

Third in a series

Are *Trial* lawyers becoming extinct?

Challenged with managing huge caseloads, how much are judges to blame for the disappearance of jury trials?


Gwilliam

By J. Gary Gwilliam

This is the third in a series of columns discussing the disappearance of jury trials in civil cases. I want to continue to explore the causes of this phenomenon with an eye towards suggesting some solutions.

Previously, I discussed some of the causes of this problem – the pressure to settle cases through mediation, the costliness of trials, the impact of attorney advertising and the changing perception of trial lawyers in the eyes of the community. The sticky wicket of politics and the impact of more women becoming trial lawyers were also considered. Now I want to focus on the role the judiciary plays in reducing the number of cases that are tried.

Fast track and rocket dockets

The evolution of fast-track, rocket dockets, and direct calendaring of cases are familiar to all of us. The judicial emphasis on managing dockets is a point repeatedly driven home during any court appearance. Many judges must manage caseloads of 500 or 600 civil cases. Rather than engaging in contemplative perusal of the filings in a particular case, judges now spend most of their time managing caseloads through case management conferences.

When the judge becomes a claims adjuster

This pressure to move the cases along and resolve them has changed the judges' roles from adjudicator of justice to that of a claims adjuster. Think of the last time you appeared before a judge at a hearing. If your experience is like that of most plaintiffs' lawyers, the parties (mostly meaning the plaintiff) were probably "strongly encouraged" to mediate or otherwise resolve their disputes. It often seems that the judges feel jury trials are time-consuming, unnecessary and something to be avoided whenever possible.

I recently appeared before a judge in Alameda County who complained about having a caseload of 600. After being informed that two of three plaintiffs had settled their cases, he referred to the ones that settled as "good" plaintiffs and the one plaintiff that did not, and was set for trial, as the "bad" plaintiff. Although the judge's comment was made somewhat in jest, it demonstrates how many judges feel that cases that proceed to a jury trial are "failures."

The role of the judiciary

The role of the judiciary was discussed in an article in *Voir Dire* magazine, the publication of the American Board of Trial Advocates. Neal Ellis, a trial lawyer from North Carolina, wrote an article entitled "Saving the Jury Trial." In it, he states:

> 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. Most would agree that a jury's greatest strength lies in making credibility determinations, evaluating demeanor, and sensing the 'mainsprings of human conduct.' 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.[1]

Bench and defense: maneuvering to avoid trial

My observations mirror those of Mr. Ellis. I am particularly concerned about the increasing use of summary judgment motions to "decide" cases so they do not go to trial. In my opinion, many judges see their roles as resolving the case through summary judgment instead of giving sufficient deference to the rule that requires all disputed evidence of fact to be decided by a jury.

Other procedural devices used to gut cases and avoid trials include limitations on discovery requests, excluding expert witnesses and most of all, the pervasive use and abuse of motions in limine. The defense bar has consistently used these and other procedural maneuverings to avoid having a jury trial on the merits of the case.

What this means for the future of the plaintiff's bar

The problem is escalating. With fewer jury trials, lawyers have less experience and feel increasingly uncomfortable in taking cases before a jury – in trusting a jury. The same is true of judges. Not only trial judges, but oftentimes the appellate judges seem quicker to criticize juries and overturn their results than they would have a few decades ago.

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Oftentimes, I feel that today's civil justice system is much more about efficiency than fairness. Getting the cases resolved is more important than getting them fully and fairly adjudicated, particularly adjudicated with a jury trial. But then, I am an old jury trial lawyer – a dinosaur. I'm fighting for survival as the number of my fellow dinosaurs shrinks in size, soon to be on the endangered species list, and with them, perhaps, the civil justice system as we know it.

What do you think? Please contact me at ggwilliam@plaintiffmagazine.com.

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Endnote

[1] *Voir Dire*, Vol. 13, Issue 2, Summer 2006, reprinted with permission of the author.

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