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# *Red Ink and Red Tape: Understanding the Challenges in our Current Civil Trial System*

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Our nation's economic turmoil and the subsequent slashing of state budgets are causing seismic changes in our court system, delaying or even cancelling trials across the country and prompting litigants to make difficult decisions about their cases. This crisis also provides us an unprecedented opportunity to examine the effectiveness and efficiency of the civil justice system, allowing us to improve the civil litigation process.

## *What is the effect of state budget cuts on the courts?*

Los Angeles has the largest court system in the United States. In 2009, California's judicial branch saw a $676 million reduction in funds, even as more and more new cases came in. In a 2010 edition of the View from the Bench newsletter prepared by the Supervising Judge of the Los Angeles Superior Court Civil Division states:

> *"Ultimately, 1,800 employees, or one-third of the court work force, will have to be laid off for the court to live within its reduced budgets. Without these necessary employees, it will be impossible for the court to maintain its current level of operations. On average, 10 employees are required to support a courtroom, including in-court personnel as well as back-office staff for such functions as filing window, file maintenance, copying services, imaging, information technology, accounting, and jury services, among others. The layoff of 1,800 employees will require the closure of some 180 courtrooms. Because criminal cases and many family law and juvenile cases have priority over civil actions, the heaviest burden of court closures will fall on our civil courts. Due to the financial crisis, it is anticipated that the superior court will most likely have to shutter over one-half of the civil courtrooms. As a necessary consequence, inventories of cases in the remaining courtrooms will increase enormously, resulting in greater delays in bringing cases to trial and having motions heard."*[1]

  

In 2009, 27 states saw court budgets reduced, with another 12 states expecting budget cuts in the future. Hiring freezes have been enacted in 28 state courts, and 13 state courts have implemented salary freezes – Delaware, for example, had a hiring freeze on all non-security positions. Seven states encouraged judges and staff to accept salary reductions or have enacted salary reductions. Six states mandated furloughs of court staff, and another six states reduced their court hours. Minnesota had to do both, with court hours being slashed and public counters shutting down for a half day each week. Some states were forced to reduce staff – Florida had to lay off 280 court employees. In New Hampshire, Superior Courts said they would cut about a third of their jury trials in the coming year in order to save approximately $280,000 for the state budget. 2008 saw the number of inadequately funded courts rise by 20%. Today, over half of all courts in the country are not fully funded.[2]

These cuts don't just affect employees or operating hours. The Boston Bar Association pointed out that these cuts actually threaten public safety. Because many courts have been forced to reduce all staff, including security, many courtrooms are left with no court officers, creating a significant security risk for judges, litigants, witnesses, court staff, and the public.[3]

Money problems aren't the only issue courts are facing – there's also a lack of jurors. A Los Angeles Times reporter watched a Judge grant hardship dismissals for more than half of the 65 people sent to his courtroom. After three straight days of hardship excuses and empty seats on the jury panel, lawyers for both the plaintiff and defendant waived their right to a jury trial and instead opted for a bench trial. In the courtroom next door, 66 of 107 prospective jurors were excused for financial difficulties before voir dire even began. Los Angeles, one of the highest cost of living cities in the United States, pays jurors only $15 a day, barely enough to cover lunch and gas. "There's a lot of tension, a lot more stress people are dealing with these days," said Gloria Gomez, director of juror services for the Los Angeles County Superior Court.[4] This same scarcity of jurors has played out in both Michigan[5] and Texas[6] trials, as well as throughout the country.

In addition, there is concern that court budget cuts may also be unconstitutional. Reduced court budgets can affect a defendant's right to appear before a judge within 48 hours of an arrest, the right to have an attorney appointed if a person can't afford one, and the ability to apply for temporary protective orders in domestic violence cases. After DeKalb County in Georgia approved a cut in its court budget, DeKalb Chief Superior Court Judge C.J. Becker had a strong reaction.

> *"Gutting [Superior] court 17 percent is unconstitutional and irresponsible. That means the poor won't have representation. That means those folks will stay in jail. The unfunding of the courts in DeKalb County will mean this will be the county where you don't have constitutional rights 24/7."*[7]

As the courts become more affected by state budget decisions, these problems will worsen. People will continue to file lawsuits, causing even greater pressure on an already strained system. As courts scale back operating hours and staff, the buildup of lawsuits will further clog the system. The economic and state budget crises have made things a lot worse, and in doing so they have exacerbated the rampant inefficiencies in the justice system that make litigation so costly and protracted.

  

## *How efficient and effective are our current civil courts?*

On May 10-11, 2010, Duke Law School conducted a symposium to specifically examine the challenges facing both plaintiffs and defendants in today's courtrooms. As part of this symposium, the Institute for the Advancement of the American Legal System conducted a survey of Chief Legal Officers and Legal Counsel to gauge their opinions of our current civil system.

When asked about their current views, a majority of the respondents felt that the civil justice system was "too complex" while more than 90% agreed that the civil justice system took too long and was too expensive. Importantly, over 80% don't believe that the merits of a case drive the outcome of the case or that litigation costs are in line with the value of the case. This suggests that the fears, risks and idiosyncrasies of trials drove counsel's estimation of settlement and verdicts. Said one respondent in the survey:

> *"The plaintiff[s] lawyers take the tactic of suing as many defendants as possible under as many legal theories as possible to see what sticks . . . The defense attorneys, billing at an hourly rate, benefit [from the resulting] broad discovery and the amount of time and effort it requires . . . The judges . . . often do not grant motions . . . that could serve to whittle the complaint down to the true cause of actions [or] act to sufficiently limit discovery. By freely granting motions to continue, they allow the cases to drag on for years . . . ."*

Corporate counsel also expressed a desire for streamlining and specialized courts to deal with the complexities of business litigation. One of the frustrations is the prolonged discovery process where two thirds of respondents felt that discovery focused on the core issues of the case infrequently or less than half of the time. Said one respondent:

> *"I find that judges (at least state court judges) handle too few business cases to really be familiar with contract and commercial law. They are too busy with their criminal dockets to really pay attention to the evidence (which is often complicated) put before them on a contract or commercial matter."*

All in all, the study expresses what seems to be a consensus among those that engage in the litigation process: the desire for more consistency, more planning and more information in order to accomplish greater efficiency.

Even before the current fiscal crisis, the average time to get to trial in a civil case could be two to three years, depending on the jurisdiction. Although there are fast track jurisdictions, and some courts have increased their efficiency in bringing cases to trial, current cuts in state budgets will surely increase the time it takes to get a case in front of a jury. When a case is finally assigned to a courtroom, the trial can often be continued more than two or three times, either because of caseload conflicts with the Court or because of the schedule of the attorneys and their witnesses. In some cases, after a case has been prepared for trial, the case can be transferred to another judge with a different outlook on the case. Attorneys may then have to scramble to re-prepare their case because of new rulings from the current judge. With the current cutbacks in the courts, these delays will be extended as criminal and juvenile matters take more precedence in the current courts.

  

When a trial finally does start, the average amount of actual court time can be only three to four days per week, three to four hours per day. Some of these scheduling difficulties are a result of union limitations on the work hours of courtroom staff. Once the judge's, counsel's, or jury's needed days off are factored in, a relatively simple matter can stretch into weeks of trial.

These extended trials have had a significant impact on litigation decisions because they make the prospect of going to trial a tremendously expensive choice for both plaintiffs and defendants. A National Law Journal article titled Life in the Doldrums Continues for Civil Litigators describes how the recession affected various parties' decisions to go to trial and why litigants are so reluctant to file suits. The article states:

> *"What happened, according to law firm litigation department heads interviewed by the NLJ, was that corporate clients worked to control costs by waiting to file suits. They likely will continue do so through the first half of 2010, said Peter Haveles Jr., co-chairman of Kaye Scholer's complex commercial litigation department. 'Part of it is deferring activity and not necessarily commencing a lawsuit if you can sue now or a year from now,' he said.*
>
> *"Steven Yerrid of The Yerrid Law Firm in Tampa, Fla., concurred with Haveles' assessment. 'In tough economic times, people are going to look at the efficiency of taking a case through the full cycle of litigation,' he said."*[8]

Unfortunately, we have come to accept these delays and the expense as "the cost of doing business" in the civil litigation system. But are they necessary? What are the practical effects of long, protracted litigation battles and trials?

These delays undoubtedly make litigation more expensive. Plaintiff attorneys must make a business decision based on their belief in whether they can ultimately prevail in the case as well as whether they can settle quickly, or whether the verdict in a lengthy litigation matter will be worth their time.[9] Corporate and defense counsel also make business decisions about whether to fight or resolve a case based on how long it will take to bring it to trial. Because of cutbacks in the courts, heavy caseloads and resulting continuances, defendants in civil suits are paying attorneys to prepare for trial two, three or even four times, not to mention the hours waiting in court for motions to be heard. For those working on contingency, these continuances make it harder to take new cases as the attorney's case and work load increase.

The irregular scheduling of many trials can also create comprehension problems for a jury. Research shows that juries (and judges) process information in a narrative model and not in a compartmentalized, linear fashion. As a result, skipped days, long breaks, and witnesses taken out of order make it harder for a jury to formulate a cohesive story of the case, which may lead them to misremember or misunderstand key evidence.

In some of the various conferences addressing these challenges, there has been an expressed desire for Judges to take a stronger hand in controlling the litigation by placing stricter limits on discovery. However, judges are often deciding rulings on a number of cases involving different types of litigation such as product liability, medical malpractice, premises liability, and contract issues. As a result of the sheer volume of their caseload, there is pressure for them to push parties to settle a case. Since they are conducting motions and hearings on multiple matters and conducting trials during the

day, they are then pushed to read and research multiple cases at night. This full docket makes it difficult for them to control the litigation with a great deal of scrutiny.

In the civil justice system, there are often complaints about juries in a specific venue being particularly pro-plaintiff or pro-defense. As a result of perceived unfairness they may receive at the hands of a specific judge or jury, plaintiff and defense counsel may become more concerned with the appellate record than with presenting their case in order to get a meaningful, thoughtful resolution from the jury. Thus, they end up making more motions and presenting more experts in order to preserve their record for appeal. While this presentation of extra evidence may give a jury a more comprehensive view of the issues in a case, it may also confuse them and distract them from some of the key evidence in the trial.

## *What is the quality of information we use to predict trial outcome and manage risk?*

Effectively managing litigation entails risk evaluation. How will jurors apportion fault and award damages in a car accident to a plaintiff who was slightly over the speed limit and suffered a mild brain injury? Will they find a key expert credible? Will they find an email between the parties in a contract dispute to establish an agreement?

Litigants and attorneys often engage in forecasting future trial outcomes using their personal experience with similar cases, prior jury verdicts, and by guessing how they think the case facts will play out in trial. Some research has shown that these outcome predictions often dictate settlement of a case.[11] A recent study indicates that attorneys are erratic when predicting the outcomes of litigation, both in achieving their litigation goals and their chances of success.[12] Only 32% of cases matched the minimum goal set by the attorneys. 24% exceeded their goals and 44% failed to reach their estimated goals. One of the interesting findings in this study shows that an attorney's years of experience had no effect on their ability to predict the outcomes of a case.

Counsel also uses past jury verdicts or settlements as way of determining their risk, case value, and whether to take a case to trial. They will look at the past record of opposing counsel, how jurors have decided cases involving similar issues, and attempt to find out settlement amounts of similar cases. They then factor this into their thinking about the perceived strength of their evidence, their expert reports, the credibility of their witnesses, the current economic pressures they are experiencing as well as how the case settlement may affect the value of future cases.

One study shows that litigants who use past trial outcomes to set their beliefs about trial award expectations will consistently overestimate the size of the award and incorrectly evaluate who is likely to win the case.[13] These studies suggest that litigants consistently use biased, flawed and incomplete information to value, settle and try cases.

While review of prior verdicts can be combined with an analysis of the case evidence, expert opinions, strengths of witnesses, opposing counsel and judicial disposition, one of the great unknown factors in any trial risk analysis is, "What will a jury ultimately do with this case?" This question is routinely addressed in settlement discussions and mediations, in conference rooms and courthouse corridors. For those who truly want to evaluate the risk of going to trial, how well can we know what a jury would do with a case?

  

To answer this question, some attorneys conduct focus groups or mock trials and some even employ "shadow jurors" to sit in the courtroom and give feedback on how they see the case being tried. No doubt this research gives attorneys valuable feedback about which issues drive juror decisions in their cases and how to adjust their trial presentations accordingly. However, the response from focus group and mock trial jurors ultimately depend on the presentations they are given from the side that hired them and future predictions about judicial rulings on the scope of evidence. Shadow jurors usually give incremental feedback on how they see the evidence unfold in the courtroom – what they thought of opening statements or how a particular witness performed. When we are evaluating the risk in case, how well are we anticipating the vast number of legal and extra-legal issues that can affect the outcome of the case, whether it be judicial inclination, evidence impact, witness and attorney performance, community and cultural values, news events related to trial issues or jury expectations, experiences and attitudes?

## *How well armed are jurors to make the most informed decisions about a case?*

*"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." - Thomas Jefferson*

*"When you go into court, you are putting your fate into the hands of twelve people who weren't smart enough to get out of jury duty." – Norm Crosby*

These two quotes demonstrate our combined hope and skepticism about the jury system. As one of the key mechanisms of democracy, the jury system is the embodiment of our rebellion against the tyranny of monarchs deciding whom to send to prison or favor in disputes about property or money. The jury is a proverbial check on unbridled power. Yet, we criticize our jury system on a regular basis. The tort reform movement condemns juries for what they call "runaway verdicts". Juries are routinely criticized for their ignorance in complex civil matters and reviled for acquittals in high publicity cases. Yet, we revere the rights a jury system affords us. In fact, The American Judicature Society published an article last year where a study shows that a majority of litigants still favor a jury over a judge.[14]

Despite a vast wealth of social science research about psychology and practices that increase juror comprehension and participation in trials, we still tend to conduct trials the same way we have for more than 200 years. That is, jurors are passive observers who neutrally listen to case facts and objectively render an impartial decision, not unlike computer processors that calculate an evidence algorithm to come up with answers to verdict questions. Of course, those that routinely try cases know this is a fallacy. But, the courts still operate procedurally under this fallacy.

Despite the strong attachment for this passive jury role, some strides have been made to address the gap between the cognitive needs of jurors and the procedural limitations of trial. Some of these reforms include allowing jurors to ask questions during the trial. Some judges give jurors exhibit notebooks, pre-instruct on the law and allow attorneys to give summary statements to help jurors understand complex testimony and how it applies to the case. Three states now allow jurors to discuss the case prior to deliberations. But these reforms are used sparingly[15], hampering the kind of participatory learning that increases juror comprehension.[16]

  

This fundamental misunderstanding about the static model of how jurors look at, listen to and decide cases also prevent us from sometimes getting the most accurate information about what really motivates a jury to find for a party or award damages. This information gap creates myths about juries that affect the advice that attorneys give their clients and ultimately their decision to settle or go to trial.

Why don't we employ better trial communication techniques to enhance the learning experience of jurors? We place great importance in the law on procedural accuracy. Procedures in the courts are mainly conducted in an authoritarian rather participatory manner. When courts started allowing jurors to ask questions, there were concerns that the questions would be disruptive to the proceedings and allow jurors to control the trial, rather than the lawyers and the Judge. There have also been concerns about jurors pre-judging the case or using information outside of evidence to influence their verdict. These concerns have been alleviated by numerous studies showing that these reforms meaningfully increase jurors' understanding of the case.[17] As a result of increased participation and comprehension, the main benefit of these reforms is that they significantly increase a juror's satisfaction with their jury experience.[18]

## *How well informed are we about our jurors?*

We also have limited information about our individual jurors and which experiences and attitudes will affect how they listen to the case. Can the juror who has had a terrible experience with a doctor or hospital be a fair and impartial juror in a medical malpractice case? While the courts routinely ask jurors to "set aside" any experiences or beliefs they may have, there is a host of psychological literature, which says this is a difficult, if not impossible task. In fact, ordering jurors to suppress their bias may in fact amplify them.[19] Why don't we get better information from jurors about their background and opinions? Are we concerned that if we take ask too many questions about a juror's attitude or life experiences, we will never be able to find a jury that can be truly fair and impartial? The courts, in their quest for orderly, rational, and objective fact finding have always had an uneasy relationship with the intangible psychology of defendants, witnesses and jurors. These limits are amplified by administrative necessities as jury commissioners struggle to get enough jurors to show up for jury service. As a result, both the courts and attorneys either limit their questioning of jurors or apply stereotypes to jurors in lieu of the deeper information about how a juror's experience or beliefs may shape how they see the case. This leads to many jury selection myths about jury profiles, leading many to still rely on demographic stereotypes.

These stereotypes affect not only jury selection but also how attorneys view their cases. Cases are routinely settled based on how attorney's and their client's speculation about how sympathetic a plaintiff may be, how a jury will view a given witness, or the strength of the attorney's presentation or track record. Depending on the case and the jury, certainly some of these musings may be valid and accurate assessments. However, if we allow these stereotypes to determine how much money we are willing to accept to settle a case, is this a systematic and reasoned evaluation of what that case is truly worth?

  

## *Conclusion*

All of these challenges in our civil courts contribute to the phenomenon of "the vanishing jury trial."[20] Risk and uncertainty all contribute to the settlement of cases. While ADR certainly has provided excellent tools for resolving disputes today that previously would have gone to trial, no doubt the fear of juror unpredictability causes many cases to resolve. Do we need to consider a jury trial a last resort or necessary evil?

We have come to accept that there is little we can do to improve how we conduct civil jury trials. That administrative pressures, procedural protocols, facile labels, and a "roll of the dice" rather than factual merit are an inevitable by-product of civil trials. While some of these extra-legal pressures are unavoidable, is this really the best way to resolve disputes between individuals, organizations, institutions, and companies? How can we use juries and trials to more effectively and efficiently resolve and try cases? These questions must be addressed in order to restore confidence and utility to a unique system that guarantees all citizens a Seventh Amendment right to resolve disputes.

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