

## THE DEATH OF THE CIVIL JURY TRIAL

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- I. The CJP was established at NYU School of Law in the fall of 2015 as the only academic center in the nation studying why jury trials are disappearing, whether we should care and if so, what can be done about it.
- A. [SLIDE 2] I hope I don't have to convince this audience that jury trials are disappearing, though even you may be surprised to learn that the percentage of cases disposed of by jury trials in Cuyahoga County dropped from 1.6% in 1999 to .2% in 2016. [SLIDE 3] A similar pattern prevails for the State of Ohio. [SLIDE 4] Jury trials are also vanishing in federal courts. I think everyone, lawyers and non-lawyers alike, would agree that the disappearance of jury trials, indeed trials of any type, is a bad thing.
- B. In retrospect, we should have called our center the "Civil Trial Project" because no sooner did we begin looking at the statistics, we found that nonjury civil trials were disappearing faster than jury trials. These slides demonstrate that. And the same pattern exists in virtually every state court around the country.
- C. This does not mean that the civil trial will go the way of the powdered wig and disappear, but rather that it will be like the California condor, still around but rarely seen.
- D. And one of the biggest dangers to the trial's survival is that nonlawyers are unaware of its infrequency. A recent study we conducted shows that 80% of the public has no idea that the number of jury trials is even declining. Of course, we could spend the rest of this program debating why this is happening. I have prepared a non-exhaustive list of 15 reasons. The first [SLIDE 5] lists the ones that are very difficult, if impossible, to change. They include:
1. Discovery rules allow parties to discover the facts without having to go to trial

2. Managerial judging
  3. Enforceability of arbitration clauses in contracts of adhesion
  4. Elimination of causes of actions as result of lawsuit abuse movement: tort reform, medical mal reform, securities law reform, class action reform, etc.
  5. Procedural screens to make sure remaining causes of action are plausible: motions to dismiss pleading; motions for s.j.; Daubert motions; limine motions
  6. Caps on damages (e.g., medical mal; punitives) remove the incentive to go to trial
  7. MDL consolidation and bell-weather trials of mass tort cases reduce the need for trials to dispose of large number of cases
  8. Absence of confidentiality exposes defendants to further litigation and/or administrative sanctions
  9. Jury consultant and mock trials are able to predict results without having to go to trial
- E. [SLIDE 6] This slide lists the ones that could be changed with your help. They include:
1. Expense of discovery
  2. Delay in getting to trial
  3. Judicial insistence on mediation as pre-condition for trial setting
  4. Lack of real trial lawyers
  5. Insufficient judicial education
  6. Repeat litigants' perception that juries exclude educated and skilled citizens and that juries are deprived of decisional tools available to judges and arbitrators
  7. Public's perception that there is still a litigation explosion and that most lawsuits are frivolous and many juries are runaway
  8. Public's ignorance of historical reasons for jury trials and public dispute resolution and the relevance of those reasons today

F. If we wait to take action until we identify and prioritize all of the causes, trials might in the meantime become extinct. So today I want to talk about the causes that the CJP can do something about. Those are the eight listed on this slide.

1. As we began to focus on these eight things, it became obvious that most of them were within the control of trial judges. Therefore we began dialoguing with federal and state trial judges across the country.

a) We now have over 250 state and federal trial judges as Judicial Advisors.

b) We also identified and recruited as Academic Advisors over 65 law professors who have written about the history or performance of juries.

c) Finally, we sought out 35 Jury Consultant Advisors to help us test some of the innovations we are suggesting.

II. Let me now turn to those things that you judges can help us accomplish.

A. *Expense of Discovery.* The expense of discovery may explain why many disputes are settled rather than decided, either in trials or arbitration.

1. Most experienced trial lawyers report that the expense of discovery today is largely the result of e-discovery and that it is roughly the same for a jury or bench trial. That probably explains why bench trials have declined as fast as jury trials. They also report that the expense of discovery in arbitration is not that different and is frequently offset by having to pay three arbitrators \$750 per hour—a strong disincentive for them to dispose of the case prior to writing a reasoned award.

2. And experienced trial lawyers also report that the biggest component of e-discovery expense is self-inflicted: most clients insist that prior to production, their lawyers review all documents individually for relevance and privilege.

3. Most bench and bar committees are working on curbing discovery expense, so this is not a top priority of the CJP. I recommend that judges require the lawyers in a civil case to at least consider the Pretrial

Agreements that I have been promoting for more than 20 years. They can be found at TrialByAgreement.com.

- B. *Delay in Getting to Trial.* Virtually all trial lawyers, on either side of the docket, believe that a definite and early trial date set very early in the pretrial process is the best way to control discovery expense and resolve any dispute. The courts that do this seem to end up trying more cases while at the same time clearing off their dockets cases that don't need to be tried.
- C. *Judicial Insistence on Mediation as Condition for a Trial Setting.* Mediation serves the useful purpose of making lawyers spend a day with their clients evaluating their case. And that should certainly happen before a trial begins. But I believe it should only be ordered after the court has ruled on dispositive motions and after a trial date has been set. Otherwise, it forces the parties to settle because they can't foresee ever getting to trial.
- D. *Lack of Lawyers who know how to try cases.* The CJP is involved in several projects in this area.
  - 1. We are encouraging judges to enter Young Lawyer rules that assure oral arguments on motions that will be argued by inexperienced lawyers and even better, give priority trial settings where the court knows that a young lawyer will be playing the role of lead trial counsel.
  - 2. We urge courts to publicize the need for lawyers to handle "trial ready" pro se cases
  - 3. We have asked our JA's to suggest ways to notify the bar of important courtroom performances.
  - 4. And finally, we have commitments from our JCA's that they will use mock trials to critique the performance of young lawyers.
- E. *Judicial Education.* During our first month of operation, in the fall of 2015 we held our first full day Institute on the State of Jury Trials in this country. At the end of the day, we met with our Judicial Advisors and one of them told us that at the school for new federal judges, conducting jury trials wasn't even discussed. Going around the country talking to judges we realized that there are few opportunities for judges to discover what other judges around the country are

doing or even to watch experienced judges in their own courthouses conduct trials. Accordingly, we have focused on what we can do to improve judicial education.

- a) We have designed programs only for trial judges at judicial retreats and are conducting workshops where we pay the expenses of trial judges to come to NYC for a full day discussion of how to improve jury trials. Thus far we have held 3 workshops for 90 judges and another 2 are planned for the fall.
  2. We are videotaping award-winning performances by judicial rock stars: welcoming the jury, delivering jury instructions at the start of the case, encouraging and handling juror questions, debriefing jurors when the trial ends.
  3. [SLIDE 7] Finally, we have an active and fulsome website [CivilJuryProject.law.nyu.edu](http://CivilJuryProject.law.nyu.edu) designed as a resource for judges and academics, and we have published a monthly newsletter for each of the last 18 months.
- F. *The perception that educated and highly-employed citizens avoid jury duty and when they do serve lack the decisional tools available to judges and arbitrators.* This is the area where we have been most active.
1. [SLIDE 8] We have hosted jury improvement lunches in major cities around the country, including Cleveland and Columbus, each of which has been attended by more than 50 lawyers and enough judges and jurors to sit at each of the tables and appear on panel discussion. Videos of all past lunches can be found on our website. Surveys after each, show that the attendees want to repeat the lunches several times a year. We have conducted 4 lunches in Houston, 3 in Dallas and next month will conduct the 2d in Seattle.
  2. [SLIDE 9] We maintain a second website called *WeThePeopleWeTheJury* whose purpose is not only to give discharged jurors a place to go to talk about their experience, but also to encourage those who have been summoned to show up. [SLIDE 10] We use cards handed out by judges

to jurors as they discharge them to attract former jurors to our website to blog about their experience. [SLIDE 11] And Twitter to attract those who have been summoned and are surfing the web to discover how to avoid serving.

3. We have developed a questionnaire that you can pick up as you leave, which is designed to be given to jurors at the start of the trial and collected at the end.
4. To improve jury trials, we are urging judges and trial lawyers to at least try certain innovations that can be implemented right now and at no expense or need for any rule change. Each can make jury trials less expensive and more reliable.
  - a) When I first began working to save jury trials, one of the first things someone sent me was this short film entitled “Order in the Classroom” produced by the IADC in 1998 as a vivid portrayal of the problems inherent in the jury trial system. [SLIDE 12]
  - b) Watching that doesn’t give one a lot of faith in the jury’s ability to get it right.
  - c) Fortunately I can report to you that a study we recently commissioned found that 57% of material B2B contracts filed with the SEC last year did not contain either arbitration or jury waiver clauses. We are in the process of interviewing GC’s of companies who were parties to such contracts and hopefully will be able to confirm that the omission was intentional and that the majority of American companies still have faith in juries.
  - d) The challenge is how do we gain the confidence of the other 43%?
  - e) In a nutshell, we believe that all of the pedagogical problems illustrated in Order in the Classroom can be eliminated by adopting the innovations we are advocating today.
  - f) Over last summer the CJP authored a short article on 9 of the innovations that was published in Law 360. These can be found on our website.

- g) There were a number of improvements that we urge that we did not write articles on. They include:
- (1) Eliminating side-bars
  - (2) Insisting on use of pattern instructions if available
  - (3) Writing plain English instructions
  - (4) Use of juror notebooks
  - (5) Providing each juror a copy of the instructions and verdict form
- h) The Innovations we wrote about:
- (1) **Limiting the length of trial.** The biggest objection to jury trials is that they are too expensive. The easiest way to reduce their expense is to set firm trial dates and to set tight limits on the length of the trial. The single biggest complaint we hear from jurors is that the trial lasted too long and was too repetitive. Every lawyer who has participated in a time-limited trial reports that it actually made for a better trial. Shorter trials mean fewer high caliber jurors get excused for hardship. Without time limits, the most complex cases last the longest and are tried to the least qualified jurors. No wonder corporate executives complain that juries are not composed of their peers. After getting the input from the parties, the Court should set a firm trial date and the length of the trial, both at the start of discovery. Discovery should be proportional to the time allowed for trial. Mock trials and all empirical studies of actual trials suggest that the outcome is not affected by the length of the trial. We have found no rule or decision that limits the trial court's power to limit the length of trial. Even without agreement of the parties, the court should impose time limits

(2) **Substantive questionnaires to venire before voir dire.**

To save time at trial and to provide more information on prospective jurors to counsel, the court should suggest to counsel that they agree on a two-page questionnaire to be completed by prospective jurors before they arrive at the courthouse. The Court should have a standard questionnaire it uses in the event one party wants one but both parties fail to agree to something else. The completed questionnaires should be made available to counsel for long enough to be able to study them and use them to conduct internet research subject to ethical prohibitions being adopted in various jurisdictions. The only objections I have heard to the questionnaire come from judges who express concerns for jury privacy. In a criminal case, where a juror might be subject to physical threats, I can understand the concern. But not in the usual civil case. After all, jurors become judicial officers and public figures during the brief time they serve. Their privacy can be protected by ordering counsel not to disclose their identities or their questionnaire answers to others.

(3) **Full openings before voir dire.**

(4) **Preliminary substantive instructions**

(5) **Jury-posed questions.** We have listened to the suggestions of hundreds of jurors voiced on our website WeThePeopleWeTheJury, or at Jury Improvement Lunches or in response to post-service questionnaire administered by trial judges. The single most popular innovation is to allow them to ask questions of witnesses. This practice is nowhere prohibited and increasingly authorized. The most common method is for each juror to be given a blank piece of paper on which she may write questions. The papers are



collected at the end of a witness' testimony before the witness leaves the stand. If any contain a question, the judge shows it to the lawyers at the bench and, if there is no objection, asks the lawyer who called the witness to ask the questions. Opposing counsel may cross. In my experience, the questions are rarely objectionable and usually quite insightful. Little time is wasted. Jurors report that it keeps them engaged and awake. I have heard some judges suggest that it may provide the lawyers too much information on how the jury is leaning. My response is what's wrong with that?

- (6) **Interim statements by counsel.** In a trial where each side is given 15 hours, the court could allow each side to use up to 5% of its time or 45 minutes to offer explanations to the jury immediately before or after examining any witness. No such explanation could last more than 5 minutes. This allows the lawyers to keep the jurors awake, engaged and more informed. Jurors we have asked, suggest it would be helpful. I have never been able to get the other side to agree to this, perhaps because whenever I suggest it, they suspect that I have some special experience or expertise at doing it. If this practice is to gain traction, it's because judges have the courage to experiment with it.

G. *Public's perception that there is a litigation explosion and that most lawsuits are frivolous and juries runaway.* We are also trying to inform the public that public dispute resolution is being marginalized and that jury trials are disappearing.

1. Now you can imagine that when you tell most non-lawyers that trials are disappearing, no one is very upset. The lawsuit abuse movement has been very effective in persuading Americans that trial lawyers like us are evil personified.

2. But opinions are changed when we tell folks that the Bill of Rights includes their right to serve on juries and have juries rather than judges decide their disputes: no one thinks the loss of a constitutional right is a good thing.

H. *Public's ignorance of the historical reasons for jury trials and public dispute resolution and the relevance of those reasons today.* We need to teach the public that the right to trial by jury in civil cases was so important to our Founders that they ratified the Constitution only on the condition that an Amendment be added that expressly protected it, and that they insisted upon this in spite of their recognition that jury trials would be more expensive, more uncertain in general and more dangerous in particular to wealthy defendants than bench trials.

1. Our survey of the public shows that it is only after a respondent is informed that the right to a civil jury trial is protected by the Constitution, that she expresses concern that jury trials are in decline.
2. We also need to explain that only public jury trials send a message about what citizens think of certain conduct and only public dispute resolution creates Rules of Law.
3. The MeToo movement and the current attack on the Rule of Law and an independent judiciary provides ample opportunity to explain why the right to civil jury trials is enshrined in the federal constitution and that of almost every state.
4. We also need to use every opportunity to remind judges of this. Thank you for giving me the opportunity today.