THE VANISHING TRIAL

An Address by Mark R. Kravitz to the

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The title of my address today is "The Vanishing Trial" – or, as some judges nervously ask, "Can we still be called 'trial judges' if we don't try cases?"

There is no question that the number of trials held each year in courts across the country, both state and federal, is declining at what to some is an alarming rate – all at the same time as nominal case filings are increasing. Personally, I do not view this phenomenon with the same sense of impending doom that many of my colleagues do. Nonetheless, this development has great implications for our justice system. In that sense, I don't think Judge Patrick Higginbotham of the Fifth Circuit was wrong when he observed in an article aptly titled *So Why Do We Call Them Trial Courts?*, that the disappearance of trials constitutes "a change in [the] very architecture" of our judicial system.

Given the limited time available this evening, I will very briefly highlight some of the data illustrating this "change in architecture." I will then focus more attention on the possible causes of this change with the hope that I can interest this group into a more systematic exploration of the causes of the vanishing trial in our own state and possible responses to that development.

I. Numbers

In thinking about the data on the decline in trials, I am reminded of the debate over global warming. I do not for a moment suggest that the vanishing trial phenomenon is anything so cataclysmic as global warming. But there are parallels in the trajectory of the debate over the two issues.

You will recall that at first, there were a few scientists who sounded an alarm about what they saw in the data as an emerging trend. These brave souls, who readily admitted their data was incomplete, were generally met with a mixture of skepticism, criticism and indifference.

There followed a period of further study and debate during which alternative explanations of existing data were offered and additional data was gathered. Indifference gave way to concern. And over time, the emerging trends became too clear to deny (at least for most of us) and attention then turned to the causes of the phenomenon, the harm it might produce and methods for addressing the trend.

The same is true of the vanishing trial phenomenon. While we still need better data, particularly at the state level, the trend is now not in doubt: The number of trials has been declining for three decades in courts across the country, and the disappearance of trials holds true both for state and federal courts, for all regions of the country, for jury and court cases, and for all categories of civil and criminal cases.

I cannot tonight recount all of the data. I urge you instead to go to the ABA Website, which sets forth a considerable amount of data collected in a recent research project funded by the Litigation Section of the ABA. In brief, however, the data shows a remarkably clear portrait. As but one example, in 1962 federal district judges conducted on average 39 trials a year, including both civil and criminal cases – a figure that I personally find astonishing. (They certainly do not make judges today like they used to). By 2002, the average federal district judge presided over only about 9 trials. The decline in the absolute numbers of trials is also mirrored in a decline in the rate of trials, from about 12% of all civil cases in 1970 to approximately 1.8% by 2002.

The data from the District of Connecticut shows a similar downward trend in the number of trials held. In 1995, the District conducted 165 civil trials, while in 2004, it conducted only 82, the lowest number of civil trials conducted in more than a decade. If one includes criminal trials, in 1995 the District conducted over 200 civil and criminal bench and jury trials; in 2004, the District conducted a little over 100 civil and criminal trials. I conducted 10 trials in 2004 – about the national average – and I appear to be on track for another 10 or so this year.

A number of aspects about nationwide data are striking:

- **First**, no region of the country is immune from this phenomenon. Circuit by circuit data shows the same overall pattern, though in varying degrees and at different levels.

- **Second**, the phenomenon is not limited to jury trials. Indeed, bench trials have declined more than jury trials over the relevant period (and that is true for the District of Connecticut as well). Therefore, litigants are not just fleeing juries.

- **Third**, the decline in trials shows up across all categories of civil cases. Thus, for example, where once 1 in 6 tort cases went to trial, now only 1 in 46 proceed to trial.

Unfortunately, the data we have from state courts is not as comprehensive or readily comparable as that from federal courts. That is truly regrettable since state courts conduct significantly more of the Nation's judicial business than federal courts. If we ignore state courts, then, we will be seeing only a very small piece of the picture.

However, the National Center for State Courts has now devoted its considerable resources to the task, and though the Center continues to gather statistics, it has already compiled and analyzed data from about 22 states. These data show that during the period from 1976 to 2002, the number of civil jury trials has fallen by nearly two-thirds in state courts, and the rate of civil bench trials has also steadily declined, to less than one-half of what it was in 1976. As with the federal courts, state courts have experienced the decline in civil trials on both a percentage and absolute basis, and each state studied experienced a decline in trials, underscoring that the vanishing trial is not a regional aberration.

I do not have hard data from Connecticut state courts, but conversations with my state court colleagues in preparation for this talk confirm that they are not immune to this development. It appears, therefore, that litigants intent on obtaining a trial are not turning away from federal courts and toward state courts. Instead, litigants in all courts, in all regions and in all types of cases are increasingly opting to have their disputes resolved without a trial.

The question then is Why?

II. Causes

The truth is that we do not know precisely why at this point. And as was true with global warming, to answer that question in any meaningful manner, we will need much better information than we now have. As I will mention at the end of my talk, I believe the Bar Foundation is well suited to play a significant role in helping us to understand why this is happening. To that end, I would like to touch on some of the possible causes as a way of stimulating interest in the subject.

Caseload Mix and Resources. As an initial matter, it is important to emphasize that the data shows quite clearly that the decline in the number of cases tried is not due to a reduction in case filings. To the contrary, both civil case filings and dispositions have actually increased many-fold in federal and state courts at the same time that both the absolute number of trials and the rate of trials has diminished steadily. Nor do changes in caseload "mix" – or the types of cases – appear to have affected the rate of trials. For example, Professor Galanter in his yeoman work for the ABA study, reports that in 1962 tort and civil rights cases constituted about 38% of the civil docket in federal courts. In 2002, those same categories made up about the same percentages of the overall civil docket, nearly 35%. Yet, during the same period, there was a sharp decline in trials in *both* tort and civil rights cases. Therefore, changes in caseload mix do not appear to have been a factor in the overall decline in trials.

We might also imagine that the demands imposed by the great increases in case filings have so stretched the resources of our judicial system that courts today are simply unable to devote time to trials. Most commentators agree the data does not support that supposition either. The District of Connecticut's experience appears to bear out what most commentators believe. For we have never had more judicial resources, counting active, senior and magistrate judges. One might suppose, therefore, that we would be trying more and more cases. But we are not. As a consequence, available resources are not a likely cause of the vanishing trial development.

Increased Use of Summary Judgment. Some commentators, most notably Professor Arthur Miller, have argued that the decline in trials in federal courts is, at least in part, attributable to the increased use of summary judgment to dispose of cases. For example, Judge Posner has commented on what he believes is a "drift in many areas of federal litigation toward substituting summary judgment for trial."

The question is whether that is an occasion for celebration or concern. And to answer that question we need much better data than we currently have on the frequency of summary judgment. (The FJC has embarked on such a study). The national data we have is only fragmentary. However, it suggests that summary judgments have increased relative trials as a means of disposing of cases.

Based upon data collected by my colleague Judge Arterton, that appears to be the case in the District of Connecticut. Her data reveals that more cases in our District are disposed of today by summary judgment than by trial – indeed, two and one-half times as many cases are disposed of on summary judgment than proceed to trial, a figure that is somewhat higher than it was just four years ago.

Therefore, increased use of summary judgment is likely to be at least one factor contributing to the decline in dispositions by trials. It would be unfair, however, to focus solely on the summary judgment procedural tool and ignore the underlying substantive legal changes that have undoubtedly affected the rate at which summary judgment is granted. For example, Congress' enactment of the Prison Litigation Reform Act – with its strict exhaustion requirements – and the Private Securities Litigation Reform Act – with its tighter scienter requirements – have each allowed an increasing number of prisoner and securities cases to be disposed without trial. Judge-made developments in the law of qualified immunity and collateral estoppel have also allowed – indeed urged – courts to dispose of cases short of trial – Not to mention Supreme Court decisions such as *Daubert* and *Markman*.

I am certain I have not exhausted the list of substantive legal developments one could mention. The key point, however, is that while we can all easily fashion a long list of doctrinal changes over the last three decades that have allowed or even encouraged courts to dispose of cases short of trial, we would have greater difficulty conjuring up a similar set of developments

that have led to more trials.

Costs. Most observers identify litigation costs and discovery as among the chief reasons contributing to the decline in civil trials. As Professor Samuel Gross of the University of Michigan School of Law bluntly put it: "The striking problem is that we have generated a procedure that is way too expensive if actually employed."

Judge Higginbotham claims that the costs of discovery incent litigants, particularly institutional parties, to turn away from courts. Of course, one might also argue that liberal discovery has allowed parties to know the strengths and weaknesses of their cases, thus arming them with the information needed to make intelligent choices about settlement versus trial. In other words, discovery might well lead fewer trials but not because of cost but rather because of the information exchange it fosters.

Judge Higginbotham also emphasizes another, less tangible and far more troubling cost of our current civil justice system – one that he terms the "indeterminancy of normative rules now deployed in civil trials." He believes that the normative rules we ask judges and juries to apply operate at a "level of generality that erodes predictability of results and produces random outcomes."

He mentions as but one example Rule 402 of the Restatement of Torts, which asks jurors to decide if a product is defective by weighing its social utility against its risk of harm. Numerous other examples also come to mind. "The relevant point," says Judge Higginbotham, "is that the decline in trials is created by the high cost of indeterminancy and in turn reinforced by declining trials - a growth that feeds on itself."

Beliefs About Juries. In a related vein, the decline in trials may also be a product of the beliefs of lawyers and litigants about juror competence (or incompetence), though I hasten to emphasize that litigants have been opting against bench trials at least as much as jury trials. It would be naive, however, to suppose that widespread beliefs about juror competence do not play at least some role in litigants' decisions about trial. Whether those beliefs are well founded is, of course, irrelevant. Misconceptions drive public opinion and choices as much as, if not more, than truths.

Several factors contribute to such views. For one, it is well documented that large (and

oddball) jury verdicts receive a disproportionate amount of media coverage, and this contributes to a view among litigants that proceeding to trial before a jury is a bad gamble. Add to that, some of the empirical data on juror attitudes that receive widespread publicity: For example, a 2000 survey by the *National Law Journal* of 1000 respondents, most of whom had served on juries, revealed that nearly 30% said they could not, *and importantly would not*, be impartial if a corporation or corporate executive were a party to a case. Little wonder then why corporate litigants get weak-kneed when approaching a jury trial.

Emphasis on Case Management and Settlement. Changes in the *Federal Rules of Civil Procedure* and in the judicial culture in the 1980s and 1990s have led to an increased emphasis on case management and settlement. This change in emphasis has also coincided with some of the most dramatic declines in civil trials, leading many to believe that judges now view their principal mandate as disposing of cases as soon as possible, rather than as trying cases. As a consequence of this emphasis on settlement and early disposition rather than trial, many courts began to offer, or in some instances require, court-annexed ADR as an integral component of the judicial process. Also, during this period, the role of federal Magistrates has morphed into one that more often than not is focused on settlement.

Based on the data, it appears that these efforts at encouraging early resolutions have succeeded. For example, case terminations in federal court during the earliest phase of a judicial proceeding increased from 20% in 1962 to nearly 70% by 2002, with the largest increases occurring in the mid-to late 1980s, coincident with changes in rules and attitudes regarding case management.

Not only have these efforts resulted in more settlements and therefore fewer trials, but more importantly, I believe that the emphasis on case management and settlement has also changed our legal culture. Today's lawyers and institutional litigants view trial-oriented litigation as only one of many ways to resolve disputes; compromise is often seen by this new generation of lawyers (whom some derisively call "litigators," not "trial lawyers") as producing better justice, with faster, fairer and longer-lasting results.

I should note that more than a few scholars have long suggested a contrary view – that is, that increased judicial management and emphasis on settlement have actually undermined the

values our civil justice system is designed to reflect. Professor Resnick of Yale is one of them and she challenges us with this question:

> [T]he claim that "the more dispositions, the better," raises difficult valuation tasks; decisionmaking must be assessed not only quantitatively, but also qualitatively. On any given day, are four judges who speak with parties to sixteen lawsuits and report that twelve of those cases ended without trial more "productive" than four judges who preside at four trials?

For better or worse, however, the *Federal Rules* currently embrace the role of Managerial Judge, and each year's crop of newly confirmed District Judges is schooled in that role at the FJC's Judge School. I am certain the same occurs in state court. Thus, for now at least, the judge as promoter of settlement and efficient manager of cases is ascendant both in federal and state court, and undoubtedly this has affected the number of cases that ultimately proceed to trial.

ADR. Finally, any discussion of the decline in trials would be incomplete without a reference to private ADR, although given the declines in trials, it may be more appropriate these days to view trials as the Alternate Dispute Resolution Mechanism and arbitration and mediation as the regular (not alternate) method of dispute resolution. It is important to keep in mind, however, that the data I discussed earlier involves *filed* cases – that is, cases that have been filed in courts rather than directly before private ADR providers. Thus, the growth of private arbitration and mediation cannot explain what is happening to cases once they get into the court system.

Whether private ADR is shunting away large numbers of cases that otherwise would be tried is a different question and difficult to document. It appears that private providers have experienced increases in filings over the last decade. It is debatable, however, how large that growth has been. I personally doubt that private ADR is responsible for siphoning off large numbers of otherwise triable cases from courts' trial dockets.

Nevertheless, the available data on what actually happens in arbitrations may be instructive as we consider why cases in the judicial system do not proceed to trial. At the request

of the ABA, my former partner Jack Dunham of Wiggin & Dana and David Geronemus of JAMS comprehensively examined arbitrations and judicial proceedings in state and federal court involving 30 well known franchisors. What they found may strike you as surprising:

> ***First***, they found that arbitrations were far more likely than lawsuits to proceed to final disposition. In excess of 75% of all franchise lawsuits settled without trial, whereas only about 40% of franchise arbitrations settled before decision. Thus, the participants in arbitrations were far more likely than their judicial system counterparts to opt for a judgment rather than a settlement.
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> ***Second***, franchisors – the defendants – were on average less successful in arbitrations than in lawsuits. In trials in federal court, bench and jury, franchisors prevailed about 60% of the time, while during the same period franchisors won only about 33% of the arbitrations that proceeded to decision.

While admittedly limited, this study's results suggest that it may not be a preference for compromise over judgment – or even a fear of losing – that drives corporations to opt for private arbitration over judicial proceedings or to prefer settlement over trial, whether bench or jury. Instead, the answer may be found in three features of our current judicial regime that are generally (though not always) absent from the arbitral process: (1) lengthy and costly discovery and motion practice; (2) intensive case management coupled with an institutional emphasis on settlement; and (3) out-sized verdicts, particularly large punitive damage awards.

III. Implications

Just as there are a variety of opinions on the causes of the decline in trials, so too is there a debate about whether the disappearance of trials is a negative development or not. The positions literally range from what I would call a "Sky is Falling" lament to a shrug of shoulders "So What?" though I hasten to add that few in this debate profess to believe that increased settlements are necessarily bad.

I would like to suggest to you that neither of the extreme positions in this debate is right.

That is, I do not believe that this development augurs the end of democracy as we know it. But neither am I prepared to write it off as inconsequential. To the contrary, I believe this development is significant, and it is one that we all should consider and discuss. For, in the end, this issue requires us to consider and then articulate precisely what we expect from our judges and our court system.

IV. Conclusion

As I mentioned at the outset, to answer that question we need more information than we currently have about the causes of the decline in trials, and we certainly need more information before we even think about undertaking any major institutional changes to respond to this development. In closing, therefore, I will mention just a few areas where I believe the Connecticut Bar Foundation – with its commitment to research, education and discourse among the bench and bar – could play an important information-gathering and discussion-promoting role:

- **We need to know more about why litigants settle cases or opt for private ADR**.

If parties are settling cases or choosing private ADR because they have negotiated a resolution that they believe is a sensible and just outcome, then no one would want to make changes that would discourage such results. However, if most litigants are settling cases or opting for ADR because the cost of continuing with court-based litigation is too high, the timetable to verdict is too long and the result at trial is too irrational, then settlements and ADR constitute an indictment of our judicial system, and we must take steps to remedy those defects if we can. At this point, we have only anecdotal information about what motivates litigants and therefore, we cannot possibly draw conclusions one way or the other.

- **We need to gain a greater understanding of how many cases should go to trial? Was our law better developed when 12% of our cases were disposed of by trial?**

We probably would all agree that adjudications of some kind are needed to allow the law

to develop. If all cases are resolved in private arbitrations or by settlements, courts do not have the opportunity they need to develop the law in a sensible and systematic manner. But is there any real danger of that happening? The federal courts are still conducting over 12,000 civil and criminal trials a year. And state courts are still trying many thousands more. Add to that the myriad pre-trial rulings that are published annually, and it would seem that we have a more than sufficient number of adjudications to allow parties to learn the true value of their cases and courts to develop the law in a meaningful fashion. However, we need empirical information about whether the decline in the number of trials has had any meaningful effect on the development of our law.

- **We need to take a closer look at the impact of efficient case management techniques on the willingness of parties to proceed to trial**.

In my own view, efficient case management ensures that parties have the information they need to evaluate their case at an early stage, and while it is possible that this leads to earlier settlements, if litigants are settling for the right reasons fully armed at an early stage of the case with the information they need to make informed choices, it is not clear to me that there is a problem with good case management. On the other hand, if litigants and the bar feel beaten down by constant judicial emphasis on settlement rather than trial, that is something we must address.

- **Finally, the information we have on summary judgment is too insubstantial to allow us to draw any conclusions about that procedural device**.

It may be that summary judgment usage has increased. However, none of us would want the alternative of convening jurors in cases where there is, in fact, no genuine issue of material fact and one side or the other is entitled to judgment as a matter of law. It is not enough, therefore, to know that summary judgment has increased. We also need to get some sense about whether there is widespread *abuse* of summary judgment by courts. And without that

information, it is too premature to indict summary judgment, let alone propose fundamental changes in the procedure.

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I could go on, but I have already occupied too much of your time. And, truth be told, we are unlikely to resolve this debate this evening. However, it is a debate that needs to take place within groups like this and beyond, since the disappearance of trials – regardless of its cause – has obvious and significant implications for the judiciary, the bar and for law schools as well. I hope that this brief talk has stimulated the Bar Foundation and each of you to join in that debate.