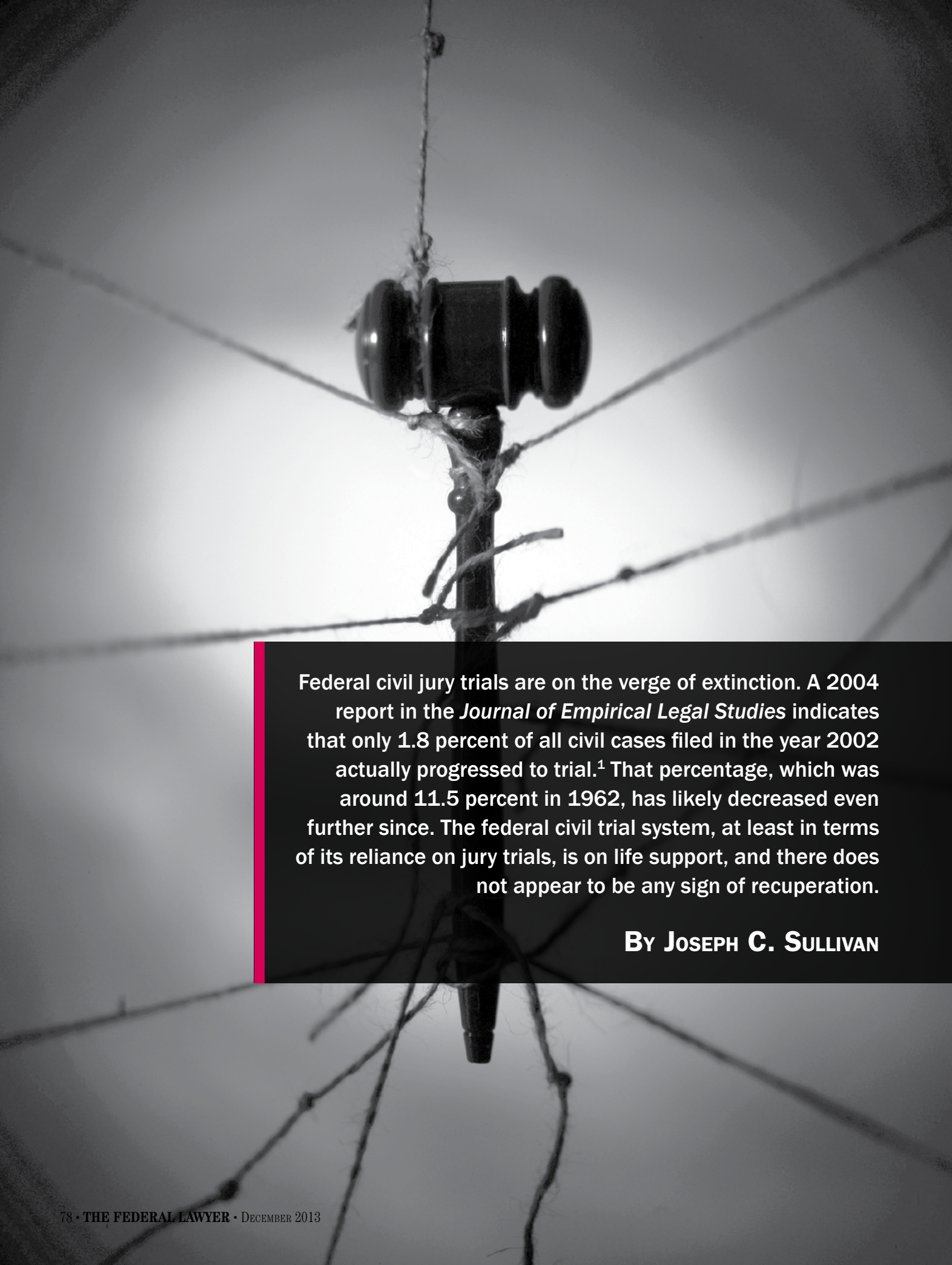

Federal civil jury trials are on the verge of extinction. A 2004 report in the *Journal of Empirical Legal Studies* indicates that only 1.8 percent of all civil cases filed in the year 2002 actually progressed to trial.[1] That percentage, which was around 11.5 percent in 1962, has likely decreased even further since. The federal civil trial system, at least in terms of its reliance on jury trials, is on life support, and there does not appear to be any sign of recuperation.

By Joseph C. Sullivan

Death of a Trial Lawyer

The Fading Future of Federal Civil Jury Trials

I consider trial by jury as the only anchor yet imagined by man by which a government can be held to the principles of its constitution.

—Thomas Jefferson

The impact of the systematic decline in civil jury trials on our federal court system depends on an individual analysis of why cases are increasingly not proceeding to the trial stage. Some see a "stat" need for a trial defibrillator while others are happily signing the "do not resuscitate" orders. Certainly, the increase of resolutions and settlements via alternative dispute resolution methods like arbitration and mediation has lessened the incidence of jury trials. Additionally, the prohibitive cost associated with jury trials can further be attributed as decreasing a litigant's desire to empanel a jury. Moreover, the risks associated with trial, particularly as to whether the laypeople selected to serve on a jury will grasp the sometimes highly complicated issues in dispute, can lead a litigant to simply make a "business decision" to settle a case after a thorough risk analysis (most often completed with the assistance/insistence of an insurance carrier).

Some will argue that the significantly diminishing occurrence that is a federal civil jury trial demonstrates progress in that litigants are increasingly cognizant of lawsuits that do not warrant the time and use of taxpayer money to adjudicate, are capable of resolution through the good faith negotiation of the parties, or exhibit the ability of the attorneys engaged to obtain pretrial resolution of their client's cases via effective motion practice. Others will cite settlements being forced by the insurance carriers of the parties, unequal positions of bargaining power imposed by mandatory arbitration provisions or the pursuit of frivolous lawsuits that are improper for trial (and should never have been filed in the first place).

What cannot be disputed is that lawyers, particularly young lawyers, are simply not obtaining the trial experience necessary to serve as effective trial attorneys or to counsel their clients as to whether trial or settlement is even indicated. Federal civil jury trials continue to decrease while the number of newly graduating law students continues to rise. Consequently, an entire generation of attorneys will likely spend their entire legal careers without the requisite training or ability to conduct a federal civil jury trial, the practical experience of admitting evidence pursuant to the federal rules, or an understanding of the procedural and tactical aspects of trying a case before a jury. In the not too distant future, as older and experienced trial attorneys begin to retire, many law firms will face an increasingly harsh reality: a jury trial to conduct with no experienced attorneys on which to rely.

In the past, law students intending to eventually serve as litigators would participate in moot court to experience firsthand the rigors and pitfalls of a jury trial while at the same time being guarded in a controlled environment, free from actual jurors, enforceable verdicts, and, perhaps most importantly, demanding (and fee-sensitive) clients. As fewer federal civil cases reach trial, and as those with actual trial experience begin to retire from the workforce, more and more firms will find themselves relying on litigators whose sole practical experience was cross-examining an actor in a mock courtroom a few doors down from their law school cafeteria.

Traditionally, at least in terms of newly admitted attorneys practicing in established law firms, a mentoring process existed that permitted a young attorney to slowly obtain experience

in, and comfort with, the jury trial process. At first, that attorney would assist behind the scenes, creating and organizing exhibits, Shepardizing cases for pre- and post-trial motions, and reviewing deposition transcripts to assist in the trial examination of witnesses. More likely than not, that young attorney would also attend the trial and witness the proceedings from the public gallery. Eventually, as that young attorney obtained more experience, he or she would serve in a second chair capacity, assisting the partner in scripting direct and cross-examinations, arguing pretrial motions, and, perhaps, conducting jury selection or examinations of a few minor witnesses. When that young attorney demonstrated sufficient comfort and knowledge of the jury trial process, the partner would eventually entrust him or her with more and more trial responsibility until that young attorney was eventually serving in a lead "first chair" capacity, essentially coordinating the jury trial process and handling the majority of the most important aspects of the case (opening/closing arguments, expert and key fact witness examinations, etc.).

Of course, for that young, inexperienced attorney to develop first chair capacity, he or she would require actual jury trials for which to prepare. It is not complicated to appreciate the trickledown effect that a lack of federal civil jury trials will have in stunting the growth of litigators throughout the country. Without an ability to train for the eventual handling of a jury trial, our future litigators will either be wholly unprepared when called upon or simply be forced to advise their clients to settle so as to avoid the trial process altogether. Even then, without a full appreciation of how a potential jury could react to the facts of a particular case, or award damages as a result, that litigator would be ill prepared to successfully advise clients through the alternative dispute resolution process.

Moreover, in the rare occasions when a federal civil case does progress to trial, cost and time considerations will ensure that only select associates are given the opportunity to assist. Not being chosen to plan and prepare for trial on a consistent basis, even early in one's legal career, could create a caste system in which only a few associates would be granted the invaluable opportunity to obtain and grow their trial experience while the remaining associates progress through their legal careers without an ability to market themselves (both in and outside of their respective law firms) as someone who can be relied upon to actually try a case. It is growing increasingly commonplace for litigators in their thirties, and even forties, to lack the experience of taking a single federal civil case to trial. Given the current dearth of jury trial practice on the federal level, law firms treat the occurrence like a legal Halley's Comet and load as many associates as possible into the courtroom to witness what is very likely to be a once-in-a-lifetime event.

And when those selected few associates are chosen for trial practice, the quality of litigation, both in terms of style and substance, is likely to be diminished. Attorneys do not complete or accomplish law; they merely practice it with an understanding that to be employed as an attorney is to understand that the profession is never truly mastered, but is instead attempted to the best of one's ability. Practicing law is nonetheless like many aspects of human endeavor. The more opportunities one is given to perfect one's craft, the more likely one will be at mastering it. The art of presenting an opening argument, like the act of shooting a free throw or executing a pirouette, is honed through practical experience—the more opportunities an attorney has to practice the aspects of a jury trial, the more likely he or she will be able to determine the art and science of effective jury trial practice. The current trend essentially requires associates to shoot their first free throw in a packed Madison Square Garden or attempt their first pirouette in the Royal Opera House. The results, as can be expected, will not be optimal, and the lasting effects of an embarrassing and potentially financially devastating jury verdict could be permanent and debilitating on the young attorney.

While witnessing a trial in the public gallery is certainly a valuable tool for any young litigator, an attorney must actually experience firsthand the swift decisions and evolving strategy that only actively participating in a jury trial can provide. Unfortunately, this experience cannot substitute for the fast-paced, unpredictable, and oftentimes stressful encounter imparted by trying a case before a jury. For better or worse, some aspects to the practice of law must be attempted to be of any real value. For instance, a young attorney can attend as many depositions as humanly possible during the course of a given year, but those experiences alone will not foster a sufficient comfort level in learning how to confidently ask probing questions, how to relate to the deponent, or how to stay calm and assured in the face of incessant objections. Young attorneys cannot be passive bystanders to the practice of law. To develop into effective practitioners, they must be active participants.

As countless young attorneys can attest, being an associate is many times a process of being unreservedly obsessed with a single legal branch of a single tree in a forest of a thousand trees. An associate may be charged with focusing on a single claim asserted in a voluminous complaint, the review of one itemization of alleged damages, or the discrediting of a single deposition witness. Often, associates note that their appreciation and understanding of their roles as attorneys are greatly heightened when they can observe the final product of their tedious labor—which, more often than not, culminates at trial (e.g., assisting the crafting of closing arguments to defeat a particular claim or collaborating with the partner in charge to draft an effective cross-examination). When associates realize their diminished ability to assist or participate at trial, their work product and overall morale related to the case dwindles accordingly. Like Sisyphus, the associate is charged with the less-than-thrilling task of drafting discovery requests and responses in hopes of being able to actually try the case, only to have that case settle (or be excluded from the trial team) and for the discovery drafting process to begin anew in yet another case.

What is more, there does not appear to be any reasonable alternative to obtaining trial experience. Law firms are not in the business of staging mock trials for the benefit of their up-and-coming associates. Nor can they predict what cases will go to trial, thus selecting those with the intention of increasing their associates' knowledge and experience. The legal and ethical obligations of the profession ensure that firms do not take cases to trial simply to procure practical experience. Indeed, when the conflict checks are performed, the demand letters sent, and the initial pleadings filed and served, every party involved actually expects the case to eventually settle. Given the current status of federal civil litigation, the trial calendar is seen merely as a deadline before which the parties should effectuate a settlement—the trial being a looming specter of significant time and expense. Pretrial conferences assist the judge in ensuring an orderly trial process, but also serve to remind the parties that only settlement can save them from the financial realities of trial. Increasingly, the service of a complaint is no longer seen as a

declaration of war, but an invitation to the negotiation table.

While young attorneys find it increasingly challenging to gain federal civil jury trial experience, there are other methods by which they can reserve a seat at the proverbial trial table. Minor criminal matters and civil cases filed in the state court system, although susceptible to early resolution as well, present additional avenues for young litigators to hone their jury trial skills. Litigation positions affiliated with the government, like those offered by the District Attorney's Office and the Public Defenders' Office, also offer considerable opportunities to get immediately involved in the practice of jury trials. Careers that once appeared too narrowly tailored, such as those associated with the Justice Systems of Indian Nations (Tribal Courts) or the Judge Advocate General's Corps, are becoming increasingly more attractive given the jury trial experience they can provide—experience that can be seamlessly implemented in the federal jury trial system. In the future, when law firms are unable to pick and choose from a roster of savvy and experienced litigators, those attorneys with any form of jury trial experience will serve as invaluable assets.

Paradoxically, while a lack of federal civil jury trials would seemingly indicate an increase in mediation and arbitration success rates, that does not necessarily mean that today's litigators are any more skilled in these capacities than they were 50 years ago. Rampant settlements do not necessarily indicate the legal profession's newfound proficiency in the good faith negotiation of disputes, but may simply evidence an absolute fear on behalf of those members to actively engage in trial practice.

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Oftentimes a party can intimidate another into settlement merely by espousing the experience and reputation of its attorney as a skilled trial advocate. An attorney who successfully navigates the courtroom and obtains large jury verdicts can confidently sit across the mediation table and not only state his or her lack of fear of jury trials, but an affinity for the same. The process of negotiating a settlement would not only include a consideration of how strong a case the other side could present at trial, but the relative style and effectiveness of the attorney. Nowadays, it is far more likely that neither party can rely upon an attorney with significant trial experience, let alone use that experience as an intimidation factor during the mediation process. In fact, where it was once common for mediators to cite the opposing attorney's record and history in successfully trying cases to foster settlement, it is now far more common for mediators to question whether any of the attorneys "really want to try this case."

With a lack of trial experience, and thus a lack of judgment in how a jury will calculate a potential verdict, inexperienced litigators will have no personal basis upon which to counsel their clients. Instead, working in conjunction with the client's insurance carrier or accounting department, the inexperienced litigator will be provided a maximum number at which to settle, then consider his or her job to have been satisfactorily performed if a settlement below that number is obtained.

The increasingly accepted notion that cases are to be settled, not tried, can likewise impact how federal civil cases are being litigated. Too often, cases are being primed with an eye toward settlement as opposed to trial. Attorneys do not take depositions for the purpose of fact discovery or to prove/disprove the legal elements of a particular claim, but to break down an opponent's ability and desire to litigate. They strategically serve nonparty document requests to cause embarrassment or discord as opposed to seeking out relevant and discoverable information. They serve written discovery to cause voluminous and expensive document productions as opposed to target the pertinent information required for trial. The parties engage in a battle of endurance (and paper) to see which will relent first.

The judiciary will not be exempt from the consequences of the current declining system. As judges focus their attention on pretrial issues, such as discovery disputes and motion practice, their awareness and familiarity with their roles as evidentiary gatekeepers will be adversely affected. Ironically, such a lack of familiarity with actually applying the federal rules of evidence in a trial setting could lead to further trial practice. Appeals based on the improper admission of evidence and trial testimony could increase exponentially. The trial process would further be slowed by the judge's need to continually review the federal rules of evidence and applicable case law to ensure avoidance of an embarrassing reversal.

When inexperienced attorneys present a federal civil trial, and the judges ultimately selected are unprepared, one can only imagine the consequent effect on the average citizen selected to serve as a juror. Needless to say, the general reputation of attorneys does not require further sullying in the eyes of the average layperson. The gradual near extinction of federal civil jury trials could steer the overall respect and understanding of the legal process into further disrepute, as average jurors would discover a wholly inept legal system where the players and adjudicators charged with upholding and advancing the law would actually be seen as active disruptors of the same.

Of course, not all view this decline as a negative trend. Jury trials are protracted, time-consuming processes that require significant resources, both public and private. In addition to paying attorneys' fees, there are costs related to multimedia presentations, expert witness fees, jury consultants, and court reporting that can quickly escalate into the hundreds of thousands of dollars. With a lack of experienced attorneys that routinely try cases, and are thus familiar with the process of preparing and presenting a case, the expenses associated with jury trials will likely increase. For instance, in the rare situation in which a case actually does progress to trial, the average litigator will find him or herself "reinventing the wheel" on a recurring basis. The case law, elements, and jury charges that were in effect for a routine breach of contract claim at the last jury trial the attorney participated in may very well no longer be relevant. While trial practice is by no means a cut-and-paste industry, customarily routine matters such as exhibit preparation and the creation of trial notebooks will become less familiar, more time consuming, and thus, more costly.

On a public level, a jury trial consumes the already limited time

and resources of the judge, court, and its staff. Moreover, jury trials can wreak havoc on the lives of the 6 to 12 citizens who are chosen to serve as jurors. Particularly telling is the absolute dread most citizens communicate when experiencing the act of finding a jury summons. As any attorney can attest, one of the most popular questions asked by their neighbors concerns the strategies involved in not being selected. In fact, most attorneys rely upon their advanced knowledge of the legal system and the potential effect it might have in excessively influencing other jury members in not being selected as a juror. In other words, if jury trials are such a fine and integral institution of the American way of life, why are all the players doing everything in their power to avoid participation? Apparently, not all embrace jury trials as anchoring the principles of the Constitution, as did Jefferson.

As much as our citizenry may not want to serve as jurors, the fact remains that our litigants are just as uncomfortable with that scenario. Trials concern, more often not, the adjudication of legal and factual issues that are squarely in doubt and thus could not be resolved via summary judgment motions or alternative dispute resolution methods. Such issues can be so difficult to comprehend they befuddle the legal experts (attorneys and judges) involved. What constitutes a preponderance of the evidence or whether the stranger doctrine should be invoked in a claim for tortious interference are legal and fact-specific considerations that can confound even the most skilled legal professional. It is perhaps then not surprising that many litigants would prefer to avoid the trial process altogether when those same issues, which could determine their personal or business livelihood, are to be decided by a largely uninterested populace with no legal education.

Many times, the attorneys arguing a case focus more on ensuring that a majority of the jury stays awake rather than crafting the perfect theme for their opening or closing argument. To say that civil jury trials are portrayed inaccurately on television and in the movies would be a gross understatement. Jury trials, especially civil jury trials, are usually long, tedious exercises in which the subject matter is dull, the presentation of evidence is scripted and methodical, and the testimony is many times uninteresting and monotonous. While juries certainly understand the importance of the evidence being presented, it is simply human nature to sometimes let one's mind drift to a child's transportation to and from school, the e-mails from work that are piling up, or the rescheduling of appointments that must occur for no other reason than being selected as a fair and impartial member of society. Critics find that perhaps the best deterrent against our jury system is to encourage a potential litigant to observe a jury during the late afternoon hours of direct examination on the third or fourth day of trial.

Often times a client will simply make a business decision to settle a particular matter, even on terms that may not be totally satisfactory, for fear of being subject to a less-than-interested jury or being bound to a jury's potentially devastating verdict. Often, litigants find that the worst case scenario involved in a jury's potential verdict will not justify the risks that can largely be mitigated by negotiating an unambiguous and less time-consuming settlement. Indeed, many times cases are settled after jury selection, during opening or closing arguments, or even while the jury deliberates. The ever-present "what if" consequences of trial are sometimes too perilous for litigants to withstand. Attorneys, who are, by their very nature risk-adverse counselors, are generally more than happy to resolve cases on terms that have already met the approval of their clients.

While he may not have necessarily been referring specifically to jury trials, Abraham Lincoln is credited as saying: "Discourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker, the lawyer has superior opportunity of being a good man. There will still be business enough."[2]

The preceding quote is noteworthy for several reasons. First, Lincoln's request that compromise be sought in conflicts is somewhat ironic given his role as President during the deadliest war in the history of our nation. Second, Lincoln apparently viewed attorneys as peacemakers and equated being a good man with compromise. Many of these same sentiments permeate how today's society views trial attorneys. Essentially, those attorneys who are able to effectuate settlements on behalf of their clients and avoid trial are good attorneys. Those who regularly try cases are bad attorneys incapable of obtaining the most beneficial outcome for their clients. Finally, Lincoln apparently equates attorneys' lack of desire to settle conflicts with an overemphasis on their own greed. He advises that attorneys should not be afraid to settle their cases because they can make money on another case somewhere down the road (i.e., "there will still be business enough").

Lincoln's words are also enlightening because, even today, it appears that the reputation of attorneys and their willingness to bring cases to trial are subject to scrutiny based on financial considerations regardless of the ultimate outcome. For instance, if an attorney files a case, especially a class action or personal injury matter, and proceeds to obtain a monetary settlement of those claims before trial, society sees the attorney as a shark looking to obtain the quick and economically favorable result for his or her own coffers. If, instead, that attorney proceeds to try the case, he or she is seen as being inefficient and looking for a home run jury verdict despite the best interests of his or her client. Either way, attorneys are forced to reconcile the widely accepted notion that most of society loathes our profession—up and until the time that we are needed.

Given the current trend of decreasing federal civil jury trials, in conjunction with the increasing view that litigation is simply too expensive and risky to be ventured, it is not likely that a renaissance of jury trials awaits us. The practice of law is unquestionably changing, and, for better or for worse, the expectations, experience, and skills of our litigators will have to change as well. ⊙

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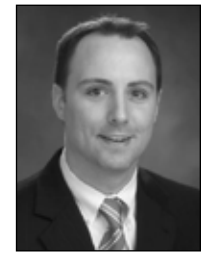

Endnotes

[1]Galanter, M. (2004), *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* Journal of Empirical Legal Studies, 1: 459-570.

[2]2 Abraham Lincoln, *Notes for a Law Lecture, in* Collected Works of Abraham Lincoln 81 (Rutgers University Press 1953, 1990).