THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM

Approved by the Board of Regents
October 2004

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THE "VANISHING TRIAL:" THE COLLEGE, THE PROFESSION, THE CIVIL JUSTICE SYSTEM

Over the past four decades, the civil justice system in the United States has witnessed, simultaneously, a litigation explosion and trial implosion. The number of civil actions over the past four decades has skyrocketed, yet the number of trials has proportionately (and, in federal court, absolutely) declined. The Ad Hoc Committee on the Future of the Civil Trial (the "Committee") of the American College of Trial Lawyers was formed by College President David W. Scott and charged with reviewing this phenomenon and its implications for the College. This is the Committee's report.

Executive Summary

H. L. Mencken once observed that: "For every complex problem there is an answer that is clear, simple, and wrong." There is no clear, simple explanation for the "Vanishing Trial" phenomenon. Many factors contribute, in varying degrees and differing ways, to the diminishing number of civil trials, among them:

- Trial court judges having come to view — indeed, having sometimes been trained to view — their proper office as that of case manager rather than presider over trials.
- Increased use of summary judgment[1] and other dispositive pretrial motions.[2]
- Stricter expert evidence requirements.[3]
- The escalating cost of litigation.
- The rising stakes of civil litigation, coupled with the uncertainty of outcome.
- Increased use of alternative dispute resolution ("ADR"), including arbitration and mediation, voluntary or court-ordered.
- Lack of trial skills and experience among younger lawyers.
- Lack of, or constraints on, judicial resources.

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1 Especially since 1986, the year of the Supreme Court's trilogy of summary judgment decisions, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

2 Including motions to dismiss or for judgment on the pleadings, pursuant to Federal Rules of Civil Procedure 12(b)(6) or 12(c), and analogous state provisions.

3 Particularly in the wake of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993), admonishing trial judges to serve as "gatekeepers," critically assessing expert evidence before admitting it. *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141-45 (1999).

- Pressure from regulators or the financial markets to (i) resolve promptly loss contingencies and (ii) eliminate avoidable costs that reduce earnings.

- Compensation incentives to corporate managers to avoid earnings-depressing costs, such as legal fees.

- Tort reform, including caps on compensatory and punitive damages.[4]

- The impact of the Vanishing Trial phenomenon itself on trial judges, who may assume the bench with less trial experience and acquire less courtroom experience in their early years on the bench as they preside over fewer trials.

This list is not intended to be comprehensive. Different variables have different effects in different jurisdictions and in different types of cases. Not all of the listed factors have any impact, let alone an equal impact, in all parts of the country, in all courts, and in all types of civil cases.[5] The combination of multiple factors applying in differing degrees and various ways to a wide array of cases in a multi-layered judicial system across an immense geographical expanse makes analysis of the Vanishing Trial phenomenon nuanced and complex. Subsumed within any analysis of this issue is the particularly nettlesome question: Why do people go to trial?

The Committee approached its task in three ways. First, it reviewed statistical and academic literature on the Vanishing Trial phenomenon. Second, it conducted a non-scientific poll of the leadership of the College in an effort to gauge the salience of the foregoing variables around the county. Third, and perhaps most importantly, the Committee drew on the collective experience of its members in analyzing this issue.

The Committee recognizes that the Vanishing Trial phenomenon necessarily has implications for the College, which is an organization dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The dwindling number of trials, if not reversed, portends ill for an organization whose fellowship is limited to the most distinguished members of the trial bar. The Vanishing Trial phenomenon raises the question whether the College can effectively act to reverse this trend or should alter the rigorous standards it applies to candidates for fellowship.

The Committee's fundamental conclusion is that the sky is not falling. While there clearly has been a precipitous decline in the number of trials, the College has never been healthier, in terms of the quality and quantity of candidates for fellowship. Nor is it clear that the decline in the number of trials is irreversible. It would appear largely to be reflective of changes in approaches to dispute resolution, judicial perspective, and economic and political forces. None of these is static. The Committee believes

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[4] It is too early to discern whether the Supreme Court's constitutional jurisprudence setting limits on recoverable punitive damages (particularly *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)) will play any role in the Vanishing Trial phenomenon.

[5] On the criminal side of the federal trial docket, there is also a strong disincentive to go to trial — the mandatory minimum sentencing requirements and the Federal Sentencing Guidelines. *See* Appendix A to this Report.

that it would be a profound error to alter in any fundamental way the nature or raison d'être of the College in response to a phenomenon that has been in existence virtually since the College was founded.

Most of the factors that appear to be precipitating the shrinking number of trials are beyond the ambit or competence of the College to address. The College should continue to be a prominent public voice in support of the civil justice system and the jury trial. It should urge its fellows to promote adequate funding for the courts and the selection of trial judges who possess both trial experience and a proper understanding of the crucial role of the civil jury trial in the American system of government. As Dean Paul Carrington has cogently observed:

> The importance of the institution is not measured by the number of civil jury trials, which is not great. It is, however, the right to jury trial that makes the rest of the constitutional scheme acceptable. And other institutional arrangements were structured around the concept of a democratic courthouse….
>
> In its role in civil proceedings, the jury…render[s] the legislators who make the controlling law doubly accountable to the people, who first elect their lawmakers and are then called to administer the laws those representatives make. Law departing too far from the common understanding, from common sense, or from commonly shared moral values tends to be modified in its enforcement by civil juries to fit common habits of mind….
>
> [T]he presence of the jury shapes the function of the American judge…
>
> > It allows the judge to stand, as the independent organ of the law, not only above the parties, hostilely arranged against each other, but also above the whole practical case before the court.
>
> ***
>
> Citizen participation in the disposition of civil cases has been an important, indeed central, and perhaps critical, element in the development of the American legal system…. The system has served many purposes, but its enduring purpose has been to secure a greater measure of trust in judicial institutions.

Paul D. Carrington, *The Civil Jury and American Democracy*, 13 Duke Journal of Comparative & International Law 79, 79, 87-88, 98 (2003) (citations and quotations omitted).

The College has not diluted, and should not dilute, its standards. The College retains its unique voice only as long as it retains its unique requirement that fellowship is limited to those displaying the highest quality of trial advocacy. The College has been, and should continue to be, responsive to the changing modes of dispute resolution. The College has appropriately undertaken the task of discriminating between those non-judicial forms of dispute resolution that are tantamount to trials in court and those that are not. The test should continue to be whether traditional trial advocacy skills are required, as they are when live testimony is elicited from witnesses under oath in a contested proceeding that can lead to an enforceable judgment or order. (Thus, substantial arbitrations and contested administrative proceedings often qualify, but mediation, conciliation and other forms of ADR

ordinarily do not.) In those circumstances, the College's historic criteria are applicable. Monitoring the evolving forms of non-judicial dispute resolution, and their impact on criteria for fellowship, will remain a long-term project, which should be monitored by the Board of Regents through the Committees on Admission to Fellowship and Alternatives for Dispute Resolution.

This Report addresses the Vanishing Trial phenomenon in four parts. Part I summarizes statistics illustrating the existence of the phenomenon. Part II summarizes the results of the non-scientific poll of the College leadership conducted by the Committee. Part III explores a variety of factors that have been identified as likely causes of the Vanishing Trial phenomenon. Part IV sets forth the Committee's conclusions.

I. The Vanishing Trial: The Statistics

Chief Judge William G. Young of the District of Massachusetts eloquently encapsulated the problem in his Open Letter to United States District Judges: "The American jury system is withering away. This is the most profound change in our jurisprudence in the history of the Republic."[6]

The data demonstrating the decline of the civil trial have been collected and analyzed in multiple sources. The Section of Litigation of the American Bar Association commissioned extensive analysis of the Vanishing Trial phenomenon in connection with a symposium on the subject convened in San Francisco in December 2003.[7] The statistics compiled by Professor Marc Galanter of the University of Wisconsin, the lead analyst, are telling. They are corroborated by statistics published by the Federal Judicial Center and the United States Department of Justice.[8]

Federal Court. The number of civil trials in federal court over the 40 years from 1962-2002 has fallen, both as a percentage of filings and in absolute numbers.

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6 Hon. William G. Young, *An Open Letter to U.S. District Court Judges*, The Federal Lawyer, 30, 31 (July 2003). *See also* the text of Chief Judge Young's address to the Spring Meeting of the American College of Trial Lawyers on March 6, 2004, available at: http://www.actl.com/PDFs/JudgeYoungSpeech.pdf.

7 Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial*, N.Y. Times, December 14, 2003, § 1, at 1.

8 Reliable comparable statistics are not available for all Canadian jurisdictions. However, many Canadian Fellows expressed the view that Canada is experiencing the same Vanishing Trial phenomenon, and this is corroborated by the available data for Ontario (summarized in a paper presented to The Advocates' Society Task Force on Advocacy Policy Forum, in Toronto, on February 17, 2004 by Thomas G. Heintzman, O.C., Q.C., entitled: *Working Toward a Cost-Effective Trial Advocacy System*). Similarly, while different litigation cultures and procedural rules mean that different variables may be at work in Canada, it appears that many of the factors reviewed in this report also play a role in the Canadian experience.

PERCENTAGE OF FEDERAL CIVIL CASES GOING TO TRIAL[9]

Year	Jury Trials	Bench Trials	Total Trials
1962	5.5%	6.0%	11.5%
1972	3.7%	5.3%	9.1%
1982	2.6%	3.5%	6.1%
1992	1.9%	1.6%	3.5%
2002	1.2%	0.6%	1.8%

NUMBER OF FEDERAL CIVIL CASES GOING TO TRIAL[10]

Year	Jury Trials	Bench Trials	Total Trials
1962	2765	3037	5802
1972	3361	4807	8168
1982	4771	6509	11280
1992	4279	3750	8029
2002	3006	1563	4569

These numbers are particularly startling in light of the enormous increase in litigation over the same 40 year period. In 1962, there were 50,320 total cases disposed of in federal court. Forty years later, that number had more than quintupled to 258,876.[11]

The Federal Judicial Center similarly reports that, in the 22 years from 1979 to 2000 (inclusive), the percentage of federal civil cases filed each year that were disposed of by a judgment at trial fell from approximately 6.5% to approximately 1.5%.[12] In an intriguing snapshot of federal judicial activity, the Federal Judicial Center data reflect that active federal district judges, in 2002, spent an average of fewer than 300 hours per year in trial (bench and jury trials combined).[13]

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9 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, THE JOURNAL OF EMPIRICAL LEGAL STUDIES, Vol. 1, No. 3 (forthcoming Nov. 2004) (rev. ed. July 2004) (manuscript at 2, available at http://www.abanet.org/litigation/vanishingtrial/vanishingtrial.pdf) (hereafter, "Galanter, *Vanishing Trial*"). Professor Galanter has graciously authorized the use of his work product by the Committee.

10 *Id.* at 2.

11 *Id.*

12 Federal Judicial Center (Donna Stienstra and Patricia Lombard) Memorandum to Chief Judges, U.S. District Courts, subject: *Graphs for Panel Discussion on The Role of the Judge, April 30, 2003*, dated April 28, 2003 (attached as Appendix B to this Report) at chart labeled: "Percent of Civil Cases Filed Each Year That Were Disposed of by a Judgment at Trial." As this chart reflects, the jury trial judgment percentages fell by about half, while the number of bench trial judgments dropped by more than three-quarters.

13 *Id.* at chart labeled: "Average Trial and Nontrial Time Reported on the JS-10 by Judges Who Were Active District Judges All Year and Reported Time for at Least 11 Months." The JS-10 is the form on which courtroom activity is reported. It is clear the federal district judges work long hours, which makes all the more glaring the relatively scant time on the bench in trial.

State Court. The story is similar in state court.

The United States Department of Justice looked at civil trials in state courts of general jurisdiction in the nation's 75 largest counties over the ten-year period from 1992-2001. It found a 47% decline in the number of civil trials:

75 Largest U.S. Counties — Civil Trials — 1992-2001[14]

	1992	1996	2001	Percent Change
Civil Trials	22,451	15,638	11,908	– 47.0%

This trend extended in varying degrees across all categories of cases examined — tort (-31.8%), contract (-61%) and real property (-80.1%).[15]

Professor Galanter analyzed civil trial data emanating from 22 jurisdictions accounting for 58% of the United States population (Alaska, Arizona, California, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, South Dakota, Texas, Vermont, Virginia and Washington). He found the same declining trend in the number of civil trials:

22 States — Civil Trials As % of Total Dispositions[16]

Year	Jury Trials	Bench Trials	Total Trials
1976	1.8%	34.3%	36.1%
1981	1.2%	31,4%	32.6%
1986	1.0%	26.5%	27.5%
1991	0.8%	20.7%	21.4%
1996	0.8%	19.8%	20.6%
2001	0.6%	16.5%	17.2%
2002	0.6%	15.2%	15.6%

An analysis of state court trial data by the National Center for State Courts last year came to the same conclusion: "The central finding is that the number and rate of jury trials has declined, often significantly, during the period 1976-2002 in almost all [22] states included in the analysis."[17]

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14 Thomas H. Cohen and Steven K. Smith, *Civil Trial Cases and Verdicts in Large Counties, 2001*, Bureau of Justice Statistics Bulletin (U.S. Department of Justice April 2004) at 9, Table 10. A copy of this Bulletin is annexed as Appendix C to this Report.

15 *Id.*

16 Galanter, *Vanishing Trial* at 68.

17 Brian J. Ostrom, Shauna Strickland and Paula Hannaford, *Examining Trial Trends in State Courts: 1976-2002* at 2 (Prelim. Version Nov. 26, 2003) (prepared for American Bar Association Vanishing Trial Symposium).

It is clear to the Committee that the decline in the number of civil trials is a real phenomenon. It is also clear that the phenomenon traces back several decades. Just how recent the decline is, however, is a matter of legitimate debate. Professor Stephen B. Burbank of the University of Pennsylvania Law School notes that, in 1936, the combined civil trial rate in federal court was 14.89%; by 1952, it was 12.1%.[18]

This issue of timing is of some consequence to the Committee, which is charged with considering the significance of the Vanishing Trial phenomenon to the College. The College was itself founded in 1950. It is noteworthy that, notwithstanding the diminution in the number of trials over most (if not all) of the life of the College, the College is a robust and thriving institution. Clearly, the trend could conceivably become so pronounced that the institution would be threatened because the number or quality of candidates for fellowship could drop precipitously. That has not occurred, and there are no indications that this is a pressing or immediate problem. On the contrary, the number and quality of candidates continues to ascend. This is, however, an important issue for the Board of Regents to continue to monitor.

II. Poll of the College Leadership

On March 10, 2004, a questionnaire was circulated by email to the leadership of the College to solicit their input on the Vanishing Trial phenomenon. The questionnaire and solicitation methodology were not designed to survive a *Daubert* challenge as to scientific validity but, rather, to solicit the insight of the College's leaders to determine whether the Vanishing Trial phenomenon exists in their respective jurisdictions and, if so, what each respondent perceived to be the reasons for it. In addition to 37 geographically dispersed responses, leaders of the College responded by furnishing to the Committee civil trial data pertaining to local jurisdictions around the country that corroborated the trend reflected in the statistics set forth in Part I of this report.[19]

The questionnaire and results of this non-scientific poll are set forth in Appendix E. The responses, as charted, reflect these informed perceptions.

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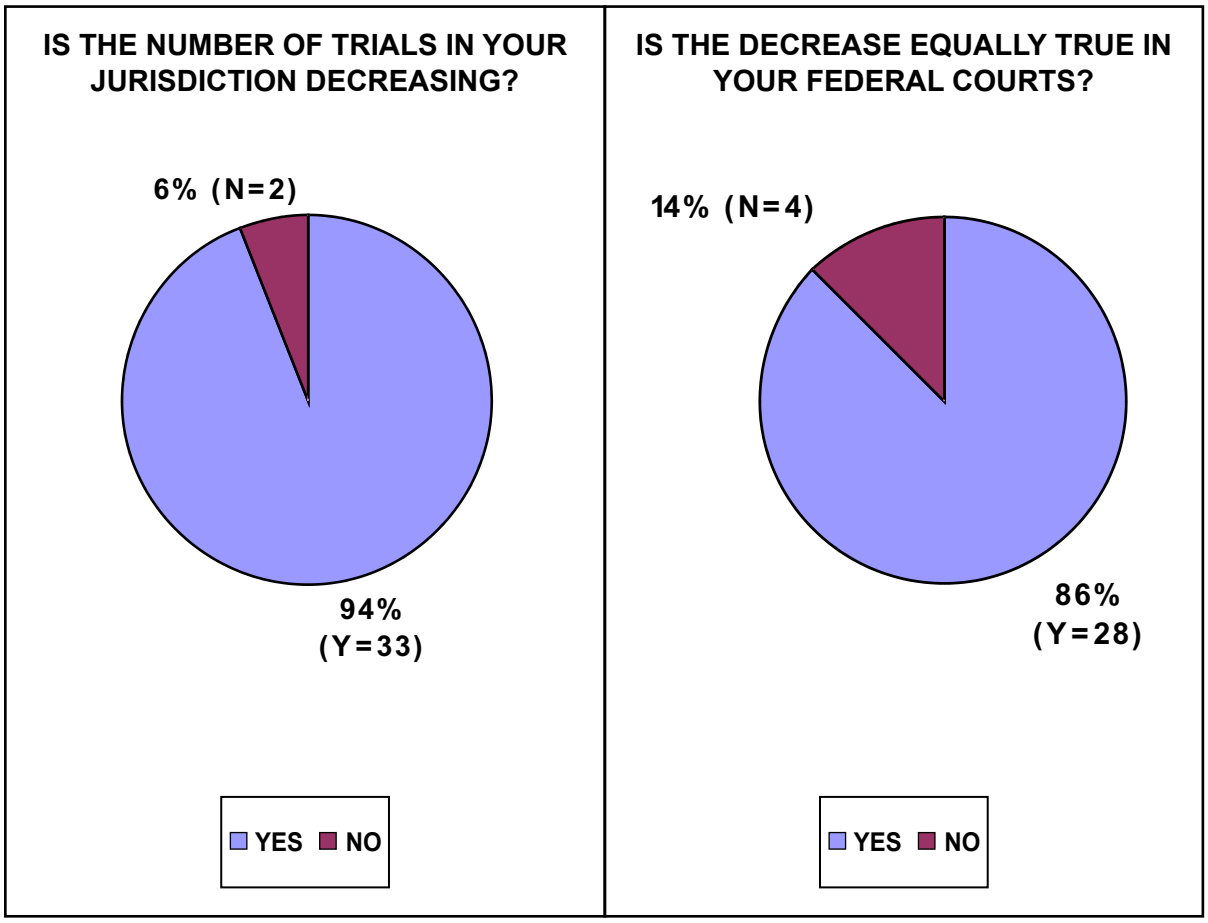
[18] Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court* The Journal of Empirical Legal Studies, Vol. 1, No. 3 (forthcoming Nov. 2004) (manuscript at 4-5) (hereafter, "Burbank, *Ambition*"). Professor Burbank cautions that not all data are fairly comparable, and stresses that this is true of the Galanter data (particularly the state court data) as well. Professor Burbank has graciously authorized the use of his work product by the Committee.

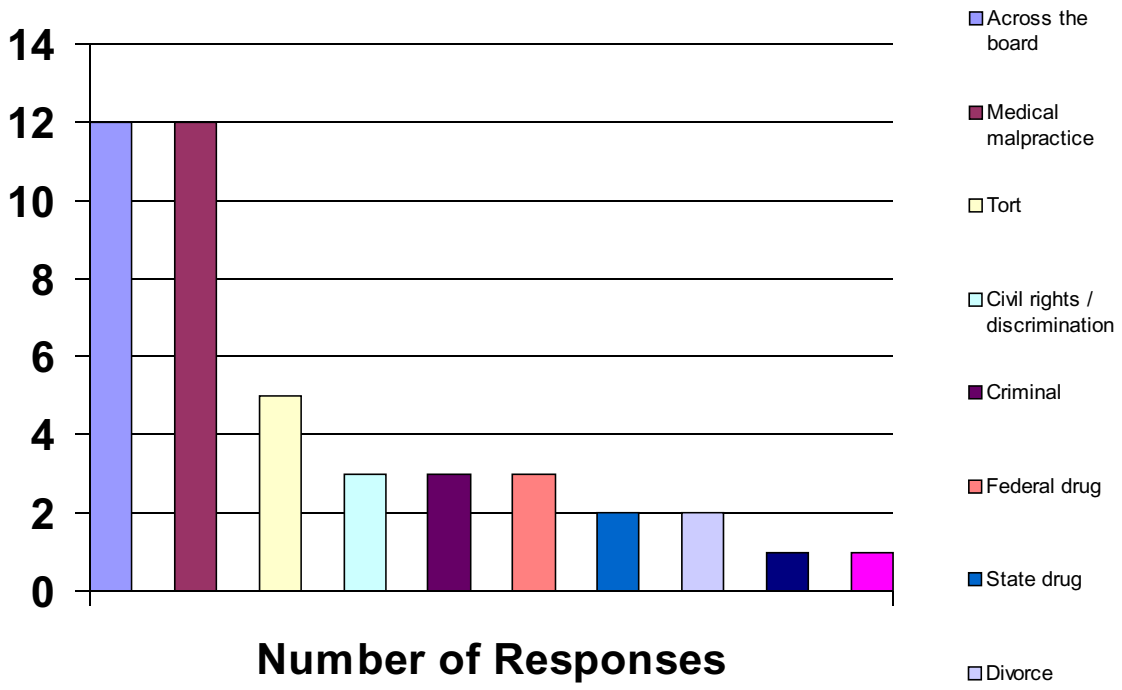
[19] For example, attached as Appendix D to this report are materials forwarded to the Committee by Past President Tom Deacy consisting of the Greater Kansas City Jury Verdict Service reports for the years 2003 and 1990. The number of verdicts reported dropped by almost exactly 50% (from 415 to 209), which tracks very closely the 47% drop reported by the United States Department of Justice in civil trials in the nation's 75 largest counties between 1992 and 2001 (Part I, *supra*).

First, in the actual experience of the Fellows, the number of trials is in fact declining:



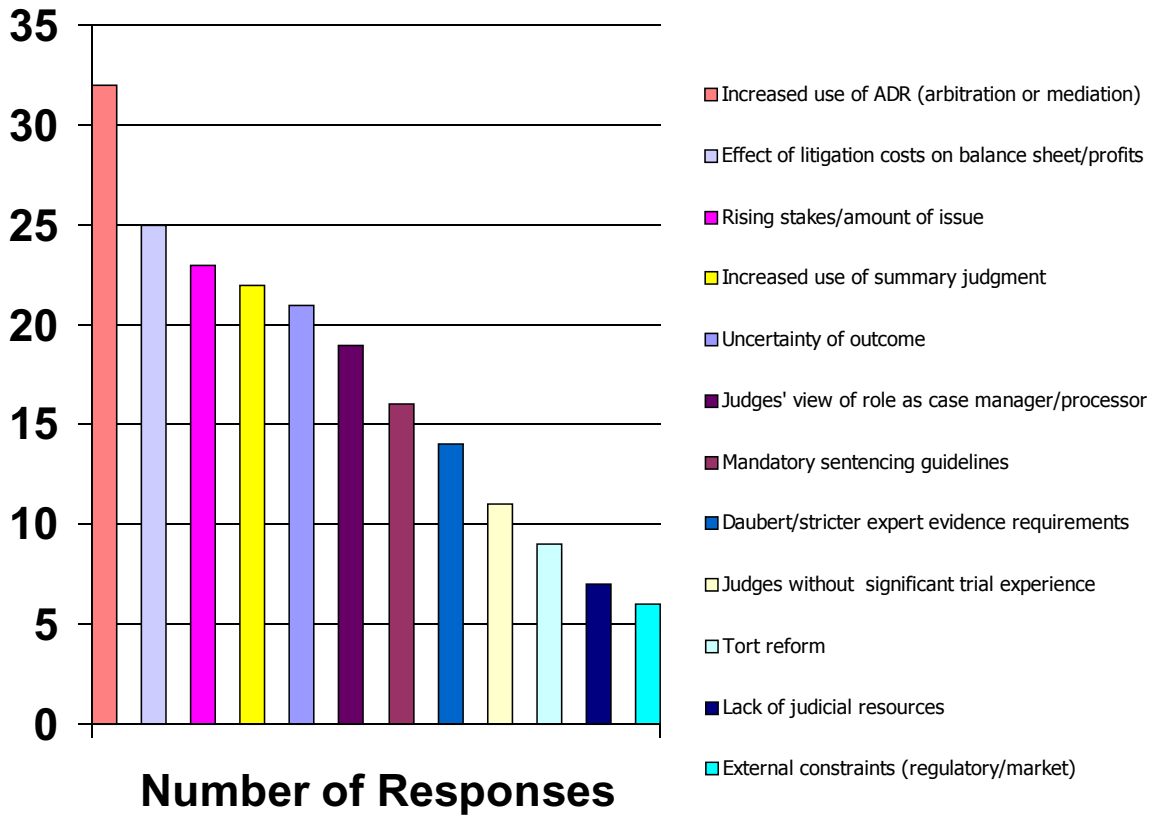
As to the impact of this decline on different categories of cases, the respondents to the questionnaire reported the following:

DOES THIS TREND OF DWINDLING TRIALS EXTEND ACROSS THE BOARD, OR ARE CERTAIN TYPES OF CASES TRIED IN DISPROPORTIONATE NUMBERS?



Finally, as to contributing factors, the results of the responses to the questionnaire were as follows:

WHAT FACTORS CONTRIBUTE TO THE DECREASE IN TRIALS?



The responses to the questionnaire thus not only corroborate the statistical analysis but move a step further, reflecting the perceptions of prominent, in-the-trenches trial lawyers as to the likely impact of various factors in precipitating the decline in the number of trials in various parts of the country and in different categories of cases. These factors are explored further in Part III of this report.

III. Factors Influencing the Decline in the Number of Civil Trials

A host of factors have been identified as playing a role — in varying degrees in different jurisdictions and differing types of cases — in the dwindling number of civil trials.[20] The Committee has undertaken to review the literature in this area and to consider, in light of the Committee members' collective experience and the poll results (Part II, *supra*), the potential significance of each. Cause and

[20] See the list of factors set forth at pages 1-2, *supra*.

effect, in a multi-variable context, are often difficult to pinpoint, and frequently blurry. In Professor Burbank's words: "[W]e should be skeptical of any attempt or claim to identify 'the cause' or even 'the primary cause' of the vanishing trials phenomenon.... [I]t may be that the most that we can hope to do (well) is to make some reliable causal inference — or more realistically to derive some plausible causal hypotheses — about federal civil litigation."[21] With that caution, it is the view the Committee that each of the factors discussed below is highly relevant to the discussion of causal factors underlying the Vanishing Trial phenomenon.

A. The Advent of Managerial Judging

It is fair to say that an increasing number of judges have come to place greater emphasis on, and have perhaps accorded greater value to, their role as case managers than their role as adjudicators. Perhaps the strongest sentiment voiced by seasoned trial lawyers is one of frustration — that, while settlement has always been encouraged, some judges have embraced a philosophy that actively discourages resolution by trial. This takes many forms, including mandatory settlement conferences, mandatory ADR, and repeated admonitions. Trial itself is viewed by some in the judiciary as a failure of the system, rather than its purpose or culmination.

This sentiment is echoed in the academic literature. Professor Judith Resnik of Yale Law School has traced the history of "how and why federal trial judges came to reorient the processes of judging and, in essence, to redefine their jobs by adding the management and settlement of civil cases to their judicial role."[22] Beginning with an anecdote — a California federal district judge who described the fact that 8 cases out of 100 went to trial "as evidence of 'lawyers' failure'"[23] — Professor Resnik writes:

> That got my attention: a person whose title was "trial judge" equated going to trial with failure. His relevance rests on the fact that he is not alone. Found in reported decisions is the phrase "a bad settlement is almost always better than a good trial." Found in rules and policy statements of the federal judiciary are increasing obligations of judges to press parties toward settlement. For example, a local rule in the federal trial courts of Massachusetts requires a judge to raise the topic of settlement at every conference held with attorneys. Moreover, this growing law of settlement is not simply hortatory. Court rules and statutes require litigants and their lawyers to engage in a variety of settlement processes; penalties flow from failure to comply.[24]

Professor Resnik examines the roots of this view, including the many pressures on federal district judges. Among other things, she explores the history of Federal Rule of Civil Procedure 16 (which governs pretrial conferences), concluding that: "In the contemporary rule, we find the managerial

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21 Burbank, *Ambition*, *supra* n.18 (manuscript at 7-8).

22 Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2001).

23 *Id.* at 925.

24 *Id.* at 926 (footnotes and citations omitted).

judge, the settlement judge, the dealmaking judge, the judge promoting alternative dispute resolution, and thus the Los Angeles judge telling lawyers that to go to trial was to admit a failure of this (new) system."[25]

It is Professor Resnik's informed belief that: "As an educational and rulemaking organization, the federal judiciary has adopted an anti-adjudication and pro-settlement agenda."[26] She elaborates:

> Over this century, the Article III judiciary as an entity has developed the views that (a) it is too busy from too high a volume of cases; (b) it is important and should be reserved for special assignments; (c) it should not expand its own numbers too much in response to the demands for more judging; (d) adjudication by non-life-tenured judges should be a presumptive substitute for adjudication by life-tenured judges; and (e) less judging and more settling is appropriate in general.[27]

Professor Arthur Miller of Harvard Law School concurs that changes to the Federal Rules of Civil Procedure make manifest the transformation of judge from adjudicator to case manager:

> The effect [of Federal Rule of Civil Procedure 16], in conjunction with other contemporary changes in practice, has been to transform the presiding judge's role from that of neutral arbiter to case supervisor. The court's power is enhanced by the fact that management often occurs beyond public scrutiny, is largely undocumented by written records or formal opinions, and generally escapes appellate review.... Judicial involvement has obvious implications for the traditional view that ours is an adversary system and that control of civil litigation rests in the hands of the advocates. These appear to be trappings of times past.[28]

While the statistical link may be impossible to establish, it is clear to the Committee — as it was to several respondents to the questionnaire — that many judges are exerting strong pressure to settle rather than try cases, and that this is a factor that influences, to a greater or lesser extent, the behavior of at least some lawyers and litigants in deciding not to proceed to trial.[29]

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25 *Id.* at 937.

26 *Id.* at 995.

27 *Id.* at 992.

28 Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1004-05 (2003) (hereafter, "Miller, *The Pretrial Rush to Judgment*").

29 A related factor merits mention. With fewer trials, newer judges are correspondingly less likely to have the experience and confidence level required to stand up to an aggressive trial lawyer and run a fair trial. In particular cases, this, too, may have an impact on the decision whether or not to proceed to trial.

B. Summary Judgment and Other Procedural Reforms

There appears to be a close relationship between managerial judging and the development of procedural tools that facilitate the pretrial disposition of cases. In Professor Miller's words: "the interrelationship between the increasing use of case management and the pressures for efficient — and rapid — resolution of litigation promotes the employment of motions to dismiss and summary judgment practice."[30] Professor Miller makes a convincing case that: "Summary judgment ... has moved to the center of the litigation stage as plaintiffs struggle to survive the motion in order to reach trial as defendants increasingly invoke it in an attempt to prevent them from doing so."[31]

In 1986, the Supreme Court decided what became known as a "trilogy" of cases that were widely read as encouraging the use of Federal Rule of Civil Procedure 56 to grant summary judgment.[32] Among other things, the *Celotex* opinion observes that:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.
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> 477 U.S. at 327.

Professor Miller, based on a review of several post-trilogy studies and cases, discerns "a definite change in attitude toward summary judgment...."[33] He cautions that:

> Overly enthusiastic use of summary judgment means that trialworthy cases will be terminated pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial.... When viewing the material on a pretrial motion without the safeguards and environment of a trial setting, courts may be tempted to treat the evidence in a piecemeal rather than cumulative fashion, draw inferences against the nonmoving party, or discount the nonmoving party's evidence by weighing it against contradictory evidence. Judges are human, and their personal sense of whether a plaintiff's claim seems "implausible" can subconsciously infiltrate even the most careful analysis. Encouraged by systemic concerns suggesting that summary judgment is desirably efficient, judges may be motivated to seek out weaknesses in the nonmovant's evidence, effectively reversing the historic approach. The effect is exacerbated when the court also imposes a heightened evidentiary requirement on the nonmovant by characterizing its theory as "implausible." All of this is reinforced by the "litigation explosion" and "liability crisis" rhetoric and a

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30 *Id.* at 1006.

31 *Id.* at 1016.

32 *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986); *Celotex Corp. v. Catret*t, 477 U.S. 317 (1986)

33 Miller, *The Pretrial Rush to Judgment* at 1049.

> culture of management that gives the judge a sense of familiarity with the dispute that emboldens pretrial disposition.[34]

Professor Miller expresses a concern shared by many trial lawyers: "Absent sensitivity to the appropriate judge-jury balance, lower courts may curtail litigants' access to trials — and obviously a jury — through arbitrary, result-oriented, or efficiency-motivated determinations at the pretrial motion stage."[35]

Professor Burbank dates the genesis of the increased use of summary judgment to the 1970s, preceding the trilogy:

> Such reliable empirical evidence as we have...does not support the claims of those who see a turning point in the Supreme Court's 1986 trilogy. Rather, that evidence suggests that summary judgment started to assume a greater role in the 1970s.[36]

For the Committee's purposes, whether the trilogy was an exacerbating factor rather than a cause of the enhanced use of summary judgment is less important than the fact that summary judgment is today playing some role in the Vanishing Trial phenomenon.

The impact of summary judgment on the number of trials would appear also to have been intensified by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993), admonishing trial judges to serve as "gatekeepers" by critically assessing expert evidence before admitting it.[37] Plaintiffs' lawyers specializing in non-federal causes of action (*e.g.*, tort) make no secret of their preference to avoid a federal forum, and defense lawyers do everything they can to secure one. If critical expert evidence is excluded under *Daubert* and its progeny, the plaintiffs' case never makes it beyond summary judgment, or survives in so weak a state as to drive down precipitously the settlement value (if it retains a value at all). Many state courts have adopted *Daubert*, moreover, and its influence extends to some extent to states that continue to apply the prior *Frye* rule.[38] This combination of factors may help to explain both (i) what Professor Burbank describes as a "'shift of filings' — a marked decline in tort or at least in diversity tort filings as a percentage of total [federal] filings....";[39] and (ii) some portion of the decline of trials in state court.

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34 *Id.* at 1071.

35 *Id.* at 1076.

36 Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Towards Bethlehem or Gomorrah?*, The Journal of Empirical Legal Studies, Vol. 1, No. 3 (forthcoming Nov. 2004) (manuscript at 33-34).

37 *See also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997).

38 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). *See generally* Note, *Frye Versus Daubert: Practically the Same?*, 87 Minn. L. Rev. 1579 (2003).

39 Burbank, *Ambition*, *supra* n.18 (manuscript at 18).

Professor Stephen Yeazell of UCLA presents a broader hypothesis concerning the relationship between procedural reform and the Vanishing Trial phenomenon.[40] His premise is that, a century ago, there were too many trials, and they were based on inadequate information, leading to trial by surprise, unpredictable results and (absent meaningful discovery) litigants' chronic inability to assess the value of their cases. This, he asserts, was the predicate of Roscoe Pound's call for reform in 1906 — which led to both expansive discovery and expert evidence. The combination of discovery and expert evidence, as they have developed, now leads to (i) frequently "converging estimates of the likely outcome of the trial" and (ii) increased costs, which "may change both parties' calculations about the desirability of settlement and the risks of trial."[41] A by-product of procedural reform, he argues, has been the development of more evenly matched plaintiffs' and defense bars which, directly or through clients, make "competitive investments in litigation" that, in turn, make small claims of dubious value to pursue.[42]

C. Litigation Costs

Professor Yeazell's analysis focuses in one respect on the role that litigation "costs" — a term that includes attorney fees and other expenses incurred in litigation — have played in the demise of the civil trial. Pinpointing this role is no easy task. The notion that costs must matter is instinctively true; no rational plaintiff or defendant will pursue civil litigation (instead of settlement, or a decision not to pursue a claim at all) in the absence of an evaluation of expected return.[43] Relatedly, what lawyers charge and what they pay associates and staff have constantly increased, which translates into higher charges to the consumer of legal services.[44] When those realities are combined with the disclosure obligations and discovery procedures under the Federal Rules of Civil Procedure, one cannot help but believe that the $75,000 amount-in-controversy requirement of 28 U.S.C. § 1332 is merely masquerading as a substitute for some other, higher amount that is the *effective* amount-in-controversy requirement for bringing a federal action.

Kent Syverud, for example, has rejected even the rise of Alternative Dispute Resolution (discussed below) as the principal cause of the decline of the jury trial, characterizing it as more of a symptom of the failure to address the deficiencies of litigation in courts.[45] Instead, Syverud described the "proximate cause" of the vanishing trial as follows:

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40 Stephen C. Yeazell, *The Vanishing Civil Trial: Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got?* (2003) (Prepared for the Symposium on the Vanishing Trial, Sponsored by the Litigation Section of the American Bar Association, San Francisco, Dec. 12-14, 2003).

41 *Id.* at 17.

42 *Id.*

43 Certain types of cases — *e.g.,* civil rights — may be exceptional but even there one presumes that the plaintiff expects a return, even if, in some instances, it may take other forms, such as the publicity attendant to the litigation as a fulcrum for social or political change.

44 Publicly available sources of such conclusions include the various websites, such as http://www.greedyassociates.com and http://www.infirmation.com/bboard/clubs-top.tcl, on which "greedy associates" at law firms report changes in compensation across the United States.

45 *See* Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1941 (1997) (explaining, with respect to ADR, that "the greatest incentives to forego a right to civil jury trial come from another source. The costs and risks of formal civil process are much higher than the lower costs and certainties of settlements, or other ADR methods.").

> First and foremost is the inordinate expense and delay of American civil process. Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details — in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it. Unless a defendant's insurance company consents to trial, and a plaintiff's lawyer chooses to take a chance, the reality is that the crushing costs of our civil process will drive almost everyone to settle. Of the subset of those parties who would like a trial, the judicial system can afford to provide one for only a small fraction. We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.[46]

Fifth Circuit Judge Patrick E. Higginbotham has concurred in Syverud's analysis, and has offered his own view, as a former trial judge, of the costs of discovery and of the absence of empirical studies that validate our anecdotal sense of discovery costs:

> The most costly feature of federal practice, by most accounts, is the discovery process, the centerpiece of reform of the 1938 Federal Rules of Civil Procedure. My own experience is that this ranking is probably justified. Yet there is a lack of meaningful empirical examination of discovery costs.... One of the few existing studies on the subject indicates that discovery costs are an appreciable component of total fees across different categories of cases, and are especially high for certain categories of cases, such as antitrust and patent disputes. A 1978 study also determined that lawyers generally devote more time to discovery than any other category of activity engaged in by a lawyer, although it was only 16.7% of the total time devoted to a case.[47]

Still, the thesis that costs, and particularly discovery costs, have been the principal cause of the decline of trials is not without dissenters, who have found much to dispute. As Charles Silver has noted, "[e]mpirical studies have never confirmed the existence of a serious problem of excessive discovery."[48] Indeed, Silver explains, even if such data existed:

> An economist would question these claims. Intuitively, any leverage to be gained via discovery derives from the ability to threaten an opponent with costs. When threatened, an opponent has an incentive to settle and avoid the expense. However, the incentive weakens as discovery progresses because avoidable future costs are converted into unavoidable sunk costs, and it disappears entirely when discovery is complete. The incentive to carry out the threat is therefore weak, and one would expect parties to settle well short of completing discovery, the precise location being a subject for strategic jockeying.[49]

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46 *Id.* at 1942.

47 Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do They Call Them Trial Courts?*, 55 SMU L. Rev. 1405, 1416-17 (2002).

48 Charles Silver, *Does Civil Justice Cost Too Much?*, 80 Tex. L. Rev. 2073, 2094 (2002).

49 *Id.* at 2093.

A more accurate account of discovery costs in civil litigation, Silver argues, recognizes that broad generalizations simply cannot be made:

> Most recently, a RAND study of 10,000 federal cases conducted after enactment of the [Civil Justice Reform Act] found that "[o]verall, lawyer work hours per litigant on discovery are zero for 38% of the general civil cases and low for the majority of cases.... Discovery is not a pervasive litigation cost problem for the majority of cases. The empirical data show that any problems that may exist with discovery are concentrated in a minority of the cases."
>
> ...Most cases end with little or no discovery, and discovery rarely accounts for 80% of the cost of a fully litigated case. On the latter point, the RAND study found that, when discovery occurs at all, it typically consumes "about one-fourth to one-third of total lawyer work hours per litigant. Discovery accounted for less than half the lawyer work hours in all the subsets of general civil cases we examined." "Even for cases with stakes over $500,000," the study noted, "the median percentage of lawyer work hours spent on discovery was only 30%."[50]

It is possible, in fact, to read Syverud, Higginbotham and Silver as making the same substantive point, albeit with different emphases. Devoting between 30-50% of a lawyer's time to discovery — a percentage significantly higher than that acknowledged by the 1978 study cited by Judge Higginbotham — can obviously be a huge and surprising expense to litigants, if the total time spent by lawyers is also high. Hence, the fact that, as Silver explains, most cases end with little or no discovery, does not assist the litigants in those cases in which discovery is actually a necessary or at least pervasive (and perhaps both) element of moving toward resolution. In such cases, we simply may never reach the point envisioned by Silver's hypothetical involving litigants who can bear all the costs of completing discovery, and then elect to treat those costs as "sunk" costs that do not deter additional spending at trial. We may instead have a situation that an economist would recognize as a market failure — in which the litigants' preferences for trial may never be manifested as a consequence of insufficient resources to survive the costs of discovery.

In those situations, costs of litigation, and likely of discovery in particular, effectively operate to deny the entitlement to trial that the Federal Rules of Civil Procedure were promulgated to protect, and, doubtlessly, to enhance. Regrettably, one obvious answer to that dilemma — more extensive management of discovery by district court judges or magistrates — may be unavailable as a consequence of the obviously greater obligation upon judicial resources that such an assignment would impose. In the absence of a significantly expanded federal judiciary (or, less likely, more agreement and constraint among lawyers), however, the result may be, ironically, a judiciary that devotes even more time to case management and to implementing incentives to settle—and, as a result, even fewer trials than we have now.

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[50] *Id.* at 2095 (footnotes omitted).

There is another, highly practical respect in which litigation costs may factor into the Vanishing Trial phenomenon. Businesses in the United States commonly measure the performance of managers by — and determine their compensation based on — the profitability of the units the managers lead. Litigation is a cost that eats into profitability and thus potentially into compensation. This negative, from the perspective of the manager, must then be analyzed within the existing framework of manager mobility. Heads of businesses and business units frequently change jobs, either within the same entity or by moving to another entity. Even a substantial plaintiffs' claim held by a business entity can be viewed largely as a negative by the manager who will, on a current basis, be charged with the costs but who may be unlikely to be in the same position when any verdict is obtained or appeal sustained. Settlement is much more promising — cash flows in, no more cash flows out.

On the defense side, financial markets punish litigation exposure. Public companies' cost of capital, credit rating, borrowing costs and share price may be substantially affected by a significant litigation exposure. Sometimes, it is cheaper to settle than, for example, to pay the higher price required by underwriters to sell a debt offering in the face of a substantial litigation exposure. While not measurable, these factors clearly play a role in the decision to settle rather than continue to litigate, much less try, a case.

One highly respected trial lawyer suggested that the Securities and Exchange Commission's accounting rules and the stock market are contributing to the demise of the civil trial. His theory was that the accounting rules (or, perhaps more accurately, the litigation-averse accountants who interpret those rules) require that corporations set up huge reserves on their books — charges against earnings — early in the litigation process. Thus, the defendant's stock "takes the hit" early in the case. If the defendant goes on to win the case, there does not seem to be a resulting "bounce," at least there doesn't seem to be a bounce that is comparable to the initial "hit." If, on the other hand, the case goes to trial and the liability exceeds the reserve, the company and its accountants will have egg on their face and summonses on their desks. This lawyer says he has corporate clients who view the reserve as "money spent," and who have little interest in fighting the case so long as it can be settled within the limits of the reserve.

D. Fear of Juries

There is no empirical evidence demonstrating that fear of excessive or irrational jury verdicts has played a part in the decline of the jury trial. Even if true, moreover, this would not explain the sharp decline in the number of bench trials. The view of the Committee, however, is that, to some extent, fear of juries probably has contributed to the dwindling number of jury trials — that defendants as a group have, to some extent, become more willing to settle, and to pay more to settle, in order to avoid facing a jury. Discussions with a number of lawyers and clients have reinforced the Committee's impression that defendants and their attorneys are fearful — more so than in bygone days — that a jury will hand them a result that is totally disproportionate to anything they rationally ought to be able to expect from an adjudication.

Judges, court administrators and plaintiffs' lawyers will tell you that pro-plaintiff verdicts are not predictable, and will assert that aberrant results on the low side or the "no" side are not that uncommon. That, however, is not the societal perception.

Factors contributing to this perception include:

The Big Verdicts Are News: For the most part, defense verdicts and modest plaintiff's verdicts are not news. It is the stunningly large plaintiff's verdict — the BMW repaint case or the McDonald's coffee cup case — that attains near-mythic stature in the folklore of litigation. Whether the results in those cases can be explained on close examination is almost beside the point if the public perception is that a jury trial is a lottery. Lawyers counsel their clients that these results are aberrant, but the fear remains.

Everything Is Somebody's Fault: A common perception is that jurors, more than in the past, are unwilling to accept the idea that not every injury is an occasion for blame, that bad things just happen sometimes. Whether this is accurate or even new, it is a common perception, and it is perceptions that drive defendants' decision to go to trial or settle.

Juror Quality: There is a common perception that juries, at least in large metropolitan areas, are peopled by citizens who are either not important enough or not resourceful enough to avoid serving. Similarly, many lawyers believe that their opponents (they themselves would never do it) systematically strike the most intelligent venire persons.

Jurors Seem Less Willing to Work Through Elaborate Defenses: It is a commonplace that "Gen X" jurors have different, media-conditioned ways of processing information: They demand sound bites and entertainment in a way that Baby Boomers did not. It is also perceived that, on balance, plaintiffs' "stories" tend to be less complicated than defendants' "stories" and, therefore, the latter are less likely to be given full consideration.

Focus Groups Frighten Defendants: Far more often than in the past, lawyers and their clients use mock trials or focus groups to test their positions on citizens in the venue. This can be a fine aid in preparing a case; it can show parties and their lawyers the shortcomings or strengths of their presentations. But there are two significant downsides:

> **Plaintiff Wins:** As mentioned earlier, the feeling is that plaintiffs usually have the simpler, more immediately sympathetic story to tell — they have been hurt either physically or economically. In the typical thumbnail-presentation before a focus group or in mini-trial — as distinguished from an actual trial, where the whole story is told over a protracted period — many lawyers believe that the "simple" side has the advantage. (In the experience of at least one member of the Committee, a defense outcome at trial has never been nearly as bad as the readings obtained from focus groups.)
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> **The Mock Jurors' Behavior Confirms the Lawyers' Worst Fears:** Sitting behind the one-way glass and watching a mock jury deliberate can be a terrifying experience, as lawyers and their clients hear how completely their evidence has been misunderstood, how confused the jurors are as to both

the facts and the law, how easily one insistent juror can turn an otherwise reasonable dialogue around, how lightly jurors reach decisions on matters of the greatest importance, how freely they ignore the court's instructions and, finally, how willing they are to spend other people's money (admittedly, play money).

The Jurors Have Little Comprehension of The Sums They Are Handling or the Consequences to the Parties: There is a big difference between $1,000 and $1 million. A clock ticks 1,000 times in less than 17 minutes. It takes more than 11 days for that clock to tick a million times, and almost 32 years for it to tick its way to a billion, if it doesn't wear out along the way. The common perception is that most people, jurors among them, really do not understand that relative relationship or think about it. News stories confirm, however, that modern juries are comfortable calculating verdicts in the millions and even billions of dollars. It is often suggested that verdicts that would once have been staggering have become commonplace because juries are used to seeing things like the ballplayer's salary, the CEO's bonus and the cost of a Super Bowl commercial, counted in 7 or 8 digits.

Juries Are Smaller: Studies have shown that aberrant decisions are more likely to be reached by small groups than larger ones.[51] The reduction in the sizes of juries and the elimination of the requirement of unanimity in some jurisdictions must both contribute to the risk of an irrational outcome.

The Law and Instructions on the Law Are More Complicated: Two lawyers shared their impressions that jury instructions have become more cautious and complicated, and in the process have become less intelligible. Over time, the various corrections of pattern jury instruction have proliferated — like warning signs on power mowers or disclaimers in prospectuses — to the point where the whole communication becomes unreadable or unread.

The Committee emphasizes that the fear-of-juries factor is a matter of perception — or, more precisely, misperception. Juries provide an important bulwark against the state and powerful special interests, and judges act as a bulwark against the relatively rare instances of irrational jury verdicts. Blackstone aptly described trial by jury as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy."[52] Early in the history of the Republic, Justice Joseph Story stressed that: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."[53] More than a century later, in *Jacob* v. *New York City*, 315 U.S. 752, 752-753 (1942), the Supreme Court reaffirmed that: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence ... [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts." The College can play a constructive role in

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51 Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions*, 6 S.Cal. Interdisc. L.J. 1 (1997); Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, 21 Law & Hum. Behav. 451 (1997); Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 Judicature 263 (1996); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 897 (1998). *See generally* American College of Trial Lawyers, *Report on the Importance of the Twelve-Member Civil Jury in Federal Courts* (2001), available at http://www.actl.com/PDFs/Importance12MemberJury.pdf.

52 3 W. Blackstone, Commentaries on the Laws of England * 379 (T. Cooley 4th ed. 1896).

53 *Parsons v. Bedford*, 28 U.S. 433, 3 Pet. 433, 446 (1830).

reminding the citizenry of the importance of the civil jury: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[54]

E. Advertising

Little or no empirical data seem to be available to assist in investigating the role of lawyer advertising in the reduction of civil trials. The yellow page ads, television and radio commercials, and billboards are evidence of the evolution of advertising for consumer — usually tort — claims since *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). That opinion "launched a revolution in how lawyers and clients find one another," a phenomenon that "has quickened with computerization and the Internet."[55]

It is evident that the amount spent on advertising can be significant, and may produce huge volumes of cases. The ABA JOURNAL reported in March 2004 that one firm of 90 lawyers in Florida spends $10 million per year on ads, including billboards across the state and 500 television and radio ads daily, and takes on about 1,600 new clients per month. "[G]reater volume makes it easier to amortize the cost of mass marketing, which produces greater volume."[56]

An emphasis on volume is not necessarily conducive to the preparation and trying of cases. Trial judges in a midwestern state reported to a member of the Committee that personal injury cases are going, in large proportions, to the firms or lawyers that advertise heavily. Former associates of those firms reported that an emphasis often is placed on settling cases as quickly as possible, and that the volume of cases leaves little time to prepare them for trial, let alone try them. In some jurisdictions, it appears to be rare for those lawyers who advertise heavily and get high volumes of cases to actually take them to trial. Some attorneys report that, not only are the cases settled, but also many of the better cases are settled for a fraction of their potential value. Some advertising lawyers do refer certain of the better cases to trial lawyers, but at least one active and skilled trial lawyer reports that referring attorneys frequently place unrealistic parameters on the time frame within which the cases must be resolved and attorneys' fees paid.

While these scenarios are anecdotal and by no means universal, they do point out a possible effect that advertising may have on the number of civil trials.

F. Arbitration and ADR

In assessing the role of arbitration and other ADR mechanisms on the Vanishing Trial phenomenon, arbitration should be singled out. As it has developed over the past half century, arbitration (as distinct from mediation and other means of ADR) has become in many instances a privatized trial, with all of the trappings of direct and cross-examination, the introduction of evidence, argument and briefing. To the extent that arbitration of that sort is replacing the civil trial in court, it is more a

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[54] Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959) (Black, J.).

[55] Terry Carter, Casting for Clients, ABA JOURNAL, March 2004, at 38.

[56] Id.

phenomenon of forum-shifting than abandoning the use of trial to resolve the parties' dispute. While there are no comprehensive numbers as to the number of cases filed in arbitration, Professor Galanter reports that one notable provider, the American Arbitration Association has experienced a significant growth, from fewer than 1,000 cases in 1960 to 11,000 in 1988 to more than 17,000 by 2002.[57] This, however, is purely a number of filings. It does not tell us the number of cases in which a hearing was commenced or a litigated decision rendered.

Many observers perceive that, arbitration aside, ADR is responsible in part for the Vanishing Trial phenomenon. Professor Burbank, however, makes the salient point that ADR can explain the drop in the number of civil trials only if ADR is causing more settlements than would otherwise have occurred before trial and, even then, only if, among those settlements, cases that would have been tried are disproportionately represented.[58] Like Professor Burbank, the Committee is unaware of any empirical data establishing either of these propositions. Nonetheless, as discussed in connection with Managerial Judging (Part III(A), *supra*), mandatory ADR is an expense and, in some cases, may betray a judicial hostility toward trial. Moreover, in the business community, ADR is sometimes stressed as a cost-cutting alternative to trial. It is the sense of the Committee that ADR is a factor, to some extent, in the drop in the civil trial rate.

G. The Lack of Trial Skills or Experience in Young Lawyers

The problems associated with the move away from the civil trial as a method of dispute resolution are magnified for young lawyers. For more experienced counsel, the problem can be characterized as one of decreasing opportunities to get into the courtroom. For many young lawyers, it becomes more of a matter of: "Will I ever get into the courtroom?" If young lawyers do not have the opportunities, in the context of real time litigation, to develop trial skills and experience, then there is very real risk that this will contribute to the move away from civil trials into the future. A prominent federal judge once suggested that, if a practicing litigator spends eight years without trying a case, thereafter he or she will earnestly avoid any trial to avoid exposure of the lack of trial skills.

There is no empirical data on this topic. It is true that, for decades, young lawyers have complained about having too few opportunities to get into the courtroom. However, it appears to be a universal impression that with the passage of time there are fewer and fewer opportunities available for young lawyers.

One aspect of this problem might be termed the "fear of trialing." This is an issue that is very much related to competence. Young litigation lawyers are held out to the public as being trial lawyers. If they are reluctant to go to court because they do not know how to try a case, then their judgment becomes distorted and they are not providing competent service to clients. In the end, we will have "trial lawyers" who do not want to try cases because of their lack of courtroom exposure.

It is also the case that continuing legal education in the form of advocacy skills training programs is important, but they are not enough. We can train young lawyers to have the theoretical skills involved in trial advocacy. However, without having an understanding of the pressures and responsibilities that arise in the trial context and understanding how real time decisions can have a serious impact on the outcome of a client's case, a young lawyer will not be equipped to handle a trial.

In addition, this fear of going to trial reflects on the ability of young counsel to give advice on litigation strategy and to be effective in the mediation or settlement context. Understanding the trial process is the unique skill of the trial lawyer and that skill is derived from the courtroom. It is that skill that allows the trial lawyer to be effective outside the courtroom as well as inside the courtroom. Trial experience is necessary to allow trial lawyers to give strategic advice and to be able to evaluate cases so that settlements achieve a fair and appropriate result.

A lack of trial experience can also contribute to decreased skill in the context of pre-trial depositions and document production. It is trial experience that assists the trial lawyer in knowing what is relevant and hence in knowing what to focus on during the pre-trial phase of litigation. It is trial experience that allows the trial lawyer to understand how to analyze a case and to use that analysis to formulate a pre-trial plan.

It is the sense of the Committee that the lack of trial skills or experience among young lawyers may exacerbate the move away from civil trials as a method of dispute resolution.

IV. Implications for the American College of Trial Lawyers

The Vanishing Trial phenomenon necessarily has implications for the College, which is composed of the most distinguished members of the trial bar. The Vanishing Trial phenomenon raises the question whether the College can effectively act to reverse this trend or should alter the rigorous standards it applies to candidates for fellowship.

The Committee does not believe that precipitous action is necessary or appropriate. While there clearly has been a decline in the number of trials, the College is robust and has no difficulty in consistently identifying a full complement of highly qualified candidates for fellowship. Nor is it clear that the decline in the number of trials is either new or necessarily irreversible. As noted in Part I, the decline in the trial rate may actually have coincided in time with the founding of the College. If this phenomenon has coincided temporally with the entire existence of the College, it does not now seem so exacerbated as to warrant a change in focus or direction for the College.

In part, the decline in the civil trial rate would appear largely to be reflective of changes in approaches to dispute resolution, judicial perspective, and economic and political forces. None of these is static. The Committee believes that it would be a profound error to alter in any fundamental way the nature or raison d'être of the College in response to a phenomenon that has been in existence virtually since the College was founded.

It is the belief of the Committee that there will always be major, contested disputes. Clients will seek out the best lawyers to handle those disputes, and those are the lawyers that belong in the College. The College should continue to maintain, and strictly enforce, its rigorous standards for fellowship. The College retains its unique voice only as long as it retains its unique requirement that fellowship is limited to those displaying the highest quality of trial advocacy.

Dispute resolution is changing. In the future, the forum might change again — just as arbitration is now, properly, considered in evaluating candidates for fellowship, other trial procedures may emerge in the future. The nature of court proceedings might change — just as multi-day, evidentiary *Daubert*

hearings and preliminary injunction hearings are also considered, new court proceedings may emerge that similarly warrant consideration. The College has been, and should continue to be, responsive to the changing modes of dispute resolution. The College has appropriately undertaken the task of discriminating between those non-judicial forms of dispute resolution that are tantamount to trials in court and those that are not. The test should continue to be whether traditional trial advocacy skills are required, as they are when live testimony is elicited from witnesses under oath in a contested proceeding that can lead to an enforceable judgment or order. (Thus, substantial arbitrations and contested administrative proceedings often qualify, but mediation, conciliation and other forms of ADR ordinarily do not.) In those circumstances, the College's historic criteria are applicable. Monitoring the evolving forms of non-judicial dispute resolution, and their impact on criteria for fellowship, will remain a long-term project, which should be monitored by the Board of Regents through the Committees on Admission to Fellowship and Alternatives for Dispute Resolution.

Most of the factors that appear to be precipitating the shrinking number of trials are beyond the ambit or competence of the College to address. The College should continue to be a prominent public voice in support of the civil justice system and the jury trial. It should urge its fellows to promote adequate funding for the courts and the selection of trial judges who possess both trial experience and a proper understanding of the crucial role of the civil jury trial in the American system of government.

Thomas Jefferson said: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[59] James Madison echoed this sentiment: "Trial by jury in civil cases is as essential to secure the liberty of the people as any one of the pre-existent rights of nature."[60] In the words of Chief Justice William H. Rehnquist: "The founders of our nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign…. [J]uries represent the layman's common sense and thus keep the administration of law in accord with the wishes and feelings of the community."[61] The College should make a continuous, concerted effort to educate and remind judges, the practicing bar, and the public about the significance of jury trials in our system of justice as well as the dangers inherent in their decline.

One area of particular concern is the shrinking number of trial opportunities for younger lawyers. The College should communicate to the fellows the importance of mentoring and creating opportunities for young lawyers to get trial experience. The College already sponsors trial competition programs for law students. In part this is to promote the development of advocacy skills and to encourage interest in becoming a trial lawyer. Many of the College's State and Province Committees have also begun, or are in the process of considering, local projects devoted to teaching trial skills to younger lawyers, and these local projects should be encouraged and nurtured by the College. Consideration should be given to whether there is an appropriate means of addressing the fear factor, frustration and demoralization experienced by young lawyers who want to be trial counsel but are confronted by lack of opportunity.

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[59] Thomas Jefferson to Thomas Paine, 1789. 7 Lipscomb & Berg (eds), The Writings of Thomas Jefferson at 408 (Memorial ed. 1903-04), 15 Julian P. Boyd (ed.), The Papers of Thomas Jefferson at 269 (Princeton 1950-).

[60] 1 Annals of Cong. 454 (Joseph Gales ed., 1789).

[61] *Parklane Hosiery Co. v. Shore*. 439 U.S. 322, 343-44, 99 S.Ct. 645, 657-58 (1979) (Rehnquist, J., dissenting).

In doing so, it may be possible to assist young lawyers in breaking out of the circle that is created where lack of trial experience discourages young lawyers from taking advantage of the opportunity to go to trial where that opportunity exists.

Conclusion

The Vanishing Trial phenomenon is real, and it has implications for the College. The College, however, remains thriving and robust, and no precipitous action is warranted. This is a phenomenon that the College should continue to monitor.

APPENDIX A

I. THE FEDERAL SENTENCING GUIDELINES HAVE REDUCED TRIALS BY PRESENTING DEFENDANTS WITH THE ASSURANCE OF SIGNIFICANTLY LONGER JAIL TERMS IF THEY CHOOSE TRIAL AND LOSE.

Jail Terms Are the Rule. A very large number of pre-Guidelines[1] federal defendants who contested guilt could go to trial and, if convicted on all counts, still enjoy the possibility that the Judge could impose a sentence of probation and spare the defendant jail time. The rigidity[2] established by the Sentencing Guidelines, has been made even more rigid by the cases decided since the Guidelines, by amendments to the Guidelines[3], and by recent policy directives from the Attorney General[4]. The government, moreover, has the right to appeal any sentence it believes too lenient if the leniency involves a violation of the Guidelines. This framework of rigidity makes a jail term mandatory for an overwhelming percentage of those who, prior to the Guidelines, would have been eligible for a sentence of probation.

Two Lessons Lead to Reduced Trials. The 15 years of experience under the Guidelines have reduced the frequency of criminal trials by the impact which this regime has had in bringing about guilty pleas.

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[1] Guidelines Effective 1987. The United States Sentencing Reform Act, 28 U.S.C. § 991 and § 994, et seq. established the United States Sentencing Commission and directed it to promulgate the Federal Sentencing Guidelines, and the Guidelines became effective on November 1, 1987. The Guidelines have been amended several times since then and their validity was upheld by the Supreme Court. Mistretta v. United States, 488 US 361 (1989). This analysis does not address the implications of the Supreme Court's recent decision in *Blakely v. Washington*, No. 02-1632 (Sup. Ct. June 24, 2004).

[2] Mandatory Sentence Ranges. Broad categories of offenses are stacked in a hierarchy of Offense Levels with increasing lengths of mandatory sentences. The defendant's criminal history, the amounts involved and other aggravating and mitigating features also can affect the sentence length. The Guidelines require the sentencing judge to impose a sentence within the range established by the Sentencing Table. The Table sets out 4 zones (A-D) populated by 43 offense levels. Each Guideline Range provides for a minimum sentence and a maximum sentence. The District Judge is forbidden to depart downward or upward from the range fixed by the Sentencing Table, except on limited grounds specified in the Guidelines.

[3] The Protect Act's Sentencing Provisions. The Protect Act directs the Sentencing Commission to amend the guidelines to insure that downward departures are substantially reduced. This is intended to eliminate the type of discretion accorded district judges in Koon v. United States, 518 U.S. 81 (1996), and to prevent unspecified downward departures.

[4] The Attorney General's Policies. On July 28, 2003, the Attorney General issued a memorandum to federal prosecutors directing them not to acquiesce to downward departures except under the most unusual circumstances. When a Judge does depart downward, the prosecutor must report that conduct to the Department of Justice. The Attorney General's September 22, 2003 memorandum to federal prosecutors supplemented his July 28, 2003 memorandum and set forth policies that called upon prosecutors to oppose downward departures not supported by the facts and the law, and to refuse to agree to stand silent with respect to departures.

1. A defendant who chooses to go to trial and to have a Judge or jury determine his guilt or innocence will pay a severe price under the Guidelines if convicted at trial.

2. Very little flexibility is left to defense counsel or the Judge after conviction to reduce the Guidelines sentence range.

The practical effect the Guidelines have is that targets of investigations must provide assistance to the prosecution in the investigation or prosecution of others, and accept responsibility[5] as early as possible by agreeing to enter a guilty plea. These are the principal choices defendants must make to reduce the stiff mandatory sentence ranges under the Guidelines. Moreover, in some cases, the defendants face staggering periods of incarceration[6], though in the pre-Guidelines era similar defendants faced probation or incarceration periods calculated in months not years.

II. AVAILABLE STUDIES.

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[5] Reduction for Pleading Guilty. For acceptance of responsibility (i.e. pleading guilty) the offense level is reduced by 2 levels. See Federal Sentencing Guidelines Manual § 3E1.1(a). And, for an offense at Level 16 or greater, if defendant has assisted in the investigation or prosecution merely of his own conduct by timely providing complete information or timely notifying the authorities of an intent to enter a plea of guilty and thereby permitting the government to forego preparing for trial, the defendant receives a reduction of 1 additional level. § 3E1.1(b).

[6] Guidelines Levels Can Soar. Mail Fraud is a frequently charged offense in business cases. Those cases can quickly reach Zone D of the Sentencing Table, Offense Level 24 (minimum sentence of 4 years and 3 months). The starting or base Offense Level for crimes involving fraud and deceit is Level 6. If the "loss" exceeds as little as $2,000, the Offense Level is 7; if it exceeds $800,000, the Offense Level is 17, and if it exceeds $80 million, the Offense Level is 24. See Federal Sentencing Guidelines Manual § 2F1.1. Offense level 24 has a minimum jail term of 51 months and a maximum of 63 months. In the corporate financial report cases rolling toward indictment and trial in New York, Houston and elsewhere, the "loss" can often reach these high Offense Levels. Moreover, these offenses are increasingly being coupled with a charge of obstruction of justice which now has a base offense level of 14. See Federal Sentencing Guidelines Manual § 2J1.2. If the obstruction involves perjury, subordination or bribery of a witness, that offense too has a base Offense Level of 14.

The accumulation of consecutive sentences for even two charges in this regime (sometimes four or more are used in sequence by prosecutors) can result in an offense level of 36 which carries a minimum prison sentence of 15 years 8 months, and a maximum sentence of 19 years 7 months.

With the increases in fraud / theft Guidelines pursuant to directives of the Sarbanes-Oxley Act (effective January 25 and November 1, 2003), it is entirely possible in corporate scandals for an individual defendant to reach level 42, a 30 year to life sentence, or level 43, a mandatory life sentence.

There are no known empirical studies or scientifically calibrated surveys that prove how many defendants declined to stand trial primarily based on the threat posed by the Sentencing Guidelines. The methodology to conduct such a survey would suffer from the inherently speculative and heavily anecdotal bases for determining the effect of the Guidelines on this most difficult decision.

While such empirical analyses of the cause/effect relationship may be lacking, studies have been made of the numbers, the timing, and the extent of the decline in federal criminal trials. Little, if any, of the decline appears to have preceded the promulgation of the Guidelines; rather the decline came after the Guidelines. One recent analysis is that of Professor Marc Galanter of the University of Wisconsin School of Law. See Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts (2003). See p. 46 (published at the ABA Conference on "The Vanishing Trial" (2003)).

The timing of the decline in federal criminal trials charted by Professor Galanter's study appears to reflect some cause/effect relationship. The number of federal criminal trials fluctuated within fairly tight ranges from 1962 (5,097 trials) to 1990 (7,874 trials), but in 1991 there began a decline from the 1990 high to a low in 2002 (3,574 trials). (By 1991 the Sentencing Guidelines applied to a large percentage of the cases on trial dockets.)

Although the opinion of some U.S. District Judges in the early years of the Guidelines was that the Guidelines would increase the incidence of trials, when the dust of early challenges to the validity of the Guidelines' regime settled, a steady decline in trials became evident. The rate of decline appears to reflect that practitioners became reconciled to the validity of the Guidelines and the ineluctable succession of jail terms being imposed under the Guidelines.

III. ANECDOTAL INFORMATION.

Many trial lawyers who spend their time in this area of federal practice attribute the drop in large measure, though not entirely, to the Guidelines' pressure to forego a trial and obtain the limited benefits of cooperation and acceptance of responsibility. Interviews reported in The Washington Lawyer, October 2003, p. 23 et seq. recount the opinions of several experienced former prosecutors and defense lawyers. Their comments echo the comments of other lawyers throughout the country:

- Rigidity. The rigidity of the Guidelines is now widely accepted by the defense bar. One lawyer in the article debunks the notion that "guidelines connotes the idea that these are suggestions. That these are things you probably ought to do. There's no "ought" about it [under the Federal Sentencing Guidelines]." Id. p. 23. Moreover, since the Guidelines, both Congress and the Justice Department have been aggressive in eliminating flexibility such as the type granted by the Supreme Court in Koon v. United States, 518 U.S. 81 (1996). Id. p. 23.

- Uniformity. The effect of equalizing or creating uniformity of sentences has indeed occurred, but only by pushing the lower term sentences to the higher range, not vice versa. The disparity sought to be eliminated, described by one lawyer as two cellmates

who committed the same crime, but one received a one-year sentence and the other a five-year sentence, is resolved under the Guidelines. Both get five years. Id. p. 25.

- The Guidelines Penalize Trials. The parity between the sentence once anticipated after a plea versus the sentence anticipated if convicted at trial is gone. A former prosecutor, now defense lawyer, said that there no longer can be the feeling as in the pre-Guidelines era "that if worse came to worst, you probably would get the same deal even if you went to trial and you got convicted." Id. p. 24, 25.

- Pressure on Defendants From Defense Counsel. Defense counsel are obligated to inform the defendant of the pressure exerted by the Guidelines and to do so bluntly. One defense lawyer cautioned that "you're obligated to tell the client about the guidelines. And you have to tell the client that if he wishes to relieve himself of the most onerous provisions of the Guidelines, they should consider cooperating with the government . . . [I]f you don't tell them about the Guidelines and the risks they impose for going to trial, you're malpracticing. I don't like telling them that. I don't like the whole process, but its an obligation." Id. p. 30.

- There is a Race to Cooperate and Plead. In many investigations only the first one in to cooperate can escape the Guidelines. Under § 5K1.1, the Sentencing Guidelines permit a downward departure if the prosecutor agrees that a defendant has provided substantial cooperation against another person who has committed an offense. One defense lawyer said "I've got to work harder and I've got to make some judgment calls very fast, [without having] the benefit of a full, complete record. I'm always looking over my shoulder at someone else who might beat my client to the punch. So you have discussions about disposition a lot earlier in the relationship than you would care to." Id. p. 25. Another defense lawyer said that "Unless you're the first guy into the [prosecutor's] office on a complex conspiracy . . . you're not going to be able to negotiate anything." Id. p. 25. Says another "It's a race to the courthouse steps. You have to go see the prosecutor right away, before someone else facing possible charges in the same case gets there." Id. p. 25.

- The Fear That the Sentence Will Be Increased If Defendant Stands Trial and Gives the Judge The Perception that Defendant Lied. The Guidelines directly empower a Judge to increase the sentence if defendant testifies and the Judge concludes that the testimony is false. One defense lawyer said "I don't want my guy to testify, because in the event he's convicted, he might be pumped up for perjury." The article states: "that aspect of the Guidelines that suggests that defendant be given a harsher sentence because the court determines that he or she committed perjury has an incredibly chilling effect on one's absolute constitutional right to testify." Id. p. 27.

- The Prosecutor, Not the Judge, Has the Only Flexibility. One defense lawyer said "Pre guidelines you could always say, 'Well, if for some reason we are convicted at trial, we still have a good shot at a decent sentence.' You don't have that flexibility any more because the judge doesn't.." Id. p. 30.

- The Guidelines' Impact Does Result in Fewer Trials. The author/interviewer concludes "Although circumstances such as the age of the defendant may compel lawyers to go to trial, most defense lawyers agree that the net result of the Sentencing Guidelines has been fewer cases going to trial." Id. p. 27. The nature of defense practice is described as "not trying cases, its jockeying for position under the Federal Sentencing Guidelines . . . to get the lowest possible sentence." Id. p. 27. One busy defense lawyer says "On a personal level, it's reduced the number of cases I've been able to take to a jury . . . I've represented clients who I believe would have taken a shot at a trial . . . but were too frightened to go to trial because of the Guidelines, because of the sentence they knew the court would impose in the event of conviction. The risks are just too high." Id. p. 27. One former prosecutor said "I'd have to say in terms of forging guilty pleas, the Federal Sentencing Guidelines are about as forceful a weapon as you could come up with." Id. p. 28.

- The Impact Is Also Evident From Comparing Federal and Local Courts. Comparisons between local and federal courts confirms the effect of the Guidelines on trials. One defense lawyer who tries cases both in local courts without guidelines and in federal courts, said most clients[7] are "absolutely" less willing to go to trial in U.S. District Court than in the local court in the same jurisdiction. Id. p. 29.

- The Bottom Line. The dynamic created by the Guidelines on the decision whether to go to trial is summed up as follows: "If you go to trial and lose, you're going to serve 36 months. If you enter a plea and cooperate, you're going to serve much less than that." Most people are not idiots and they don't want to be deprived of their liberty[8] any more than necessary, so they opt to work out something." Id. p. 30.

- What the Guidelines Mean for Trial Lawyers. One defense lawyer, summed it up: "Being a defense attorney is not nearly as much fun as it once was." Id. p. 30.

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[7] Criminal Cases Against Companies. Even where liberty is not directly at stake, as when a corporation faces indictment, unique pressure often leads to a plea agreement even before the charge is filed. The defense contractor cases that were prevalent in the 1980s delivered the sobering message that upon indictment the company stood to be suspended from work on federal procurement contracts. Public Companies in all industries face the risk of extraordinary criminal fines of twice the gross gain or loss from an alleged fraud. 18 U.S.C. § 3571(d). Such liabilities may lead their Boards to demand that defense counsel settle a threatened criminal case. Moreover, financial markets often punish the share price of scandal plagued companies.

[8] Only One Age Group Appears to Experience the Reverse Effect. In the current wave of corporate financial crime where the large amounts involved make Guidelines ranges very high, some defense lawyers report that business executives, often in their 50s, 60s or 70s, face Guideline ranges which produce a virtual life sentence. For those executives (a small sub-set of the dockets in Federal Courts across the country), winning at trial may seem to them their only option under the Guidelines.

APPENDIX B

Federal Judicial Center
Research Division

memorandum

DATE: April 28, 2003
TO: Chief Judges, U.S. District Courts
FROM: Donna Stienstra and Patricia Lombard
SUBJECT: Graphs for Panel Discussion on The Role of the Judge, April 30, 2003

During the panel discussion on The Role of the Chief Judge, we will present some graphs that show trends in the number of trials, along with some other statistics about disposition of cases. Attached are the six graphs we will present during the program, as well as several others that are provided for your information.

Each graph is based on a particular set of data and tells a specific story. Because we cannot go into all the details during the brief presentation at the meeting, below we provide more information about each graph. Please feel free to contact either of us if you have any questions (Donna: 202-502-4081, dstienst@fjc.gov; Pat: 202-502-4083, plombard@fjc.gov).

The graphs are based on information reported by the courts to the Administrative Office as part of the standard statistical reporting. The term "trial" is used in different ways in the statistical reports. In some instances, it refers only to final disposition trials by a judge or jury. In others, it is used more broadly to refer to any contested proceeding at which evidence is introduced. We will indicate which definition of trial is appropriate to each graph. We have attached a copy of the JS-10, the form on which courtroom activity is reported.

Percent of civil cases filed each year that were disposed of by a judgment at trial.

This graph looks at the civil trial rate from the perspective of a cohort of filed cases. It includes only cases that were disposed of by trial before a judge or jury. Taking the year 1983 as an example, we see that approximately 2.0% of the civil cases filed that year were disposed of by a jury trial and 2.6% by a bench trial (reading from the left axis). The trials for this cohort of filings may have been held in 1983 or any subsequent year. We also see from the graph that the number of filings was rising sharply at the time this cohort of cases was filed, reaching 200,000 in 1983 (see the right axis). The graph begins with the 1979 filing cohort because the statistical reports for earlier years did not include codes for method of disposition. The graph ends in 1999 because more than 5.0% of filed cases are still pending for recent years.

Percent of criminal defendants filed each year that were disposed of by judgment at trial.

This graph looks at the criminal trial rate from the perspective of a cohort of defendants. It includes only defendants whose charges were disposed of by trial before a judge or jury. We see that of the approximately 45,000 defendants whose cases were filed in 1983, approximately 3.5% were disposed of by a bench trial and 11.0% by a jury trial. As with civil cases, the trials for these defendants may have been held in 1983 or any subsequent year. The graph begins in 1981 because large numbers of pending or fugitive cases were reported for earlier years and ends in 1999 because more than 5.0% of the filed defendants are still pending for recent years.

Percent of civil cases filed each year that were terminated after a trial was held.

This graph, like the previous two, looks at the trial rate from the perspective of a cohort of filed cases, but it includes all cases in which a trial occurred, whether or not the trial disposed of the case (e.g., it includes preliminary evidentiary hearings). Looking at the year 1983, we see that approximately 5.6% of civil cases filed that year had a trial during the lifetime of the case, somewhat more than the approximately 4.6% of this cohort that were disposed of by trial. Like the previous graphs, this one ends with the 1999 filing cohort because more than 5.0% of filed cases are still pending, but it goes back further in time because the data field on which it relies was more consistently reported throughout the full period.

Total trial and non-trial time reported by judges on the JS-10.

Each month judges report their courtroom hours to the Administrative Office on the JS-10 form. This form includes both trial and non-trial time for both active and senior district judges, as well as appellate judges who sit by designation. Trial time includes bench and jury trials, as well as a variety of contested hearings in which evidence is introduced, such as hearings on preliminary injunctions and sentencings. Non-trial time includes a range of other proceedings, such as arraignments and taking of pleas, pretrial conferences, and conference calls involving both parties. Relying on the JS-10 data, this graph shows the total hours judges spent in trial and non-trial proceedings in the courtroom between 1980 and 2001 (left axis). It also shows the number of judges who reported courtroom time (right axis). The graph begins in 1980, when trial time was first reported, and runs through 2002, the most recent reporting year.

Average trial and non-trial time for active district judges who reported time for at least 11 months.

This graph refines the information from the JS-10 and provides a per judge average number of hours spent in the courtroom on both trial and non-trial matters. The graph includes only active district judges and is limited to judges who reported time for at least eleven months out of the year. It excludes new, retiring, and senior judges, as well as active judges who worked only part of a year. The graph juxtaposes the average number of courtroom hours per judge (left axis) with the total number of judges who reported court room time (right axis).

Comparison of trends in average trial/non-trial time, number of judges, and active caseloads.

This graph also uses information about hours spent in the courtroom. It juxtaposes trends in courtroom time with trends in the number of civil cases and criminal defendants that are active (that is, the average number of cases pending an any time during the year). In 1983, for example, we see that judges spent, on average, approximately 725 hours in the courtroom. In that year, the approximately 330 judges actively deciding cases were responsible for approximately 3000 criminal defendants and 240,000 civil cases.

Civil trials completed by type of trial.

Whereas the first graph looks at the civil trial rate from the perspective of a cohort of filed cases and includes only cases disposed of by trial, this graph looks at the trial rate from the perspective of each year and includes all trial or trial-like events that occurred in a given year. Thus, we see that in 1983 there were approximately 5000 jury trials, 5700 bench trials, 1900 preliminary injunction and TRO hearings, and 1900 other trial-like events in the district courts.

Criminal trials completed by type of trial.

This graph also shows the number of trial and trial-like events in a given year, but in this instance for criminal cases. In 1983, for example, nearly 1000 non-jury and 3700 jury trials were completed. The line that begins in 1998 reflects the introduction of statistical reporting regarding sentencing.

Percent contributed by case type for civil cases disposed of by trial.

This graph looks at all civil trials and asks what case types account for the trials. For the cohort of cases filed in 1983, for example, personal injury and product liability cases,

non-prisoner civil rights cases, and contract cases accounted for over 70% of civil trials. In more recent years, contract cases make up a significantly smaller portion of the trials while non-prisoner civil rights cases make up a much larger share.

Civil trials conducted by district and magistrate judges.

This graph shows the number of civil trials conducted by district judges and magistrate judges. For the district judges, the graph includes only trials that disposed of the case. For magistrate judges, the graph includes all trials conducted by the magistrate judges on consent by the parties.

Percent of civil cases with summary judgment motions, percent in which motions were granted in part or in full, and percent in which summary judgment terminated the case.

This graph shows the percent of cases in which summary judgment motions were filed, the percent with motions granted in whole or in part, and the percent of cases terminated by summary judgment motion. The graph is based on data collected by the Federal Judicial Center from docket sheets in a random sample of cases in six district courts for six different years. When examining the trend shown in this graph, keep in mind that the spike in 1988 may be due to an unusual number of asbestos cases terminated by summary judgment that year.

Percent of civil cases with summary judgment motions in six federal district courts.

This graph shows the wide differences across districts in summary judgment activity.

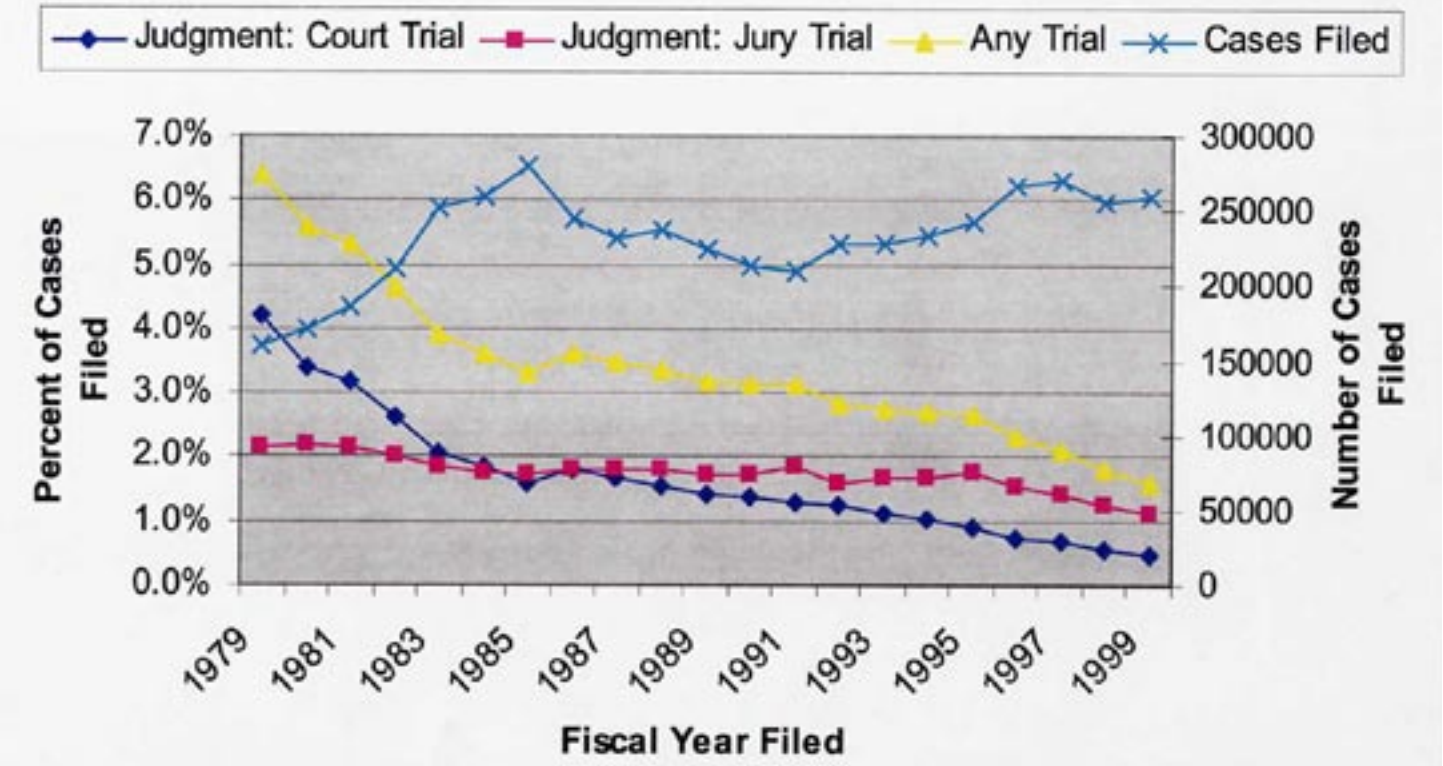
Percent of civil cases with summary judgment motions by case type.

This graph shows the wide variation in summary judgment use across case types.

Cases referred to ADR and settlement conferences.

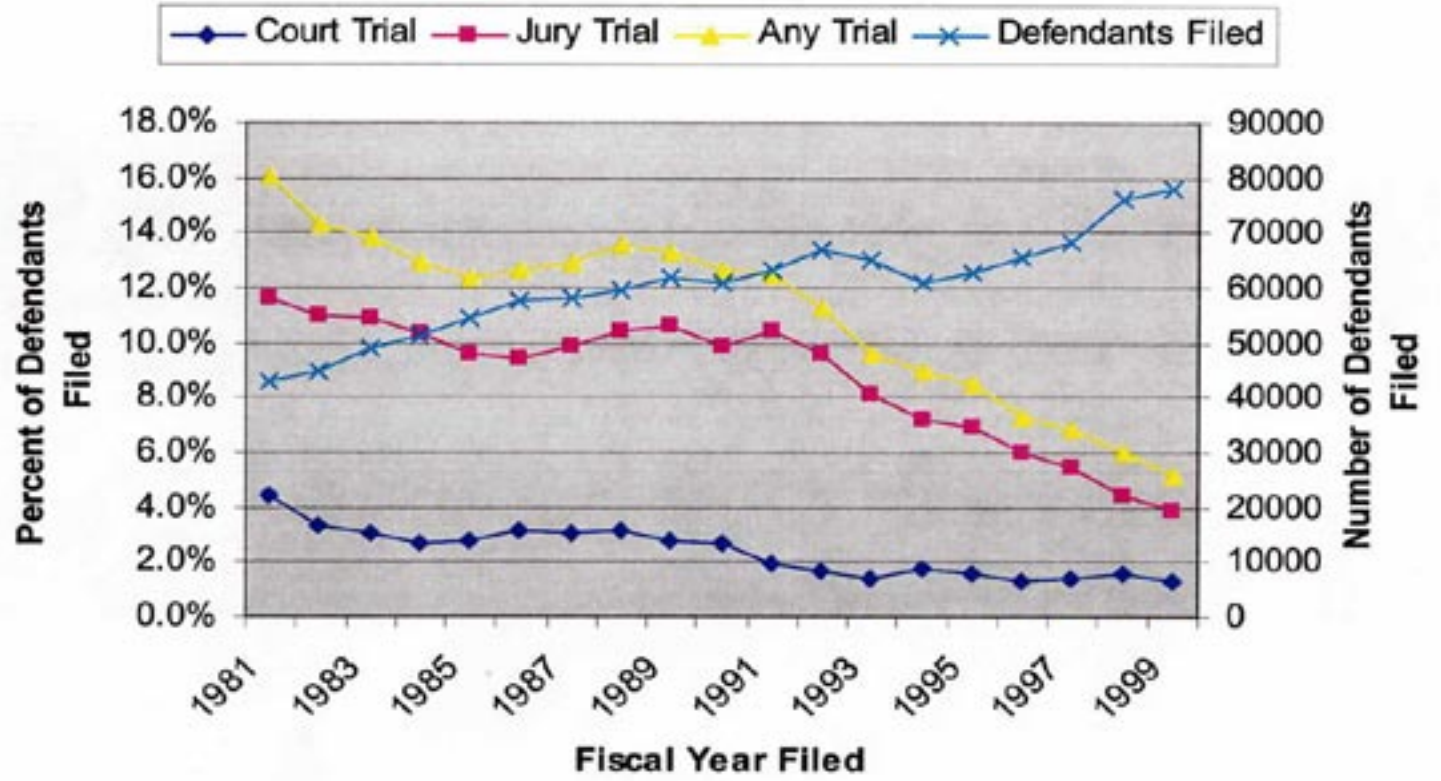
This table shows the number of civil cases referred to ADR and certain types of settlement conference in the 49 districts that requested funding for ADR staff for the 2003 fiscal year. These districts represent most of the active ADR programs. The number of cases referred to ADR was slightly lower in the FY03 funding request than it had been the previous year.

Percent of Civil Cases Filed Each Year That Were Disposed of by a Judgment at Trial

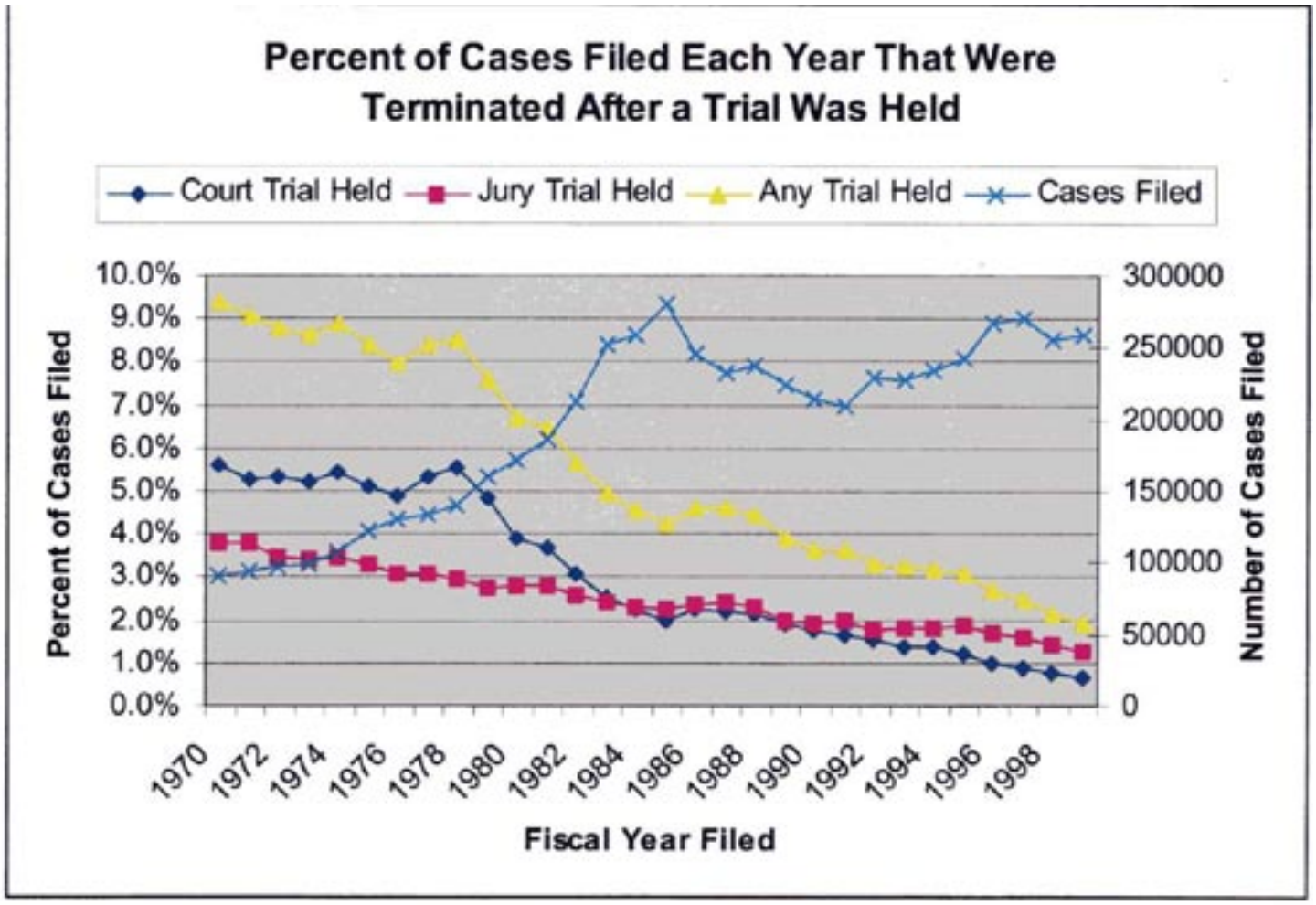


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on civil case filings and terminations.
Note: Years following 1999 were excluded because they had more than 5% of filings still pending as of Dec. 31, 2002.

Percent of Criminal Defendants Filed Each Year That Were Disposed of by a Judgment at Trial

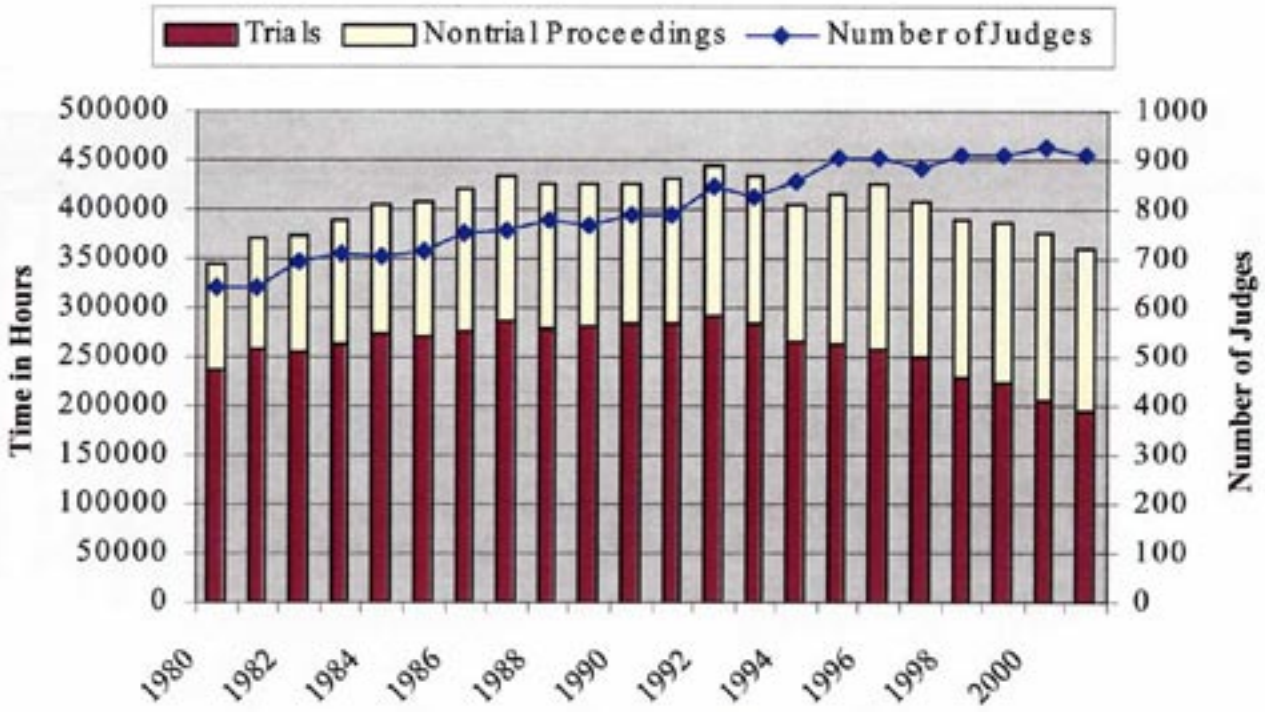


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on criminal defendant filings and terminations.
Note: Years following 1999 were excluded because they had more than 5% of filings still pending as of Sep. 30, 2002.

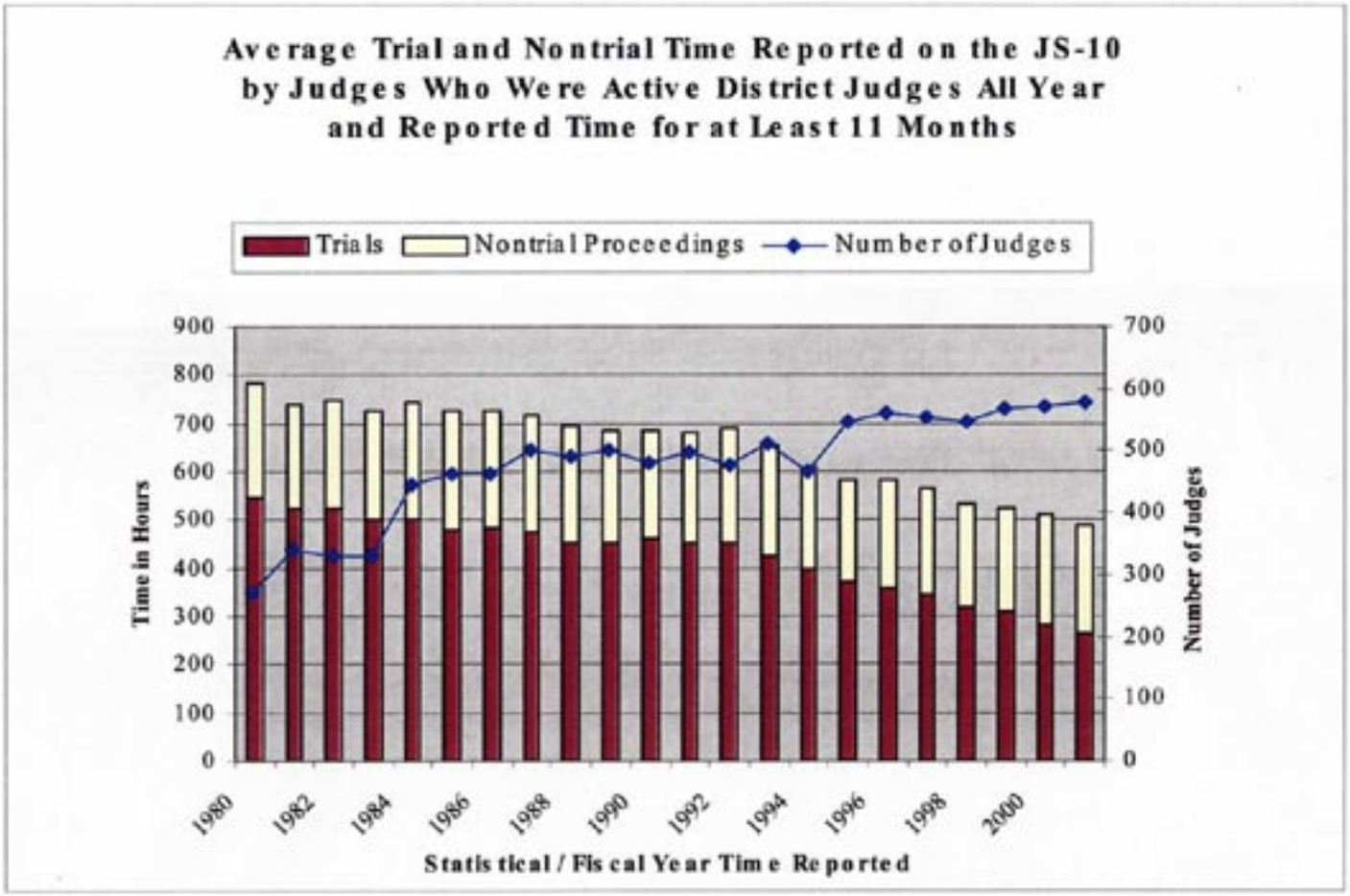


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on civil case filings and terminations.
Note: Years following 1999 were excluded because they had more than 5% of filings still pending as of Dec. 31, 2002.

Total Trial and Nontrial Time Reported by Judges on the JS-10

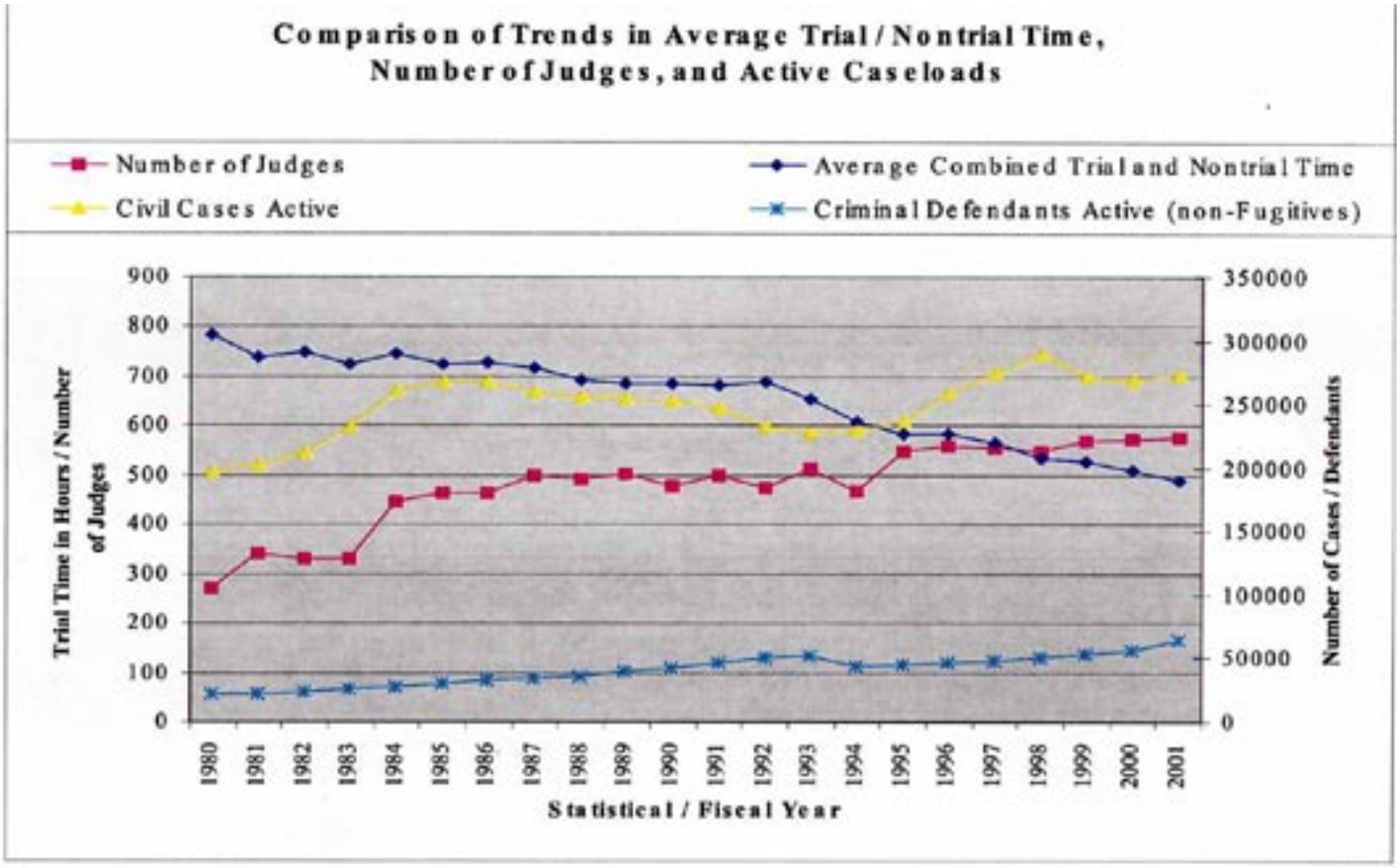


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity (JS-10)

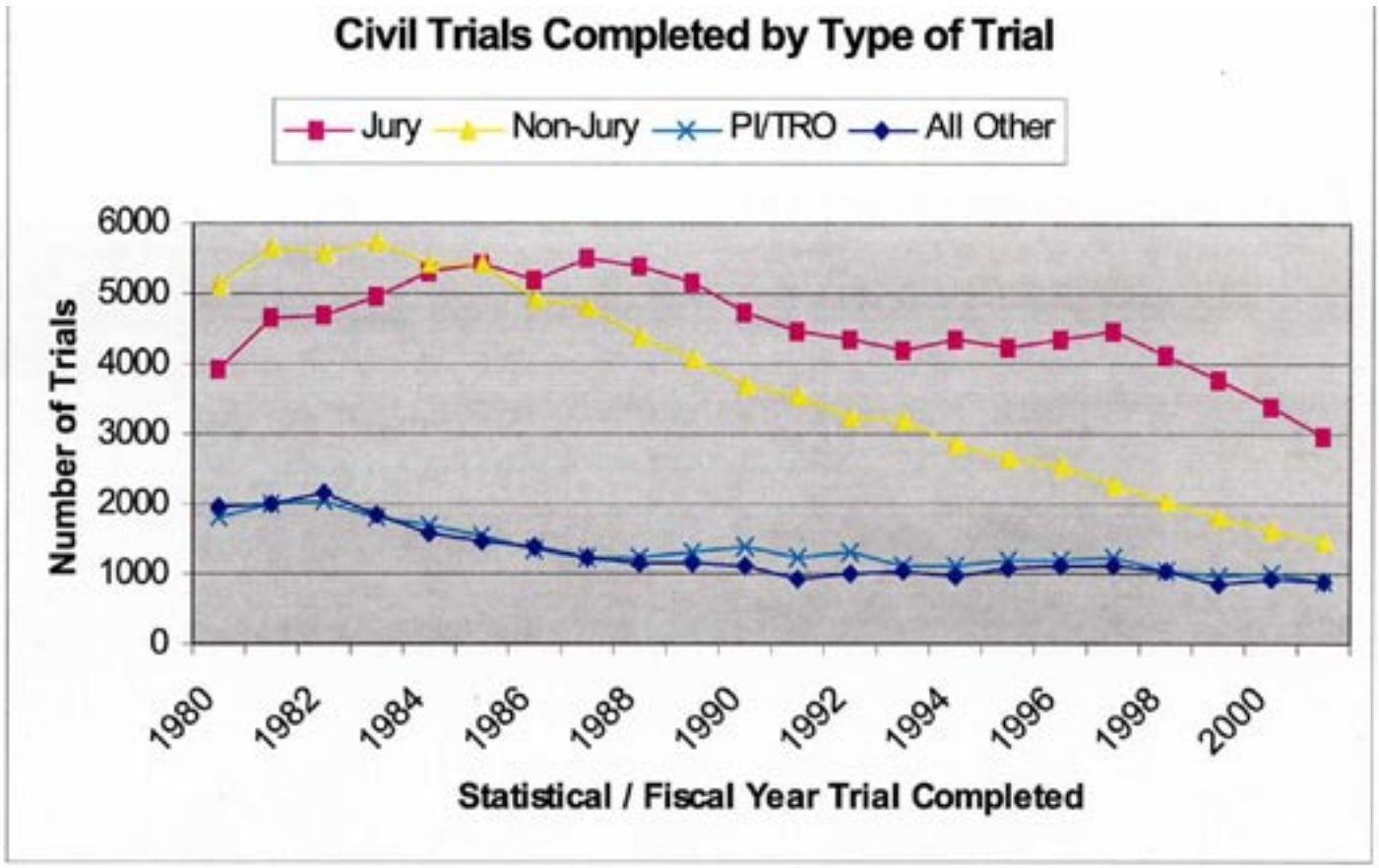


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity (JS-10)

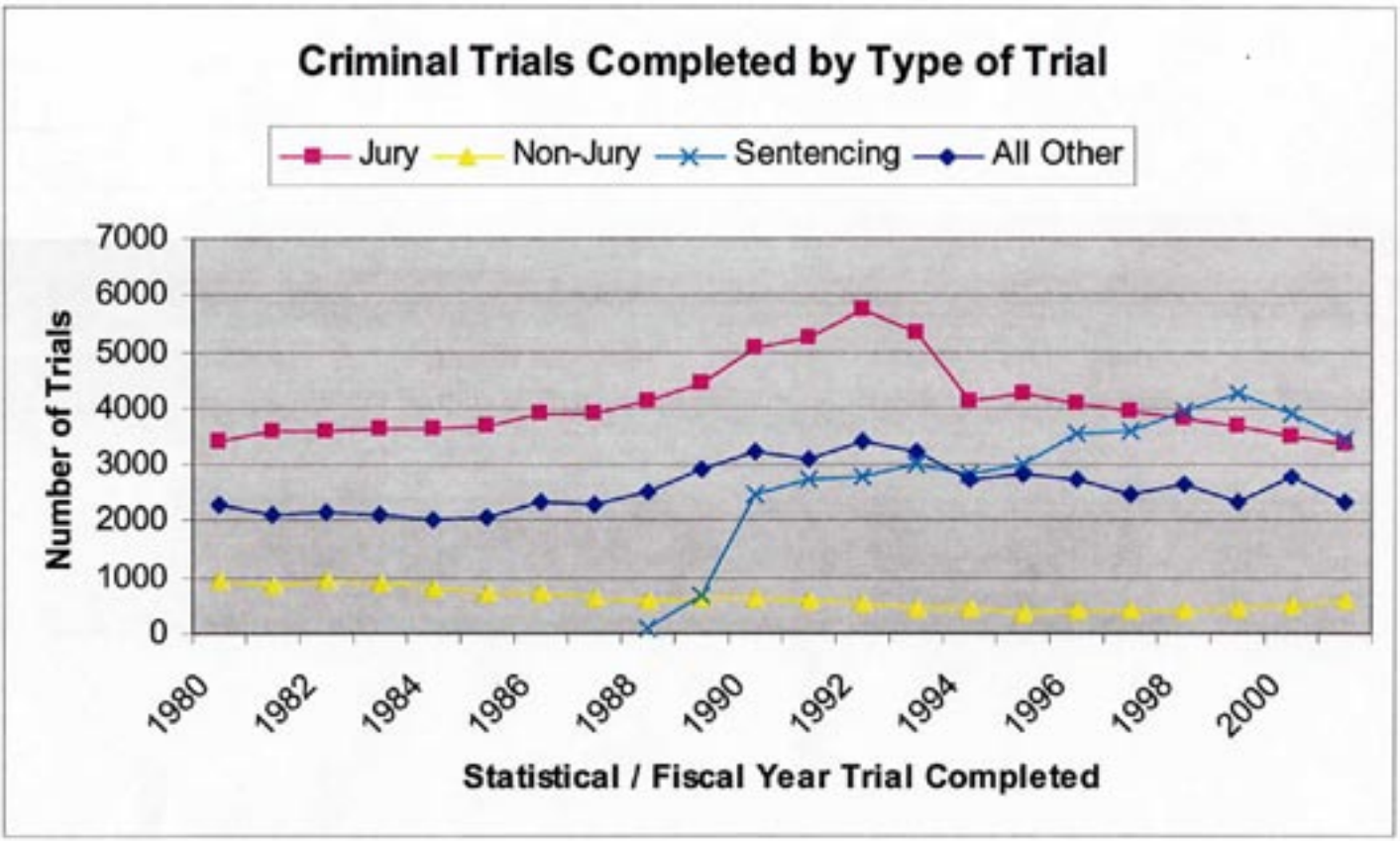
Comparison of Trends in Average Trial / Nontrial Time, Number of Judges, and Active Caseloads



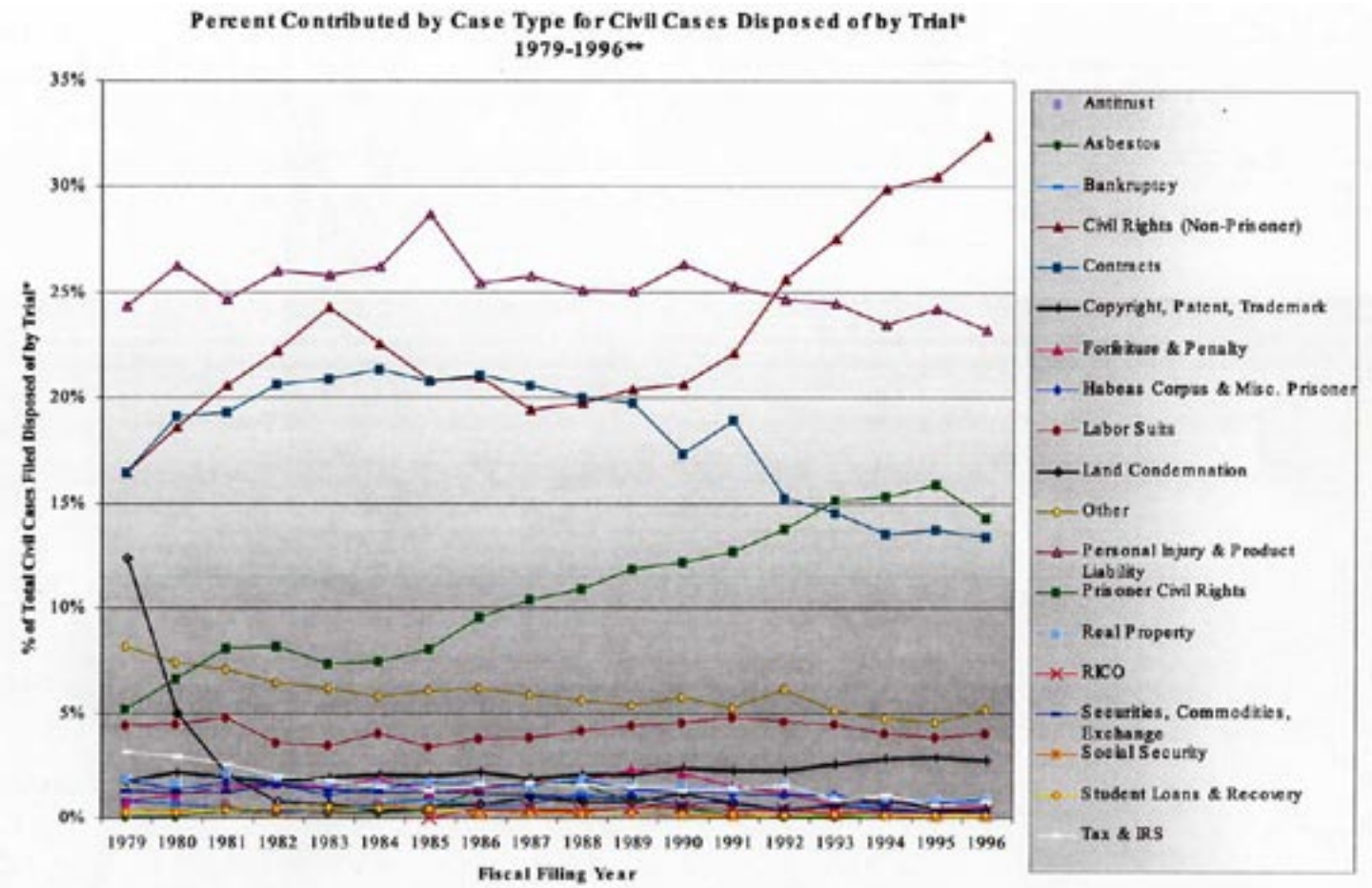
Prepared by the Federal Judicial Center based on data reported to the Administrative Office on case filings and terminations and trial and nontrial activity.
Note: Trial times and number of judges are based on district judges who were active for the full year and reported time for at least 11 months.



Prepared by the Federal Judicial Center based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity (JS-10)

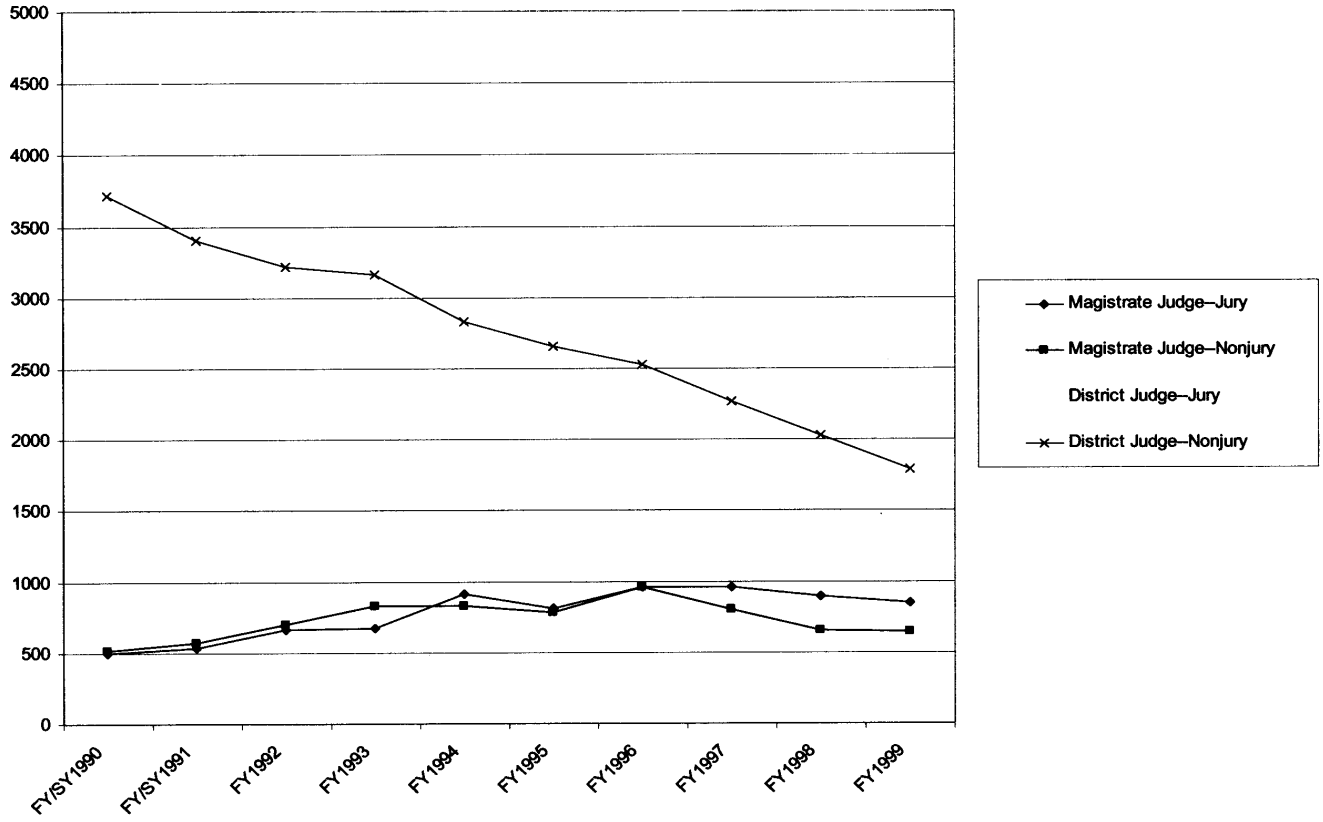


Prepared by the Federal Judicial Center based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity (JS-10)



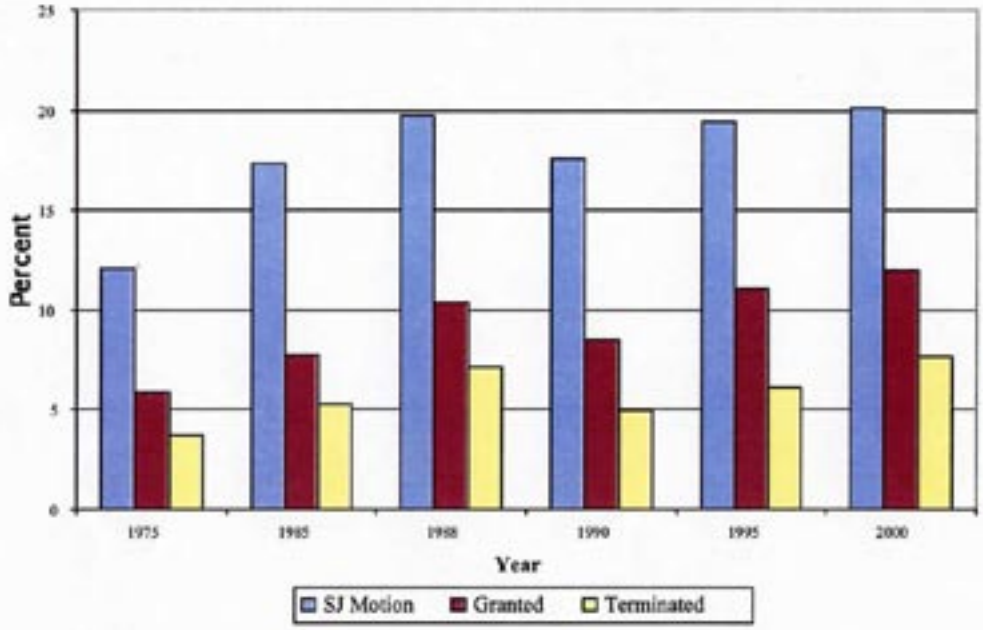
Prepared by the Federal Judicial Center based on data reported to the Administrative Office on civil case filings and terminations.
*Both jury and court trials are reported together.
**Note: Years following 1996 were excluded because they had more than 5% of filings still pending as of Sep. 30, 2001.

Civil Trials Conducted by District Judges and Magistrate Judges
FY90-99



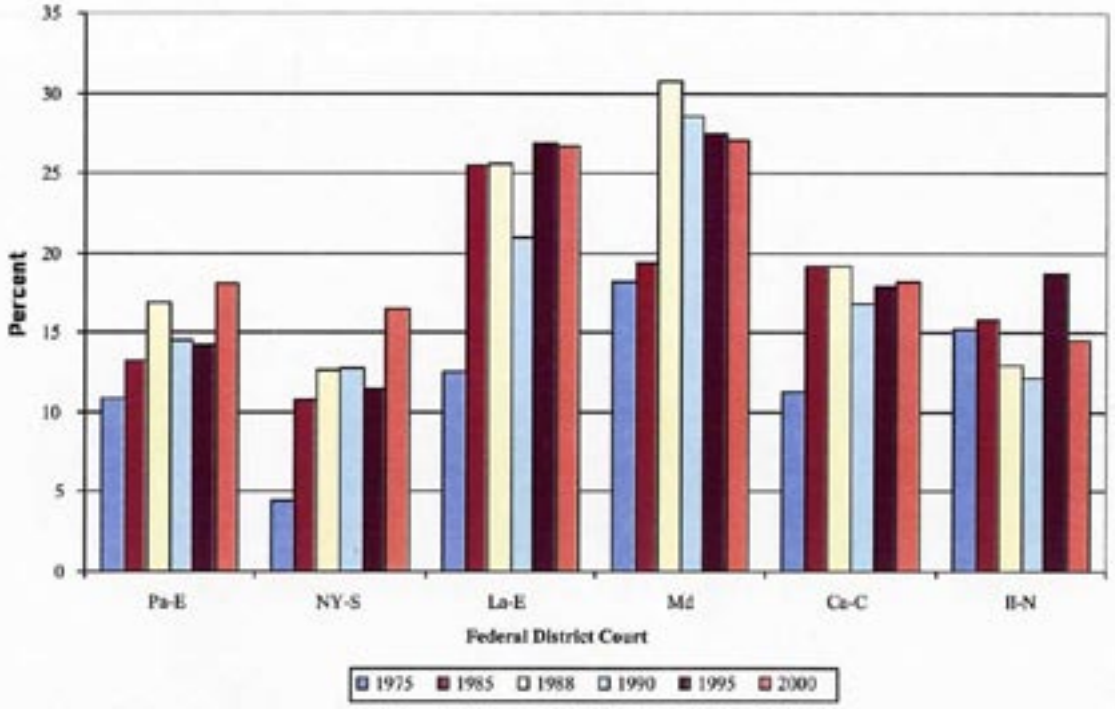
Prepared by the Federal Judicial Center based on data reported to the Administrative Office on the Monthly Report of Trials and Other Court Activity (JS-10) for district judges. The data for magistrate judges was obtained from Table M-5 (column labeled "Consunsual Civil Cases Terminated Under Section 636 (C)") of Judicial Business of the United States Courts: Annual Report of the Director for 1990 – 1999.

Percent of Civil Cases with Summary Judgment Motions, Percent in Which Motions Were Granted in Part or in Full, and Percent in Which Summary Judgment Terminated the Case



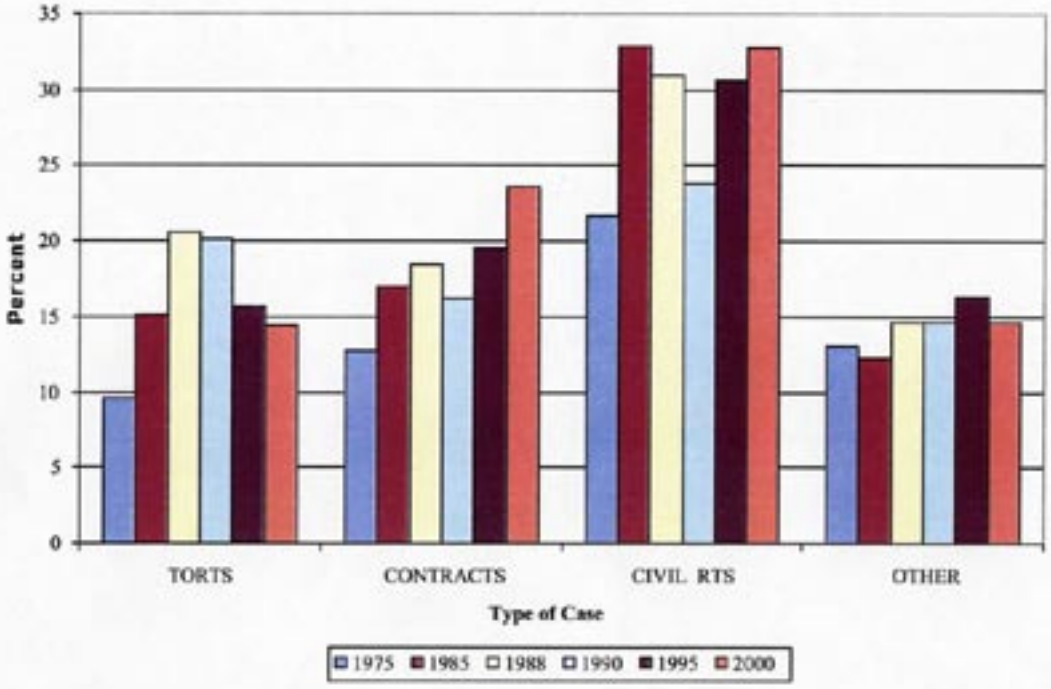
Based on a study of summary judgment motions conducted by the Federal Judicial Center and reported to the Court Administration and Case Management Committee, Nov. 2001.

Percent of Civil Cases With Summary Judgment Motions in Six Federal District Courts



Based on a study of summary judgment motions conducted by the Federal Judicial Center and reported to the Court Administration and Case Management Committee, Nov. 2001.

Percent of Civil Cases With Summary Judgment Motions by Case Type



Based on a study of summary judgment motions conducted by the Federal Judicial Center and reported to the Court Administration and Case Management Committee, Nov. 2001.

Cases Assigned to ADR and Settlement Conferences
July 1, 2001 to June 30, 2002
For the 49 District Courts That Requested Funding for ADR Staff[a]

Type of ADR/Settlement	Number of Cases Referred[b]
Arbitration	4,857
Early Neutral Evaluation	1,440
Mediation	14,937
Other ADR	3088
Judge-Hosted Settlement Conferences[c]	1,317
Total Referred to ADR and Settlement	25,639

[a] The data reported here were provided by the Administrative Office. Each year the AO invites the district courts to report the number of cases assigned to an ADR process during a specified 12-month period. The information is applied to a staffing factor that determines funding allocations for ADR staffing resources. For the year July 1, 2001 to June 30, 2002, 49 districts provided information. These districts represent most of the active ADR programs.

[b] We do not present the percent referred to ADR because we do not have information about the pool of eligible cases (i.e., the denominator) in each court.

[c] For purposes of the funding allocation, judge-hosted settlement conferences are defined as follows: "(To be distinguished from Fed.R.Civ.P. 16 judicial settlement conferences.) Presided over by a judge or magistrate judge not assigned to the case who serves as a neutral to give an assessment of the merits of the case and to facilitate the trading of settlement offers. Some judges also use mediation techniques in the settlement conference.... Judge-hosted settlement conferences must be authorized by local rule as an alternative dispute resolution process." In other words, the number in the table does not represent all judge-hosted settlement conferences in the district courts.

APPENDIX C

U.S. Department of Justice
Office of Justice Programs

Bureau of Justice Statistics
Bulletin

April 2004, NCJ 202803

Civil Justice Survey of State Courts, 2001

Civil Trial Cases and Verdicts in Large Counties, 2001

By Thomas H. Cohen, J.D., Ph.D.
Steven K. Smith, Ph.D.
BJS Statisticians

State courts of general jurisdiction in the Nation's 75 largest counties disposed of almost 12,000 tort, contract, and real property cases by jury or bench trial during 2001. Juries decided almost three-fourths of these cases, while judges resolved about a fourth of them.

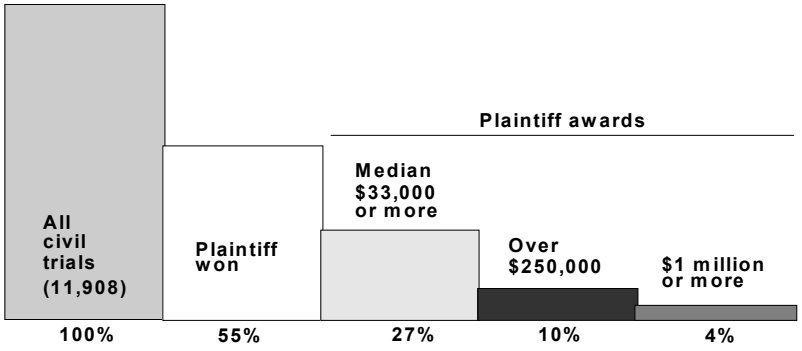
Plaintiffs won in 55% of trials and were awarded a total of about $4 billion in compensatory and punitive damages. The median total award was $33,000, and the amounts awarded to plaintiff winners ranged from under $10 to $454 million. Tort claims comprised 67% of trials disposed. The majority of trials (62%) were disposed of in less than 2 years.

These are some of the findings from a study of civil trials in State courts involving tort, contract, and real property cases in the Nation's 75 largest counties. This study is part of a series examining general jurisdiction court civil cases resolved through trials.[1]

[1]Courts of general jurisdiction may handle many types of civil cases including estate, domestic relations, probate, and small claims. This report only examines general civil cases (that is, tort, contract, and real property) in courts of general jurisdiction.

Highlights

In 2001 plaintiffs in the 75 largest counties won just over half the 12,000 general civil cases at trial, with 442 or 4% awarded $1 million or more



• During 2001 a jury decided almost 75% of the 12,000 tort, contract, and real property trials in the Nation's 75 largest counties. Judges adjudicated the remaining 24%. Tort cases (93%) were more likely than contract cases (43%) to be disposed of by jury trial.

• The 11,908 civil trials disposed of in 2001 represents a 47% decline from the 22,451 civil trials in these counties in 1992.

• In jury trials, the median award decreased from $65,000 in 1992 to $37,000 in 2001 in these counties.

• Two-thirds of disposed trials in 2001 involved tort claims, and about a third involved contractual issues.

• Overall, plaintiffs won in 55% of trials. Plaintiffs won more often in bench trials (65%) than in jury trials (53%), and in contract trials (65%) more than in tort (52%) or real property trials (38%).

• An estimated $4 billion in compensatory and punitive damages were awarded to plaintiff winners in civil trials. Juries awarded $3.9 billion to plaintiff winners while judges awarded $368 million. The median total award for plaintiff winners in tort trials was $27,000 and in contract trials $45,000.

• Punitive damages, estimated at $1.2 billion, were awarded to 6% of plaintiff winners in trials. The median punitive damage award was $50,000.

• Plaintiffs prevailed in about a fourth (27%) of medical malpractice trials. Half of the 311 plaintiffs who successfully litigated a medical malpractice claim won at least $422,000, and in nearly a third of these cases, the award was $1 million or more.

The sample of civil cases included tort, contract, and real property cases. Federal trials, trials in counties outside the 75 most populous counties, and trials in State courts of limited jurisdiction were excluded from the sample.

Cases that reach trial

During calendar year 2001 State courts of general jurisdiction in the Nation's 75 most populous counties disposed of an estimated 11,908 tort, contract, and real property trial cases. Previous studies conducted by the Bureau of Justice Statistics found that a majority of tort, contract, and real property cases are resolved prior to going to trial and that only a small percentage (about 3%) are actually disposed of by jury or bench trial verdict.[2]

Civil trials, however, are crucial because it is through these cases that important information on civil case components such as compensatory award amounts, punitive damages, and case processing times are known. In the majority of civil cases that settle, the terms of settlement agreements and other key case information may not be publicly available.

Most (67%) of the civil cases disposed of by trial in the Nation's 75 most populous counties during 2001 involved a tort claim, in which plaintiffs alleged injury, loss, or damage from the negligent or intentional acts of defendants. Cases dealing with allegations of breach of contract (contract cases) accounted for 31% of trials and real property cases about 2% (table 1).

The most frequent kinds of civil cases disposed of by trial were automobile accident cases (36%); premises liability cases, alleging harm from inadequately maintained or dangerous property (11%); seller plaintiff cases, involving payment owed by a buyer or borrower (10%); and medical malpractice cases in which the plaintiff claimed harm from a doctor, dentist, or other health care provider (10%).

Cases involving the purchasers of goods or services seeking a return on their money (buyer plaintiff) and cases that arose due to the intentional or negligent misrepresentation of a product or company (fraud) accounted for 7% and 5% respectively, of all civil trials.

Product liability cases represented less than 2% of all civil trials.

Types of cases disposed of by trial

Generally, juries decided civil cases involving issues of personal injury or harm, such as automobile or medical malpractice. For example, juries were more likely to decide tort cases (93%) than contract cases (43%) or real property cases (27%) (figure 1). Judges disposed of business-related civil trials such as contract (57%) and real property cases (73%) more often than juries (not shown in a table).

Over 90% of medical malpractice and premises liability cases were decided by jury trial. Among the sampled product liability cases, 100% of asbestos and 93% of the other product liability cases were disposed of by jury trial. The majority of automobile tort cases were also adjudicated by jury trial.

Among contract cases, bench trials disposed of 77% of seller plaintiff cases, 77% of rental lease cases, and 53% of fraud cases. Only in employment discrimination suits was a substantial majority of contract cases (89%) decided by a jury (not shown in a table).

Table 1. Number of civil trials disposed of in State courts in the Nation's 75 largest counties, 2001

Case type	Number of trials[a]	Percent
All	11,908	100.0%
Tort cases	7,948	66.7%
Automobile	4,235	35.6
Premises liability	1,268	10.6
Product liability	158	1.3
Asbestos	31	0.3
Other	126	1.1
Intentional tort	375	3.1
Medical malpractice	1,156	9.7
Professional malpractice	102	0.9
Slander/libel	95	0.8
Animal attack	99	0.8
Conversion	27	0.2
False arrest, imprisonment	45	0.4
Other or unknown tort	390	3.3
Contract cases	3,698	31.1%
Fraud	625	5.2
Seller plaintiff	1,208	10.1
Buyer plaintiff	793	6.7
Mortgage foreclosure	22	0.2
Employment discrimination	166	1.4
Other employment dispute	287	2.4
Rental/lease	276	2.3
Tortious interference	138	1.2
Partnership dispute	40	0.3
Subrogation	69	0.6
Other or unknown contract	73	0.6
Real property cases	262	2.2%
Eminent domain	52	0.4
Other real property[b]	210	1.8

Note: Data for case types were available for 100% of the 11,908 trial cases. Detail may not sum to total because of rounding.
[a]Trials include bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Includes title disputes, boundary disputes, and other real property cases.
See *Methodology* section for case type definitions.

[2]See *Tort Cases in Large Counties,* NCJ 153177, April 1995 and *Contract Cases in Large Counties,* NCJ 156664, February 1996.

Tort, contract, and real property cases disposed of by jury trial in State courts in the Nation's 75 largest counties, 2001

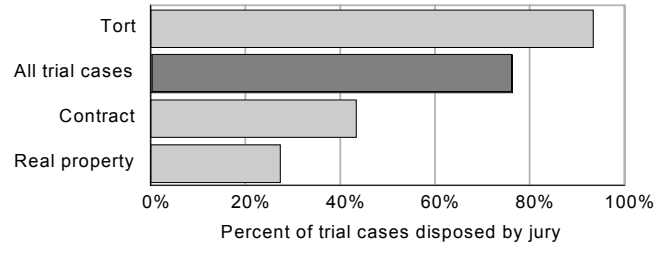


Figure 1

Comparing jury and bench trials

The cases before judges and juries differ in terms of case type, plaintiff win rates, damage awards, case processing times, and other trial characteristics (table 2).

Table 2. Comparing bench and jury trials in State courts in the Nation's 75 largest counties, 2001

	Jury	Bench
How many civil trials were decided by a jury or judge?		
All cases	8,859	2,828*
Who were the plaintiffs?[a]		
Individuals	91.2%	56.5%*
Businesses	8.0	41.5*
Who sued whom?[b]		
Individual v. individual	44.9%	31.6%*
Business v. business	5.5	26.6*
Who won?[c]		
Plaintiffs overall	52.6%	65.1%*
Plaintiffs in torts	50.7	64.7*
Plaintiffs in contracts	61.6	67.8*
How much?[d]		
Median award	$37,000	$28,000*
In tort cases	28,000	23,000
In contract cases	81,000	30,000*
What percentage of prevailing plaintiffs received awards of $1 million or more?		
All cases	8.4%	2.6%*
Torts	7.8	5.4
Contracts	10.7	1.9*
What percentage of prevailing plaintiffs were awarded punitive damages?		
All cases	5.7%	4.4%*
How long did the cases last?[e]		
Median number of months	21.7 mo	16.1 mo*
Decided within 2 years	56.9%	77.0%*

Note: There were 221 other cases including, directed verdicts, judgments notwithstanding the verdict, and jury trials for defaulted defendants that were not included in this table.
*Jury - bench difference is significant at the 95%-confidence level.
[a]Data on plaintiff types were available for 99.5% of jury and 99.6% of bench trials.
[b]Data on litigant pairings were available for 99.3% of jury and 99.4% of bench trials.
[c]Data on plaintiff winners were available for 99.9% of jury and 99.8% of bench trials.
[d]There were a total of 4,603 jury and 1,792 bench trials where the plaintiff won an award. Award data were available for 99.4% of jury and 99.1% of bench trials.
[e]Case processing time data were available for 99.9% of jury and bench trials.

Type of litigants: Plaintiffs

In 83% of all trial cases, the plaintiff was an individual.[3] Businesses were plaintiffs in 16% of all trials, government agencies, 1% and hospitals, 0.3% (table 3). Because tort litigation primarily involves personal injury, over 97% of tort trials had an individual as the plaintiff (not shown in a table).

As contract cases often involved business disputes, businesses comprised a substantial percentage (44%) of all contract plaintiffs. Government agencies represented a majority of plaintiffs (69%) in eminent domain property cases (not shown in a table).

Type of litigants: Defendants

Defendants in all trials were primarily divided between individuals (47%) and businesses (42%).[4] Hospitals were named as the defendant in 6% of all trials and governments 5% (table 3). In jury trials, 47% of defendants were individuals and 40% were businesses. Defendants in bench trials were evenly represented by businesses (50%) and individuals (47%).

Who sues whom?

The most common type of civil trial involved an individual suing either another individual (42%) or a business (31%). Businesses sued each other in about 11% of all civil trials (table 4). Among bench trials, a larger proportion of businesses were more likely to be plaintiffs suing either businesses (27%) or individuals (14%) (not shown in a table).

Multiple plaintiffs and defendants

Over 42,000 litigants were involved in the 12,000 tort, contract, and real property trials disposed of in the Nation's 75 largest counties in 2001. Cases with multiple defendants were more prevalent than cases with multiple plaintiffs. About three-fourths (73%) of all trials had only one plaintiff while about half (56%) had only one defendant (not shown in a table).

[3]Each civil trial case, regardless of the number of plaintiff types involved, was assigned one of four plaintiff designations from the following hierarchy: hospital, business, government, and individual. A case with multiple plaintiffs received the designation of whichever type appeared first in the hierarchy.
[4]A case with multiple defendants was assigned the defendant type that appeared first in the hierarchy.

Table 3. Type of plaintiffs or defendants, by disposition of civil trials in State courts in the Nation's 75 largest counties, 2001

			Plaintiffs			
Type of disposition	Number	Total	Individual	Government	Business[a]	Hospital[b]
All trial cases	11,849	100%	82.8%	0.8%	16.0%	0.3%
Jury trial cases	8,815	100	91.2	0.7	8.0	0.2
Bench trial cases	2,816	100	56.5	1.2	41.5	0.8
Other trial cases[c]	217	100	86.1	0.9	13.0	--
			Defendants			
	Number	Total	Individual	Government	Business[a]	Hospital[b]
All trial cases	11,828	100%	47.1%	4.8%	41.9%	6.2%
Jury trial cases	8,800	100	47.3	5.3	39.5	7.9
Bench trial cases	2,812	100	46.9	2.7	49.6	0.8
Other trial cases [c]	216	100	42.2	12.9	40.4	4.5

Note: Plaintiff or defendant type for each case is whichever type appears first on this list: 1) hospital/medical company, (2) business, (3) governmental agency, and (4) individual.
Data on plaintiff type were available for 99.5% of all trial cases and jury trials, 99.6% of bench trials, and 98.5% of other trials. Defendant data were available for 99.3% of all trial cases and jury trials, 99.4% of bench trials, and 97.5% of other trials.
Detail may not sum to total because of rounding.
--No cases recorded.
[a]Includes insurance companies, banks, and other businesses and organizations.
[b]Includes medical companies.
[c]"Other cases" include directed verdicts, judgments notwithstanding the verdict, and jury trials for defaulted defendants.

Trial outcomes

Overall, plaintiffs won in 55% of trials. The rate of plaintiff success varied according to the type of case litigated. Plaintiffs were more likely to win in contract cases (65%) than in either tort (52%) or real property cases (38%) (table 5).

• Among *tort trials* plaintiffs prevailed in over half of animal attack (67%), automobile (61%), and asbestos (60%) cases. Plaintiffs won in less than a third of medical malpractice (27%) cases.

• For *contract trials* the estimated win rate surpassed 70% in seller plaintiff (77%) and mortgage foreclosure (73%) cases and exceeded 60% in buyer plaintiff (62%), rental lease (65%), and subrogation (67%) cases. Conversely, plaintiffs prevailed in 44% of employment discrimination cases and 46% of partnership disputes.

Trial awards

During 2001 plaintiff winners in civil trials were awarded an estimated $4.4 billion in compensatory and punitive damages in the Nation's 75 largest counties. Slightly over half the estimated total amount ($2.3 billion) was awarded in tort cases.

The median amount awarded to plaintiff winners for all trial cases was $33,000. Contract cases garnered higher median awards ($45,000) compared to tort ($27,000) cases.

Table 4. Pairing of primary litigants in civil trials in State courts in the Nation's 75 largest counties, 2001

Type of case	Number	Plaintiffs: Individual	Government	Business[b]	Hospital[c]
All defendants[a]	11,822	82.8%	0.8%	16.0%	0.3%
Individual only defendant	5,576	41.6%	0.3%	5.0%	0.2%
Government defendant	566	4.4	0.1	0.4	0.0
Business defendant[b]	4,952	30.9	0.4	10.6	0.0
Hospital defendant[c]	728	6.0	--	0.1	0.1

Note: Data on litigant pairings were available for 99.3% of cases. Plaintiff or defendant type for each case is whichever type appears first in this list: (1) hospital/medical company, (2) corporate/business, (3) governmental agencies, and (4) individuals.
For example, any case involving a hospital defendant is categorized as a case with a "hospital defendant" even if a business, individual, or government were defendants in the case.
Detail may not sum to total because of rounding.
--No cases recorded.
[a]Includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Includes insurance companies, banks, and other businesses and organizations.
[c]Includes medical companies.

Table 5. Plaintiff winners in State courts in the Nation's 75 largest counties, 2001

Case type	All trial cases: Number	Plaintiff winners[b]
All trial cases[a]	11,681	55.4%
Tort cases	7,798	51.6%
Automobile	4,121	61.2
Premises liability	1,260	42.0
Product liability	154	44.2
Asbestos	30	60.0
Other	124	40.3
Intentional tort	366	56.8
Medical malpractice	1,149	26.8
Professional malpractice	99	52.5
Slander/libel	94	41.5
Animal attack	99	66.7
Conversion	28	46.4
False arrest, imprisonment	45	42.2
Other or unknown tort	383	50.9
Contract cases	3,625	64.8%
Fraud	602	58.3
Seller plaintiff	1,196	76.8
Buyer plaintiff	779	61.5
Mortgage foreclosure	22	72.7
Employment discrimination	160	43.8
Other employment dispute	282	55.7
Rental/lease	276	64.9
Tortious interference	133	57.9
Partnership dispute	41	46.3
Subrogation	61	67.2
Other or unknown contract	73	56.2
Real property cases	258	37.6%
Eminent domain	49	40.8
Other real property[c]	209	36.8

Note: Data on plaintiff winners were available for 99.9% of trials. Detail may not sum to total because of rounding.
[a]Trial cases include bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Excludes bifurcated trials where the plaintiff litigated only the damage claim. There were 216 trials where only the damage claim was litigated.
[c]Includes title disputes, boundary disputes, and other real property cases.

Class action lawsuits

A class action lawsuit requires that (1) the number of persons be so numerous that it would be impractical to bring them all before the court, (2) the named representatives can fairly represent all of the members of the class, and (3) the class members have a well defined common interest in the questions of law or fact to be resolved (*Black's Law Dictionary*).

Of the 11,908 civil trials litigated in 2001, only 1 could be classified as a class action. This lawsuit, "Bell v. Farmers Insurance Exchange," resulted from the decision of Farmers Insurance Exchange to classify their claims' representatives as administrative personnel, which exempted the insurance company from having to pay overtime. The suit was certified as a class action because it involved over 2,400 California claims adjustors. The jury trial took place in Oakland, California, and a finding was entered for the plaintiffs. The award totaled $124.5 million of which $90 million was for uncompensated overtime, $1.2 million for double time, and $34.5 million for prejudgment interest. The case took almost 5 years from filing to verdict to litigate.

Source for additional case details: *The National Law Journal* (February 2002) Vol. 24, No. 22 (Col. 3).

About 18% of plaintiff winners were awarded over $250,000 in total damages while an estimated 7% were awarded $1 million or more (table 6). Among particular types of cases, asbestos product liability trials had the highest median awards, with half of the 19 asbestos cases receiving at least $1.7 million in damages. These cases averaged a higher number of plaintiffs (3.2 plaintiffs per case) compared to the typical tort case (1.4 plaintiffs per case). Among the non-asbestos product liability cases, plaintiffs recovered a median award of $311,000. Plaintiff winners in medical malpractice trials received a median award of $422,000, with 1 in 3 receiving awards of $1 million or more.

Among contract trials, employment discrimination suits had median awards of $166,000, with 14% garnering awards of $1 million or more.

Jury awards versus bench awards

The data reveal that final award amounts also varied by whether the case was decided by a jury or a judge.

Largest damage award

Of the 11,908 civil trials studied, the largest damage award involved a business dispute between several parties in Texas and Mexico.

A company in Texas attempted to franchise several stores in Mexico. Under Mexican law this company could not establish franchise contracts without a Mexican business partner. The company sought assistance from several Mexican business partners who initially expressed an interest in the deal; however, the company contended that these business associates broke off negotiations and used the insider information gained to directly buy the franchise for $800 million. The plaintiff accused their Mexican business associates and the seller of reneging on the contractual deal.

A jury in Dallas, Texas, found for the plaintiff corporation and awarded $90 million in actual damages for lost profit and $364.5 million in punitive damages. The case, from filing to disposition, took 3½ months to process; the trial lasted 17 days. The $454 million total award was reduced to $121 million on appeal.

Sources for additional case details: *Los Angeles Times,* February 9, 2001; *Houston Chronicle*, May 19, 2001.

Table 6. Plaintiff award winners in the Nation's 75 largest counties, 2001

Case type	Number of all trial cases with a plaintiff winner[b]	Final amount awarded to plaintiff winners		Percent of plaintiff winner cases with final awards —	
		Total	Median	Over $250,000	$1 million or more
All trial cases[a]	6,487*	$4,346,072,000	$33,000	18.3%	6.8%
Tort cases	4,069	$2,299,957,000	$27,000	18.8%	7.7%
Automobile	2,565	526,435,000	16,000	8.6	2.8
Premises liability	522	400,653,000	59,000	22.9	9.1
Product liability	70	199,153,000	450,000	64.6	39.1
Asbestos	19	86,275,000	1,650,000	90.7	59.7
Other	51	112,878,000	311,000	54.7	31.4
Intentional tort	214	128,428,000	37,000	25.4	16.3
Medical malpractice	311	600,746,000	422,000	66.1	29.7
Professional malpractice	51	43,108,000	93,000	30.6	13.9
Slander/libel	39	17,067,000	121,000	39.6	6.0
Animal attack	66	6,741,000	18,000	11.7	--
Conversion	13	926,000	23,000	--	--
False arrest, imprisonment	19	2,185,000	30,000	14.6	--
Other or unknown tort	199	374,514,000	106,000	39.9	15.5
Contract cases	2,369	$2,043,211,000	$45,000	17.7%	5.4%
Fraud	358	768,506,000	81,000	30.2	12.0
Seller plaintiff	925	165,336,000	34,000	10.5	2.9
Buyer plaintiff	477	130,585,000	45,000	17.7	4.8
Mortgage foreclosure	13	2,731,000	70,000	13.6	13.6
Employment discrimination	73	44,913,000	166,000	39.4	14.4
Other employment dispute	162	265,939,000	78,000	23.8	4.8
Rental/lease	176	24,112,000	20,000	11.9	2.6
Tortious interference	83	580,211,000	94,000	30.7	6.9
Partnership dispute	19	52,462,000	97,000	41.8	12.8
Subrogation	44	2,047,000	8,000	4.1	--
Other or unknown contract	41	6,369,000	22,000	13.9	7.1
Real property cases[c]	49	$2,904,000	$15,000	6.1%	--

Note: Data for case type and final awards were available for 99.3% of all plaintiff winners. Award data were rounded to the nearest thousand. Final award amount includes both compensatory (reduced for contributory negligence) and punitive damage awards. Detail may not sum to total because of rounding.
*The number of plaintiffs awarded damages may differ from the number calculated from the percentage of plaintiffs who successfully litigated the case (table 5). Missing award data, the fact that in some cases plaintiff winners receive nothing because of award reductions, and the inclusion of plaintiff winners in bifurcated damage trials (a group excluded from table 5) account for some of this difference.
--No cases recorded.
[a]The number of trials includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Excludes bifurcated trials where the plaintiff won on only the liability claim. Bifurcated trials involving only damage claims, however, have been included.
[c]Eminent domain cases are not calculated among final awards because there is almost always an award; the issue is how much the defendant (whose property is being condemned) will receive for the property.

This was particularly true for contract cases where juries awarded a median amount of $81,000 compared to the $30,000 median amount awarded by judges. Among the employment discrimination cases, plaintiff winners received a median award of $218,000 from juries and a median award of $40,000 from judges. In seller plaintiff cases, juries awarded a median of $68,000 to plaintiffs compared to $29,000 by judges (not shown in a table).

Table 7. Punitive damage awards in civil trial cases for plaintiff award winners in State courts in the Nation's 75 largest counties, 2001

Case type	Number awarded punitive damages[a]	Trial cases with plaintiff winners: Amount of punitive damages awarded — Total	Median	Number of cases with punitive damages — Over $250,000	$1 million or more
All trial cases[a]	356	$1,221,877,000	$50,000	81	41
Tort cases	217	$367,149,000	$25,000	45	23
Automobile	54	48,578,000	5,000	9	7
Premises liability	8	646,000	33,000	--	--
Product liability	3	1,077,000	433,000	2	--
Asbestos	2	900,000	500,000	2	--
Other	1	177,000	177,000*	--	--
Intentional tort	78	32,653,000	16,000	16	9
Medical malpractice	15	115,577,000	187,000	4	2
Professional malpractice	7	117,000	1,000	--	--
Slander/libel	23	3,771,000	77,000	4	--
Animal attack	6	391,000	68,000	--	--
Conversion	3	289,000	100,000	--	--
False arrest, imprisonment	5	202,000	8,000	--	--
Other or unknown tort	16	163,849,000	470,000	11	4
Contract cases	138	$854,658,000	$83,000	36	18
Fraud	60	368,992,000	63,000	11	5
Seller plaintiff	9	484,000	4,000	--	--
Buyer plaintiff	16	16,509,000	275,000	9	3
Mortgage foreclosure	--	--	--	--	--
Employment discrimination	13	13,552,000	606,000	9	5
Other employment dispute	16	3,949,000	151,000	2	1
Rental/lease	9	2,282,000	15,000	2	2
Tortious interference	9	431,981,000	83,000	3	1
Partnership dispute	4	16,909,000	186,000	1	1
Subrogation	--	--	--	--	--
Other or unknown contract	2	1,000	1,000	--	--
Real property cases[b]	1	$70,000	$70 ,000*	--	--

Note: There was a total of 364 cases in which a punitive damage claim was awarded. In 356 of these cases, the punitive award went to the plaintiff and in 8 cases the punitive award went to the defendant on a counterclaim. In this study, cases are classified by the primary case type, though many cases involve multiple claims (that is, contract and tort). Under laws in almost all States, only tort claims qualify for punitive damages. If contract or real property cases involved punitive damages, it involved a related tort claim.
Detail may not sum to total because of rounding.
Award data were rounded to the nearest thousand.
*Not median but the actual amount awarded.
--No cases recorded.
[a]The number of trial cases includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Excludes eminent domain cases.

Punitive damage awards

Punitive damages were awarded in 6% of the 6,487 trial cases in which the plaintiff won damages. Punitive damages totaled over $1.2 billion and accounted for about 28% of the $4.4 billion awarded to plaintiffs overall.

The median punitive damage amount awarded to plaintiff winners who received a punitive damage award was $50,000. Twenty-three percent of punitive damage awards were over $250,000, and 12% were $1 million or more (table 7).

Among tort cases punitive damages were awarded more frequently to plaintiff winners in slander/libel cases (59%), intentional tort cases (36%), and false arrest/imprisonment cases (26%). Contract cases recorded the highest estimated punitive awards in partnership disputes (21%), employment discrimination (18%), and fraud cases (17%).

Compensatory versus punitive damage awards

In civil trials that received punitive damages, substantial differences can occur between the amount awarded in punitive and compensatory damages.[5] In 39% of civil trials that awarded punitive damages to the plaintiff winner, the amount of punitive damages exceeded the amount awarded for compensatory damages. Punitive awards exceeded compensatory awards in 40% of tort trials and in 37% of contract trials (table 8).

[5]The U.S. Supreme Court ruled on the compensatory to punitive damages ratio, after this sample of civil trials was collected, in "State Farm Insurance v. Campbell" in which the Court overturned a punitive damage award that it considered "grossly excessive." While the Supreme Court did not delineate a bright line ratio of punitive to compensatory damages, it did suggest that punitive damages "more than four times the amount of compensatory damages might come close to the line of constitutional impropriety." (State Farm Mutual Automobile Insurance Company v. Campbell, April 7, 2003, 123 S.Ct. 1513: 1524.)

Table 8. Compensatory and total award amounts for plaintiff winners who were awarded punitive damages in civil trials in State courts in the Nation's 75 largest counties, 2001

	Number of cases with a plaintiff winner awarded punitive damages[a]	Total damage award amount			Percent of punitive damage cases with punitive awards —		
		Total[b]	Punitive	Compensatory[b]	Greater than compensatory damage awards	At least 2 times greater than compensatory damage awards	At least 4 times greater than compensatory damage awards
All trial cases	356	$1,822,834,000	$1,221,877,000	$595,725,000	38.8%	23.8%	13.9%
Tort cases	217	$626,779,000	$367,149,000	$257,790,000	39.9%	28.6%	18.1%
Contract cases	138	1,195,705,000	854,658,000	337,655,000	37.4	16.6	7.5
Real property cases[c]	1	350,000	70,000	280,000	--	--	--

Note: Punitive and compensatory damage data will not sum to total because a third category, fees and costs, have been excluded. Award data were rounded to the nearest thousand. Detail may not sum to total because of rounding. In this study, cases are classified by the primary case type, though many cases involve multiple claims (that is, contract and tort). Under laws in almost all States, only tort claims qualify for punitive damages. If contract or real property cases involved punitive damages, it involved a related tort claim.

--No cases recorded.
[a]The number of trials includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
[b]Compensatory and total award damages do not include reductions.
[c]Excludes eminent domain cases.

Federal civil trials

Federal district courts exercise jurisdiction in civil actions that —
(1) deal with a Federal question arising out of the U.S. Constitution,
(2) are between parties that reside in different States or countries and that exceed $75,000 at issue,
(3) are initiated by the U.S. Government, or
(4) are brought against the U.S. Government. (See *Federal Tort Trials and Verdicts,* NCJ 172855, February 1999, and "The Jurisdiction of the Federal Courts," <www.uscourts.gov/understand03>, viewed 3/9/2004.)

• In fiscal year 2001 Federal district courts disposed of 1,964 tort, contract, and real property cases by jury or bench trial.

• As in State courts, a small percentage (2%) of the 87,852 terminated Federal tort, contract, and real property cases reached trial.

• A jury verdict disposed of a majority (67%) of Federal tort, contract, and real property trials.

• Federal tort cases (79%) were more likely to be decided by jury trial than contract (50%) and property (26%) cases.

• In about half of Federal tort, contract, and real property trials, the plaintiff won the decision. Plaintiffs won 51% of jury trials and 56% of bench trials.

• The median amount awarded to plaintiff winners was larger in Federal district courts than in the sampled State courts. The median award for plaintiff winners was $216,000 for all Federal tort, contract, and real property cases disposed of by trial. The median award was $228,000 for jury trials and $177,000 for bench trials.

Federal tort, contract, and real property trials terminated in U.S. district courts, 2001

	All trial cases				Jury trial cases			Bench trial cases		
Case type	Number plaintiff winners	Number of plaintiff monetary awards	Total award	Median award	Number plaintiff winners	Number of plaintiff monetary awards	Median award	Number plaintiff winners	Number of plaintiff monetary awards	Median award
Total	801	636	$976,156,000	$216,000	483	405	$228,000	318	231	$177,000
Tort	434	358	$462,943,000	$179,000	316	261	$201,000	118	97	$139,000
Contract	324	266	508,543,000	272,000	159	140	330,000	165	126	226,000
Real property	43	12	4,670,000	125,000	8	4	773,000	35	8	105,000

Note: Award data were rounded to the nearest thousand.
Source: Administrative Office of the U.S. Courts, Civil Master File, fiscal year 2001.
Published reports on Federal District Court data are also available from the U.S. Administrative Office of the Courts: <http:\\www.uscourts.gov\statisticalreport.html>.

Case processing time

Among all trials the average case processing time from filing of the complaint to verdict or judgment was 24.2 months, with half the civil trials taking a minimum of 20.2 months to dispose (not shown in a table).

• *Tort* trials reached a verdict or judgment in an average of 25.6 months compared to 21.7 months for real property cases and 21.5 months for contract cases.

• Among *tort* cases, non-asbestos product liability trials had one of the longest case processing times, averaging 35.1 months from filing to verdict or judgment, followed by *medical malpractice* cases with an average of 33.2 months.

Table 9. Average number of days in trial in State courts in the Nation's 75 largest counties, 2001

Case type*	Mean number of days in trial
All trial cases	3.7
Tort cases	3.9
Automobile	2.9
Premises liability	3.7
Product liability	9.2
Asbestos	14.1
Other	8.1
Intentional tort	4.1
Medical malpractice	6.5
Professional malpractice	5.4
Slander/libel	4.2
Animal attack	2.6
Conversion	5.2
False arrest, imprisonment	4.4
Other or unknown tort	4.7
Contract cases	3.4
Fraud	3.7
Seller plaintiff	2.2
Buyer plaintiff	3.5
Mortgage foreclosure	1.8
Employment discrimination	8.4
Other employment dispute	4.2
Rental/lease	2.5
Tortious interference	5.2
Partnership dispute	5.6
Subrogation	2.3
Other or unknown contract	3.7
Real property cases	2.8

Note: Data on the number of days in trial were available for 92.7% of all cases.
*The number of trials includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.

• The 31 *asbestos product liability* cases had one of the shortest average case processing times (16.8 months).

Number of days in trial

General civil trials conducted in the Nation's 75 most populous counties lasted 3.7 days on average.[6] Asbestos cases took about 3 weeks on average to process (14.1 days), while the other product liability trials were disposed within nearly 2 weeks (8.1 days). Medical malpractice and employment discrimination cases took between 1 and 2 weeks on average to dispose. The average number of days in trial for automobile cases, the most common civil case, was 2.9 days (table 9).

A bench or jury disposition also affected the length of time in trial. Jury trials lasted 4.3 days on average compared to 1.9 days for bench trials. The longest jury trial recorded in the sample lasted 70 days, and the longest bench trial, 18 days (not shown in a table).

[6]Trial days involve the actual number of business days that a case is in trial. Weekends and holidays are not counted.

Trends in civil trials

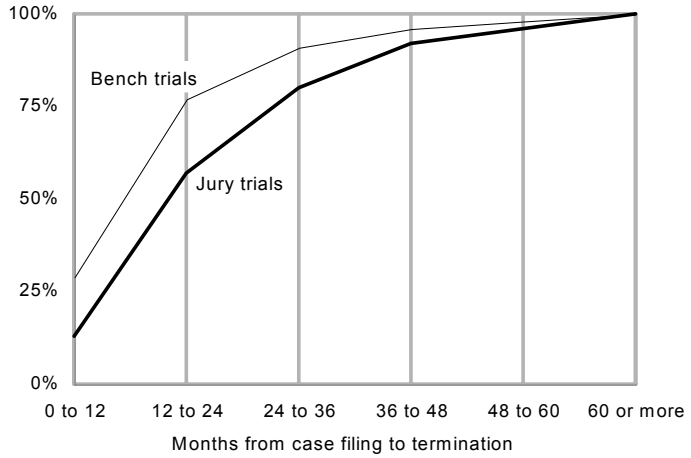
The total number of civil trials declined from 1992 to 2001

The number of civil trials decreased 47%, from 22,451 to 11,908 cases, since 1992. Tort cases decreased the least (-32%), while real property (-80%) and contract (-61%) cases registered the largest declines. Among tort cases, product and premises liability saw the sharpest declines, while medical malpractice and automobile torts had insignificant decreases (table 10).[7]

The growing use of alternative dispute resolution (ADR) as a diversion from trial, and other statutory reforms aimed at limiting damage awards, contributed to the decline in civil trials. In addition, the National Center for State Courts reports that the number of tort filings declined by 9% in 30 States during the 1992-2001 period. Contract filings, in comparison, rose nearly 21% in 17 States after 1995; however, because

[7]Civil cases disposed of in 1992 and in 1996 are part of the earlier BJS studies on this topic. See *Civil Jury Cases and Verdicts in Large Counties, 1992,* NCJ 154346, July 1995, and *Civil Trial Cases and Verdicts in Large Counties, 1996,* NCJ 173426, September 1999.

During 2001, 77% of bench trials and 57% of jury trials were disposed of within 24 months of being filed



Note: Cases disposed of by directed verdict, judgments notwithstanding the verdict, and jury verdicts for defaulted defendants are not shown. During 2001, 56% of these cases were disposed of within 2 years of filing. The intervals shown give rounded values; for example, "12 to 24" contains the period from 12.00 months to 23.99 months.

Figure 2

contract cases account for a smaller proportion of civil trials, their impact is less substantial than the tort filings.[8]

The percentage of tort plaintiff winners remained stable in civil trials during the 1992 to 2001 period

In 1992 and 1996, 52% of plaintiffs were successful at trial, while in 2001, that percentage was 55%. Among tort cases, around half the plaintiffs prevailed at trial from 1992 (47%) to 2001 (52%). Contract case plaintiff win rates rose from 1992 (57%) to 2001 (65%). Conversely, the percentage of prevailing plaintiffs in real property cases dropped from 56% to 38% during the 1992 to 2001 period (not shown in a table).

From 1992 to 2001 the overall median awards in jury trials declined

When adjusted for inflation, the median jury trial award for civil cases in 1992 and 1996 was $65,000 and $40,000, respectively.[9] The median award imposed by juries in 2001 was $37,000 (table 11).

Some civil case categories had marked increases in their median jury awards

This trend was particularly apparent in product liability trials in which the median award amounts were at least 3 times higher in 2001 than in 1992. The median award amounts also doubled for medical malpractice cases. [10]

Punitive damages awarded in a small percentage of jury trials

Since 1992 the number of jury trials with punitive damage awards has remained stable (4% to 6%).

Between 1992 and 2001 the median amounts awarded for plaintiff winners with punitive damages decreased from $63,000 to $50,000; this decline, however, was not statistically significant (not shown in a table).

Table 10. Trends in civil trials in State courts in the Nation's 75 largest counties, 1992-2001

Case type	Number of civil trial cases, by year 1992	1996	2001	Percent change, 1992-2001
All trial cases[a]	22,451	15,638	11,908	-47.0%*
All tort cases	11,660	10,278	7,948	-31.8%*
Selected case types				
Automobile	4,980	4,994	4,235	-15.0%
Premises liability	2,648	2,232	1,268	-52.1*
Product liability	657	421	158	-76.0*
Medical malpractice	1,347	1,201	1,156	-14.2
All contract cases	9,477	4,850	3,698	-61.0%*
Selected case types				
Fraud	1,116	668	625	-44.0%*
Seller plaintiff	4,063	1,637	1,208	-70.3*
Buyer plaintiff	1,557	832	793	-49.1*
Employment	468	621	453	-3.2
All real property cases	1,315	510	262	-80.1%*

Note: Detail may not sum to total because of rounding. Data sources: *Civil Justice Survey of State Courts, 1992* (ICPSR 6587),*1996* (ICPSR 2883), and *2001* (ICPSR 3957).
Data can be obtained from the University of Michigan Inter-university Consortium for Political and Social Research (ICPSR).
*1992-2001 difference is significant at the 95%-confidence level.
[a]The number of trials includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.

Table 11. Trends in jury trial awards in State courts in the Nation's 75 largest counties, 1992 - 2001

Case type	Median jury award amounts, adjusted for inflation, by year 1992	1996	2001	Percent change in median award amount 1992-2001
All trial cases	$65,000	$40,000	$37,000	-43.1%*
All tort cases	$64,000	$34,000	$28,000	-56.3%*
Selected case types				
Automobile	37,000	20,000	16,000	-56.8%*
Premises liability	74,000	64,000	61,000	-17.6
Product liability	140,000	373,000	543,000	287.9*
Medical malpractice	253,000	287,000	431,000	70.4*
All contract cases	$70,000	$90,000	$81,000	15.7%
Selected case types				
Fraud	88,000	90,000	87,000	-1.1%
Seller plaintiff	44,000	70,000	68,000	54.5
Buyer plaintiff	55,000	55,000	62,000	12.7
Employment	178,000	234,000	127,000	-28.7

Note: In 1992 there were two distinct data collection efforts for civil cases. The first project focused on all civil cases (trials, settlements, and dismissals) disposed in 1992, with no information on awards or punitive damages. In the second civil case project, BJS collected information on jury trials disposed in 1992, including both award and punitive damage data. Because award data were available for jury trials in 1992 and not for bench trials, table 11 includes only jury trial award data.
*1992-2001 difference is significant at the 95%-confidence level.

[8]The sources for these findings are *Tort Reform Record*, American Tort Reform Association, 2003 and B. Ostrom, N. Kauder, and R. LaFountain, *Examining the Work of State Courts, 2002: A National Perspective from the Court Statistics Project*, 2003.
[9]The inflation adjustment was calculated by utilizing the inflation calculator on the U.S. Department Labor's website at <http://www.bls.gov/cpi/home.htm>.
[10]The inflation rate for medical services between 1992 and 2001 explains some of the increase in medical malpractice awards. The inflation rate for medical services can be calculated on the U.S. Department of Labor's website at <http://www.bls.gov/cpi/home.htm>.

Civil trials involving a wrongful death claim

Civil cases in which a party alleges that the defendant's negligent action or wrongdoing resulted in a death comprised a small number of civil trials. These trials, however, can involve large damage awards. Of the 11,908 civil trials, 452 had a wrongful death claim. Nearly two-thirds (65%) were medical malpractice cases. The remaining involved automobile (16%), intentional (6%), other torts (6%), premises liability (5%), and product liability (2%). The majority of wrongful death claims (93%) were adjudicated by jury trial.

Plaintiffs prevailed in about a third (36%) of all wrongful death cases including 25% of wrongful death cases involving a medical malpractice action. In comparison, at least half the estimated plaintiffs successfully litigated the small number of wrongful death cases with an automobile, premises liability, product liability, intentional tort, and other tort claim.

Half the plaintiffs who prevailed in a wrongful death case were awarded at least $961,000. The estimated median awards were above $2 million for the product liability and other tort cases and over $1 million for the intentional tort cases. Wrongful death cases with estimated median awards below $1 million included medical malpractice, premises liability, and automobile torts.

Characteristics of civil trials with a wrongful death claim in State courts in the Nation's 75 most populous counties, 2001

Case type	Number of civil trials with a death claim	Number of plaintiff winners	Total	Median award
Total*	452	162	$608,889,000	$961,000
Automobile	72	37	$95,083,000	$318,000
Premises liability	22	11	243,053,000	729,000
Product liability	11	6	26,492,000	2,000,000
Asbestos	2	1	2,364,000	2,364,000**
Other	9	5	24,128,000	2,242,000
Intentional tort	25	19	30,435,000	1,801,000
Medical malpractice	295	74	175,443,000	876,000
Other or unknown tort	26	15	38,384,000	2,039,000

Note: Award data were rounded to the nearest thousand. Final award includes both compensatory (reduced for contributory negligence) and punitive damage awards. Detail may not sum to total because of rounding.
*The number of trial cases includes bench and jury trials, trials with a directed verdict, judgments notwithstanding the verdict, and jury trials for defaulted defendants.
**Not median but actual amount awarded.

Methodology

Definitions of disposition types:

Jury trial: A trial held before and decided by a group of laypersons selected according to the law presided over by a judge culminating in a verdict for the plaintiff(s) and/or defendant(s).

Bench trial (nonjury trial): A trial held in the absence of a jury and decided by a judge culminating in a judgment for the plaintiff(s) or defendant(s).

Directed verdict: In a case in which the party with the burden of proof has failed to present a prima facie case for jury consideration, a trial judge may order the entry of a verdict without allowing the jury to consider it, because, as a matter of law, there can be only one such verdict.

Judgment notwithstanding the verdict: ("JNOV" or Judgment non obstante veredicto): A judgment rendered in favor of one party despite the finding of a jury verdict in favor of the other party.

Jury trials for defaulted defendants: Some States make provisions for a jury to be impaneled even if the defendants in a case fail to appear and enter a defense. The purpose of a trial is typically to decide issues such as amount of damages.

Definitions of civil case types:

Torts: Claims arising from personal injury or property damage caused by negligent or intentional acts of another person or business. Specific tort case types include: *automobile accident*; *premises liability* (injury caused by the dangerous condition of residential or commercial property); *medical malpractice* (by doctor, dentist, or medical professional); *other professional malpractice* (such as by lawyers, engineers, and architects); *product liability* (injury or damage caused by defective products; injury caused by toxic substances such as asbestos); *libel/slander* (injury to reputation); *intentional tort* (vandalism, intentional personal injury); *animal attack* (the negligent supervision of a dog or other animal resulting in an attack); *conversion* (unauthorized use or control of another person's personal property); *false arrest/imprisonment* (an arrest or imprisonment without the proper legal authority); and *other negligent acts* (negligence against another party for an act not represented by the other case categories).

Contracts: Cases that include all allegations of breach of contract. Specific case types include *seller plaintiff* (sellers of goods or services, including lenders seeking payment of money owed by a buyer or borrowers); *buyer plaintiff* (purchaser of goods or services seeking return of their money, recision of the contract, or delivery of the specified goods); *mortgage contract/foreclosure* (foreclosures on commercial, or residential real property); *fraud* (financial damages incurred due to intentional or negligent misrepresentation regarding a product or company; fraud is also considered a type of tort claim, but because it arises out of commercial transactions, it was included under contracts); *employment discrimination* (claim based on an implied contractual relationship against an employer for unfair treatment or denial of normal privileges due to race, gender, religion, age, handicap and/or nationality); *other employment dispute* (claim against an employer for wrongful termination not

based on discrimination or by the employer or the employee claiming contractual failure of the other party); *rental/lease agreement*; *tortious interference with a commercial or contractual relationship* (this claim consists of four elements: existence of a valid contract, defendant's knowledge of that contract, defendant's intentional procuring of breach of that contract and damages); *partnership dispute* (dispute over a business owned by two or more persons that is not organized as a corporation); *subrogation* (the exchange of a third party who has paid a debt in the place of a creditor, so that the third party may exercise against the debtor all the rights which the creditor might have done); and *other contract* claims (any contractual dispute other than the case categories used in this study such as stockholder claims).

Real property: Any claim concerning ownership or division of real property (excluding mortgage foreclosures which are included under contracts). Specific categories used include *eminent domain* (condemnation of real property to obtain for public use) and *other real property* (any other claim regarding title to or use of real property).

Source: Definitions were developed by the National Center for State Courts through consultation with NCSC staff attorneys, law professors, and from *Black's Law Dictionary.*

Appendix A. Selected estimates, standard errors, and confidence intervals, 2001 survey

	Estimate	One standard error	95%-confidence interval Lower	Upper
Number of civil trials	11,908	525	10,865	12,952
Tort	7,948	366	7,219	8,677
Contract	3,698	184	3,333	4,065
Real property	262	16	229	293
Percent decided by a —				
Jury trial	74.4%	1.0%	72.5%	76.3%
Bench trial	23.8	1.0	21.7	25.8
Other	1.9	0.1	1.6	2.1
Percent of trials with a plaintiff winner				
All cases	55.4%	0.7%	54.0%	56.8%
Torts	51.6	1.0	49.6	53.5
Contracts	64.8	0.8	63.2	66.5
Property	37.7	2.7	32.0	42.7
Median final award to plaintiff winners				
All cases	$33,000	$2,329	$29,899	$39,166
Torts	27,000	2,020	23,999	32,036
Contracts	45,000	2,533	40,379	50,460
Property	15,000	2,880	8,727	20,186
Median punitive award to plaintiff winners				
All cases	$50,000	$12,839	$29,281	$80,371
Torts	25,000	10,796	12,896	55,855
Contracts	83,000	7,238	70,251	99,054
Median months from filing to final verdict				
All cases	20.2 mo	0.6 mo	19.0 mo	21.6 mo
Torts	21.5	0.6	20.3	22.8
Contracts	17.7	0.8	16.2	19.4
Property	18.3	0.7	16.7	19.4

Note: Standard errors were calculated by using the jackknife method generated by WESVAR PC.

Sample

The sample design for the 2001 civil trial study was similar to the ones used for the 1996 and 1992 BJS civil trial studies. The sample is a 2-stage stratified sample with 46 of the 75 most populous counties selected at the first stage. The 75 counties were divided into 5 strata based on 1990 civil disposition data obtained through telephone interviews with court staff in the general jurisdiction trial courts. Stratum 1 consisted of the 14 counties with the largest number of civil case dispositions. Every county in stratum 1 was selected with certainty. Stratum 2 consisted of 13 counties with 11 chosen for the sample. From strata 3, 10 of the 18 counties were selected. Nine of the 26 counties in stratum 4 were included in the sample. Stratum 5 was added to the 2001 sample to replace Norfolk County, Massachusetts, a stratum 4 site that participated in the 1992 and 1996 studies but that fell out of the 75 most populous counties in the 2000 Census. Mecklenberg County, North Carolina, and El Paso County, Texas, were randomly selected from the 4 counties whose population increased sufficiently that they joined the ranks of the 75 most populous counties.

The second stage of the sample design involved generating lists of cases that would be coded. Prior to drawing the 2001 case sample, each participating jurisdiction was asked to identify a list of cases that had been disposed of by jury trial or bench trial between January 1, 2001, and December 31, 2001. Trial cases were to meet the definitional criteria for jury and bench trials as defined in *Black's Law Dictionary:* (1) A jury trial was defined as "a trial held before and decided by a jury of laypersons and presided over by a judge culminating in a verdict for the plaintiff(s) or defendant(s)," and (2) A bench trial was defined as "a trial held in the absence of a jury and decided by a judge culminating in a judgment for the plaintiff(s) or defendant(s)."

The study plan was to obtain every jury and bench trial disposed from the court of general jurisdiction in each of the counties selected for the study. In courts where the number of trials became too great, a sample of civil trials based on “take rates” generated by WESTAT was selected. Regardless of whether all or a sample of civil trials was collected, every medical malpractice or product liability case was included to oversample these case types.

At the second stage of sampling, all tort, contract, and real property cases disposed of by bench or jury verdict between January 1, 2001, and December 31, 2001, were selected in 43

jurisdictions. In two of the remaining three jurisdictions (Cook and Philadelphia), a sample of civil trials was selected and then "weighted" to obtain an appropriate number of civil trials. In Bergen County some civil case files were unavailable for coding purposes. Weights were applied in Bergen County in order to account for these missing cases.

Data on 6,215 civil jury trial cases, 1,958 civil bench cases, and 138 other civil trial cases that met the study criteria were collected in the 46 courts. The final sample consisted of 8,311 tort, contract, and real property cases disposed of by jury or bench verdict.

Sampling error

Since the data in this report came from a sample, a sampling error (standard error) is associated with each reported number. In general, if the difference between 2 numbers is greater than twice the standard error for that difference, there is confidence that for 95 out of 100 possible samples a real difference exists and that the apparent difference is not simply the result of using a sample rather than the entire population. All differences discussed in the text of this report were statistically significant at or above the 95-percent confidence level. Standard error estimates were generated by using a bootstrap method (jackknife) available for WESVAR PC.

Data coding

For each sampled case, a standard coding form was manually completed by on-site court staff to record information about the litigants, case type, processing time, and award amounts.

The Bureau of Justice Statistics is the statistical agency of the U.S. Department of Justice. Lawrence A. Greenfeld is director.

This BJS Bulletin presents the first release of findings in a series of reports from the Civil Justice Survey of State Courts, 2001. Thomas H. Cohen wrote this Bulletin under supervision of Steven K. Smith. Mark Motivans provided statistical review. Data collection was supervised by the National Center for State Courts (NCSC); Paula Hannaford-Agor was the project director. Paula Hannaford-Agor and Neil LaFountain of the NCSC provided comments. Neil LaFountain also provided data assistance. Devon Adams, Tina Dorsey, and Tom Hester edited the report. Jayne Robinson prepared the report for final printing.

April 2004, NCJ 202803 E

APPENDIX D

GREATER KANSAS CITY JURY VERDICT SERVICE

SUMMARY AND STATISTICS OF JURY VERDICTS REPORTED DURING THE YEAR 2003 BY THE GREATER KANSAS CITY JURY VERDICT SERVICE

There were a total of 159 cases or trials, reported in the Jury Verdict Service during 2003. Cases may consist of multiple claims with multiple verdicts. Statistics are based on claims, not cases reported. There were a total of 209 verdicts for claims reported during the year. Of these, 126 verdicts, or 61%, were for the Plaintiff, for a total of $106,543,567. All average verdict figures are based on monetary Plaintiff's verdicts only and not total cases or claims tried. The overall average of verdicts which were returned for the Plaintiff was $845,584 (Please Note: This year's figures have been inflated by five cases: The $30,400,000 verdict in Virgil and Sandra McCormack v. Capital Electric Construction Co., Inc.; a $25,000,000 verdict in Angell v. Eaton; and Missouri Highway and Transportation Commission; the $8,900,000 verdict in Group One, Ltd, and Goldstein v. Hallmark Cards, Inc.; the $8,371,912 verdict in Cory Pronold ... v. Kansas East Youth Services, Inc.; and the $4,800,000 verdict in Debbie and Eddie Wood v. Kansas City Southern Railway).

Totals and comparisons of statistics are effected by variations in laws in Kansas and Missouri. Punitive damages in Kansas are awarded by the Court at a later date after a jury determination that such damages are appropriate. These amounts, therefore, are not reflected in reported totals for Kansas District Courts or in any of the general categories for punitive damages. Claim categories for punitive damages in which all Plaintiff's verdicts were in Kansas will, therefore, be indicated by a blank entry under average verdict. Punitive damages in Missouri, on the other hand, are determined by juries and included in the totals and averages of Missouri Circuit Courts. Comparative fault statutes vary between the states. No recovery is allowed to Plaintiffs in Kansas found 50% or greater at fault; these verdicts are calculated as Defendant's verdicts. Plaintiffs in Missouri can make recoveries if a Defendant is found to bear any percentage of fault, and these verdicts are calculated as Plaintiff's verdicts.

There were 17 verdicts of $1,000,000 or more. Of these, 10 were in the Jackson County, MO Circuit Court at Kansas City; 2 were in the Jackson County, MO Circuit Court at Independence; 1 was in the Clay County, MO Circuit Court; 1 was in the Johnson County, KS District Court; 1 was in the Wyandotte County, KS District Court; 1 was in the U.S. District Court for the Western District of Missouri; and 1 was in the U.S. District Court for the District of Kansas.

There were 24 verdicts of $100,000 or more. Of these, 12 were in the Jackson County, MO Circuit Court at Kansas City; 6 in the Jackson County, MO Circuit Court at Independence; 2 in the Circuit Court of Clay County, MO; 1 in the Circuit Court of Platte County, MO; 1 in the District Court of Johnson County, KS; and 2 in the District Court of Wyandotte County, KS.

The following is a breakdown by area of total verdicts reported:

	CLAIMS	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Jackson County, Missouri at Kansas City	91	55	61	$928,487
Jackson County, Missouri at Independence	32	18	57	475,271
Clay County, Missouri	20	10	50	2,614,843
Platte County, Missouri	10	7	70	48,686
Wyandotte County, Kansas	11	7	64	206,634
Johnson County, Kansas	26	20	77	436,367
U.S.District Court, Missouri at Kansas City	16	6	38	1,505,367
U.S.District Court, Kansas at Kansas City	3	3	100	408,904

The following is a breakdown of auto cases:

Auto Passenger	7	4	58	2,105,143
Defendant Violated Right-Of-Way	16	13	82	27,403
Failure to Signal Turn or Stop	1	1	100	25,000
Head-On Collision	2	2	100	228,200
Loss of Services – Auto	3	1	33	50,000
Plaintiff Hit in Rear	24	18	75	76,143
Plaintiff Motorcyclist or Bicyclist	2	1	50	30,000
Plaintiff Pedestrian	4	2	50	80,500
Property Damage Only Claim	1	1	100	3,068
Traffic Light Intersection, Question of Light	5	2	40	24,500
Uncontrolled Intersection	1	1	100	1,465
Underinsured or Uninsured Motorist	3	3	100	44,968
Wrongful Death (Auto)	2	1	50	4,800,000
Wrongful Death (Punitive Damages)	1	1	100	1,000,000

	CLAIMS	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
The following is a breakdown of all other categories:				
Adverse Possession	1	0	0	
Assault and/or Battery	1	0	0	
Breach of Contract	20	13	65	393,544
Breach of Fiduciary Duties	2	0	0	
Breach of Insurance Contract	3	2	67	14,415
Breach of Employment Contract:				
Discrimination	4	0	0	
Retaliatory Discharge (Actual Dam.)	7	4	58	26,354
Retaliatory Discharge (Punitive Dam.)	1	1	100	15,000
Business Liability	4	4	100	7,705,819
False Arrest	1	0	0	
Federal Employers Liability Act	5	4	80	522,250
Government Liability	2	1	50	25,000,000
Hotel, Restaurant, Entertain. Liability	1	1	100	3,429
Legal Malpractice	2	1	50	270,000
Legal Malpractice (Punitive Damages)	1	1	100	1,500,000
Libel, Slander or Defamation	3	2	67	20,225
Libel, Slander or Defamation (Punitive Dam.)	2	2	100	22,508
Loss of Services (Other than Auto)	1	1	100	500,000
Malicious Prosecution	3	0	0	
Medical Malpractice	15	4	27	1,027,457
Medical Malpractice (Punitive Damages)	1	1	100	200,000
Medical Malpractice (Wrongful Death)	6	3	50	864,333
Medical Negligence	1	0	0	
Missouri Merchandising Act	1	1	100	34,775

	CLAIMS	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Misrepresentation:				
Or Fraud in Contract Breach	5	4	80	420,437
Or Fraud in Contract Breach (Punit.)	1	1	100	1,000
In Auto Sale	1	1	100	25,500
In Auto Sale (Punitive)	1	1	100	840,000
In Auto Odometer	1	1	100	25,500
In Auto Odometer (Punit.)	1	1	100	50,000
In Real Estate Sale	1	1	100	35,330
In Real Estate Sale (Punit.)	1	1	100	2,500
1981 Hostile Environment	1	0	0	
Patent Infringement	1	1	100	8,900,000
Personal Liability	1	0	0	
Products Liability	4	2	50	1,421,754
Request for Declaratory Judgment	1	0	0	
Sexual Harassment (Actual Damages)	1	1	100	10,000
Sexual Harassment (Punitive Damages)	1	1	100	1,200,000
Slip and Fall	11	6	55	93,813
Tortious Interference	3	0	0	
Trespass (Actual Damages)	1	1	100	1
Trespass (Punitive Damages)	1	1	100	300
Vexatious Refusal to Pay	3	2	67	11,870
Violation of Civil Rights or Due Process	1	0	0	
Violation of Consumer Protection	2	1	50	5,751
Violation of Consumer Protection (Punitive)	1	0	0	
Wrongful Attachment, Repossession, Replevin or Garnishment	1	0	0	
Wrongful Conversion	2	1	50	3,500
Wrongful Death Other than Auto or Med. Mal.	1	1	100	1,000,000

SUMMARY AND STATISTICS OF JURY VERDICTS REPORTED DURING THE YEAR 1990 BY THE GREATER KANSAS CITY JURY VERDICT SERVICE

There were a total of 415 verdicts reported during the year. Of these 296 verdicts were for the plaintiff, for a total of $99,904,540. All average verdict figures are based on plaintiffs' verdicts only and not total cases tried. The overall average of verdicts which were returned for the plaintiff was $337,515.

There were 13 verdicts of $1,000,000 or more. Of these, four were in the Jackson County, Missouri Circuit Court at Kansas City; five in the Circuit Court of Clay County, Missouri; one in the District Court of Wyandotte County, Kansas; and three in the U.S. District Court for the Western Distirct of Missouri at Kansas City. One verdict of $45,000,000 is the largest amount for injuries to one person that the Service has reported in this area in the 27 years of its existence. This was rendered in the Circuit Court of Jackson County, Missouri at Kansas City.

There were another 55 verdicts of $100,000 or more. Of these, 21 were in the Jackson County, Missouri Circuit Court at Kansas City; six in the Jackson County, Missouri Circuit Court at Independence; eight in the Circuit Court of Clay County, Missouri; one in the Circuit Court of Platte County, Missouri; six in the District Court of Wyandotte County, Kansas; five in the District Court of Johnson County, Kansas; seven in the U.S. District Court for the Western District of Missouri; and one in the U.S. District Court for the District of Kansas.

The following is a breakdown by area of total verdicts reported:

	CASES	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Jackson County, Missouri at Kansas City	188	120	64%	506,621
Jackson County, Missouri at Independence	40	27	68%	107,439
Clay County, Missouri	41	34	83%	551,073
Platte County, Missouri	8	5	63%	77,871
Wyandotte County, Kansas	54	35	65%	87,430
Johnson County, Kansas	52	30	58%	92,681
U.S. District Court, Missouri at Kansas City	18	12	67%	909,556
U.S. District Court, Kansas at Kansas City	14	6	43%	54,699
TOTALS:	415	296	65%	337,515

The following is a breakdown of auto cases:

	CASES	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Bus or Auto Passenger (Actual Damages)	9	7	78%	29,496
Bus or Auto Passenger (Punitive Damages)	--	2	----	375,000
Defendant Hit in Rear by Plaintiff	5	3	60%	34,038
Defendant Violated Right-Of-Way (Actual Damages)	24	23	96%	20,864
Defendant Violated Right-Of-Way (Punitive Damages)	--	2	----	4,000
Head-On Collision (Question of Right-Of-Way)	1	0	0%	0
Lane Change	5	4	80%	11,271,765

	CASES	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Loss of Services	6	4	67%	5,608
Plaintiff Hit in Rear (Actual Damages)	24	16	67%	49,375
Plaintiff Hit in Rear (Punitive Damages)	--	1	----	15,000
Plaintiff Motorcyclist or Bicyclist	2	1	50%	347,880
Plaintiff Pedestrian	4	3	75%	33,371
Plaintiff Violated Right-Of-Way	5	1	20%	150
Railroad Crossing	1	0	0%	0
Road or Bridge Defect	8	3	38%	85,417
Traffic Light Intersection, Question of Light	9	7	78%	1,243
Uninsured or Underinsured Motorist	11	11	100%	71,819
Wrongful Death	6	5	86%	210,750

The following is a breakdown of other categories:

	CASES	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Abuse of Process (Actual Damages)	3	3	100%	125,652
Abuse of Process (Punitive Damages)	--	2	----	400,000
Action Against Insurance Company or Agent	14	8	57%	56,861
Assault and/or Battery (Actual Damages)	13	4	31%	1,313
Assault and/or Battery (Punitive Damages)	--	3	----	7,333
Breach of Contract	55	42	76%	172,319
Breach of Employment Contract	6	4	67%	341,291
Breach of Fiduciary Duties (Actual Damages)	7	4	57%	316,991
Breach of Fiduciary Duties (Punitive Damages)	--	2	----	206,250
Breach of Warranty	13	6	46%	48,685
Business Liability, Misc.	15	10	67%	48,889
Contractor's Liability	12	6	50%	92,405
Criminal Conversion (Actual Damages)	1	1	100%	13,292
Criminal Conversion (Punitive Damages)	--	1	----	10,000
Dental Malpractice	2	1	50%	275,000
Dog Bite	3	3	100%	5,893
Employment Discrimination or Retaliatory Discharge (Actual Damages)	8	4	50%	56,557
Employment Discrimination or Retaliatory Discharge (Punitive Damages)	--	2	----	55,000
Excessive Force in Arrest	1	1	100%	1,000
False Arrest	3	1	33%	935
Federal Employers Liability Act	4	4	100%	730,138
Governmental Liability	3	3	100%	55,567
Hotel, Restaurant or Entertainment Liability (Actual Damages)	5	2	40%	10,966

	CASES	PLAINTIFF	% FOR PLAINTIFF	AVERAGE PLAINTIFF'S VERDICT
Hotel, Restaurant or Entertainment Liability (Punitive Damages)	--	1	----	200,000
Intentional Infliction of Emotional Distress (Actual Damages)	1	1	100%	127,000
Intentional Infliction of Emotional Distress (Punitive Damages)	--	2	----	100,000
Landlord's Liability	8	6	75%	35,124
Legal Malpractice	7	6	86%	144,516
Loss of Services (Other Than Auto)	7	6	86%	21,095
Malicious Prosecution	3	1	33%	10,000
Medical Malpractice	21	7	33%	197,585
Misrepresentation or Alleged Fraud in Contract Breach (Actual Damages)	21	14	67%	214,678
Misrepresentation or Alleged Fraud in Contract Breach (Punitive Damages)	--	10	----	343,200
Negligent Infliction of Emotional Distress	2	2	100%	10,000
Nuisance	1	1	100%	1,000
Outrageous Conduct	1	0	0%	0
Personal Liability	5	1	20%	2,500
Products Liability	17	8	47%	517,543
Service Letter Liability (Actual Damages)	2	2	100%	1
Service Letter Liability (Punitive Damages)	--	1	----	180,000
Slip and Fall	14	10	71%	84,223
Tortious Interference With Contract (Actual Damages)	1	1	100%	111,500
Tortious Interference With Contract (Punitive Damages)	--	1	----	129,000
Trespass	1	1	100%	100
Violation of Civil Rights or Due Process (Actual Damages)	1	1	100%	15,000
Violation of Civil Rights or Due Process (Punitive Damages)	--	1	----	1,000
Violation of Franchise Act	1	1	100%	5,000,000
Wrongful Attachment, Repossession, Replevin, Conversion or Garnishment (Actual Damages)	10	6	60%	27,453
Wrongful Attachment, Repossession, Replevin, Conversion or Garnishment (Punitive Damages)	--	6	----	48,417
Wrongful Death (Other Than Auto)	6	3	50%	683,333

BEST WISHES FOR A PROSPEROUS 1991

GREATER KANSAS CITY JURY VERDICT SERVICE

APPENDIX E

APPENDIX E:

QUESTIONNAIRE SENT TO STATE AND GENERAL COMMITTEE CHAIRS AND PAST PRESIDENTS

On December 23, 2003, President David Scott created the College's Ad Hoc Committee on the Future of the Civil Trial. The charge of the Committee is to look into the causes, extent and implications of what has been termed the "vanishing trial" phenomenon — the ironic fact that, as the number of litigations continues to rise, the percentage (and, in some instances, absolute number) of cases actually being tried continues to fall, in federal court and in many, if not most, state court systems.

There has been a great deal of academic, empirical analysis of this trend, which was the subject of a panel discussion at the College's Spring Meeting in Phoenix. Many causes have been suggested. The Committee is soliciting the help of each of you in the College's leadership to determine whether this phenomenon exists in your jurisdiction and, if so, what you perceive to be the reasons for it. Among other things, the Committee is curious as to whether there are geographical differences with respect to this perceived trend (*e.g.*, differences as to cause because of local tort reform statutes), or perhaps differences in subject matter as to the type of cases that continue to go to trial. We solicit any other observations you may have on this topic.

We would appreciate your responses to the following questions:

1. Is it your experience that the number of trials in your State/Province is falling?

2. If so, is that equally true in state as well as federal court?

AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

3. Is it your perception that this trend extends across the board, or are there certain types of cases that continue to be tried in disproportionate numbers?

4. Are any of the following among the reasons for this trend, to the extent that you perceive it to exist in your jurisdiction?
   (a) Increased use of summary judgment or other dispositive pretrial motions.
   (b) Stricter expert evidence requirements, such as *Daubert*.
   (c) Tort reform.
   (d) The election or appointment of judges without significant trial experience.
   (e) Judges having come to view their proper office as that of case manager and processor.
   (f) Increased use of ADR, including both arbitration and mediation (whether voluntary or court-ordered).
   (g) Mandatory sentencing requirements (such as the Federal Sentencing Guidelines).
   (h) The cost of litigation (*e.g.,* the impact of legal fees in depressing quarterly earnings and thus possibly affecting managers' incentive compensation).
   (i) Lack of, or constraints on, judicial resources.
   (j) The rising stakes (*i.e.*, amounts in issue/financial impact of equitable relief).
   (k) The uncertainty of outcome (in light of the rising stakes in the litigations.
   (l) External constraints, such as pressure from regulators or the market.
   (m) Any other factor that you believe affects the number of trials in your jurisdiction.

We are very grateful for your thoughts. Please feel free to respond by email to gjoseph@josephnyc.com

Ad Hoc Committee on the Future of the Civil Trial

Gregory P. Joseph, Chair (gjoseph@josephnyc.com)
Donald R. Abaunza, New Orleans LA
Jack M. Bray, Washington DC
W.J. Michael Cody, Memphis TN
The Hon. Phillip R. Garrison, Springfield MO
William T. Hangley, Philadelphia PA
John J. Kenney, New York NY
Jeffrey S. Leon, Toronto ON
Michael E. Mone, Boston MA
Elizabeth N. Mulvey, Boston MA
James M. Sturdivant, Tulsa OK

AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

TABLE 1:

IS THE NUMBER OF TRIALS IN YOUR JURISDICTION DECREASING?

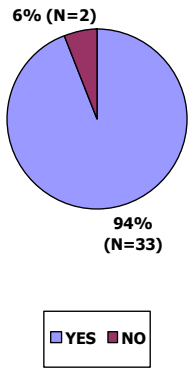
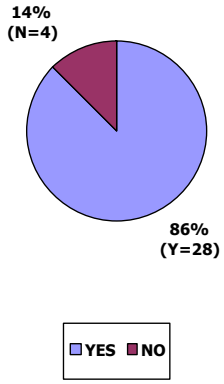


TABLE 2:

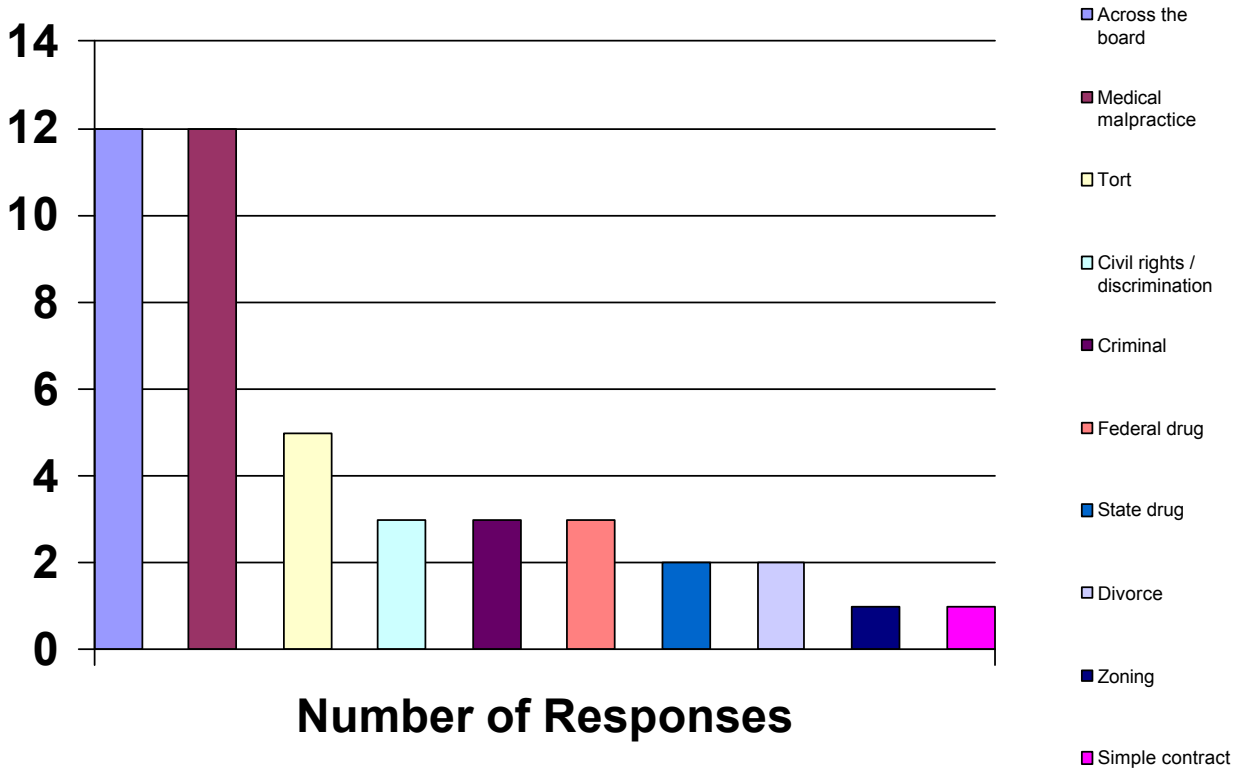
IS THE DECREASE EQUALLY TRUE IN YOUR FEDERAL COURTS ?



AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

TABLE 3:

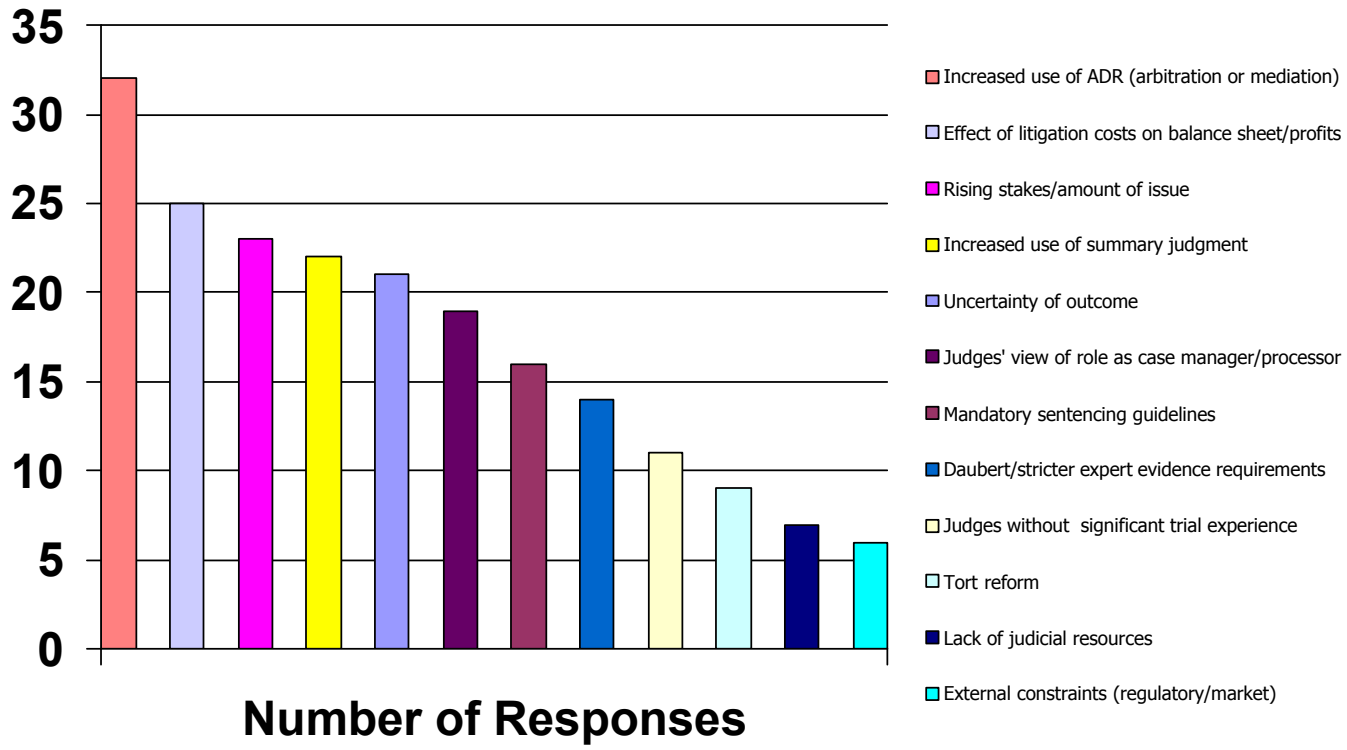
DOES THIS TREND EXTEND ACROSS THE BOARD,
OR ARE THERE CERTAIN TYPES OF CASES THAT CONTINUE
TO BE TRIED IN DISPROPORTIONATE NUMBERS?



AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

TABLE 4:

WHAT FACTORS CONTRIBUTE TO THE DECREASE IN TRIALS?



AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

TABLE 5:

TABULATION OF ALL RESPONSES

STATE	Q1	Q2	Q3	Q4a	Q4b	Q4c	Q4d	Q4e	Q4f	Q4g	Q4h	Q4i	Q4j	Q4k	Q4l	Q4m
AL	Y	N		Y	Y	Y	Y	Y	Y	Y	N	N	Y	Y	N	
CA	Y	Y		Y					Y	Y					Y	
DC	Y	N	Federal and state drug, medical malpractice	Y	N	N	N	Y	Y	Y	Y	N	Y	Y	Y	
FL	Y						Y									
GA	Y	Y	"large asset" divorce cases, insurance tort, medical malpractice	N	N	N	N	N	Y	N	Y	N	Y	Y	N	Note 2
ID	Y		Criminal	Y	Y	N	N	Y	Y	N	Y	Y	Y	Y	N	Note 3
IL	Y	Y	Civil cases						Y		Y					
IL	Y	Y	Across the board	Y	N	N	Y	Y	Y	Y	Y	Y	N	Y	N	
IN	Y	Y	Across the board	N	Y	N	Y	Y	Y		N	N	N			
KS	Y	Y		Y			Y				Y			Y		
LA	N	N	Criminal	N	N	Y	N	N	N	Y	Y	N	Y	N	N	
MA	Y		Med Mal, tort & criminal	N	Y	N	N	Y	N	Y	Y	Y	Y	Y	Y	Note 4
MA	Y	Y	Tort, zoning appeals & simple contract	Y				Y	Y		Y	Y	Y			
ME	Y	Y	Across the board	Y	Y	N	N	Y	Y	Y	Y	Y/N	Y	Y	N	
MI	Y	Y	Medical malpractice	Y	N	Y	Y	Y	Y		Y	N	Y	Y		
MN	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Note 5
MN	Y	Y	Medical malpractice	Y	Y	Y	N	N	Y	N	Y	N	Y	Y	N	
MN	Y		Across the board	Y	Y		Y		Y							
MN	Y	Y	Across the board	Y	N	N	N	Y	Y		Y	N	Y	Y		
MN	Y	Y	Tort (PI)						Y		Y		Y			
MO	Y	Y	Medical malpractice					Y	Y	Y			Y			
ND	Y	N	Criminal						Y		Y		Y			Note 6
NH	Y	Y	Medical malpractice	Y	Y			Y	Y				Y	Y		

AD HOC COMMITTEE SURVEY ON THE FUTURE OF THE CIVIL TRIAL

NM		Y	Employment and medical malpractice		N	N	N	Y	Y			N	Y	Y		Note 8
NM	Y	Y	Across the board (civil)					Y	Y		Y				Y	
NY	Y	Y	Across the board	N	N		Y	Y	Y	Y	Y	Y	Y	Y	Y	
OH	Y	Y	Medical malpractice	N	N	Y	N						N	N		
OH	Y	Y	Drug conspiracy, civil rights & employment	Y	N				Y		Y	Y				
OK	Y	Y	Employment & federal drug	N	N	N	N	Y	Y	Y	Y	N	N	Y	N	Note 7
OK	Y	Y	Across the board	Y	Y	N	N	Y	Y							
PA	Y	N	Across the board, medical malpractice	Y				Y	Y	Y	Y		Y	Y		
SC	Y	Y	Across the board	Y	Y	N	N	N	Y	Y	Y	N	Y	Y	N	Note 1
TN			Domestic and medical malpractice	Y					Y				Y			
UT	Y	Y	Across the board	Y	Y	Y	Y	N	Y	Y	Y		Y	Y		
VA	Y	Y	Y	Y	Y				Y	Y	Y			Y		
WI	Y	Y	Across the board	Y	Y	Y	Y	N	Y	Y	Y	N	Y	Y	N	
WI	N	Y	Auto and& medical malpractice			Y			Y		Y					Note 9

Notes -- Additional Comments in Response to Question 4M:

[1] Decreasing number of experienced trial lawyers capable of rendering effective advice on advantages of trial as opposed to settlement

[2] In commercial litigation, I believe astute business managers have come increasingly to believe that litigation is incompatible with the business goal of capping and quantifying adverse business risks. I also believe most trial lawyers do not want to try cases. This is due in many instances to the lack of courtroom exposure young lawyers get today, which breeds a lack of both familiarity with and confidence in the jury system. I have taught trial techniques to "litigation" lawyers with 5 to 7 years experience in large Atlanta law firms, who not only have not tried a case but have never argued a motion. The lack of courtroom exposure for young lawyers may stem, in part, from the reluctance of clients to turn smaller legal disputes over to law firms because of the enormous fees they may have to pay to litigate a relatively small matter.

[3] There has been an attitude advanced by the judiciary that it is better to settle then try a case. This permeates the whole system. When Judges let us know it is okay to try suits, more are likely to go.

[4] With tort reform litigation, jurors have a bias against plaintiffs in our jurisdiction

[5] Also, increased disdain for jury system by society in general

[6] Judicial efforts to force settlement

[7] I believe the following are the four most significant factors in North Dakota: the rising stakes of litigation, the cost of litigation, increased use of ADR (as a consequence of the first two factors), and criminal sentencing guidelines.

[8] Unreasonable timelines on pretrial prep; failure of judges to remit excessive verdicts; lack of faith in the quality of the jury pool

[9] Jury attitudes in auto cases

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