Coping with dearth of jury trials

Leigh Jones
Staff reporter
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Whether the shrinking number of jury trials is good or bad news depends on whom you ask, but one thing is certain: Fewer trials mean fewer trial-ready lawyers.

By some estimates, jury trials have declined to less than 2% of all cases filed. The decrease is so pronounced that it sparked a confab of judges, scholars and practitioners at the American Bar Association's recent annual conference in Atlanta. There, 5th U.S. Circuit Court of Appeals Judge Patrick E. Higginbotham blamed the falling numbers on clogged dockets, where cases flow through the courts "like a rat through a python."

Although some legal professionals say that the downturn in trials has led to the faster disposition of cases, others decry the decrease as an erosion of the American justice system. The practical effect to law firms, however, is a gap in their associates' skill set.

As a consequence, firms are having to find new ways to give their younger attorneys vital courtroom experience.

Even though the number of jury trials is dropping, firms still need attorneys who can convincingly bluff their opponents into believing a trial is imminent and can argue a motion before a judge. And on those increasingly rare occasions when a dispute lands in front of a jury, firms want lawyers who can handle the pressure.

Providing attorneys with trial experience is "a real struggle," said Scott O'Connell, a partner in Nixon Peabody's Boston office. "The larger the firm, the higher-exposure cases you have, and the less likely it is for lawyers to get in front of a jury," said O'Connell, who practices securities and business litigation. He added that the way the firm trains its litigators has "evolved considerably."

As is the case with most large firms, Nixon Peabody hires private consultants to teach its associates to handle trials, in addition to having them participate in arbitrations and in-house seminars. Pro bono cases also give young lawyers courtroom time.

But Laurence Rose, executive director of the National Institute for Trial Advocacy (NITA), said that many lawyers in firms across the country are not receiving the preparation they need to try a case and, more importantly, to serve their clients in the best way possible.

"There are lots and lots of lawyers who are not getting the kinds of experiences that they used to get even handling small cases," he said. The South Bend, Ind.-based nonprofit run by Rose, also a professor at the University of Miami School of Law, teaches trial skills to lawyers, students and law school faculty at its own venues or on-site at firms.

Rose said that NITA's services are more popular than ever because even the more seasoned attorneys at law firms lack the trial experience to train younger lawyers. Still, he said that the best way for young lawyers to get comfortable with trying a case is to do it. "Would we love to go out of business? Probably yes," he said.

The lack of trial experience can be a disservice to clients because attorneys are not prepared to take the case all the way, Rose said. And if they are not comfortable with that, trialworthy matters can settle prematurely.

"If they're not thinking of it in that way, they realize, 'Oops, I'm going to trial,' and they start sweating," he said.

Between 1962 and 2002, the number of federal civil cases resolved by trial plunged from 11% to 1.8%, according to a January ABA report, "The Vanishing Trial." And the number of trials per year

showed a net drop of more than 20% over the same period, starting at 5,802, peaking to 12,529 in 1985 and falling to 4,569, the report concluded. The decline occurred despite a fivefold increase in cases resolved, from about 50,000 to almost 260,000. Federal criminal trials fell from 15% to 4.7%.

The report attributed the decline, in part, to costs and risks of going to trial and to alternative forms of resolution. It also cited an emphasis by the judiciary to resolve rather than preside over cases.

At the ABA conference earlier this month, some members of the panel that focused on the issue suggested that fewer trials are here to stay, and that the judicial system should rethink how it operates its courthouses. Yale Law School Professor Judith Resnik, for example, said that one-half of all courtrooms are "dark" because judges have fewer trials.

State numbers also reflect a sharp drop in jury trials. According to data compiled by the National Center for State Courts, from 1993 to 2002, civil trial dispositions dropped from 27,567 to 19,264. In California, for example, trial dispositions fell from 4,927 in 1993 to 2,688 in 2002. In Michigan, they declined from 1,119 to 569.

To make up for the fewer opportunities young lawyers have to try cases, Chicago-based Kirkland & Ellis also conducts in-house training, hires consultants and promotes pro bono work. Partner Marjorie Lindblom, a 26-year veteran of the firm's litigation team, said mock trials and in-house preparation have a "different dynamic" from the real thing. "In a real trial, you have to be very thoughtful about making an overall impression on the jury," she said. "In mock trial situations, it's easier just to focus on what you're doing without thinking about the overall impact."

To provide that real trial experience, some New York firms participate in a two-year-old program with the city's Corporation Counsel's Office. About 30 firms "donate" associates to try civil cases for the city. In return, it gets young lawyers from some of the world's best firms.

Recruiting lawyers from U.S. attorneys' and district attorneys' offices is another way to make up for the shortage of trial experience. But criminal trial experience does not equate to civil trial skills, said NITA's Rose.

"The bottom line is that new attorneys and the five- to 10-year lawyers just don't get the trial experience that they did 20 years ago, and their clients might not be getting the same results," he said.

Judges in S.D. May Lose Lawsuit Immunity

By CHET BROKAW, Associated Press Writer*Mon Nov 14, 9:59 PM ET*

A movement is under way in South Dakota to turn the tables on members of the bench.

Activists are trying to put a radical measure on next year's ballot that could make South Dakota the first state to let people who believe their rights have been violated by judges put those judges on trial. Citizens could seek damages or criminal charges.

The measure would overturn more than a century of settled law in the United States by stripping judges of their absolute immunity from lawsuits over their judicial acts.

"The current system doesn't work because there is no adequate way to hold a given judge accountable for improper behavior or to prevent them from judicial misconduct if they choose to do so," said businessman William Stegmeier, a leader of the movement.

Legal experts warned that such a provision could dangerously undermine the independence of South Dakota's judiciary, plunge the court system into anarchy, and run afoul of the U.S. Constitution.

And they noted there are already remedies available to the public: Bad rulings can be overturned on appeal, and judges who break the rules can be punished by state disciplinary boards and, in South Dakota and other states, voted out of office.

Marie Failinger, a law professor at Hamline University in St. Paul, Minn., said judicial immunity is seen as a way to protect judges' independence so they decide cases on the merits, not in response to pressure from the community or individuals.

"Judges are kind of the last barrier we have between government oppression and the individual, so if they can't be independent, that could be a problem," Failinger said. She added: "Judges will be chilled from making the right decision because they don't know what crazy litigant is going to decide they are going to sue them."

Stegmeier, owner of a company that manufactures livestock-feed grinders, turned in 46,800 signatures last week to put the proposed state constitutional amendment on the ballot in November 2006. That is about 13,000 more than needed. The state is still verifying the signatures.

Judicial immunity, the doctrine that says judges cannot be sued over their judicial acts, was established by the U.S. Supreme Court in an 1871 case.

The South Dakota amendment would eliminate state judges' immunity in cases involving deliberate violations of the law or someone's constitutional rights or deliberate disregard of the facts.

People could file complaints against judges after the traditional appeals process has concluded. A special grand jury would handle complaints, deciding whether a judge could be sued or face criminal charges.

If the grand jury decides on criminal charges, it could indict the judge and create a special tribunal that would act as both judge and jury, deciding guilt and any sentence. The measure would not apply to federal judges.

Stegmeier said he has never had a bad experience in court. In fact, supporters of the measure have no examples of any problems in South Dakota. But Stegmeier said the amendment could help curb the abuses he has heard about across the country.

On its Web site, the group promoting the amendment, South Dakota Judicial Accountability, cites an Indiana case from the 1970s involving the sterilization of a 15-year-old girl, and argues that stripping judges of immunity would also help prevent decisions such as the recent U.S. Supreme Court ruling that allowed homes to be seized for private development.

"We didn't throw the yoke of the king off to get under the yoke of the judges," said Gary Zerman, a Valencia, Calif., lawyer who is a spokesman for the South Dakota ballot effort.

Tom Barnett, secretary-treasurer of the State Bar of South Dakota, said inmates would quickly figure out that they could harass the judges who put him behind bars by filing a complaint.

"You don't think there aren't going to be hundreds and hundreds of them, everybody giggling up in the penitentiary?" he said.

Georgetown University Law School professor Roy A. Schotland, who studies judicial elections and constitutional law, said the measure could violate the Constitution.

"It at least erodes and may go so far as to destroy judicial independence, which means it erodes and perhaps destroys the rule of law and fair judging," Schotland said. "Having this come in would be big trouble."

On the Net:

http://www.southdakotajudicialaccountability.com

Subject: Editorial: Court system reform reflected in statistics, SAEN 8-14-2005

Editorial: Court system reform reflected in statistics

Web Posted: 08/14/2005 12:00 AM CDT

San Antonio Express-News

Civil jury trials are on the decline across the country.

Editorial writer Gloria Padilla's examination of this phenomenon locally shows that between 1994 and 2004, the number of civil jury trials in Bexar County dropped from 193 a year to 48.

Tort reform, mandatory mediation and increased use of arbitration in business contracts have made a tremendous impact.

The civil trial statistics can be viewed as a major victory for those who worked long and hard to reform a civil court system plagued by lawsuit abuse and runaway jury verdicts.

However, in society's efforts to minimize the abuse of the system, care must be taken not to disenfranchise those who want their day in court.

In the search for efficiency and the battle against frivolous lawsuits, Americans and Texans need to maintain their access to judges and juries.

The hefty price tags on trials and the limitation placed on the amount of damages that juries can award in certain types of cases have made litigators very selective of the type of cases they will accept.

Mediation is now mandatory for all cases set for trial in Bexar County, and that is a good policy. It allows the parties a chance to work through their differences and arrive at a mutually agreeable conclusion.

Many legal disputes are being settled through mandatory arbitration. In such instances, a third party — a judge for hire of sorts who is unaccountable to the voters — presides over the case and renders a binding decision that cannot be appealed.

Mandatory arbitration is in the fine print of many consumer contracts, including those for most major credit cards and new homes. The arbitration clauses are often overlooked by harried consumers, who become aware of them only when they have a complaint against the business.

Getting litigating parties to resolve their differences without going through long and expensive trials has its merits. However, it should not come at the expense of the average citizen.

Reform of the system was overdue and it appears to have been accomplished, at least in Bexar County.

Now, we need to ensure the system remains fair, equitable and accessible to everyone.

Subject: Gloria Padilla: As cases change, new justice system emerges, SAEN 8-14-2005

Gloria Padilla: As cases change, new justice system emerges

Web Posted: 08/14/2005 12:00 AM CDT

San Antonio Express-News

Civil jury trials are following the path of the dinosaurs: They are becoming extinct.

And as they vanish, some lawyers worry that the Seventh Amendment to the U.S. Constitution, the guarantee of a trial by jury, may also disappear.

"It's all a matter of economics," Dale Hicks, president of the San Antonio chapter of the American Board of Trial Advocates, says.

Last fiscal year, the 13 elected civil court judges in Bexar County oversaw only 48 jury verdicts — less than one per week. In comparison, records for fiscal year 1994-95 indicate almost 200 civil trials were taken to jury verdict among the 11 trial benches that existed then.

This does not necessarily mean people are becoming less litigious or the need for lawyers has diminished.

About 76,000 lawyers are licensed to practice law in the state, and 34,703 lawsuits were filed in Bexar County last year. Both those numbers are expected to grow a bit each year.

The downward trend

Civil court statistics for the past 10 years show some striking trends in the law business in this community.

The disappearing civil law trial phenomenon is not exclusive to state district courts or Texas. The same thing is happening in district and federal courts across the country — a trend that has become a hot topic in legal workshops and seminars throughout the nation.

Factors in the declining requests for jury trials include tort reform; arbitration clauses in contracts; changes in the law regarding workers' compensation; the growing use of mediation; and the rising cost of trials.

The drop in jury trials has produced a cottage industry of mediators and arbitrators while forcing a decline in the litigation sections of most large law firms.

During the past 10 years, Bexar County has witnessed a steady increase in family law and divorce cases, while personal injury cases have decreased dramatically and workers' compensation cases have become nonexistent.

Of the 34,703 civil suits filed with the Bexar County district clerk last year, 20,922 were divorce and family law cases. There were more than 1,000 personal injury cases — but no workers' compensation cases.

In fiscal year 1994-95, there were 18,843 family law and divorce cases among the 31,328 cases filed. That total included 2,899 personal injury suits and 63 workers' compensation cases.

Keeping judges busy

So if Bexar County civil court judges are not presiding over trials, what are they doing?

Mainly, they are presiding over family law matters, an area in which many lawyers who assume the civil court benches in this county have little experience. The last three appointees to civil court vacancies in Bexar County — Lori Massey, Rene Diaz and Joe Frazier Brown Jr. — came from practices that focused on insurance and personal injury work.

While family law comprises the majority of the courthouse docket on any given day, it is not the type of case many judges like to preside over, although they may not admit that publicly.

Being a legal scholar is not an advantage in family law because in many cases, the outcome of a hearing is not based entirely on the law.

"In some cases, all a judge has to do is follow the law, but in family law cases it's a decision of what is in the best interest of the child, and that often has little to do with what is in a book," longtime Bexar County Judge Andy Mireles points out.

For many years, most of the family law cases in Bexar County were farmed out to associate judges appointed by district judges to help them with the family law workload.

Last summer, during the height of the Child Protective Services scandal that included the death of two children in Bexar County, efforts were launched to hire more associate judges to help with the neglect and abuse dockets.

After some public resistance to the plan, civil court judges decided to refocus the work of Associate District Judge Richard Garcia from family law to the abuse and neglect docket.

As a result, the sitting judges have started presiding over more routine family law cases, not just the trial cases as in the past.

Meet the mediators

The handful of cases that make it to civil court juries do so only after they have been ordered to mediation.

Rules for the local district court require that all cases try to mediate 45 days before the trial date. But while the courts can force the parties to hold a mediation conference, they cannot force them to settle.

There are no local records on successful mediation. The proceedings are considered a private matter between the parties. If the mediation is successful and a settlement is reached, a motion to have the case dismissed will be filed.

Many of the cases end up at the Bexar County Dispute Resolution Center before volunteer mediators, while some of the higher-stakes cases go before professionals who specialize in mediation and arbitration.

Mediators and arbitrators are not regulated by the courts or the state. They self-monitor through a credentialing association. While most mediators and arbitrators are lawyers, many are not.

Bill Lemons, chairman of the State Bar's Alternate Dispute Resolution Section, worked in a large law firm for 26 years, managing two sections responsible for 17 lawyers, before becoming a full-time mediator in 1997.

At a time when some lawyers might want to seek an elected bench, Lemons opted to become a hired judge of sorts, lured — at least partly — by the fact that he did not have to solicit funds for a political campaign.

"I have the best of both worlds. I serve as a judge and I don't have to go through the hassle, and I have better pay than they (the judges) do," he says.

Selection of a mediator is usually a joint decision between the two parties. Before agreeing to pay — the going fee is $1,000 a day for mediation or $150 to $250 an hour for arbitration — the parties review a disclosure statement from the mediator. The purpose is to disclose any potential conflicts of interest.

Often, Lemons points out, the disclosure statement contains more information about a mediator or arbitrator than litigants would get from a judge or jury.

"The average mediator is a white male lawyer about 57 years old," Lemons says.

Mediators are trying to diversify their ranks, but Lemons points out the group reflects the makeup of law school graduating classes when he was finishing law school.

Women and lawyers of color represent only about 20 percent of the group.

Making the decision

Cost is a major factor affecting mediation and the filing of lawsuits.

Attorney Fidel Rodriguez is very selective about the cases he takes on.

When he started in the legal business 25 years ago, he was trying two cases a week. Today, his law firm of three goes to jury trial perhaps two times a year.

"A simple auto collision lawsuit can't go to trial for less than $5,000 to $6,000 in expenses. That includes the depositions of the doctors and witnesses," he says.

Costs in a major case can run from $30,000 to six figures, a big gamble for any law firm.

If there is a jury award, the lawyers earn 40 percent of the verdict, plus expenses. If they lose or the parties file bankruptcy before the judgment is collected, they absorb the costs.

Jimmy Allison, executive director of the San Antonio Bar Association, says his agency's lawyer referral service is no longer able to place clients with medical malpractice claims.

With a noneconomic damage cap of $250,000 and trial costs of $100,000, little is to be gained by going to trial.

"It's just not worth it," Allison says.

Hicks, the president of the San Antonio chapter of the American Board of Trial Advocates, agrees. Plaintiffs' lawyers are getting more calls but taking fewer cases.

He is concerned that plaintiffs' access to the courthouse will continue to decline.

"It's obvious when you look at the big picture that mediation, arbitration, tort reform, products liability law and state and federal legislation that has been aimed to limit litigation has had a huge impact on the number of cases filed and those that are tried," Hicks says.

Fear for the future

Voicing concerns that the Seventh Amendment guarantee of a trial by jury might be the first of Americans' constitutional rights to disappear, Hicks laments nobody will consider fighting to preserve that liberty until it's too late.

"Jury trials are the truest form of democracy. Other than voting, that is the only way most people participate in government," Hicks says.

If the political dynamics don't change, he is afraid that in his lifetime — he is 50 — he will see the disappearance of civil litigation in noncommercial areas. "Trial lawyers as we know them won't exist; they will only be family and criminal trials," he predicts.

Attorney Raul Rios began his practice in the law offices of one of the most high-profile plaintiff's lawyers in town, Pat Maloney, and has since branched out on his own.

At the height of his 15-year career, Rios recalls, he was doing 20 to 30 trials a year. Last year he did six; he has had one so far this year.

He is worried about the effects that two factors — corporate donations to appellate court justices and changes in the law limiting damages across the country — are having on jury trials, jury verdicts and the public's access to one of its basic rights.

"I was an idealist. I loved to go to trial, but now I tell my clients we need to resolve the case and accept less than it's worth because if we get a favorable verdict we might get reversed on appeal," he says.

Ironically, he adds, defense lawyers have complained to him about the decline in their business because plaintiffs' lawyers are not filing as many lawsuits as they used to.

"Defense lawyers, too, are hurting, but they can't say or do anything about it because they are being hired by the insurance companies and corporate America," Rios says.

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Trial-less Lawyers

As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills

By NATHAN KOPPEL
Staff Reporter of THE WALL STREET JOURNAL
December 1, 2005; Page B1

Marc Kadish, a partner at Mayer, Brown, Rowe & Maw LLP, recently made an offer to federal judges in Chicago, where the law firm is based: The 1,300-member firm would represent, pro bono, any prisoner with a case set for trial who didn't already have counsel.

Since prisoners are prolific case filers and most private lawyers disdain such cases, Mayer Brown thinks the offer will give its young associates the opportunity to hone their courtroom skills -- and it might be one of the few chances they get in the near future.

Courtroom trials have been steadily declining since the 1980s. There were only 5,500 federal civil trials across the U.S. last year, down sharply from 14,300 in 1984. State civil jury trials dropped 34% between 1976 and 2003, even as the volume of civil cases disposed of during the period rose 165%. In criminal court, meanwhile, federal sentencing guidelines are so stiff that more than 95% of all criminal defendants opt for plea deals that offer leniency rather than risk going to trial.

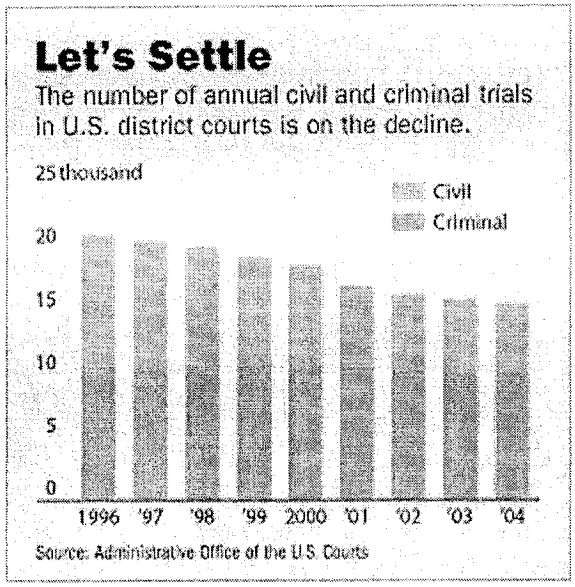
There are plenty of reasons behind the falloff. Scared off by huge jury verdicts, such as the $253 million awarded this year to the widow of a man who died after taking Merck & Co.'s Vioxx drug, more civil litigants are arbitrating or settling the majority of disputes, legal experts say.

The cost of litigation, which often drags on for years, has scared off some plaintiffs. Changes in the law have also had a dampening effect on trials: Judges can now more easily dismiss cases that rely on junk science. "It's like you prepare for a big game and then it gets canceled, so you have to negotiate a final score," says James Winton, a partner with Cleveland-based Baker & Hostetler.

Furthermore, lawyers say fewer marginal or low-damage cases are being filed now that some state legislatures have imposed caps on jury verdicts.

The trend worries some judges. "There is so much settlement and arbitration that we are losing sight of the basic right to trial by jury," says U.S. District Judge David Hittner of Houston.

Junior lawyers have long complained about the fact that they rarely see the inside of a courtroom during the course of their daily work. What has changed, as evidenced by Mayer, Brown, Rowe & Maw's arrangement to represent prisoners, is that many law firms are coming up with creative ways to score trial work -- reaching out to judges, government agencies and legal-aid organizations, offering to donate associate time in exchange for referrals of cases that seem particularly likely to go to trial. Typically, once a firm gets such a referral, it handles every aspect of the case.



"Firms have really begun to realize the advantages of donating legal services as a professional development tool," says Esther Lardent, president of the Pro Bono Institute at Georgetown University Law Center, which tracks law firms' offerings of free legal services.

Earlier this year, associates at New York-based Cravath, Swaine & Moore LLP handled a personal-injury trial they inherited from the New York City law department. In Pittsburgh, Jones Day associates try domestic-abuse cases referred to the firm by the Allegheny County District Attorney's Office. Even if trials are rare, "being able to stand on your feet and make arguments in court are still very vital skills," says Michael Ginsberg, head of litigation training at Jones Day.

Many firms have gone so far as to ask associates to take paid leaves to work for organizations that routinely head to court. Houston-based Fulbright & Jaworski LLP has an associate prosecuting police officers for the Washington, D.C., attorney general's office, while another Fulbright associate is trying slip-and-fall cases and traffic altercations for the New York City law department.

Thomas Manakides, an associate at Gibson, Dunn & Crutcher LLP, says a stint this year prosecuting misdemeanors in Orange County, Calif., has helped him bring focus to cases, regardless of whether they end in trial. "I am better able to conceptualize the main themes in a case that we would want to tell a jury during jury selection and closing arguments," he says.

Stephen Dillard, head of litigation at Fulbright, says his firm, like many others, has run mock-trial training programs for young lawyers. "Starting in the '90s, the concern became that we had a dress rehearsal for a play that never runs," he says. In fact, many associates have left the firm for lower-paying government agencies

simply because they wanted more trial experience. But Mr. Dillard says outsourcing Fulbright associates has helped slow the exodus.

The handful of trials that do occur are increasingly handled by boutique firms, which often nab corporate clients from the bigger "white shoe" firms. That is because companies are often more interested in experience than pedigrees when they hire trial lawyers. The logic is that opponents will be more inclined to settle than fight when they have to face off against seasoned courtroom attorneys.

"There are a lot of name-brand firms with big litigation departments, but they never go to trial and are petrified of it," says Paul Gracie, general counsel of Nicor Inc., which uses 55-lawyer Bartlit Beck Herman Palenchar & Scott LLP of Chicago for trial work. "I hire firms that like to go to trial," he adds.

Thomas Sager, DuPont Co.'s assistant general counsel, says he uses large firms for the resource-intensive task of preparing cases for trial. But when it is apparent there will be a trial, Mr. Sager often turns to trial specialists at small firms, such as San Antonio's Davis, Cedillo & Mendoza Inc., which has 25 lawyers, and Glynn & Finley LLP of Walnut Creek, Calif., a nine-lawyer firm. "A number of large firms have lost their trial edge," Mr. Sager says.

Still, even the litigation boutiques aren't going to trial as often as they would like, and they, too, are seeking creative ways to train associates. Houston attorney Stephen Susman, head of Susman Godfrey LLP, one of the nation's best-known boutique firms, says he teaches associates by using videotapes of high-profile trials, such as Merck's recent Vioxx trial in New Jersey. "Would I like each of our associates to have five or six trials a year? Yes, but it ain't going to happen in my lifetime. So you make the best of a bad situation."

The decline in trials hasn't changed some things -- for example, the push for tort reform. Steven Hantler, an associate general counsel of DaimlerChrysler AG and one of the more active tort reformers in the country, notes that class actions are larger and more prevalent than in the past and are costly to defend even if they don't go to trial.

Also, law firms are still hiring litigators in record numbers because of a surge in such nontrial work as international arbitrations and internal corporate investigations. And judges' workloads are no lighter with fewer trials, says Marc Galanter, author of an American Bar Association study entitled "The Vanishing Trial." He says they now have to put more time into pretrial motions and opinions.

Mr. Galanter says that, starting in the 1970s, many judges came to see their primary role as managing cases -- by encouraging parties to mediate or settle disputes rather than resolving them in trial. But he adds that as "more and more

judges begin to say, 'We are really losing the trial as a societal institution,' many of them may become less prone to push for settlements.

Meanwhile, at Mayer Brown, two associates have tried cases for inmates, with one victory and one loss, and two more trials are pending. Mr. Kadish, the Mayer Brown partner, says both the firm and the associates have gained from the experience. "As a firm, you constantly need to have a new generation of lawyers who actually knows how to try a case," he says.

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DISAPPEARING JURIES AND JURY VERDICTS.

By Honorable Sam Sparks and George Butts[1]

SOME HISTORY ABOUT JURY TRIALS

By the time John, "...by the Grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitane and Count of Anjou" signed the Magna Carta in 1215 in order to appease the insubordinate Scot, French, and English barons arrayed against him, the right of trial by jury, or judgment by one's peers, was already centuries old. It developed in Europe during feudal times and was brought to England with the Norman Conquest in 1066.[2] The Magna Carta provided that "...no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him or send upon him, *except by the lawful judgment of his peers* or by the law of the land."[3]

GREAT BRITAINS' PROVOCATIONS

More than five hundred years later when the British set about to deprive the rebellious colonials of their right to trial by a jury of their peers, they were met by strong resistance. By 1764 every American colony provided for a right to jury trial.[4] At that time the jury's prerogative extended not only to deciding controlling facts, but also to determining what law should be applied.[5] This power residing in juries resulted in the practical inability of British officials to enforce, among other things, certain navigation acts designated to lay heavy tariffs on certain commodities and to impose severe fines on violators. One Massachusetts governor complained that "a trial by jury here is only trying one illicit traitor by his fellows, or at least by his well wishers."[6] The Crown reacted to this inability to obtain either collections or convictions by, among other things, the creation of vice-admiralty courts in the colonies; that is, courts without juries.[7]

Passage of the Sugar Act of 1764, further inflamed the colonists by assigning the trials of those accused of a violation of the act to a vice-admiralty court in Halifax, Nova Scotia, irrespective of where the offense occurred. This compounded the denial of a right to a jury trial by removing the trial of the accused from his vicinage, or locale.[8]

The Sugar Act was followed closely by the Stamp Act of 1765 which required that revenue stamps be affixed to many kinds of legal papers. Violations of the act could be tried in the vice-admiralty courts, thereby greatly extending the power of those courts to cases involving violations of the revenue laws having nothing to do with maritime commerce.[9]

THE COLONISTS' RESPONSES

These actions, and others denying colonials the right to trial by jury in their vicinage resulted in a series of escalating responses. The Stamp Act Congress of 1765 declared that "trial by jury is the inherent and valuable right of every British subject in these colonies."[10] Further that "the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits have a manifest tendency to subvert the rights and liberties of the colonists."[11]

The dispute between the king's government and the colonials escalated further with the passage of the Administration of Justice Act in 1774. That act authorized the trial of cases brought by the government for the collection of revenues to be held in Great Britain, a denial of rights so egregious that it prompted British political writer and statesman Edmund Burke to protest: "[B]rought hither in the dungeon of a ship's hold... he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence"[12]

The First Continental Congress responded directly to these constrictions on the right of jury trial in its Declaration of Rights in 1774, stating, in part:

> *"Resolves, N.C.D. 2.* That our ancestors, who first settled these colonies, were at the time of their immigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England....
>
> ....
>
> *Resolves, N.C.D. 5.* That the respective colonies are entitled to the common law of England, and *more especially to the great and inestimable privilege of being tried by their peers of the vicinage* according to the course of that law."

The Continental Congress went on to decry these and other actions of the Crown as "grievous acts and measures" to which "Americans cannot submit."[13]

These laws drew negative comments even in the British House of Commons[14] and outrage in the American colonies.[15] The Provincial Congress of North Carolina resolved in 1774 "that trial by juries of the vicinity is the only lawful inquest that can pass upon the life of a British subject and that it is a right handed down to us from the earliest ages, confirmed and sanctified by the Magna Carta itself.[16]"

South Carolina issued a declaration against Parliament's action "declaring that the people of Massachusetts Bay are liable for offenses or pretended offenses done in that colony to be sent to and tried for the same in England, or in any colony, where they cannot have the benefit of a jury of the vicinage."[17] Similar declarations of protest were mounted throughout the colonies.[18]

The Virginia legislature also passed a resolution, later known as the Virginia Resolves, protesting Parliament's action. The Virginia Resolves were adopted by the assemblies of every American colony.[19]

Clearly, the several attempts on the part of the British government to enforce their revenue gathering laws through the restriction of the colonists' rights to trial by jury were contributing causes of the American Revolution. Among the "facts" complained of in the Declaration of Independence of July 4, 1776, were violations of both the colonials' rights to jury trial and that of the community to try British citizens for crimes committed in the colonies. It described the Administration of Justice Act as one of "pretended Legislation", "foreign to our

constitutions" that protected the King's armed troops "by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states" and "for depriving us in many cases of the benefits of jury trial", "for transporting us beyond seas to be tried for pretended offenses."[20]

The importance of the right of trial by jury was consistently emphasized by the declarations of the Stamp Act Congress of 1765, the Declaration of Rights of 1774 by the first Continental Congress, the Declaration of Independence of 1776, and the Northwest Ordinance of 1787. It was the only right secured in all state constitutions subsequent to the Declaration of Independence.[21]

The United States Constitution, as originally drafted by the Constitutional Convention and submitted to the states for approval, did not assure the right to trial by jury. This omission was pointed out continually by Patrick Henry and Thomas Jefferson. In his speech against the federal constitution at the Virginia Constitutional Convention, Henry decried the lack of guarantees of personal liberty, generally, and the absence of a right to trial by jury.

> "Is it necessary for your liberty that you should abandon those great rights by the adoption of this system? Is the relinquishment of the trial by jury and the liberty of the press necessary for your liberty? Will the abandonment of our most sacred rights tend to the security of your liberty? Liberty, the greatest of all earthly blessings. Give us that precious jewel, and you may take everything else!
> ....
>
> How does your trial by jury stand? In civil cases gone – not sufficiently secured in criminal – this best privilege is gone. But we are told that we need not fear; because those in power, being our representatives, will not abuse the power we put in their hands.
>
> I am not well versed in history, but I will submit to your recollection, whether liberty has been destroyed most often by the licentiousness of the people, or by the tyranny of rulers. I imagine, sir, you will find the balance on the side of tyranny. . . ."

Thomas Jefferson was succinct in his statement of the importance of trial by jury:

> I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.[22]

While the Federalists and anti-Federalist factions contended over the appropriate allocation of power to the federal government and the states, the general agreement of the importance of trial by jury was stated by Alexander Hamilton, himself a Federalist:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[23]

As all know, those contending for constitutional assurance of the right to trial by jury prevailed. The right to jury trial in criminal and civil cases is ultimately guaranteed in the Sixth and Seventh Amendments of the Constitution. To refresh recollections, the Seventh Amendment states:

> "In suits of common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried to a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

At great personal risk, with no assurance of the ultimate success of their rebellion, American colonists defied the far greater wealth and power of the British Empire to preserve, *inter alia*, our ancient and fundamental right to trial by jury. The leaders who formed our Constitution and, with it, the underlying structure of our government and judicial system, literally fought, wrote, and debated to assure that trial by jury survived in the new nation. They were unwilling to accept any other outcome on this issue. The question finally comes: are we? What are we doing with this long held and hard won right? As to both the extent to which the right is being utilized and the degree of deference given to jury verdicts by our appellate courts, the clear answer unfortunately seems to be, not much.

WHERE HAVE ALL THE JURIES GONE?

Judge Patrick Higginbotham gathered statistics that indicated that in the 30-year period from 1970 through 1999, the total number of civil cases filed in federal courts increased by 152% while the number of cases tried during that same period decreased by 20%. While it has always been true that a small percentage of cases are tried, the decline in the relative number of cases tried has been from 12% in 1970 to 3% in 1999.[24] By 2002 that number decreased to 1.8%.[25]

In 1962, each sitting federal district judge tried an average of 39 cases per year. That number dropped to 35.3 by 1987, then plummeted to 13.2 per judge per year by 2002.[26] In 1962, there were 2,765 jury trials and 3,037 bench trials in federal civil cases. In 2002, there were 3,006 jury trials and only 1,563 bench trials in federal civil cases. During that period total cases disposed of in our federal courts increased from 50,320 in 1962 to 258,876 in 2002, an amazing increase of 514% while total trials diminished by 1,233, or about 21%.[27]

Empirical data aside, the decline in trials and jury trials, in particular, is well known in the legal profession. Ask the person sitting next to you and the one behind you and the one in front of you. If they are experienced lawyers, they will tell you that they don't try as many cases

as they once did. If they are relatively newer lawyers, they are likely to tell you that they have very little trial experience.

Commentators have sought to identify the reasons for the decline in trials. Common among the litany of causes are high costs, delay, crowded dockets, and perceptions that the system is random and unpredictable.[28] Judge Higginbotham identifies as a further reason the expectation that cases will settle, ". . . an expectation largely being fulfilled by the new class of lawyers, called litigators, few with substantial trial experience."[29] ADR has replaced the resolution of issues through trial in many instances.

Some commentators have suggested that the flight from the courthouse is a flight from the jury itself, with the attendant costs, perceived randomness of their verdicts, inability to understand and apply the court's instructions, and general inability to comprehend complex data lying behind this reticence.[30] However, the data gathered by Judge Higginbotham indicates that the decline in trials applies to bench trials as well as to jury trials.[31]

There is marked disagreement about the importance of jury trials. While supporters revere trial by jury as "the most transcendent privilege which any subject can enjoy" and "the lamp that shows that freedom lives"[32], critics have reviled the jury as a "dozen dimwits gathered at random" and "the stupidity of one brain multiplied by twelve." [33]

Judge Higginbotham denies that a jury collectively has less ability than does a single judge.[34] The Ninth Circuit has stated that "no one has yet demonstrated how one judge can be a superior fact finder to the knowledge and experience that citizen jurors bring to bear on a case. We do not accept the underlying premise of appellee's argument that a single judge is better than the jurors collectively functioning together."[35]

An early twentieth century commentator distinguished between the perceptions of a judge and jury as follows:

> Strictly, judges do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they see only their own workshop. Therefore, the instinct of Christian civilization has most wisely declared that into their judgments there shall upon every occasion be infused fresh blood and fresh thoughts from the streets. Men shall come in who can see the court and the crowd, and coarse faces of the policemen and professional criminals, the wasted faces of the wastrels, the unreal faces of the gesticulating counsel, and see it all as one sees a new picture or a ballet hitherto unvisited.[36]

Whatever the final proof may be as between these contending perceptions, at least one true thing can be said: for every case resolved by means other than trial to a jury, there is a guaranteed and fundamental right left unexercised. It is an ancient right that has been fought for and clung to for hundreds of years. In the Virginia Constitutional Convention, Patrick Henry

often shouted to the Federalists, "Why is the trial by jury taken away?"[37] A better question for our current state is "Why is the trial by jury given away?"

WHERE HAVE ALL THE JURY VERDICTS GONE?

Confounding the problem of the diminishing role of jury trials in our civil justice system is an extremely disturbing pattern; a ready willingness on the part of judges of the Fifth Circuit Court of Appeals and the Texas Supreme Court to substitute their preferred resolution of disputed fact issues for that made by trial juries. In instances where this is done, it is clearly contrary to the "re-examination" provision of the Seventh Amendment to the United States Constitution.[38] Section 15 of article one of the Texas Capital Constitution, obviously adopted long after the Seventh Amendment, provides that the right of trial by jury shall remain inviolate.

Professor Dorsaneo contends that in legal analysis of court opinions the issue of "who should win" often overshadows the more important question of "who should decide".[39] In simple and obvious terms, the willingness of appellate courts to substitute their view of contested fact issues for those of the jury renders the right to trial by jury considerably less meaningful.[40] Since the early '90s, circuit judges in the Fifth Circuit and justices on the Texas Supreme Court with little or no trial experience who either do not trust the constitutional jury system or care, have whacked away at the constitutional authority of the jury to find the factual issues in trial.

FIFTH CIRCUIT CASES

Some examples can be found by looking only at the Fifth Circuit opinions issued in January, 2005. The first case we bring to your attention is *Brown* v. *Parker Drilling Offshore Corp.*[41] In this case, the plaintiff Brown applied for work with Parker Drilling Offshore Corp. He checked "no" when asked whether he had "present or past back and neck trouble" and was hired. Approximately eighteen months into his employment, he had a back injury and made a claim. Background information established that in 1998 he injured his back while lifting a sack of corn and was treated in the emergency room and issued a wheelchair and walker. And in 2000, while working for another employer, he was fired for falsely reporting an on-the-job accident and failing to disclose the 1998 back injury. Brown testified both the 1998 and 2000 injuries resulted from a "muscle pull," that he did not think he had suffered any "past back and neck trouble," and that he didn't believe the problems he had in the past were the types of problems the employer was inquiring about. The case went to trial, and the jury failed to find for the employer on its factual defense that Brown had intentionally misrepresented or concealed medical facts which were material to the decision to hire and which had a casual connection to the injury complained of in the lawsuit.

The jury issued its verdict in favor of the plaintiff, and the district court remitted the jury's award regarding medical expenses. The district judge, knowing well the danger of an appeal of a jury verdict in the Fifth Circuit, wrote a detailed opinion specifically setting out the evidence the jury could have relied on in denying the defendant's defenses. The circuit reversed and rendered for the employer. But the significance of the judgment is emphasized by the circuit panel when it states:

> "This Court reviews factual findings of a jury for clear error... under a clear error standard, this Court will reverse "only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made."[42]

The Fifth Circuit simply admits what it has been doing for some time. If two of three judges on a panel are left "with a definite and firm conviction that a mistake has been made" by the jury, then they have assumed the authority to disregard entirely the jury's factual findings and make their own findings—whether as to liability or damages.

The issue of the court's usurpation of the jury's privilege was plainly exposed by the dissenting judge, who wrote:

> Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000. Having remitted the verdict to $100,000, the trial court fully discussed the facts and law pertaining to Parker's post-trial motions and then denied them. *Despite this context, the panel majority sifts through the evidence, essentially declares Brown to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff's verdict and summarily renders a substitute verdict for Parker, the employer. Because I decline to participate in the majority's usurpation of the jury's function, I respectfully dissent.* [43]

Still looking only at the month of January, 2005, an additional example of circuit judges not respecting the important role of juries in civil trials is found in *Carboni v. General Motors Corp.*[44] There, Mr. Carboni was driving his General Motors vehicle when an unidentified vehicle swerved into his lane, causing him to take evasive action and his car slammed into a guard rail. The driver's side air bag did not deploy upon impact and he struck his head on the steering wheel sustaining brain damage. The jury returned its verdict for Carboni. A final judgment based on the jury's verdict was entered.

The circuit panel held that there was more than adequate evidence in the record that the failure of the air bag to perform violated the express warranty given by General Motors. The evidence was undisputed the air bag should have deployed, but didn't; that Carboni's head hit the steering wheel, resulting in brain injury; that Carboni's head would not have hit the steering wheel had the air bag deployed properly. The trial judge excluded testimony from one of the plaintiff's experts regarding causation and enhancement injuries because of the *Daubert* standard. The circuit judges noted that no expert testified what injuries Carboni would have suffered in the event the air bag operated properly and what injuries he suffered as a result of the air bag not deploying. Consequently the court vacated the judgment, rendering a take-nothing judgment against Carboni, because there was no evidence that his injuries were enhanced because of the failure of the air bag.

While the court is correct in stating that there was no expert testimony specifically stating that Mr. Carboni suffered more severe injuries than he would have received had the air bag deployed, there is evidence in the record that was sufficient to uphold the jury's finding. It was undisputed that Mr. Carboni suffered head injuries when he hit the steering wheel and there was expert testimony to that effect. There was also expert testimony that Mr. Carboni's head probably would not have hit the steering wheel had the defective air bag deployed properly. Finally, there was evidence that Mr. Carboni suffered a brain injury as a result of his head hitting the steering wheel. While there was no specific testimony that Mr. Carboni's head injury was worse from having hit the steering wheel than if he had not hit the steering wheel, that is an obvious and reasonable inference that the jury was entitled to draw. Moreover, given the testimony in this case, it is an entirely logical conclusion that Mr. Carboni's head would have not hit the steering wheel had the air bag deployed and, therefore, he would have not suffered the brain injuries which the expert testimony established resulted from hitting the steering wheel. In this instance, the circuit panel has denied the plaintiff a recovery based upon the juries logical inference that the specific injuries that Mr. Carboni suffered would not have occurred had the air bag deployed and, instead, have substituted their own far less logical inference that there was no proof that Mr. Carboni's brain injury that resulted from striking the steering wheel was enhanced by the failure of the air bag to deploy.

Fact findings by trial judges suffer no better fate in the Fifth Circuit. In *Mumblow v. Monroe Broadcasting, Inc.*,[45] the Fifth Circuit panel reversed the factual findings of the trail judge in a non-jury case, holding, "[b]efore we will disturb the trial court's factual findings, we must be 'left with a definite and firm conviction that a mistake has been made.' Because we have thoroughly reviewed the record and are left with such a conviction, we reverse."

Therefore, presently in the Fifth Circuit, any judgment entered on factual issues found by a jury or a judge can be reversed by two circuit judges who believe the fact finder made a mistake.

In a similar vein, we would be remiss if we didn't remind you of the Fifth Circuit doctrine of the "maximum recovery rule" created over the last several years. This theory limiting damages found in a jury's verdict started in admiralty or Jones Act cases, but today is applied across the board in personal injury cases. If the circuit judges believe the damages determined by the jury are too large, they research the thousands of published opinions for similar facts with a lesser award of damages and then hold the "maximum recovery" cannot be over 150 percent of the lesser award. It makes no difference that the verdicts were based on different evidence, determined by different juries in different places at different times with different witnesses, tried by different lawyers, and presided over by different judges making different rulings on different motions and objections in different venues. It is obvious that the Fifth Circuit has decided that it is better at deciding damages than are the juries who heard the evidence. Unfortunately, their actions are contrary to the letter and spirit of the Seventh Amendment.

TEXAS SUPREME COURT CASES

The Supreme Court of Texas may be guilty of this same unfortunate readiness to disregard jury verdicts. On January 10, 2005, in *Volkswagen of America, Inc.* v. *Ramirez*,[46] the Court reversed and rendered a judgment based on a jury verdict. In this case, two vehicles were proceeding in the same direction on U.S. 83 when they bumped each other, resulting in a Volkswagen Passat's crossing the median and colliding head-on with a Ford Mustang. There were deaths and substantial injuries in this accident. There was no dispute that the wheel separated from the Passat, but there was a dispute over when the wheel assembly detached and whether the detachment caused the accident. Each side had expert witnesses. The plaintiff's expert testified that the left rear wheel detached from the axle as the Passat entered the median and fishtailed across the grass and concrete and further testified that the "laws of physics" explain how the wheel was able to remain pocketed in the rear wheel well throughout this turbulent accident. Volkswagen's expert testified the wheel separated as a result of the impact between the two vehicles going in opposite directions. The Supreme Court held the two experts for the plaintiff failed to present sufficient evidence that a defect in the Volkswagen caused the accident. The opinion is long, but Chief Justice Jefferson's dissenting opinion succinctly focuses on the obvious problem with the majority's reasoning:

> The Court concludes that Cox's testimony amounts to "no more than a mere scintilla" of evidence on causation.... To the contrary, Cox testified that the Passat experienced a "catastrophic failure of the wheel bearing assembly" while it was traveling in the eastbound lane of U.S. Highway 83, before, the Passat entered the median. He both tested and rejected Volkwagen's alternative theory — that damage to the wheel bearing assembly occurred after the Passat's collision with the Mustang. Reasonable jurors could have accepted Volkswagen's theory and rejected Cox's..., or accepted Cox's and rejected Volkswagen's..., but *unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence.* Accordingly, I respectfully dissent from the Court's rendition of judgment for Volkswagen.[47]

In *Southwestern Bell Telephone Co. v. Garza*[48], the Supreme Court reversed a jury verdict awarding punitive damages by announcing a new rule for evaluating the quality of evidence in instances where the case involves an enhanced burden of proof. "Clear and convincing" evidence was necessary to sustain the jury's finding of malice that supported its award of punitive damages. A Supreme Court majority explained its ruling, in part, as follows:

> [W]hen proof of an allegation must be clear and convincing, even evidence that does more than raise surmise and suspicion will not suffice unless it is capable of producing a *firm belief or conviction that the allegation is true. Evidence of lesser quality is, in legal effect, no evidence*. . . in reviewing a finding that must be proved by clear and convincing evidence, it makes no sense for an appellate court to determine whether the supporting evidence amounts to more than a scintilla. Even if it does, the finding is invalid unless the evidence is also clear and

> convincing. In such a case, the review required by the 'scintilla' rule is wholly irrelevant and, thus, no review at all. Thus, as a matter of logic, a finding that must meet an elevated standard of proof must also meet an elevated standard of review.[49]

Justice O'Neill concurred in the result, but argued in her concurring opinion that the majority overreached "the constitutional limitation that the factual conclusivity clause imposes upon our jurisdiction, yet proceeds to weigh the evidence unfettered by any such constraint. Because the court usurps the factual sufficiency review power that our Constitution reserves to the court of appeals, I cannot join in its opinion."[50]

Another case in which the Texas Supreme Court set aside a large jury verdict is *Diamond Shamrock Refining Co. v. Hall*,[51] where the plaintiff's decedent died of burns he suffered in a refinery explosion. The widow sued Diamond Shamrock for gross negligence to recover exemplary damages. The explosion was the result of complex facts, but basically a hydro-cracker unit was being restarted following a routine maintenance shutdown and it began to overheat causing excessive vaporization of liquid hydrocarbons. The vapor turned to liquid when it cooled and the suction drum began to fill with the liquid, a potentially explosive situation. Recognizing the danger of explosion from sending liquids into a compressor, the operator requested instructions to change the flow of liquid, but his request was refused. Notwithstanding, the operator disobeyed his instructions and diverted the flow to storage. The automatic shut-off switch on the suction drum failed to operate, and finally, the compressor was shut down manually. At that point there was a crew change and, unfortunately, the plaintiff's decedent came on shift. Ultimately there was a fire resulting in him being fatally burned. The jury awarded $32.5 million in exemplary damages. The trial judge ordered a remititur, but overruled all of the defendant's motions on liability, holding there was sufficient evidence to justify the jury's verdict. The Court of Appeals affirmed, specifically describing the evidence and holding it sufficient for the finding of gross negligence supporting the jury's verdict. The majority of the Supreme Court writes for pages, reviewing voluminous evidence, but basically holds that while there was clear evidence of negligence, there was no clear and convincing evidence that "Diamond Shamrock was unconcerned." Of course, the difference between evidence of negligence and gross negligence is in the eye of the beholders—judges in Austin, not the jury that heard the evidence.[52]

It is obvious that the Texas Supreme Court regularly reverses judgments based upon jury findings. In many instances that is the court's proper function. Unlike the Fifth Circuit where judges appear to reverse jury findings without reticence if they determine that "clear error" has occurred, the Texas Supreme Court appears to carefully analyze the evidence to determine whether it is legally or factually sufficient to support the jury's verdict. But, having done so, in some instances it appears that the court ultimately reverses the jury's verdict based upon the court's preferred interpretation of the facts or by recharacterizing the issues in the case in order to avoid the effect of the jury's verdict. Other recent cases that are subject to this interpretation are:

1. *Haggar Clothing Co. v. Hernandez*.[53] Ms. Hernandez sued her former employer, Haggar Clothing Co., alleging that she was fired in retaliation for filing a worker's compensation

claim after an injury on the job. The jury found in her favor on her retaliation claim, found that Haggar acted with actual malice, and awarded compensatory and exemplary damages. The Court of Appeals affirmed, holding that the evidence was legally and factually sufficient to support the jury's findings, but the Supreme Court in a *per curiam* opinion reversed and rendered. After reciting evidence in the record that seems to support the jury's findings, the court cited its own prior authority in holding that Haggar, the employer, terminated Ms. Hernandez pursuant to the uniform enforcement of a reasonable absence-control provision, and, therefore, was not subject to the charge of retaliatory discharge, as a matter of law, the specific facts of the case and the jury's verdict based on them notwithstanding.

2. *General Motors Corp. v. Iracheta, et. al.*[54] Ms. Iracheta's grandson died in an automobile collision, along with his mother and sibling. However, the grandson did not die in the collision and "first fire" that resulted, but, rather, from a second fire and explosion that occurred after the passage of some time during which the child was trapped in the vehicle. Ms. Iracheta offered the testimony of two experts to explain how a defect in the automobile caused the fire. The opinion recites many pages of their testimony and demonstrates that there were inconsistencies between the explanations given by the two plaintiff's experts for the fire's causation. The Supreme Court latches on to the lack of uniformity between the expert's testimony, stating:

> Iracheta attempts to borrow from each of her experts pieces of opinion that seem to match, tie them together in an ill-fitting theory, discard the unwanted opinions, disregard the fact that the experts fundamentally contradicted themselves and each other, and then argue that there is some evidence to support the verdict.[55]

Not surprisingly, the Supreme Court reversed the jury verdict, essentially holding that the jury was not entitled to evaluate all of the evidence presented to them and to conclude from it that a defect resulted in the conflagration in which the child was killed. While there was evidence tending to prove that a defect existed, it was inconsistent with other evidence and was, therefore, the same as "no evidence" under the court's reasoning.

3. *Southwest Key Program, Inc., et. al. v. Gil-Perez.*[56] An employee of Southwest Key took Gil-Perez to a sports stadium to participate in athletic activities. An impromptu football game occurred in which the Southwest Key employee allowed Gil-Perez to participate so long as tackling was "only below the waist." None of the players wore any football equipment. Gil-Perez was tackled and suffered a dislocated knee. He sued Southwest Key, alleging negligence in allowing him to play tackle football without providing protective gear or equipment. Despite a jury verdict finding Southwest Key negligent, the Supreme Court reversed on the basis that there was no evidence of "cause in fact" that the lack of protective equipment resulted in the knee injury.

4. *U.S. Silica Co. v. Tompkins.*[57] Tompkins sued U.S. Silica claiming that he contracted silicosis from using its flint products in abrasive blasting work. The jury found for plaintiffs and the Court of Appeals affirmed. The Supreme Court reversed and remanded for a determination of the issue of whether *if* warnings had been given, they could have effectively reached the employees who used the silica products.

Reckless politicians met a responsible judiciary

By Palm Beach Post Editorial

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Wednesday, April 06, 2005

Just when it seemed that Republicans couldn't sound more stupid when talking about judges, along comes Sen. John Cornyn, R-Texas. Referring to recent courthouse shootings, he wondered Monday "whether there may be some connection between the perception in some quarters, on some occasions, where judges are making political decisions yet are unaccountable to the public that it builds up to the point where some people engage in... violence." He did acknowledge that any such violence would be "without any justification." How statesmanlike.

Most likely, the GOP's tough talk concerning the judiciary will turn out to be just that. Even demagogues like House Majority Leader Tom DeLay, R-Texas, surely know that there are no grounds in Washington or Tallahassee for impeaching "liberal judges who have twice thumbed their noses at both the Congress and the President of the United States!" by rejecting Washington's unconstitutional attempt to intervene in the Terri Schiavo case. Threats by Rep. DeLay and others to reduce judicial authority probably are designed more for fundraising letters and this week's attack-the-judges conference than mainstream legislation. And on Tuesday, Senate Majority Leader Bill Frist, R-Tenn., said, "I believe we have a fair and independent judiciary."

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But since too few politicians of both parties seem willing to challenge such dangerous thinking, and since President Bush and Gov. Bush indulge in that attitude themselves, we will point out that only those unelected judges whom Sen. Cornyn and Rep. DeLay scorn kept the nation safe during the political hysteria over Ms. Schiavo's case. The Marbury vs. Madison Supreme Court ruling of 1803 established judicial review over actions by the executive and legislative branches. That appears to be a shared sentiment among judges, no matter who put them on the bench.

When the 11th U.S. Circuit Court of Appeals refused to grant Ms. Schiavo's parents a hearing after their

daughter's feeding tube had been removed, the 10-judge majority included appointees of five presidents, from Jimmy Carter to George W. Bush. In his concurring opinion, Judge Stanley Birch — whom the first President Bush put on the court — wrote: "The separation of powers implicit in our constitutional design was created 'to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.' But when the fervor of political passions moves the Executive and Legislative branches to act in ways inimical to basic constitutional principles, it is the duty of the judiciary to intervene." He called the Terri Schiavo bill "an unconstitutional infringement on core tenets underlying our constitutional system."

Simply put, when politicians violate the federal or state constitution, the courts are not obliged to bless abuse of power. In this case, the Legislature — in 2003 — and Congress — last month — tried to overturn a judicial ruling because they didn't agree with it. As Judge Birch noted, they may try to change the law for future cases, but they could not change it just for Terri Schiavo's case. There is nothing wrong with a judicial branch that protects the constitution from political manipulation.

By Judge Sam Sparks

Texas Association of Defense Counsel
Austin, Texas
April 21, 2005

Good afternoon, Ladies and Gentlemen.

David Chamberlain called and graciously invited me to participate in your program. I asked what subject you wished for me to consider. David was politically correct and indicated that I could speak on any subject I desired. In our discussions, I advised him that I just read a treatise on the vanishing civil jury trial. Indeed, in January I had received an invitation to participate in a national summit to be held in Las Vegas on March 31 entitled, "The American Jury Trial—Do We Allow Its Death or Lead to Its Rebirth?"

And that's what I'm going to talk to you about this afternoon, in a more serious vein than most of my speeches because it involves the future of our profession—the experienced trial lawyer.

Several years ago, Judge Pat Higginbotham called and asked me to inquire of Fellows in the American College of Trial Lawyers the reasons state and federal dockets were having fewer filings of civil cases and fewer trials. I contacted members of the College in Texas, made notes with regard to their views and opinions, and forwarded that information to Judge Higginbotham. That information, along with others, went into a study that was ultimately published by the SMU School of Law. My interest in this topic was rekindled by my good friend from Boston, the Honorable William Young, Chief Judge of the District of Massachusetts. I am sure many of you have read some of his articles or the transcripts of some of his statements in court regarding jury trials and democracy in these United States. He recently said,
★2

> The American jury system is dying. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than on the criminal, but it is dying nonetheless.

As I advised, I had received an invitation to participate in the 2005 ABOTA FDCC Summit in Las Vegas under the topic: The American Jury Trial—Do We Allow Its Death or Lead Its Rebirth? I think it important to note the seriousness of this issue as the conference was supported by the Academy of Rail Labor Attorneys; ABA Tort and Trial Practice Section; American Trial Lawyers Association; Association of Defense Trial Attorneys; Defense Research Institute; International Association of Trial Lawyers; International Association of Defense Counsel; International Society of Barristers; National Center for State Courts; Trial Lawyers for Public Justice; and the Federal District Judges Association.

To understand my perspective in these reports, I should remind you a little bit about myself. I graduated from law school in 1963, served as a law clerk in the federal courts and went to El Paso, Texas, to begin private practice in 1965. I tried lawsuits from 1965 until

December of 1991 when I took this job. In the middle '60s, the lawsuits were primarily automobile collision lawsuits. In the late '60s and early '70s, my docket increased to include products liability, worker's compensation, and FELA cases. By the early 1970s, I was primarily defending doctors, hospitals, pharmaceutical companies, and the Santa Fe Railroad. By the early 1980s, I had tried criminal and civil anti-trust cases, gas and propane explosion cases, and defended General Motors, Ford and Nissan. By the mid-80s, my trial docket was primarily medical and legal malpractice cases and civil rights cases, representing school districts. When I was sworn in as a federal judge in 1991, I had tried personal injury lawsuits, commercial lawsuits, antitrust lawsuits, security lawsuits, and was involved in the trials of national cases involving asbestos, the birth control pill, thalidomide, DES, the Dalkon shield. By 1975, the majority of my clients were law firms representing insurers and excess carriers. During those years, my close friend and partner of many years, Malcolm Harris, and I used to keep statistics as to who would try more lawsuits to verdict in any given year. From1966 to approximately 1980, neither one of us tried less than twenty cases to verdict every year. These experiences cemented my belief in the jury system, and I can tell you, no lawyer got more satisfaction out of his or her work than I.

The first question you should ask is, "Are we really faced with the vanishing jury trial?" The answer is, of course, "We are." The statistics confirm. The statistics in the federal court are parallel with the statistics in the state courts where statistics are maintained.

★3
In the United States District Court in 1962, 11.5 percent of all civil cases filed were disposed of by trial. By 2002, only 1.8 percent of all civil cases filed were disposed of by trial.
★4
In the same time frame, 1962, 15 percent of all criminal cases were disposed of by trial, while in 2002, only 4.6 percent of criminal cases were disposed of by trial.
★5
In 1962 the average for each sitting federal district judge in the nation was 39 trials per year (18 criminal trials and 21 civil trials). By 1987, the average had dropped to 35.3 trials per year (13 criminal trials and 22.3 civil trials). And by 2002, the number of trials per year had dropped to 13.2 (5.8 criminal trials and 7.4 civil trials).

Yet, during this same period of time in the United States, there were more people, more accidents, more injuries, more business activities, more statutes and regulations enacted—all leading to more legal problems requiring more lawyers and more judges. There were more cases filed and yet fewer and fewer trials.

Why?

★6
The most popular answer to this question has been the expense of litigation—the expense of lawyers and expense of discovery and trials. It is certainly true in my lifetime lawyers

have gone from a service profession making a good income to a profession where lawyers have become very wealthy through the practice of law. However, this is not a complete answer. The problem of expense in litigation led the way to an ongoing program of alternative dispute resolution. But intertwined was a growing doubt in many segments of our population of the jury system. Physicians publically stated their doubts juries could evaluate medical judgments. Manufacturers voiced their concerns juries could not understand complex patents. The securities industry voiced its opinion litigation was too slow in the world of finance. And the legislators got busy. Binding arbitration now limits civil jury trials in contracts from construction of real property to purchasing personal property. Arbitration has eliminated lawsuits regarding stock transactions between customer and broker. Arbitration is now eliminating employer liability for wrongful termination, discrimination, and violations of the labor laws. Arbitration has eliminated customers' right of jury trial against banks or credit card companies, and the courts have upheld these mandatory arbitration notwithstanding the constitutional protection. ERISA has eliminated the insured/patients' rights to appropriate medical treatment, selection of physicians, and full review of administrative decisions on health benefits. ERISA has eliminated or limited a patient's right to sue for medical malpractice against medical providers. ERISA in many states, like Texas, has limited the applicability of workers' compensation laws.

Tort reform has limited how one can sue and how much one can obtain in damages, reducing non-working mother or father to $250,000 value, and virtually eliminating punitive damages.

Administrative courts now regulate banking and insurance industries, students' rights in school, handicapped rights of students, and consumers' rights regarding telephone rates, cell phone rates, and the like.

★7
In November of 2004, the American Bar Association Section of Litigation published "Journal of Empirical Legal Studies," a thousand-page interesting read by the Cornell Law School. The article reflected what I have just stated, but also pointed out the downward spiral of the number of lawsuits tried has now become a Catch-22. The result of which is the eliminating of that sophisticated segment of the bar: the experienced trial lawyer. And the inevitable result would be, and is, eliminating the experienced trial judge. There are those of you who are old enough to remember in the middle 1960s going to meetings of the Texas Association of Defense Counsel and observing and listening to a large number of lawyers who were daily involved in the trial of lawsuits. I was in awe of these lawyers' experience, their talents, and their achievements. Today it is difficult to find a person who has had twenty jury trials to verdict, much less twenty jury trials in one year.
★8
The fact of fewer trials and trial lawyers with less trial experience has resulted in judges with less trial experience, and in the federal courts especially the appointment of district and circuit judges and Supreme Court justices with little or no courtroom experience.

Let me give you three quick examples of your daily problems caused by Supreme Court justices with little trial experience.

The first is *Batson*—a lawyer cannot discriminate against a juror because of race, gender, or whatever. This ruling is wholly inconsistent with our system of peremptory challenges. The result is lawyers have to virtually lie upon any *Batson* objection, and today almost any good, ordinary lie will suffice. Recently, the Fifth Circuit held that a lawyer's "instinct" about a juror was sufficient to overcome a *Batson* challenge.
The second example is the Supreme Court's case in *Markman*. Now, in patent litigation, you have two trials: one with a judge and one with a jury with no interlocutory appeal, which has increased the expense of litigation multiple times in patents cases.

A third example is the *Daubert* decision, making judges gatekeepers and giving trial lawyers no consistency as what testimony can be eliminated at any level of the proceedings—whether trial or appeal.

These movements have been anti-litigation and anti-jury. Competent lawyers had no difficulty in selecting juries. The jury had no difficulty in handling patents cases when tried by competent trial lawyers before *Markman* and little problems reviewing expert testimony and decided what, if any, testimony should be considered.

My impression is also we have result-oriented judges who believe they have superior judgment than the ordinary person who composes a jury. Remember, that in 2004, the United States Court of Appeals for the Fifth Circuit issued 8,439 rulings and appeals, which is about its annual average, and the Supreme Court does not take more than four or five cases a year from the Fifth Circuit. This is a virtual zero percentage, meaning circuit courts have become the courts of last resort, and the circuit judges' discretion is now absolute.

Let me refresh your memory regarding jury trials in the United States. The Seventh Amendment of the United States reads as follows
★9

> *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.*

Briefly, let me give you a reminder of why the right to jury trial is so important and why and how the Seventh Amendment came to be.

You will recall after the Revolutionary War there was a real battle between those Americans who wanted a strong federal government and those who wanted the powers of government to remain in individual states, i.e., the Federalists and the Anti-Federalists.

The absolute right to a trial by jury in civil and criminal cases was the centerfold of this historic argument.

In 1774 in the Declaration of Rights, one of the primary statements was,

> The respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to course of that law.

Again, in 1776 in the Declaration of Independence, the colonists denounced the British government for "depriving us in many cases of the benefits of trial by jury."

Prior to the enactment of the Constitution most of the territory within the United States had some history of permitting jury civil trials. The primary reason was a safeguard against judicial corruption. Remember, colonial royal judges were appointed and controlled by the British and presided over criminal and civil suits with a twelve-member jury empaneled to try the facts of the case. Following the oppressive taxation in the early 1760s, the British Crown tightened its grip on the colonies legally, and trial by jury was no longer assured in either criminal or civil cases. Colonists and their cases could actually be taken to England without any guarantee of either a fast or fair trial. The British reorganized the court system and placed all civil matters under the heading of Admiralty and Maritime Law which were decided by judges without juries. The effect was to eliminate the participation of the colonists from the legal process.

In the Constitutional Convention in 1780, the delegates almost overlooked the civil jury trial, but in August of 1786, as the second phase of the Convention began and the Constitution itself existed in rough draft form only without any mention of juries, the debate started.

Five days before adjournment, Eldbridge Gerry of Massachusetts made a speech emphasizing that juries were the safeguards against judicial corruption. George Mason, who had written the Virginia Declaration of Rights, suggested a Bill of Rights be attached to the Constitution for comfort to the people and that the Bill of Rights should address civil jury rights. However, the Federalists won the day, and the draft of the Constitution was accepted and put out for ratification by the states without mentioning the right to trial by jury.

Immediately, the Anti-Federalists appealed to the early Americans not to approve the Constitution without a guaranteed right to trial by jury, arguing the jury trials would protect people by employing them as jurors and ensuring that trials would serve as a check upon the judiciary as well as the legislature.

In the Virginia Constitutional Convention, Patrick Henry described civil juries as "the best appendage of freedom . . . which our ancestors secured with their lives and property." And would frequently shout to the Federalists, "Why is the trial by jury taken away?"

Thomas Jefferson concluded his speech in the convention by stating, "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."

Notwithstanding Federalists arguments by Alexander Hamilton, James Madison, John Jay and others, it appeared the Anti-Federalists would prevail. Six of the states—Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island—attached proposals calling for the right of civil jury trial before ratification of the Constitution. The typical wording of these recommendations was found in the Virginia statement, "That, in controversies respecting property and in suits between man and man, the ancient trial by jury is one of the greatest securities to the rights of the people, and to remain sacred and inviolable."

Hence, in the First Congress, Congress culled all recommendations down to seventeen, and finally, to the ten amendments, which were passed. The original Seventh Amendment read in draft form, "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate." The second draft of the Seventh Amendment was accepted without change and remains the Seventh Amendment to this day. It is interesting to note—as later written by Chief Justice Story—that the right to jury by trial in civil cases existed in all cases with the exception of admiralty, maritime, or court in equity.

Thomas Jefferson sums the issue up when he writes,
★10

> In truth it is better to toss up heads or tails in a cause than to refer it to a judge whose mind is warped by any motive whatever, in that particular case. But the common sense of twelve honest men gives still or better chance of just discussion than the hazard of heads or tails.

Thus, it is clear from the beginning of our constitutional form of government, that the right to jury trials and the sanctity of the jury's verdict as to factual matters were the center point to prevent judicial corruption and to act as a limitation on both legislative and judicial powers under the Constitution.

Since the early '90s, circuit judges in the Fifth Circuit and justices on the Texas Supreme Court with little or no trial experience either do not trust the constitutional jury system or care and have whacked and whacked away at the constitutional authority of the jury to find the factual issues in trial. I began preparing this speech in January. Let me simply talk about a few cases issued in January 2005.

The first case I bring to your attention is *Brown v. Parker Drilling Offshore Corp.*, 396 F.3d 619 (5th Cir. 2005). In this case, the plaintiff Brown applied for work with Parker Drilling Offshore Corp. He checked "no" when asked whether he had "present or past back and neck trouble" and was hired. Approximately eighteen months into his employment, he had a back injury and made a claim. Background information established in 1998, he injured

his back while lifting a sack of corn and was treated in the emergency room and issued a wheelchair and walker. And in 2000, while working for another employer, he was fired for falsely reporting an on-the-job accident and failing to disclose the 1998 back injury. Brown testified both the 1998 and 2000 injuries resulted from a "muscle pull," that he did not think he did not think he had suffered any "past back and neck trouble," and that he didn't believe the problems he had in the past were the types of problems the employer was inquiring about. The case went to trial, and the jury failed to find for the employer on its factual defense that Brown had intentionally misrepresented or concealed medical facts which were material to the decision to hire and which had a causal connection to the injury complained of in the lawsuit.

The jury issued its verdict in favor of the plaintiff, and the district court remitted the jury's award regarding medical expenses. The district judge, knowing well the danger of an appeal of a jury verdict in the Fifth Circuit, wrote a detailed opinion specifically setting out the evidence the jury could have relied on in denying the defendant's defense.

The circuit reversed and rendered for the employer. But the significance of the judgment is emphasized by the affirming panel when it expressly holds,
★11

> This Court reviews factual findings of a jury for clear error . . . under a clear error standard, this Court will reverse "only if on the entire evidence, we are left with a definite and firm conviction that a mistake has been made."

The Fifth Circuit simply admits what it has been doing for some time. If two of three judges on a panel are left "with a definite and firm conviction that a mistake has been made" by the jury, then they have the authority to disregard entirely the jury's factual findings and make their own findings—whether liability or damages.

The issue was plainly exposed by the dissenting judge as he writes:
★12

> Following a three-day jury trial in this hotly contested maintenance and cure lawsuit, the jury deliberated for five hours over all the competing claims of the parties and then returned a verdict in favor of Brown in the amount of $150,000. Having remitted the verdict to $100,000, the trial court fully discussed the facts and law pertaining to Parker's post-trial motions and then denied them. Despite this context, the panel majority sifts through the evidence, essentially declares Brown to be unworthy of belief by the jury, and then substitutes its appellate judgment for that of the jury. The majority discards the plaintiff's verdict and summarily renders a substitute verdict for Parker, the employer. Because I decline to participate in the majority's usurpation of the jury's function, I respectfully dissent.

The dissenting judge then writes for pages, pointing out "the substantial evidence that was presented at the trial for the jury to consider" resulting in the jury's not being persuaded that Brown intentionally attempted to defraud the employer.

★13

By the way, it is important to note in *Mumblow v. Monroe Broadcasting, Inc.*, No. 03-31013, 2005 WL 459243 (5th Cir. Feb. 28, 2005), a panel in the Fifth Circuit in a non-jury case reversed the factual findings of the trial judge, holding, "Before we will disturb the trial court's factual findings, we must be 'left with a definite and firm conviction that a mistake has been made.' Because we have thoroughly reviewed the record and are left with such a conviction, we reverse."

Therefore, presently in the 5th Circuit, any judgment entered on factual issues found by a jury or a judge can be reversed by two circuit judges who believe the fact finder made a mistake.

★14

The second January example of circuit judges not understanding the role of juries in civil trials is found in *Carboni v. General Motors Corp.*, 398 F.3d 357 (5th Cir. 2005). There, Mr. Carboni was driving his General Motors vehicle when an unidentified vehicle swerved into his lane, causing him to take evasive action and his car slammed into a guard rail. The driver's side air bag did not deploy upon impact, and he struck his head on the steering wheel, sustaining brain damage. The jury returned its verdict for Carboni. A final judgment based on the jury's verdict was entered.

The circuit panel in this case held there was more than adequate evidence in the record that the failure of the air bag to perform violated the express warranty given by General Motors. The evidence was undisputed the air bag should have deployed, but didn't; that Carboni's head hit the steering wheel, resulting in brain injury; that Carboni's head would not have hit the steering wheel had the air bag deployed properly. The trial judge excluded testimony from one of plaintiff's experts regarding causation and enhancement injuries because of the *Daubert* standard. The circuit judges noted no expert testified what injuries Carboni would have suffered in the event the air bag operated properly and what injuries he suffered as a result of the air bag not deploying and vacated the judgment, rendering a take-nothing judgment against Carboni holding there was no evidence his injuries were enhanced because of the failure of the air bag. This is another good example that the panel simply did not understand the role of the jury fact-finding or simply didn't care.

By the way, I read in the Texas Lawyer recently GM was hit by a judgment of $18 million when a GMC Suburban's air bags did not deploy in a violent accident. You can bet an appeal is being drafted in that one.

Unfortunately, this same picture is found in the Supreme Court of Texas. On January 10, 2005, in *Volkswagen of America, Inc. v. Ramirez*, 2004 WL 3019227 (Tex. Dec. 31, 2004), the Court reversed and rendered a judgment based on a jury verdict. In this case, two vehicles were proceeding in the same direction of U.S. 83 when they bumped each other, resulting in a Volkswagen Passat's crossing the median and colliding head-on with a Ford

Mustang. There were deaths and substantial injuries in this accident. There was no dispute the wheel separated from the Passat, but there was a dispute over when the wheel assembly detached and whether the detachment caused the accident. Each side had expert witnesses. The plaintiff's expert testified the left rear wheel detached from the axle as the Passat entered the median and fishtailed across the grass and concrete and testified that the "laws of physics" explain how the wheel was able to remain pocketed in the rear wheel well throughout this turbulent accident. Volkswagen's expert testified the wheel separated as a result of the impact between the two vehicles going in opposite directions. The Supreme Court held the two experts for the plaintiff failed to present sufficient evidence that Volkswagen caused the accident. The opinion is long, but I simply quote from the first paragraph of Chief Justice Jefferson's dissenting opinion:

★15

> The Court concludes that Cox's testimony amounts to "no more than a mere scintilla" of evidence on causation. . . . To the contrary, Cox testified that the Passat experienced a "catastrophic failure of the wheel bearing assembly" while it was traveling in the eastbound lane of U.S. Highway 83, before the Passat entered the median. He both tested and rejected Volkswagen's alternative theory—that damage to the wheel bearing assembly occurred after the Passat's collision with the Mustang. Reasonable jurors could have accepted Volkswagen's theory and rejected Cox's . . . , or accepted Cox's and rejected Volkswagen's . . . , but unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence. Accordingly, I respectfully dissent from the Court's rendition of judgment for Volkswagen.

And, on January 21, 2005, the Texas Supreme Court issued four consecutive cases in which the court reversed judgments based on jury verdicts.

★16

The first, *Diamond Shamrock Refining Co. v. Hall*, 2005 WL 119950 (Tex. Jan. 21, 2005), 48 Tex. Sup. Ct. J. 354, is a case where the plaintiff-decedent died of burns he suffered in a refinery explosion. The widow had sued Diamond Shamrock for gross negligence to recover exemplary damages. As you would imagine, the explosion was the result of complex facts, but basically a hydro-cracker unit was being restarted following a routine maintenance shutdown and it began to overheat causing excessive vaporization of liquid hydrocarbons. The vapor turned to liquid when it cooled and the suction drum began to fill with the liquid, which could result in an explosion. Recognizing the danger of explosion by sending liquids into a compressor, the operator requested instructions to change the flow of liquid, but his request was refused. Notwithstanding, the operator disobeyed his instructions and diverted the flow to storage. The automatic shut-off switch on the suction drum failed to operate, and finally, the compressor was shut down manually. Then there was a crew change and, unfortunately, the plaintiff-decedent came on and ultimately there was a fire and he was burnt to a crisp. The jury awarded $32.5 million in exemplary damages. The trial judge ordered a remittitur but overruled all of the defendant's motions

on liability, holding there was sufficient evidence to justify the jury's verdict, and the Court of Appeals affirmed, specifically, describing and holding the evidence sufficient for the finding of gross negligence supporting the jury's verdict. The majority of the Supreme Court writes for pages, but basically holds, while there was clear evidence of negligence, there was no clear and convincing evidence that "Diamond Shamrock was unconcerned." Of course, the difference between evidence of negligence and gross negligence is in the eye of the beholder—judges, not the jury in Austin.

In the same Supreme Court Journal, read *U.S. Silica Co. v. Estate of Tompkins*, 2005 WL 120052 (Tex. Jan. 21, 2005), 48 Tex. Sup. Ct. J. 360; *Texas A&M University v. Bishop*, 2005 WL 120058 (Tex. Jan. 21, 2005), 48 Tex. Sup. Ct. J. 361; and *Military Highway Water Supply Corp. v. Morin*, 2005 WL 119933 (Tex. Jan. 21, 2005), 48 Tex. Sup. Ct. J. 364. These are cases where judgments based on jury verdicts were reversed, rendered, and/or remanded on the same day.

And I would be remiss if I didn't remind you of the Fifth Circuit doctrine of the "Maximum Recovery Rule" created over the last several years.
★17
This theory limiting damages based on the jury's verdict started in admiralty or Jones Act cases, but today is applied across the board in personal injury cases. If the circuit judges believe the damages determined by the jury are too large, they will research the thousands of published opinions for similar facts with a lesser award of damages and then hold the "maximum recovery" cannot be over 150 percent of the lesser award. It makes no difference the different verdicts were based on different evidence, determined by different juries in different places at different times with different witnesses tried by different lawyers and presided over by different judges in different jurisdictions.

Now, I missed that Constitutional amendment. Did you?

While many may argue these decisions are the product of result-oriented judges who believe they know what's best and should have and do have the authority to make these decisions, I truly believe there are also products of judges who simply do not trust the jury system and do not enforce the constitutional mandate of the Seventh Amendment. It may well be they do not have the experience to know the jury is the best arbiter of facts and our system of justice for over 200 years has made the United States the envy of every civilized nation. And, of course, there are plenty of safeguards. The first is that juries rarely make unreasonable findings. Second, a trial judge has ample weapons in remittitur and new trial authority to correct any errant verdict.
★18
Therefore, I have come to the conclusion, along with other lawyers and judges, that we lawyers ourselves are one of the causes for the diminishing number of trials. We are not doing our job in educating the public as to the importance and the value of the Seventh Amendment, the right of jury trial, and importantly, the sanctity of a jury verdict. If we lawyers cannot trust the jury system, then it has become outdated and should be changed. However, I doubt seriously that any constitutional amendment pass three-fourths of the fifty

states to alter the Seventh Amendment to the Constitution. The bad news is it is being amended through legislative and judicial decisions, rather than a constitutional process.

So what should you do personally if you wish the profession of a trial lawyer in civil jury trials to continue? What should you do as an organization?

★19
This organization needs to establish a committee to review and monitor the decisions of the appellate courts—both state and federal—and critique them accordingly in your publications. You should commission law professors or other experts to write articles for publication for both the legal and public sectors. You must become involved in the process of evaluating judicial nominations and endorsing candidates in judicial elections.

You must deal with these sitting judges in their arrogance by identifying them by name and giving them credit for their opinions. This process works. I have learned in the last several years federal circuit judges do not like criticism and especially public or semi-public criticism of the opinions. I wrote a newsletter for the district judges with spread sheets of the numbers of judgments based on jury verdicts that were reversed and rendered, and after several publications, the results did improve to a degree.

The circuit judges do not like public reports on their unpublished opinions. Don't let your circuit get by with not publishing opinions and sweeping constitutional rights under the rug. Expose what is going on. Americans are not going to give up the jury system to the judicial, legislative, or executive branches of the government, if they know the facts. And you are in the best position to evaluate and report to the bar as well as to the public what judges are doing to our system of justice.

Judges who write opinions are no different from trial judges who work in the public forum and are critiqued by the newspapers and lawyers on a daily basis. Appellate opinions must be evaluated and exposed. Public exposure promotes honesty.
★20
Do your job.

Don't make my generation the last of the real trial lawyers—don't return to the "toss of the coin" system of trying lawsuits.

Thank you.
It will make a difference.

saving the jury trial

By Neal Ellis

Perhaps Chief Judge William G. Young, of the U.S. District Court for the District of Massachusetts, has summed up the vanishing trials phenomenon most succinctly. He emphatically stated last year that "[t]he American jury system is dying. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than on the criminal, but it is dying nonetheless."[1] He is not alone in this conclusion. For example, Professor Marc Galanter, of the University of Wisconsin School of Law, has documented in painstaking detail the ongoing disappearance of the very cornerstone of our American system of justice, the jury trial.[2] To trial lawyers, it may be evident that they are trying fewer cases than they did 10 or 20 years earlier. However, Galanter has shown empirically that the jury trial is disappearing from our courtrooms at a rate that raises alarm because it has implications beyond the profession that extend into the fabric of American culture.

According to Galanter, the percentage of civil cases reaching trial in our federal courts dropped to 1.8 percent in 2002. Forty years earlier, approximately 11 percent of all civil cases were tried in our federal courts. Although there was a fivefold increase in terminations of all civil cases over the same period, the absolute number of cases tried in the federal courts still dropped substantially.[3] Trials of criminal cases in the federal courts also dropped from 15 percent in 1962 to less than 5 percent in 2002. Despite markedly higher numbers of criminal defendants, the absolute number of criminal cases tried in the federal courts decreased by 30 percent.

When Galanter released his study in 2003, his research on civil trials in the state courts was embryonic. Nonetheless, his initial figures suggest that trials in the state courts are disappearing at roughly the same rate as in the federal courts.[4] As an absolute number, jury trials in the state courts plummeted by 28 percent from 1976 to 2001. A recent study conducted by the National Center for State Courts concludes that "the number and rate of jury trials has declined, often significantly, during the period 1976–2002 in almost all states included in the analysis."[5]

The diminishing number of trials is puzzling when contrasted to virtually every other aspect of the legal system. The number of lawyers admitted to the bar, the number of judges in both our federal and state court systems, and the number of cases filed have all increased by leaps and bounds. Politicians have campaigned for office decrying the "litigation explosion" that has engulfed the country. So much has been said about this supposed explosion that the American public believes that we are in the middle of a litigation crisis. Hence Americans have no conception whatsoever that the centerpiece of our justice system is disappearing. To some extent, this ignorance must be attributed to the legal profession itself. Lawyers have not been prepared to go public with the news that lawyers are no longer trying many cases. To do so would be a little like the medical profession announcing that doctors are no longer performing surgeries.

Why Are Jury Trials Disappearing?

To some extent, analyzing the causes for the precipitous drop in jury trials defies quantification. Court administrators in many jurisdictions do not keep figures on the number of cases that would have been tried but for diversion from the system for some reason.[6] But recent research suggests at least five reasons for the vanishing trials phenomenon.

First, it takes no great intuitive leap to see that vast numbers of cases are now resolved by nonjudicial means, especially through alternative dispute resolution (ADR). According to Galanter, a significant number of cases have been diverted from trial into resolution by ADR processes. Most would agree that ADR has produced major benefits for the justice system. ADR advocates contend that it has developed approaches that are quicker, less costly, more creative, serve business goals, improve relationships, and achieve more lasting results.[7] Certainly, absent ADR, the courts would be hard pressed to handle the increasing number of new filings.

Second, everyone knows that

the cost of litigation has risen dramatically. Many potential litigants have been priced out of the market.[8] Embarking on litigation now requires a party to seriously consider the vast amount of time and resources that will be consumed in the litigation process.[9] Many civil trials involve battles of competing expert opinions, which drive litigation costs skyward. To ensure the most favorable jury, lawyers in high-stakes litigation frequently employ pricey jury consultants. Discovery now entails expensive searches and information collection from electronic databases, which subsequently engenders disputes over electronic discovery. Pretrial motions relating to discovery or disposition of claims take copious amounts of attorney time. To handle the ever-increasing amount of pretrial and trial work, more lawyers are assigned to prosecute or defend any given action.

Cost-effectiveness is also a huge consideration. The RAND study on asbestos litigation costs suggests that only $0.37 of each $1.00 of asbestos litigation expenditures have gone to compensate victims, while the remainder compensates lawyers and pays other transaction costs.[10] Parties therefore naturally look for the most cost-effective means of resolving their disputes.

While a significant component of litigation cost is attorney fees, clients must also consider the time that they must devote to litigation by responding to discovery requests, undergoing depositions, preparing for trial, and participating in the trial. Absent filing in a jurisdiction with a "rocket docket," parties must evaluate the impact of delay in pursuing their cases to finality. Notwithstanding recent docket management measures, years may pass before the litigants resolve their dispute.[11] Because corporate managers often find that they are personally penalized when their business unit profits drop due to litigation expense, they have an added incentive to resolve claims early and protect the bottom line.

Further, while trials may have lasted only a day or two several decades ago, civil trials often extend for weeks or even months in the current system.[12] According to Galanter, civil trials taking four days or more represented 15 percent of trials in 1965. This rose to 29 percent in 2002.[13] The number of very short trials shrank, while the number of very long trials increased.

Third, the past decade witnessed an enormous surge in high-stakes litigation. Plaintiffs have resorted far more frequently to class actions and other devices to "up the ante" in virtually every form of civil litigation, from consumer complaints, mass torts, and securities litigation to products liability. The bundling of large numbers of individual claims into class actions also has the effect of reducing the number of potential cases that may reach trial. As more defendants perceive that jury trials are a "roll of dice" and likely to favor sympathetic plaintiffs, they are inclined to settle these large claims rather than confront bankruptcy.[14] Facing the prospect of "bet the company" litigation, defendant companies have also been required to allocate far more resources to defend these cases, exacerbating the already high cost of litigating claims.

Media reports of extreme verdicts have undoubtedly influenced the parties' assessment of risk in proceeding to trial. Few of us will forget the early reports of the $2.9 million jury verdict against MacDonald's in the coffee spill case. Corporate defendants who are deluged with media reports of out of control juries cannot help but lose confidence in the system and distrust jurors to find the truth and apply justice even-handedly.[15] Of course, many of these reports are baseless or misstated, but the damage has been done. When sued, defendants may be more inclined to avoid trial and pay money to settle even negligible claims. Concomitantly, plaintiffs with marginal claims may be encouraged to file suit, expecting the defendant to crumble at the prospect of a jury trial.[16]

Fourth, since at least 1986 and the U.S. Supreme Court decisions in *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[17] *Anderson v. Liberty Lobby, Inc.*,[18] and *Celotex Corp. v. Catrett*,[19] all of which encouraged the use of summary judgment, the increase in summary dispositions has been connected to the decrease in the number of trials. Professor Arthur R. Miller, of Harvard Law School, has observed that after these Supreme Court decisions courts are much more likely to grant dispositive motions in cases that likely would have been tried.[20] Further, cases are now sometimes resolved in "paper trials," where judges rely on affidavits and documents to decide disputes that might have been developed on the merits more fully at trial.[21]

In addition, Congress has passed legislation in some contexts requiring that courts summarily dispose of claims that fail to meet elevated pleading requirements.[22] With the passage of the Class Action Fairness Act this year[23] and the Lawsuit Abuse Reduction Act pending in the U.S. House of Representatives,[24] legislative efforts are clearly afoot to promote procedural devices to resolve cases in

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the most efficient manner possible. Inevitably, the question must be asked whether the liberal use of these devices sacrifices the traditional values of our justice system by preventing jury trials. No one would suggest that frivolous claims ought to survive an attack by dispositive motion, but overapplication of the summary disposition rules may well have intruded on the right to a jury trial.

At least some court observers believe that judges may be using procedural devices to dispose of trial-worthy cases summarily because of the judges' lack of confidence in jurors' ability to understand and assimilate the complex technical evidence needed to arrive at a verdict.[25] Most would agree that a jury's greatest strength lies in making credibility determinations, evaluating demeanor, and sensing the "mainsprings of human conduct."[26] Yet some fear that jurors are too intellectually incompetent or too gullible to evaluate complex—and particularly expert—testimony. Rather than submitting such cases to juries, some believe that judges have devised ways to remove these cases from the system by various means, including forcefully managing the case, exploiting uncertainty, deciding class action issues, and excluding technical and scientific evidence.[27]

Fifth, changes in the procedural rules and the growing emphasis on managing dockets have forced judges into the role of case supervisors. As caseloads increased during the last decades and as concerns focused on filing to disposition times, docket clearance rates, and other management statistics, judges and court administrators found ways to divert cases from trial. Amendments to Rule 16 of the Federal Rules of Civil Procedure required presiding judges to monitor closely the management of cases throughout pretrial proceedings to ensure movement toward ultimate resolution.[28] Many judges strongly encouraged parties to mediate and resolve disputes rather than have people with no knowledge of the case resolve it for them in a totally unpredictable fashion. Increased judicial involvement in pretrial proceedings, the setting of firm trial dates, and diverting cases into ADR programs all became popular techniques to administer trial dockets.[29] With all of the pressures to manage their caseloads, judges may now view their role more as resolvers of cases than as adjudicators.[30]

When cases are terminated through summary procedures and parties have never had their day in court, the perception of justice suffers.

Some believe that both litigators and the courts have assiduously pursued a goal of avoiding trials. The diminishing number of trials simply proves that they have been successful. A culture is beginning to pervade the courts that trying cases represents a failure of the judicial system.[31] With an ever-increasing emphasis on the efficiency of resolving claims, our courts may now be more focused on processing and terminating disputes than they are on whether the right result is reached by the fact-finder. If so, then we have sacrificed several of the core values of our justice system at the altar of efficiency.

Should We Be Concerned?

The Seventh Amendment right to jury trial stands at the center of our justice system. It has long been honored as the means of arriving at the truth of a dispute. From a lawyer's first day in law school, it has been drilled into his or her head that parties should have their day in court. However, if cases that would ordinarily proceed to trial are now summarily disposed of by the courts, it must be asked whether this Seventh Amendment guarantee has been abridged. When cases are terminated through summary procedures and parties have never had their day in court, the perception of justice suffers.[32] Instead of weeding out meritless cases, the 1986 trilogy of Supreme Court cases on summary judgment may have encouraged the courts to use summary procedures to control their dockets through paper trials. Docket management techniques have turned our judges into case administrators. As Miller suggests, a cynic might say that "getting it right" is no longer at the top of the priority list. Instead, it might rank below "getting it over with."[33]

The impact of the vanishing trial on the trial bar has been obvious. Fewer lawyers are trying cases. Those with substantial trial experience may find their courtroom skills atrophying as fewer opportunities to try cases come their way. Those with some trial experience proudly proclaim that they have actually "first chaired" a trial. Those with no trial experience sit on the sidelines, ill prepared but waiting for the rare occasion to try their first case.

Clients likewise may suffer as they receive advice from inexperienced lawyers about the risks and benefits of proceeding to trial. In the absence of trial experience, it is difficult for any lawyer to evaluate

properly the merits of taking the case to the jury. Some clients may pay a lot more or accept a lot less to settle a case than they would have if a lawyer with substantial trial experience had valued the case.

If the diminishing number of trials likely has had an impact on counsels' readiness to try cases, it stands to reason that it affects trial judges' preparedness to handle trials as well. Since the number of judges has increased and the number of trials has decreased, one may deduce that our judiciary is not spending as much time trying cases as it has in the past. Galanter's statistics show that a federal district judge sitting in 1962 averaged 39 trials a year (18.2 criminal and 20.8 civil); by 2002, it was merely 13.2 trials (5.8 criminal and 7.4 civil).[34] The Federal Judicial Center reports that in 2002 federal district judges spent an average of less than 300 hours per year in trial.[35] The obvious implication is that the skills of our trial judges are also deteriorating as the number of trials drops.

Fears about Juries

Perhaps one of the most significant factors in the demise of the jury trial is the fear of the parties that the jury's verdict will be based on something other than thorough consideration and comprehension of the evidence. Trials in complex cases frequently involve evidence that is difficult for the fact-finders to comprehend or recall. Lengthy trials test the endurance of even the most attentive jurors, who may react unfavorably to the party they perceive as unduly prolonging the trial. Juror patience can be sorely tested when minimal juror compensation causes financial and other hardship. Defendants worry that unsophisticated jurors bent on punishing corporate America will award massive verdicts to sympathetic plaintiffs. They are concerned that skilled plaintiffs attorneys will play the "emotions card" and that a "runaway" verdict will result.[36] In short, the risk that a verdict may not reflect thoughtful deliberation of the evidence and the law but instead reveal a visceral reaction to a play on emotions creates sufficient fear of the process and uncertainty that parties are willing to forgo their day in court and rely on other means to resolve their disputes.

Interestingly, studies conducted by jury experts dispel the myths about how juries decide cases. Juries are neither gullible nor lazy. Instead, jurors try diligently to do the right thing. They spend the time to reconstruct critical events by pooling their evaluations of conflicting testimony. They understand that experts are being paid by the parties and scrutinize carefully experts' credentials and opinions. Although technical evidence is sometimes difficult for jurors to comprehend,[37] it similarly challenges lawyers and judges. Studies repeatedly show that the contentions about juror incompetence and irresponsibility in evaluating expert and other technical evidence are simply unsupported.[38] Juries generally refrain from tagging large corporations with huge monetary awards.[39] Jurors identify points that lawyers miss. In the jury room, they pay close attention to the evidence adduced on critical issues. Although instructions may be delivered in obscure language, jurors do their best to apply the law to the facts.[40] In short, juries try to get it right.[41]

If jurors are doing their best under the circumstances, what can we do to preserve one of our country's most sacred institutions? Is there anything the legal profession can do to save the jury trial?

Sounding the Alarm

Recently, the legal profession has started to seriously discuss and address the disappearing trials phenomenon. In December 2003, the ABA's Litigation Section held a Symposium on the Vanishing Trial, attended by academics, trial lawyers, and judges. In April 2005, the American Board of Trial Advocates and the Federation of Defense and Corporate Counsel held a National Summit on the Present State and Future of the Seventh Amendment Right to Trial by Jury, calling their program "The American Jury Trial—Do We Allow Its Death or Lead Its Rebirth?" The klaxons have indeed been sounded, but has the warning been heard?

During his year as president-elect of the ABA in 2003–04, Robert J. Grey, Jr., announced that he would focus his attention on the importance of juries and jury trials. As he began his following year as president, Grey formed a working group of lawyers, judges, academics, and former jurors—the American Jury Project, chaired by Patricia Refo of Phoenix, Arizona—to develop a set of principles governing juries and jury trials. At the ABA Midyear Meeting in February 2005, those ABA Principles for Juries and Jury Trials were adopted by the House of Delegates by a nearly unanimous vote. (See the box on page 19 to review the 19 basic principles.)

Grey's initiative is directed at taking the fear out of the jury trial system and putting the fair back into it. The jury principles seek to restore trust on both sides of the jury box. For jurors, the principles seek to ensure adequate compensation, privacy, and respect for jurors' time. For parties, they seek to ensure that jurors will have the tools necessary to assess the evidence and reach even-handed justice. For judges, the principles help the jury to fulfill its role as the ultimate decision maker, freeing the trial judge to focus on managing the trial.

The principles favor neither plaintiffs nor defendants. They do

The **ABA American Jury Project's** Principles for Juries and Jury Trials

Preamble

The American jury is a living institution that has played a crucial part in our democracy for more than two hundred years. The American Bar Association recognizes the legal community's ongoing need to refine and improve jury practice so that the right to jury trial is preserved and juror participation enhanced. What follows is a set of 19 principles that define our fundamental aspirations for the management of the jury system. Each principle is designed to express the best of current-day jury practice in light of existing legal and practical constraints. It is anticipated over the course of the next decade jury practice will improve so that the principles set forth will have to be updated in a manner that will draw them ever closer to the principles to which we aspire.

Principle 1	The right to a jury trial shall be preserved
Principle 2	Citizens have the right to participate in jury service and their service should be facilitated
Principle 3	Juries should have 12 members
Principle 4	Jury decisions should be unanimous
Principle 5	It is the duty of the courts to enforce and protect the rights to jury trial and jury service
Principle 6	Courts should educate jurors regarding the essential aspects of a jury trial
Principle 7	Courts should protect juror privacy insofar as consistent with the requirements of justice and the public interest
Principle 8	Individuals selected to serve on a jury have an ongoing interest in completing their service
Principle 9	Courts should conduct jury trials in the venue required by applicable law or the interests of justice
Principle 10	Courts should use open, fair and flexible procedures to select a representative pool of prospective jurors
Principle 11	Courts should ensure that the process used to empanel jurors effectively serves the goal of assembling a fair and impartial jury
Principle 12	Courts should limit the length of jury trials insofar as justice allows and jurors should be fully informed of the trial schedule established
Principle 13	The court and parties should vigorously promote juror understanding of the facts and the law
Principle 14	The court should instruct the jury in plain and understandable language regarding the applicable law and the conduct of deliberations
Principle 15	Courts and parties have a duty to facilitate effective and impartial deliberations
Principle 16	Deliberating jurors should be offered assistance when an apparent impasse is reported
Principle 17	Trial and appellate courts should afford jury decisions the greatest deference consistent with law
Principle 18	Courts should give jurors legally permissible post-verdict advice and information
Principle 19	Appropriate inquiries into allegations of juror misconduct should be promptly undertaken by the trial court

The 19 general principles are supplemented by highly detailed standards that enunciate the specifics that the ABA proposes as a model for courts throughout the land. To see the entire document, visit **www.abanet.org/juryprojectstandards/principles.pdf.**

not seek to cause a result that will lead to more plaintiffs' or defendants' verdicts. The emphasis is on getting it right.

Provisions of the New ABA Principles

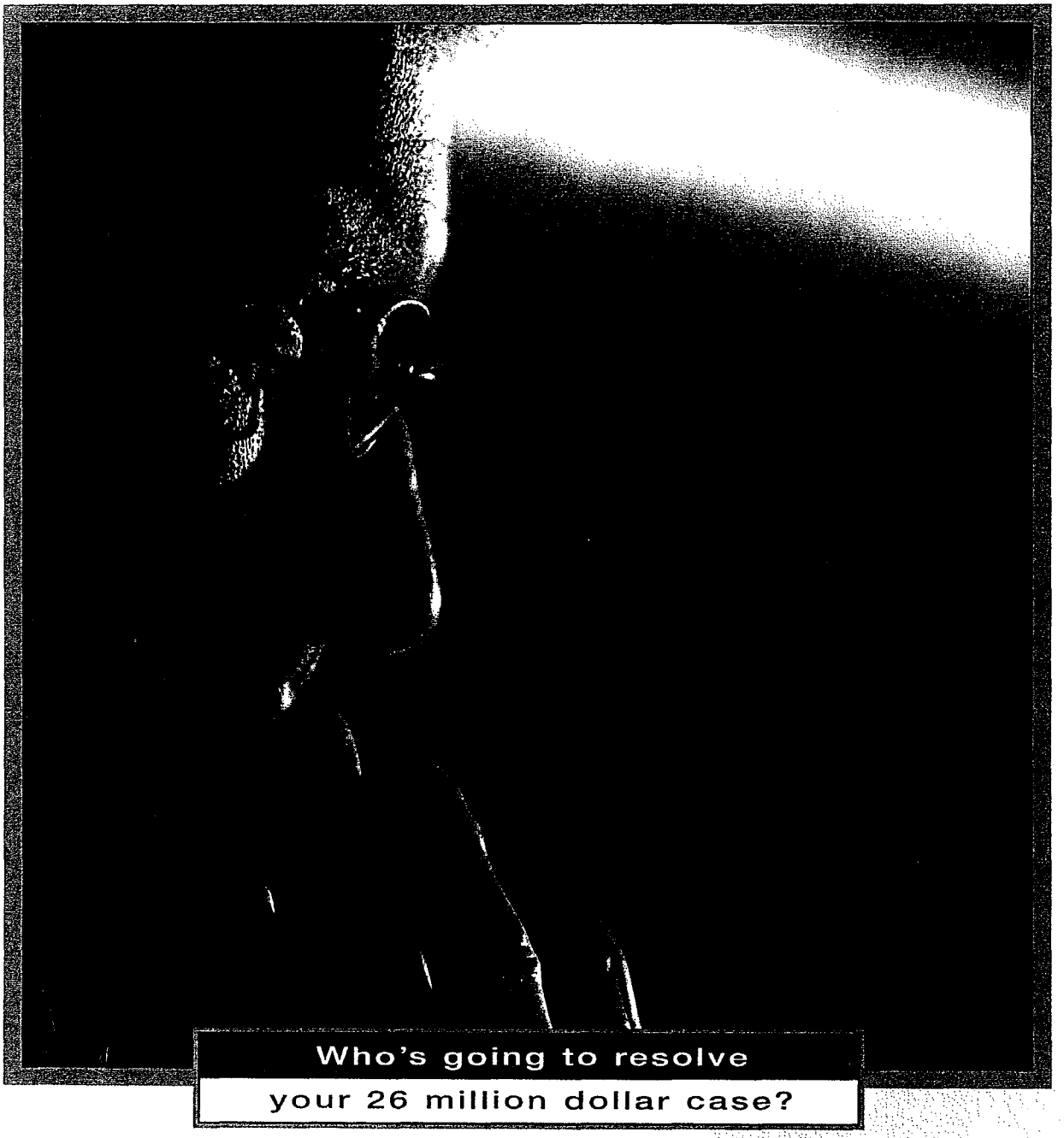
The ABA Principles for Juries and Jury Trials adopt a number of measures that put additional tools in jurors' hands to assess evidence. The ultimate goal of several of the principles is to enhance juror comprehension and competence because jurors are the ultimate decision makers. Other principles are directed at ensuring the deliberative process and representativeness of juries.

Standard 13(A) permits jurors to take notes after receiving cautionary instructions from the trial judge on note taking and note use. Studies show that note taking aids memory for both factual and conceptual matters, encourages more active participation in jury deliberations, assists reconstruction of the presented evidence, keeps jurors alert and interested, and increases juror confidence that their deliberations correctly apply the law from the instructions.[42] Perhaps Fred Friendly, Professor of Journalism at Columbia University, best expressed the rationale for juror note taking when he wrote that "[t]here sits the learned judge, scribbling away—along with the prosecutor, the defense lawyers, the press, and even the defendant—while the least trained in the chamber must trust to memory. The strains of a three-week or even a three-day trial burden the storage and retrieval faculties of most jurors beyond tolerable limits."[43]

Standard 13(C) permits jurors to ask questions of witnesses while at the same time ensuring that parties are not prejudiced. Allowing jurors to submit written questions alerts the trial judge and the parties to evidence that has been misunderstood, affords the parties an opportunity to correct the misunderstanding, and keeps the jury engaged in the trial proceedings.[44] Concerns that submission of juror questions might interfere with the usual roles of attorneys and jury appear to be unwarranted.[45] The parties are protected because the judge retains the sole discretion on whether to submit the question to the witness. The procedure calls for disclosure of the question to the parties outside the presence of the jury. The parties are afforded the opportunity to interpose objections and suggest modifications to the question. After ruling on admissibility, the trial judge may decide that the question is best presented to the witness by one of the parties.

Standard 13(F) would permit jurors in civil cases to discuss the evidence among themselves in the jury room when all are present, subject to an instruction that would require them to reserve judgment until deliberations commence. Discussing evidence during trial allows jurors to clarify ambiguous evidence while it is still fresh in their minds.[46] Fears that juror discussions before final deliberations would prejudice parties appear to be unwarranted. A 2000 study conducted by the National Center for State Courts found no evidence that jurors who were permitted to discuss evidence before final deliberations prejudged the evidence or that the technique favored either plaintiffs or defendants.[47] A later study funded by the State Justice Institute and National Science Foundation determined that in trials involving more complex evidence juror discussions of the evidence improved understanding of the issues.[48]

Principle 4 expresses a strong preference for unanimous verdicts in civil cases but acknowledges that unanimity may not be feasible in all cases. A five-sixths verdict is acceptable if jurors have deliberated for a reasonable period of time and cannot reach absolute agreement.[49] The unanimity rule is currently in place in a number of courts. Our federal courts require unanimous verdicts, and at least 19 states require a unanimous verdict. Seventeen states require a verdict joined by five-sixths or seven-eighths of the jurors. Fifteen states permit verdicts by a three-fourths supermajority, and one state allows a two-thirds verdict. Empirical work has contrasted the quality of deliberations when juries operate under a unanimity rule of decision and a less-than-unanimity rule. That work finds that where juries operate under a unanimity rule the thoroughness of deliberations increases and factual discussion and consideration of legal issues are more complete.[50] Unanimity requires that the views of all jurors be heard. Concomitantly, as the percentage of jurors needed to arrive at a verdict decreases, the discussion of issues and facts may suffer. As soon as the requisite number of jurors is reached, the majority jurors are no longer compelled to hear dissenting views.[51] Principle 4 was opposed by the Task Force on Plaintiff Involvement of the ABA's Tort Trial and Insurance Practice Section, a group composed primarily of plaintiffs' lawyers. They argue that unanimity puts too much power in the hands of a single juror to prevent a verdict.[52] Concerns that the unanimity rule may produce more hung juries may be unfounded. The data indicate that in jurisdictions requiring unanimity only a few percent of juries hang, and, curiously, in jurisdictions permitting verdicts by a supermajority, juries do not reach a unanimous decision in about one-fourth of the cases.[53] In keeping with the American Jury Project's goal of seeking even-handed justice, this principle is not directed at achieving a particular outcome, by favoring either plaintiffs or defendants, but instead seeks to ensure that the process is deliberative and fair.



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Principle 3 expresses a strong preference for 12-person juries while acknowledging that they may not be feasible in all cases.[54] It has long been a basic tenet of our justice system that civil disputes should be resolved by juries made up of people who represent the community at large.[55] Twelve-person juries ensure that juries are more representative of the community because the larger composition can be more diverse. With more viewpoints, deliberations are more thorough and complete.[56] Steve Landsman, a professor of law at DePaul University and reporter for the American Jury Project, observes that the research demonstrates that smaller juries "are more likely to return verdicts at variance with testimony, evidence and the law . . ."[57] The work of various social scientists indicates that reducing the size of the decision-making group is "a recipe for increasing variance of the decisions rendered."[58] In the case of civil juries, that means that the smaller the jury, the less predictable the result. Thirty states already require 12-person juries.

Standard 10(C) works hand and glove with Principle 3 to ensure representativeness by eliminating all automatic excuses or exemptions from jury service and providing that eligible persons summoned for jury service may be excused only if they can demonstrate undue hardship or severe impairment. Minorities historically have been systematically excluded from juries, thereby skewing the representativeness of juries. For the most part, the Supreme Court decision in *Batson v. Kentucky*[59] has addressed that problem. Today, we are as likely to see that the people who are most capable of digesting complex evidence—the well educated and informed—are excluded from juries because they either refuse to serve or are precluded by statutory professional exclusions.[60] Eliminating exemptions and ratcheting down on excuses will ensure more representative juries and better reasoned jury verdicts. For example, jury reform efforts in New York have required judges, other public officials, law enforcement officers, doctors, lawyers, priests, ministers, and persons in other professional fields to serve as jurors.

The ABA Principles for Juries and Jury Trials are a strong step in the direction of restoring confidence in the jury trial and our system of justice.

Standard 13(G) encourages courts to consider other techniques that will enhance juror comprehension of the evidence, such as altering the sequencing of expert witness testimony, mini or interim openings and closings, computer simulations, deposition summaries, and other aids. Interim summations can be particularly helpful in lengthy, complex cases to help the jury focus on the significance of evidence, place it in context while still fresh, and provide cohesion as the trial progresses.[61] Sequencing expert evidence so that opposing experts testify back-to-back would permit the jury to see their differences of opinion more clearly.[62]

In the absence of clear and understandable instructions, jurors may be left in a quandary about how to apply the law to the facts. Jurors undoubtedly struggle with legal concepts and often misunderstand the correct legal principle to apply.[63] Standard 6(C) calls on trial judges to provide instructions to the jury in plain and understandable language throughout each stage of the trial. Directly following empanelment, the court should give preliminary instructions explaining the jury's role, the trial procedures (including note taking and questioning by jurors), the nature of evidence and its evaluation, the issues to be addressed, and the basic relevant legal principles, including the elements of the claims and the definitions of unfamiliar legal terms. During the course of the trial, the trial judge should provide the instructions necessary to assist the jury on the facts and law of the case. Before deliberations, the jury would be instructed on the applicable law in plain and understandable language and each member of the jury provided with a written copy of the instructions. Questions raised by the jury during deliberations should be responded to promptly and completely or the court should explain to the jurors why it cannot do so.

The ABA Principles for Juries and Jury Trials, in short, attempt to arm jurors with the tools that they need to better comprehend the evidence at trial and apply the law to it. They ensure the thoroughness of the deliberative process and the representativeness of juries. Although they do not address all of the reasons for the diminishing number of trials, they are a strong step in the direction of restoring confidence in the jury trial and our

system of justice. If the public and potential parties are persuaded that jurors reach fair and rationale decisions, will they return to the courtroom? Only time will tell. But the ABA has heard the distress signal and responded. ■

Notes

1. Chief Judge William G. Young, Address at the Spring Meeting of the American College of Trial Lawyers (Mar. 6, 2004).

2. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004). This article was originally presented as a working paper at the ABA Litigation Section's Symposium on the Vanishing Trial in San Francisco in December 2003. All of the papers presented at that symposium were collected and published in the November 2004 issue of the *Journal of Empirical Legal Studies*, and several others are referenced below.

3. Galanter's study reports a 20 percent decrease in the absolute number of cases tried in the federal courts from 1962 to 2002. *Id.* at 461. On August 17, 2005, the U.S. Department of Justice released the results of a study showing that tort trials conducted by the federal courts declined by almost 80 percent from 3,600 trials in 1985 to fewer than 800 trials in 2003. Thomas B. Cohen, *Federal Tort Trials and Verdicts: 2002–2003*, Bureau Just. Stat. Bull., Aug. 2005, at 2.

4. Based on the initial data, Galanter's study shows that civil jury trials dropped from 1.8 percent to .6 percent of all case dispositions and that criminal jury trials dropped from 3.4 percent to 1.3 percent of all case dispositions. *Id.* at 506–15.

5. Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 756 (2004).

6. *See* Thomas J. Stipanowich, *ADR and the Vanishing Trial: The Growth and Impact of Alternative Dispute Resolution*, 1 J. EMPIRICAL LEGAL STUD. 843, 846 (2004).

7. *Id.* at 848.

8. Galanter, *supra* note 2, at 517.

9. Much has been written about the burden of litigation costs. *See, e.g.*, AMERICAN BAR ASSOCIATION, ATTACKING LITIGATION COSTS AND DELAY: FINAL REPORT OF THE ACTION COMMISSION TO REDUCE COURT COSTS AND DELAY (1984); Benjamin R. Civiletti, *Zeroing in on the Real Litigation Crisis: Irrational Justice, Needless Delays, Excessive Costs*, 46 MD. L. REV. 40 (1986).

10. RAND INSTITUTE FOR CIVIL JUSTICE, COSTS OF ASBESTOS LITIGATION 39–40 (1983).

11. In the federal system, the Civil Justice Reform Act, 28 U.S.C. §§ 471–482, required each federal district court to implement a civil justice expense and delay reduction plan to "ensure just, speedy, and inexpensive resolutions of civil disputes." The Act has since expired.

12. *See* MOLLY SELVIN & PATRICIA A. EBENER, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAYS IN THE LOS ANGELES SUPERIOR COURT 46 (*cited in* Galanter, *supra* note 2, at 465).

13. Galanter, *supra* note 2, at 478.

14. As Judge Richard Posner wrote denying class certification in *In re Rhone-Poulenc Rorer, Inc* , 51 F.3d 1293, 1298 (7th Cir. 1995), "[The defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle . . . Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action blackmail settlements."

15. *See* Michael J. Saks, *Public Opinion About the Civil Jury: Can Reality Be Found in the Illusions?* 48 DEPAUL L. REV. 221, 226 (1998).

16. Shari Seidman Diamond, *Truth, Justice and the Jury*, 26 HARV. J.L. & PUB. POL'Y 143 (2003).

17. 475 U.S. 574 (1986).

18. 477 U.S. 242 (1986).

19. 477 U.S. 317 (1986).

20. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. REV. 982, 984 (2003).

21. *Id.* at 1131.

22. *See, e.g.*, The Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77–78, 18 U.S.C. § 1964(c).

23. Pub. L. No. 109-2, 73 U.S.L.W. 2485 (2005).

24. H.R. 420. Among other things, the proposed statute would require state courts to impose Federal Rule of Civil Procedure 11 on litigants in any case having an impact on interstate commerce. Rule 11 works hand in hand with the summary disposition rules to control judicial resources.

25. Miller, *supra* note 20, at 1094.

26. Markman v. Westview Instruments, Inc., 517 U.S. 370, 389 (1996).

27. Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 490 (1998).

28. *See generally* Miller, *supra* note 20, at 1004.

29. *See* Paula L. Hannaford et al., *How Judges View Civil Juries*, 48 DEPAUL L. REV. 247, 254 (1998).

30. *See generally* Marc Galanter, *A Settlement Judge, Not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. SOC'Y 1 (1985).

31. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2001); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

32. Morton Denlow, *Summary Judgment: Boon or Burden?* 37 JUDGES' J. 26, at 26 (Summer 1998).

33. Miller, *supra* note 20, at 1003.

34. Galanter, *supra* note 2, at 521.

35. Federal Judicial Center Memorandum to Chief Judges, U.S. District Courts, subject: Graphs for Panel Discussion on the Role of the Judge, Apr. 30, 2003.

36. Whether jury verdicts have increased over time is a matter of some debate. *See, e.g.*, Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321 (1986).

37. In even highly technical cases, the studies show that there is a high degree of juror comprehension of the evidence. *See* Peter H. Schuck, *supra* note 27, at 501; Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lesson from Civil Jury*, 40 AM. U. L. REV. 727 (1991); Neil Vidmar, *Are Juries Competent to Decide Liability*

in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice, 43 EMORY L.J. 885 (1994).

38. Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOKLYN L. REV. 1121, 1174 (2001).

39. Recent studies suggest that there is no difference in awards by judges and juries and that in many of the most highly publicized cases judges treat plaintiffs more favorably than juries. *See* Michael J. Saks, *supra* note 15, at 230; Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992).

40. According to a study conducted by Louis Harris & Associates, over 98 percent of state and federal judges believe that jurors try earnestly to apply the law as they have been instructed. LOUIS HARRIS & ASSOCS., JUDGES' OPINIONS ON PROCEDURAL ISSUES: A SURVEY OF STATE AND FEDERAL TRIAL JUDGES WHO SPEND AT LEAST HALF THEIR TIME ON GENERAL CIVIL CASES 79–80 (1987); *see also* Paula L. Hannaford et al., *supra* note 29, at 249.

41. *See* Shari Seidman Diamond, *supra* note 16, at 152; VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000); Phoebe Ellsworth, *Are Twelve Heads Better Than One?* 52 LAW & CONTEMP. PROBS. 205 (1989); Shari S. Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857 (2001); Valerie P. Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328 (1999).

42. G. THOMAS MUNSTERMAN ET AL., JURY TRIAL INNOVATIONS 141–43 (1997); AMERICAN JUDICATURE SOCIETY, TOWARD MORE ACTIVE JURIES: TAKING NOTES AND ASKING QUESTIONS (1991); Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121 (1994); David L. Rosehan et al., *Notetaking Can Aid Juror Recall*, 18 LAW & HUM. BEHAV. 53 (1994).

43. Fred W. Friendly, *On Judging the Judges*, in STATE COURTS: A BLUEPRINT FOR THE FUTURE 70, 73 (T. Fetter ed. 1978).

44. JURY TRIAL INNOVATIONS, *supra* note 42, at 144–47.

45. Larry Heuer & Steve Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 256 (1996); Larry Heuer & Steve Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Note Taking and Question Asking*, 12 LAW & HUM. BEHAV. 231 (1988).

46. *See* Paula L. Hannaford et al., *supra* note 29, at 261; PAULA L. HANNAFORD ET AL., PERMITTING JURY DISCUSSIONS DURING TRIAL: IMPACT OF THE ARIZONA REFORM (1998).

47. Paula L. Hannaford et al., *Permitting Jury Discussions during Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359 (2000).

48. *See* Shari S. Diamond et al., *Juror Discussions During Civil Trials*, 45 ARIZ. L. REV. 1 (2003).

49. Standard 4(A) states: "In civil cases, jury decisions should be unanimous wherever feasible. A less-than-unanimous decision should be accepted only after jurors have deliberated for a reasonable period of time and if concurred in by at least five-sixths of the jurors."

50. REID HASTIE ET AL., INSIDE THE JURY (Harvard 1983); *see also* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S. CAL. INTERDISC. L.J. 1, 40 (1997).

51. Saks, *supra* note 50, at 40.

52. Plaintiffs' lawyers contend that a less than unanimous verdict encourages defense lawyers to focus on persuading one or two jurors to block a verdict in favor of the plaintiff. They also express the concern that requiring a unanimous verdict endows a single juror with the power to disrupt the deliberations and to prevent the jury from reaching a fair and well-considered verdict for a deserving plaintiff or defendant on a counterclaim. The unanimous jury standard in their view might also give a rogue juror the power to control the discussion of damages by threatening to withhold a vote in favor of the plaintiff on liability.

53. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966); Michael J. Saks, *supra* note 50, at 39.

54. Standard 3(A) states: "Juries in civil cases should be constituted of 12 members wherever feasible and under no circumstances fewer than six members."

55. *See, e.g.*, Justice Story's opinion in *Sioux City & Pac. Ry. Co. v. Stout*, 84 U.S. 657, 664 (1873).

56. Ballew v. Georgia, 435 U.S. 223, 232 (1987) (opinion by Justice Blackmun, holding that "[r]ecent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts.").

57. Terry Carter, *The Verdict on Juries*, A.B.A. J., Apr. 2005, at 41, 44; *see also* Mark A. Behrens & M. Kevin Underhill, *A Call for Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve*, 40 CAL. W. L. REV.135, 141 (2003).

58. Michael J. Saks, *supra* note 50, at 14.

59. 476 U.S. 79 (1986).

60. *See* Richard K. Willard, *What Is Wrong with American Juries and How to Fix It*, 20 HARV. J.L. & PUB. POL'Y 483, 485 (1997).

61. Tom M. Dees, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 S.M.U. L. REV. 1755, 1779 (2001); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 22.34 (1995).

62. JURY TRIAL INNOVATIONS, *supra* note 42, at 98.

63. *See* Paula L. Hannaford et al., *supra* note 29, at 256.

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■ Coverage of the Labor Department's report on weekly jobless claims and Freddie Mac's report on mortgage rates.

Builders leave Better Business Bureau

■ Homeowners losing one option to resolve issues

By PURVA PATEL
HOUSTON CHRONICLE

Homeowners used to be able to easily turn to the local Better Business Bureau for help resolving a complaint against a builder.

They still can, but for some it's getting harder.

Some builders are dropping their membership in the Better Business Bureau of Metropolitan Houston because they don't want to use the alternative dispute resolution process, a process they agreed to as terms of their membership.

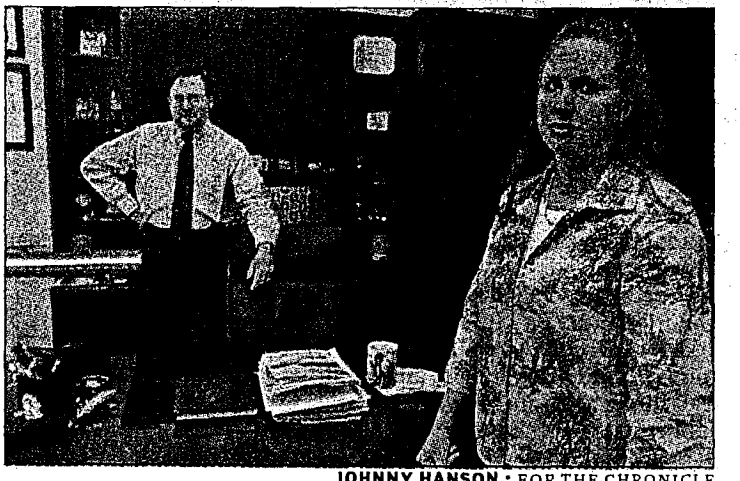
Instead, they'd rather disputes go through the American Arbitration Association or the Texas Residential Construction Commission.

So far, four major builders — Centex Homes, Pulte Homes of Texas Houston Division, Tremont Homes and David Weekley Homes — have left the bureau in the past year.

And Bay Area Builders' membership is pending revocation for not participating in the

Please see **BUREAU,** *Page D4*

LOREN STEFFY'S COLUMN DOES NOT APPEAR TODAY.



JOHNNY HANSON : FOR THE CHRONICLE

BUREAU WITH FEWER BUILDERS: Dan Parsons, left, president of the Better Business Bureau of Metropolitan Houston, and Carol Ritter, vice president of operations, handle customer complaints against local builders.

BUREAU: Group says it's affordable, accessible

CONTINUED FROM PAGE D1

agency's arbitration process.

A spokesman for David Weekley said the builder didn't renew its membership this year because it would rather potential customers research the builder by talking to other customers and the company directly, instead of using the bureau.

But bureau officials believe Weekley's non-renewal stemmed from an arbitration ruling against the builder.

Complaints on fairness

In letters to the agency, a few other builders or their attorneys took issue with the process's fairness. Some said their contracts with homeowners call for arbitration through the arbitration association or that they have to handle consumer complaints through the two-year-old commission, a state agency builders lobbied heavily to create.

The bureau was trying to force builders through their mediation process when they had another legal requirement they had to to go through, said Toy Wood, CEO of the Greater Houston Builders Association.

"I'm hopeful we can work these things out and the BBB can modify their policy to accommodate the law, but at this point I'm not sure what's going to happen," she said.

The Chronicle is a member of the building association and the Better Business Bureau.

The building industry isn't new to dealing with consumer complaints. The onslaught of consumer issues prompted the industry to lobby for the creation of the Texas Residential Construction Commission.

The bureau's process is free for consumers with disputes against members, but would cost consumers $150 to $250 for mediation or arbitration against a nonmember.

"We feel the BBB offers a cost-effective way for consumers to resolve their complaints without having to jump through hoops and deplete their resources," Ritter said.

A spokesman for the American Arbitration Association, Larry Parker, wouldn't discuss the specifics of arbitration costs, but noted potential filing fees are usually laid out in contracts between homeowners and builders.

He added that both parties must consent to the appointment of an arbitrator, but it usually ends up being whomever the builder chooses. That's because the arbitrator is usually someone with knowledge of the industry, and builders are more likely to come across the individual in the course of business than the consumer.

"Every now and then we'd get a builder who didn't want to, we'd explain their obligation and how it's better than going to court, and they'd agree and do it. Now we can't even get to the member to talk to them."

—CAROL RITTER
vice president of operations, BBB of Houston

In the August issue of *Home Builder* magazine, Wood noted the commission was created to help resolve disputes between the industry and consumers and provide accountability and fairness for both, but it could lead to overregulation of the industry.

"And although our reasons for creating the TRCC and the various associated processes were very worthy, we were creating another bureaucracy," she wrote. "While we maintain control of the commission, we must be just as vigilant with the TRCC as we are with any other agency or commission."

The commission also overrides the BBB process, builders say.

Committed to mediation

But the bureau argues that its membership contracts commit members to participate in the agency's alternative dispute resolution program, which first includes mediation and then binding arbitration.

Only those who name an alternative, such as the arbitration association, on their membership agreement and get it approved by the BBB can avoid the bureau's process.

"So far, to my knowledge, we've only done that with one homebuilder, and that was in 2000," said Carol Ritter, vice president of operations at the BBB of Houston.

Most builders have been cooperative with the process in the past, she said.

"In the past, they came on down and arbitrated the case. But lately, that's not the case. But in the past 12 months, it's like they're saying they don't need us," Ritter said. "Every now and then we'd get a builder who didn't want to, we'd explain their obligation and how it's better than going to court, and they'd agree and do it. Now we can't even get to the member to talk to them."

The bureau won't take a case to arbitration if the consumer and builder have already started another process through the AAA or Texas Residential Construction Commission, Ritter said. But she noted that going through the American Arbitration Association can be costly and burdensome for consumers.

"We do get some media criticism for it. But we have strict codes of ethics for neutrality and impartiality," Parker said.

Confused consumers

In the meantime, some consumers aren't sure where to turn.

Homeowner Dan Jurgena hoped Centex Homes would show up for a mediation so he could argue the builder should replace rotting trim in his home.

But the builder never showed and instead, canceled its membership in the BBB.

Mike Belmont, division president of Centex Homes, said the company canceled its membership last month because the local bureau's process could confuse homeowners and circumvent Texas laws governing dispute resolution between homebuilders and homeowners. The company is willing to work with Jurega, Belmont said, but not through the BBB.

"We have our process and it is something we have offered to all homeowners," Belmont said adding that "with the BBB there's just two choices: you either use their process or they revoke membership. We chose to just cancel our membership."

Jurgena says he chose the BBB because it was free and impartial. He worried going through the American Arbitration Association would take too long and potentially be unfair.

He can't go through the Texas Residential Construction Commission because he knew of defects in 1999. The state agency only handles disputes on home defects discovered on or after Sept. 1, 2003, the effective date of its creation.

"I don't know what else I can do," Jurenga said. "I don't have the money to screw around with these guys in court or arbitration, and I certainly don't have the time to waste."

Centex offered to pay Jurenga's arbitration fees, but he's not sure he wants to accept.

"If they're so willing to resolve the problem, why won't they go through the BBB?" he asked.

purva.patel@chron.com

MY OPINION

BY EDUARDO R. RODRIGUEZ / PRESIDENT, STATE BAR OF TEXAS

Reviewing a History Lesson

As lawyers, we know that our judiciary and jury system have played an integral role in our country's heritage, but it is important to reflect on why our Constitution provided for our particular system of government.

Long before the American colonies were established, the British recognized judicial independence as a protection against oppressive government. The Magna Carta of 1215 included a provision that no freeman should be punished "except by the lawful judgment of the land."

In 1776, the Declaration of Independence listed the king's act of making judges "dependent upon his will alone for the payment of their salary" high on the list of grievances justifying the colonies' revolt.

During the debates that led to the adoption of the Constitution, James Madison and Alexander Hamilton argued persuasively for the need for an independent judiciary. Madison wrote in *The Federalist*, No. 47, "There can be no liberty where the legislative and executive powers are united in the same person or body of magistrates [or] if the power of judging be not separated from the legislative and executive powers.'" In *The Federalist*, No. 78, Hamilton wrote, "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves."

From the very inception of our country, an independent judiciary and the right to trial by jury were priorities. No one summarized this better than Madison, who, when preparing the Bill of Rights, said, "Independent tribunals of Justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive."

The establishment of the judicial system, with its jury trials and independent judiciary, is at the core of our democracy. Article III of the Constitution provides for the vesting of judicial power in our Supreme Court and in such inferior courts as the Congress shall establish. It provides life tenure during good behavior for the federal judiciary and a system of checks and balances in the appointment of judges.

Unfortunately, many of our citizens will seize upon one case or one verdict and, because they disagree with it, argue for the need to change drastically how our judicial system functions. Even lawyers have offered intemperate remarks about what to do with judges who rule against their interpretation of the law. No one is against disagreeing with decisions of our courts. Indeed, freedom of speech is a bulwark of our system. What we must deplore are calls for impeachment or violence against judges because one disapproves of a court decision.

We must remind the public that the nation's founders had great vision in creating our democracy. Even though our country has gone through times of public outrage, our country has survived and will continue to survive. While one side or the other pulls and tugs at the framework of our democratic society, that framework is strong because it was crafted by men of vision.

Justice Sandra Day O'Connor, in *The Majesty of the Law*, wrote, "And so, in the end, these bedrock principles — an independent judiciary, a free press, and a mechanism that guarantees basic rights to all — work together. An interlocking framework of principles must be in place if a nation is to ensure the liberty of its citizens. Unless judges are free to enforce the law without fear of reprisal, the other principles and goals of a free society can easily become empty promises."

The boards of directors of the State Bar of Texas and the Texas Young Lawyers Association have committed to stand up for an independent judiciary by reminding civic groups throughout the state of these fundamentals of our democracy. Please join us in that effort. If you would like to make a presentation to a local civic club, the State Bar has available a PowerPoint presentation and other materials that you can adapt for your own use.

We have heard the critics and they are many. We must respond. We as lawyers — more than anyone else — are aware of the role that our judicial system has played in our history. We must remind our fellow citizens that ours is a democracy made up of three co-equal branches of government, each with its own unique role to play.

As Justice O'Connor said, "Fundamental to the Rule of Law in the United States is the role of an independent judiciary in enforcing the individual rights and liberties guaranteed by our Constitution."

As I write this, a judicial pay raise bill is on the governor's desk. The Texas Legislature is to be commended for approving a judicial pay raise three times this year. By the time you receive this issue, hopefully our judges will be paid more than the first-year associates at some of our law firms.

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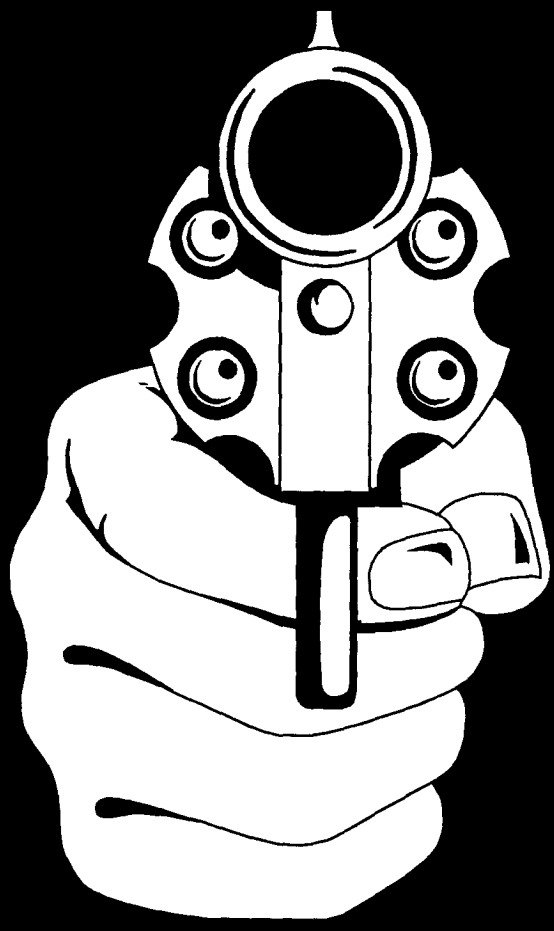

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Four indictments issued against TAB; one against TRMPAC

No TAB officials charged with using corporate cash in 2002 state races

By Laylan Copelin
AMERICAN-STATESMAN STAFF
> Thursday, September 08, 2005

The Texas Association of Businessand Texans for a Republican Majority Political Action Committee have been indicted on charges of illegallyusing corporate money to help Republicans win control of the Texas Legislature in 2002.

The indictments, released publicly this morning, include 128 counts against the business group and two against the political action committee, which was created by U.S. House Majority Leader Tom DeLay, R-Sugar Land.

The Travis County grand jury that issued the indictments, however, took no action against the Texas Association of Business' president, Bill Hammond, or any other officials with the group today.

A rare meeting among Hammond, his lawyer Roy Minton and Travis County prosecutors Wednesday might have made a difference.

If convicted, the state's largest business group faces the threat of fines — up to $20,000 for each count. But the indictments also complicate the group's defense against civil lawsuits filed by losing Democratic candidates. Damages in those suits could be double the $1.7 million that the association spent on 4 million mailers to voters in 2002.

The four indictments against the business group — two of which were issued last month and then sealed — break down the counts by different actions the group took. They include:

n 14 counts of prohibited political contributions by a corporation (TAB) for paying Hammond and staffer Jack Campbell to do political work.

•28 additional counts for fraudulently soliciting money from corporations to use in the 2002 election..

•83 additional counts of prohibited political contributions by a corporation for paying for political mailers and TV commercials.

•Three counts of prohibited political expenditures by a corporation for spending money in connection with 23 legislative campaigns.

All the counts are third-degree felonies.

TRMPAC, in the lone indictment against it, is charged with two counts of illegally accepting corporate donations, including $100,000 from the Washington, D.C.-based Alliance for Quality Nursing Home Care.

Texas House speaker candidate Tom Craddick collected that check at a Houston restaurant days before the 2002 election. He has said he didn't know the amount of the check and was just passing it along to the PAC.

Craddick, who became speaker after Republicans took control in the 2002 elections, was not named in the indictments.

At a noon press conference, Travis County District Attorney Ronnie Earle said TAB and Texans for a Republican Majority worked together in a complicated scheme to circumvent the state law banning corporate money being spent on campaign activity.

Earle said the use of secret money was "improper, illegal and unprecedented" in Texas elections.

"Such use of money to buy power that comes from illegally influencing elections endangers democracy and imperils the public," Earle said.

Lawyers for TAB and Texans for a Republican Majority were expected to respond later today after reading the indictments.

Last fall, a separate grand jury indicted three officials with TRMPAC. That committee spent about $600,000 of corporate money on committee activities, including sending $190,000 in corporate donations to the Republican National Committee which, in turn, donated the same amount of non-corporate dollars to Texas candidates.

The grand jury indicted the committee's consultants, John Colyandro of Austin and Jim Ellis of Washington, D.C., on charges of money laundering. A third official, Washington fundraiser Warren Robold, was indicted on charges of accepting or making corporate donations.

The indictments also name lobbyists Mike Toomey and Eric Glenn as individuals who assisted the TAB Board of Directors in its spending, though neither one is charged with any wrongdoing. Toomey later served as Gov. Rick Perry's chief of staff.

State law forbids spending corporate money on campaign activity, but TAB, the state's largest business organization, has contended that its mailers did not advocate the election or defeat of any candidates. Corporate money can be spent on issue ads.

Minton said he and Hammond met with prosecutors Wednesday, outside the grand jury's presence, to try to head off criminal charges against the organization or its officers. Minton said he was unaware of the sealed indictments at the time of the meeting.

He said Hammond explained how the association was organized and how it spent about $1.7 million in corporate money, mostly from insurance firms, to educate voters about issues with mailers.

"I think he did a good job," Minton said of his client. "He told them there was never anything he did that he didn't run by (his lawyer) Ed Shack."

Shack specializes in campaign finance law.

For almost three years, Earle, a Democrat, has been investigating whether TAB, along with Republican allies, illegally spent corporate money to finance the GOP sweep at the polls.

Speculation has escalated in recent weeks that Earle's investigation is wrapping up because time is running out. Under state law, prosecutors only have three years from the 2002 campaign to conclude the grand jury inquiry.

In 2002, Republicans won an unprecedented legislative victory, claiming a majority in the House of Representatives for the first time in more than 100 years.

Hammond, among others, claimed credit.

In a TAB newsletter, Hammond boasted that the organization "blew the doors" off the election by using its "unprecedented show of muscle."

Hammond's comments in news reports prompted Earle to begin his criminal investigation and emboldened losing Democratic candidates to sue both TAB and Texans for a Republican Majority.

Earlier this year, Travis County District Judge Joe Hart ruled in a civil lawsuit that the GOP political committee violated the state ban against corporate spending on campaign activity.

TAB has refused to identify the 30 or so corporations that underwrote its mail campaign. But TAB unintentionally disclosed 20 corporations, mostly insurance companies, as donors, in documents it was required to release as part of the civil suit. Additional donors are listed in the indictments, including the Alliance for Quality Nursing Home Care and the American Health Care Association, sister organizations that together gave $300,000, the largest single corporate contribution to TAB.

Since the 2002 election, the Republican-controlled Legislature has refused to raise business taxes for public education and aided the insurance industry by curbing lawsuits against business.

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Doing the "Right Thing"

by Marc E. Williams

DRI Board of Directors

I have always been troubled by the plaintiffs' bar's confiscation of the "trial lawyer" moniker. Not only has it developed a negative connotation in many circles, but it creates mistaken impressions in the minds of non-lawyers. We defense lawyers who try cases are inevitably lumped in with the plaintiffs' bar on issues regarding our legal system, and many times I have to explain to friends that I too have concerns about the prevalence of litigation in our society.

Recently, I was asked a pointed question by a colleague who is a plaintiffs' lawyer. We were discussing civil justice reform and he asked, "Why do defense lawyers advocate the repeal of billable hours?" His inquiry was typical of many in the plaintiffs' bar who seem to couch civil justice reform issues only in economic terms. My response was that if defense lawyers advocate reform to the system that could result in less litigation, it is because it is the right thing to do. But the question posed by my colleague raises a more substantial question facing DRI and its members: What should our role be in this national debate on our civil justice system?

Last month in this space, DRI President Richard Boyette wrote of the tort reform debate in this country and warned that the discussion should be substantive and informed, and not consist solely of media sound bytes. His concern is well-founded. At no time in our history has there been this much public discourse about civil justice issues. President Bush has made tort reform a priority for his second term. Congressional Republicans have sought to pass a statutory version of Rule 11, with harsher penalties for forum shopping or filing frivolous lawsuits. Congress passed class action reform and the President signed it into law. Most states are debating statutory changes or ballot initiatives that would alter the substantive and procedural rules that govern civil actions. Business interests and plaintiffs' lawyers are spending millions in an attempt to gain an edge in the outcome of this debate. So where does DRI fit into this discussion?

I like to think that this national debate is a perfect opportunity for DRI to truly show that it is the "Voice of the Defense Bar," by speaking out on those issues where there is a consensus among our members. But what are those issues? Damage caps? Joint and several liability reform? Punitive damage reform? And on whose behalf should we be speaking? Our membership? Our clients?

In his book, *The Rule of Lawyers*, Walter Olson argues that big money litigation has created a new economic class of plaintiffs' lawyers that can plow the riches earned from these cases into influencing the election of judges and legislators. While not sparing the rod in his criticism of the plaintiffs' bar, Olson also points out that DRI could and should be doing more in this debate:

> DRI regularly, if quietly, sends officials to legislative hearings to testify against proposed curbs on litigation, right alongside the witness sent by its supposed opposite number, ATLA. A lawyer/commentator in DRI's magazine *For The Defense* notes that the organization has "always taken the position" that "the basic principles of the liability reparation system are sound." Indeed, the casual reader perusing DRI's literature might sometimes find it easy to confuse DRI's point of view with ATLA's.

I think Mr. Olson is wrong. Developments over the last decade have required DRI to critically examine the civil justice system. On those occasions when we do take a position on an issue, it is because there is an aspect of the system that needs to be changed in order to ensure a level playing field for all litigants. We advocate this change not because it is in our members' financial best interest, since most civil justice reform has the potential to result in less litigation. Likewise, we are not taking these positions in order to please our clients. We do this because it is the right thing to do.

But doing the "right thing" is not very helpful in deciding when and where to engage in this debate. We need something upon which to focus when making that decision. Ultimately, our focal point in choosing which civil justice issues to address will be driven by the extent to which the issue impacts the jury trial as an institution.

We live in an age of mandatory mediation and mass litigation procedural rules that are diminishing the role of the jury trial, and correspondingly, the civil trial lawyer. I fear that our system is transitioning away from its traditional role as a mechanism to resolve disputes with the aid of trained advocates, and is moving towards a claims handling system that does little more than legitimize wealth transfer and in which advocates are not needed, if not discouraged.

Ultimately, the future of DRI and its membership is dependent on the preservation of the jury trial as an institution. As a result, we have the unique opportunity to be advocates for more than just the economic well-being of our membership. Our foremost duty is to ensure that jury trials remain part of our civil justice system. We are the voice for the jury system and for all who seek to preserve it. That is our focus, and ultimately, it is the key to DRI's continued success.

Round Table Discussion

Jury Service and The Jury System

All-star litigators, judges and corporate counsel debate the strengths and weaknesses of the jury system

Round table Participants:

MODERATOR

Randall O. Sorrels of Abraham, Watkins, Nichols, Sorrels, Matthews & Friend is the president of the Houston Bar Association. He is Board Certified by the Board of Legal Specialization of the State Bar of Texas in both personal injury and civil trial and represents plaintiffs in both commercial and personal injury litigation.

Brad Allen of Martin of Disiere, Jefferson & Wisdom is the 2005-2006 Editor-in-Chief of *The Houston Lawyer.*

Dick DeGuerin of DeGuerin, Dickson & Hennessy practices primarily in the area of criminal defense, both trials and appeals, in the state and federal courts, along with some civil work. He is Board Certified in criminal law.

Lyn McClellan is Assistant District Attorney for Harris County. McClellan has been a Harris County ADA for 24 years, his entire legal career, and is one of six Bureau Chiefs in the office.

Hugh Rice Kelly is currently the General Counsel for Texans for Lawsuit Reform and is a former General Counsel for Reliant Energy and a former partner at Baker Botts, L.L.P. At Baker Botts, Kelly handled both personal injury and commercial cases and was Board Certified in civil trial.

Dale Jefferson of Martin, Disiere, Jefferson & Wisdom is in charge of the firm's trial and commercial litigation section and practices on both sides of the docket. Jefferson has handled numerous high profile lawsuits and has appeared on CNN, Dateline, Good Morning America, and the Oprah Winfrey Show.

Gaynelle Griffin Jones, Litigation Counsel for Hewlett-Packard Company, has a docket that involves intellectual property, commercial litigation, and consumer class action cases. She has been a judge on the First Court of Appeals in Texas and United States Attorney for the Southern District, as well as a state prosecutor.

The Honorable Elizabeth Ray, Judge of the 165th Judicial District Court, Civil Division, Harris County, has been on the bench since 1992 and has been Administrative Judge for Harris County for four years. Prior to the bench, Judge Ray practiced approximately 14 years as a civil defense lawyer. She is Board Certified in civil trial.

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SORRELS: Why don't we talk first about statistics as to what percentage of people are showing up for jury duty here in Harris County.

JUDGE RAY: As we all recognize, there is a problem because it's such a low percentage of turnout of the people who are called to serve on juries; and, so, we've been wrestling with this for a very long time. In fact, we commissioned a study three or four years ago from an expert in the field to look at what are we doing wrong, what are we doing right, and how to make it better. We actually have a pretty good system. It's somewhat unique in terms of the way the rest of the country does it, but turnout is still low, which, in turn, is causing objections to jurors and to jury panels.

SORRELS: Of the people that have been charged with a crime, the statistics show that 50 percent or more are minorities. What do you see in your jury turnout, and how does that affect your approach to a case?

DeGUERIN: What we see is that generally the higher someone is in the socioeconomic scale, the less likely they are to show up. And whether that's because of other important things they think they have to do or because they don't have as much respect for the system, I don't know what the root cause of it is. The other end of the spectrum is also not likely to show up. If you get somebody who is in and out of trouble, they're not going to come in response to a jury summons. Of course, if they have a conviction, that disqualifies them. If they can read the jury questionnaire, then they won't be there. But what that does is it kind of narrows down the jury pool to the middle of the socioeconomic scale. I don't know whether that's a bad thing at all. When you get to age, that's another factor, I suppose, that shows the lack of turnout. The younger folks don't come; and the older folks, who, of course, are exempt if they're of the right age, don't come. And, again, I don't know that that's a bad thing because it gives you the middle of the spectrum.

I like the panels that we get in Harris County. I think that probably where minorities are concerned, we get a smaller turnout of those summoned than we should. That presents a problem sometimes if you've got a client who's on trial who is a member of a minority and you want somebody that can empathize with them, and you just don't get enough people. The prosecution can find some reason to strike them, and they do. So if we've got a black client, we don't have a very good chance of getting very many blacks on the jury.

SORRELS: Lyn, let me give you a chance to sit across the table from Mr. DeGuerin, as you have in the past, to

respond a little bit from what you see from the prosecutor's office.

McCLELLAN: One of the reasons people don't come for jury service is that some of it is economic. They can't afford to be off. In other words, if you're working an hourly wage and if you don't get paid by your employer, you're not going to come down for jury service and then be told that you're not going to be used and be sent home, just lose eight hours of work or whatever. Other people don't come because I think they just don't care. They really don't care about the system, or what's going on. And I think both sides really are looking for somebody that is somewhat what I call a stakeholder in the community. In other words, if you have a stake in the community and you live in the community and you want it to be good, then I think both sides benefit from the people who have a stake in that situation. I think a lot of people confuse a "jury of my peers." That would mean, I guess, I should have a jury of 59-year-old lawyers who live in North Houston. No, I don't think that's what a jury of your peers means. I think there's a cross section that you have to have, and sometimes you're prevented from getting a cross section because the people don't show up. If the low economic end of the spectrum doesn't show up, then you're going to lose a lot of minorities in that regard. If the high end doesn't show up, then you're going to lose a lot of professionals in that regard. But I agree. I think getting the middle of the pack, which are people that probably have some stake in the community, is not a bad situation.

SORRELS: Hugh, I think your organization is addressing the jury system in a different way.

KELLY: Well, let me sort of give you my own view; and, that is, that if you've tried cases, you'll never shake the view that you want a jury. Now, that's really my view. I'd much rather have a jury than a judge. And if a jury is selected and impaneled properly and the case is conducted well, I have always thought that you'd get a better result than any other way I know. So, I'm confident that we're in favor of the jury system. The real question is: Can we get people in there that will listen to the case and do a good job? Therefore, our approach has tended to be issue oriented. For example, we filed a brief recently in the Supreme Court in *Hyundai Motor Co. v. Vasquez*, where there's a case pending that has to do with how the voir dire is conducted. We don't believe "commitment" questions should be permitted. These are questions that give the jurors a sound byte of three or four selected parts of a case eloquently spun from the standpoint of the questioner, to try to nail people the questioner thinks will not be good for his client. And, of course, every trial lawyer is not interested in a fair trial; trial lawyers are interested in their clients prevailing. And, so, the fact is we think that, for example, that kind of question shouldn't be permitted. There have been some other kinds of issues where people say we're not in favor of the jury system because the juries don't have full range to do things. For example, in the medical cases, where the Legislature put a ceiling on non-economic damages. I certainly don't think ceilings on damages as a general rule are a good idea; and it's only a good idea if there is something terribly wrong with how some lawsuits affect society as a whole. So, that's sort of the short version.

SORRELS: Let me ask you, Gaynelle, you have a lot of complex cases in which you may be on either side, depending on who gets to the courthouse first, such as intellectual property issues, patents, and sophisticated business disputes. Do you believe that the jurors that do show up are the best people to hear complex

technical cases, and how do you approach those situations?

GRIFFIN JONES: I think that for a company like HP, at least in my experience, we don't take advantage of the jury system for complex litigation. The stakes are often too high financially. I think that also may be partly due to the fact that not everyone in our society is participating in the jury system. I think in the ideal world, if we had the higher end, as well as the lower end of citizens showing up, people who are businessmen and women who understand the impact, actually showed up on jury duty, it might be a different result. I'd just like to quickly comment, though, because the first question asked was, "What do you think about the jury system"; and being a student of the Constitution in college, I think it is by far one of the most important things we have in a democracy. We fought for 200-plus years. At the beginning of the system, only white males with property could serve on juries. We're almost getting back to a point where only white males with property come to jury duty. And I think that the struggle with jurisprudence over the years, to open it up to minorities, African-Americans, to women, to make it more representative, that is really our goal. And I think our system would work better if we, in fact, had people that appreciated the importance of jury duty show up for jury duty. We could have the kind of dialogue we really want in the jury room, that many of us as lawyers are afraid to risk in the jury system the way it exists today.

SORRELS: Dale, you do defense work representing a lot of lawyers, and we've all heard that jurors often do not like lawyers as defendants. Do you find the jury system is intimidating for you and your lawyer clients?

JEFFERSON: Well, I have a couple of thoughts. I think, first of all, the biggest misconception that jurors have is the fact that they get selected to be on a jury. When I've been asked to speak on this issue before, I generally will ask for a show of hands and say, "How many of you people here have been picked to be on a jury before"; and all these people raise their hand. And then I say, "Well, you weren't picked to be on anything." The fact of the matter is we don't pick juries. We get the first 12 leftovers. Both sides get their strikes; and the first 12 people that either are flies on the wall or otherwise don't get picked; by default, those are the people that wind up on the jury. You don't get picked; you get not selected. And, so, from my perspective, there is that delicate balance between, the overall notion of we need to preserve the integrity of the process, while simultaneously recognizing that no matter what side that we're on, whether or not our client is a lawyer, an individual or a

corporation, the fact of the matter is, as a trial lawyer, you know, we are duty bound to zealously represent our client; and certainly we want to take as much advantage that we can, during the voir dire selection process. Because, once again, we're not there to pick anybody; we're there to pick up the leftovers from those who we strike. And, certainly, I think there are some unique challenges when you represent lawyers in legal malpractice cases and the like; because I think there's a perception out there that there is a different set of rules in the mind set of the jury that, well, if I was judging the standard of care of another individual, I would hold one set of views; but since this is a lawyer, even subconsciously, I think jurors hold a different set of standards.

SORRELS: Gaynelle, you have been on all sides of the docket, done criminal work, civil work, and complex litigation. What are your thoughts on how we get a more diverse group of people to show up for jury duty, whether it's sending out the sheriff, which was probably done at one time when you were a judge, although not that much anymore.

GRIFFIN JONES: I think it's a long-term type of approach. I think today what we might be able to do versus what we may be able to do over a long period would be a little different. Part of the reason might be lack of understanding about the importance of jury duty and how critical it is to citizenship. Democracy is not a spectator sport. It's participatory. So, I think we have to educate the community about the importance of jury duty. The apathy that we see both in the courthouse and in the voting booth is evidence of the fact that we aren't getting this message across. I think there are some financial hardship issues and maybe some language barriers. There may be some logistical problems in terms of such a large county, and people are afraid to go all the way downtown and don't really know what jury service is all about. We should start long term doing some public service announcements and targeting our schools. We can use our Law Day program and do some things to get across to citizens that you need to be willing to serve on juries. I think that the average person has heard on the late night shows and even among lawyers the expression "You have got to be pretty stupid if you don't know how to get out of jury duty." People chuckle about it. We have to start changing that mind set plus include a little bit of enforcement, as well, in terms of consequences if you don't show up.

KELLY: I have one point we didn't touch on. Back when I was with Houston Lighting & Power Company, our experience was that people moved on the average of every two to three years; and it is hard to know what the current address of somebody is. I'll venture that a large percentage of the no shows never got their notice.

SORRELS: The District Clerk's Office says it has about 12 percent wrong addresses for people.

JUDGE RAY: I don't know the most recent numbers of returns. One of the things we've been doing from the judicial standpoint is trying all different kinds of things like providing online procedures, so you don't have to come down. You used to have to come down or at least call. Many times the call system didn't work, you got put on hold forever, and people just got frustrated and hung up. The new Harris County Jury Assembly Room is going to be a huge help in this regard because when you come out for jury service, if you're uncomfortable, if you can't get to your computer, if you're going to be stuck somewhere and you can't get to a phone, if you can't figure out how to get there, or even what the location is; you know, all those things cause people to say, "Well, I'll go next time."

SORRELS: Let's talk about sending the Sheriff out for a roundup.

JUDGE RAY: That was Judge Shearn Smith's approach; and he comes back from time to time as a visiting judge and makes fun of us for not arresting people. Just call me a cream puff; but I think the way you do it is not necessarily by punishing, but much more by encouraging. I think that's why we have to increase juror pay. Many people can't afford jury service. I think the second thing is we have a very strong responsibility to use them quickly and efficiently or release them. Putting them in the hallway and standing them up for hours, that's just judicial nonsense.

SORRELS: Does the District Attorney's office have any sense on the reason people don't show up for jury duty?

McCLELLAN: Well, I don't think either side of the Bar wants people there who don't want to be there. That's not going to be a good jury for either side. Somebody who, has been arrested and brought in is not going to be receptive to either side of the situation. Now, about the only thing you can do there, if you're going to arrest them and bring them in, is to have them sit there and watch the trial during the whole period of time. I sure don't want them in there voting one way or the other, and I sure don't want us to go out and arrest them, you know, as the D.A.'s office. So, that's not going to work.

JEFFERSON: They'll be prosecuted by you.

McCLELLAN: I kind of like Dick DeGuerin's idea that it's a natural selection process, that people who don't care just don't show up. If they don't show up, if they don't care, we never got to talk to them; and we don't want them anyway. They're always going to be able to figure out a way to say something. Half the time a guy that's getting ready to go to jury duty will talk to a lawyer and say, "What can I say to get off?" What can I tell him? I've had neighbors I would love to have as jurors; and they're saying, "How can I get out of jury duty?" You shouldn't be trying to get out of jury duty. You ought to be trying to come down and participate in the process. Because if the only people who show up are the people who don't care, then that's who's going to be making the decision. Well, that's a bad situation.

SORRELS: I've seen a lot of jurors show up unwillingly. They thought it was their responsibility; they thought there was a fear of being arrested or some other penalty would occur. After they get picked and serve on a jury, they say it's one of the best experiences that they've ever been through. With that being one of the issues, maybe if we could just get people to show up, they'll find it's not such a bad experience; and maybe if there's some arm-twisting, that might help the whole system.

GRIFFIN JONES: I think you're absolutely right. The studies seem to indicate that once you serve and participate on a jury, you have greater respect for the system. I think that's critical if you're going to have buy-in in the community on the civil and criminal justice system. I think we have had in our history — I recall the Rodney King case where the community in the first verdict did not believe that jury verdict was proper. I think the problem with letting whoever wants to show up be on the jury in the long-term will result in people deciding or realizing if they don't have to show up, they won't show up and nobody's going to come to jury duty. You don't have to arrest them, necessarily. There are other incentives – fines, for instance. It has to be approached from a sort of a molding process to get the message across how important it is and that can be done in a variety of ways.

SORRELS: Are there any other counties whose approaches you like or dislike?

DeGUERIN: Judge Ray mentioned that we're considering going online. I tried a case in Austin a couple of years ago. Austin has an online response to jury summons, and they get a large response up there. I don't know if there's been any comparative studies. (Austin's) jury questionnaires are done online. You can complete it online or bring it in when you come. That kind of encourages it. I said that it is a preselection process, and I think it is. But you're right, Judge Jones, that if people get the word out that there's no consequence to not coming in, then who's going to show up at all? I think we need to encourage citizens that care about their community to show up. How we go about doing that, I don't know the answer.

JEFFERSON: To your particular question about other jurisdictions, what I have found in smaller jurisdictions is a greater willingness to allow the use of jury questionnaires. The biggest negative about the entire trial process is the rush, rush, rush mentality of we have to do everything quick. Well, I know these are some important limine issues; but we have 48 people sitting on a hard bench out in the hallway, and we've got to get moving. If we could do a better job and have more willingness to allow questionnaires to be used as we transition into our newer facilities and the like, then we could make it a smoother process. At the end of the day, no matter which side of the aisle you may be on, civil case, criminal case, what all of the lawyers want is as much information that they can get. What the trial judge and the voir dire panel don't want, understandably, is their time wasted. One of the biggest wastes of time that I ever see is a jury shuffle. That's just a disaster. You got to renumber everybody, so go back out into the hall. I'm sure everybody in here knows this, that under Texas law, if you use a jury questionnaire, then that counts as your jury shuffle. So, the utilization of a questionnaire automatically eliminates one of the biggest time wasters that you ever see, and that is the jury shuf-

fle. And I think more and more with the advent of online information and the other information that we already have to share in terms of pretrial orders and the like, that we should consider coming up with a standard questionnaire that is approved by the trial judges. If the lawyers want to go beyond that, they can, to the extent that they agree on it. If they can't agree on it, fine, we'll use the standardized questionnaire; because more information in a democracy is never a bad thing.

DeGUERIN: If you walk into the court room and your jury panel's sitting there, and the first row looks like the grand jury and the last row looks like your guy, you want a jury shuffle.

JEFFERSON: That's right. Of course, you only get one shuffle.

DeGUERIN: That's true, but questionnaires can be extremely useful to both sides. Whenever I've had a questionnaire and the prosecutor has given us some resistance on getting a questionnaire, invariably when the whole process is over, they've said, if they'll be honest about it, "I got a lot of information out of that. That helped a lot." I don't think it replaces voir dire, and I don't think it should. I think that a standard questionnaire is fine, but you need to fit the questionnaire to the facts of the case. It's very helpful.

JUDGE RAY: I have a suggestion, because I think questionnaires can be very valuable. Judges are thinking, "How am I going to manage this time wisely?" I have got these typically big panels maybe 60 jurors sitting there, and now they have got to fill all this stuff out. You can't just hand the completed questionnaires over to a lawyer; you have to give them time to digest whatever responses the jurors have made. You have to send the panel away, which means you have got to bring them back. That means 60 people are going to be mad at me, the lawyers, the system and the parties. That's not going to work. So, my suggestion is: this can be done electronically. You can do jury questionnaires in a way that they can answer them electronically. That data can be zapped over while they go to lunch. Your computer guys could key in whatever buzz words you're looking for and analyze all that, and we can all be back in an hour; and then we don't lose a whole day. A lot of times it's a weekend, because you'll impanel them on a Friday and bring them back on a Monday.

DeGUERIN: The problem is that's another pre-selection process, because a lot of people don't use computers.

JUDGE RAY: We can provide them with computers in the jury room. I'm guessing the civil lawyers in particular would help fund that effort since it would save them so much attorney time.

DeGUERIN: I know, but a lot of people can't turn them on. That might be another selection process. So, what's wrong with hav-

ing the jurors come in on a Friday, fill all that stuff out, give them to the lawyers to have over the weekend, and have them come back. So, they come back. It impresses on a juror, "This must be an important case. We're going to have to come down twice to do this." So, they're going to be paying attention.

JUDGE RAY: You know, Dick, I don't think on the types of cases that you're dealing with, basically everybody in this room is dealing with, it's probably not as big a problem; and I do it pretty routinely on my big cases. But if you're talking about a jury questionnaire as a routine, basic, every-car-wreck, every-whatever it is you do in a small world, we can't manage that because we can't manage the jurors. And, regardless of the size of the case, judges are responsible for the correct use of jurors' time.

DeGUERIN: I agree. And I think the realities of cases and the caseload that the courts have would take care of that, because not everybody's going to want that. It's only going to be the exceptional case that wants jury questionnaires.

GRIFFIN JONES: If you're trying any kind of case and you could have a jury questionnaire, you're probably going to want one. I'm concerned, however, about privacy issues. If we're looking for ways to have more participation in jury service, there's a lot of people in our community that need to understand that they're going to be filling out questionnaires electronically; what's going to happen to that data, how secure is it going to be, and all kinds of things. In this day of identity theft, it's just one other reason why somebody might decide they don't want to show up.

McCLELLAN: We do individual questionnaires on all capital cases. We go through and ask maybe 200-250 jurors, and jurors are concerned about what's going to happen to that questionnaire. The procedure in Harris County is that these questionnaires are taken and destroyed afterwards, because, they're putting out a lot of information. Some jurors are offended by too much.

SORRELS: Are there any specific examples of abuses in the jury selection process that you've heard and want to steer us away from?

KELLY: You hear that in certain jurisdictions in the state, people don't believe that they're getting a fair draw out of the county. Now, that may be just superstition, but most of the defense lawyers say you can't get a fair trial in Beaumont. A lot of defense lawyers don't believe that the jurors are being fairly drawn to the courthouse. Some believe that the clerks are telling defense jurors that they don't have to show up. That's

probably just a myth. Still in all, defense lawyers don't like to be in Beaumont, and they don't like to be in the Valley. They feel like that no matter what happens, they're going to get a jury that's not fair. That's what you really hear is the problem. You do see some isolated judges in the state who have such freewheeling voir dire and dismiss so many jurors that, at the end of the day, after you take away all the strikes and all the other things, the people that are left are people who have no opinions and no stake in society, who don't care how the case comes out, and are easily led. Let me say I've never had that experience in Harris County. I'm telling you that, for Houston Lighting & Power we had good juries every time, and we tried more than 30 cases to a verdict over the past twenty years.

SORRELS: You mentioned the medical malpractice, and Lyn has mentioned the capital murder cases. How do the Texans for Lawsuit Reform answer the question, that while we have a jury that can take the life of an individual, they shouldn't be able to decide the amount of damages an injured malpractice victim should be awarded?

KELLY: It's the same answer as why we have workers' compensation law, which has the same effect. The workers' compensation law cut off the damages completely, except on a schedule; and the reason was not that it was fair, but that it was necessary; because, otherwise, it disrupted the industry, the workplace, too much. The report from the health industry – and they had their statistics and other people had their statistics – but if you believe; as we did, the health care industry, that they were really suffering badly and it was because of excessive verdicts; and if the choice is no medical care in the Valley for most people or medical care in the Valley but limitations on lawsuits, you've got to choose. We were not in favor of, and are not today in favor of, the practice of putting ceilings on damages arbitrarily until there's some completely unrelated issue that says it's the appropriate societal decision.

JUDGE RAY: The proper role of a jury is to do what? What kind of limitations are we going to put on that proper role? I think that's why people who are troubled by tort reform are troubled by that, because it chips away at the role of the jury. It says you cannot go beyond this or that limit. Who sets the limit?

DeGUERIN: The right of the jury and the right of the litigants.

JUDGE RAY: Exactly. It's debating why tort reform happened in the medical area and whether it's proper or not; I think what's troubled a lot of jurors, juries and lawyers is whether this creates a precedent. If you start with medical malpractice, what about some other cause of action or some other group of defendants? All of a sudden we won't need the jury system anymore because everything will be regulated and statutory. I feel fairly

strongly that this is not where we want to go. I don't know specifically about the medical malpractice area; I can't speak on that. If, however, we are in the process of setting a precedent of routinely limiting full jury participation then that troubles me. I want to make sure that our juries not only get the full and complete facts from both sides of the table, but that they are empowered to do, within reason, what the federal and state Constitutions mandate that they are empowered to do. We don't need to and should not take that away from them.

SORRELS: Gaynelle, is there a position or angle that one of the major corporations in our community has on this issue of what we should allow juries to decide or not decide?

GRIFFIN JONES: Well, not from a corporate policy standpoint. Obviously, we do look at each case differently. We're all over the country and the world and each jurisdiction is different in each case. When dealing with a product class-action case, we've had some success in trying these cases before a jury in some jurisdictions. In other jurisdictions, we're a little less likely to want to go to a jury. So, I think we look at each situation and our facts and so forth. We're certainly concerned with the bottom line, as would be any company in making sure that we don't run into a situation where we're putting ourselves at risk of a huge verdict that's not supported by the evidence.

ALLEN: I want to give everyone a chance at some closing thoughts. And as part of the closing thoughts today, you may or may not want to address what message you would send to the HBA members that are going to read these comments. What would you instill in them to support the jury system or impact the things that have been discussed today?

JONES: I think we all, as lawyers, recognize that we're officers of the court, and we should stop and think about the importance of the jury system and if we think it's important, which I happen to think it is. I think it's a critical foundation for democracy. So, to that extent, I think as lawyers we need to do what we can, where we can, as often as we can, in conversations, as well as in participating in Bar events, to encourage citizens, old and young, that our system just wouldn't work without it. We need to be advocates for that and work with the courts to make sure the system works. It will help all of our cases if more people show up for jury duty, and I mean across the board, and whatever we can do individually and collectively. There's a lot. We need to think about it and start working towards making sure the jury system continues.

McCLELLAN: I think jurors, once they've had the jury experience, are grateful for having participated in the process. They learn a whole lot more about the process by being in the system. If they pass that information on to others, then I think that's a great way of getting out the information. People always question everybody, "How can I get out of jury duty?" What we have to impress

upon people is that if people like you, me, or them don't come down for jury service, then who's coming down and what right do you have to complain about this verdict or that verdict or what did they do down there or what are they doing now? It's on us. So, everybody needs to participate. It doesn't take a long time. We need to be more respectful of their time, such as waiting in the hallway. I thought it was kind of odd that when Harris County was building the jury assembly room they charged jurors to park. Why are we charging them to park? People shouldn't have to spend their own money to come down and do their civic duties. The rate has gone up to $40 a day. I think you have to continue for a second or third day before you get that parking money back. That's at least something. It shouldn't cost you money to be on juries. That's one thing we can try to do to bring in more people.

JEFFERSON: We're seeing a trend more and more away from trial by jury and into arbitration, and, provided that that's done in an arms-length business fashion, I don't have any problem with that. When it comes to juries themselves, I think that, as lawyers, we need to recognize that we have become a society of instant experts where most of the citizenry get their opinions from the talking head-instant experts on TV talk shows. The bottom line to that kind of stuff is that both jurors and the jury system and lawyers are a popular target on the talk show circuit. We need to be vigilant to stop the degradation of our profession in general and the trial-by-jury system in particular to attack by hyperbole where a McDonald's coffee case in New Mexico, which was significantly reduced in damages, all of a sudden becomes a rallying cry for the need for change in Harris County, Texas. The fact of the matter is that during the course of our meeting today, we probably had some soldiers in Iraq who died defending this American jury system for the Iraqi people who are dying who want this system. We have nothing for which to apologize for practicing the craft that embraces this system.

JUDGE RAY: I think you're very eloquent.

DeGUERIN: How do you follow that?

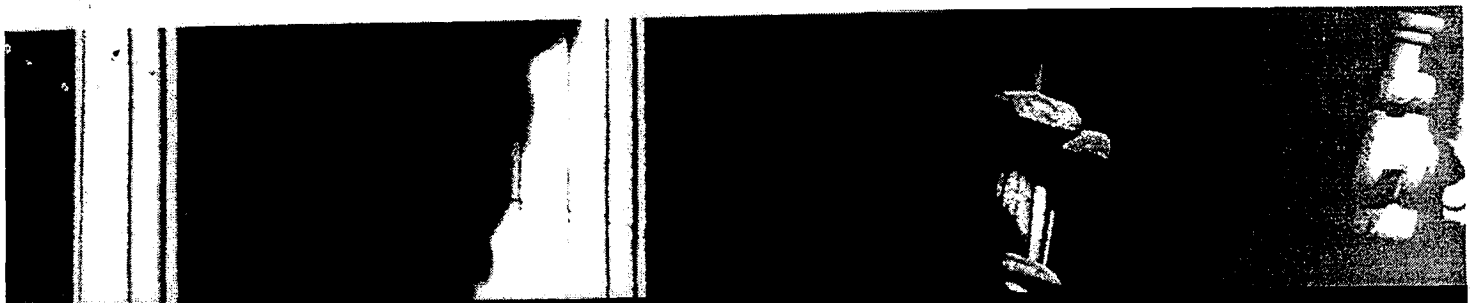
JUDGE RAY: That's actually one of my favorite topics, which is we should not apologize for being lawyers. We should not apologize for defending the Constitution. We should not apologize for what we do. I echo what you say about what's going on in New Mexico isn't going on in Harris County. I agree with all of that. I think my particular answer to the question is we have to start early. It goes back to civics. One of the most important things we do at the courthouse is — and we do it almost every month — is we have classes come through; and we split them. We send half to the criminal side, half to the civil side. Then an hour later we switch. And we have them sit as potential jurors, as the judge; and we walk them through mock trials. We do that all

year long, every month. The reason for that is to educate the children. This is an interesting system, and you can be involved. It goes back to being involved in your government. It's your government. You've got to run it. I think maybe that would be my unique answer to "How do you get people interested?" I think you start when they're very young.

DeGUERIN: Education of the general public on the importance of the jury system is very important; and we, as lawyers, can do that. Probably only five percent of the lawyers in Harris County have ever been in a courtroom. So, whom we're talking to in our journal are those lawyers, for the most part, that don't know much about the jury system. They need to know. They need to tell their friends and neighbors and those that come to them and say, "Can you get me off jury service?" "No, I can't. Maybe you've got something to do you can get postponed for a couple weeks, but you ought to go do it." And "Try it; you'll like it."

KELLY: I would suggest that we need to communicate to the people in a way we know that works, and we've got to talk to people. You can't lecture them or send them a letter. Somebody's got to get on television. We should get the Houston Bar or somebody on there to talk about serving on the jury. Because, as you said, Randy, once people have been through a well-conducted trial, they're usually inspired by that. They see that it was useful and that it's a good thing. They're proud of it, even if they were sort of forced to be there. Most people look on it as being a potential ordeal where they're going to waste a ton of time, be bored to death, and, at the end of the day, be sent home. The judges in Harris County have worked for decades to try to reduce the down time, but it's hard to do. We probably do a better job than just about everybody for doing it for a massive court system. If we can tell the folks through television that serving on a jury is significant, meaningful, and attractive, and that they'll be recognized and not have their time wasted; if we could do that in the same medium that all the advertising lawyers are using, we may find that we can get our message through. We're not going to get it through letters and civic lessons that are boring. If we do it right, however, maybe the people would be a little more responsive.

SORRELS: Let me give a plea to the lawyers of the Houston Bar Association, that if they have more helpful ideas than the eight of us sitting around this table can think of, we'd love to have those ideas. Mayor White has recently recorded a public service announcement for jury service and if any of our lawyers have clients who would be a great public service announcement spokesperson, that would be recognized by the community, that would be willing to come out and talk about the virtues of the jury system, we'd love to have a different PSA that could be used to help generate public interest in jury service. I want to thank all of you all for coming and sharing your time with us this afternoon; you have certainly inspired me.



The Jury System

An Essay

By JOSEPH D. JAMAIL, JR.

The jury system is the only protection against all of the evil "isms" mankind has dreamed up. The current attack on the jury system did not begin yesterday, but rather almost at the jury system's beautiful birth. The attack began by those whose privileges, prejudices, and special interests were threatened by the existence of the jury system. These purveyors of special interests have handed the attack down through the years to privileged look-alikes who continue the attack. The courageous trial lawyer who believes his oath includes the protection of his clients' rights cannot separate these rights from the right of a jury trial in order to afford full protection to clients. We must continue to fight off these attacks on the jury system.

In 1765, Sir William Blackstone, the notable British jurist, wrote the following in his *Commentaries on the Laws of England*:

"But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in . . . . Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice."

"Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. . . . When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing around." [G.K. Chesteron, "Twelve Men," in *Tremendous Trifles*.]

Independence of the jury from interference by the crown was an important aspect of the colonists' drive to sever their dependence upon Great Britain and provided an impetus to the development of the jury system in America. Colonial judges were instruments of the crown inasmuch as they were appointed by the king, who also determined their salaries. Understandably, during our colonial history, trial judges often dominated jury trials. A preview of radical changes yet to come took place in 1734, however, when John Peter Zenger, a New York City newspaper publisher, was arrested for printing allegedly libelous stories about the royal governor, William Crosby. At the trial, the government-appointed judge, James De Lancy, ordered the jury to decide the sole question of whether Zenger had published the offending statements. Judge

De Lancy thought that he, as judge, would then decide whether the statements were libelous. Zenger's attorney, Andrew Hamilton, advised the jurors that they had the right to decide *both* the law and the facts. In defiance of the judge's orders, the jury returned a not guilty verdict and established not only freedom of the press but asserted the independence of the jury from judicial and royal control.[1]

Haven't we all recognized, time and again, the extraordinary attention, the high purpose, the dedication, and the spirit of the jury to do the *right thing*? Haven't we also seen the collective judgment and conscience of the jury to go beyond what would be expected from each of the individual members; and which collective judgment and conscience, time and again, will cut through hypocrisy, deception, and artifice to find the truth?

Haven't we marveled at how readily a jury will recognize a liar? Who better to decide the facts: a jaded, experienced judge who has heard it all before or a fresh jury that can bring its collective experience to bear on the facts, uncluttered by any other cases where similar or dissimilar facts would cloud the issue before it?

What's the first question asked of a potential juror? "Are you familiar with the facts of this case?" And what is the caveat most often repeated to them by the judge? "Don't judge this case on anything other than the evidence adduced in this courtroom!"

Can any judge - any human - divorce himself from the experiences of a thousand prior cases he has heard? The very inexperience of a jury is its greatest asset. Its transience precludes rigidity of ideas. The jury is not as prone to a mind-set or bias that sometimes characterizes the judges who have seen it all before.

As judges of the facts, jurors bring a composite of learning, judgment, and experience that, regardless of education, surpasses that of any given indi-

vidual. Jurors also have the vital tool of discussion. They have the opportunity to put the evidence into the crucible of argument, exchange ideas, and distill the evidence, argument, and ideas down to a decision. A judge cannot argue with himself, just as a single person cannot talk himself out of preconceptions or misconceptions.

Juries educate judges on the needs of society. Jurors pass through the judges' courtrooms by the thousands. The judge is only one court, one mind, and one experience. Our jury system allows society's problems to be filtered through thousands of minds. There is thus great input from the public.

Further, the jury is totally independent. It is neither elected nor appointed. It answers to no one but its own conscience. It is subject to no control. It is almost always anonymous. The jury system, as I view it, imbues our judicial process with humanity, so that the letter of the law remains tempered by the spirit of law.

Any proposed change to the procedures for jury trials should be subjected to the greatest scrutiny and should avoid the notion of change for change's sake. The right to have a trial by jury is a fundamental right in our democratic judicial system and should need no citation.

I offer some observations by the United States Supreme Court, which has repeatedly noted that "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[2]

In a recent dissent, Justice Scalia pointedly observed: "*When this Court deals with the content of this guarantee* - the only one to appear in both the body of the Constitution and the Bill of Rights - *it is operating upon the spinal column of American democracy.* William Blackstone, the Framers' accepted authority on English law and the English Constitution, described the right to trial by jury in criminal prosecutions as 'the grand bulwark of [the Englishman's] liberties . . . secured to him by the great charter.'[3] One of the indictments of the Declaration of Independence against King George III was that he had 'subject[ed] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws' in approving legislation '[f]or depriving us, in many Cases, of the Benefits of Trial by Jury.' Alexander Hamilton wrote that '[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this, the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.'"[4]

When adoption of the Constitution was being debated, Antifederalists like George Mason went so far as to object that under the proposed Constitution the people would not be "secured even in the enjoyment of the benefit of the common law."[5] In particular, the Antifederalists worried about the failure of the proposed Constitution to provide for a reception of "the great rights associated with due process" such as the right to a jury trial [Jay II, at 1256], and they argued that "Congress's powers to regulate the proceedings of federal courts made the fate of these common-law procedural protections uncertain," [id., at 1257]. Federalists met this objection by arguing that nothing in the Constitution necessarily excluded the fundamental common-law protections associated with due process, see, e.g., 3 Elliot's Debates 451 [George Nicholas, Virginia Convention].[6] The Seventh Amendment, after all, was adopted to respond to Antifederalist concerns regarding the right to jury trial.[7]

Justice Murphy's first words in the United States Supreme Court's opinion in *Jacob v. City of New York* cautioned that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."[8]

The Bill of Rights of the Texas Constitution is no less emphatic about the right of Texans to jury trials. Section 15 of the Texas Bill of Rights states that "[t]he right of trial by jury shall remain inviolate."[9] For a right to remain inviolate, it must not diminish over time and must be protected from all assaults. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury should

be scrutinized with the utmost care. The right of trial by jury must not be burdened by the imposition of onerous conditions, restrictions, or regulations that diminish such right. Proposals to modify voir dire examination, diminish peremptory strikes, and allow for rehabilitation of *prima facie* disqualified jurors, however, do just that.

I recognize that the constitutional provision that the right to trial by jury shall remain inviolate does not carry with it a corresponding right that all court rules, procedures, and methods remain forever unchanged. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right to trial by jury. This reality is incorporated into Section 15 of the Texas Bill of Rights, which gives the Legislature the responsibility to pass such laws as are needed to "maintain the purity and efficiency" of the jury system.[10]

My comments address the concern that any "jury reform" not be used as a stalking horse for more "tort reform." I don't want to see the most basic component of our system of justice used as a pawn for ideological innovations and short-sided political agendas. I also don't want to castrate the professionalism of advocacy by sterilizing the moment of truth.

Endnotes

1. M. Bloomstein, *Verdict* 23 (1968); McCart, *Trial by Jury* 8-9 (1964); Van Dyke, *Jury Selection Procedures* 228 (1977). 2. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S.Ct. 948, 952 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 301 (1935). 3. 4 W. Blackstone, Commentaries* 349. 4. The Federalist No. 83, p. 426 (M. Beloff ed. 1987). *Neder v. United States*, 517 U.S. 1, 30-31, 119 S.Ct. 1827, 1844 (Scalia concurring in part and dissenting in part) (emphasis added). 5. Mason, *Objections to This Constitution of Government*, in 2 Records of the Federal Convention of 1787, p. 637 (M. Farrand ed. 1911) (Farrand); *see also* 3 Elliott's Debates 446-449 (Patrick Henry, Virginia Convention). 6. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 138-139, 116 S.Ct. 1114, 1163-1164 (1996) (Souter dissenting). 7. *Id.*, n. 59 at 164, 1176. 8. *Jacob v. City of New York*, 315 U.S. 752, 752-753, 62 S.Ct. 854, 854 (1942). 9. TEX.CONST. art. 1 Section 15. 10. TEX.CONST. art 1 Section 15.

Joe Jamail is a partner in the law firm of Jamail & Kolius, located in Houston, Texas. Jamail has been called the "King of Torts" and obtained one of the largest jury verdicts in legal history ($11.12 billion) in Pennzoil v. Texaco.

Thomas Taschinger, editorial page editor

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Bill Peacock

Lone Star State still needs work on civil justice

AUSTIN — By the late 1980s, it was no secret to anyone that justice was very difficult to come by in the Texas civil justice system.

Since 1993, Texans embarked on an unprecedented effort to restore justice to its rightful place in our courtrooms. One can get a sense of the impact of this pursuit by examining benefits of the 2003 medical liability reforms.

Since they were put in place, every liability insurance provider in Texas except one has lowered premiums. Health care for Texans has improved as tens of millions of dollars being saved by health care providers are redirected into new services and improvements. Doctors are more willing to take on new, risky cases, and hospitals have had unprecedented success in recruiting new physicians.

While Texans clearly benefited from past tort reforms, there is evidence more work remains to be done in completing the overhaul of the civil justice system.

The most telling evidence is the decision in August by a Corpus Christi jury to award $253.4 million in damages against Merck in the first Vioxx lawsuit to go to trial. The lawsuit claimed Vioxx caused a heart attack that killed Robert Ernst, and the jury agreed.

However, the autopsy showed that the cause of death was arrhythmia, not a heart attack. There is no scientifically proven link between Vioxx and arrhythmia. Additionally, Ernst's arteries were clogged up to 75 percent in some places. He was clearly at risk for heart problems, and he had only been taking Vioxx for eight months, not the 18 months that it takes for the cardiovascular risk of taking Vioxx to appear.

Actual economic damages in the case totaled only $400,000. Most of the damages seemed designed to punish Merck for what the jury considered to be questionable marketing practices. If the verdict is upheld on appeal, the punitive damages must be reduced, but the total damages could still top $25 million, based on junk science and a questionable verdict.

Potential payouts like this are driving massive filings of Vioxx lawsuits all across the nation. More than 6,400 suits have been filed, with at least 600 of those in Texas. And more are on the way.

That is because many trial lawyers, led by Mark Lanier, the Houston lawyer who won the initial Vioxx verdict, are shifting their focus to state courts. Tommy Fibich, a Houston trial lawyer, explained why Texas courts in particular are attractive to trial lawyers.

"All mass torts go through Texas: breast implants, fen-phen and now Vioxx. ... There is no other group of lawyers anywhere able to do what the lawyers in Texas have done, and every other state looks to us," said Fibich.

The first big wave of Vioxx lawsuits is likely to hit Texas in the middle of 2006. Lanier has a Vioxx suit set for trial in April 2006 in Hidalgo County with several others soon to follow. Fibich says he believes Judge Randy Wilson of Houston, who oversees the Texas Vioxx multidistrict litigation pool, will set trials for May and June 2006.

If the Texas civil justice system is going to weather this and future waves generated by the mass tort litigation industry, there is clearly more work to be done. Options for additional reforms include modifying damage awards and reforming jury and judicial selection.

With just a little more effort, Texans can finish the job they started.

Reach guest columnist Bill Peacock, the economic freedom policy analyst at the Texas Public Policy Foundation, at:
bpeacock@texaspolicy.com

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 4, 2005

The Honorable Bill Frist
United States Senate
Washington, D.C. 20510

The Honorable Harry Reid
United States Senate
Washington, D.C. 20510

Dear Senator Frist and Senator Reid:

I am writing to request that the federal judiciary be exempted from any fiscal year 2006 across-the-board cut to its enacted appropriations, and that funding be provided at least at the level requested in the judiciary's appeal to the conferees on H.R. 3058 (The Departments of Transportation, Treasury, the Judiciary, and Housing and Urban Development Appropriations Act, 2006). I make this request because the Judicial Conference of the United States has concluded in the enclosed Resolution that an across-the-board cut to the judiciary's appropriations for a third straight year would "severely jeopardize" the federal judiciary's performance of its constitutional duties.

I of course appreciate the many competing interests that must be weighed in making decisions on appropriations for the federal government, especially for such critical areas as homeland security and military operations, and in the wake of the damage caused by Hurricane Katrina. Unlike some other parts of the federal government, however, the judiciary cannot control its workload, and well over half of its budget goes to pay required expenses: the salaries of judges and chambers' staff, and rent to the General Services Administration.

Because of across-the-board cuts imposed on the judiciary during the last two fiscal years, we are down approximately 1,500 employees when compared to October 2003. The loss of these employees has meant that fewer probation officers must supervise more offenders, and many courts have had to cut back on the hours that clerks' offices are open to serve the public. The Administrative Office of the United States Courts has calculated that a two percent across-the-board reduction applied to the judiciary's fiscal year 2006 appeal to the conferees on H.R. 3058 would require the courts to reduce staffing by approximately 1,000 additional employees -- meaning for the most part even fewer probation officers and clerks' office staff.

In the scheme of things, the judiciary as a coordinate branch of government makes only modest requests of the other branches with respect to the funding needed to carry out its vital mission of preserving the rule of law under the Constitution. I understand the challenges we as a nation confront in this area, but I would be remiss in my duty if I did not make clear that further reductions would seriously harm the ability of the courts to fulfill their mission.

I ask for your support in obtaining an exemption for the judiciary from any fiscal year 2006 across-the-board cut. Thank you for your consideration.

Sincerely,

John Roberts, J.

cc: Honorable Thad Cochran
Honorable Robert C. Byrd
Honorable Christopher S. Bond
Honorable Patty Murray
Honorable Arlen Specter
Honorable Patrick J. Leahy

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 4, 2005

The President
The White House
Washington, DC 20500

Dear Mr. President:

I am writing to request your support for exempting the federal judiciary from any fiscal year 2006 across-the-board cut to its enacted appropriations, and for funding at least at the level requested in the judiciary's appeal to the conferees on H.R. 3058 (The Departments of Transportation, Treasury, the Judiciary, and Housing and Urban Development Appropriations Act, 2006). I make this request because the Judicial Conference of the United States has concluded in the enclosed Resolution that an across-the-board cut to the judiciary's appropriations for a third straight year would "severely jeopardize" the federal judiciary's performance of its constitutional duties.

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I ask for your support in obtaining an exemption for the judiciary from any fiscal year 2006 across-the-board cut. Thank you for your consideration.

Sincerely,

John Roberts, J.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

November 4, 2005

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

The Honorable Roy Blunt
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nancy Pelosi
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker, Mr. Blunt and Mrs. Pelosi:

I am writing to request that the federal judiciary be exempted from any fiscal year 2006 across-the-board cut to its enacted appropriations, and that funding be provided at least at the level requested in the judiciary's appeal to the conferees on H.R. 3058 (The Departments of Transportation, Treasury, the Judiciary, and Housing and Urban Development Appropriations Act, 2006). I make this request because the Judicial Conference of the United States has concluded in the enclosed Resolution that an across-the-board cut to the judiciary's appropriations for a third straight year would "severely jeopardize" the federal judiciary's performance of its constitutional duties.

I of course appreciate the many competing interests that must be weighed in making decisions on appropriations for the federal government, especially for such critical areas as homeland security and military operations, and in the wake of the damage caused by Hurricane Katrina. Unlike some other parts of the federal government, however, the judiciary cannot control its workload, and well over half of its budget goes to pay required expenses: the salaries of judges and chambers' staff, and rent to the General Services Administration.

Because of across-the-board cuts imposed on the judiciary during the last two fiscal years, we are down approximately 1,500 employees when compared to October 2003. The loss of these employees has meant that fewer probation officers must

supervise more offenders, and many courts have had to cut back on the hours that clerks' offices are open to serve the public. The Administrative Office of the United States Courts has calculated that a two percent across-the-board reduction applied to the judiciary's fiscal year 2006 appeal to the conferees on H.R. 3058 would require the courts to reduce staffing by approximately 1,000 additional employees -- meaning for the most part even fewer probation officers and clerks' office staff.

In the scheme of things, the judiciary as a coordinate branch of government makes only modest requests of the other branches with respect to the funding needed to carry out its vital mission of preserving the rule of law under the Constitution. I understand the challenges we as a nation confront in this area, but I would be remiss in my duty if I did not make clear that further reductions would seriously harm the ability of the courts to fulfill their mission.

I ask for your support in obtaining an exemption for the judiciary from any fiscal year 2006 across-the-board cut. Thank you for your consideration.

Sincerely,

William H. Rehnquist

cc: Honorable Jerry Lewis
Honorable David Obey
Honorable Joe Knollenberg
Honorable John Olver
Honorable Jim Sensenbrenner, Jr.
Honorable John Conyers, Jr.

Enclosure

RESOLUTION OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

To exempt the judiciary from across-the-board cuts to its enacted FY 2006 appropriations and to provide funding at least at the levels requested in its appeal to the conferees on H.R. 3058

Approved November 4, 2005

The Judicial Conference urges Congress and the President to exempt the Judicial Branch from any fiscal year 2006 across-the-board cuts to its enacted appropriations and to provide funding at least at the levels requested in the judiciary's appeal to the conferees on H.R. 3058 (The Departments of Transportation, Treasury, the Judiciary, and Housing and Urban Development Appropriations Act, 2006). The judiciary requires appropriate and timely funding to avoid compromising its core mission, the administration of justice. The American people must be assured that the United States courts are available to perform their constitutional and statutory duties.

The judiciary is still reeling from the impact of the across-the-board reductions experienced in fiscal years 2004 and 2005. Due to the nature of the judiciary's work, the courts' single greatest expense is funding for our dedicated and hard-working staff. When the judiciary receives across-the-board reductions to an already constrained funding level, we have little recourse but to apply them to court staffing. Across-the-board cuts applied to judiciary appropriations in fiscal years 2004 and 2005 resulted in the loss of about 1,800 court employees between October 2003 and March 2005. Since that time, courts have begun to fill some of their most critical vacancies, but staffing levels today are still 1,500 below those in October 2003. Over that same period, the courts have had to absorb growing law enforcement and homeland security related workload, especially along the Southwest Border, with fewer probation officers and clerks' office personnel. Office of Management and Budget officials inform us that no other component of the entire federal government was required to make such large staff reductions as the Judicial Branch was compelled to do. Another year of across-the-board reductions in funding would erode judiciary staffing further and severely jeopardize the performance of our constitutional duties.

The impact of recent cuts to the judiciary has been exacerbated by the exemption provided to Executive Branch agencies, such as the Department of Homeland Security (DHS), from these reductions. For example, without across-the-board reductions, DHS has been able to implement fully immigration and border enforcement initiatives, such as the hiring of 2,250 new border patrol agents since FY 2001. Conversely, the judiciary — which has been subject to across-the-board reductions resulting in massive staffing losses in FY 2004 and FY 2005 — has not had adequate personnel resources necessary to respond to the additional caseload resulting from these law enforcement initiatives.

Accordingly, the Judicial Conference urges the Congress and the President to exclude the judiciary from any across-the-board reductions and to provide funding at least at the level contained in the judiciary's request to House and Senate conferees.