Report of the
Boston Bar Association

Task Force on the Vanishing Jury Trial

Jury Trial Trends in Massachusetts: The Need to Ensure Jury Trial Competency among Practicing Attorneys as a Result of the Vanishing Jury Trial Phenomenon

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Boston Bar Association
Task Force on the Vanishing Jury Trial

Chairs
Anthony M. Doniger,
Sugarman, Rogers, Barshak & Cohen, P.C.

Joan A. Lukey,
WilmerHale

Denise J. Casper
Boston University School of Law

Martha Coakley
Middlesex County District Attorney

Miriam Conrad
Federal Defender Office

Daniel J. Gleason
Nutter McClennen & Fish, LLP

David A. Hoffman
Boston Law Collaborative, LLC

Laurence D. Pierce
Choate Hall & Stewart LLP

Andrew Silverman
Committee for Public Counsel Services

Gerald P. Stewart
Suffolk County District Attorney's Office

Richard M. Zielinski
Goulston & Storrs, P.C.

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Executive Summary

On May 10, 2005, Federal District Judge F. Dennis Saylor IV and Magistrate Judge Charles B. Swartwood jointly issued a rather novel standing order: *Federal Court Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys.* Noting that courtroom opportunities for relatively inexperienced attorneys, particularly those who practice at larger firms, have "declined precipitously across the nation in recent years" the Order states that the above-named judges: "as a matter of policy, strongly encourage the participation of relatively inexperienced attorneys in all court proceedings" including, where appropriate, "the examination of witnesses at trial" subject to certain cautions set forth in the Order.

The perceived decrease in recent years in the number of jury trials in both state and federal courts nationwide has come to be known as "the vanishing jury trial phenomenon". Where data are available, particularly in the federal court system, a number of comprehensive analyses have been undertaken, which, as discussed in this report, confirm a decline in the number of jury trials. In other venues, such as our own Massachusetts court system, reliable data as to the number of trials and trials days are of much more recent vintage; and reference to the phenomenon has been anecdotal, rather than confirmed. Hence, with respect to Massachusetts state courts, further study is required to determine both the reality, and the perception, of the vanishing jury trial phenomenon.

In the fall of 2005, Edward P. Leibensperger, President of the Boston Bar Association, appointed a Task Force on the Vanishing Jury Trial (the "Task Force") to assess the validity of the vanishing jury trial phenomenon, particularly in Massachusetts, and to identify the best practices for training new trial attorneys if such a trend were found to exist. Over an eleven-month period, the Task Force reviewed statistical information and academic literature about trial trends in state and federal courts; conducted surveys of members of the bar in the Boston area regarding their trial practices and their training models for trial lawyers; interviewed trial judges in leadership positions; and conferred about recommendations for the training of new trial lawyers.

To the extent that the "vanishing jury trial" is actually affecting the jury trial experience of current and future generations of practitioners, which the Task Force believes to be the case, the Task Force makes three recommendations to ensure that this critical aspect of our Constitutional system does not atrophy and effectively die:

1. **Courts -** The Task Force recommends that a system be implemented that more precisely tracks the categories of cases filed and determines the percentage of jury trials and jury trial days that are consumed by each such category. Further, the Task Force calls upon judges presiding over pre-trial conferences and related matters to identify and encourage opportunities for a junior attorney to participate in the examination of witnesses or other significant trial work.

2. **Firms** – The Task Force recommends that firms and practitioners employ and encourage such training methods as those set forth in the report to ensure that competent jury trial lawyers remain within the ranks of all firms that hold themselves out as having litigation capacity.

3. **Clients** – The Task Force recommends that clients, particularly parties such as insurance companies that have numerous cases in our courts, might be encouraged by the judges to think more innovatively about approaches to staffing. Further, the trial bar should be encouraged to share such recommendations with litigants whose work merits taking a broader look at how their litigation needs are being conducted in courts of this Commonwealth.

Introduction

The perceived decrease in recent years in the number of jury trials in both state and federal courts nationwide has come to be known as "the vanishing jury trial phenomenon". Where data are available, particularly in the federal court system, a number of comprehensive analyses have been undertaken, which, as discussed below, confirm a decline in the number of jury trials. In other venues, such as the Massachusetts court system, reliable modern data as to the number of trials and trials days are of much more recent vintage; and reference to the phenomenon has been primarily anecdotal, rather than confirmed. Hence, with respect to Massachusetts state courts, further study was required to determine both the reality, and the perception, of the vanishing jury trial phenomenon. In general, it was difficult to compile and analyze comparative data for the trial courts of the fifty states given the challenges presented by the breadth of data, accessibility to reliable data, and the difference in statistics maintained by each state. Additionally, on both the federal and the state side, analysis was generally lacking as to the implications of any such trend for the training of new members of the bar.

> *"'Old warhorses'" from a time when jury trials were common bemoan the dearth of trial skills and experience on the part of their younger associates as if something integral in the persona of a 'real lawyer' is being lost."*[1]

> *"Junior lawyers have long complained about the fact that they rarely see in the inside of a courtroom during the course of their daily work."*[2]

I. Are Jury Trials Disappearing For New Generations of Lawyers?

a. Nationwide – Federal Courts

Comprehensive studies of statistical information from the nation's federal courts lend empirical support to the sentiments expressed above: Jury trials on the federal side, if not vanishing, are certainly declining markedly. One of the most recent studies of trial activity in the federal courts was prepared by Marc Galanter, professor of law at the

University of Wisconsin-Madison, in 2003.[3] Relying upon data from the Administrative Office of the United States Courts ("Administrative Office") for the fiscal years from 1962 to 2002 for the U.S. District Courts,[4] Galanter found that the total number of dispositions of civil cases at ten-year intervals between 1962 and 2002 had increased "by a factor of five."[5] The percentage of civil case dispositions by trial,[6] including both jury and bench trials, however, "was less than one sixth of what it was in 1962."[7] Fluctuating patterns of the number of trials lead Galanter to conclude that "[t]he drop in civil trials has not been constant over the forty-year period; it has been recent and steep."[8]

Nationwide, there has also been a decline in the disposition of federal criminal cases by trial.[9] According to Galanter, the number of criminal cases filed has increased between 1962 and 2002.[10] But, both the percentage of criminal dispositions by trial and the actual number of criminal trials have also decreased in that period.[11] The decline has largely occurred in the last twenty-five years.[12] A similar overall trend exists when criminal cases disposed of by jury trial alone are reviewed.[13]

b. Nationwide – State Courts

In 2004, three analysts with the Research Division of the National Center for State Courts published a report of their analysis of civil and criminal trial trends based upon data collected from almost one-half of the states in the U.S. for the years 1976 to 2002.[14] This study concluded that "[a]nalysis of the number and rate of state court trials showed that both jury and bench trials have declined over the last two decades despite substantial growth in the number of state court dispositions."[15] Between 1976 and 2002, the number of both civil and criminal dispositions "increased dramatically."[16] During the same period of time, "civil jury trials have fallen by nearly two-thirds. . . ."[17] The study further opined that "this decline is somewhat less dramatic than the decline in criminal jury trials…, but then again the rate of civil jury trials was never as high initially as that for criminal jury trials."[18]

A similar study has been made of the 75 largest counties of the U.S., including counties in Massachusetts (Essex, Suffolk, Middlesex and Worcester counties).[19] Based upon studies of civil case dispositions in these counties in 1992, 1996 and 2001, the study concluded that there was a decrease in the number of civil trials between 1992 and 2001.[20]

Overall, on a nationwide level,[21] "[w]hat we are seeing since the late 1980s is not only a continuation in the shrinkage of *percentage* of cases that go to trial, but a shrinkage of the *absolute number* of cases that go to trial."[22]

c. U.S. District Court for the District of Massachusetts

Using the data from the Administrative Office as Professor Galanter did for his study of federal district courts nationwide, the Task Force undertook to examine the trial trends in the U.S. District Court for the District of Massachusetts. Although the Task Force reviewed and compiled data regarding criminal trial trends in the U.S. District Court for the District of Massachusetts (see Table 2), the Task Force made a decision to focus on civil jury trials because we hypothesize that the uneven history of the federal Sentencing Guidelines, as well as the policies of particular United States Attorneys, make it imprudent to generalize regarding criminal jury trial trends in the District of Massachusetts. Focusing on the period between the fiscal years 1987 and 2004, the Task Force examined the number of civil trials and the percentage of total case dispositions that these trials represented.

Using the same source of data as Galanter used for his study,[23] the Task Force observed a decrease in the number of civil jury trials and in the percentage of total case dispositions that these trials represented between 1987 and 2004, even though the decline was not a steady one. (See Table 1).[24]

The rate of civil case filings during roughly the same time period (1988 through 2004) in the District of Massachusetts, however, has not involved a similar decline. In 1988, 3395 civil cases were filed in the district.[25] In 2004, the number of civil cases filed in the district was 3312.[26] Between 1988 and 2004, the number of civil cases rose to as high as 4103 (in 1990), and only fell below 3100 in one year, 2001.[27] Although the rate of civil filings remains high, the number of civil trials has continued to decline at the rate described above during this period.

d. Massachusetts – State Courts

Confirmation of the existence of a "vanishing jury trial phenomenon" in the Massachusetts States Court system has proven complicated. As discussed below, the survey undertaken by the Task Force verifies the *perception* among most practitioners

that jury trials are declining. In addition, a number of nationwide studies regarding jury trial trends in the nation's courts, including courts of the Commonwealth, suggest that such a decline has indeed occurred.[28]

The conclusions of those studies are echoed by a recent examination that focused solely on civil jury trial trends in Massachusetts.[29] Analyzing data for 1924 through 2000 as culled from the annual reports of the courts statewide, Professor Peter L. Murray reached several conclusions that are relevant to the Task Force's inquiry: i) "in the late 1920s, there were more than five times as many jury verdicts returned as are currently received;"[30] ii) the percentage of civil case filings resolved by jury trial has decreased since 1925;[31] iii) there are fewer jury trials for judges to preside over than there were in the 1920s;[32] and iv) attorneys have a lesser chance of trying cases to a jury now than they did in earlier years.[33] In 1925, there were 3022 civil jury verdicts in Superior Court; by 2000, there were only 571 civil jury verdicts.[34]

The problem that arose for the Task Force in performing its assessment is this: Until very recently, the reported numbers of civil jury trials in Massachusetts (as indicated by published sources listed in Table 3) confirmed a definite decline,[35] but the Task Force has been cautioned by court administrators that the published records for both civil trials (see Table 3) and criminal trials (see Table 4) may be less than accurate. For the first quarter of 2006 alone, there were 301 criminal trials (jury and bench) and 345 civil trials (jury and bench) initiated or underway in the Superior Court. The number of total trial days during this period was equally robust: 1,098 criminal trial days and 1,162 civil trial days.[36] Regardless of the reporting system, without question the courts of the Commonwealth remain busy. The total number of annual civil dispositions by the Superior Court in the last nineteen years has never been lower than 23,567 (2005) nor higher than 46,471 (1991). (See Table 3). It is rare for a jury session not to have a case on trial. The kinds of cases, and how many trial days they consume, have a direct effect, however, on the number of lawyers who have the opportunity to try jury cases.

In sum, the prominent trend is that the jury trial has been on a measurable decline, at least on the civil side of the federal court, between the last generation of attorneys and this generation of attorneys – and even in the individual career of an attorney who has been practicing for twenty to thirty years. A similar perception exists, as discussed

below, on the state civil side. Indeed, a retired judge of the Commonwealth recently noted that "[w]hen I first passed the bar, there were many opportunities for young lawyers to get into court and try cases,"[37] implying that things are very different today. Nonetheless, this perception is disputed by some current Superior Court judges in leadership roles. Given the unreliability of the state court's historic records, the Task Force cannot confirm the "vanishing jury trial phenomenon" as more than a matter of perception in the Massachusetts state court system. The Task Force nonetheless takes note of the apparently widely held perception, and has directed its attention to this question: What does all of this mean for new members of the bar who want to be trial attorneys?

e. Massachusetts – Boston Law Firm and BBA Member Survey Results

In an effort to further explore the extent of the perception of the "vanishing jury trial phenomenon" on practicing attorneys in Massachusetts, the Task Force distributed two surveys: one to the litigation departments of Boston-area law firms (the "law firm survey"), the other to members of the Boston Bar Association (the "member survey").

The initial goal of the law firm survey was two-fold: first, to collect hard numbers on trials per year at each firm between 1995 and 2004; and, second, to supplement those numbers with anecdotal evidence, based on observation, of the decline of the jury trial. The Task Force was able to test further this perception by looking at factors that were articulated both in the survey responses that the Task Force received and a willingness, on behalf of eighteen firms, to participate with follow-up discussions and share their insights.

The goal of the member survey was to try to evaluate how the big-picture trends articulated in the law firm survey were playing out in the individual practices of BBA members. Whereas the law firm survey was subject to voluntary and optional follow-up interviews agreed upon by the firms' heads of litigation, the member survey asked for detailed thoughts on the scope of the phenomenon including contributing factors ramifications, and possible remedial action.

Of the law firm survey respondents, four reported no jury trials in the last ten years. Only six respondents indicated that in any given year they had seven or more jury trials. Of these, one averaged eleven to thirteen jury trials per year over the last five

years, almost all of which were tort cases. Another averaged approximately twelve jury trials in each year over the last ten years (predominantly tort, contract, and civil rights cases). Interestingly, and as will be discussed further in section IV of this report, the managing partner at one firm indicated that approximately forty-five to sixty jury trials were conducted by the firm each year, and those cases were predominantly medical malpractice cases. Two insurance defense firms explained that they tried between seven and fourteen cases per year, almost all of which were tort cases. Finally, one general litigation firm estimated that over the last ten years the jury trials its lawyers participated in declined steadily from twenty per year to five per year; those cases are predominantly tort and business cases.

Six respondents indicated that they had one to – at most – two jury trials per year over the last ten years; and, that in some years they had had no jury trials. Clearly, there was no real possibility for decline in these responses.

Three of the larger law firms in the city responded to the survey. One of these firms indicated that, over the last ten years, there were one or two jury trials per year, primarily contract cases, but no jury trials in the last few years. Another firm indicated that in the late '90s the firm had had one or no jury trials in Massachusetts per year, but added that in 2002, 2003 and 2004 they had had three to six jury trials per year, mostly contract, medical malpractice, and intellectual property disputes. Of note, those firms that participated in externships with public offices reported a larger number of jury trials among the lawyers involved in those programs. For example, one large firm noted that, in addition to the relatively small number of jury trials conducted for their clients, the firm's lawyers, as externs, had conducted ten to thirteen criminal jury trials per year through the firm's participation in a program with a local District Attorney's Office.

Ultimately, of all the respondents, only one firm indicated a marked decline in the number of jury trials it was handling annually over the ten year period. The other respondents seemed to have maintained a fairly constant number of jury trials over the period reported, be it many or few, allowing for a one to two- case variable per year.

Summary of Survey Comments - The factors set forth in the law firm survey – combined with follow-up discussions and drawing reasonable inferences – with respect to

reasons for the decline in, or consistently low number of, jury trials fall under at least one, and often more than one, of the following categories: time, expense, uncertainty, and court system failures. Obviously these four categories are intertwined. The following table is a suggested way of categorizing the issues raised in the comments according to these four categories.

Factors Cited by Boston-Area Law Firms
As Contributing to the decline in Jury Trials

	Time	Expense	Uncertainty	Court System Failures
Costs of litigation[38]		√		
Complexity of cases[39]	√	√	√	√
Discovery[40]	√	√		
Potential exposures[41]		√		
Court system is not user-friendly[42]				√
Pressure to shorten trial, limit voir dire[43]				√
Speed of cases[44]	√	√		√
Lack of reliable trial dates	√			√
Variability and unpredictability in rulings and results; greater inconsistency from the rotation of judges			√	√
Court delays, lack of reliable trial dates	√	√	√	√
Uncertainty of outcome and costs			√	

The implications of what was *not* said by – and the information that was *not* available from – respondents were revealing as well. The Task Force quickly discovered that, generally speaking, firms engage in very little record keeping regarding the number of jury trials in which their attorneys engage. The immediate response from many of the firms was to report that they would be unable to offer hard statistics, but that they did wish to share their observations concerning this trend. Lawyers seem eager to propose the possibility that the numbers might not be the key indicator of this trend. There

appears to be a common, shared perception throughout the legal community that is based in the actual day-to-day experience of practicing law. Whether the information is coming from an attorney who has practiced for many years and noticed firsthand the change in what a law practice entails, or a first or second year attorney who has a small likelihood of trying a case in the first fifteen years of practice – the trend is perceived as undeniable to the practitioners who responded. Without regard to specific numbers, the subtext to almost every response was that the "vanishing jury trial" is an observable fact that is touching on the practice of many lawyers in the greater Boston area. As a result, alternative methods for training young lawyers to try cases are being more rigorously encouraged by firms.

II. Effects of "Vanishing Jury Trials" on the Practice of Law And the Legal System Generally

The downward shift in the number of jury trials in recent years is forcing changes in how litigation is practiced, and redefining skill-sets of the current generation of young lawyers, in ways that eventually will reshape the legal system. An impending jury trial is now more a hypothetical possibility than a predictable endgame. As a practical matter, parties are now more likely to view a case in terms of a series of strategic motions leading to settlement or alternative forms of resolution. This shift places a greater emphasis on short-term moves than on long-term strategy. Litigation by motion practice curbs the traditional big-picture approach in favor of strategic impact by targeted moves, e.g., an insightful deposition examination or well-prepared dispositive motion. The benefit of this change in approach is that young lawyers may be more adept in the art of careful preparation; the downside is that these lawyers may lack the confidence and acumen needed to execute the sometimes unpredictable and tumultuous nature of conducting a trial.

This section examines implications of the vanishing jury trial on the practice of litigation, and its influence on the skill-set of present and future litigators. The Task Force looks first at how the perceived meager prospect of attaining a jury trial affects legal strategy, and then considers how the diminished expectations of a jury trial may

impact case dynamics within a trial team, and in interactions with opponents. Finally, the Task Force discusses the impact of these developments on the legal system.

a. Impact on How We View and Practice Litigation

With faint mockery, some lawyers draw a line between litigation lawyers who rarely, if ever, try cases (i.e., "litigators") and their more trial-ready counterparts who (either by chance or by the nature of their practice) find themselves in the courtroom before juries (i.e., "trial lawyers"). While such distinctions are no doubt partially a matter of semantics, there are noteworthy differences between the two categories.

The trial experience of the attorney in charge of a case can have a marked impact on how the key elements of the case are assessed and what case strategy is pursued. For example, questions like the following might be answered differently by a "trial lawyer" as compared to a "litigator":

- *What key challenges are presented by this case?*
- *Which priorities should be pursued to best shape the case?*
- *What steps are essential and in what order?*
- *Where will my adversary likely head?*
- *What is the best team for this job?*
- *Who supervises the action?*
- *Where might the court help out?*
- *What pace makes sense?*
- *What are the client's expectations and what are my expectations of the client?*

The differences in approach to these questions have little to do with legal aptitude, and everything to do with perspective. It stands to reason that trial-oriented lawyers would be more likely to approach a case with a concern for the hypothetical jury response to various facts and legal issues, than would motion practitioners, who are accustomed to addressing their arguments to the Court.

Litigation is driven by selective and creative planning and must incorporate a broad legal, factual and thematic "landscape." Throughout the entirety of a case, lawyers make strategic decisions, test and refine theories, hone themes, and continually recalibrate as more information is gathered and the case takes shape. While trial-oriented lawyers conversant with trial dynamics will likely respond to questions shaping case

preparation with a view to jury impact, lawyers geared towards motion practice might assess the "end-game" at a point prior to trial — molding the case themes with a judge in mind as fact finder rather than a jury.

b. Effect of Less "On-Your-Feet" Trial Time On Trial Skills

Given the on-your-feet nature of trial practice, trial lawyers especially need to try cases before juries. Progressing from competent to experienced to (for some) exceptional levels of trial advocacy requires opportunity to learn more, case by case, and then to find ways to keep off the "rust." One cannot learn well without practice against good competition, and skills once learned can weaken without use. Trial lawyers cannot expect their skills to remain sharp without sufficient opportunity to use them in realistic settings. Young lawyers in particular, are in need of training that improves skills and experience that keeps those skills sharp.

The skills upon which trial lawyers draw are diverse. Trial lawyers pick, package, and pursue what they hope will prove to be effective trial themes. They use their space in the courtroom to best affect these themes. They connect with the jury, through their own demeanor, their use of exhibits, how they promote trial themes, the signals given as to rapport with or control over witnesses. They relate to the judge. They pace the trial. Trial lawyers must also know how to deal with the unexpected and make "mid-course" corrections in trial plans appear seamless. The more practice, the more refined these skills become. For the most part, the fresher the experience, the smoother the execution. Whether making an effective opening or an inspiring closing, attacking tough evidence, or persuasively embracing a trial theme or blunting a counter-theme, effectiveness of the trial lawyer will depend in large measure on the frequency and nature of opportunities to practice his or her specialty.

Lastly, fewer trials mean fewer seasoned mentors. Obviously, if there are fewer senior lawyers truly and deeply experienced in courtroom trial practice, there are fewer practiced mentors to train associates. Mentoring is a time-proven core part of developing good trial lawyers.

c. Impact on the Legal System

Much of what has been discussed in this section speaks to the impact of the vanishing trial on the legal system as a whole. If case resolution occurs less predictably by trial, the court system becomes a stage (or backdrop) on which the drama of a case unfolds, but not necessarily where the case is resolved. This shift away from the courtroom as the arena of definitive resolution diminishes the traditional role of the court as primary arbiter. For better or for worse, these changes present us with the question of whether justice is better served under the current state of affairs, or under the historic paradigm of the jury trial.

Those who argue that justice *is* better served with fewer jury trials, point to the escalating costs of jury trials, advantages of party-driven solutions, and avoidance of "uncertainties" inherent in the jury trial system. Certainly, if administering "justice" means achieving litigation closure, i.e., getting cases resolved on terms with which parties can live, current trends may not set off alarm bells. For example, the notable successes of alternative dispute resolution signal its viability to bring cases to closure. Furthermore, to say that trials are "disappearing" does not mean that they have disappeared. Proponents of the new *status quo* take comfort in the fact that cases that "need" to be resolved by a jury trial can still get that treatment.

But there are sobering implications to the *status quo* as it stands today. Inexorably rising costs narrow the pool of parties who can afford to use the jury system. An important question presents itself as to whether costs could be better controlled if the "Davids" with a meritorious case had more leverage with the "Goliaths" by virtue of the jury peer review option. If settlements are driven by inordinate leverage where there is no real prospect of jury peer review, "justice" may be crowded out in settlement outcomes.

An even more fundamental question posed by the *status quo* involves how one may picture the future. Even if jury trials are still seen as being available when really "needed," their true measure of usefulness as an effective dispute resolution mechanism is tied directly to the continuing availability of lawyers skilled in trying such cases. As we come to recognize a *status quo* where fewer lawyers are trying a larger percentage of

the remaining jury cases, we must ask ourselves whether tomorrow's trial lawyers will have the skills and experience necessary to utilize the jury trial system. Otherwise stated, if we are not in crisis now, for just how long will we be able to say that the jury trial remains an available and effective dispute resolution option?

III. ADR and the Vanishing Jury Trial

Just as there is no doubt that the rate of jury trials in the United States is declining as a percentage of overall case filings, similarly, there is no doubt that the use of alternative methods of dispute resolution ("ADR") – such as mediation, arbitration, and case evaluation – has increased dramatically.

What remains less clear is whether the phenomenon of the vanishing jury trial is causally related to growing use of ADR. The data collected by the Task Force from the survey sent to BBA members suggest that client concerns about the cost of litigation are a more significant factor in causing this phenomenon. In response to the Committee's on-line survey, 72 respondents (admittedly a small sample) listed the following factors as the most important reasons for fewer trials:

Reason	Major Factor	Minor Factor	Not a Factor
Client concerns about the cost of litigation	63%	23%	13%
Increased availability/usefulness of mediation	44%	36%	20%
Clients' concerns about the speed of litigation	30%	49%	21%
Clients' concerns about impact of discovery/trial on their lives/work	24%	41%	35%

a. Data on ADR Utilization

To date there have been no systematic studies of the overall utilization of ADR in the United States or in any individual state. Such data would be extraordinarily difficult to obtain because of the sheer breadth of ADR activity, and because a substantial portion

of ADR utilization is in the private sector and largely unregulated. Such surveys and studies as are available are summarized in Exhibit A at the end of this Report.

b. Policy Implications of Increased ADR Use

One of the concerns expressed in the early years of the development of ADR in the United States was that settlements would rob our society of judicial precedents and compromise the important role of our courts – and in particular juries – in illuminating public values. See, e.g., O. Fiss, "Against Settlement," 93 Yale L.J. 1073 (1984). It does not appear that Professor Fiss's concerns have materialized. Nonetheless, other concerns have come to the fore.

First, privatization of dispute resolution creates particular concerns in cases where the parties have unequal power or access to information, which is often the case in employment, housing, and consumer cases.

Second, the growing use of adhesion contracts that require the use of binding arbitration in cases involving consumer products, banking relationships, employment, and insurance matters undermines the voluntariness of the use of private ADR forums.

Third, the lack of licensure of ADR professionals may cause concern about the quality of ADR services, at least in those cases where the parties do not have counsel to assist in the selection of neutrals.

Finally, the paucity of public funding for ADR services reduces the availability of these options to the poor.

In sum, the overall impact of ADR in our justice system is largely positive producing, according to one scholar "enhanced [client] satisfaction, reduced dispute resolution costs, shorter disposition times, improved compliance with a settlement, and other benefits" (T. Stipanovich, "ADR and the 'Vanishing Trial': The Growth and Impact of Alternative Dispute Resolution," 1 Journal of Empirical Studies 843, 911 (2004)) – those benefits may not be available to all, or in all cases.

c. Need for Further Research

The primary question regarding ADR in connection with the vanishing trial is whether the greater use of ADR truly is a free choice by those who elect to use it, or essentially compelled by a lack of availability of trial within a reasonable time, and the

reluctance of inexperienced trial lawyers to proceed in a courtroom setting. If ADR is a second-best alternative to trial in a significant number of cases, consideration should be given to whether more resources should be devoted to making trials more readily available. If, on the other hand, ADR use is primarily driven by client preference, different conclusions might result. Accordingly, the Task Force recommends that further research be conducted regarding the reasons for the use of ADR by litigants and their counsel.

d. Conclusions Regarding ADR

Not all cases can be tried, nor should they be. For clients who prefer settlement, ADR often provides an important opportunity to be heard. Mediation also enables the parties to construct settlements that go beyond the remedies available in court. Nevertheless, unanswered questions remain about whether the choice of ADR is made freely in our court system or whether the cost and length of time often associated with obtaining a jury trial influences that choice in ways that should be rectified.

IV. Is the Vanishing Jury Trial Phenomenon Dependent on the Type of Case?

a. Medical Malpractice Cases and Trial Days

As the Task Force undertook its investigation into the phenomenon of the vanishing jury trial, it became apparent, through the survey and through interviews with practitioners, that a certain relatively small percentage of civil trial lawyers remain as actively engaged in jury trial practice as ever. On examination, the Task Force determined that these practitioners were predominantly involved in medical malpractice trials.

The statistical information that the Task Force originally possessed regarding trial trends for medical malpractice cases was scant, but nonetheless provided a backdrop for this discussion. For the period 1987-2005, a breakout of jury trials for medical malpractice cases was only available in the Annual Reports for the fiscal years 1987-1992. The information for those years is as follows:

Year	Total No. of Dispositions	Total No. of Jury Trials	No. of Medical Malpractice Jury Trials
1987	39738	744	53
1988	40959	667	77
1989	37803	469	64
1990	44022	741	70
1991	46471	904	81
1992	43633	688	79

However Chief Justice Barbara J. Rouse reported to the Task Force that the accuracy of these data was suspect because of rudimentary technology systems that were not docket based, and inconsistencies in data entry practices among the counties, clerks and judges.

Because of these reported problems, and because the survey results and interviews suggested that medical malpractice lawyers are still trying more jury trials than are other trial lawyers, the Task Force Co-Chairs met with Chief Justice Rouse and Superior Court Judge Stephen Neel, who has been assigned certain responsibilities relating to the "firm and fair" trial date program. Following that meeting, Chief Justice Rouse made inquiry of the various counties and supplied the Task Force with recent statistics that are very telling regarding the dominance of medical malpractice trials in the civil jury sessions of the Commonwealth. These statistics are particularly significant when one considers that medical malpractice cases constituted only 6 to 7% of all civil cases filed in the relevant time periods.

b. Massachusetts Medical Malpractice Cases by County[45]

Barnstable County (July 2005 – April 2006)

- 13% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 16% of all trial days were medical malpractice cases.

Bristol County (July 2005 – April 2006)

- 6% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 11% of all trial days were medical malpractice cases.

Dukes County (October 2005 – May 2006)

- 20% of all cases that went to trial were medical malpractice cases. All were jury trials.

- 50% of all trial days were medical malpractice cases.

Essex County (September 2005 – April 2006)
- 22% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 37% of all trial days were medical malpractice cases.

Norfolk County (July 2005 – March 2006)
- 6% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 8% of all trial days were medical malpractice cases

Middlesex County (July 2005 – March 2006)
- 14% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 23% of all trial days were medical malpractice cases.

Plymouth County (July 2005 – April 2006)
- 5% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 10% of all trial days were medical malpractice cases.

Suffolk County (September 2005 – March 2006)
- 11% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 20% of all trial days were medical malpractice cases.

Worcester County (September 2005 – April 2006)
- 8% of all cases that went to trial were medical malpractice cases. All were jury trials.
- 19% of all trial days were medical malpractice cases.

These statistics, reflecting that medical malpractice cases consume roughly three times their proportionate "share" of trial days at least in Suffolk and Middlesex counties, and in some smaller counties (e.g. Dukes County) as much as 50% of all trial days suggest to the Task Force that the vanishing jury trial phenomenon may not be affecting all categories of cases equally, and that the prevalence of trials in one category may actually be exacerbating the unavailability of courtrooms for other types of cases.

The Task Force recognized that there may be many factors accounting for the disproportionate courtroom time consumed by medical malpractice cases, including (a) a lower likelihood of settlement, due to insurer practices and preferences; (b) a tendency toward more complicated, and therefore longer, medical malpractice trials in recent years; (c) a judicial perception that preservation of trial dates is more important when medical experts (whose schedules tend to be less flexible) are involved; and (d) a judicial

recognition that "justice delayed, is justice denied" when dealing with seriously injured plaintiffs/patients.

Ironically, perceptions within the Bar indicate that an additional unintended factor of recent vintage may also be at play. Several months ago, the Superior Court adopted the "firm and fair" trial date principle, a laudable and much-needed program designed to ensure that cases are provided with trial dates that are determined to be fair to counsel and the litigants at the time given, and thereafter are deemed to be firm. This principle is not limited to medical malpractice cases. Indeed, Chief Justice Rouse has publicly stated that the concept was implemented in response to a concern for all civil cases, and not simply a growing problem in the medical malpractice field.[46] Nonetheless, because too few defense counsel are generally called upon by insurers to handle too many significant malpractice trials, the perception has arisen within the Bar that medical malpractice cases are, in some instances resulting in the delay of trials of other types under the "firm and fair" trial date principle. With Superior Court judges now insisting that those highly regarded defense counsel provide realistically available dates at the time of trial assignment (i.e., no more double or triple booking), the dates become as unmovable for the courts as they are for counsel. Hence, the perception is that, if one case must defer to another because of inevitable courtroom scheduling issues, it will generally be the case that does not involve the over-scheduled medical malpractice defense lawyer. While expressing no view as to the accuracy of the perception, Chief Justice Rouse and Judge Neel have indicated an intention to review this perceived problem.

The Task Force takes no position with regard to the appropriateness of medical malpractice trials receiving any informal priority, if indeed such is the case. Nor does the Task Force offer any alternatives that would allocate judicial resources equally among all categories of cases, if such allocation is even necessary. Rather, this section is offered as a possible explanation for the recent statistics provided by the Superior Court Department suggesting that there is no vanishing jury trial phenomenon, when many trial lawyers believe the contrary to be true.

V. Three Recommendations of the Task Force to Provide Meaningful Jury Trial Training and Experience to Practicing Attorneys

1. Courts

a. Federal Court Standing Order Re: Courtroom Opportunities for Relatively Inexperienced Attorneys

In light of current trial trends, the professional development of the latest generation of trials attorneys must involve not only the Bar, but the Bench as well. Judges presiding over pre-trial conferences and related matters are in a unique position to recognize the opportunities for a junior attorney to participate in the examination of witnesses or other significant trial work before even lead counsel does. On May 10, 2005, Federal District Judge F. Dennis Saylor IV and Magistrate Judge Charles B. Swartwood jointly issued a rather novel standing order. (A copy of this standing order is available at www.mad.uscourts.gov/Orders). Noting that courtroom opportunities for relatively inexperienced attorneys, particularly those who practice at larger firms, have "declined precipitously across the nation in recent years" the Order states that the above-named judges: "as a matter of policy, strongly encourage the participation of relatively inexperienced attorneys in all court proceedings" including, where appropriate, "the examination of witnesses at trial" subject to certain cautions set forth in the Order. Such orders, coupled with more informal suggestions to lead counsel, may certainly go a long way in prompting (while not requiring) more senior attorneys to give newer attorneys "on-your-feet" trial experience when appropriate opportunities arise.

Although the Task Force began its efforts believing that the "vanishing jury trial" was an undisputed phenomenon, that matter is indeed disputed by the Superior Court Department of the Trial Court, where both civil and criminal jury trial statistics of recent vintage are robust. The Task Force applauds the Superior Court for its new tracking system and recommends that the system be maintained and monitored over the long term. In addition, the Task Force recommends that a system be implemented that more precisely tracks the categories of cases filed, and determines the percentage of jury trials and jury trial days that are consumed by each such category. In the event that material discrepancies are found and sustained over a multi-year period, the Task Force

recommends that specific studies be undertaken by the Trial Court, with the assistance of the Bar, to determine whether inadvertent priorities or practices are favoring certain categories without reasonable justification.

Finally, the Task Force is persuaded that the Massachusetts state courts are actively working to improve the overall efficiency of the court system -- as evidenced by the creation of court staffing models, time standards and *MassCourts* (computerization of the courts). It is the hope of the Task Force that continued efforts by the state courts to improve efficiency will lead to more opportunities for newer lawyers to try cases.

2. Law Firms

Regrettably, with the decline in the number of jury trials described elsewhere in this Report, few civil practitioners entering practice today can reasonably expect to try a significant number of cases over their entire careers. How, then, can we train the next generation of "competent" trial lawyers? From its survey results, research and the Task Force Members' own experiences, the Task Force has identified a number of tools that law firms, government agencies, public interest organizations and individual lawyers are using in an effort to provide their lawyers with meaningful trial training and experience:

a. Representation of Indigent Persons in Court-Appointed or Pro Bono Cases

Excellent opportunities exist to try cases either as appointed counsel or on a pro bono basis. Examples in Massachusetts include the Bar Advocate programs in the State Courts, administered by the Committee for Public Counsel Services ("CPCS"); the federal Criminal Justice Act ("CJA") appointment program; the federal court program for the appointment of counsel for indigent plaintiffs in civil cases; and, the Volunteer Lawyers Project ("VLP") of the BBA. Many of these programs provide excellent trial skills courses for participants. To obtain additional information and application forms for the above-referenced programs, please use the following contacts:

- CPCS - Bar Advocate Programs in the State Courts, Kristen Munichiello, Admin. Assistant, CPCS Training Unit, 617-482-6212

- CJA program, Helen Costello, Court Services Manager, United States District Court for the District of Massachusetts, 617-748-4428

- Federal Court Program for the Appointment of Counsel in Civil Cases, Barbara Morse, Pro Se Staff Attorney, United States District Court for the District of Massachusetts, 617-748-9180

- Volunteer Lawyers Project, Joanna Allison, 617-423-0648, ext.143

b. Externships

Several Boston-area law firms participate in programs under which associates are placed in a district attorney's office on a full or part time basis, typically for a six month period, and try both jury and jury-waived cases in the District Courts. The District Attorneys' Offices welcome these lawyers, and it seems clear that more firms could take advantage of these programs than is currently the case. By way of example, one firm continuously sponsors two externships with the Middlesex DA's Office. Two litigation associates each spend six-month rotation as an Assistant District Attorney – one in Lowell and one in Woburn. Thus, the firm sends a total of four associates per year to the DA's office. The firm reports that these participants gain tremendous courtroom experience on a daily basis handling arraignments, motion practice and sentencing hearings, as well as first chairing several trials over the course of their six-month externships.

A second firm reported that it sends four associates each year to participate in fulltime externships in six-month rotations in either Malden District Court or Somerville District Court. Each associate works full-time as a special Assistant District Attorney, trying bench and jury trials, investigating cases, arraigning defendants and arguing motions. This opportunity is open to all associates at the third-year level and above. To obtain additional information and application forms for special Assistant District Attorney Externships in Middlesex, Suffolk, Norfolk and Plymouth Counties please use the following contact information:

- Middlesex County District Attorney's Office, Kerry Ahern, Director of District Courts, 978-458-4440

- Suffolk County District Attorney's Office, Stacey Fortes-White, Chief of the District Courts, 617-619-4200

- Norfolk County District Attorney's Office, Michael Connolly, Chief of District Court Prosecutions, 781-830-4800

- Plymouth County District Attorney's Office, Michael J. Horan, Chief of Staff, 508-584-8120

c. Small Case Programs

Several law firms have formal programs under which young lawyers are permitted, indeed encouraged, to take on small cases, usually at greatly reduced hourly rates or under some other discounted fee structure, in order to obtain trial experience.

d. Formal CLE Programs and In House CLE Programs

Law firms and government and public interest organizations send younger, and sometimes even experienced, lawyers to outside trial advocacy training programs, such as the week long workshops sponsored by the National Institute for Trial Advocacy (NITA) and, locally, by Massachusetts Continuing Legal Education (MCLE).

Increasingly, law firms and other organizations also sponsor their own in-house trial training programs, which may include trial advocacy workshops, mock trials and lectures on evidence and other relevant topics. Sometimes firms will bring in an outside provider, such as NITA, to conduct the programs.

One firm informed the Task Force that it had developed the 'Exceptional Advocate training program.' The program is designed to provide early and vigorous mock trial training for associates and to provide a greater opportunity to talk with and seek advice concerning effective advocacy from experienced lawyers at the firm. The 4-year curriculum is conducted in 4 phases:

1. Court Trial/Arbitration. Participants will conduct two hearings/trials in labor matter.
2. Basic Jury Trials. Participants will conduct two trials of a tort case.
3. Complex Jury Trials. Participants will take depositions and conduct a Markman Hearing in an IP case and then proceed to trial.

4. Advanced Jury Trial. Participants will conduct one trial in an IP or complex Business Litigation case.

The firm also noted that litigation associates are given the opportunity to develop their trial skills through a program developed for the firm by NITA. Mid-level associates spend two weeks at "trial camp" where they practice direct and cross examination, opening statements, closing arguments and how to utilize courtroom technology. At the end of each week, the associates conduct a bench trial (week 1) and a jury trial (week 2) to federal or state judges and to partners from the firm.

Another firm stated that all of its litigation associates participate in training programs focused on litigation process and technique. Specifically, the associates get the following training: litigation introductory training (first year); deposition skills training (first year); introductory modules to trial training (a new program being designed for second and third years); and, trial training (third, fourth and fifth years).

Another office explained that, based on the NITA program, it conducts a 3-4 day program with lectures and hands on practice in opening statements, direct examinations, cross examinations and closings. These sessions are videotaped and critiqued.

Finally, one firm described its 15-week program as covering several litigation topics, including formulating a defense, case management, written discovery, electronic discovery, document discovery and management, substantive and procedural motions, preparing witnesses for deposition, defending depositions, taking depositions, working with experts, mediating cases, settlement, trial preparation, pre-trial conferences and appellate advocacy. This program is offered each year. All new associates in contested-matter areas participate; laterals participate at their option.

e. Use of the Second Chair and Mentoring Programs

Firms and other organizations actively encourage senior lawyers to allow more junior lawyers to second chair a trial, even where the needs or economics of the case might not otherwise justify the practice, in order to give the junior lawyer meaningful trial experience.

Additionally, firms and organizations now have formal or informal mentoring programs in which junior lawyers are paired with senior trial lawyers. Mentees are encouraged to attend and observe their mentors on trial and then meet with the mentors afterward to ask questions about what they have seen.

f. Department Meetings/Roundtables

Law firms and other organizations promote the use of regular litigation group meetings or roundtables at which strategy is discussed for an upcoming trial or a debriefing takes place regarding a recently concluded trial.

3. Clients

Clients, particularly parties such as insurance companies who have numerous cases in our courts, should be encouraged to think more innovatively about approaches to staffing. Incentives for developing a deeper cadre of capable trial lawyers eventually suited to handle the first chair role in cases should be obvious. Such litigation-savvy clients could have potentially huge impacts by deepening the trial capabilities of their own litigation team, while at the same time, aiding courts in scheduling trials. Everyone benefits from the development of a larger pool of more seasoned replacements that can meet both the current trial load and demands for the future.

Questions such as the following may assist clients in broadening their thinking in beneficial ways:

- Do we focus excessively on a small group of trial attorneys, or even on an individual trial lawyer for many cases, because we fear others are not yet "proven"?
- Is our docket backing up, with bottlenecks attributable in part to the unavailability of our chosen lawyers?
- Might this particular case warrant a younger lawyer at the helm, albeit one with a shorter "track record"?
- Are there realistic opportunities to assess younger lawyers, in courtroom settings?

- If our favored choice of "first-chair" were not available where would we turn? What is impeding us from gaining confidence in skilled backup litigators?
- Are we interfering with trial scheduling throughout the court system because of our insistence on approving only a limited "pool" of trial lawyers to handle our cases?
- Who actually knows the case best? Are we depriving junior lawyers of "on your feet" opportunities, even when they are the ones with the most familiarity with our cases?

We would strongly encourage the Trial Bar to share such recommendations with clients whose caseloads merit taking a broader look at how their litigation needs are being conducted in courts of this Commonwealth.

Conclusion

To the extent that the "vanishing jury trial" is actually affecting the jury trial experience of current and future generations of practitioners, which the Task Force believes to be the case, the Task Force strongly recommends remedial measures to ensure that this critical aspect of our Constitutional system does not atrophy and effectively die.

While the Task Force hopes that the future will bring systemic changes, in the meantime the Task Force recommends implementation of such interim methods as those set forth in the report. For many firms, this may necessitate a specific recognition that maximizing billable hours at the highest rates that the traffic will bear is a short-sighted, non-visionary approach to the future. To ensure that competent jury trial lawyers remain within the ranks of all firms that hold themselves out as having litigation capacity, a willingness to accept a lesser, or even no, short-term economic gain in exchange for adequate training and experience should become a self-imposed requirement. The Bar and the federal and state judiciaries must work cooperatively to stem the erosion, actual and perceived, of jury trials as a critical part of our system of justice.

APPENDIX

Table 1
Civil Case Statistics – United States District Court of Massachusetts[47]

Fiscal Year	Total No. of Civil Cases Terminated (A)	No. of Civil Cases Terminated During/ After Trial (B)	No. of Civil Cases Terminated During/ After Jury Trial (C)	Percentage of Defendants Disposed of by Trial (D)	Percentage of Civil Terminated by Jury Trial[48] (E)
1987	4014	217	142	5.4	3.5
1988	3783	196	113	5.2	3.0
1989	3827	195	115	5.1	3.0
1990	3515	192	120	5.5	3.4
1991	3522	158	104	4.5	3.0
1992	6378	165	99	2.6	1.6
1993	3955	168	104	4.2	2.6
1994	4204	201	141	4.8	3.4
1995	3538	130	82	3.7	2.3
1996	3630	147	100	4.0	2.8
1997	3454	123	71	3.6	2.1
1998	3105	84	51	2.7	1.6
1999	3462	88	60	2.5	1.7
2000	3119	96	66	3.1	2.1
2001	3100	74	52	2.4	1.7
2002	3024	99	73	3.3	2.4
2003	3003	82	59	2.7	2.0
2004	3166	83	54	2.6	1.7

Table 2
Criminal Case Statistics – United States District Court of Massachusetts[49]

Fiscal Year	Total No. of Defendants (A)	Defendants Disposed of by Trial[50] (B)	Defendants Disposed of by Jury Trial[51] (C)	Total Percentage of Defendants Disposed of by Jury Trial[52] (D)
1987	698	84	80	11.5
1988	504	64	58	11.5
1989	515	69	62	12.0
1990	417	60	55	13.2
1991	542	69	67	12.4
1992	419	56	49	11.7
1993	487	47	38	7.8
1994	442	48	31	7.0
1995	519	57	47	9.1
1996	523	40	37	7.1
1997	522	45	41	7.9
1998	535	41	35	6.5
1999	563	28	24	4.3
2000	593	28	25	4.2
2001	583	33	23	3.9
2002	620	21	16	2.6
2003	556	38	30	5.4
2004	539	52	49	9.1

Table 3
Civil Case Statistics – Superior Court (All Counties)[53]

Fiscal Year	Total Number of Civil Dispositions (A)	Number of Civil Dispositions by Jury Trial (B)	Total Percentage of Civil Cases Disposed of by Jury Trial (C)
1987	39738	744	1.9
1988	40959	667	1.6
1989	37803	469	1.2
1990	44022	741	1.7
1991	46471	904	1.9
1992	43633	688	1.6
1993	41129	661	1.6[54]
1994	39252	801	2.0
1995	38267	728	1.9
1996	34843	652	1.9
1997	33822	706	2.1
1998	32548	622	1.9
1999	29813	628	2.1
2000	26066	571	2.2
2001	23832	417	1.7
2002	26240	576	2.2
2003	24349	586	2.4
2004	26553	428	1.6
2005	23567	461[55]	2.0

Table 4
Criminal Case Statistics – Superior Court (All Counties)[56]

Fiscal Year	Total Number of Criminal Dispositions (A)	Number of Criminal Dispositions By Trial (B)[57]	Number of Criminal Dispositions by Jury Trial (C)	Total Percentage of Criminal Dispositions by Trial[58] (D)	Percentage of Defendants Disposed of by Jury Trial[59] (E)
1987	6069	721		11.9	
1988	6544	799		12.2	
1989	5712	959		16.8	
1990	5567	900		16.2	
1991	6223	1042		16.7	
1992	5438	1097		20.2	
1993	8791	759		8.6[60]	
1994	7397	4290		58.0	
1995	7410	1146		15.5	
1996	7945	1046		13.2	
1997	8034	1127		14.0	
1998	10018	1231		12.3	
1999	9242	1208		13.1	
2000	5717	1011		17.7	
2001	4885	(743)	599		12.3
2002	4787	(664)	525		10.9
2003	4789	(690)	546		11.4
2004	4941	(651)	530		10.7
2005	5193	(775)	614[61]		11.8

EXHIBIT A

The following surveys and studies, however, demonstrate convincingly what casual observation tells us – namely, that ADR use is increasing in the U.S. and locally.

- The American Arbitration Association reports an increase in case filings from 63,171 in 1993 to 150,009 in 2002 and almost 175,000 in 2003.
- In the only systematic study to date of private sector ADR, the RAND Institute for Civil Justice found that in Los Angeles metropolitan area, there was an average increase of 15% per year in the utilization of ADR between 1988 and 1993, while the case load in the court system was relatively stable. This study also showed that the cases going to private ADR tended to be of somewhat higher value than the cases going to court (60% involved claims of more than $25,000, as compared with only 14% of the court-filed cases).
- A Cornell study of Fortune 1000 companies in 1997 showed that 87% were using mediation and 80% were using arbitration. The primary reasons given by the companies for mediation use were (a) saves money (89.2%); (b) allows parties to resolve disputes themselves (82.9%); (c) more satisfactory process (81.1%); (d) saves time (80.1%); and (e) more satisfactory settlements (67.1%). The primary reasons given for using arbitration were (a) required by contract (91.6%); (b) saves money (68.6%); (c) saves time (68.5%); (d) more satisfactory process (60.5%); and (e) limited discovery (59.3%).
- A study by the Toro Company of its claims process during 1993-2002 showed that implementation of an ADR program reduced its attorneys' fees and costs from an average of $47,252 per claim to $9,074, and reduced settlements/judgments from an average of $68,368 per claim to $26,589.
- The U.S. Postal Service recently implemented a mediation program for internal grievances that conducts approximately 10,000 mediations per year. As a result, formal claims dropped by almost 25% in the first year and another 20% in the following year. The average mediation in the Postal Service program takes four hours and results in settlement more than 80% of the time.

The NASD and NYSE have implemented an ADR program which, in its fifth year (1984) handled 2,464 cases, and the case load has grown steadily; in 2002, there were 11,641 cases filed for mediation or arbitration.

Endnotes

[1] Peter L. Murray, The Disappearing Massachusetts Civil Jury Trial, Massachusetts Law Review 51, 51 (Fall 2004).

[2] Nathan Koppel, Trial-less Lawyers, The Wall Street Journal, December 1, 2005, at B1.

[3] Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Studies 459-570 (Nov. 2004). Professor Galanter's paper was presented as a working paper at the American Bar Association Litigation Section's Symposium on the Vanishing Trial held in San Francisco on December 12-14, 2003.

[4]For his analysis of civil trial trends, Galanter relied upon data from Table C-4 (entitled U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken) of the annual reports of the Administrative Office that records cases that terminated "during or after trial." Id. at 461 n. 4.

[5] Id. at 461 & Table 1.

[6] The Administrative Office defines a "trial" as "a contested proceeding before a jury or court at which evidence is introduced." Id. at 460 n. 2 (quoting AO Form JS-10). As Galanter noted in his study, given the definition of "trial" used by the Administrative Office, "[t]he degree of overstatement depends on the portion of commenced trials that end before judgment, due to settlement or other cause." Id. at 461 n. 4.

[7] Id., & Table 1 & n. 4. The figures of federal civil cases disposed of by trial includes those cases tried before U.S. magistrates who, since 1979, have been empowered to conduct civil trials with the consent of the parties. Id. at 474, 475. But even if those civil cases disposed by magistrate judges are examined separately, the Administrative Office records reveal that the number of civil cases disposed of by the magistrate judges has also decreased: the number of trials before magistrates rose between 1979 and 1996, but fell steadily through 2002 and continued to fall in 2003. Id. at 474 & Figure 10.

[8] Id. at 461. None of this is to say that our federal courts are not busy. First, the number of civil case filings in federal court has increased over the last forty years. Id. at Figure 16 (relying on data from Table C-2 to the Annual Reports of the Administrative Office). Second, even though there is a lesser number of jury trials, data on the length of trial of civil cases in federal trials shows that "[a] larger portion of trials take longer." Id. at 477-78 & Figure 11. Third, "although the number and rate of trials has fallen, judicial involvement in case activity—at least on some level—has increased" as evidenced by the number that cases that terminated before pre-trial with some type of court action. Id. at 481 & Figure 14.

[9] Id. at 492-93. For his analysis of criminal trial trends, Galanter relied upon data from Table D-4 (entitled U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Major Offense) of the annual reports of the Administrative Office. Id. at 493-94. For consistency, the Task Force relied upon data from Table D-7 (entitled U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and District) to the annual reports of the Administrative Office. See note 44, infra. See (then U.S. Chief District Court Judge for the District of Massachusetts) William G. Young, "An Open Letter to U.S. District Judges," 50 Federal Lawyer 30, 31 (July 2003) (noting that "[t]he American jury system is dying – more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts – but dying nonetheless").

[10] Id. at 492.

[11] Id. at 492-93 & Figure 24.

[12] "From 1962 and 1991, the percentage of trials in criminal cases remained steady," but this percentage "has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001)" between 1991 and 2002. Id. at 495.

[13] Id. at 494, Figure 24.

[14] Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, Examining Trial Trends in State Courts 1976-2002, 1 J. Empirical Legal Stud. 755-82 (2004). This study examined data from 23 states for its criminal trial trend analysis and data from 22 states for its civil trial trend analysis. Id. at 758. Although the sample of states was a

"convenience sample" (i.e., given comparative data available from these states and not others), "the sample contained a broad cross-section of states drawn from all population levels" and represented 58 percent and 59 percent, respectively for the criminal trial analysis and civil trial analysis, of the total U.S. population. Id. at 760. Data from Massachusetts was included in the civil trial trends analysis, but not the criminal trial trends analysis. Id. at 759, Table 2.

[15] Id. at 773.

[16] Id. at 768.

[17] Id. at 768.

[18] Id. at 768.

[19] Thomas H. Cohen & Steven K. Smith, Civil Trial Cases and Verdicts in Large Counties, 2001 (Bureau of Justice Statistics Bulletin (Apr. 2004)).

[20] Id. at 8; see Carol J. DeFrances and Marika F.X. Litras, Civil Trial Cases and Verdicts in Large Counties, 1996 (Bureau of Justice Statistics Bulletin 1, 2 (September 1999); Carol J. DeFrances et al., Civil Trial Cases and Verdicts in Large Counties, 1992 (Bureau of Justice Statistics Bulletin 1, 2 (July 1995). The studies for 1992 and 1996 also included data from Norfolk County.

[21] Figures and analysis above do not include bankruptcy cases. However, in a study of bankruptcy court data regarding bankruptcy adversary proceedings between 1985 and 2002, Professor Elizabeth Warren of Harvard Law School concluded that "adversary proceeding filings, the bankruptcy system's closest analogue to a lawsuit, have followed the pattern revealed elsewhere in the federal court system." Elizabeth Warren, Vanishing Trials: The Bankruptcy Experience, I J. Empirical Legal Stud. 913, 937 (2004).

[22] Galanter, supra n. 3, at 516.

[23] For consistency with the data relied upon by Galanter in his analysis of civil trial trends in the federal district courts nationwide, the Task Force also relied upon data from the annual reports of the Administrative Office for its review of the trial trends in the U.S. District Court for the District of Massachusetts. Specifically, the Task Force relied upon data from Table C-4A (entitled U.S. District Courts—Civil Cases Terminated, by District and Action Taken) to those reports that records cases that terminated "during and after trial" as Table C-4, upon which Galanter relied, did for all federal districts. As Galanter noted, see note 6, supra, the number of trials from this data may be overstated since trial is defined as any contested proceeding during which evidence is introduced.

[24] In 1987, of 4014 civil cases that were terminated in this district, 217 were terminated during or after trial (of which 142 were by jury trial). Table C-4A, U.S. District Courts—Civil Cases Terminated, by District and Action Taken, During the Twelve-Month Period Ended September 30, 1987 to Annual Report of the Administrative Office of the U.S. Courts. Accordingly, the percentage of cases that were terminated by trial was 5.4 percent and the percentage of cases that were terminated by jury trial was 3.5 percent. Id. Between 1987 and 2004, the percentage of civil cases terminated by trial has not risen above 5.5 percent (1990) and the percentage of civil cases terminated by jury trial has not rise above 3.5 (1987) percent. Table 1, infra. Although there has not been a steady decline in civil case dispositions during this period, by 2004, there were 3166 civil case terminations; 83 were during or after trial (54 by jury trial). See Table 1, infra. Accordingly, 2.6 percent of civil case terminations were by trial; 1.7 percent of civil case terminations were by jury trial. Id.

[25] Table 2.3, U.S. District Courts, Civil Cases Filed by District, Judicial Facts & Figures from the Administrative Office of the U.S. Courts (2005) (including figures for 1988-2004).

[26] Id.

[27] Id.

[28] Two of the nationwide studies regarding declining rates of civil trials referenced above included analysis of civil trials in the Commonwealth (one study included analysis of civil trial trends in 22 states between 1976 and 2002; the other included analysis of civil trial trends in the 75 most populous counties including Essex, Middlesex, Suffolk, Worcester [and, for part of the study, Norfolk] counties in 1992, 1996 and 2001). Civil Trial Cases and Verdicts in Large Counties, 1992, supra n. 21 at Appendix Table 2; Civil Trial Cases and Verdicts in Large Counties, 1996, supra n. 26, at Appendix C; Civil Trial Cases and Verdicts in Large Counties, 2001, supra n. 20, At Appendix F. Relying on

data from the Civil Justice Survey of State Courts, the latter study found in 1992, 1996 and 2001, as aforementioned, a decrease in the number of civil trials between 1992 and 2001. Civil Trial Cases and Verdicts in Large Counties, 2001, supra n. 20, at 8. The former study relied upon published and unpublished data, including data from the Commonwealth's Annual Reports on the State of the Massachusetts Court System, which it then compiled into the National Center for State Courts' State Courts Disposition Trends database. Examining Trial Trends in State Courts 1976-2002, supra n. 15, at 758 & Appendix E. Also as discussed above, this multiple-state study concluded that the rate of bench and jury trials had declined even as the number of annual case dispositions had increased. Id. at 768.

[29] Murray, "The Disappearing Massachusetts Civil Jury Trial," supra n. 1, at 51-60.

[30] Id. at 54.

[31] Id.

[32] Id. at 55-56.

[33] Id. at 57.

[34] Id. at 53. Although noting that the housing court has conducted a limited number of civil jury trials and the district court has been empowered to conduct some civil jury trials, Professor Murray relied upon statistics for civil jury trials in Superior Court. Id. & n. 9. The Task Force has done the same thing here. A table containing data regarding the disposition of civil cases between 1987 and 2004 (the same time period that the Task Force examined for the U.S. District Court) is included below as **Table 3.]**

[35] The statistics available for 2000 through 2005 confirm that the number of civil jury trials available for trial lawyers to try has decreased from those available a generation ago. For example, the total number of civil cases disposed of in Superior Court in 2005 was 23,567, but only 461 (see notation about this figure in Table 3, infra) were disposed of by jury verdict. Although 2002 and 2003 exceeded the number of civil jury verdicts reported in 2000 (571 jury verdicts), it remains the case that the number of civil cases disposed of by jury verdict has decreased in the last generation of attorneys.

[36] Information provided from Chief Justice of the Superior Court, Barbara Rouse, to the Task Force on May 15, 2006.

[37] Edward M. Ginsburg, "Where Have All The Trials Gone?," Opinion, 34 M.L.W. 1895 (April 17, 2006).

[38] Fee structures, staffing issues

[39] Take longer, more expensive

[40] Out of control, prodigious scope

[41] Larger cases, more at stake

[42] Federal court limitations on discovery; federal court disclosure requirements

[43] Lack of commitment by judges to the jury system as a legitimate dispute resolver.

[44] The business community in particular requires greater speed in the resolutions of its disputes

[45] The percentages do not include medical malpractice trials that were settled. Berkshire, Franklin, Hampden, Hampshire, and Nantucket are not included because they either did not submit trial logs or did not have any medical malpractice trials (settlements only.)

[46] BBA Superior Court Bench Meets Bar Conference, February 15, 2006.

[47] Source: Table C-4A (U.S.D.C. – Civil Cases Terminated by District & Action Taken) to the Annual Reports of the Administrative Office of the U.S. Courts.

[48] Although it included the percentage of civil trials terminated by trial, Table C-4A did not provide the percentage of the number of defendants disposed of by jury trial. These figures were calculated by using the data from Table C-4A to

determine the ratio between the number of civil cases terminated by jury trial to the total number of civil cases terminated in a given year.

[49] Source: Table D-7 (U.S.D.C. – Criminal Defendants Disposed of, by Type of Disposition and District) to Annual Report of the Administrative Office of the U.S. Courts.

[50] Column B reflects both convictions and acquittals by trial. This data was listed separately in Table D-7.

[51] Column C reflects both convictions and acquittals by jury trial. This data was listed separately in Table D-7.

[52] Table D-7 did not provide the percentage of the number of defendants disposed of by jury trial. These figures were calculated by using the data from Table D-7 to determine the ratio between the number of defendants disposed of by jury trial to the total number of defendants disposed of in a given year.

[53] Source: For fiscal years 1987-1993: Annual Reports of the Massachusetts Trial Court submitted by the Chief Administrative Justice (and later the Chief Justice of Administration and Management) of the Trial Court of Massachusetts to the Chief Justice of the Supreme Judicial Court. For fiscal years 1994-2000: Annual Reports on the State of the Massachusetts Court System presented by the Chief Justice of the Supreme Judicial Court. For 2001-2005, Annual Reports on the State of the MA Court System (Criminal—Breakdown of Dispositions), available at www.mass.gov/courts.

[54] The Annual Reports for fiscal years 1993-2005 did not provide the percentage of the number of civil cases disposed of by jury trial. (N.B. Pie charts in the 1995 and 1996 Annual Reports listed the disposition by jury verdict as 2 percent and 2.0 percent, respectively. The Task Force has not rounded off the actual percentage for those years from 1.9 percent). These figures were calculated by using the data from the Annual Reports to determine the ratio between the number of civil jury trials to the total number of civil case dispositions in a given year.

[55] Annual Report on the State of the MA Court System for Fiscal Year 2005 (Civil – Breakdown of Dispositions), available at www.mass.gov/courts noted that the total number of 461 civil cases disposed of by jury verdict "does not include cases disposed by trial without jury, cases settled during trial prior to verdict, or cases which were mistried for any reason. It may or may not include cases disposed by jury in which the court disposed of one or more claims upon dispositive or other motion prior to verdict."

[56] Source: For the fiscal years 1987-1993: Annual Report of the MA Trial Court submitted by Chief Administrative Justice (and later the Chief Justice for Administration and Management) to the Chief Justice of the Supreme Judicial Court. For fiscal years 1994-2002: Annual Report of the State of the MA Court System by the Chief Justice of the Supreme Judicial Court. For fiscal years 2001-2005, Annual Reports on the State of the MA Court System (Criminal—Breakdown of Dispositions), available at www.mass.gov/courts.

[57] The Annual Reports for 2001-2005 did not provide figures for criminal dispositions by trial (both jury trials and bench trials), but just provided the figures for the dispositions by jury trial. Chief Justice Rouse has informed the Task Force that this total can be calculated by adding jury dispositions to the number of dispositions under the category of finding in the Annual Reports but noted that the number of dispositions by jury trial was still underreported. This calculation for each of the years between 2001 and 2005 is provided in parentheses.

[58] Annual Reports for fiscal years 1987-2000 did not provide a breakdown of jury trials from the total number of criminal trials.

[59] The Annual Reports did not provide the percentage of the number of defendants disposed of by jury trial. These figures were calculated by using the data from the Annual Reports to determine the ratio between the number of criminal jury verdicts to the total number of criminal case dispositions in a given year.

[60] Reports for 1993 to 2000 did not provide the percentage of the number of defendants disposed of by trial. (N.B. Pie charts in the annual reports for 1995 and 1996 listed the percentage of dispositions by trial as 15 percent and 13 percent, respectively. The Task Force has not rounded off the actual percentage for those years. These figures were calculated by using the data from the Annual Reports to determine the ratio between the number of criminal trials to the total number of criminal case dispositions in a given year.

[61] A footnote to the number of criminal cases disposed of by jury trial in 2005 in the 2005 Annual Report noted that that the total number of 614 jury trials "does not include cases disposed by trial without jury, cases in which a defendant changed his/her plea to guilty after empanelment but prior to verdict, or cases that were mistried for any reason."