



The vanishing civil jury trial

Could jury consultants and mock trials be used more creatively to resolve cases?



Gwilliam

J. GARY GWILLIAM

As regular readers of this column know, I am increasingly concerned about the fact that we are trying fewer jury trials in our civil cases. The American Board of Trial Advocates (ABOTA) has studied this issue extensively. ABOTA is a national honorary organization of experienced plaintiff and defense attorneys in the civil field. Their national magazine, *Voir*

Dire, recently reprinted a very interesting and extensive study of this issue done in Pennsylvania, "The 'Vanishing' Civil Jury Trial."

Chief Judge Yvette Kane of the U.S. District Court for the Middle District of Pennsylvania appointed a Task Force in June of 2007 to study this issue. Their extensive study cites many of the same issues I have previously discussed:

Increasing use of alternative dispute resolution ("ADR") processes.

The increasing depth and cost of discovery.

Delay in resolution of cases by jury trial.

The uncertainty of jury verdicts.

Increased filing and granting of dispositive motions, most particularly summary judgment motions

The lack of trial experience by both lawyers and judges (and the attendant reluctance to try cases).

The article sets forth 14 separate recommendations for resolution of this problem, most of which deal with systemic civil discovery rules relating to discovery, use of dispositive motions, modernization of juries (e.g., allowing them to take notes, giving written copies of readable and understandable jury instructions to jurors) and other procedural issues.

Although California is ahead of the game on many of these recommendations, the problem remains acute here. Perhaps their most provocative recommendation was the expanded use of summary jury trials in appropriate cases. This would allow the courts and the litigants to work together to have shortened jury trials and perhaps even advisory verdicts in more complex cases.

I have a couple of other ideas, involving the use of jury consultants, mock trials and ADR organizations, that may help us evaluate and resolve our matters short of the traditional, expensive, and often times uncertain courtroom jury trials.

For many years, our firm has used focus groups or mock juries to evaluate our cases before trial. We use well-qualified and

experienced jury consultants to assist us. I know this is true of many plaintiffs' firms. The assistance of jury consultants is increasingly important in this era of strong juror attitudes that can affect the outcome of our case. Although the problem revolves primarily around tort reform attitudes, we are now seeing jurors who have prior exposure to civil cases through the media, television programs and the Internet. They often come into the courtroom with strongly formed opinions about lawyers, judges, expert witnesses and other jurors.

While jury consultants are critical to help us ferret out the negative attitudes, the focus groups serve another important function: They act as a rehearsal for the real trial. If plaintiffs' lawyers are not getting enough real jury trial experience, then the mock trials set up by a good jury consultant can help overcome the lack of actual courtroom experience. That helps keep us sharp, but it doesn't address the declining number of civil trials.

So how might the mock jurors and jury consultants help us evaluate and resolve cases? It is obvious that the defense is doing the same thing that we are with focus groups and mock jurors, and we often times share our results in the confidential ADR settings. In many cases, we certainly could agree to summary adjudication if we had the appropriate judicial cooperation.

But short of that, could we find a way to use this important and expensive jury evaluation information cooperatively with the other side? Couldn't we use our mock jury experience as a way to occasionally substitute for an actual jury trial? It does seem that the subject is worth exploring with the major ADR groups and jury consultants. I certainly believe our local, state and national plaintiffs organizations should be involved, and ABOTA's resources could be of great help.

I am searching for solutions as the future is upon us, now. We need some creative thinking to resolve the problems created by fewer jury trials and I am vitally interested in any ideas that the plaintiff or defense bar has along these lines. I hope to hear from some of you soon.

J. Gary Gwilliam is an Oakland trial lawyer, a veteran of over 150 jury trials, and the author of the award-winning book, Getting a Winning Verdict in My Personal Life: A Trial Lawyer Finds his Soul. Gwilliam is a past president of Consumer Attorneys of California and Public Justice (formerly Trial Lawyers for Public Justice). For more information, see www.garygwilliam.com. For information on his law firm, see www.gicch.com