DISAPPEARING CIVIL TRIALS

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I. Until recently, I had always expected that at the end of my career as a trial lawyer, I would attach myself to my alma mater, the University of Texas Law School, to teach trial advocacy.

A. But a few years ago, I came to the realization that teaching dinosaur hunting might not be the most productive thing I could do with my 50 years of experience as a trial lawyer

B. Instead I began traveling around the country speaking to various Bar groups about the need to take action to keep jury trials from becoming extinct. But I soon found that preaching to the choir was not very

rewarding either: trial lawyers attending semi-annual bar association meetings in nice places were hot to work on projects on Fridays of the meetings, thinking about their T times on Saturdays and about the busy week ahead on Sundays, and between meetings did little to move the ball.

C. If my effort to save jury trials was going to bear fruit that I could see during my lifetime, I had to devote more time to it than as a member of a Bar committee or task force, and I had to associate my efforts with an academic institution that could provide me access to judges and to lawyers on both sides of the docket and political spectrum. I had a busy trial practice in New York and I became familiar with the great work being done by the Brennan Center at NYU law school.

D. Using that as my model, I offered to fund for four years and run the CJP at NYU, with an option to convert it to a permanent center like Brennan if at the end of 4 years the Dean and faculty conclude that we have achieved concrete results and can make a real difference.

E. The CJP began operations last September with a full day conference on the State and Future of Civil Jury Trials attended by more than 400 registrants. Over the summer leading up to that kickoff, we began putting together lists of Academic and Judicial Advisors and finally, Jury Consultant Advisors.

1. That was the result of my thinking about who, besides trial lawyers, have a vested interest in preserving jury trials and then asking Tara Trask what she thought.

2. She confirmed, as I suspected, that you had a trade association that might be interested in working with us to save trials.

F. We today have 165 Judicial Advisors, 52 Academic Advisors and 22 Jury Consultant Advisors.

G. You will note that except for me, the CJP doesn't have any practicing trial lawyer advisors.

1. I intended that because I have a 4-year time fuse and don't want to have to spend time getting the establishment on board. Also, I personally think the trial bar of this country, on both sides of the docket, is a large part of the problem. We are conservative, risk-adverse and because we getting old, set in our ways.

2. But I soon discovered that an unintended benefit of not involving practicing lawyers was the

access I could get to judges as Professor Susman rather than Attorney Susman.

H. Over the last 6 months, I have met with hundreds of state and federal judges at their courthouses to tell them about the CJP, to solicit their ideas and finally to secure their agreement to assist us.

II. One of the things I have learned is that it is beyond dispute that trials are disappearing

A. In 1962, an average of 21 civil trials (10 jury and 11 bench) were conducted per active federal judge

B. From 1962 thru 1985, all civil trials doubled, increasing each year with the size of the bench. In 1985, 12 jury and 12 bench trials were conducted per active federal judge.

C. But in 1986, something changed: trials began to decline

D. In 1990 there was a precipitous decline and it continued thru 2006 when there were half the trials that there were in 1962

E. Since 2006, trials have declined at a much slower rate

F. Last year, the 677 active federal judges on the average tried 4 civil cases, 3 jury and one non-jury.

G. These numbers overstate the number of cases tried by active federal judge because they also include trials conducted by magistrate and senior judges. Also, the numbers of reported trials in federal court are likely exaggerated because a trial is defined as any hearing in open court at which evidence is introduced.

H. The number of bench trials has declined faster than jury trials. That was news to me. I had assumed that because of expense or uncertainty, parties were opting for trial by judge rather than jury. While my focus has

been on the jury, the problem is the broader one of vanishing trials.

I. There is considerable variation between districts and among judges within a district, although it is impossible, without the intervention of a US Senator, to get the number of cases tried by individual judges.

J. The same decline has taken place in criminal trials but probably for a different reason, i.e., minimum sentencing guidelines.

K. The same pattern exists in state courts.

III. While none of the judges I have met with quarrel with the above, everyone lists different reasons for this dramatic reduction in civil trials

A. I start with one that is rarely mentioned: the public's general ignorance that trials are vanishing. Most non-lawyers think that the trial business is flourishing and

that judges are overwhelmed with trying cases to clear crowded dockets. The Chamber of Commerce has convinced them that there is a litigation explosion and watching TV and movies leads them to believe that jury trials are commonplace.

1. No one has shown them pictures of empty hallways and dark courtrooms in most courthouses in the country. PHOTO
2. When I tell my non-lawyer friends that I am trying to save trials from extinction, they are shocked to learn of the situation.
3. While most Americans are ignorant about why the right to a jury trial was so important to our Founding Fathers, they are pretty certain they do not want to lose any right that the Constitution provides them. That's particularly true at a time

of great distrust of government and great adoration of constitutional rights.

4. I believe that lack of public knowledge about the near disappearance of jury trials is a big reason that corporate America has succeeded in its campaign to get rid of them.

B. In the 80s, with the election of Ronald Reagan, big business started the lawsuit abuse movement that ended up giving us tort reform, securities law reform, antitrust reform, class action reform and patent reform. It is not coincidental that trials began to decline in 1986, the year the American Tort Reform Ass'n was established.

C. The idea that it would be unfair to make a business "bet the company" on a jury's verdict and that frivolous lawsuits were the result of a litigation

explosion, caused a conservative Supreme Court, composed of 8 justices who had never tried jury cases, to construct judge-controlled gates to protect businesses from having to confront juries.

1. The first such gate was summary judgment, erected, again not coincidentally in 1986, by a trilogy of Supreme Court decisions that requires the plaintiff to convince the judge that the evidence makes his claim plausible enough to warrant a trial.

2. Other gates include motions to dismiss that, before you get any discovery, make you plead facts that establish a plausible claim, mediation as a condition of getting a trial setting, Daubert hearings to convince the judge that your expert's testimony is reliable, class certification hearings

that resemble mini-bench trials on the merits, and motion in limine practice aimed at limiting what the jury can hear.

3. While it is true that jury trials are more expensive than bench trials or arbitrations, it is these gates, not discovery costs, that tend to make them so.

   a) The main driver of discovery costs is ESI, but that is the same in bench trials or arbitrations.

   b) I have heard a few judges point to mock trials and jury consultants as cost drivers of jury trials, but I quickly point out to them that smart lawyers are using your services for bench trials and arbitrations as well.

   c) To be sure, the time and expense of trying to open the judicially erected gates, and the

uncertainty of getting through, put pressure on pls to settle.

D. Professor Langbein of Yale blames the demise of trials on the enactment of the civil rules of procedure in 1938: so much time is devoted to preparing for trial, that the trial itself is unnecessary. I disagree. But the emphasis on pretrial discovery has left us with a generation of trial lawyers that fear surprise and thus want to avoid trials. These lawyers are risk adverse.

E. Congested dockets and budget restraints gave rise to managerial judges who think they are failures if they have to conduct a trial. I ran into a federal judge recently who said that trials take place only when one of the lawyers does a bad job of evaluating his claims or defenses.

F. Then there are corporate clients who distrust juries, judges and even arbitrators to reach the right results, and settle rather than fight—though they often wait til closer to trial after all death-knell motions have been exhausted.

1. Their fears are fed by lots of bad PR on runaway verdicts
2. And by their observation of jurors being instructed in gobbledygook and being deprived of tools used by judges to decide cases
3. When judges, fed up with lawyers arguing their cases during voir dire, began displacing them entirely, they deprived parties of tools they thought they needed to eliminate jurors who could not be fair. Settlement before verdicts makes a lot of sense when you have no idea what

the jurors are thinking because you couldn't question them during voir dire and they weren't allowed to ask questions at trial.

4. Disparity of wealth and political rhetoric caused executives in the 1% to fear that a jury that is not composed of their peers cannot be impartial

G. The availability and popularity of mediation as an alternative form of dispute resolution. We tend to forget that this originated with a Democratic Senator—Joe Biden's Civil Justice Reform Act of 1990.

H. A generation of lawyers and trial judges who are uncomfortable trying cases to juries. The vanishing judge is a rather new phenomenon. The contentiousness of the nomination process and the influence of money in judicial elections—even the

demand for diversity—has meant that fewer experienced trial lawyers end up a judge. Lots of the new judges have never tried cases, have never had to manage the overblown egos of trial lawyers and prefer to decide cases in the privacy of their chambers surrounded by their law clerks. It's hard to expect them to encourage jury trials.

I. The Supreme Court's affection for arbitration as a form of private dispute resolution means that you can't buy goods or services without giving up your right to go to trial and there are few breach of contract cases being litigated today.

J. The development of the trial consultant business that provides disputants with an accurate prediction of what will happen at trial. As you perfect your science, you make superfluous my services.

IV. This list of the reasons for the vanishing trials is long but still incomplete. And it may take more than the life of the CJP to identify the real culprits and rank them in order of importance. Unfortunately, two things are, I think, clear:

A. First, the tort reform/lawsuit abuse effort by the Chamber of Commerce is probably the biggest cause of the vanishing trial and it can only be countered by an equally expensive public relations campaign that is beyond the ability of any academic project or professional association to counter. The AAJ has been trying for years, without much to show for it.

B. Second, if we wait to act until we identify and prioritize the causes, it may well be too late, if it's not already too late. We have got to assume that all of the above have contributed to the decline and take lots of different steps to counter what we can.

V. What can be done now, with the help of those present today, to halt the extinction of trials?

A. First, we need to inform the public that jury trials are in danger of extinction

1. We need to provide civic education as to why our Founders fought so hard to enshrine the right to civil jury trials in our Constitution: to protect citizens from the abuse of power by a strong federal government; to protect debtors (today "Main Street") from creditors (today "Wall Street").

a) We need to remind the public that 3/4ths of the cases in this country are tried in state courts, many by judges who need to solicit campaign contributions to get elected and re-elected.

b) With the Judiciary held in lower repute today than at any other time in recent history and with candidates on both extremes complaining that the system is rigged, the idea that we need to hang on to juries that cannot be rigged, should resonate

2. Obviously we need to also spread the word that jury trials are vanishing.

3. We probably could use some empirical research to confirm or refute my premise that the public is unaware of the drastic decline in trials. Something as simple as a monkey survey would be great. Or since you all are frequently summoning a cross section of the community to serve as mock jurors, might you be willing, at the end of the exercise, to give them a short

questionnaire inquiring whether they think trials are vanishing?

4. You could also help us determine what sells best as the reason for being concerned. I recently heard the chair of a major trial organization say that we should focus on the citizen's right to serve on the jury rather than on the litigant's right to have a jury resolve their dispute. My gut tells me that the average person would be more concerned about the protection a jury provides her from abuse by government and big business rather than the opportunity to perform jury duty. But that's my gut and it should be subject to research.

B. Second, we need to study why lawyers who try cases think trials are vanishing and what can be done about

it. We are deeply grateful to the efforts of the ASTC on this score. The questionnaire your committee prepared is being circulated to the members of most trial organizations in this country and we are hopeful to have answers by the end of the summer.

VI. Third, we need to encourage judges to make jury trials more attractive by reducing the expense for litigants, improving the perception of fairness and lessening the burden on jurors

A. As to reducing expense, pretrial discovery is what has the attention of most bar groups and rule-making committees. We should focus on reducing the **trial** expense and I know of two ways to do that:

1. Eliminate the need for a pretrial order, which is the greatest make-work project known to those civil trial lawyers who bill by the hour.

2. Allocate a fixed number of hours to each side and enforce it.

   a) Here's where you can be most helpful because the premise of your very expensive mock trials is that in a one or two day exercise, you can get a result that will be very similar to what would happen in a much longer trial.

   b) We are putting on a day-long conference on Sept. 30th on the Jury Trial of Patent Cases. Prof. Mark Lemley is updating a study of patent cases tried between 2000 and 2011, many of which were time-limited jury trials, to determine whether it is still true that time limits do not favor either the pl or the def, nor the extent to which the judges agree with

the jury verdict. Judges and lawyers who have tried the most patent cases to juries will be panelists.

B. While there is tremendous empirical evidence that jury trials are fair and that judges almost always agree with jury verdicts, the perception by businesses that repeatedly need dispute resolution, is otherwise. A short video made by the IADC and entitled Order in the Classroom demonstrates the problem.

1. The innovations we have polled judges on include instructing the jury on the law at the start of the case, allowing them to ask written questions and discuss the evidence before deliberations, allowing the lawyers to make interim arguments, putting experts back to back or simply hiring court-appointed experts,

providing each juror with a copy of the instructions and verdict form. None of these are novel, but since they were first suggested over a decade ago, judges have been slow to try them.

2. We are trying to spread the word, through judges who have used these practices, to others who have not.

3. We are trying to identify those judges who try more cases than their brethren and get them to write down their recipes.

4. Whenever we hear a good idea, we raise it with a group of judges. The idea of providing jurors with iPads loaded with instructions, exhibits and realtime testimony has been warmly received. There is considerable interest in requiring the lawyers to make their full openings before voir

dire. It has the advantage of providing a richer experience to members of the venire who are not chosen and it doesn't add to the time of trial. But what impact does it have on voir dire?

a) There is clearly room for empirical research here.

b) And we must recognize that it is the jury selection process that makes so many people try to avoid jury duty. Many academics have argued against allowing pre-emptory challenges. It was lawyer abuse of voir dire, in places like Texas, that made the federal judges kick us out of the process altogether. We cannot blindly insist that things could not be improved.

5. At our initial conference, many academics suggested we should replicate the classic study about Judge/Jury agreement published 50 years ago by Kalvin & Ziesel.

   a) That study's finding that in over 4000 civil cases tried to juries in the 50s, the judge agreed with the verdict 75% of the time. That finding has been relied upon repeatedly to defend the jury's ability to get it right.

   b) The academics would like to know whether this has changed over the last 50 years and whether judge/jury agreement is increased by the use of some or all of the trial innovations we are suggesting.

   c) When we asked for bids to replicate this study, the expense was daunting, so we decided to solicit the views of our Judicial Advisors.

(1) Some thought it would be unfair to ask them to serve as 13th jurors, since they do not always listen that carefully to the evidence and since they have no help from other jurors.

(2) Some were worried about the result we might get. They argued that if the agreement rate were a lot lower than 75%, it would cast doubt on the jury's competence. If much higher, it would fuel the argument that juries are superfluous. That's not a reason to refrain from the research, but I do wonder how you determine agreement when most of our verdicts today are special ones, consisting often of dozens of questions.

d) As a result we have put that project on hold until we consult with our Jury Consultant Advisors.

C. Making jury service more attractive to jurors is also one of our goals. It might not create more jury trials, but at least it would keep the public from saying "good riddance" when they learn of the decline. It's hard to argue jury duty is a "right" when as many as 80% of those summoned don't even bother to show up.

1. We need to improve the video presentations made in the jury assembly rooms
2. Present testimonials from jurors who have served. One might come from Senator Claire McCaskill, a former trial attorney, who recently served on a civil jury and raved about it. She has introduced a bill to remove the exemption for members of Congress. Judge Young of Boston thinks this should be expanded to remove the exemption for judges. We could urge the Judiciary Committee to hold hearings on jury service in connection with these bills.
3. Improve voir dire in those courts, like state courts of New York, where it is abusive and unending

4. Encourage greater use of the internet to determine whom to strike (contrary to those who think this should be banned)
5. Shorten trials, end them when promised and conduct them on half-day schedules
6. Side bars and bench conferences should be eliminated
7. We need to oppose efforts to preclude or discourage post-verdict debriefing of jurors by judges or attorneys. Recently the New Jersey Supreme Court held this was improper.
8. I've even thought about creating a juror hardship fund that would be available when a juror's employer penalized his service

VII. Any argument against the use of juries to resolve civil disputes depends on the availability of what is perceived to be a better way. Today, of course, that is arbitration.

A. When businesses put arbitration clauses in contracts of adhesion like consumer contracts or employment contracts, one assumes that it has nothing to do with a perception that arbitration is fairer. It is almost always

motivated by a desire to avoid class actions or just win. The CFPB is on the verge of prohibiting this and it doesn't take much of a change in the composition of the Court to confirm its power to do so.

B. But when businesses put jury waivers or arbitration clauses in their B2B contracts, it may signify their belief that arbitration is a fairer and more efficient way to resolve disputes.

1. In 2002, some law professors studied over 2000 B2B contracts that public companies deemed material enough to include in their SEC filings. They found no jury waivers or arbitration clauses in 70% of the contracts and therefor concluded that a lot of companies still had faith in juries and civil trials. One suspects that this number would be much smaller today, 15 years later.

a) So we are about to contract with several academics to replicate the 2002 study, mainly with the idea of identifying at least a few general counsel who for some reason

have chosen to rely on public dispute resolution by juries.

b) We think that interviewing those GCs may give us answers to why arbitration is not necessarily better.

c) We would use what we learn to inform repeat consumers of dispute resolution services of the advantages of trial by jury (or at least a bench trial)

VIII. A final complaint I hear from most of the judges I have met with is that jury trials have declined because the lawyers today don't have enough experience to try a jury case and therefor seek settlement as an alternative to trial.

A. I'm not sure you need a lot of experience to try a jury case or that trying a jury case is that different than trying a nonjury case or conducting an arbitration. I know that experienced trial lawyers say otherwise in

order to defend their turf. In any event, I think that perception of inadequacy matters and that it may help to develop programs that give young lawyers confidence that they can try a jury case.

B. One such program that provides CLE credit to lawyers and also honors jurors is Juror Appreciation lunches held at regular intervals in all major cities. Judges invite the jurors as they discharge them and then would-be trial lawyers are invited to attend a lunch where they break bread with judges and jurors and discuss how jury trials can be improved. Our first lunch was held in Houston on May 5th: over 100 lawyers, 20 judges and 8 jurors attended. Everyone agreed it was a huge success so another is scheduled for Houston in October. Dallas is planning one too.

The ASTC could develop a CLE program that we could take on the road for these lunches.

C. Today a few judges around the country are telling the parties that if they will allow a young lawyer to argue a motion, the judge will grant an oral hearing. We are taking that one step further and proposing that judges give preferential settings when young lawyers serve a lead counsel in cases.

D. We are urging all courts to post on their websites when pro se civil cases are "trial ready" and in need of pro bono counsel.

E. We have proposed a Second Chair Mentoring Program that can be used when an inexperienced trial lawyer in a paying case, has no experienced lawyer in his firm to mentor him through his first trial. Lawyers like me

would volunteer to parachute in the week before trial and sit second chair on a pro bono basis.

F. Watching a good lawyer perform at trial is how most of us learned how to do it. But sitting in as an observer on a trial you are not involved in, or even watching a video of a trial filmed by Courtroom View Network, is like watching grass grow. Yet whenever something exciting and educational is about to happen in any courtroom, it is magical how law clerks of other judges in the courthouse show up to observe. Why couldn't the judges develop a system to text lawyers not involved in the case and not normally hanging around the courthouse, of when such teaching moments are about to occur? Most of the judges I have spoken to would gladly cooperate with this project if we can come up with the right structure.

IX. I had the good fortune of entering the trial practice when if you were a judge, “trying cases is what you do.” Of course I am nostalgic about the Golden Age of the Trial Bar and would love to see my son, who is one of my partners, have the same opportunities that I had.

A. But I am convinced we wouldn’t have had a Bill of Rights at all or maybe not even a constitution were it not for the insistence of those who distrusted governmental power.

B. Apart from history, I am also persuaded that jury trials are the best way to determine the truth in any dispute about what happened.

C. I am encouraged at the enthusiastic reception the CJP has received from the judiciary: they are eager to hear how they can try more cases; most of them love the

interaction with jurors and didn't go on the bench to push paper.

D. With your help, I think the bench, the academy and the Bar can keep access to justice available in a healthy system of public dispute resolution.