571 LOGAN STREET, DENVER, COLORADO 80203 | 303–292–1212 | www.LAWWEEKONLINE.com VOL. 08 | NO. 17 | $6 | APRIL 26, 2010

LAW WEEK COLORADO

SPOTLIGHT ON LITIGATION

The Disappearing Jury Trial

By **Timothy O'Neill and Nathan Davis**
SNELL & WILMER

This "Spotlight on Litigators" edition of *Law Week Colorado* affords the opportunity to explore the vitality of one of the hallmarks of the American system of justice – trial by jury. In 1787, Alexander Hamilton issued Federalist Paper No. 83, in which he developed arguments touching on the importance of trial by jury, particularly in civil cases. He characterized the prevailing viewpoint: The right to trial by jury is an essential safeguard to liberty, if not the "very palladium of free government." By August 1789, this core principle was embodied in the seventh amendment to the Constitution of the United States. From the earliest days of the American civil justice system, we have valued and safeguarded the ideal of open justice in public courtrooms with a jury of our peers as a bulwark against the state.

Why then, do we observe the paradox in recent years of an ever-increasing number of lawsuits filed, yet a corresponding decrease in the number and percentage of matters tried to a jury? In a 2004 study, the Rand Corp. noted that there is "growing evidence that the trial is disappearing." The study notes that trials in virtually every substantive category – both civil and criminal – have steadily declined.[1] In the 20-year period from the mid-1980s to 2004, there was nearly a 63% percent drop in the number of federal civil trials, with only 5,500 reported across the U.S. in 2004.[2] Only 1.2 percent of the 263,049 federal civil cases that terminated in the 12-month period ending September 30, 2009, did so after reaching trial.[3] It has been reported that between 1976 and 2003, the number of state civil jury trials dropped 34%, even as the volume of civil cases rose 165% during the same period.[4] This trend has not eluded Colorado. Of the 65,909 civil cases that disposed of in Colorado district courts in 2009, only 297 concluded by way of jury trial, or less than one half of one percent. (0.45%). [5]

Tracing the root cause of this trend has been controversial, and the question remains unsettled. According to one observer, the shift from trials as the central icon of federal courts to a "settlement culture" may be traced back to Chief Justice Warren E. Burger, consistently an advocate of ADR and the concept of managing litigation toward settlement.[6] This approach has its supporters and critics. One commentator suggests that the expansion of discovery and use of magistrates has had the unintended consequence of turning "discovery into the end-game" not the trial.[7]

Although judicial efficiency and speedy resolution of litigation remain necessary goals, there is certainly room to argue that we may have gone too far and have lost a clear understanding of the central importance of civil jury trials as part of the very core of our system of justice. Some in the judiciary share this concern. U.S. District Judge David Hittner of the Southern District of Texas has noted that: "There is so much settlement and arbitration that we are losing sight of the basic right of trial by jury."[8] U.S. District Judge William G. Young of District of Massachusetts, a leading proponent of the jury trial system, wrote several years ago in an open letter to U.S. District Court Judges:

> Of course, most cases ought settle. Of course we must embrace all forms of voluntary ADR. Of course we must be skilled managers. But to what end? To the end that we devote the bulk of our time to those core elements of the Article III Judiciary – trying cases and writing opinions.[9]

Attorney Patricia Lee Refo, former chair of the ABA Litigation Section and promoter of the ABA Vanishing Trial Project, doesn't mince words either. Agreeing that there is a balance to be found between cases that are tried and cases that are not, she noted in a 2004 ABA article that only 1.8 percent of federal cases went to trial: "We can with confidence say that whatever the 'right' balance is, that isn't it."[10]

The consequences of this trend seem to suggest at least two distinct risks. First, has our system so minimized the role of trial by jury in civil matters that we risk loss of trust among our citizens that this is an important and vital role in deciding disputes in an open and just manner? Stated differently, are we moving farther away from the shared belief that the justice system serves the people because ultimate questions of disputed fact are resolved by unbiased juries of our peers? If the numbers of our citizens participating in the justice system as jurors is so diminished, is this another loss of transparency to outsiders in the justice system?

Second, has the experience become so rare that a new generation of lawyers has almost no meaningful experience in the art of trying a case to a jury? In a 2005 Wall Street Journal article, a general counsel noted that: "There are a lot of name-brand firms with big litigation departments, but never go to trial and are petrified of it."[11] Another commented: "A number of large firms have lost their trial edge."[12] Firms have gone to great lengths to facilitate trial experiences: pro bono prisoner cases, mock trial programs, even paid leave to work for non-profit organizations that offer more courtroom time. All of this helps, but the truth remains that the number of lawyers with seasoned courtroom experience is diminishing and further threatens the institution of the jury trial. This is not an effort to lay the blame for this trend at the feet of trial courts, who struggle mightily with increasing case loads and administrative demands. Instead, it a suggestion that we collectively evaluate the current system and find a way back to a more appropriate balance. As the former chief justice of the South Carolina Court of Appeals, Hon Alex Sanders, suggested:

> Trial judges should return to being trial judges, instead of docket managers. They should start treating jury trials as a vindication of the justice system rather than a failure of the justice system. They should revere and respect jury trials as the centerpiece of American democracy.[13]

The solutions are no less controversial than the causes of this trend: adequate funding of the judiciary, reducing the expense of getting to trial (i.e., discovery and motion practice), making trials faster and more streamlined. Again, all appropriate points for discussion, but let's at least engage in the discussion before a very important aspect of our civil justice system is lost. •

1 **Hon. Patrick E. Higginbotham**, "The Disappearing Trial and Why We Should Care," The Rand Corporation, Summer 2004.
2 Nathan Koppel, "Trial-less lawyers: As More Cases Settle, Firms Seek Pro Bono Work to Hone Associates' Courtroom Skills," Wall Street Journal, December 1, 2005, at B1.
3 U.S. Courts Website (www.uscourts.gov/judbus2009/appendices/C04Sep09.pdf).
4 Nathan Koppel, *supra Note 2.*
5 Colorado State Judicial Branch Website (www.courts.state.co.us/Administration/Custom.cfm/Unit/annrep/Page_ID/268).
6 See Delaventura v. Columbia Acorn Trust, 417 F.Supp.2d 147, 151 n4 (D. Mass. 2006).
7 **Honorable Patrick E. Higginbotham,** *supra Note 1.*
8 Nathan Koppel, *supra Note 2.*
9 Hon. William G. Young, "An Open Letter to U.S. District Judges, *Fed. Law. July 2003.*
10 Patricia Lee Refo, "Trial Rescue", ABA Litigation, Spring 2004.
11 Nathan Koppel, *supra Note 2.*
12 Nathan Koppel, *supra Note 2.*
13 Hon. Alex Sanders, "Ethics Beyond the Code: The Vanishing Jury Trial," Address to ATLA, Dec. 2, 2005.

Dozens aided ID effort

The Homeless ID Task Force won the award for Task Force of the Year. Tim Macdonald of Arnold & Porter accepted the award on behalf of the Homeless ID Task Force — 32 lawyers who volunteered their time last year to help indigent clients get the government identification they need to receive public benefits.

Snell & Wilmer's Jim Kilroy talked last month about his firm's involvement in the task force, saying it's not as easy as it might seem to get a legal name change or birth certificate.

"In some cases we've had to proceed to file lawsuits when we've had difficulties getting our clients through the administrative process," he said.

Finally, Denver attorney and author Harry MacLean gave the keynote address, discussing his recent book "The Past is Never Dead: The Trial of James Ford Seale and Mississippi's Struggle for Redemption," which deals with a former Klansman's 2007 conviction of murdering two black teens 43 years earlier.

Connie Talmage, executive director of the lawyers committee, and Kenzo Kawanabe of Davis Graham & Stubbs, the committee's board chair, hosted the ceremon. About 500 attedned, including most of the state's Supreme Court.