DRI's Jury Preservation Task Force

Ongoing Efforts to Preserve Our Unique Right

By Jonathan M. Judge, Lori Vella and Hudson Jones

A review of the factors behind the vanishing jury trial, and a look at how some jurisdictions are implementing innovations designed to address the problem.

The problem of the vanishing jury trial is a familiar one to DRI members, for whom this loss is keenly felt. This decline in jury trials presents not only an economic threat to membership, but also a decline in fair and just adjudication. Many disputes cannot and should not settle, and contrary to what mediators frequently claim, the fact that everyone is dissatisfied with a settlement is not necessarily proof that settlement was the appropriate resolution.



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While juries take their fair share of criticism, most lawyers recognize that juries typically try hard and generally do a good job. Juries are also often more defense-friendly or at least neutral than commonly perceived. And defense lawyers routinely have more confidence in a jury to resolve disputes fairly than the assigned judge, whether that jurist is appointed or elected.

With the establishment of the Jury Preservation Task Force (JPTF), DRI has joined the nationwide effort to revive the civil jury trial as a primary means of resolving disputes. This article presents an overview of the jury trial's decline, a survey of existing perceptions among membership, an introduction to some innovations occurring in certain jurisdictions, and a brief summary of DRI's upcoming efforts.

History of Jury Trials in Civil Matters

A trial by jury has been described as one of the most effective weapons in democracy's arsenal to combat tyranny. Stanley E. Sacks, *Preservation of the Civil Jury System*, 22 Wash. & Lee L. Rev. 76 (1965). Jury trials are a "bulwark of liberty and a cornerstone of democracy." *Id.* Thomas Jefferson strongly characterized the trial by jury "as the only anchor yet imagined by man, by which a government can be held accountable to the principles of its constitution." 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861). America's jury trial system has long been admired because of its unique role in holding both the government and its citizens accountable. The French statesmen, Alexis de Tocqueville, following a visit to the United States, captured the empowering concept of this sacred American ideal in a single sentence. "The institution of the jury places the real direction of society in the hands of the governed and not in that of the government." Alexis de Tocqueville, *Democracy In America*, 282–83 (1835).

The Seventh Amendment codifies the right to a jury trial in civil cases. It was part of the original Bill of Rights adopted by Congress on September 25, 1789, and ratified by the states on December 15, 1791. The amendment states, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." A civil jury acts as a moral arbiter and legal fact-finder. Some of the virtues of the civil jury include 1) keeping the law in touch with popular values; 2) serving as a guard against excessive rigidity in the law; 3) independence; 4) the symbolic value of rule by the people; 5) the advantage of numbers in decision-making; 6) the expertise ordinary people bring; 7) providing judges political cover for unpopular decisions; 8) educating people about the law through jury service; and 9) the greater drama a jury trial brings to the administration of justice. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 Fordham L. Rev. 407, 436–37 (1999).

Why Are Civil Jury Trials Vanishing?

For the last 50 years, the number of jury trials conducted annually has sharply declined. Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. Disp. Resol. 35, 36–37; Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, 2011 Pound Civil Justice Inst. Federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent by 2002. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. of Empirical Legal Studies 459 (2004). The even steeper drop in bench trials suggests that the downward trend in jury trials is due to an overall decline in the number of cases that reach the trial phase of litigation. Civil jury trials in state courts have experienced an unprecedented decline similar to their federal court counterparts. One particular study of 22 states concluded that there were only 13 jury trials for every 1,000 civil dispositions, a meager 1.3 percent. Brian J. Ostrom, Shauna Strickland & Paul Hannaford, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. Empirical Legal Stud. 755 (2004). Several theories have been advanced to explain the drastic shift away from trials.

The Usual Suspects

Many reasons for the decline in jury trials have been discussed at length, and do not need extensive review. The increased cost of going to trial due to longer and more complex cases has rightly taken a share of the blame for the obvious decline in trials. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. of Empirical Legal Studies 459, 477–81 (2004). Also, an increase in the number of cases settling to avoid the economic burden and risk of going to trial accounts for a substantial portion of cases terminating before trial. When parties are unable to settle prior to court involvement, increased judicial management frequently steers parties to nevertheless resolve their disputes without trial. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 Stan. L. Rev. 1255, 1265 (2005) (providing that federal judges increasingly spend their time encouraging parties to settle before trial). Additionally, ADR programs dispose of a significant number of claims, making trial unnecessary. The American Arbitration Association reported an increase in filings from 1,000 to over 17,000 between 1960 and 2002. Finally, judges utilize summary judgment to dispose of cases without trial more today than in previous decades. Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. Ill. U. L.J. 469, 469 (2009); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U. L. Rev. 67, 78 (2006).

The Innocent Bystander

Longer and more elaborate trials, additional procedural hurdles, and budget cuts invite casual observers to conclude that the decline in jury trials is due to a lack of judicial resources. There is no question that our nation's courts are in many respects underfunded. Increasing court funding will be necessary to support and strengthen our civil courts. Some observers and scholars have taken the view that the decline in civil jury trials is often incorrectly attributed to resource constraints. The data this argument relies upon suggests that rather than insufficient resources to conduct additional trials, the real story is the judiciary's reallocation of its resources to pretrial judicial management.

As Professor Marc Galanter has explained, three trends suggest that the ju-

diciary has the resources to conduct more trials but that these resources are primarily allocated to case management instead. First, federal judicial resources greatly increased between 1962 and 2002. The number of district court judges rose from 279 to 614 in this time period. Similarly, the number of nonjudicial personnel employed by the judiciary increased from 5,602 to almost 26,000 between 1962 and 1992 (the last year that data was available). Furthermore, judicial expenditures (accounting for inflation) increased from roughly $2.5 million to $4.25 billion between 1962 and 2002. Second, federal district court judges conducted fewer than half as many trials in the early 2000s as they did in the 1980s. Third, the number of filings per Article III judge more than doubled between 1962 and 2002. Galanter, *The Vanishing Trial* at 500–501. Approximately 20 percent of cases filed in 1963 resolved "before pretrial" due to managerial judges steering parties towards settlement; in 2010, roughly 70 percent of cases terminated "before pretrial" due to judicial management. Galanter & Frozena, *The Continuing Decline of Civil Trials in American Courts* at 20 fig. 16. Indeed, federal judges presided over an average of 40 trials annually in the "era before the arrival of 'managerial judging'" and only an average of 10 per year since this ideological shift.

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Whether judges could adequately adjudicate the cases on their dockets if they allocated fewer resources to judicial management and spent more time conducting trials is an open question. Some statistics suggest the percentage of cases terminating with no court involvement decreased significantly between 1963 and 2010 from approximately 55 percent of all filings to roughly 18 percent. Cases terminated "before pretrial" due to judicial management largely displaced cases resolved without judicial involvement, while the number of cases reaching the pretrial stage remained fairly constant. This suggests that there are some cases that would likely settle without the investment of judicial resources. More data is needed to confirm such generalized trends. However, to preserve civil jury trials in the future, scholars and practitioners alike should recognize and balance the need for more judicial funding to help bolster the ideal that jury trials are important and must remain an integral part of the legal process.

Surprising Culprits

Although prisoner litigation has not received much attention in the scholarship on the decline in civil juries, it is a significant cause of the decrease in trials. The Prison Litigation Reform Act of 1995 (PLRA) was enacted in response to an increase in prisoner litigation in federal courts. By increasing the number and complexity of procedural requirements, as well as decreasing the potential remedies available to prisoners, the PLRA significantly decreased the number of prisoner filings and trials. At their peak, prisoners' suits constituted one-sixth of all trials in 1996 and declined to roughly one-eighth of all trials by 2002. Over a third of all prisoners' trials were before juries prior to the PLRA. Thus, the decline in prisoners' suits accounts for a substantial decline in the number of jury trials.

The cyclical nature of the decline in civil jury trials may also largely explain their demise. As summary judgment motions, ADR, settlements, and other forms of resolution replace trials, fewer lawyers and judges have trial experience. For attorneys, lack of trial experience adds to their perception that trials are risky and that juries are arbitrary and "out of control." Galanter & Frozena, *The Continuing Decline of Civil Trials in American Courts* at 23; Galanter, *The Vanishing Trial* at 517–18. Attorneys' view that trials are unpredictable discourages them from taking future cases to trial; and therefore, attorneys continue to lack trial experience. Judges are also inundated with ideological rhetoric that trials are wasteful. Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War* at 1266. As trial judges manage more cases to settlement, steer an increasing number of disputes to some form of ADR, and decide more cases on motions for summary judgment, trials may seem more wasteful because judges lack the breadth of trial experience necessary to conduct trials efficiently. An interesting future research question would be whether district court judges are actually less efficient at conducting trials than in previous decades. The increase in judges' dockets and case management expectations may have made them more efficient in all areas of their job, including conducting actual jury trials. However, until these perceptions about the risks and inefficiencies of trials are changed or there are more incentives for taking cases to trial, the decline in jury trials will continue to have a cyclical effect that perpetuates the downward trend.

SLDO Surveys and State Reform Measures

The "usual suspects" and "innocent bystander" factors outlined in the previous section are consistent with recent surveys by the JPTF directed to state and local defense organizations (SLDOs). Leading defense attorneys were asked to complete a formal questionnaire regarding what they perceived as the most significant issues impacting civil jury trials in their respective states. While the responses varied state-to-state, the "usual suspects" and "innocent bystander" factors were all present and noted as reasons why jury trials are vanishing. JPTF, SLDO Survey, Update: March 22, 2012. Modern ADR, mandatory mediation and arbitration, increased discovery and pretrial defense costs, court system budget cuts, and tort reform were the most prevalent responses to the survey. The omnipresent emphasis on ADR in most states has caused the attention to shift away from trials. Ironically, and unfortunately, many have forgotten that "trial, and particularly trial by jury, is the least-used dispute resolution methodology in America." David A. Domina and Brian E. Jorde, *Trial: The Real Alternative Dispute Resolution Method*, Voir Dire Fall/Winter 2010. However, regardless of the multiple causes, the SLDO survey respondents overwhelmingly state that civil jury trials are indeed vanishing in their states.

One of the most important aspects confirmed by the SLDO survey is that not much is being done through state reforms to change this civil jury trial decline. Vanishing trial theories and empirical data have been far too focused with the "cause" of the decline, and less focused on actual "solutions" that could serve to dispel these commonly cited reasons for the decline. This lack of focus is evident in one of the crucial follow-up questions contained within the SLDO survey. When asked whether their states have undertaken any actions to increase the number of civil jury trials at any level, respondents of the survey overwhelmingly stated "No." The obvious rhetorical question is: Why not? If legal scholars and practitioners already know the causal roots of the problem, why are there only very minimal reform efforts at the state and federal levels to fix the obvious decline in jury trials?

Perhaps there should be more focus on proactive reforms, and less focus on empirical data showing a decline that all seem to acknowledge already exists. Undoubtedly, most tend to agree with the reasons for the decline in civil jury trials. However, very few know how to solve or improve the decline problem. It is unlikely that there is one universal "silver bullet" reform measure that will cure the increased decline in civil jury trials. After recognizing that there is definitely a serious problem generally, some states have chosen to take action by implementing reform measures to address some of the specific problems that either cause or contribute to the decline in civil jury trials.

Ideas for reform have come from various sources, but many states point to a report by the American College of Trial Lawyers (ACTL) and the Institute for the Advancement of the American Legal System (IAALS) as the impetus for their proposals. *See* Pilot Project Rules, Institute for the Advancement of the American Legal System (Nov. 2009). At the 2011 National Jury Summit, IAALS outlined its call to action, issuing a report that outlined the jury trial decline and discussed several ways the individual states could institute reform projects and help solve the problem.

The premise of IAALS's call to action rested on a simple theory: "Litigants in unacceptable numbers are being priced out of the civil justice system and priced out of trial by jury." The factors at the top of the list causing the problem were "cost" and "delay," the empirical buzzwords for "too expensive and not worth it to litigate."

The focus of the IAALS and ACTL reports underscore the importance of three common reform initiatives: (1) proportional discovery, (2) fact-pleading requirements, and (3) expedited trials and categorical trial procedures. Both through voluntary pilot programs and mandatory changes to the rules of the courts, these programs and proposals are already impacting the civil justice system in state and federal courts across the country.

Here are some innovations of interest.

Utah's Three-Tier Approach and Changes to the Rules of Civil Procedure

How many times have we seen cases settle, and trial therefore avoided, simply because the cost of discovery has proved too enormous in the years leading up to trial? How many cases that should have been tried settled because parties poured all their resources into costly pretrial discovery and eventually spent all their money conducting discovery, taking hours of depositions, and jockeying over insufficient interrogatory answers and incomplete document production? In 2011, Utah attacked one of the "usual suspects" causing a decline in jury trials by proposing several amendments to the Utah Rules of Civil Procedure that would help eliminate unnecessary costs associated with discovery. The Utah Supreme Court approved a number of these substantial amendments in an effort to get back to the primary purpose of the Rules of Civil Procedure—to achieve the just, speedy, and inexpensive determination of every action. Federal Civil Procedure Rule 1 provides that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Similarly, most state civil procedure rules also contain similar "purpose" language. These substantial amendment changes limit parties to discovery that is proportional to the stakes of the litigation, curb excessive expert discovery, and require the early disclosure of documents, witnesses, and evidence that a party intends to offer in its case-in-chief. The amendments became effective for all cases filed on or after November 1, 2011.

Utah's new rules attack the problem of unnecessary, prolonged, and costly discovery by adopting a proportional three-tier approach. The tiers set limits for standard fact discovery and prevent a party from running up discovery costs unnecessarily before trial. The rule also sets a discovery cut-off to expedite the case. At least in Utah, no longer will a party be able to conduct years of costly discovery before trial. In the event that a party claims damages, but does not plead an actual amount, the party must still plead that their damages are such as to qualify for a specified tier. The three tiers are:

- Tier 1 = Under $50,000; Three hours of fact witness depositions; no interrogatories; five requests for production; five request for admissions; 120 days to complete standard discovery.
- Tier 2 = $50,000–$299,000 and actions for non-monetary relief: 15 hours of fact depositions; 10 interrogatories; 10 requests for production; 10 request for admission; 180 days to complete standard discovery.
- Tier 3 = $300,000 and above: 30 hours in fact depositions; 20 interrogatories; 20 requests for production; 20 request for admission; 210 days to complete standard discovery.

To obtain discovery beyond these limits the parties may stipulate that extraordinary discover is necessary and proportional. However, each party must review and approve a discovery budget. A party may also file a motion for extraordinary dis-

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covery under similar guidelines. Any stipulation or motion must be filed before the close of standard discovery and after reaching the limits. *See* U.R.C.P. 26(c).

The party seeking discovery always has the burden of showing proportionality and relevance. Most importantly, the proportional three-tier approach allows a court to order that the requesting party bear some or all of the costs of producing the information to achieve proportionality. Imagine how many attorneys would choose to conduct a "fishing expedition" if they had to pay for and bear the expense of all the voluminous and costly information produced. It is too early to predict whether Utah's new three-tier system will help avoid the discovery problems inherently related to the decline in civil jury trials. However, the new rules are a bold and appropriate step in the right direction because they tend to reduce and limit unnecessary discovery costs that could be allocated for trial.

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California's Expedited Jury Trials Act

California is focused on reforming the delays and costs associated with civil jury trials and passed a bill focused on expediting jury trials and reducing the costs associated with trial. On January 1, 2011, the California state legislature unanimously passed Assembly Bill 2284, known as the Expedited Jury Trials Act. The bill was introduced by Assembly member Noreen Evans (D-Santa Rosa), a former trial lawyer. This trial reform bill significantly speeds up the opportunity for parties to receive a trial, especially for smaller cases that otherwise would not likely go all the way to trial. However, each party must agree to the expedited trial process.

California's Expedited Jury Trials Act has several unique and key features. First, the entire trial—from voir dire to closing arguments—occurs in one day. Each side must agree to present its entire case in three hours, including cross-examination of the other side's witnesses. This time limitation eliminates all extraneous information that is less necessary to the case and likely unnecessary for the jury to reach a verdict. The limitation forces both sides to simplify their cases to the material issues at hand. Second, the standard rules of evidence still apply, but the parties waive any rights to appeal or make posttrial motions. All evidentiary objections are handled during a pretrial conference, eliminating potential delays during trial. Without the right to appeal, the parties essentially have to be extremely confident with their cases because there is no "second bite at the apple" if things do not go your way. Third, the juries are smaller and consist of eight people with two alternates. Three peremptory challenges are permitted for each side. Fourth, all witness lists, exhibits, and other materials would be exchanged 25 days before trial. Lastly, the two sides are required to reach a "high/low agreement" related to the minimum and maximum amount of damages. The minimum and maximum amounts would control regardless of the jury's verdict.

When the Expedited Jury Trials Act was proposed and signed into law, commentators suggested that the reform measure found praise from plaintiff and defense bars alike. American Association for Justice, *California lawmakers vote to allow expedited jury trials*, September 23, 2010 at http://www.justice.org/cps/rde/xchg/justice/hs.xsl/13351.htm. However, whether this particular measure will actually increase the number of civil jury trials is less certain. It will likely take several years to evaluate if the measure is truly working. However, like Utah's three-tier approach to limit discovery, California's Expedited Jury Trials Act may in time prove to be one successful reform solution to the civil jury decline problems facing litigants in those states.

The Return of Fact-Based Pleading

While many states have required fact-based pleading for years, others are instituting similar requirements in order to increase the efficiency of the courts. Seen as a way to narrow the issues early in a case, which reduces the amount of discovery and its associated costs, some states are moving away from the issue-based pleading requirements of the federal courts. For example, the Colorado Civil Access Pilot Project requires parties to plead all material facts known to that party that support its claim or affirmative defense.

In 2009, IAALS conducted a survey of attorneys and judges in Oregon, a state that preserved fact pleading in its state courts. When asked to compare the fact-pleading requirements in state court with the issue-pleading requirements in federal court, responses were mixed as to whether fact pleading actually reduced the volume of discovery. When assessing the responses, 39 percent of respondents agreed that fact pleading reduced the volume of discovery, while 55 percent disagreed. However, most attorneys stated that fact pleading increased their ability to prepare for trial and the efficiency of litigation. Interestingly, most attorneys disagreed that fact pleading generally favors defendants over plaintiffs. Of attorneys who represent only plaintiffs, 49 percent think fact pleading favors defendants.

Conclusion

DRI's JPTF is monitoring these and other initiatives to ensure that the views and interests of DRI and its members are heard in the ongoing effort to preserve the jury trial. Other organizations have also been actively involved, including, but by no means limited to, the American College of Trial Lawyers, the American Board of Trial Advocates, the Conference of Chief Justices, and the American Bar Association.

The goal of JPTF is to offer a defined set of proposals that individual members can take back to their states and use to build upon the successes of other members and jurisdictions. We welcome your views on these matters as we work to preserve this fundamental aspect of American justice, the civil jury trial. FD