

# Trial: The Real Alternative Dispute Resolution Method

By David A. Domina and  
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## I. The Greatest Insight to the Character of Justice<sup>1</sup>

Trial, and particularly trial by jury, is the least-used dispute resolution methodology in America. Informal discussions, formal business meetings, use of consultants, and in recent years, use of mandatory and commonplace mediation techniques to resolve civil disputes, have become commonplace.

The method of dispute resolution that is *uncommon* is trial. *Trial is the real alternate dispute resolution procedure.*

The United States judiciary compiles statistics of its judicial business and publishes the data annually.<sup>2</sup> The results of the publication may be surprising. In 2009, during the entire year, this was the incidents of civil jury trials in the Eighth Circuit:

### Civil Trials, December 30, 2009

Judicial District	Total All Trials	Civil Trials						
		Total	1 Day	2 Days	3 Days	4 to 9 Days	10 to 19 Days	20 Days or More
<b>Eighth Circuit</b>	<b>468</b>	<b>217</b>	<b>67</b>	<b>41</b>	<b>33</b>	<b>72</b>	<b>4</b>	<b>0</b>
AR, E	66	49	14	12	7	16	0	0
AR, W	26	19	5	4	4	6	0	0
IA, N	26	7	1	2	1	1	2	0
IA, S	71	17	3	4	2	8	0	0
MN	50	28	6	2	6	13	1	0
MO, E	74	42	17	8	6	11	0	0
MO, W	48	23	14	3	3	3	0	0
NE	46	17	6	2	4	5	0	0
ND	17	1	0	0	0	1	0	0
SD	44	14	1	4	0	8	1	0

How unique are these rights? *Human Rights Watch* estimates more than 98% of all civil jury trials, and over 90% of all criminal jury trials, occur in the United States of America.<sup>3</sup>

Judge William G Young, United States District Judge for the District of Massachusetts, observed in an extended article<sup>4</sup> the American jury "must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy."<sup>5</sup> No other legal institution sheds greater insight into the character of American justice. As an instrument of justice, the civil jury is, quite simply, the best we have.

"[T]he greatest value of the jury is its ability to decide cases correctly."<sup>6</sup> We place upon juries no less a task than discovering and declaring the truth in each case. Jurors are called to, and perform, the task, finding the facts and applying the law as they, in their collective vision, see fit.

In a real sense a jury verdict actually embodies our concept of "justice." Jurors bring their good sense and practical knowledge into our courts. Reciprocally, judicial standards and a respect for justice flow out to the community.<sup>7</sup> The acceptability and moral authority of the justice provided in our courts rest in large part on the presence of the jury. It is through this process, in which the jury applies rules formulated in light of common experience to the facts of each case, we deliver the best justice our society knows how to provide.

## II. The Only Right Mentioned Twice in the Bill of Rights & Once in The Constitution

Two provisions of the *Bill of Rights*, Amendments I through X to the *Constitution of the United States*, mention the right to trial by jury. The jury is also mentioned in Article III, Sec. 2. History's simple lesson is that the 13 Colonies could not agree upon the Constitution's text. Only the addition of the *Bill of Rights* led to the Constitution's ratification, and the formation of our current form of government. It is worthwhile to recall what the

Constitution says:

### *US Constitution, Amendment VI*

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

### *US Constitution, Amendment VII*

In suits at common law, where the value and controversy shall exceed 20 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.

But, the *Bill of Rights* is not the only place where the jury is mentioned. It also appears in *US Constitution* Art III, § 2, which contains these clauses:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, ....

The trial of all crimes, except in cases of impeachment, shall be by jury . . .

Three of the *Federalist Papers* mention trial by jury.<sup>8</sup> Alexander Hamilton's comments in *The Federalist No. 65*, make insightful points about why impeachments of officials should not be tried to juries, while other cases should:

The loss of life and estate would often be virtually included in a sentence which, in its terms, imported nothing more than dismissal (in original) from a present, and disqualification for a future, office. It may be said, that the intervention of a jury, in the second instance, would obviate the danger. But juries are frequently influenced by the opinions of judges. They are sometimes induced to find special

verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?<sup>9</sup>

Hamilton again, in a subsequent paper, made it clear that the jury's decision on the facts was to be inviolate, *i.e.*, not disturbed by appellate review for legal errors committed by a judge while presiding over a jury:

But it does not follow that the re-examination of a fact once ascertained by a jury, will be permitted in the Supreme Court. Why may not it be said, with the strictest propriety, when a writ of error is brought from an inferior to a superior court of law in this State, that the latter has jurisdiction of the fact as well as the law? It is true it cannot institute a new inquiry concerning the fact, but it takes cognizance of it as it appears upon the record, and pronounces the law arising upon it.<sup>10</sup>

## III. The State Department's Explanation of Trial by Jury<sup>11</sup>

What does the United States say to our neighbors about the right to trial by jury?<sup>12</sup> These comments, posted on the U.S. Department of State's website during the presidency of George W. Bush remain descriptive of the jury's role and its uniqueness in this nation. They remain the official description under the Obama administration, now:

It has been said that a society can be judged by how it treats its least-favored citizens, and people accused of crimes, by definition, fall into this category. They have allegedly broken the social compact by depriving other people of life, limb, or property, and if in fact the charges are true, they have placed themselves outside the bonds of society; they are, literally "outlaws." . . .

There are two reasons for this cautious approach. The first, and most obvious, is to avoid lasting harm to the individual. . . . Another, and equally important reason, is to prevent both harm to society and

the erosion of the people's liberties. A system of justice that is corrupt, that is used by authorities to punish political opponents, or that lets the guilty go free, erodes the trust in government and society that is essential in a democratic society. Just as one cannot have a free society without liberty of speech or press, neither can democracy exist without a justice system that treats people accused of crimes fairly and ensures them their rights.

... Moreover, jury duty is an essential responsibility of citizenship, second only, perhaps, to voting itself. In no other governmental function is the average citizen asked to shoulder the task of determining whether someone is innocent or guilty of a crime, or bears the responsibility for civil damages. Jury duty is an education, in which people are asked to apply the law, and so they must learn to understand what the law is, and how it affects the case in front of them.

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*Alexis de Tocqueville,  
Democracy in America (1835):*

*The jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it to rule well.*

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A jury trial is essentially an effort to determine the truth. Did a person actually do what the state says he or she has done? ... Hundreds of years ago ... the accused might suffer through a physical ordeal, in which he called upon God to prove his innocence. A person might be tossed into a pool to see if he would sink (innocent) or float (guilty); and if innocent, be retrieved, hopefully while still alive. In Europe, for the knightly classes, the ordeal often took the form of trial by combat, in which it was believed that God would strengthen the arm of the innocent....

By the era of the American Revolution, trial by jury was an accepted right in every colony. The colonists saw it as a basic protection of individual freedoms, and Edmund Burke, the British statesman, warned

Parliament that the American colonies would rebel if the mother country attempted to restrict trial by jury. But that is exactly what Parliament did in the Stamp Act of 1765, when it transferred the trial of persons accused of smuggling to admiralty courts, where naval officials sat in judgment without a civilian jury.

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*John Adams, on the Stamp Act (1765):*

*But the most grievous innovation of all, is the alarming extension of the power of the courts of admiralty. In these courts, one judge presides alone! No juries have any concern there! The law and the fact are both to be decided by the same single judge.*

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Unlike nearly all the other liberties of the people, trial by jury has been the subject of serious criticism, and of the sort that requires extensive examination.

[T]o eliminate trial by jury because of perceived defects in the system would be to strike a blow against democratic government itself. For those who believe they will do better by bench trial or (in civil matters) through arbitration, that option is there. But for many, their only hope of establishing their innocence is to go before a jury of their peers, where the state must establish the issue of guilt "beyond a reasonable doubt."

Critics who look at the jury system simply in terms of its efficiency or inefficiency also fail to recognize the importance the jury has beyond the question of determining guilt or innocence. As society grows more complex, many people worry that the average citizen is growing disconnected from the government, that he or she is losing a sense of participation in the daily processes of democracy. Jury service, almost alone of everything a person does as a citizen, continues to provide that sense of both responsibility and participation.

A free and fair trial by a jury of one's peers remains a critical right of the people, both of those who may be

accused of a crime, as well as those called upon to establish that fact.

#### IV. Why Is Trial Disappearing?

The data seems incontrovertible. The American jury system is dying—faster on the federal side—but also in the state courts. This is true even though the jury is, perhaps, the only exceptional thing about *American* jurisprudence.<sup>13</sup> Without question, several reasons are principal among those causing the decline in jury trials at a significant, indeed alarming rate. The attitude of the public and legislators is part of the problem. But not all of it.

Judges do not merely manage cases now. Often, they shape litigation by deciding issues in cases as they arise, directing the evidence-gathering process, ordering mediation, delaying scheduling to force parties to reconsider matters, and using technique upon technique to avoid trial. Summary judgment has exploded as a dispute resolution device. It has led to the regrettable process, accepted and bought into by judges, of deciding matters on an issue-by-issue basis when doing so clearly involves increased judicial energy and often delays resolution while enhancing cost. The only thing saved is time with a jury. This "savings" deprives the litigants of their original reason for going to court and prevents citizens in investing in their nation and state through mandatory government service.

Out-of-control use of arbitration is a second problem. Arbitration clauses are ubiquitous. They appear in car rental contracts, credit card company contracts, bank loan agreements, landlord-tenant leases, office equipment leases, and perhaps even in the contract signed by lawyers for their online computer assistance services. Lawyers are altogether too reluctant to strike them out and insist they be removed.

Mediation, in some states called facilitation, is now mandatory in most places. For some cases, mediation is fine. For others, it thwarts the very essence of the dispute resolution process so vital to permit people the catharsis of trial and a mechanism to cope with losing. Settlement is not always a dispute resolution surrogate

for trial.<sup>14</sup> The outcome in many cases, *i.e.*, the motive that drives people, is not recovering money, or even deciding child custody or visitation matters. Instead, people want to tell their story. In mediation, they get no chance to do so.<sup>15</sup> In some states, legislation governing the use of ombudsmen and the regulation of certain professionals, including matters involving fee disputes, keep things from court.<sup>16</sup>

The rapidity of the jury's disappearance has been cataloged by several authors.<sup>17</sup> Entire systems have been created to handle issues related to Social Security benefits, black lung, employment issues, workers compensation, and other kinds of claims. Administrative law judges, who function without the *possibility* of trial by jury, exist and are expanding in numbers at both state and federal levels. Mark S. Galanter of the University of Wisconsin College of Law suggests that "vanishing trials" might be relabeled as "displaced" trials. Instead of saying trials are vanishing, perhaps it is more accurate to say that what was originally a citizen-driven and a citizen-based jury trial process has now passed to the hands of a new cadre of judges who have formed new, or expanded hierarchies, and seem to view the jury as a threat to their empowerment.

For decades, business and insurance interests have disparaged civil juries while courts have failed to defend the institution upon which judicial moral authority ultimately depends.<sup>18</sup> Perhaps an institutional mistake of constitutional and substantial dimension has also contributed to the decline in trial by jury. *F R Civ P 50(a)(1)* contains this language which is starkly inconsistent with the Seventh Amendment:

**(1) In General**, if a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

- (A) resolve the issue against the party; and
- (B) grant a motion for judgment as a matter of law....

This procedure is nothing more than a delayed summary judgment in some settings. But, Rule 50 has been used altogether too frequently to ignore jury verdicts, cast them aside, and enter judgment on the judge's view of the facts. Rule 50(b) provides:

If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. Not later than 28 days after entry of the judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial.... In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict; or
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

Official comments to the Rule include a reference to the Seventh Amendment, and suggest the Rule was drafted in an effort to circumvent the Amendment's mandate:

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50 motion is only a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the pre-verdict motion....

The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some, or even all, issues, without submission to the jury. **This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment.** Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 US 654 (1935). (emphasis added).

Courts, and commentators, are

not perfectly uniform in their view that the Seventh Amendment is so easily placated. In 1913, *Slocum v. New York Life Ins. Co.*,<sup>19</sup> held a federal Court of Appeals lacked authority to order entry of a judgment contrary to a verdict. The case was one in which the Court of Appeals found a directed verdict should have been granted, but the jury found for the other party. The Supreme Court held the only course open to either court was to order a new trial. The five-four decision was viewed as consistent with the common law. Yet, it was heavily criticized based on convenience. Subsequent cases dramatically impaired the *Slocum* holding.<sup>20</sup>

The Court held a trial court has a right to enter judgment on a verdict of the jury after reserving that decision on a motion by the defendant for dismissal on grounds of insufficient evidence. *Baltimore & Carolina Line v. Redman*, 295 US 654 (1935). The Supreme Court's decision, in *Baltimore & Carolina Line*, distinguished *Slocum*. The *Baltimore* court noted its ruling qualified some of the positions taken in *Slocum*.<sup>21</sup>

*Galloway v. United States*, 319 US 372, 398 (1943) led to the Supreme Court's observation that "the [Rule 50 practice] practice has been approved explicitly in the promulgation of the *Federal Rules of Civil Procedure*." The Court cited *Berry v. United States*, 312 US 450 (1941) where the Court remarked the new rule of civil procedure had given "district judges, under certain circumstances... the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But, that rule has not taken away from juries . . . any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."<sup>22</sup>

Justice Black, speaking for a three-judge dissenting group in *Galloway*, lamented in dissent that, "Today's decision marks a continuation of the gradual process of judicial erosion which in 150 years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment."<sup>23</sup>

## V. Why Is Such An Important Right so Marginalized?

“Yet 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 that on the criminal side, but it is dying. It will never go entirely, but it is already marginalized.”<sup>24</sup>

Judge Young’s comments seem dire. But the data supports his

words. The National Center for State Courts<sup>25</sup> and the US Courts, both publish data confirming the scope of the problem.<sup>26</sup> This table<sup>27</sup> reporting results through 2008 tells the story:

**Table 4.10 U.S. District Courts — Civil Cases Terminated, by Action Taken**

Fiscal Year	Total	No Court Action	Total	Before Pretrial	During or After Pretrial	During or After Trial			
						Total	Nonjury	Jury	Trial
1990 <sup>1</sup>	213,429	51,630	161,799	127,017	25,519	9,263	4,480	4,783	4.3%
1995	229,325	36,558	192,767	166,017	19,307	7,443	3,317	4,126	3.2%
2000	259,234	43,281	215,953	189,808	20,365	5,780	2,001	3,779	2.2%
2004	252,016	54,273	197,743	174,212	19,580	3,951	1,422	2,529	1.6%
2005	270,973	62,661	208,312	183,072	21,341	3,899	1,289	2,610	1.4%
2006	272,644	60,863	211,781	170,028	38,198	3,555	1,140	2,415	1.3%
2007	239,292	55,275	184,017	150,756	23,429	9,832 <sup>2</sup>	1,093	8,739 <sup>2</sup>	4.1%
2008	233,826	55,024	178,802	151,404	22,675	4,723 <sup>3</sup>	2,510 <sup>3</sup>	2,213	2.0%

Note: Land condemnation cases omitted.

<sup>1</sup> Twelve-month period ending June 30.

<sup>2</sup> These increases resulted from terminations of oil refinery explosion cases in the Middle District of Louisiana.

<sup>3</sup> More than 1,400 of the cases were related to oil refinery explosions in the Middle District of Louisiana.

Source: Table C-4, Annual Report of the Director: Judicial Business of the United States Courts.

Of the total number of civil actions terminated in 1990 only 2.24% terminated during or after a jury trial. By 2008 this ratio fell by 57% with only 0.95% of civil actions terminating after reaching a jury.

## VI. Vanishing Juries Diminish Judiciary and Impacts State Court Functions

The National Center for State Courts has candidly said this problem with the decline in jury trials, and trials in general, has “reoriented [the court] itself to focus on resolving cases before a jury verdict. This is often accomplished by impending early case management, judicial intervention, and handling pretrial motions.”<sup>28</sup> The Center cautioned this trend “may also mark a major shift of power from appellate judges to trial judges. With the increase in managerial judging, the trial judges have been granted a largely unreviewable discretion to encourage settlement.”<sup>29</sup> The authors wonder whether appellate jurists, who have encouraged alternative dispute resolution processes and helped make

them rampant, have considered the risk to their own judicial authority.

Judge Patricia Wald, writing a tribute to Professor Charles Allen Wright, observed: “Federal jurisprudence is largely the product of summary judgment...”<sup>30</sup>

The summary judgment observation is not just a complaint by a lawyer whose work is predominately for plaintiffs. It has been observed that institutionally, federal courts today seem unconcerned with jury trials.<sup>31</sup> Judges demonstrate a willingness to “accept a diminished less representative, and thus sharply less effective, civil jury.”<sup>32</sup>

Courts have failed to do so despite the likely connection between a powerful jury system and a powerful independent judiciary which has been the envy of the world.<sup>33</sup> The attack by business on civil juries was followed by members of Congress who, dependent upon business interests for campaign contributions, took up the cause. A sophisticated analysis of the problem concludes that, “a civil justice system without a jury would evolve in a way that more reliably serves the elite business

interests.”<sup>34</sup>

The judicial role in the decline of the American jury is palpable. In *Patton v. United States*, the Supreme Court held that “the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused.”<sup>35</sup> Fortunately, *Patton* was eventually abrogated, but on other grounds.<sup>36</sup> Today the federal criminal justice system’s undeniable focus is on plea bargains. Nothing produces a hearing date faster than word that a plea bargain has been reached. Trials—and jury trials—are altogether too often extraneous.

Much lip service is paid to the possibility of trial by jury, but so few juries are empaneled that the words spoken before juries pale when compared with those spoken to avoid trial. Offenders are rewarded for waiving juries. They are incentivized to forego a constitutional right by the criminal sentencing process. In fact, to resolve their cases, offenders are routinely and severely punished for crimes for which they have never been charged.<sup>37</sup> Even more incredibly, at times they are punished for crimes for

which a jury acquitted them.<sup>38</sup> Civil litigants are praised by judges for settling cases. Lawyers who demand trial are viewed as trouble makers.

Despite the Seventh Amendment's prohibition that decisions of juries will not be reviewed, appellate judges, and even trial judges in post-trial motions, freely and regularly examine jury verdicts. The Seventh Amendment's overt mandate is utterly ignored.<sup>39</sup> Some of America's preeminent scholars have commented on this topic.<sup>40</sup>

The disappearing jury is not simply a consequence of procedure. It is not simply the result of a change purchased by big business. And, it is not a sign of modernity. Instead, it is a product of culture—largely judicial culture. Judges do not sufficiently revere the jury system to protect it. Neither do lawyers.<sup>41</sup> As Judge Young wrote, "We have so deconstructed the role of trial judge that today far too many judges do not understand the concept." Judge Young cited an anecdote by a former federal law clerk, who described a clerkship for an anti-trial judge who hated trials and had the "enter my courtroom and I'll make you pay" sentiment.<sup>42</sup> Professor Resnik of Yale once recounted a professional meeting where she heard a federal judge remark that "He regarded the 8% trial rate as evidence of 'lawyers' failure.'" Judges are rewarded for avoiding trial. "The more cases you settle, the better your statistics and better yet, no one criticizes you."<sup>43</sup>

These attitudes have long tails. Conferences with lawyers in chambers, instead of in the courtroom, are surely a symptom.<sup>44</sup> The authors have conducted trial in the United States District Court for the District of New Mexico. A new multi-story courthouse there is designed for courtroom sharing.

As Justice Young says, "Somehow we [judges] seem to be forgetting that the very reason for our judicial existence is to afford jury trials to our people pursuant to the United States Constitution."<sup>45</sup> It is also worthwhile to see *US Const* Art III, § 2.

## VII. What Can Be Done To Save The Trial Process?

Lawyers must help judges

and help them to regain a whetted appetite for the trial process. Our attitudes about trial and the jury must change. Efficient, thoughtful, decision-oriented trial presentations are needed. Salesmanship has been overvalued. Advocacy has been diminished. Manipulation has supplanted careful thought and tactical consideration. "Jury consultants" have developed a cottage industry in a context where the only inquiry about the jury should be one designed to assure impartiality and objectivity, but not to use the voir dire, or pre-voir dire questionnaire, process to choose predisposed jurors who are, in fact, not fair, but predisposed.

The trial need not be the object of fear for the judge or the lawyer. Solutions are available. First, judges can become very comfortable with the trial process if they will practice at it. A few jury trials can readily make the trial process pleasant and appealing to the jurist who presides—if the case is well-tried.

Chief Justice William Rehnquist long advocated a certification process to require trial lawyers be limited in number, certified separately, generally get their cases from other lawyers, and be required to demonstrate proficiency by maintaining a minimum number of trials annually. This idea has merit.

Chief Justice Rehnquist, and many others, have advocated that "trial lawyers" should be required to appear in both civil and criminal proceedings, and their practice and continuing certification criteria largely mandate they be in court regularly, in manageable settings, and be freed from the discovery process.<sup>46</sup> A similar approach has been advocated by others. Surely, this approach, if implemented, would help to eliminate the frustration experienced by trial judges and jurors at dealing with incompetent presentations at trial by lawyers who are in court too seldom. The process would also largely eliminate horror stories about the uncertainties, delays, costs, etc., of trial by streamlining the process.<sup>47</sup>

The discovery process is out of hand. Unless the lawyers involved are, themselves, wise enough to

recognize their job is to get a dispute to resolution on the merits, the wealthier party can win by attrition during discovery unless the trial judge is willing to step in and take control. Few Rule 37 motions to restrict discovery are made and fewer are sustained. More are needed. Lawyers should file them without fear of losing Rule 37 motions. Only by appearing in court time after time to seek constraints on the discovery process, making the amount of discovery permitted match the complexity of the case, will the corner ever be turned on the abusive and illogical system, as it exists today, permitting a meritorious claim be destroyed without ever reaching the merits by simply allowing inanities and absurdities to be plumed in the name of efforts "reasonably calculated to lead to the discovery of admissible evidence."<sup>48</sup>

Streamlining trials and increased judicial management could involve other things:

(a) Time constraints—each party is given a specific amount of time, and when the party is on its feet in the courtroom, the clock is against it. This can include voir dire, opening statements, and the presentation of evidence. Cross-examination counts against the cross-examiner. So does disorganized or lengthy voir dire.

(b) The number of exhibits can probably be limited. Focus on key documents, advance review of documents in excess of a particular number for evaluation of their necessity under Rule 403 of the *Evidence Code*, is a possibility.<sup>49</sup>

(c) Summary jury trials could be used and should be encouraged. The summary jury trial statute could be amended to permit a trial judge to order a summary jury trial. A set of statutory standards for such an order could certainly be drafted.

(d) Permitting jurors to take notes and ask questions should be encouraged. Pointed, thoughtful jury questions can often guide lawyers to get to an issue — or clean one up — and may help with expediting and effectively resolving issues during the jury trial process.<sup>50</sup> Where they are used, most judges



**Conclusion**

Trial lawyers and all judges exist to try cases. We do not exist to find angles, frustrate with discovery, or learn how to manipulate in order to win. In fact, winning is not our first priority. Trial is our obligation. Lawyers are sworn in by a court to practice law before courts. Mediation is a subordinate, and junior dispute resolution method. No license is required to appear before a mediator. And, the advocate at mediation is not required to swear an oath of allegiance to the law.

A trial lawyer quoted often, and revered even more when he is quoted, said, "We cannot escape history... It will light us down, in honor or dishonor, to the latest generation."<sup>59</sup>

Surely, for ABOTA members history will "light us down" as failed trial lawyers unless we exhort our judges, and command ourselves, to value trial, respect its process, and honor its occurrence more than we facilitate its demise by over-emphasizing the fact of disposition

over the process of trial.

Parties win and lose. Their lives go on. But, if courts lose trials and juries, courts will lose the respect of the public.<sup>60</sup>

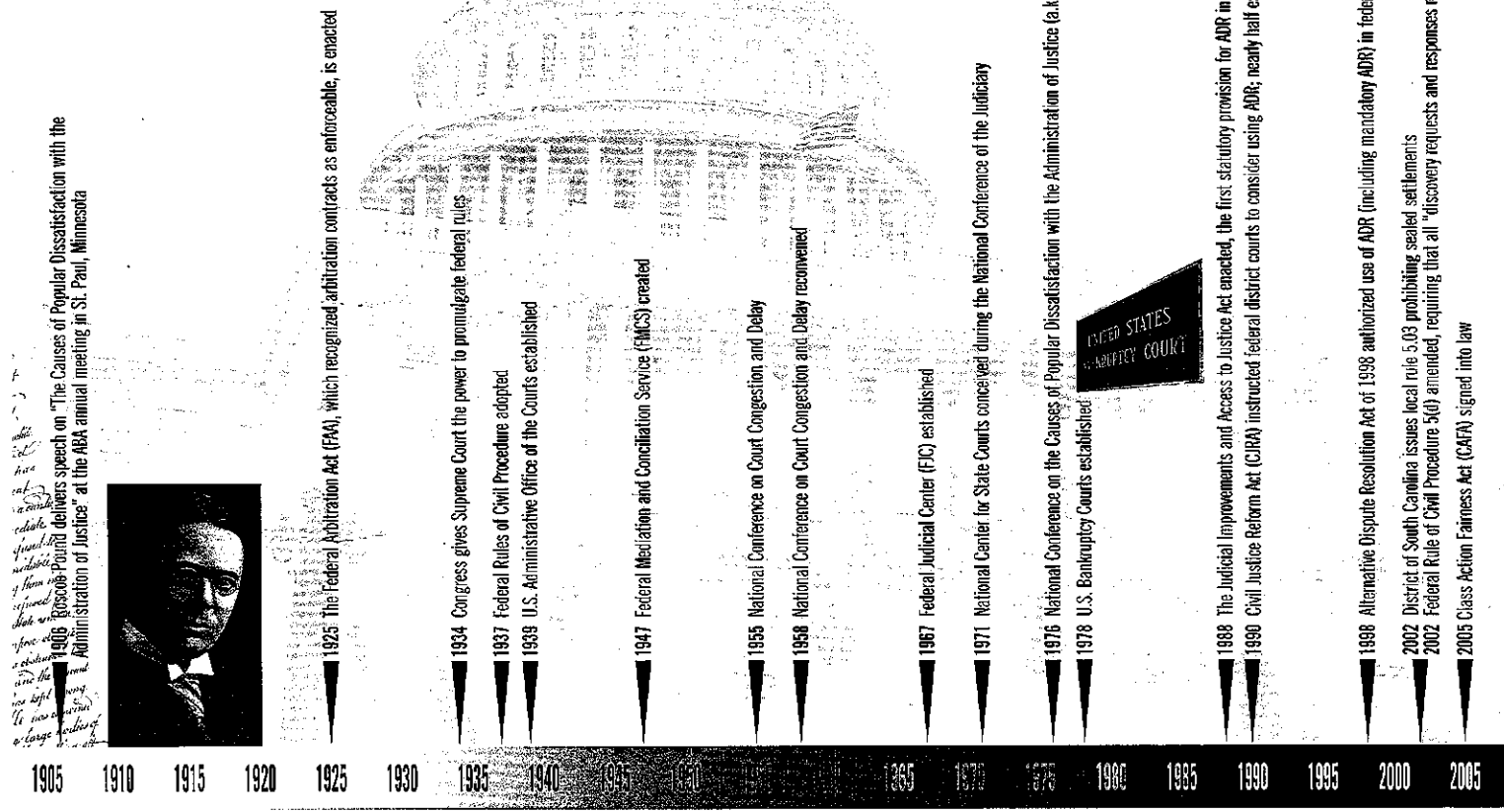
Good lawyers will win our share of cases, and lose cases we should lose but need to try, because the people involved need the catharsis of trial. We owe it to our fellow citizens, our clients, and ourselves to revere the trial process, respect the jury, and honor the juror. We might also do well to consider whether a diminishing number of jurors means diminished respect for the judiciary, and the process of government itself.

Do we dare risk the loss of what we hold dear because we try too hard to manage the docket away from trial,

not toward it, or because we value winning at any cost over presenting a case at trial for a decision to be made? Our founding fathers did not suffer from these failings. And, we should not.

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(Footnotes continued on pages 18-19)



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<sup>2</sup> [www.uscourts.gov/statistics/judicialbusiness.aspx](http://www.uscourts.gov/statistics/judicialbusiness.aspx).

<sup>3</sup> HON. WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 153 (2002).

<sup>4</sup> Hon. Wm. Young, *Vanishing Trials, Vanishing Jury, Vanishing Constitution*, Suffolk Law Rev (2007).

<sup>5</sup> Harry Kalven, Jr., & Hans Zeisel, *The American Jury* 499 (1966).

<sup>6</sup> Charles W. Joiner, *From the Bench, in The Jury System in America* 146 (Rita James Simon ed., 1975).

<sup>7</sup> See Patrick E. Higginbotham, Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 Tex L Rev 47, 59 (1977).

<sup>8</sup> *The Federalist Papers* No. 65, 81, 83.

<sup>9</sup> Hamilton, *The Federalist Papers* No. 65.

<sup>10</sup> Hamilton, *The Federalist Papers* No. 81.

<sup>11</sup> This Section II of this paper is taken from U.S. Department of State publication, *Rights of the People: Individual Freedom and the Bill of Rights*. <http://www.america.gov/st/democracyhr-english/2008/June/20080630224303eaifas0.7254129.html>.

<sup>12</sup> [www.america.gov/st/democracyhr-english/2008/june/20080630224303eaifas0.7254129.htm](http://www.america.gov/st/democracyhr-english/2008/june/20080630224303eaifas0.7254129.htm).

<sup>13</sup> Some scholars say a second exceptional aspect of American jurisprudence is first-line judicial review of legislative enactments on constitutional grounds. In the United States, trial judges have the right, duty, and power to interpret the organic law, i.e., the Constitution and Statutes. Trial judges, including state trial judges, also interpret state organic law for its compliance, or violation, of the United States Constitution's supremacy clause. Placing this responsibility in first line jurists, instead of a specialized constitutional court, is a second distinguishing hallmark of American jurisprudence.

<sup>14</sup> Perhaps it is valuable to recall the day of admission to the Bar and the thrill of taking the oath that makes one a lawyer. Lawyers are sworn in by a court to practice law before courts. Mediation is a subordinate, and junior dispute resolution method. No license is required to appear before a mediator. And, the advocate at mediation is not required to swear an oath of allegiance to the law.

<sup>15</sup> Like nearly all trial lawyers, our experience is our clients do not complain about losing, and return for our services after losing, if they feel like they have been effectively represented and have their day in court. Trial lawyers are seldom blamed for losing if they try their cases well.

<sup>16</sup> See 4 *Civil Action 1*, Spring 2005 (publication of the National Center for State Courts). This issue highlighted aspects of the Center's Civil Justice Reform Initiative.

<sup>17</sup> See Ostrom, et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 Journal of Empirical Legal Studies, Issue 3, November 2004. See also Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State Courts*, 1 Journal of Empirical Legal Studies 3, November 2004.

<sup>18</sup> Young, XL Suffolk L Rev 67 at 76, *supra*. See, for example, the website of the Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce, <http://www.instituteforlegalreform.com/>.

<sup>19</sup> 228 US 364 (1913).

<sup>20</sup> This history is recounted at *F. James Civil Procedure*, 332-33 (1965).

<sup>21</sup> Later, the Supreme Court dealt with the issue further in *Lyon v. Mutual Benefit Ass'n*, 305 US 484 (1939). There, the court sustained a district court's rejection of a defendant's motion for dismissal and peremptorily directed a verdict for the plaintiff. The Supreme Court held there was ample evidence to support the verdict and the federal court acted appropriately.

<sup>22</sup> *Berry v. United States*, 312 US 450, 452-53 (1941).

<sup>23</sup> *Galloway v. United States*, 319 US 372, 379 (Brennan, J. dissenting).

<sup>24</sup> Hon. Wm. Young, U S District Judge, Dist. of Massachusetts, speech to Florida Bar July, 2007.

<sup>25</sup> [http://www.ncsconline.org/Projects\\_Initiatives/Images/CivilActionSpr05.pdf](http://www.ncsconline.org/Projects_Initiatives/Images/CivilActionSpr05.pdf).

<sup>26</sup> See the shocking decline in trial numbers reported by the Statistical Reports on the Business of the U S Courts.

They may be viewed at [www.uscourts.gov/statistics/judicialbusiness](http://www.uscourts.gov/statistics/judicialbusiness).

<sup>27</sup> 2008 Statistical Report, Business of U S Courts, <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2008/Table410.pdf>.

<sup>28</sup> See 4 *Civil Action 1*, Spring 2005 (publication of the National Center for State Courts). This issue highlighted aspects of the Center's Civil Justice Reform Initiative.

<sup>29</sup> *Id.*

<sup>30</sup> Patricia Wald, *Summary Judgment at Sixty*, 76 Tex L Rev 1897 (1998).

<sup>31</sup> See *Edmond v. Ludwick, The Changing Role of the Trial Judge*, 85 Judicature 216, 216-17, 252-53 (2002).

<sup>32</sup> See Judith Resnik, *Changing Practices, Changing Rules, Judicial & Congressional Rule Making on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA L Rev 133, 137-52 (1977) (decrying failure of judicial conference to restore 12-person jury in civil cases). See also Development and the Law, *The Civil Jury*, 110 Harvard L Rev 1408 (1466-89) (1997).

<sup>33</sup> See generally, Clermont & Eissenberg, *Litigation Realities*, 88 Cornell L Rev 119 (2002), and *United States v. Reed*, 214 F Supp 2d 84 (D Mass 2002).

<sup>34</sup> Valerie P. Hans, *Business on Trial: The Civil Jury and Corporate Responsibility*, 226-27 (2000).

<sup>35</sup> *Patton v. United States*, 281 US 76 (1930).

<sup>36</sup> *Williams v. Florida*, 399 US 78 (1970).

<sup>37</sup> For example, see Richard S. Frase, *State Sentencing Guidelines: Still Going Strong*, 78 Judicature 173, 176 (1995).

<sup>38</sup> See *Watts v. United States*, 519 US 148, 156 (1997).

<sup>39</sup> See *Pickett v. Tyson*, 420 F 3d 1272 (11th 2005) (vacating \$1.267 billion jury verdict for cattle producers for insufficient evidence of harm to market for fed cattle); see also Domina *Proving Anticompetitive Conduct in US Courtroom*, 2 Journal of Ag Food & Industrial Organization, Art. 8 (2004).

<sup>40</sup> Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Way in Court & Jury Trial Commitments*, 78 NYU L Rev 982 (2003).

<sup>41</sup> Young, *Ravishing Trials, Ravishing Juries, Ravishing Constitution*, XL Suffolk L Rev 68, 79 (2007).

<sup>42</sup> This story is told by Paul Butler, *Case for Trials: Considering the Intangibles*, IJ Empirical Legal Stud 627 (2004).

<sup>43</sup> Hon. Nancy Gertner, US District Court, D Mass, *A Quasi Independent Judiciary*, Address to the Massachusetts Bar, January 26, 2006.

<sup>44</sup> The Judicial Conference of the United States has urged courtroom sharing since a single judge does not need one on a full time basis. See, Judicial Conference of the United States, Securities and Facilities Committee, *US Courts Design Guide*, Ch 4 at 41 (4th Ed 1997).

<sup>45</sup> Young, XL Suffolk L Rev 67.

<sup>46</sup> Generally, reform of the American system by incorporation of some aspects of the British system was within Chief Justice Rehnquist's vision.

<sup>47</sup> Hon. William Rehnquist, the 1999 Year-End Report on the Federal Judiciary, the Third Branch, January 2001 at 1 (Admin Office, US Courts, DC), [www.uscourts.gov/ttb/jan00ttb/jan2000.html](http://www.uscourts.gov/ttb/jan00ttb/jan2000.html).

<sup>48</sup> *FR Civ P* 26.

<sup>49</sup> This approach has been advocated by the National Center for State Courts.

<sup>50</sup> Juror questions after the parties have finished should be permitted.

<sup>51</sup> *Apprendi v. New Jersey*, 530 US 466, 490 (2000).

<sup>52</sup> *Blakely v. Washington*, 542 US 296, 313-14 (2004).

<sup>53</sup> *United States v. Booker*, 543 US 220 (2005).

<sup>54</sup> American Bar Association, *Principles for Juries and Jury Trials: American Jury Project*, 18-19, available at [www.abanet.org/juryprojectstandards/the\\_aba\\_Principles\\_for\\_Juries\\_and\\_Jury\\_Trials.pdf](http://www.abanet.org/juryprojectstandards/the_aba_Principles_for_Juries_and_Jury_Trials.pdf).

<sup>55</sup> Alexander Sanders, former Chief Justice, South Carolina Court of Appeals, *Ethics Beyond the Code: The Vanishing Jury Trial*, Address to the American Trial Lawyers Association (December 2, 2005).

<sup>56</sup> Administrative Office of the United States Courts, Federal Management Statistics 2003 & 2004, [www.uscourts.gov/fomstat/index.html](http://www.uscourts.gov/fomstat/index.html).

<sup>57</sup> 4 NCSC Civil Action No. 2 (Spring 2005).

<sup>58</sup> A remarkable, and rare book, Wm Forsyth, *History of Trial by Jury* (1875), provides an arresting recantation of the jury's evolution. The book may be read at <http://www.constitution.org/cmt/wf/htj.htm>.

<sup>59</sup> President Abraham Lincoln, Annual Address to Congress (December 1, 1862).

<sup>60</sup> It may be argued, vigorously, that this is already happening. As jury trials have diminished, already massive dissatisfaction with government has sprung upward and into existence, Congress has become more dysfunctional than ever, and openly disrespectful and borderline "treasonist" comments have been made by persons who ought to know better. See the comments of Texas Governor Rick Perry. <http://www.wikio.com/video/texas-governor-texas-leave-union-1024162>