



The Obituary of the American Trial Lawyer: *or whatever happened to jury trials?*

By Thomas J. Smith, Esq.

In June, 2007, this magazine published my article entitled "Whatever Happened to Jury Trials." That article discussed the dramatic decline in civil jury trials in Bexar County and the rest of this country. In particular, the article stated that in 2006, only 85 civil jury cases were tried to a verdict in the Bexar County District Courts. Approximately 35,000 cases were filed each year during the period I reviewed and the fact that we tried only 85 civil jury trials seemed incredible.

As a result of that article, I received numerous comments and calls from colleagues, including some from District Judges, questioning the statistics I cited. After convincing the skeptics that I was only using the official statistics filed by the Bexar County District Clerk's Office with the State of Texas, I was then told by several folks that the statistics must be wrong. Either that or the year I had cited was an aberration and that if I checked the following year, I would see a definite increase in jury trials. I did check the next year and found that in 2007, we were down to 78 civil jury trials. They went down again in 2008.

This trend is not unique to Texas or the state courts. In 1962, 5.5% of federal cases were resolved by juries. By 2002, that number was 1.2%. The rate is now below 1%. An article in the December, 2013, Texas Bar Journal indicates that in 2012 only .4% of Texas cases were resolved by jury trials.

Recently, I have gone back to see if the trend in Bexar County had continued. I have found that the number of jury trials has continued to decline, virtually every year since the article was written. In 2014, civil jury trials in Bexar County District Courts had dropped to 48. We had 14 Civil District Judges who tried 48 jury trials to verdict. This is less than 4 cases per judge! (See <http://www.txcourts.gov/statistics/trial-court-activity-database.aspx>)

The reasons for this decline are many... arbitration, mediation, jury waiver provisions in contracts, fear of unpredictable juries and similar causes. It is likely that the big reason, and the one lawyers don't like to talk about, is that the expense of litigation has become a major deterrent, not just to jury trials, but to all trials. The cost of a full-blown jury trial, with

extensive discovery and motions, has become an insurmountable financial obstacle for all but the very wealthy. If one looks at the breakdown of the types of cases being tried, you can see that in the past three years (2012 - 2014), over 70% of the civil jury trials were tort cases (as opposed to family, contract and business matters). Why? Because Plaintiff lawyers in tort cases generally work on a contingent fee basis (i.e., they are paid a percentage of any recovery), which makes them affordable by people who have been injured. Contract, business and family cases all involve lawyers who generally charge by the hour, and those cases are almost unaffordable and are disappearing from the jury trial docket.

So, what are the consequences to our judicial system of this decline in civil jury trials? Some experts have expressed concern that this trend may result in no further need for trial lawyers, judges or appellate courts. I don't share this concern. We still need a resolution of the 35,000 lawsuits filed each year. We still need judges to administer those cases, make rulings, and try the cases when juries are not used (a "bench trial"). We will need trial lawyers (who now seem to prefer the term "litigators") to file the lawsuits, do the pre-trial motions and discovery, and take their client to an ultimate determination, whether it be by settlement, mediation, arbitration or a bench trial. Lawyers need to understand that jury trials in civil cases may no longer be a viable way of resolving disputes. Professor Neil Vidmare, of Duke University, did a comprehensive survey in 2000 that reported that the United States today is the ONLY country in the world that has jury trials in civil matters.

Civil jury trials have become so rare that most young lawyers have never had the experience of trying a case before a jury. Many never will. A litigator today will resolve many more of his or her cases in the future in mediations or arbitrations, as opposed to a trial. Law schools need to accept this trend and spend more time training their lawyers to be better advocates at mediation and arbitration. Litigators need to explore ways to make trials more affordable.

A recent article in the March 2015 Texas Bar Journal raises an interesting ethics issue. If we are raising an entire generation of litigators for whom trial is "merely a theoretical concept," does the lawyer who has never tried a jury case have an ethical obligation to disclose this fact to the client who has

just hired this lawyer as a "trial lawyer?" The Bar Journal authors strongly suggest that the lawyer needs to advise the client of his or her lack of trial experience.

Whether lawyers think this decline in jury trials is a good thing or a bad thing, the decline is a reality that must be faced. A recent issue of the Journal of the American Bar Association in section on Litigation featured (in part) the following:

OBITUARY: THE AMERICAN TRIAL LAWYER

The American Trial Lawyer, who enhanced the lives of so many Americans and made the United States...a just nation, passed away recently. Although a precise age is uncertain, the American Trial Lawyer was believed to have been at least 371 years old at the time of death. The cause of death is uncertain...but was not sudden. In fact, the American Trial Lawyer had been placed on the Endangered Species List a decade or so before death. The autopsy determined that the American Trial Lawyer most likely died from a long term, progressive illness that began more than 40 years ago...and was exacerbated by a genetic mutation of the civil justice system that came to be known as arbitration and mediation... and the spread of inaccurate information about frivolous lawsuits and verdicts like the McDonald's "hot coffee" case.

- Thomas J. Smith began practicing law in San Antonio in the sixties and continues to do so today as one of this city's best-known mediators. He can be contacted at smith@tjsmithlaw.com.