VANISHING TRIALS: IS THE SYSTEM WORKING?

by

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Addressing a State Bar of Texas Litigation Section seminar two months ago, Fifth Circuit Judge Patrick Higginbotham gave his highly informed and respected opinion on the topic that seems to consume the litigation community these days: "The Vanishing Civil Trial."

Judge Higginbotham provided facts to prove what litigators already know – the days of congested dockets in big cities are gone because so few cases go to trial these days. Statistics tell the tale. The percentage of jury and bench trials in federal civil cases across the country has declined from 10% of cases resolved in 1970 to 2.2% in 2001. Juries resolved 4.3% of federal civil cases in 1970 and only 1.5% -- 3,633 cases in raw numbers – in 2001.

Judge Higginbotham essentially blamed alternative dispute resolution as the cause of trials' declining numbers, and then expressed his concern that too many settlements arising out of mediations harms our legal system because it reduces the amount of court created precedent that serves as the basis for our common law.

No one can dispute that more settlements mean fewer trials, which in turn mean fewer appeals, which in turn means less precedent. A district judge in Dallas typically tries only 13 – 15 jury trials per year since the county courts at law acquired concurrent jurisdiction more than six years ago. Most of those cases involve either car wrecks, grocery story slip-and-falls, or terminated employees who have no written employment agreements. Thus, those few lawsuits that go to trial almost always involve plaintiffs who have their lawyer hired on a contingent fee basis, such that they essentially have not downside to rolling the dice at trial since it does not cost them any money to proceed.

One Dallas district judge told me in early February that the judge had not had a jury trial go past voir dire since the first week in November. A justice on the Dallas Court of Appeals confirmed the impact on appellate practice, telling me in late January that it had been over two months since the justice last heard an oral argument.

The ultimate question for all people having any interest in the American system of jurisprudence now becomes: "Is the Vanishing Civil Trial a good thing or a bad thing?" Maybe the question deserves some tweaking – "A good thing or a bad thing for whom?" Therein lies the rub.

Certainly, trials are good things for those of us, litigators and judges, who spend our careers involved in the business of lawsuits. Historically, they are what we most enjoy doing in our practice, and where reputations are made. Until recently, trials have been what notched our belts.

In over a quarter of a century practicing as a trial lawyer in downtown Dallas, however, I have yet to have a client who truly wanted to proceed through the entire litigation process of going to trial and then proceeding through an appeal when an acceptable settlement became available. I have always represented business people. They don't like paying enormous, out-of-pocket fees. Most important, they prefer to decide their own fate in bringing closure to a dispute, over having closure brought by some combination of jury, a politically elected or appointed trial judge, or an appellate court.

I respectfully disagree with Judge Higginbotham as to the cause of the Vanishing Civil Trial. In my opinion, it is *not* caused so much by the influx and effect of alternative dispute resolutions; rather, it is a natural result of the development of discovery over the last few decades. Improved discovery, as applied by veteran practitioners, removed the possibility of trial by ambush, and allowed parties assisted by competent counsel to evaluate the pertinent facts in a case in advance of trial. It also handicaps their likelihood for success in the trial, and causes them to evaluate how much pursuing and appealing a trial will cost them, analyze the solvency of a defendant, and arrive at a reasonable settlement that makes sense in the context of all these factors.

John Ashcroft is not everyone's favorite lawyer. But his remarks to the University of Missouri-Columbia Law School graduation ceremony in the spring of 2002, ties all these points together. The Attorney General explained to the law students how and why our legal system works today in the disposition of civil disputes, saying, "Justice can be achieved through consensus as well as litigation. Adversarial 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."

Let all the people say, "Amen."

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