THE TEXAS LAWBOOK

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Decline In Civil Jury Trials: The Cheese Has Moved And That's Okay

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April 12, 2012 – Last week, Mark Curriden's article "Civil Jury Trials Plummet in Texas" appeared in *The Dallas Morning News,* highlighting the fact that the number of civil jury trials in Texas during 2011 were one-third of what they were in 1996, and then providing the opinions of noted lawyers and judges on this seismic shift in our jurisprudence over the last fifteen years. The article's quotes were to the effect that the demise in jury trial dispositions was "disheartening;" "not a positive development;" and a reflection that "judges simply do not trust juries," and "appellate courts do not respect jury verdicts." The commentators appeared to reflect a consensus in the legal community that the reduction in civil jury trials is overall a very negative development for the citizens of Texas.

I disagree. The decline in the number of jury trials is a positive development reflecting that our system for addressing disputes is now working better than it ever has before because those involved in disputes have more and better choices, which provide the opportunity for more satisfactory and efficient methods of bringing fair closure to their civil conflicts.

My conclusion comes from recognizing the obvious, after thirty-three years of practicing in Texas' civil litigation arena. The typical two year path from the time a civil lawsuit is filed until it goes to trial is a battlefield riddled with landmines. These hidden explosives can take the form of witnesses with selective memories; documents full of ambiguous language; unanticipated massive expense; suddenly insolvent defendants; and certain judges calling shots in unjustified ways because of a politically cozy relationship with opposing counsel. With these dangers present, a party traversing the litigation minefield with even the best lawyer can find himself a target in the equivalent of guerrilla warfare.

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Experienced trial lawyers know this, and also realize that in a world changing at the speed of light, where time is often more valuable than money, the prudent client's goal for his existing dispute is not to survive as the battle scarred victor at the conclusion of a multi year heavily litigated war of attrition; but rather achieve a prompt and acceptable resolution through creative tactics calculated to produce an expedited satisfactory result long before he has to face a jury.

Veteran mediator Harlan Martin, once an esteemed district judge in Dallas who presided over a few hundred jury trials in a prior life, starts his mediations with a thought few lawyers and even fewer parties would have reached on ›

their own. Explaining at the outset why that day's mediation is the best day for concluding the dispute at hand, Harlan tells the parties, "If we don't get this lawsuit settled today, then you'll get to go try this case, and will thereby put your fate in the hands of twelve people who aren't smart enough to get off jury duty."

What are the advantages, disadvantages, and realities of civil juries that cause practitioners to have such different opinions of them?

- Plaintiff's lawyers favor jury trials because they provide the highest likelihood of awarding large actual and punitive damage awards. Defense lawyers favor them when a trial judge has underwhelming horsepower, well known biases, and/or unpredictable judgment.

- Who shows up on and gets challenged off, and finally is picked to serve on a jury impacts the trial's outcome, and, therefore, adds to its uncertainty.

- Jury questions and instructions often involve unfamiliar words and seemingly foreign syntax, which brings the element of unintelligibility into the deliberation process, thereby adding uncertainty to a trial's conclusion.

- With a captive audience of novice fact finders in place, litigators usually engage in more theatrics and gamesmanship, which causes the roller coaster ride of a trial to have higher highs and lower lows.

- Studies of the jury system have proved that jurors often make up their minds about a trial's outcome by the end of the trial lawyers' opening statements, meaning final decisions get reached before the first witness gets called—totally contrary to the way a fact finder is instructed to do his job.

- Jury trials necessarily last longer than non jury trials, typically take longer to get reached on a court's docket, and can result in a mistrial, making them more costly than bench trials.

- These days, jurors often improperly (*i.e.,* contrary to court instructions) access the Internet and social media during trials, bringing in information extraneous to the lawsuit itself.

This being the reality of jury trials, a major reason for their demise is due to the rise in civil litigation of pre-trial discovery, which allows parties to better predict their prospective outcome at trial, putting them in the position to control their own destinies by achieving a reasonable settlement (*i.e.,* reasonable in light of weighing their trial risks). Consummate trial lawyer Leon Jaworski saw pre-trial discovery as a good thing, as he stated in a 1980 speech:

> *"Opportunities for taking depositions and obtaining evidence in advance, to know pretty well what the facts are at the time of trial, takes the sport out of the trial to a large degree but, we just can't help that; we're still seeking justice. I think that, today, with all the advancements that have been made in pre-trial discovery, the jousting, the sport of combat, in the courtroom, has been lessened to some degree. But we should not mourn that; we should praise that."*

The rise of mediation and arbitration has also been a huge factor in removing civil disputes ›

from juries' consideration. In the last two decades, most judges won't try a case unless it's been mediated to impasse. A hardball "agent of reality" mediator helps remove most of the crystal ball's few remaining clouds after discovery closes. Across the board, approximately three fourths of the cases that get mediated result in settlement.

More commercial contracts contain arbitration provisions in recent years. Why? Because the business community perceives arbitration to be advantageous to litigation due to: (i) a fear of runaway juries; (ii) an arbitrator's expertise in the subject of the dispute often exceeds that of trial judges; (iii) its being binding, and, therefore, will have prompt closure and not be delayed by an appeal and possible retrial; (iv) arbitration settings are more likely than trial dates to go on the day scheduled, (thereby avoiding the problem of multiple trial resettings, which cause additional lawyer preparation time and, therefore, additional expense); (v) arbitration typically has less discovery and, thus, less likelihood for discovery abuse; (vi) arbitration's being perceived as less costly than litigation due to all the circumstances described above, (even though parties have to pay arbitrators a fee, while judges' salaries are paid by taxpayers); and (vii) the confidentiality of the arbitration process, meaning any dirty laundry in a case won't get aired out in a public courtroom.

Is arbitration a perfect means of achieving the resolution of a civil dispute? Of course not, but as sportswriter Dan Jenkins once said, "Ain't nuthin' in life's dead solid perfect." Sometimes arbitration proceedings become protracted, and thereby expensive. Sometimes arbitrators err, and the losing party gets stuck with a bad result in a binding decision for which he has no right of appeal. Yes, bad stuff happens in arbitration from time to time; but parties can decide in advance in negotiating their commercial contracts whether they want to accept the costs and risks of arbitration, and make their own determination whether they want to abide by the choice they make, as opposed to having their choice for who should decide their disputes made by others.

Bottom line, is the decline in civil jury trials in Texas a good thing or a bad thing? A good thing or a bad thing for whom? Therein lies the rub.

Certainly, jury trials are good things for litigators and judges because they keep us busy, put notches in our belts, and are often where reputations are made. However, in more than three decades as a trial lawyer handling commercial disputes, I have yet to have a client who would rather proceed (and pay all associated costs and fees) through the entire discovery and pre trial process, then go to trial, and plow through an appeal, as opposed to entering into an a more prompt, acceptable resolution as soon as it became available. To choose the trial/appellate route over the acceptable settlement route is a choice made only by masochists.

When rational people find themselves in a dispute, their goal is to spend minimum time and expense on it, and put it to bed quickly with a resolution that may not be perfect, but is something they can live with, as determined by their own choice, as opposed to having it decided by a jury, a politically elected or appointed trial judge, or an appellate court.

Former United States Attorney General John Ashcroft said it best about why today's system ›

of multi-option dispute resolution is more satisfactory than when civil jury trials played the dominant role in ultimate resolution, in a speech he gave in 2002: "Justice can be achieved through consensus as well as litigation. Adversarial justice and consensus justice are mutually reinforcing concepts. Behind every successful mediation of a dispute is the prospect of aggressive litigation. And behind all successful litigation must be the opportunity for citizens to work together to reach a mutually beneficial outcome."

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