Judicial and Legislative Responses to the Vanishing Civil Jury Trial

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I. Fundamental Guarantee of the Jury Trial and Its Regrettable Decline

While the phrase “vanishing jury trial” may sound like a magician’s trick up Harry Houdini’s sleeve, the term is actually the widely discussed vernacular among litigators and trial lawyers describing an increasingly common and unfortunate trend. The right to jury trial in civil disputes – a pillar of our democracy so axiomatic it is preserved in the Seventh Amendment to the Constitution – has all but disappeared. Empirical studies report that from the 1970’s through the first decade of the 2000’s, the resolution of civil dispute by jury trial dropped from 3.5 percent to just one half percent. Resolution by trial of criminal matters, by contrast, declined from 3.1 percent to 1.1 percent of cases filed during this same time period.

As a result, ask any new associate or junior partner, particularly in urban centers, how much trial experience they have, and the answer given is probably the same: little to none. Cases settle far more often than they are tried. A multitude of reasons exist to explain the diminished role of the jury trial in the resolution of civil disputes including the significant apprehension of clients regarding the risks and uncertainty of trial. The expense of pre-trial discovery and case preparation is substantial and continues to increase due to a variety of factors including identification, classification, and production of electronically stored information. The unpredictability of jury verdicts contributes to an understandable, yet regrettable, attitude and preference for settlement when the merits of the case suggest that trial could be won. Increases in motion practice, including both motions to dismiss and for summary judgment, particularly in the federal courts, often preclude the necessity of trial. Mandatory arbitration requirements in contracts frequently preempt civil litigation. Statutes and court rules often mandate or encourage mediation before trial thereby further limiting opportunities for trial. Legislative actions in many states and characterized as “tort reform” has adversely impacted the number and nature of civil suit filings and therefore limited the number of potential matters for trial.

A new generation of lawyers is maturing in their profession without ever having conducted a jury trial. By the time the current generation of practicing trial attorneys retires, much of the knowledge and experience needed to successfully prepare and try a case will be lost. Young lawyers have not had the opportunity to serve as apprentice trial lawyers and learn to become master litigators themselves. The ability of lawyers to zealously represent clients in all forums, therefore, diminishes, as the culmination of a legal action by civil jury trial becomes less and less available. Clients, the courts, and our system of jurisprudence suffer.

On a deeper (and perhaps more deeply felt) level, American democracy itself suffers from the diminishing of the right to jury trial in civil disputes. The Supreme Court has described as “justly dear” the Seventh Amendment right. Far more than an “object of deep interest and solicitude” (which it also is), the right to a jury trial in civil disputes more importantly, is a “fundamental guarantee of the rights and liberties of the people.” Thomas Jefferson once described this uniquely American privilege as the “only anchor yet imagined by man, by which a government can be held accountable to the principles of its constitution.”

A public trial, after all, airs disputes and issues out in the open and allows cases to be decided according to the contemporary values and the judgment of a diverse community. A public trial of a civil dispute promotes legitimate decisions and a transparent process that can be superior to a decision based on written motions reviewed and analyzed behind the closed doors of chambers.

As the Institute for the Advancement of the American Legal System (IAALS) has lamented: “The decline in jury trials has meant fewer cases that have the benefit of citizen input, fewer case precedents, fewer
jurors who understand the system, fewer judges and lawyers who can try jury cases – and overall, a smudge on the Constitutional promise of access to civil…jury trials.” A decrease in trials, therefore, impacts in a quite practical way the philosophy on which democracy depends – a government by the people and for the people.

Until now, in this era of settlements, “every encroachment upon [that Constitutional promise] has been watched with great jealousy” by the Supreme Court. The judiciary and lawyers of the 21st Century should “scrutinize [the right] with utmost care” and undertake actions to promote jury trials as a just and efficient method of dispute resolution.

This paper discusses some of the methods and techniques judges, lawyers, and legislators are utilizing to promote the exercise of this fundamental constitutional right, such as by actively managing the pretrial discovery process, establishing dedicated trial case docket systems, and employing novel innovations to limit the expense and delay that can be associated with trial.

II. Methods to Promote Jury Trials and Enhance the Jury Experience

The role of juries in civil matters and the important functions they serve is universally recognized. So what exactly is being done to save this deeply enshrined right?

A. Federal Judicial Dockets

Several prominent district court judges have focused on enhancing juror experience of serving on a jury in federal court. United States District Court Judge Mark Bennett believes having one’s “day in court” philosophy applies to benefit both the litigants and the jurors. Judge Bennett employs the “WWJW” approach in his courtroom: What Would Jurors Want. Judge Bennett has written, “[i]f we truly want and expect a higher response rate from summoned potential jurors, and for them to be the best ambassadors for our civil justice system, a juror bill of rights needs to be adopted and practiced.” The following steps are recommended by Judge Bennett for the trial of any matters and these suggestions apply equally to the federal and state courts:

I. Jurors Have the Right Not to Have Their Time Wasted by Judges, Lawyers, Witnesses, and Unnecessary, Cumulative, and Excessive Evidence

II. Jurors Have The Right in Jury Selection in Every Civil Case to Be Told Exactly How Long Trial Will Last – Minus Deliberations.

III. Jurors Have the Right in Every Trial to Their Own Set of Plain English Final Jury Instructions Prior to Opening Statements.

IV. Jurors Have the Right to Have Their Trial Judge Thoughtfully Consider Innovations that Enhance Their Experience and Improve the Fairness of the Trial

V. Jurors Have the Right to Juror Creature Comforts.

Judge Bennett manages the trial proceeding to limit possibilities for losing valuable time and believes a jury’s time is best utilized by hearing and considering crucial evidence. He suggests, somewhat controversially, that trial judges “Just Say No to Sidebars.” Eliminating or reducing the number of sidebars, Judge Bennett believes, is one proven way to ensure lawyers do not waste jurors’ time due to conversations with the court of minimal importance. Evidentiary issues requiring the attention of the court are dealt with by the lawyers and judge outside the presence of the jury at times when the jury is not present. Other methods of ensuring efficiency and respect for juror time include starting and finishing the proceedings on time, setting time limits on opening statement and closing argument, and using the Federal Rules of Evidence and Federal Rules of Civil Procedure to limit repetitive or excessive evidence on a given issue. Judge Bennett requires parties
to meet and confer prior to the Final Pre-Trial Conference to identify and resolve evidentiary objections and eliminate witnesses and exhibits that are redundant or cumulative.19

Judge Bennett also ensures trials do not exceed their proposed length of time by setting strict time limits on the litigants for the presentation of evidence.20 Judge Bennett is not alone in seeking to limit the length of trials by placing restrictions on the amount of time that attorneys have to present the case. Principle 12 of the American Bar Association’s American Jury Project Principles and Standards provides that “[c]ourts should limit the length of jury trials insofar as justice allows,” and “jurors should be fully informed of the trial schedule established.”21 Trial time limits not only save time and money but also force lawyers to marshal their best case forward.

The juror-focused approach Judge Bennett employs also includes giving jurors their own written set of “plain English” final jury instructions at the outset of the case.22 Included with the jury instructions are a table of contents, and the instructions set forth in a simplified bullet point format with white or open space. Lengthy paragraphs of complicated text do not aid jurors come to a decision. At the end of the jury instructions is the verdict form. Judge Bennett prepares the verdict form in tabular format so that each element of the crime or claim to be decided on which the jury’s determination is helpful or required is clearly stated.23 The jury must correspondingly follow and complete the verdict form in a sequential manner to reach their ultimate verdict.24

Other methods utilized to enhance the experience of jurors include a modified daily trial schedule of proceedings from 8:30 a.m. to 2:30 p.m. with shortened breaks.25 Jurors are allowed to take notes, ask questions of the witnesses, and have personal access to all types of evidence during jury deliberations.26 These advances are intended to help jurors understand the facts in the case and to stay engaged with the trial proceedings.27 This approach and continually recognizing the need to adapt to juror opinions ensures proper respect for the constitutional role of jurors and simultaneously enhances the fairness of jury trials.

Other federal district judges have addressed vanishing civil jury trials and identified means to remedy the problem. United States District Judge William G. Young employs a “running trial list” to control his docket.28 Judge Young ordinarily does not set specific trial dates, but instead requires parties in civil suits to stand ready and in line while cases on the trial docket calendar before them either settle or go to trial.29 This is how he described his system:

At the initial case management conference, counsel chooses a month in which to commence trial that is not more than 13 months in the future. The case goes on the running trial list on the first Monday of the chosen month. I schedule all interim dates – such as those for motions for summary judgment and the final pre-trial conference – relative to the parties’ chosen trial month. When I call the case for trial, I grant a continuance only if one of the parties’ lawyers is on trial somewhere else or if an individual litigant has died between the final pre-trial conference and the trial.30

Judge Young believes this model promotes professionalism and supports the central reason Congress established the district courts: to give the American people ready access to justice and a jury of their peers.31

Besides Judges Young and Bennett, other district court judges are managing their trial dockets in a similar way to ensure cases get to trial in a reasonable period of time. United States District Judge Rodney Gilstrap oversees a “rocket docket” of patent cases in the Eastern District of Texas.32 As of 2014, Judge Gilstrap was assigned 968 patent cases – approximately 20 percent of all patent cases filed that year.33 How does the court manage such an active docket? First, cases are assigned a scheduling conference within three to four months of the case’s filing, at which hearing the court issues a docket control order and timeline.34 Like Judge
Young, Judge Gilstrap also employs a “trailing docket” system, in which several cases are set for trial in a given month, and if prior cases settle or are dismissed, the remaining cases move up accordingly. Judge Gilstrap has stated, “[i]t’s my view that with as demanding a docket as I and the other judges in this district have, you have to keep a steady stream of trials, that is an important way of moving the docket.”

While the Eastern District of Texas is heralded as the “patent rocket docket,” the original rocket docket is the United District Court for the Eastern District of Virginia. The speed and efficiency by which cases are handled in the Eastern District of Virginia is in part due to creative local rules. For example, “[m]otions for continuances of a trial or a hearing date shall not be granted by the mere agreement of counsel. No motion will be granted other than for good cause and upon such terms as the Court may impose.” Another source of the local rules’ emphasis on efficiency is Local Rule 16 (B) which states, “[i]n all other civil actions, as promptly as possible after a complaint or notice of removal has been filed, the Court shall schedule an initial pretrial conference . . .” These local rules help demonstrate why the Eastern District of Virginia is one of the speediest jurisdictions to trial in the country.

B. State Legislative and Judicial Responses

Several state legislatures around the country have recognized the importance of jury trials and have adopted legislation to encourage parties to try cases. On March 7, 2013, South Carolina Chief Justice Toal issued a Fast Track Jury Trial Administrative Order allowing the implementation of a statewide Fast Track Jury Trial system. A Fast Track jury trial is a voluntary, binding jury trial, before a jury panel reduced in number, and a mutually selected Special Hearing Officer. The mode and method of presentation of evidence can be traditional or the parties may agree on procedures to streamline and expedite the trial process, often in a manner similar to what is done in arbitrations.

Several features of the South Carolina innovation increase the likelihood of the parties going to trial. One feature is the requirement that the parties are given a date-certain for trial. After the parties provide the Clerk of Court with the Consent Order Granting a Fast Track Jury Trial and Appointing a Special Hearing Officer, the case is removed from the traditional docket and a mutually convenient trial date is set. The date-certain trial setting reduces litigation costs by avoiding repeated case management conferences, other administrative hearings, and the fees and expenses associated with preparing for trial only to have the case continued.

Another unique feature of the Fast Track Jury Trial is the option for the parties to eliminate engaging in alternative dispute resolution. Under the South Carolina Supreme Court Order, “[w]here the parties consent to a Fast Track jury trial, the case is exempt from mandatory mediation and/or arbitration.” As previously discussed, alternative dispute resolution is a significant contributing factor to the decline in jury trials. While alternative dispute resolution has several appealing qualities, by eliminating this process as a mandatory requirement, South Carolina increases the chances of the parties having their day in court.

South Carolina also allows parties that consent to a Fast Track Jury Trial to modify the rules of evidence. If the parties choose to relax the applicable rules of evidence, this can greatly reduce the costs of going to trial. The parties can further agree to waive the use of live witnesses or eliminate evidentiary authentication requirements, simple modifications which can greatly reduce the costs of going to trial.

In California, the legislature passed the Expedited Jury Trial (“EJT”) program in an effort to make state courts more accessible for litigants and promote jury trials. The Code of Civil Procedure 630.01-630.10 and California Rules of Court 3.1545 through 3.1552 govern the state’s expedited jury trial (EJT) program. There are several costs-saving and efficiency promoting aspects of California’s EJT program. Each side is given up to five hours’ time to conduct voir dire and to present its case. The jury is composed of eight or fewer
jurors and without alternates. Similar to the South Carolina Fast Track Jury Trial, the parties may stipulate to the use of relaxed rules of evidence. California’s Expedited Jury Trial program offers litigants a cost-saving and time-efficient method to ensure ready access to a jury trial.

Oregon has acted to encourage jury trials by adoption of Oregon Uniform Trial Ct. Rule 5.150, which permits a civil case to be designated as expedited. Parties seeking an expedited trial designation must prepare and submit a joint motion and order to the presiding judge of the assigned circuit court. It is within the sole discretion of the presiding judge whether to accept or reject the designation of the matter as expedited for trial. If the case is deemed expedited, the judge will set a trial date certain no later than four months from the date of the order. Similar to other jurisdictions with expedited trial programs, Oregon’s Expedited Civil Jury Trial Program places limits on written and oral discovery, permitting a maximum of two depositions, and no more than one set of requests for production of documents and requests for admission. Unlike California, there is no specified time limit on the trial proceeding in Oregon. The state’s expedited designation for trial gives parties an opportunity to obtain a date certain for trial within the very near future of a suit’s filing.

Similarly, Texas has adopted a process to encourage cases to proceed to trial. Pursuant to Texas Rule of Civil Procedure 169, the expedited action process applies to any suit in which all claimants affirmatively plead that the monetary relief sought is $100,000 or less. If a case is expedited, a trial date is set within 90 days after the discovery period ends. If a case reaches trial, each side is allowed no more than eight hours to complete jury selection, present opening statements, present evidence, conduct examination and cross-examination of witnesses, and make closing arguments.

The Iowa Supreme Court recently approved Iowa Rule 1.281 governing trial of expedited civil actions. The Expedited Civil Action (“ECA”) Rule includes a $75,000 damages recovery limit for or against a party. Expedited actions also include discovery limitations, restricting each party to a maximum of 10 interrogatories and 10 requests for production of documents. The Iowa Supreme Court stated it believes the provisions of the ECA will significantly reduce litigation time and cost while increasing access to justice. The ECA rule is also designed to preserve the traditional jury trial and parties’ right of appeal.

C. Innovations Suggested by Supporters of Civil Jury Trials

In addition to the various federal, state legislative and state court responses to the challenge posed by declining rates of civil dispute resolution by jury trial discussed above, legal experts continue to discuss other methods to counter the decline in jury trials. It is possible that the recent changes to the Federal Rules of Civil Procedure regarding discovery and same being in proportion to the scope and issues of the case may help moderate the costs of litigation and therefore encourage trials. Approaches such as the concepts pioneered by Judge Mark Bennett and other courts discussed in this paper seek to enhance the jury experience and reduce certain concerns lawyers and clients hold regarding the ability of a jury to accurately comprehend and act upon complex evidence.

The New York University School of Law - Civil Jury Project has been established to study the causes of the decline in civil jury trials and offer solutions to encourage trials. The Civil Jury Project is devoted to preserving and revitalizing the civil jury trial and has sponsored several presentations and supported the work of scholars investigating the problem. Some of the suggested trial innovations proposed by researchers at The Civil Jury Project are set forth below.

One proposed trial innovation is for courts to allow expert witnesses to testify sequentially based upon the subject matter of their testimony. This technique may aid comprehension by allowing jurors to more easily compare and contrast the testimony and opinions of battling experts. Another method designed to increase jury comprehension is to allow for interim arguments of counsel between opening statement and
closing argument addressing segments of evidence as presented.64 The ABA American Jury Project also promotes this method and recommends allowing counsel to make statements or arguments to the jury during the course of a trial, thereby giving lawyers the opportunity to explain the significance of evidence and testimony as it is presented.65 Judges and legal commentators continue to debate the ability of jurors to understand all forms of evidence which views can prompt litigants to seek resolution of disputes using methods other than jury trials. Some scholars believe, however, that juror “misunderstanding” sometimes reflects rejection of positions or contentions that jurors find illogical in light of their common sense and experience. Attorneys, parties, and/or experts in these situations perhaps have simply failed to credibly and cogently persuade the finder of fact of the merit and logic of their position or contention.

Other trial innovations include juror discussion of evidence before deliberations, writing and providing jurors with all substantive jury instructions at the start of trial, presenting mini-opening statements before voir dire, and allowing juror to ask questions of witnesses.66 Like the other methods previously discussed, these policies promote juror involvement in hopes of increasing juror comprehension.

Nearly all civil jury trials and approximately ninety percent of criminal jury trials on the planet take place in the United States.67 It is a defining feature of our legal system. Courts should consider and implement the innovations and methods discussed above to promote the reemergence of civil jury trials. For additional resources and information about this topic, consult the publications and websites of the American Board of Trial Advocates,68 The National Center for State Courts,69 the Institute for the Advance of the American Legal System,70 and DRI.

Endnotes

2 The Sixth Amendment guarantees the right to trial by jury in criminal cases.
9 Id.
15 Id. at 490.
Id.

Id. at 495.

Id. at 495-499.

Id. at 498-499.

Id.


Id.

Mark W. Bennett, 509.

Id.


Id.

Id.

Id.

Id. at 40.

Jess Krochtengel, Judge Gilstrap Keeps Eastern District’s Tight Ship Afloat, LAW360, March 6, 2015.

Id.

Id.

Id.

Id.

E.D. Va. LAR 7(G)

E.D. Va. LAR 16(B)


Id.

Id.

Id.

Id.

E.D. Va. LAR 16 (B)

Id.

E.D. Va. LAR 16 (B)

Id.

Or. Unif. Trial Ct. Rule 5.150 (1)(b)

Or. Unif. Trial Ct. Rule 5.150 (2)

Or. Unif. Trial Ct. Rule 5.150 (2)(b)

Or. Unif. Trial Ct. Rule 5.150 (4)(c)(d)

Tex. R. Civ. P. 169 (a)(1)

Tex. R. Civ. P. 169 (d)(2)
Civil Jury Project at NYU School of Law, http://civiljuryproject.law.nyu.edu/.


ABOTA has encouraged judges to set time limits for trial, as the practice is “squarely in their interests as stewards of scarce judicial resources.” Stephen D. Susman and Thomas M. Melshimer, “Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases,” Voir Dire, 19 (Fall/Winter 2013).

The National Center for State Courts actually has an online system called “CourtMD,” which was apparently launched in 2014 to help court administrators, including judges, diagnose the “most frequent or most troublesome symptoms” preventing the smooth administration of justice in the courtroom. The latest mass tort management guide NCSC cites and provides on their website is Alexander B. Aikman’s 1995 “Managing Mass Tort Cases: A Resource Book for State Trial Court Judges.”

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