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# Death of the Jury Trial: The Past, the Present, and Future?

Almost 20,000,000 civil suits will be filed this year, a staggering number for the courts, the litigants, and the insurance industry. From this massive number of filings, less than one percent will ever go before a jury! Over the last several decades the number of jury trials has seen a drastic and continuous decline. The jury trial has deep legal, social, and economic roots; however, the general public's exposure to the jury trial is more likely to come in the form of television trial dramas and in movies. This session will focus on the Jury Trial's impact, past, present, and future and why the decline of the Jury Trial may ultimately be a poisoned chalice. This interactive presentation will engage the panel and attendees in discussion of why the Jury Trial is a not only a crucial element of risk management but indeed is the central pivot of American legal system.

## ROADMAP: The Past, The Present, And Future

Most Americans have been exposed to the headline grabbing criminal and civil trials held in the United States. These trials are sensationalized by the media which often extends the true narrative of the legal process. Television would have the average American believe that every matter is tried to verdict before a jury. In reality, almost the opposite is true. At one time, the jury trial was the crown jewel of litigation and a true test of not only the trial attorneys' skill but perhaps the ultimate measure of the litigants' mettle. Today the majority of litigation costs will not be spent on jury trials, as only the cases that "need" to be tried actually go before a jury. Although experts and scholars cannot agree why, they can agree that the American jury trial is dying at an alarming rate. The desire to try cases is vanishing and with that the loss of what can be a strategic and economic advantage during the course of litigation. This panel will explore the origins of the jury trial, why it is in its current state, and why its potential death will benefit neither Plaintiffs nor Defendants. However, before one understands where jury trials are going, one must first understand where they came from.

## THE PAST: Yesterday Is Gone

> *"Trial by jury is the palladium of our liberties. I do not know what a palladium is, but I am sure it is a good thing!"*
>
> *-Mark Twain*

*Palladium is defined as a safeguard or source of protections.*

The Jury Trial involves expense and risk that litigants are often not willing to undertake. The reasons for same are varied, and often made with exposure and expenses in mind. Independent of the business aspects of litigation, the Jury Trial has deep legal and social roots and is a reflection of our society to its core values. There are three types of juries in the United States: criminal grand juries; criminal petit juries; and civil juries. This panel will focus on civil juries.

The U.S. Supreme Court noted the importance of the right to a jury trial in its 1968 ruling of Duncan v. Louisiana. In *Duncan*, the Court stated that:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to trial by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

The U.S. Declaration of Independence accused George III, inter alia, of "depriving us in many cases, of the benefits of trial by jury." This deprivation of certain rights altered the course of history and was the impetus for the founding of the United Sates. Article III of the U.S. Constitution states that all trials shall be by jury. This right was expanded with the Seventh Amendment to the United States Constitution, which guarantees a jury trial in civil cases. It must be noted that the right to trial by jury for civil disputes is preserved and not created by the 7th Amendment. Almost every state's constitution preserves this same right.

The origin of the jury trial traces its roots back to when the majority of people were illiterate. The only way to conduct trials was orally, having the judges, lawyers, and witnesses speak to jurors in an attempt for them to understand and resolve disputes. Even today, it is an invaluable ability and skill to be able to distill complex ideas into concepts suitable for consumption by the average American juror. Although trial attorneys rarely face an illiterate juror today, they face new challenges as a result of changes in technology and society. Technology provides instant access to all of the information one could ever need. Today many jurors possess short attention spans and appetites for continuous action, culminating in potentially bored and distracted individuals with no desire to appreciate the nuances of your case. Setting aside the difficulty of engaging potential jurors, it is a problem that fewer and fewer attorneys face as trials continue to dwindle. This can be traced to decades of change in procedure and litigation expectations.

Trials were originally the only time evidence was introduced and presented to the court, with limited or no pre-trial discovery. The original Anglo-American legal system was a dual system with jury trials at common law and non-jury proceedings in equity. In the mid-1800s, the two were merged, which culminated in the 20th century with the introduction of the Federal Rules of Civil Procedure. Many states mimicked the Federal Rules and adopted their own versions. These rules began to alter the course of litigation and, over time, pre-trial discovery and proceedings became the focus.

From the founding of this Country the number of claims filed has increased, Courts and the Government responded by reducing Court involvement. As a point of reference and an objective indicator of the demise of the jury trials, in 1962, 5,802 civil trials were conducted in the federal district courts. In 1990 there were 4,517 federal civil jury trials. By 2016, the number of federal civil jury trials dropped to 1,758. Consistently, the majority, more than 98%, of civil jury trials take place in state courts. Inversely, in 1960 there were 385,933 attorneys in the United states. As of 2016, there were 1,315,561 lawyers in the United

States. Everything in the legal world is growing, more regulations and enforcement activity, more laws, more claims, clearly more lawyers, all with one exception, jury trials.

Many scholars note that in 1986 American trials began to decline. The reason for same is highly disputed. Of note, this is the year a Supreme Court decision instructed trial courts to grant summary judgment, enabling lower courts to dismiss "meritless" cases. Plaintiffs' attorneys argue that, with the election of Ronald Regan and the protection of big business, came the idea of "tort reform." Others argue that the introduction of civil procedures, as well as new laws and regulations, limited the number of viable trials. Additionally, since the 1930s, mandatory discovery has become expensive, and having to bear those costs can dissuade Plaintiffs and Defendants from taking the final costly step to trial. Many scholars have noted that since the reformation so much time is devoted to preparing for trial, that undertaking a trial has become an antiquated and unnecessary aspect of litigation.

Contrary to what the media would have the public believe, most cases will never be resolved inside of a court room. It appears from the statistics and studies that litigants have become risk adverse. Some in our profession argue that Judges who profess admiration for the jury trial push for pretrial settlement as they seek an outcome that is more rationalized and systematic without the spontaneity and uncertainty of a jury verdict. Today the overwhelming preferred course of litigation is to conduct discovery, file dispositive motions, and explore pre-trial settlement. While mediation and pre-trial settlement are legitimate avenues of risk management, the jury trial is an equally valuable weapon.

**THE PRESENT: Whether It Is the Best of Times or The Worst of Times, It Is the Only Time We Have**

*"Let us never negotiate out of fear, but let us never fear to negotiate"*

*- John F. Kennedy.*

If the Plaintiff or Defendant decide to try a case, and maybe for all of the right reasons, there could be great victory, a terrible loss, or something in between. Depending on the outcome of the trial, clients could be thrilled or not, an appeal could be filed, the case could be re-tried—there are many possibilities, all of which delay resolution. Everyone involved in litigation is well aware of these risks and the advantages to mediating or attempting to settle a case prior to trial. In recent decades, both court ordered and private mediation have dominated the resolution of cases ripe for trial.

Additionally, during the course of litigation, attorneys are faced with converting an alleged harm that is measured qualitatively (pain and suffering, wages, reputation, health, etc.) into a measurable commodity, money. There are certain factors that also come into play that can greatly reduce or add value to a case. These factors are often idiosyncratic to specific venues and, for an outsider looking in, can be difficult to appreciate. All jurors hold preconceived beliefs and notions of what is fair and equitable. These beliefs are molded by media, by environment, and by internal characteristics that may not be revealed until after a verdict. Other factors that may determine the outcome of a trial are jurors' ability to comprehend the law or appreciate the testimony of witnesses, both expert and lay. With that, the credibility and general likeability of clients and witnesses impact how a jury may or may not act. It is the uncertainty of these intangibles that results in cases being resolved at mediations.

Private mediation has blossomed over the last few decades, with many former Judges retiring to become mediators in the private sector. Some Judges have retired early and attorneys have left private practice to pursue careers in private mediation. The Mediator sees the case from a fresh perspective and often

offers new suggestions toward settlement. Mediation can break stalemates between the attorneys and the parties or claims representatives in terms of creating further discussion. During the Mediations' opening exchanges each party has the opportunity to educate and influence their opponents. Mediation offers each party a "realistic" look at their own case and gives the parties an idea of what may happen at trial.

When to Mediate a Case

A case should go to mediation when: liability is clear, but the parties cannot agree on damages, or inversely, damages have been agreed upon but the parties disagree on liability; issues have arisen regarding insurance coverage; negotiations have broken down and settlement appears to be heading nowhere; or both parties want to keep the dispute private and out of the public eye.

When Not to Mediate

You should not mediate when: you are still waiting for a key deposition or expert review; the client and/or their carrier(s) may not have the case properly reserved; the excess carrier is not on notice or refuses to participate; your adversary will only mediate with a mediator who reveals confidences; your client becomes a problem; your adversary insists on a Mediator who is merely a conduit; a party who will impact the outcome will not attend; or a party will not pay its share of the mediation fee.

When a Party ignores the request for mediation, do not chase your unwilling adversary, whether it is the plaintiff or a co-defendant, and, if overtures need to be made, consider letting the mediation company handle it.

The Timing of Mediation

The timing of mediation is also a crucial consideration. You should consider mediation: when motions for summary judgment are pending; when motions for summary judgment have been decided; just before trial; post-trial; when appeals are pending or at any point that is to your strategic advantage.

Should You Utilize Court or Private Mediators?

There are pros and cons to court ordered versus private mediation. If the jurisdiction where the case is pending has a court mediation program, this may be your best option. The court mediator can carry more weight than a private mediator as the court mediator has the power to send a case out for trial. However, the Court and their mediator may have too many cases on the docket to give your case individualized attention. If your case is complicated and requires a significant block of time, consider retaining a private mediator who specializes in that type of litigation. The purpose behind these settlement discussions is to have a well-respected and knowledgeable intermediary act as a neutral and objective third party. His or her role is solely to bridge any gaps between the positions of the opposing parties. Even when mediators do not seal the deal during the session, they can enable progress that eventually leads to resolution.

The Choice is Yours!

One of the major issues with mediation is that your opponent obtains a glance into your plan of attack for trial. Additionally, by agreeing to mediate you are conceding, to a degree, that there is merit or value to your opponent's case. The core purpose behind pre-trial settlements should be to expedite resolution. Plaintiffs should realize that the time value of money, coupled with the fact that they do not have to expend significant expense and time on a potentially unfavorable verdict, should coax them to take a reasonable position on settlement. Ultimately, if you go to mediation and make no progress, you can just walk away.

Again, Judges, strongly push for pre-trial settlements in civil matters. The rules and regulations of Courts have been tailored to flesh out every detail of a matter before it is presented to a jury. Some Judges view a trial as a failure on their part and, accordingly, will attempt to force an outcome that the Plaintiffs and Defendants cannot agree to. Court mandated pre-trial or settlement conferences often require the Plaintiff to be present and the Defendants to come with a claims representative.

**THE FUTURE IS WHAT *YOU* MAKE IT!**

> *"Trial by jury must and shall be preserved! Amidst the throng of crude sacrilegisms ... that assail us nowadays in the legal sanctuary, none is more shortsighted, none more dangerous, than the proposal to abolish trial by jury."*
>
> *-John Henry Wigmore*

Although no one has publicly clamored for the abolition of jury trials, the statistics would tell a different story. The majority of cases that do not settle are those in which there is material uncertainty regarding the laws or the facts, despite pretrial discovery. The decision to try or mediate a case is a pivotal moment in the life of a case. In like kind, the jury trial is a not only a crucial element of risk management, but indeed is the central pivot of the American legal system.

Setting aside the civic aspects of why jury trials are crucial to maintaining and preserving democracy, the willingness and ability to try a case to verdict is a crucial ace in the hole. You should always consider going to trial when: your adversary has taken such an unreasonable position that negotiation is pointless; a litigant has drawn a line in the sand; or you have the goods. The narrative of the runaway verdict has continued to this day. It gives Plaintiffs an unearned air of leverage a curtails some defendants from trying potentially high exposure, but lackluster or meritless cases. In a logical progression, as trials have declined, the number of skilled lawyers who are experienced trial attorneys has also declined. And, in turn, fewer experienced trial attorneys have become judges. If this trend continues, in the decades to come the art of the trial could become an antiquated aspect of civil litigation.

Know When to Hold 'Em, Know When to Fold 'Em!

In poker there are many different ways to play a hand. You can muck a losing hand or bet a potential winning hand. In addition to playing the cards you are dealt; skilled players play their opponents and make calculated gambles. Reading your opponents, knowing their tells, and attacking or retreating based on same, is a crucial skill to winning. In that sense, there are cases that are winners and there are cases that are losers.

Looking at the facts of your case and assessing the liability and damages aspects is crucial in knowing how to resolve a matter. However, there are intangible aspects of the case that are sometimes equally as important: who is your opponent, both the Plaintiffs themselves and their counsel; who is the Judge assigned to the case; does that Judge have a reputation for siding with Plaintiffs or Defendants; who are the witnesses, lay and expert; where is the matter venued? Unfortunately, civil matters are rarely black and white. Ever increasingly do cases operate in the gray, where intangible aspects of a case can create or reduce value.

If you have been in this business for any amount of time, you know you come across bad cases: dead liability cases, in a Plaintiff-friendly venue, and a severely injured and sympathetic Plaintiff. In those

instances, a gamble would rarely pay off. A case that could settle in the six-figure range, in the wrong circumstances, before the wrong jury, can be a multimillion-dollar exposure.

The question begs, when do I consider trial?: when settlement has failed and you are on the trial calendar, but the Plaintiff has questionable liability; damages are de minimis or questionable; and the demand is beyond comprehension. There are a few avenues for dealing with a Plaintiff who attempts to bluff with the threat of trial. The choice to go to verdict is a decision between business sense and business cents.

Yet, if Plaintiffs know that Defendants are unable or unwilling to go to trial, their demands will reflect that. The threat of trial is not something that should deter the defense of a litigation or enlarge the value of settleable cases. A defendant should always be willing and able to go to trial to either bring a Plaintiff back down to realty, or call his bluff. Merely because a Plaintiff threatens to go to trial does not mean he, or his client, is willing and able to attempt a time consuming, expensive, and potentially fruitless endeavor.

It is important to remember that merely because you paid something as a result of a verdict, that does not mean that you ultimately lost. The amount might be lower than what you would have paid to settle it before trial, the percentage of liability may be split between you, the Plaintiff, and codefendant, or you may be granted indemnification and defense from a co-defendant or third-party defendant.

Factors to Consider for Settlement or Trial

As discussed above, there are many different variables for why cases aren't going to trial. The potential exposures for both Plaintiffs and Defendants can be daunting and the costs associated with same ultimately result in a Pyrrhic victory. Different venues with different jury pools can turn a five-or-six figure case into a six-or-seven figure case, and vice versa. Knowing your witnesses, your evidence, and the skill of your opponent are all factors to weigh when you decide to either fold or push all in.

There are many ways to litigate a case. Ideally, a case is dismissed on summary judgment, but that is a high standard and infrequently granted. Mediation and pre-trial settlements are always a viable option, but not always the best choice. Some scholars have criticized the privatization of dispute resolution as it has wide ranging effects. The resolution at private mediation is behind closed doors. Oftentimes the settlements are confidential and the reasons and values are obscured. The jury trial with all of its risks is the epitome of democracy and self-governance. The trial results in deep accountability where facts, good or bad, are exposed and responsibility is forced upon the parties. Having your peers, fellow Americans, decide the fate of others is the essence of democracy.

There are many reasons why we need to fight for the preservation of the jury trial. At the end of the day, one of the biggest motivations should be that sometimes trial by jury is the best option for you and your clients. However, whatever the motivation may be, principal, time and money, something else, it should be executed in the right way. Trials should not be seen as some far off and unlikely element of litigation. Rather, every step along the way should be tailored to going to trial. A successful trial can be won or lost in the earliest days of litigation. Members of this panel present this topic with the central theme of *si vis pacem para bellum*, if you want peace, prepare for war.

The Art of Litigation

> "*Victorious warriors win first and then go to war, while defeated warriors go to war first and then seek to win"*
>
> - *Sun Tzu*

The future of litigation management does not hinge on the jury trial but it is a key factor in effective risk management. The narrative of a runaway jury is factually inaccurate and has done nothing more than embolden certain Plaintiffs to attempt to use trial as leverage. Whether you go to trial or not, having the ability to go to trial confidently is a major bargaining chip. With the right plan and right people in your corner, you can prevent a small matter from turning into a high exposure case. Having competent and experienced lawyers handle the matter from its inception to trial enhances your ability to accurately assess a case's strengths and weaknesses. For every multi-million-dollar verdict you hear about, you don't hear about the cases that were either dismissed by summary judgment or resulted in a defense verdict.

When this country was formed, the foundation upon which our legal institution sat was partly comprised of the right to trial by jury. In the decades and centuries that have passed, we have seen that parts of the foundation have been replaced. Although different methods of resolution have stepped into the shoes of jury trial, the jury trial is a key element of claims management that must be cherished, protected, and revitalized.