Whatever Happened to Jury Trials?

By Thomas J. Smith

A profound change is taking place in the way we resolve legal disputes in this country... and Texas is leading the way. Over the past two decades, civil jury trials have virtually disappeared from the legal landscape. According to the latest data available from Bexar County District Clerk Margaret Montemayor, there were approximately 35,000 cases filed in the Bexar County District Courts during the last fiscal year, ending August 31, 2006. During that same period, only 85 jury cases were tried to a verdict.

The reason for this change is being widely debated in the legal community. While there is no consensus, most agree that several factors have contributed to the decline in trials, both jury and non-jury. What are these factors?

Expenses. Endless pretrial discovery and motions are not only expensive, but delay a resolution of the conflict. A full-blown trial at the courthouse, whether to a judge or a jury, has just about priced itself out of the market for the average person or company.

Unpredictability. Clients are frustrated when their lawyer tells them how unpredictable juries are. Likewise, clients blanche when their lawyer, in response to "How much is this going to cost me?" says simply, "It all depends on what the other side does."

Tort Reform. Tort reform has unquestionably reduced the number of jury trials in Texas. Worker's compensation cases have almost totally disappeared. An increasingly conservative appellate judiciary has caused many plaintiffs' lawyers to settle their cases rather than risk a favorable jury verdict being reversed on appeal.

Arbitration and Mediation. In response to the general public's dissatisfaction with the expense, delay and unpredictability in our judicial system, the Texas Alternative Dispute Resolution Procedures Act (ADR Act) was enacted in 1987. Former State Senator Cyndi Krier, the sponsor of the bill, intended to provide alternatives to the traditional manner of resolving lawsuits at the courthouse. The Act exceeded all expectations. Although the Act provided several different alternatives to a trial, the two most commonly used procedures have been arbitration and mediation.

Arbitration is very similar to a non-jury trial, except that a private neutral party, generally a lawyer, is hired to conduct an abbreviated trial, away from the courthouse, and make a final ruling. Generally, there is no appeal from the arbitrator's ruling. It's important to remember that the Courts cannot compel binding arbitration, unless the parties have agreed to it. Large companies have now fully embraced arbitration and insert binding arbitration clauses in virtually all of their contracts. Today, it is common to find binding arbitration clauses in leases, bank loan documents and myriad other contracts. If you have recently signed a credit card application or a contract for phone service, you have agreed to binding arbitration, probably without knowing it.

One wonders how long it will be before McDonald's has binding arbitration language printed on its coffee cups. Stated simply, the bigger clients—banks, landlords, builders, employers—do not want to go to the courthouse when they are dealing with customers, borrowers, tenants, homeowners and employees. They prefer a binding resolution by an arbitrator, or an arbitration panel, because they feel this will be quicker and cheaper and less likely to be swayed by emotion. Many lawyers are beginning to question whether arbitration is, in fact, quicker or cheaper. In many ways, arbitration has taken on some of the characteristics of a full-blown trial, with discovery, delays, etc. Nevertheless, more and more disputes are today being resolved by arbitration.

Mediation is simply a process whereby the parties, usually with their attorneys, meet with a third party neutral, the "mediator," in an attempt to settle their differences. Mediation was rarely used before the ADR Act was passed. Today, it has become increasingly popular with both lawyers and clients. The Bexar County District Courts require that all cases be mediated before trial, and mediation is now by far the most popular of the methods being used as alternatives to the traditional trial. Lawyers have generally embraced the procedure and are now agreeing to mediation before being ordered to do so by the Courts. Some lawyers are now urging mediation before a suit is filed. Clients like the mediation process because it affords them more control of their own destiny. Only clients decide whether or not to settle their case at the mediation.

There are no reliable statistics showing what percentage of cases is settled at mediation. A fairly safe estimate would be that 60 to 70 percent of the cases settle during mediation and another 10 percent settle within a few days thereafter as a result of the mediation. The near total absence of jury trials currently would indicate that these numbers might even be higher.

According to a recent article in the *Texas Bar Journal*, Justice Nathan Hecht expressed concern about the trend away from jury trials toward arbitration and mediation. His concern is that this trend may result in there being no further need for trial lawyers, judges and appellate courts. I do not share this concern. The judges' roles are changing, but they continue to play a crucial role in our system. They administer the 35,000 cases filed in the District Courts every year. Frankly, for a long time, jury trials have not been a significant portion of their workload. The judges in Bexar County have always effectively administered our heavy court dockets and generally cases in Bexar County have moved faster than cases in other major metropolitan areas of this State.

The lawyers' role in resolving conflicts likewise is changing drastically. A young lawyer today will resolve many, many more disputes in mediation and arbitration than in traditional trials. In a recent conversation with a young lawyer in the trial section of a major law firm, he corrected me when I referred to him as a "trial lawyer." He indicated he was a not a "trial lawyer," but in fact a "litigator." I told him I didn't really know there was a distinction and he proceeded to tell me that litigators prepare cases for settlement, mediation or arbitration and that very few of his cases today go to trial. He is, of course, correct.

One wonders, at this juncture, if trial lawyers (or litigators, if you prefer) shouldn't really be thinking of themselves as "problem solvers." It may not sound sexy, but it's more accurate and the clients probably would like it better. Clients don't come to us to file suit. They come to us because they have a problem or a dispute that they want resolved — as quickly and economically as possible.

Twenty years ago, arbitration and mediation were referred to as "alternatives" to the traditional methods of resolving legal disputes. Today, trials at the courthouse, jury and non-jury, have become the alternatives. Arbitration and mediation have become the primary methods of resolving most disputes.

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