, as well as former Assistant U.S. Attorneys **Zachary Hafer** in Boston and **Lindsay Jenkins** in Chicago.

"I always believed and I still do that turning the experience and expertise you developed as a sophisticated federal prosecutor translates into an elevator pitch that says, 'I know where the bodies are buried. I've done this. I know how to investigate something. And I know how to try a case. Hard stop. Not just a white-collar case. Not just a criminal case. Any case,' " says Attanasio, himself a former federal prosecutor.

But Rhodes, who grew up as a lawyer handling civil cases, cautions any firm against relying too heavily on hiring from the government ranks.

"[M]y experience is that an adjustment in thinking is often required, for when you have the power of the federal government at your back the odds are more in your favor than representing corporate defendants accused of misconduct," Rhodes said. "So while AUSAs will continue to be a source of trial lawyer ranks, to me we have to get back to allowing younger lawyers much more court time."

Cooley