

The Vanishing Trial

*A Symposium on the Decline of Trials
Presented by a Special Committee of the
Knoxville Bar Association*

October 24, 2006

... the jury, the most energetic method of asserting the people's rule, is also the most effective method of teaching them how to rule.

Alexis de Tocqueville, *Democracy In America*.

The right of trial by jury "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.

Blakely v. Washington, 124 S. Ct. at 2538-2539.

I have a hard time viewing the overall decline in the number of trials as a bad thing for the public or the justice system. . . .No one would bemoan a decline in the number of surgeries required to cure cancer if less invasive alternatives were effectively treating those patients.

Anonymous Court Clerk, United States District Court for
the 8th Circuit

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Introduction

In late 2005, incoming president of the Knoxville Bar Association, Steve Collins, asked that we co-chair a special committee of area lawyers, judges, and other parties having regular interaction with the court system, for the purpose of examining, at the local level, a trend of declining trials, particularly civil jury trials. The basis for the endeavor was a 2003 project conducted under the auspices of the ABA Section of Litigation Civil Justice Initiative. That project led to the publication of a white paper by University of Wisconsin law professor Marc Galanter, entitled *The Vanishing Trial: An Examination of Trials and Related matters in Federal and State Courts*. The *Vanishing Trial* project was the most comprehensive and costly single study of a legal topic ever undertaken by the ABA.

With the ABA study as a backdrop, the charge of our KBA committee was to examine the topic of diminishing trials at our local level in order to determine whether the trend pervades our court system in east Tennessee, to learn something about the specific experiences of our local practitioners in a changing litigation environment, and to share with our membership at least some studied reflection on changes in the profession of law that are being encountered – particularly among the large percentage of our ranks who consider themselves “trial lawyers.”

The special committee convened meetings throughout 2006, meeting at times with invited “guests” whose position and interest in the workings of our local bar have provided invaluable insights, particularly the members of our local state and federal judiciary. These individuals included lawyers, judges, and non-lawyers. The committee also conducted a written survey of the KBA membership regarding our local litigation experience, and the decline of trials within our region. The KBA’s special committee was composed of the following regular members:

Dale Allen – Woolf, McClane, Bright, Allen & Carpenter, PLLC
Doug Blaze – University of Tennessee College of Law
Steve Collins – (KBA President) - Burroughs, Collins & Jabaley, PLC
Bruce Fox – Fox & Farley
Ron Koksall – Butler, Vines & Babb, PLLC
Keith Stewart – McGehee, Newton, Stewart, Dupree, Cole & Boswell

Dave Yoder – Legal Aid of East Tennessee
Summer Stevens – Lewis, King, Kreig & Waldrop, P.C.
Ted White – Hodges, Doughty & Carson, PLLC
Sam Doak – Arnett, Draper & Hagood
Honorable Clifford Shirley - Magistrate, United States District Court
Honorable Dale Workman, Judge, Knox Co. Circuit Court, Division I
Wade Davies – Ritchie, Dillard & Davies, P.C.
Mike Collins - CEO and Chief Manager, 2nd Generation Capital, LLC

The trial data conveyed in these materials, so far as it exists and is susceptible of interpretation, is accurate. It must be understood, however, that the available data contains gaps, and reflects an imprecision in the reporting of trial events, especially in our state court system. The statistical flaws notwithstanding, the data provides useful insight into the decline trials in our local courts. Beyond the court-generated trial data, KBA litigation also indicates diminished trial activity among our membership. With only a very few exceptions, our members reported a decline in the number of cases they try. The commentary provided herein represents the view of no single member of our committee, but rather a distillation of our many hours of group deliberations, and the input of “guest participants.”

It is important to recognize that, in spite of the work performed, our committee has reached no “ultimate” conclusions with respect to the causes of the decline in trials, nor the conclusions necessarily to be drawn from the trend. It was not our aim to diagnose what may ail the trial process, nor to formulate or suggest any “fixes.” Indeed, there is a distinct element in the legal profession that earnestly believes the decline of trials in our system of justice is overstated, and that the entire concept of the “vanishing trial” is simply an exaggerated myth growing out of the ABA project. The reliable evidence, however, both empirical and anecdotal, suggests that our conduct of trials locally has been and continues to decline. By choice, or by necessity, the way in which trial lawyers and their clients conduct their legal business is changing.

As co-chairs of the special committee, we wish to thank the members of the special committee, each of whom has volunteered considerable time and attention to this important topic. We also offer our special thanks to two local insurance industry veterans who graciously shared their thoughts and insights with the committee from the insurance industry perspective, Mr. Dallas Reynolds of State Farm, and Mr. Joe Rafferty of Cincinnati Insurance Company.

We also wish to convey special thanks to our committee member Mike Collins, a veteran corporate consultant and expert witness who made the trip from his home in Nashville each month to attend our meetings in person. We wish further to thank each member of our bar who took the time to respond to our litigation survey. Over one hundred KBA members responded to the committee’s litigation questionnaire, and a vast number of the respondents took the added time to convey comments and observations about their trial practice in our community.

Finally, we the committee, and the bar members at large, owe a debt of gratitude to our association president, Steve Collins, for his foresight in recognizing the importance of the topic and the value of examining local litigation trends.

With no pun intended, we sincerely hope we have done this topic “justice” by, if nothing else, bringing it to light among our members, and fostering an awareness that our profession is undergoing change. We hope the bar membership will benefit from this work, particularly the younger and future generations of our profession whose practice of law will be most deeply affected by the changes afoot.

*David A. Draper
Lewis, King, Krieg & Waldrop, P.C.*

*Judge Dale Workman
Knox County Circuit Court
Division I*

The Vanishing Trial Thesis

So what is *The Vanishing Trial* phenomenon? For purposes of this paper, the phrase *The Vanishing Trial* refers to the general proposition conveyed in the ABA study – that trials continue to decline and that serious consequences flow from that decline. While the *The Vanishing Trial* author was careful to avoid drawing specific conclusions as to the consequences of fewer trials, the clear message of the study is that the consequences are generally negative. Implicit in the *The Vanishing Trial* study is the view that trial lawyers, and judges, being engaged in increasingly fewer trials, possess generally less skill in the law. Litigants have increasingly fewer reliable indicators of trial outcomes. And, the privatization of the legal process has created a general “backroom” environment of claims settlement, out of site of the courts and the public.

Whether such dire consequences are indeed true is a matter of intense debate, but the empirical data regarding trials does in fact indicate a general decline in the number of trials being conducted in our courts – and this holds true in east Tennessee. While some courts have experienced a recent “bump” in trial activity, particularly our state criminal courts, there remains an overall decline in the rate of trials. The trend is not restricted to civil jury trials, but all types of trials, civil and criminal, state and federal, bench and jury. Consider the following data:

- 1.) According to *The Vanishing Trial* data, between 1962 and 2002 the number of civil cases in the federal courts reaching trial declined from 11% to 1.8%.
- 2.) The U.S. Justice Dept.'s Bureau of Justice Statistic's August 2005 report found that between 1985 and 2003, the number of federal court tort trials terminated by trial dropped by 79%.
- 3.) Of the 98,786 federal tort cases terminated in U.S. District Courts in 2002-2003, only 1,647 (just 2%) were decided by bench or jury trial.
- 4.) In the federal courts, in 1962, 15% of all criminal cases were terminated by trial, whereas only 5% were terminated by trial in 2002. In the 1970s, only 62% of criminal defendants pled guilty, while 85% entered guilty pleas in 2001.

5.) The trial data for 22 states across the country shows that between 1976 and 2001, jury trials decreased by 15 percent for criminal cases and 32 percent for civil cases, while bench trials declined 10 percent and 7 percent, respectively.¹

6.) The trial numbers for Tennessee appear to reflect a similar pattern - total filings are up, but cases decided by trial are down. Between 1970 and 2005, total case filings in Tennessee dipped to 81,272 in 1972, then steadily rose to a peak of 294,871 in 2005. While filings have risen, however, jury trials numbers have dropped precipitously since 1990. In the 4 major metropolitan areas of Shelby, Davidson, Knox and Hamilton, Circuit Court jury trial numbers are in steep decline:

| | Jury Trials -1 Peak | Jury Trials - 2005 |
|----------|---------------------|--------------------|
| Shelby | 140 (2000) | 40 |
| Davidson | 174 (1993) | 66 |
| Knox | 125 (1992) | 71* |
| Hamilton | 101 (1996) | 28 |

(* The committee was pleased to note that more cases are actually tried in the courts of Knox County than in than any other metropolitan court system in Tennessee.)

7.) Chancery Court filings in Tennessee increased by a far larger percentage (75%) since 1970 than did Circuit filings (48%). Chancery Court filings were at a low of 17,847 in 1970, and increased to 69,478 filings in 2005. Circuit Court filings were at 42,638 in 1970, and increased to 68,642 in 2005.

8.) In 1962 there were 39 trials (criminal and civil) for every federal judge. By 2002, that number had dropped to just 13.2 trials for each judge.

9.) Although the actual number of federal civil trials — in absolute numbers — decreased 21 percent from 1962 to 2002, the number of lawyers has tripled. Lawyer ranks grew far faster than the rate of our population as a whole, from about 180 million in 1960 to about 284 million in 2001 – a 58 percent increase.²

10.) U.S. Department of Justice statistics indicate that between 1992 and 2001, the median federal court jury verdict fell from \$65,000 to \$37,000.

¹ See Brian J. Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, "Examining Trial Trends in State Courts: 1976-2002," *Journal of Empirical Legal Studies* 1, no. 3 (November 2004): 755-82.

² The U.S. population currently stands at 300,046,403, and there are 1,116,967 lawyers. The Tennessee population is 5,962,959, and there are 14,470 lawyers licensed and residing in this state.

So What's The Debate?

While some question whether the available trial data truly demonstrates a relevant decline in trials, the core debate that ensues is over the consequences of reduced trial rates, and whether declining trial rates are an indicator of a broken legal system. Assuming trials really are declining by an appreciable margin, then why are we trying even fewer cases than the historically low percentage of cases tried? Does the trend reflect some failing of our legal system, particularly the jury system, or has mediation come of age and combined with other factors to lead us away from trials? What does the decline in trials portend for the legal profession, the court system, and society-at-large?

Some view the trend as a dramatic and forboding erosion of the plenary event in our system of jurisprudence - *the trial*. They suggest we have adopted an “all cases should settle” mindset, and have embraced, with overzealousness ADR in all its many forms. Others vehemently insist there is no “vanishing trial” phenomenon, but rather a mere “vanishing trial” myth that verges on hysterics. *The Vanishing Trial* detractors suggest, as noted in the third opening quote above, perhaps no avoided trial can be a bad thing, and that the need for trial may actually reflect a breakdown of the legal process, where the opportunity to resolve a dispute was probably missed for no valid reason.

A. The Case for Legitimate Concern

The author of *The Vanishing Trial* whitepaper, Marc Galanter, views the decline of trials in this way:

Legal contests [have] become . . . a series of encounters with more judicial control, more documentary submissions and less direct oral confrontation. Settlements entail “bargaining in the shadow of the law”, so the influence of legal doctrine is present, but is thoroughly mixed with considerations of expense, delay, publicity and confidentiality, the state of the evidence, the availability of attractiveness of witnesses, and a host of other contingencies that lie beyond the substantive rules of law.

Several studies suggest that in the absence of trials, the decision-making process of adjudication may get swallowed up by the surrounding bargaining process.³

³ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, JOURNAL OF EMPIRICAL LEGAL STUDIES, Vol. 1, No. (November 2004), p.98.

Another author, Janet Cooper Alexander, speaking in the context of securities class action litigation, in which virtually all cases settle, relates that “it may not be possible to base settlements on the merits because lawyers may not be able to make reliable estimates of expected trial outcomes.”⁴

Within the criminal defense bar, one veteran defense lawyer, John Keeker of California, laments the demise of trials:

Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well conducted trial is its crowning achievement.⁵

Julia Molander, past Vice-Chair of the Defense Research Institute’s Insurance Law Committee observes:

Why should we care about the vanishing trial? Three reasons. First, we are rapidly losing trial experience, with a full generation of attorneys having practiced in the ADR era. If our lawyers and our judges no longer try cases, they will not perform well on those rare occasions when a case goes to trial. Second, if we do not have trials, we no longer have a way to gauge the jury verdict potential for purposes of settlement or trial. Third, and perhaps most important, we are limiting the development of our system of law. If significant cases are siphoned out of our judicial system, we will lack the cases upon which to build the common law.⁶

B. The Case for *The Vanishing Trial* as Myth

The case for an overstated myth of vanishing trials is quite passionately conveyed by Stanford Law Professor Lawrence Friedman in his article *The Day Before Trials Vanished*.⁷ The *Vanishing Trial* phenomenon, he argues, is a myth

⁴ Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991).

⁵ John W. Keeker, *The Advent of the “Vanishing Trial”*: *Why Trials Matter*, National Association of Criminal Defense Lawyers – *The Champion Magazine*, September/October 2005, Page 32.

⁶ Julia Molander, *Passing Thoughts on the Vanishing Trial*, *Carrier Chronicle*, October 2005, Vol. 1, Issue 2.

⁷ Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. Empirical Legal Studies 689, 690-91 (2004).

resonating with nostalgia for a golden age of trials. Friedman argues that the *Vanishing Trial* project led not merely to a questionable statistical argument for declining trials, but an extended argument that the classic trial, the trial of the good old days, has *vanished*. That myth of the trial as a dying breed, Friedman observes, errantly presumes that the trial has remained the core modality of legal contests, when in fact it "is not the norm, and [has] not been the norm for quite some time." Trials, he says, have always been the exception.⁸

Professor John Lande, of the University of Missouri School of Law, is an ardent proponent of ADR and "collaborative lawyering." In numerous articles, Professor Lande has sought to dispel what he views as *The Vanishing Trial* study's implied indictment of ADR. Lande argues that the mere title of the ABA's study - *Vanishing Trial* - implies that something has gone terribly wrong with the legal system. He argues that the ABA white paper could just as accurately have been entitled "The Amazing Success of Judicial Case Management." The *Vanishing Trial* data, he says, actually shows that (a) there are many trials in the state courts, which have substantially higher trial rates than federal courts, (b) the expansion of pretrial activity and the increased complexity of cases have added reasons for litigants to settle, (c) courts have shifted some of their efforts from trials to pretrial work, and (d) declining trial rates have not reduced the production of case law.⁹

C. The Middle Ground on *The Vanishing Trial*

There are a good many legal commentators who have formed a middle-of-the-road view toward the *Vanishing Trial* theorem. These observers suggest that while the decline in trials rates may be real, not all of the factors present cause for concern. On the positive side, they suggest that fewer cases may be going to trial because lawyers and courts are managing cases better, and litigants are taking advantage of a wider array of dispute resolution mechanisms, including ADR. However, some factors causing a decline in trials, such as mandatory arbitration clauses in consumer and employment contracts or tort reform schemes which limit or deny access to courts should justify cause for concern.

Within the committee, there was at least some unanimity of opinion that the decline of trials seems to generally tract the adoption of the rules of civil procedure (TRCP -January 1, 1971); that is, expansive pre-trial discovery has had the effect of exposing all facets of claims and the attendant trial risks, and therefore claims are more susceptible of settlement.

⁸ *Id.*

⁹ John Lande, "The Vanishing Trial" Report: An Alternative View of the Data, 10 Dispute Resolution Magazine 19 (Summer 2004).

So Why Are We Trying Even Fewer Cases?

Numerous factors have been attributed to the decline in trials. The most commonly cited factors, not in order of significance, include:

- 1.) prohibitive costs of going to trial
- 2.) increased complexities of litigated matters
- 3.) fear of adverse publicity, invasion of privacy
- 4.) the public's distrust of the courts and the jury system
- 5.) contractually imposed ADR, and ADR emergence generally
- 6.) fear of runaway verdicts, unpredictability of trial
- 7.) improved case management practices, including enhanced role of judges as cases managers and promoters of settlement.
- 8.) expanded discretion of judges
- 9.) loss of productivity of litigant's personnel
- 10.) other non-trial options, such as arbitration
- 11.) avoidance of abusive discovery stemmed by the ease of overly broad discovery in the "information age."
- 12.) federal sentencing guidelines
- 13.) strong-arm plea bargain tactics
- 14.) lawyer fear of trial
- 15.) litigation "control" practices of third-party payors.

The Consequence of Fewer Trials

Without subscribing to any given view of the trial data, it is useful to ponder the ultimate consequences of fewer trials. Few of us would argue that preparing for and conducting a trial is the penultimate professional challenge. It is at the point of

trial where the “rubber meets the road”, so to speak, and the casual nature of discovery gives way to stringent rules of evidence and procedure.

Theories differ widely, however, as to the consequences the lawyer’s lack of trial skill. Observations related to and among the special committee members about a lack of trial skill, or “live fire” experience as it has been termed, include:

- 1.) a diminished capacity to perceive the legally relevant facts
- 2.) a diminished capacity to cross examine witnesses in deposition
- 3.) a diminished capacity to evaluate trial risks, claim value
- 4.) a diminished capacity to prepare witnesses for trial
- 5.) a tendency to “over discover” cases
- 6.) failure to perceive ultimate questions of law
- 7.) diminished capacity to formulate and advance coherent pre-trial motions
- 8.) a general lack of ability to expedite cases toward conclusion
- 9.) failure to perceive procedural issues
- 10.) inability to conduct effective voir dire, proffers of evidence
- 11.) substantial lack of proficiency with *Rules of Evidence*

These are but a few of the “consequences” for lawyers who have minimal exposure to the trial setting. But lawyers are not the only trial participants adversely impacted by declining trials. The committee also discussed the impact of judges with little or no trial experience, and generally concurred that most of the above factors have equal application to judges whose trial skills atrophy in the absence of regular trial activity. Concern was also expressed that regardless of the causes for fewer trials, the trend of fewer trials presents a serious impediment to training younger lawyers. Indeed, in some larger legal communities, firms have adopted the strategy of requiring junior lawyers to seek out trial experience through appointed cases or pro bono cases.

One veteran Knoxville lawyer has summed up the decline of trial work in this way:

So many of the lawyers I encounter today possess no notion of what matters in a particular case, whether it’s a car wreck or a breach of

contract case. They can take a 3-day deposition and gain the life history of a witness, and it doesn't occur to them to ask whether they were wearing their glasses at the time of the wreck. One young lawyer told me he had advised a carrier that the claim was worth \$100,000. I asked how he arrived at that value, and he told me because that was what those kinds of cases were settling for. I asked him what amount juries were awarding for such a case.

The insurance industry at large is also beginning to recognize a potential down side of avoiding trials. A recent article on a prominent industry blog observes:

The diminishing number of trials in relation to the number of judges and lawyers means that judges and lawyers on average have less trial experience than they did in the past.

A 20 percent decline in the number of actual federal trials combined with a tripling of the absolute number of lawyers means less experience to go around. What impact does that lack of experience have on the insurance industry? Are lawyers less inclined to try cases? Are lawyers, on both sides, and claims people, less qualified to gauge trial outcomes? Is there less data available to predict trial outcomes? The study leaves plenty to think about.

Recent Cases Bearing on Trials

The committee also considered the relevance of developments in our common law that may influence the likelihood of trial. In our survey, many lawyers observed that the advent of comparative fault has promoted more unwieldy multi-party litigation, and that unwieldiness has led to a greater propensity to mediate.

1992

McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992): Adoption of comparative fault to replace contributory negligence in Tennessee.

1993

Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993): Clarification of summary judgment standard in Tennessee Rule of Civil Procedure 56.

Tenn. Code Ann. § 20-1-119 (1993): Providing 90 days to add additional defendants named in the answer of an existing defendant as a potential comparative tortfeasor.

1996

Ray by Holman v. BIC Corp., 925 S.W.2d 527 (Tenn. 1996): Two distinct tests (consumer expectation and prudent manufacturer) for ascertaining whether a product is unreasonably dangerous under the Tennessee Products Liability Act.

Ramsey v. Beavers, 931 S.W.2d 527 (Tenn. 1996): Adoption of general negligence approach to replace zone of danger test in determining negligent infliction of emotional distress.

Camper v. Minor, 915 S.W.2d 4377 (Tenn. 1996): Adoption of general negligence approach to replace “injury” rule for emotional or mental distress claims.

1997

McDaniel v. CSX, 955 S.W.2d 257 (Tenn. 1997): Clarification of standards for admissibility of scientific evidence under Tenn. R. Evid. 702 and 703.

Snyder v. Lufttechnische GmbH, 955 S.W.2d 252 (Tenn. 1997): Permitting defendants in products liability actions to introduce evidence at trial that immune employer’s conduct was the cause in fact of the plaintiff’s injury.

1998

Coln v. City of Savannah, 966 S.W. 2d 34 (Tenn. 1998): Adoption of foreseeability and comparative fault analysis in premises liability claims.

1999

Jordan v. Baptist Three Rivers Hosp., 984 S.W.2d 593 (Tenn. 1999): Loss of parental consortium.

2000

Carroll v. Whitney, 29 S.W.3d 14 (Tenn. 2000): *Comparative fault of immune defendants.*

Dotson v. Blake, 29 S.W.3d 26 (Tenn. 2000): *Comparative fault of defendants protected by statute of repose.*

Brown v. Walmart, 12 S.W.3d 785 (Tenn. 2000): Comparative fault of unknown tortfeasors.

2001

Rothstein v. Orange Grove Ctr., 60 S.W.3d 807 (Tenn. 2001): Loss of filial consortium.

**Knoxville Bar Association
Litigation Survey Highlights**

One-hundred thirteen KBA members responded to the special committee's survey made during the summer of 2006. Because of the inconsistencies in and incompleteness of some responses, not all data correlates with mathematic precision. In each instance where the information was imprecise, we have attempted to convey the pre-dominant response.

For how many years have you been licensed to practice law?

19 1 to 5 18 6 to 10 12 11 to 15 13 16 to 20 17 21 to 25

34 26+

What percentage of your practice is devoted to litigation?

13% less than 25% 17% 26% to 50% 10% 51% to 75%,

60% 76% to 100%.

Of the total percentage of your litigation practice, what percentage is criminal litigation? 17%. What percentage is civil litigation? 83%. (Respondents who indicated criminal practice comprised more than 50% of their practice – 11)

Of the total percentage of your litigation practice, in what percentage do you represent the defendant 62%; plaintiff 48%.

Please provide a brief composite of the types of litigation you handle, i.e. (25% med. mal.- pltf;, 35% product liability – pltf ; 40% workers compensation - pltf).

***Workers Compensation (49)
Personal Injury (51)
Employment (19)
Domestic Relations (6)
Professional Malpractice (11)
FELA (2)
General Civil Litigation (62)***

***Construction (4)
Product Liability (29)
Medical Malpractice(27)
Criminal Defense (33)
Business Disputes (3)
Estate/Probate/Trust (5)
Toxic Torts (5)***

*Juvenile/Child Support (4)
Collections (3)
Real Estate (4)
Car wrecks/Auto (31)*

*Insurance Defense (26)
Commercial/Transactional (11)
Motor Carrier Defense (7)*

What is the total number of jury trials you have handled to verdict as lead counsel for your client?

| | | | |
|--------------------|----------------------|--------------------|-------------------------|
| <i>1 to 5 yrs</i> | <i>11 (1.7/atty)</i> | <i>16 to 20yrs</i> | <i>206 (16.6/atty)</i> |
| <i>6 to 10 yrs</i> | <i>62 (3.4/atty)</i> | <i>21 to 25yrs</i> | <i>211 (12.4/atty)</i> |
| <i>11 to 15yrs</i> | <i>78 (6.5/atty)</i> | <i>26+yrs</i> | <i>1596 (46.9/atty)</i> |

The above numbers represent the total jury trials reported by all respondents within the given experience level, i.e. the 19 respondents in the 1 to 5 yr. experience range reported having tried a total of 11 jury cases.

Of the trials referenced above, how many trials did you conduct in:

*2004 - 6(civil); 8(criminal); 81 respondents reported no trials
2005 - 8(civil); 7(criminal); 83 respondents reported no trials
2006 - 4(civil); 3 (criminal); 74 respondents reported no trials*

Responses are the most trials conducted by a single respondent in the indicated year.

What is the total number of bench trials you have handled to verdict as lead counsel for your client?

2004: 5; 2005: 7; 2006: 7.

As reported by the lawyers who indicated having conducted the most civil trials – bench and jury – in response to the preceding question.

Of the trials referenced above, how many trials did you conduct in 4 2004; 6 2005; 2 2006.

Through what means are the majority of your litigated matters resolved (non-mediated settlement, mediation, summary judgment, plea agreement, trial)?

The overwhelming response by civil practitioners was “mediation”, with non-mediated settlement running a distant second. Thereafter, the civil practitioners

listed pre-trial dismissal (defaults, voluntary and involuntary dismissals, and summary judgments), ahead of termination by trial. On the criminal defense side, the overwhelming method of termination was plea bargain (78%), with trial listed second.

Approximately what percentage of your litigated matters are resolved through some form of ADR?

| | |
|-------------|---------------|
| 0 to 15 - 5 | 40 to 50 - 5 |
| 15 to 25 -3 | 50 to 60 - 16 |
| 25 to 30 -7 | 60 to 80 - 46 |
| 30 to 40 -5 | 80+ -23 |

As a percentage of the total litigated matters you handle, is the percentage of those cases actually going to trial: 68% on the decline; 17% remaining constant; 15% on the increase?

In order of greatest to least significance, to what factors would you attribute any change in the percentage of cases you try? (Without endorsing or refuting any factors, theories posited to explain a decline in trial numbers include: prohibitive costs and risks of trial; emergence of ADR; avoidance of abusive discovery tactics, laxity of procedural and evidentiary rules, potential for adverse publicity; collateral loss of productivity of litigants, advent of interim billing by lawyers, increased prevalence of contractual ADR, legal malpractice risks, unbridled use of “expert” proof, enhanced discretionary powers of trial courts.)

Emergence of ADR (81)
Costs of Litigation (69)
Unpredictability of Trial (77)
Laxity of Court Enforcement of Procedural/Evidentiary Rules (68)
Court’s unwillingness to grant summary judgment (53)
Sentencing Guidelines (15)
Client’s loss of productivity (11)
Adverse publicity (9)
Prevalence of contractual ADR (12)
Attorney fee avoidance (5)

In what ways, if any, has the percentage of cases you try been influenced by particular developments in the law, i.e. adoption of comparative fault, federal sentencing guidelines, ADR, time and economic factors.

- emergence of ADR

- costs of litigation
- third-party payor pressure to settle, carrier's fear of trial
- comparative fault has led to "kitchen sink" litigation
- inability of opposing counsel to prepare for trial
- failure of courts to impose reasonable control over discovery

In what ways, if any, has the percentage of cases you try been influenced by particular practices and/or procedures of the courts in which you litigate, i.e. resolution of motions, case management?

- Inability to obtain SJ in cases of questionable liability (31)
- Delays or refusal to rule on motions (22)
- Client's distrust of courts/juries (19)
- Lack of court management of docket – trial dates not enforced (9)
- Failure to reasonably contain or exclude "expert" testimony (8).
- Plead!, or maximum sentence will be sought (4)

Rule 31 of the Tennessee Supreme Court outlines four ADR procedures other than mediation: non-binding arbitration, case evaluation, mini-trial, and summary jury trial. Have you every utilized any of these ADR procedures, and if so, were they beneficial.

8 respondents said they had used one of the alternative Rule 31 procedures.
 19 respondents said they were "unfamiliar" with the other Rule 31 procedures.
 11 said judges refuse to use them, so counsel doesn't bother.

Of the types of cases you handle, which are most prone to be tired? (i.e. state court, corporate defendant/product liability; federal court criminal tax fraud, state court, catastrophic injury/loss of earning capacity). Car wrecks and personal injury claims with minor injuries.

Civil rights. State court felony and criminal tax. Child custody. Consumer plaintiff. "Soft tissue" slip and fall. Allstate. Catastrophic injury and substantial loss of earning capacity.

In your experience, are there any particular types of cases that you once typically tried, but now rarely try (car wreck, workers compensation, divorce, premises liability)? If so, to what factors would attribute any change in trial frequency of such cases?

Workers Compensation; Divorce; Product liability absent substantial injury; state court “soft tissue”; commercial disputes involving two companies.

Have your clients employed any particular practices or procedures aimed at specifically avoiding participation in litigation and/or trial (i.e. contractual ADR clauses, in-house dispute resolution procedures, litigation guidelines, case management procedures)

- Insurance companies focused on “bottom-line”, as opposed to case-by-case risks of trial.
- More clients using contractual ADR and limits of liability provisions.
- Emphasis on early mediation
- Clients resolving “in-house”
- Use of non-lawyer intermediaries (accountants, appraisers,

So What Do We Make of It All

Without succumbing to the temptation of formulating conclusions, we offer these thoughts for your consideration:

- A client’s selection of counsel is influenced by their attorney’s skill and experience. Would you choose a surgeon who rarely performs surgery over a surgeon who does?
- Is society becoming more receptive to methods of conflict resolution that do not involve lawyers or the courts?
- How can the profession grapple with training younger lawyers in an environment of fewer trials?
- Are lawyers guilty of having created a litigation culture in which going to trial is more costly than it really should be?
- Isn’t a prime litmus test for selecting a mediator that mediator’s trial experience?

- The primary complaints registered against the legal profession and the court system are unpredictability (also referred to “arbitrariness”), untimeliness, and cost.
- Can the courts be engaged in new and differing ways, .i.e. specialty courts, repositories of settlement data, streamlined discovery upon litigant election?
- Has the profession at large promoted an erroneous message that all cases should settle because juries are too unpredictable and trials too expensive?
- Should law schools change the way they educate lawyers, since most of our time is spent in discovery and mediation?

A Closing Thought

Veteran criminal defense lawyer John Kecker has offered a somewhat poignant summary on the relevance of trials, and why it is that a lawyer’s ability to try cases remains of utmost importance, not only to the lawyer, but to the client. His observations, we submit, are as applicable to the civil bar as the criminal bar.

Our system of justice demands trials to work. We have a “battle model” of justice. Sometimes it leans towards “due process,” as in the Warren Court years, and at other times it leans towards “efficiency,” as it has under Chief Justices Burger and Rehnquist. But at heart the system is based on battle, usually called, in the quaint way of the English, “the adversarial system.” It works on the premise that conflict and contradiction is the way to truth. The inquisitorial system, in use throughout most of the world, also gives prosecutors enormous power to investigate and decide who to charge, but rarely even permits guilty pleas. The inquisitorial system recognizes that guilt is a legal, not empirical, concept, and abhors plea bargaining.

Our prosecutors are trained to represent the state in the battle model. In our system, they need resisting, they need to be kept honest — indeed, in my opinion, they need to be kept humble. The only thing defense lawyers have to keep prosecutors in check is the threat that we will embarrass them by winning at trial. If they know we won’t go to trial, we have nothing. One SEC lawyer told a colleague that the SEC in the old days would not

bring a case unless it had at least a 70 percent chance of winning. Now, he said, SEC lawyers bring marginal cases if they think they have a 30 percent chance of winning, because they know their cases will settle without a trial.