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THE RAND REPORT: CONCERNS AND FUTURE CHOICES†

William H. Erickson*

The five-year report on judicial case management under the Civil Justice Reform Act of 1990 (CJRA) by the RAND Institute for Civil Justice (RAND) surprised many in the ADR and legal communities when it concluded, despite positive reports from parties and litigants about ADR, that nonbinding ADR processes, such as mediation and early neutral evaluation, have not been proven to reduce the cost and delay of litigation.[1] As U.S. District Court Judge Ann C. Williams of Chicago, Chair of the Judicial Conference's Committee on Court Administration and Case Management, put it, "We were disappointed that the RAND study didn't affirm our belief that ADR reduces cost and delay."[2] She noted that the committee's May 16 report to Congress reflected a firm judicial commitment to ADR, although it did not recommend implementing across-the-board programs, based to some degree on the RAND report.

Given the unexpectedness of the report's conclusions, RAND researchers should expect rigorous scrutiny of their data-gathering and analytic methodologies. Although some concerns have already been expressed about the report's conclusions regarding ADR, at this time no formal evaluation of the analysis has yet reached print, and it is with the intent to stimulate further assessment that the methodological and analytical concerns discussed below are raised regarding this report.

The ADR empirical study was unduly limited to four mediation and two neutral evaluation pilot programs. In one of the two districts with useful data, mediation is mandatory, and that district had the highest number of complaints of any district studied. Whether mandatory mediation can effectively resolve disputes when the parties have not agreed to mediate is debatable. Mediation is most successful when the disputants desire to explore settlement. Court-mandated mediation often commences with the parties in disagreement on their desire for mediation. A mediator cannot force agreement, or successful mediation.

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†Reprinted, with permission, from *ADR Currents*, Vol. 2, No. 3—Summer 1997, a publication of the American Arbitration Association.

*Former Chief Justice, Colorado Supreme Court; Fellow (President, 1971), International Society of Barristers.

[1] J. KAKALIK, T. DUNWORTH, L. HILL, D. MCCAFFREY, M. OSHIRO, N. PACE, M. VAIANA, AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT (RAND, The Institute for Civil Justice, 1996). All page numbers cited parenthetically in the text refer to this volume of the four-volume RAND report. Other volumes of the report, dealing with case management, are not referenced.

[2] Bossert, *Case Management Gets Judicial Nod: Rand ADR Study Fails to Deter Judges, Who Say More Experiment is Warranted,* Nat'l L.J., June 9, 1997, at A11.

BACKGROUND

The CJRA had its genesis in the keynote address of Dean Roscoe Pound to the 1906 American Bar Association annual meeting. Speaking on the "Causes for Popular Dissatisfaction With the Administration of Justice," he pointed to the archaic nature of court proceedings, the uncertainty and expense of trial, and the injustice of basing decisions on procedural technicalities rather than the merits of the case, and challenged the American bar to address these concerns.[3] In 1976, the late Chief Justice Burger convened the Pound Conference to address the still-timely issues Pound raised and current complaints about the abuse of discovery and the ever-rising expense of litigation.[4] One of the Conference recommendations was to expand existing methods and develop new initiatives and alternatives for dispute resolution.

The CJRA was the end product of reports by the Federal Courts Study Committee and the Council on Competitiveness, and recommendations by the Brookings Institute to reduce the cost and delay in the federal court litigation process.[5] In this legislation, Congress mandated that every federal district court conduct a self-study, with the aid of an advisory group, to develop a cost-and-delay reduction plan through civil case management. It also mandated, in 28 U.S.C. §471, that ten "pilot" districts adopt civil justice plans, including an ADR component, for the purpose of ensuring just, speedy, and inexpensive resolution of civil disputes. To provide an empirical basis for assessing new procedures adopted under the act, an independent evaluation was to be made at the end of five years. This evaluation was to review the use of ADR in the ten pilot district court plans. Ten other districts were to serve as control groups for comparison purposes.

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3 *Reprinted in* 35 F.R.D. 273 (1961).

4 The Pound Conference addresses are reprinted in 70 F.R.D. 79 (1976). Following the conference, Griffin Bell was appointed to chair the committee to study the means of implementing the recommendations. *ABA Report of Pound Conference Follow-up Task Force*, 74 F.R.D. 159 (1976). *See generally* Erickson, *Responses of the American Bar Association*, 64 A.B.A. J. 48 (1978); *The Pound Conference Recommendations: Blueprint for the Justice System in the 21st Century*, 76 F.R.D. 277 (1978).

At the American Bar Association (ABA) meeting in 1991, Vice President Quayle, as chairman of the President's Council on Competitiveness, presented an "Agenda for Civil Justice Reform in America," which included many recommendations based on the Pound Conference recommendations, among them promoting the voluntary use and awareness of ADR. The ABA responded in 1992 with the "ABA Blueprint for Improving the Civil Justice System," which pointed out the implementation of many of the Quayle recommendations proposed to improve ADR techniques and create a multi-doored courthouse, which would have available mediation, arbitration, ombudsperson, early neutral evaluation, and summary jury trial. Implementation of ADR was also strongly supported by the American College of Trial Lawyers.

5 TASK FORCE ON CIVIL JUSTICE REFORM, THE BROOKINGS INSTITUTE, JUSTICE FOR ALL, REDUCING COST AND DELAY IN CIVIL LITIGATION (1989).

The Judicial Conference and the Administrative Office of the U.S. Courts chose RAND to evaluate the cost-and-delay reduction programs adopted in the pilot districts. The four-volume RAND report was released in the winter of 1997. After a limited review of only six pilot districts that participated in mediation and neutral evaluation programs, the volume of ADR raised serious questions about the efficacy of these types of programs in the federal courts, having concluded that these programs "as implemented in these six districts, do not appear to be a panacea for perceived problems of cost and delay, but neither do they appear to be detrimental. We have no justification for a strong policy recommendation because we found no major program effects, either positive or negative."(4) The report acknowledged, however, that "[p]articipants in these ADR programs are generally supportive of them. Only a small percentage of participants in any district thought the referral to ADR was inappropriate or that the program should be dropped. Most of them felt that the programs were worthwhile both in general and for their individual cases.(*Id.*)

Of the twenty pilot and control district courts, only six districts were considered in the RAND study because the researchers felt that in 1992-1993, when the data was being compiled, the other fourteen districts did not involve a sufficient number of cases to permit empirical review of mediation and early neutral evaluation.(*Id.*) Moreover, the RAND report addressed only two of the many well-established methods of ADR—mediation and early neutral evaluation. The RAND study was limited in scope because mediation and early neutral evaluation are new to the federal courts and were sufficiently widely used to generate a substantial data pool. It did not review the use of arbitration, but noted that in the jurisdictions where arbitration was mandatory, arbitration was not binding unless agreed to by the parties and that earlier federal studies had considered this process and favorably recommended its use. Neither did the study review abbreviated mini-trials, summary jury trials, or the use of special masters to manage discovery, because they are relatively rare and tend to be used in complex cases only.(2) In addition to these methods noted but not evaluated in the report, other common ADR procedures in the federal courts include settlement conferences, rent-a-judge programs, summary judge trials, private neutral fact-finding, early settlement under Rule 68, early offer programs, and screening panels.

In a narrow sense, the RAND report is directed primarily at case-management techniques in the ten pilot and ten control districts, and not to ADR. The report on ADR is only one of the four volumes generated by the study. The other volumes on case management make no recommendations concerning the federal ADR procedures.

In order to provoke further examination of the RAND study's findings regarding ADR, RAND's data-gathering method is reviewed here.

AREAS OF CONCERN

Data from the Chosen Districts

In the first federal district studied by the RAND researchers, the Southern District of New York [NY(S)], where the study-group cases comprised an otherwise perfectly random group, program design required the cases to be tracked before they could be sent to mediation. Eighty-five percent of the cases were never tracked, and there is no explanation of why this procedure was followed, nor any analysis of the factors that kept a case from being tracked.(16-17) The reasons for non-tracking, particularly if they relate to complexity, difficulty, or perceived time requirements for settlement or litigation, may introduce a bias sufficient to invalidate the characterization of the sample as "random," since, as the researchers note, "acceptance of cases in the standard and complex track ultimately was a matter of judicial discretion, and the majority of cases were not assigned."(265)

Fifteen percent of the ADR cases and 30% of the control-group cases were still unresolved (i.e., open) when the data was assembled for analysis.(22-23) The researchers' attempts to "adjust" for this factor are of questionable validity because a control group having 30% unavailable data is far too incomplete to permit either extrapolation or interpolation. Necessary speculation about what is missing probably renders the data gathered too suspect for a meaningful analysis, but the data were plugged into the analysis without regard to the problems and became a conclusion.

In the Southern District of Texas [TX(S)], the court selects cases for ADR based on their perceived difficulty of settlement.(21) Because this was not known when the study and control groups were assembled, and because the researchers could find no valid method of correcting for the bias, the data from TX(S) appear untrustworthy, and any analysis performed on them is also suspect. The analysts admitted the problem in a footnote (21, n. 7), but nevertheless used the data to reach the published results.

The data sample from the Southern District of California [CA(S)] also is flawed. Before the study began, the district implemented a program requiring that all civil cases be sent to a judicial magistrate for facilitation, both those that ultimately went to trial and those slated for ADR. There was no possibility of assembling a contemporaneous control group because there were no cases similar to those in other districts. The researchers attempted to use old cases as a control group but admitted that anything beyond an "exploratory" analysis is not valid.(22)

In the Eastern District of New York [NY(E)], the district shifted from a "later" evaluation method to early neutral evaluation during the RAND

study.(22-23) Since the two methods are very different in application and efficacy in any given case, a comparison of cases in the study group before and after the change is of questionable value. The report's authors admitted that the analysis is merely "exploratory" and should be viewed only as "suggestive."(22)

Is what remains a sufficient sample to permit evaluation? After assessing the data-gathering methodology and eliminating the untrustworthy data sets, the sample is reduced to two programs: those in the Eastern District of Pennsylvania [PA(E)] and the Western District of Oklahoma [OK(W)], each involving about 150 mediated cases. The analysts recognized the problem thus created, admitting that in four of the six districts "we have [only] observational data . . . one should not treat our statistical results as exact estimates of causal effect . . . we cannot say definitively that our observed effects correspond to causal effects."(27)

In PA(E), only cases that are ineligible for arbitration go to mediation.(16) Thus, the study group is not randomly generated and may not be properly comparable to a group that is, such as OK(W). Also, the study does not explain what factors make a case ineligible for arbitration, although they may create a bias. There is an obvious problem in comparing a group of selected and "steered" cases with an all-inclusive volunteer group. The perturbations a "mandatory and directed" vs. a "wholly optional" comparison might create are not acknowledged or addressed.

The two programs are similar in the stage at which they move to mediation. On average, both occur within four months of filing. However, the PA(E) mediation occurs before discovery(45-46), and before the scheduling conference. It results in the highest percentage of complaints of any district studied.(*Id.*)

In contrast, the OK(W) program results in the lowest percentage of complaints and has the highest number of volunteer referrals.(*Id.*) The researchers admit that litigants in the OK(W) program seem to seek a resolution of their disputes at the earliest possible stage, while the PA(E) litigants are dissatisfied with early mediation.(*Id.*) Remarkably, the researchers do not consider that cultural differences, noticeable to any well-traveled observer, are likely to be responsible for this phenomenon, and that those cultural differences may introduce a substantial and significant bias into the data for which no provision has been made.

The PA(E) program is mandatory, the OK(W), voluntary. Mediation in PA(E) consists of one 90-minute session, provided pro bono by attorneys with limited training.(18) Mediation in OK(W) takes about four hours, is provided by trained lawyer-mediators (whether certified is not known), and the parties split the $500-$750 fee.(*Id.*)

If the PA(E) and OK(W) programs are properly comparable, and it is not certain that they are, the study and its conclusions rest on one relatively small sample of one mandatory and one voluntary program. The report cannot prop-

erly make any assessment of the early neutral evaluation program because no trustworthy data set exists from which to draw the analysis.

Any analysis that can be made of the two surviving data sets is substantially less reliable than it would be if another data set were available for each type of program, because another set would allow the analysts to fit data points from the second group to the control variables they have generated. If the second 150 cases yielded an average comparable to the first 150 after adjustment, the variables would be substantially more trustworthy than they are without such a check. Even the simplest test for statistical significance demonstrates that the confidence limits when n=150 are substantially the same as the square when n=151. The number of data points within a group are sufficient, but if analysis is attempted on the number of groups (i.e., two), the problem becomes obvious. A statistical analysis of two "results" is simply not meaningful.

Cost Analysis Data and Method

The data-gathering for the attorney-hours portion of the study, which forms the basis for the report's conclusions on cost-reduction efficacy, is the result of only a 50% response by those surveyed, of whom only 75-80% gave full information. The bias introduced by an attempt to analyze data generated by respondents while ignoring non-respondents and the reasons for their non-response may be assumed, and may be large. Although the analysts address this issue in Appendix D (289-290), they appear to ignore it for purposes of analysis. Nevertheless, an attempt to perform meaningful statistical analysis on a data set that is better than 60% undetermined, and when the reason for the missing data is unknown, would appear to be questionable.

Analytical Methodology

The analytical technique required by including the "open cases" from the NY(E) district involves a censored regression.(277) While the technique is certainly valid, it requires scrupulous care in determining what data will not be included and how the questionable data will be treated.

The simple test for the method lies in the variance between the first and last iteration, as a percentage of the average, and the number of iterations required to achieve convergence. Simply put, if the total time to disposition for closed cases varies greatly from that for all cases, after the open cases are adjusted using the estimate, there is a problem. The number of times the adjustment has to be made is important if the two averages are far apart to start with. Because the 95% confidence limits reported by the analysts involve a very large range (see 287), it is likely that the first and last iterations of the critical factor vary similarly. As the analysts do not report this information or discuss the problems inherent in the method, it is not possible to assess either the method or the re-

sult. The number of adjustment and control factors applied to the raw data is also problematic, and the problem is exacerbated, as discussed above, by having no trustworthy second set of data against which the variables can be tested. Although the analysts properly attempted to control for other effect-producing factors, external to the ADR process itself, each factor is a potential source of error. When the errors are additive or multiplicative, the total and percent error can rapidly exceed any acceptable confidence limit.

The variables used for modeling are disclosed(280), but no rationale is provided for their selection or for the coefficient applied to the average total time to disposition as a result. Based on the enormous spread of the 95% confidence limits reported in Appendices C and D, it is reasonable to conclude that the analysts recognize the error magnitude the variables may produce. While there is no discussion of the reliability of the result, there is a confidence limit that clearly reflects the unreliability of the resultant number.

The breadth of the confidence interval does not mean the result offered is wrong, but it certainly suggests it is untrustworthy, and that no policy should be based on it until a more rigorously correct method succeeds in producing a similar result. It is to their credit, and appropriate, that the report's writers profoundly qualify much of the analysis by noting: "Thus, interpretation of our statistical results should take place only in the context of an understanding of how the judicial system functions in practice."(27) In effect, they cede the question of whether the results are inherently and independently reliable.

RESPONSES TO THE RAND STUDY

The *Dispute Resolution Magazine* (ABA Section on Dispute Resolution) devoted its Summer 1997 issue entirely to the RAND report and federal court ADR. In "Welcoming Scrutiny of ADR," Jose C. Feliciano, the former chief prosecutor for the city of Cleveland and an ADR practitioner, pointed out that the findings in the RAND report were equivocal at best. He also noted that the six districts examined were not model programs and were not representative of the fifty-one mediation and fourteen early neutral evaluation programs operating in the federal courts. Other studies concur with his position. The published reports from the Western District of Missouri present an altogether different picture of federal ADR in use today. Similar reports from the appellate circuits and state court studies, like those from Maine and Massachusetts, support Feliciano's reservations.

In another article, the RAND report's authors summarized the characteristics of the ADR programs studied and emphasized that ADR in the report refers only to mediation and neutral evaluation. They admitted that most mediation and neutral evaluation programs have been in operation for only a few years

and need fine-tuning, but did not address the limited scope of the report or the questions raised regarding the significant meaning of the conclusion.

Dr. Deborah R. Hensler, a RAND director, defended the study and report in "Puzzling Over ADR: Drawing Meaning From the RAND Report." She focused on the use of ADR over its 20-year history, and stated that American Arbitration Association indicators show rising ADR caseloads, but that other surveys show "modest to negligible experience" in the use of court-related ADR. According to *Business Week*, however, the AAA managed an annual caseload one-fourth the size of all federal court civil-case filings in 1994.[6] With a 1996 caseload of over 70,000, as reported in the *Dispute Resolution Journal*, the AAA is the largest nonprofit ADR group in the nation.

In Dr. Hensler's view, the RAND evaluation should be used not to "bash" ADR, but to encourage future use and study of its methods and models. While she recognized that the Western District of Missouri, selected for intensive study by the Federal Judicial Center, has demonstrated a reduction in the time to disposition and, based on lawyer opinions, a reduction in litigation costs, she suggested that the real potential of ADR may lie outside, not inside, the courts. As a general statement, this fails to account for the Missouri experience and experiences of the federal appellate courts, which have had substantial success with mediation.

In the Ninth Circuit, which uses primarily a neutral evaluation method, the settlement rate of cases on appeal is over 73%.[7] The Tenth Circuit, which uses mediation, reports settlement or voluntary dismissal rates of 60%, and the Second Circuit has settled or dismissed 45% of mediated appellate cases.[8] These studies tend to suggest that there is a healthy potential for ADR in the courts, and in the federal courts as well.

Francis E. McGovern of Duke University took a more analytical approach to the RAND report in his article, "Beyond Efficiency: A Bevy of ADR Justifications (An Unfootnoted Summary)." He suggested that RAND directed its attention to a limited study of court-annexed ADR in the federal courts and not to ADR generally and questioned whether time and money savings should measure the efficacy of ADR, emphasizing that the participants' satisfaction and perceptions of fairness, which RAND concedes are very high, are extremely important factors. Professor McGovern set forth a number of common-sense reasons for utilizing ADR more fully and stressed that cost and time-saving considerations should not be the controlling factors. Many studies bear out his

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6 Schine & Himelstein, *Legal Affairs: Dispute Resolution*, BUS. WK., June 12, 1995, at 88-92.
7 Dick, *The Surprising Success of Appellate Mediation*, ALTERNATIVES MAG., April, 1995, at 41-48.
8 *Id.*

contention that ADR, generally, has proven its high satisfaction ratings and its effectiveness in cost and time savings.

Also responding to the RAND report, Pamela Chapman Enslen, the vice chairperson of the ABA Section on Dispute Resolution, suggested that the time limitations under which the report had to be completed may have created problems in its conclusions. In "Insights on Participant Satisfaction May Be Real Significance of RAND Report," she suggested that the RAND study was conducted too soon after implementation of the CJRA. Eighty-five percent of the judges had not yet changed the methods of managing their cases, which indicates the judges believed their procedures were in compliance with the CJRA. She focused on the RAND finding concerning participant satisfaction with ADR, stating, "In the end, isn't the civil justice system successful if the litigating public perceives it will serve them well?"

Jeffrey G. Kichaven, in an article titled, "ADR Does Not Save Time or Money? Great News!," also suggested that what is important is that ADR produces a satisfied client.

In "Five Years of Random Testing Shows ADR Successful," Kent Sapp, director of the ADR program for the Western District of Missouri, explained that his district is a demonstration rather than a pilot district, and uses a program designed to bring about earlier settlement by requiring earlier face-to-face meetings between the parties. Cases are divided into three categories: "A," which are required to use the program; "B," in which the parties may choose to use ADR; and "C," which are ineligible for the program. An early assessment meeting is held within 30 days after the initial meeting and must be attended by parties with settlement authority and by the lawyers responsible for handling the case. The parties may choose a private neutral mediator or have the program administrator handle the mediation.

Many cases settle at the first meeting, and the administrator may direct further meetings and make suggestions. The results reported to the Federal Judicial Center are that ADR has brought about case termination at a 28% faster rate than traditional litigation, often without the need for discovery, and saved parties more than $16 million from May 1994 through December 1996.

Diane E. Kenty, administrator of the ADR program for the state of Maine, in "RAND Report Provides Insights for State Court ADR Programs," pointed out that the fair dispensing of justice is not measured by the time and money expended. Courts must strive, she believes, to ensure that litigants achieve satisfactory outcomes, and ADR tends to produce a result that is more agreeable to the parties than that reached by the adjudicative process. She believes voluntary, rather than mandatory, ADR results in the most successful settlement, and her review of the Maine procedures suggests that the report's conclusions notwithstanding, ADR works well in her state. Other studies support her claim.

Two researchers have studied the use of ADR in Maine small-claims court and report impressive results. Craig A. McEllen and Richard J. Maiman, in "Mediation in Small Claims Court,"[9] report that in 81% of mediated settlements the parties are in full compliance, as compared with 48% full compliance in adjudicated cases. In mediated cases, the partial compliance rate is 93%, compared with 67% in the adjudicated cases.

A recent report on Massachusetts District Court Judge Paul E. Ryan's "conciliation" experiment in seven different courts suggests there is a real prototypical "economy court" operating and available for study.[10] Judge Ryan routinely resolves thirteen or fourteen civil trials in a day, nine or so by the volunteer mediators he has trained, and another four or so by himself. "In two years, I don't think I've had over twelve cases that went on beyond the day they were assigned," he proudly observed of a program that has proven "efficient and effective without costing the public a dime."

Dwight Golann, the author of a new work on mediation,[11] cites numerous corporate and state court studies that concur. For example, the Toro Company has made a wholehearted commitment to ADR and reports that more than 90% of its product-liability claims settle without a lawsuit, that the number of claims it litigates is drastically reduced, that its expenditures have reached an unhoped-for low of $45,000 per average claim, and that, as a result, its liability insurance premiums have decreased by $1.8 million annually. Cited as a model program by the Canadian *Financial Post*, the Toro Company estimates its total annual systems process cost savings at 25-30%.[12]

The *Wall Street Journal* recently reported that over the last three years, 100 of the major American corporations have agreed to mediate all disputes with any other signatory to the pact negotiated under the auspices of the CPR Institute for Dispute Resolution (July 21, 1997, at 12, B1). Signers include PepsiCo, Philip Morris, Kraft Foods, Kellogg Co., Chase Manhattan, Bank of America, Nations Bank, DuPont, W.R. Grace, and many others. Compact participants estimate that 85-90% of the more than 100 cases that have gone to mediation have settled. McDonald's and Pizza Hut, also signatories, are encouraging franchisees to mediate all disputes. Chubb, Inc., under the insurance pact with the mediation group, has negotiated settlements in all but a few cases and estimates that the corporation has saved between $150,000 and $200,000 per case. The

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9 In K. KRESSEL & D. PRUITT, MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 55-56 (1989).

10 *The Massachusetts Lawyer Bench Conference Survey of ADR Providers*, Mass. Law. Wkly., June 23, 1997, at B2.

11 D. GOLANN, MEDIATING LEGAL DISPUTES 529 (1996).

12 Michael Fitz-James, *Corporate America Embraces ADR*, Fin. Post, July 16, 1997, at 10.

corporate response to ADR may reflect the fact that law firms grossed more than $100 billion in collected legal fees in 1991, with one major company alone spending over $100 million in annual legal services and liability insurance.[13]

Golann estimated that the typical Fortune 500 Company spent $6.7 million annually during the decade to litigate sexual discrimination and harassment claims. Under the EEOC's pilot program for employment discrimination claims, between April 1993 and March 1994, the cost per defendant claim was reduced to $87,000, and the total time to disposition dropped from 294 to 67 days, with a success rate of 80-90% depending on the city, and an overall satisfaction rating by the participants as high as 92%.[14]

In a study on divorce settlements, researchers Jessica Pearson and Nancy Thoennes found impressive results. The study, titled, "Divorce Mediation: Reflections on a Decade of Research,"[15] which looked at programs in Colorado and Delaware, found that compliance rates in mediated settlements and custody agreements were 80%, as compared to 60% full compliance among the litigated groups. Among the mediated group, less than 10% reported serious disagreements after the settlement, as compared to 33% among the adversarial group. Perhaps the most remarkable statistic, particularly with regard to the children involved, was that among the mediated group, not one individual reported infrequent visitation, while 30% of those in the adversarial group did.

Implementation of ADR was enhanced by President Clinton's Executive Order No. 12988, which was entered on February 5, 1996. The executive order was intended to carry out the goals and purposes of the CJRA by requiring settlement conferences and the expanded use of ADR, and the Attorney General was called upon to assist in implementing the order. The CJRA will have greater meaning because of the President's order and no doubt will result in extended use of ADR in the federal courts. The case of *Tenaska Washington Partners No. II, L.P. v. Bonneville Power Administration*[16] was removed from the U.S. Court of Federal Claims and sent to arbitration under the auspices of the AAA. The case involves a billion-dollar damage claim, thousands of exhibits and reels of testimony, and is sufficiently complex to overwhelm the docket of a federal court. The decision of the White House and Justice Department to

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13 *See* Birnbaum & Sosland, *Guilty! Too Many Lawyers and Too Much Litigation. Here's a Better Way*, BUS. WK., April 13, 1992, at 60, 61; *see also* Johnson & Kamlani, *Do We Have Too Many Lawyers?*, TIME, Aug. 26, 1991, at 54.

14 D. GOLANN, *supra* note 11, at 445-47.

15 In K. KRESSEL & D. PRUITT, *supra* note 9, at 9-27.

16 In the Matter of Arbitration between Tenaska Washington Partners No. II, L.P., claimant, and the United States of America, acting by and through the Bonneville Power Administration, respondent., #770198-0224-95, removed from the Court of Claims and sent to arbitration under Exec. Order No. 12,988, 61 Fed. Reg. 4729 (1996).

send the case to arbitration sends a clear message that complexity and potential exposure are not significant determinants of whether litigation is the better method of dispute resolution.

Another study on ADR in the state courts will be completed by the end of 1997. The Judicial Council of the State of California is currently preparing a report on all court-operated ADR programs over a full three-year period. The report is to be completed by January 1, 1998, and the results should be available soon thereafter.[17]

Every state has now adopted a provision for court-related ADR; in most the program is administered by the courts and an evaluation of ADR potential is made part of the pretrial conference. In a substantial minority, an attempt to mediate is required before the case can go to trial. However, only nine states and the District of Columbia have enacted rules requiring an attorney to discuss the availability of ADR with clients, or to determine whether ADR is appropriate in any given case.[18] In the other 41 jurisdictions, the responsibility for the implementation and effective use of ADR is placed entirely on the judiciary and court administrative personnel. An important step in achieving full implementation of ADR is securing the active support of the working bar by including responsibility for full disclosure and fair assessment of alternative methods of dispute resolution in the Canons and Codes of Professional Responsibility under which attorneys practice.

CONCLUSION

There have already been some reflective responses to the four-volume RAND report on case management and ADR in the federal district courts. The material on case management had a broader empirical base for analysis than the ADR report and, thus, may arrive at more useful conclusions than did the ADR report, given the data-gathering and analysis problems already discussed here.

Perhaps the RAND report's most glaring failure is in limiting the study of ADR to mediation and early neutral evaluation. Many successful methods of dispute resolution exist. Arbitration has been used for more than two decades in the federal courts, and abbreviated mini-trials, settlement conferences, use of special masters to manage discovery in complex cases, and other procedures

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17 Schachter, *To Litigate or Not?—Time for ADR*, 28 BEVERLY HILLS B.A.J. 30, 34-35.

18 The districts that have a rule of professional conduct specifying that the attorney should or shall advise the client about alternative forms of ADR include Alaska, Arizona, Delaware, Colorado, the District of Columbia, Georgia, Hawaii and New Hampshire. The Lawyer's Creed in New Mexico and Texas requires that a lawyer do so.

have been used successfully to bring about an early resolution of litigation. Early neutral evaluation may be nothing more than the first step in a settlement process. Many studies, a fraction of which are cited here, prove that ADR works and that it provides a cost-effective, speedy, and fair alternative to litigation, resulting in two satisfied parties to a dispute.

The RAND report should not end efforts to implement and further develop ADR. Implementation of ADR in both the state and federal courts and by the organized bar should be carried out without further delay.

ADR AND THE DECLINE OF THE AMERICAN CIVIL JURY†

Kent D. Syverud*

As a method of dispute resolution, the American civil jury trial is fading away. Are the alternatives to blame? Are alternative dispute resolution methods, whether denominated as "programs" of the courts or as choices of the parties, the cause of the decline of the American civil jury trial? Or are these competing methods rather simply symptoms of that decline, and its beneficiary?

This Article argues that alternative dispute resolution, broadly defined, is a cause of the decline of the American civil jury, but not the proximate cause. True, disputants are increasingly driven away from exercising their right to a jury trial, in small part because there are attractive alternatives. But it is ultimately the defects of the civil jury trial itself, and society's failure to address those defects, that is the proximate cause of the civil jury's decline.

In America today, the civil jury trial too often resembles the expensive and outmoded automobile produced by a flagging state-run industry in a once centrally planned economy. Few people buy it unless they have to, although there remain die-hard supporters, mostly among the work force on the assembly line. I am one of those supporters. In the conclusion of this Article, I inventory the changes necessary in order to assure that the civil jury does not fade away, but rather retains its proper share of a vibrant market of dispute resolution techniques.

I

To the public, it may seem curious indeed to claim that the civil jury trial is fading away. If anything, the civil jury trial is more visible now than ever. Innovations in jury selection, such as the one-day, one-trial system and the abolition of occupational exemptions for doctors, teachers, and even politicians, have assured that more people, and a more diverse array of people, participate as jurors. More importantly, cable and satellite television ensure that the rest of us, never summoned for jury service, can directly observe the process, often aided in notorious cases by sophisticated play-by-play coverage and analysis. Indeed, the

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civil jury trial retains its hold on the public imagination as the quintessential instrument of civil justice. Jonathan Harr's award-winning account of a federal lawsuit by leukemia victims in Massachusetts, *A Civil Action*,[1] rides the top of nonfiction best-seller lists and is soon to be released as a motion picture, with a reenacted civil jury trial as its climax. In fiction—plays, books, movies—the jury trial remains central to almost all portrayals of dispute resolution.

Yet the signs of decline are all around us. It is worth highlighting a few, although empirically proving the decline is beyond the scope of this article. Hopefully the highlights here—about the number of civil jury trials, the subject matter of civil jury trials, the prevalence of bench trials, and the increasingly negative public perception of the civil jury—will ring true enough with most readers that they can accept the possibility of decline, for the sake of argument, and move on to address both whether alternative dispute resolution is the cause and whether the civil jury trial should be reformed so as to save it.

The number of civil jury trials

In a presentation a decade ago at the University of Michigan Law School, Professor George Priest argued that a citizen in Cook County, Illinois, had a greater chance of being struck by lightning than serving as a civil juror. I was a skeptical member of the audience, and I rejoiced to find this claim dropped from Professor Priest's published paper.[2] In the ensuing years, however, the data and analysis of Professor Priest and others, and my own empirical work with Professor Samuel Gross,[3] have led me to conclude that the number of civil jury trials is indeed becoming insignificant.

In California superior courts in 1993 through 1994, there were a total of 9048 jury trials. More than half of these were in criminal cases—5451. The rest—3627 civil jury trials—represent less than two percent of the dispositions of civil cases filed in California during that fiscal year.[4] Even accounting for the much smaller number of civil jury trials handled by federal trial judges, who are outnumbered more than ten to one by the state bench, the reality remains stark: Of all the civil disputes in California, roughly one per year is resolved by a civil jury for every 10,000 Californians. Through the medium of jury verdict

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1 JONATHAN HARR, A CIVIL ACTION (1995) (Recently number one on the New York Times nonfiction best-seller list, *A Civil Action* won the 1995 National Book Critics Circle Award for nonfiction.).
2 *See* George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 187-91.
3 *See* Samuel R. Gross & Kent D. Syverud, *Don't Try Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996) [hereinafter Gross & Syverud, *Don't Try*]; Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991).
4 *See* JUDICIAL COUNCIL OF CAL., 1995 ANNUAL REPORT 88.

reporters, it is fairly easy for a lawyer or scholar to read a thorough account of every civil jury trial in California for the past year in a day or two. The sample size is really that small.

It seems to be getting smaller, at least in per capita terms. In a study by the RAND Corporation Institute for Civil Justice, Erik Moller recently analyzed changes in civil jury verdicts over the last decade in fifteen urban or suburban counties in six states. Four of those counties were in California. Although there is a significant variance across counties, Moller found that per capita civil jury trial rates are generally level or decreasing in California, and that per capita civil jury trial rates have declined markedly in Los Angeles, Sacramento, and San Francisco since 1992.[5] With the exception of St. Louis, and Harris County, Texas, no jurisdiction in the study ended the decade with a civil jury trial rate greater than one per 10,000 people per year. Thus, in 1994, there were a total of 292 civil jury trials in Los Angeles County; 178 in Manhattan; 61 in King County (Seattle), Washington; and 57 in San Francisco.[6]

When a method of dispute resolution becomes this rare—when a county with millions of residents averages one dispute resolved by the method per week—it becomes difficult to maintain that it is a central or even a significant player in how the system is experienced by the population.

The subject matter of civil jury trials

The decline of the civil jury is also evident when one looks beyond these numbers to the substance of the civil disputes that still go to jury trial in the United States. Because law teachers, law students, and to a lesser extent legal practitioners largely use cases in their work—cases that often involve appeals from a civil jury verdict, regardless of the substantive area of law at issue—it is easy to overlook how small a population of cases we now have to sample from in most substantive areas. It is a commonplace, of course, that the number of civil jury trials of class actions, regardless of the substantive law at issue, is vanishingly small.[7] But that is true as well, I believe, for most other areas not involving tort law and personal injuries.

My own samples of California civil jury verdicts provide an illustration. When one looks to the verdict reporters' descriptions of claims that actually went to trial, as distinguished from either claims that were merely filed or the case categorization at that time, it becomes apparent that civil jury verdicts are

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5 *See* ERIK MOLLER, RAND INST. FOR CIVIL JUSTICE, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at 7-11 (1996). Per capital civil jury trial rates increased in Orange County, California.

6 *See id.*

7 *See generally* Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995).

almost exclusively the domain of tort law today—and these are primarily personal injury cases. More than three-quarters of all civil jury verdicts concern personal injury disputes, and much of the remainder consists of a small number of tort-based claims of professional malpractice, unfair practices, or bad faith. Largely gone are contract claims or disputes over property rights; commercial transactions amounted to 4.8% of the trials in California state samples in 1985-1986 and only 3.6% in 1990-1991.[8] Apart from tort law and tort-based theories of recovery, private law is almost entirely made outside the province of the civil jury, except for the rare and increasingly unrepresentative case that figures disproportionately in the materials we lawyers read and use.

What explains the dominance of tort law in the residue of cases that still go to civil juries? In large part, it is the wholesale abandonment of the civil jury system by governments and businesses, of all sizes, when suing as plaintiffs. In my most recent research with Professor Samuel Gross, only 5.8% of all civil jury trials in our 1990-1991 sample included a business or government, in any capacity, on the plaintiff's side of the litigation; in many of those few cases, an individual plaintiff was still the driving force behind the litigation. Litigation by business and government, using the civil jury as decisionmaker, has effectively disappeared in most of the United States.[9]

The prevalence of bench trials

Many business and government plaintiffs may well be electing for fact finding by judges rather than juries. Even when there is a right to jury trial in the United States, it can be waived. One further indication of the decline of the civil jury lies in the frequency of waiver. The most comprehensive recent study of bench trials in the United States, by Professors Kevin Clermont and Theodore Eisenberg,[10] primarily addresses misperceptions of the public and academics about relative plaintiff success rates in bench and jury trials. The remarkable and counterintuitive findings (with plaintiffs winning more often with judges, rather than with jurors as factfinders in a range of federal cases), and their complicated interpretation of these findings overshadow an obvious and overlooked point in the Clermont and Eisenberg data: In almost a third of the filed federal cases in which litigants have a right to a jury trial, they waive it. More than half of federal trials are now conducted without juries, and the proportion is higher still in state courts.[11]

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8 *See* Gross & Syverud, *Don't Try*, *supra* note 3, at 13.
9 *See id.* at 15.
10 *See* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).
11 *See* Samuel R. Gross, *Settling for a Judge: A Comment on Clermont and Eisenberg*, 77 CORNELL L. REV. 1178 (1992).

A small fraction of civil disputants elect to use the court system, and fewer still pursue their disputes all the way to judgment. It is remarkable that, of the fraction of the few who have a right to the jury trial that seemingly defines our popular conception of civil justice, an increasing number may be opting for a judge.

The negative public perception of the civil jury trial

Other than the trial bar and an occasional exhilarated juror, is there anyone left in America whose impression of a civil jury trial is so positive that he or she is willing to pay for one? I fear that, after a decade of relentless publicity bemoaning the civil jury—its unpredictability, its expense, its tendency to wildly overcompensate some plaintiffs and undercompensate others, its untrustworthy composition in some jurisdictions in Texas and elsewhere—the number of us having confidence in the common sense and good judgment of a jury, and ready to pay for it, is small indeed. Of course, some of that publicity is wildly inaccurate. Yet it is nevertheless reinforced, in litigated cases, by both the plaintiffs' bar and the judiciary, in efforts to persuade recalcitrant plaintiffs to settle. Moreover, exhaustive media coverage of a few notorious civil trials does not seem to have bred much respect for the process among the uninitiated. If anything, cynicism about civil juries and their biases seems stronger now than it has ever been before. I emphasize this point without presenting complete proof, but I am confident it is true and is one reason why litigants choose among dispute resolution alternatives.

II

Some may assert that I exaggerate the decline of the civil jury trial in the last decade; few would dispute that this same period has seen an increasing use of alternative dispute resolution techniques. ADR has shown remarkable growth wholly outside the public justice system; increasing numbers of disputes go to arbitration or mediation in employment, commercial, and insurance contexts unaccompanied by any civil filing in a public court. But even within the courts, a growing range of court-based ADR methods—particularly arbitration, mediation, and what has come to be called "early neutral evaluation" (ENE)—has closely paralleled the decline of the civil jury trial.

Is the parallel development of ADR the cause of the civil jury's decline or merely a symptom? A brief synopsis of court-based ADR programs in two federal districts suggests we should look beyond ADR to the nature of the public civil process in our search for the most relevant causes. Consider the following attributes of court-based ADR programs currently employed in the Central District of California (which includes Los Angeles) and in the Eastern District of Michigan.

The Central District of California is one of the "comparison districts" established by the Civil Justice Reform Act of 1990.[12] While it is not a pilot district authorized to employ mandatory arbitration and some other ADR techniques, it has had a program of mandatory settlement procedures pursuant to local rule since 1993. District judges can make a mandatory referral of most civil cases to an array of settlement procedures, including a magistrate judge or trial judge's pretrial settlement conference; a settlement discussion presided over by a private, neutral attorney selected from an Attorney Settlement Officer Panel or by the trial judge; a mediation conducted by a retired judge or a nonprofit dispute-resolution body; or a settlement conference before another judge or magistrate as appointed by the presiding trial judge. As in most of the country, the employment of the summary jury trial, or indeed of any abbreviated jury procedure as part of ADR, is extraordinarily rare. Most court-based alternative dispute resolution is conducted through settlement conferences by managerial judges in cases they would otherwise try.

As in the Central District of California, the Eastern District of Michigan relies primarily on settlement conferences conducted by judges to resolve civil cases short of trial. While individual judges may authorize arbitration and other ADR methods at the request of the parties, this rarely occurs. Instead, judges frequently order parties to submit to "Michigan Mediation," a technique pioneered and widely employed by the state trial courts. Under this method, civil cases in which money damages are sought (particularly for personal injury, a category in which referral is mandatory in the Western District) are referred to a panel of three attorneys under the auspices of the Wayne County Mediation Tribunal. At the close of discovery, each side must submit brief summaries of the merits of their case with respect to liability and damages, and they are given up to half an hour to orally argue their position as to the settlement value of the case. The panel files a written valuation of the case, and that value can be rejected by either party. However, if a trial takes place and the verdict is not 10% greater than the valuation, taxable court costs and fees are imposed as a penalty on the party who rejected the valuation. According to the recent Federal Judicial Center survey of ADR in the federal courts, 145 civil cases were referred for mediation in the Eastern District in the first nine months of 1994, and in 1993 mediation produced settlements in 14% of the cases so referred.[13]

While not representative, ADR in these two federal districts does have attributes worth noting in any search for causes of the decline of the civil jury. First, mediation seems to predominate among formal ADR techniques, and jury-

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[12] 28 U.S.C. §§ 651-658 (1994); *see also* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 85 (1996).

[13] *See* PLAPINGER & STEINSTRA, *supra* note 12, at 155.

based ADR techniques are largely absent. Second, the primary dispute resolution technique short of trial remains a settlement conference, presided over by a federal judge, in which the parties and their lawyers are confronted directly with that judge's view of the case and the risks of a jury trial. Both mediation as practiced in Michigan and the settlement conference as practiced by many judges have coercive aspects, but in most contexts the greatest incentives to forgo a right to civil jury trial come from another source. The costs and risks of formal civil process are much higher than the lower costs and certainties of settlements, or other ADR methods.

When ADR is selected instead of a civil jury trial, we should therefore ask what is wrong with the civil jury trial and with the civil process generally, rather than pinning the cause or the credit or the blame on ADR. In my view, there are three main causes for the decline in the civil jury trial, and these operate incidentally to promote ADR.

First and foremost is the inordinate expense and delay of American civil process. Our civil process before and during trial, in state and federal courts, is a masterpiece of complexity that dazzles in its details—in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the factfinder and the choreography of the trial. But few litigants or courts can afford it. Unless a defendant's insurance company consents to trial, and a plaintiff's lawyer chooses to take a chance, the reality is that the crushing costs of our civil process will drive almost everyone to settle. Of the subset of those parties who would like a trial, the judicial system can afford to provide one for only a small fraction. We thus have increasingly designed our system to provide incentives, including delay, that drive almost all to settle.

The second cause of the decline in the civil jury trial, I believe, is the commodification of civil claims through the twin institutions of liability insurance and the contingent fee. In a time when the personal injury case predominates among jury trials, it is insurance companies and plaintiffs' attorneys who largely call the shots in decisions to try or settle a case. Almost all personal injury defendants are insured under arrangements that give the insurance company control of the decision to settle. On the plaintiff's side, the contingent fee is nearly universal in personal injury cases, giving the plaintiff's lawyer a direct stake in the claim, which must influence a lawyer's thinking concerning trial or settlement.[14] In a real sense, these cases are about money for the crucial decisionmakers—the lawyers and the insurers. The other factors that might drive a case to trial—a desire for vindication, or a day in court, or a repaired reputation, or a public acknowledgement of values and law—are removed when the case is viewed from the perspective of the decisionmakers who call the shots.

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[14] *See* Gross & Syverud, *Don't Try, supra* note 3, at 16-17, 22.

When we asked 735 lawyers in a sample of California civil jury cases from 1990 through 1991 why their cases went to trial, only three of them (two from the same case) said the case was tried because of a desire for public vindication in the litigation.[15] No noneconomic motives for going to trial surfaced as a significant explanation for the trials in the sample. The inference from this survey is that either trials are about money, or that lawyers and insurers rarely, if ever, drive a case to trial due to the extra-monetary goals of the litigants. If the residue of trials are about money alone, and if the civil jury trial is reduced to a business on all sides, then perhaps the public cynicism about the civil jury—and about its vaunted role among dispute resolution techniques—is understandable and to be expected.

Third and finally, the civil jury's decline is characterized by the almost universal election of businesses and governments to opt out of fact finding by a civil jury when they are civil plaintiffs. I do not know why this has occurred, or whether ADR techniques have been the primary beneficiary. I do believe that there is a perception, on the part of businesses and governments, that there is less predictability, and greater variance, in the results of fact finding by a civil jury than in dispute resolution by other methods. This perception may be seriously in error, as a survey of jury research by Marc Galanter has recently demonstrated.[16] Nevertheless, when entities with the ability and resources to plan ahead for litigation choose to avoid civil juries, it is time to ask seriously why, and to consider how the civil jury and the process leading to its fact finding could be made more attractive.

ADR, and particularly the judicially supervised settlement conference, appears to be a beneficiary of the decline of the civil jury trial, not the important cause. Experienced agents looking at the numbers find settlement to be a superior alternative to trial, and by the numbers alone it almost always is. The civil jury trial just is not an affordable alternative in all but a tiny number of cases, given the cost and delay that precedes and accompanies it.

III

Very few of the ideas in this Article are new. What is new, and perhaps is great cause for concern, is that as the civil jury trial declines—as fact finding by civil juries becomes increasingly rare—the remnant of cases that actually are decided by a jury become increasingly unrepresentative of the universe of civil disputes. The typical case never goes to trial, for it takes extraordinarily un-

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15 *See id.* at 57.

16 *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

usual facts and extraordinarily stubborn or foolish or incompetent parties and lawyers to see a dispute through to judgment on a jury verdict.

One of the most remarkable things about reading a jury verdict reporter today is how extreme and unusual most of the tried cases seem to anyone familiar with legal disputes. These odd cases are increasingly the only visible part of civil litigation for the public. Policy making based upon these unrepresentative samples is likely to be misguided; public impressions of the jury based upon them are likely to be distorted by them. And alternative methods of resolving disputes, including the ADR techniques discussed at this Symposium, are the direct beneficiary, for the civil jury trial appears to be an alternative for the freaks—an alternative to be avoided.

So what should be done? I do not think the answer lies in abolishing or cutting back on ADR programs, whether wholly private or court based. At the outset of this Article, I suggested that the civil jury trial has come to resemble the outmoded automobile produced by a flagging state-run industry in a once centrally planned economy. In the long run, the way to protect such an alternative does not lie in subsidies or in taxing its competitors. Instead, it lies in improving the product so that normal and rational consumers choose it, so that it does not take an extraordinarily rich, stubborn, or risk-preferring set of parties to obtain a jury verdict.

How can we improve the attractiveness of the civil jury trial? The suggestions for improvements by scholars, lawyers, and judges are manifold. They range from innovations in the selection of jurors, to improvements in the ways jurors receive and deliberate upon evidence, and restrictions on the range of jury discretion.[17]

I believe two reforms are key to reversing the decline of the civil jury trial. First, if we want more civil jury trials, we must reduce the expense of reaching a civil jury. In part, we can do this by reducing the length and complexity of trials. We can, for example, speed up jury selection, and reduce the inflationary number of experts who testify in each trial. But most of the savings have to come from the process preceding trial, not during it. Civil process must be streamlined, particularly in the expensive discovery stage, before the option of fact finding by a civil jury will appear viable—or preferable—to a significant fraction of civil litigants.

Second, I believe we must remove the public's perception of catastrophic risk—or reward—by making jury verdicts more predictable. It is not obvious that greater predictability would encourage greater use of the civil jury. Indeed, there is an argument that the opposite would be the case—if juries are pre-

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17 *See generally* VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert Litan ed., 1993).

dictable, then parties will rationally and more accurately assess the likely outcomes of their cases and will settle more often because their assessments are less likely to diverge. I agree that in a system in which jury verdicts are perceived to be predictable and rarely extreme, we could end up with even fewer trials than the small remnant in our current system. The composition of those trials, however, would be different and more desirable. No longer would the risks and costs of trial drive all but the bizarre cases out of the civil jury system. Instead, rational litigants, including perhaps even business and government plaintiffs, might choose public fact finding in typical disputes because of the attributes public fact finding alone can provide.[18]

[18] *See* Judith Resnik, *Finding the Factfinders*, in VERDICT, *supra* note 17, at 500. For the classic defense of public adjudication, including its attribute of authoritative interpretation of law by public actors in a way visible to the world, *see* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

TRIAL BY JURY†

Ronald D. Krist*

The following exchange between a Texas trial lawyer and a potential veniremen recently occurred in a Houston courtroom:

> Question: Mr. Blackstock, I see that, in response to the written jury questionnaire relating to whether or not you felt there should be reforms made in our civil justice system, you indicated you felt that certain changes were in order. Would you mind elaborating on the type of changes that you feel are in order?
>
> Answer: Well, I just think that things are out of control and that there should be some limitations or caps on the damages that some juries have been tossing around.
>
> Question: In other words, it is your belief that juries have been awarding damages without supporting evidence.
>
> Answer: Well, I mean it just seems like the system is out of control and I think there should be certain changes.
>
> Question: Well, tell me if you will, Mr. Blackstock, what changes you think should be made. By that, I mean, do you think that there should be some alternative form of dispute resolution other than trial by jury?
>
> Answer: Yes, I do. I think that these matters should be handled by some other sort of panel. I don't believe that personal injury cases such as the one that you have described to us should be handled by juries.

Mr. Blackstock was not alone in his view of the jury system. Two of Mr. Blackstock's fellow veniremen likewise shared his condemnation of trial by jury.

Trial lawyers have assumed that our cherished right to trial by jury was a value shared by all Americans. Recent experience has shattered that notion.

The U. S. Constitution guarantees one the right to trial by jury. Article 3, Section 2 of the U. S. Constitution as adopted in 1789 provided that the trial of all crimes except impeachment shall be by jury. In 1791 the sixth and seventh amendments were added as part of the Bill of Rights. The sixth amendment assures a person accused of crime "a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have previously been ascertained by law . . . ." This amendment merely underscores or amplifies the right protected in the original constitution.

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†Dean's Address, International Academy of Trial Lawyers, Phoenix, Arizona, March 13, 1997.

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The seventh amendment guarantees the right in federal civil cases: "In all suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ."

The original states also guaranteed the right to jury trial.[1] Similar assurances were provided in the constitution of every state that subsequently joined the union.[2] The right to trial by jury is protected in some form by both federal and state law. The U. S. Supreme Court has held that the due process clause imposes on the states the sixth amendment right to trial by jury in serious criminal cases.[3]

It has been observed that:

> The American commitment to jury trial is explained in part by the fact that it was among the rights of Englishmen for which the revolution was fought. The Declaration of Independence accused the king of depriving colonists "in many cases of the benefits of Trial by Jury" and of transporting colonists to England for trial "for pretended offenses." English vice-admiralty courts sat in the colonies without juries, and this was perceived by colonists as a step toward slavery.[4]

And in one of The Federalist papers, Alexander Hamilton wrote:

> The friends and adversaries of the plan of the convention, if they agree on nothing else, concur at least in the value they set upon trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have for holding it in high estimation; and it would be superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to as a defense against the oppressions of a hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government.[5]

These sentiments can best be understood in their historical context. Those who emigrated from England "brought with them this great privilege 'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'"[6]

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1 Duncan v. Louisiana, 391 U.S. 149, 153 (1968).
2 F. BUSCH, 1 LAW AND TACTICS IN JURY TRIALS 17-42 (1959).
3 *Duncan*, n. 1, at 149.
4 V. STARR AND M. MCCORMICK, JURY SELECTION, 2d ed. (1993), §1.0, 4 [hereinafter cited as STAR AND MCCORMICK] (citing POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 24 (1978)).
5 *Id.* at 4, 5 (quoting THE FEDERALIST NO. 83, at 499 (A. Hamilton) (The New American Library)).
6 *Id.* at 5 (quoting Thompson v. Utah, 170 U.S. 343, 349-50 (1898) (quoting 2 STORY, COMMENTARIES ON THE CONSTITUTION §1772 (1833)).

The concept of jury trial as it existed at the time of the American Revolution was not the product of a preconceived theory of jurisprudence. Rather, it was the outgrowth of forms previously in use and contained elements of several systems of varying origin.[7] Historians have traced these elements to Anglo-Saxon and Norman institutions bearing the influence of systems in ancient Greece, Rome, and Germany.[8] The concept resulted from several centuries of experience rather than from a specific plan.[9]

Justice Byron R. White, in a 1968 Supreme Court ruling, observed:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of a single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Government in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.[10]

A lily-white jury handed down a verdict in the *Rodney King* case that so outraged the black community and others that Los Angeles was transformed into an urban war zone. Shortly thereafter, a black jury rendered a verdict exonerating football star O. J. Simpson for the murder of his wife and her male friend. The acquittal of the King police officers for the brutal beating of a black man long after he was submissive and compliant seemed incomprehensible to the black community who, however, readily supported an acquittal of O. J. Simpson notwithstanding overwhelming scientific proof establishing, to the majority of Americans, his guilt beyond a reasonable doubt. There are, in this writer's

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7 W. FORSYTH, HISTORY OF TRIAL BY JURY 6 (1852).
8 M. LESSER, HISTORY OF THE JURY SYSTEM (1894).
9 STARR AND MCCORMICK, *supra* note 4, at 5.
10 *Duncan*, note 1, at 155-56.

opinion, examples of verdicts by the thousands, rendered by something less than fair and impartial juries. One would think that seemingly aberrant verdicts would give rise to a groundswell of support for a refinement of our jury system aimed at enhancing the likelihood of fulfilling the entitlement of a fair and impartial jury. Surprisingly, many among the bench and bar are encouraging a movement that would severely restrict or even completely eliminate peremptory challenges. Perhaps it is not the intent of the establishment to abolish the jury system as much as it is simply a by-product of their larger plan to reform our tort reparation system; but whatever the objective, the result is the same. Exaggerated anecdotes, half truths, and distorted results have all played their part in undermining the public's belief in one of our most cherished and valuable rights. Clearly this movement was driven by a desire to enhance the corporate bottom line.

Money, hype, sloganeering, scapegoating, sound-bite advocacy, and the power of repetition can effectively obfuscate the truth. The relentless propaganda campaign pressed by tort reformers is omnipresent in the United States today. *Newsday* magazine recently wrote that "the war against lawyers is at bottom a camouflaged aggression against the jury system." *Newsday* is not alone in suggesting that corporate America would favor less or no jury involvement especially in cases brought by individuals against companies. Tort reformers claim juries have an antibusiness bias and operate under what might be described as a deep pocket syndrome. Corporations have encouraged desertion of the court system with its juries, in favor of binding arbitration. This reminds me of a form of judicial Federal Express, i.e., the courts privatized.

Suffolk University law professor Charles P. Kendregan has stated: "There has been a mass public relations campaign by manufacturers, marketers, insurance companies, and others to persuade the general public and many legislators that the tort system is somehow bad for the economy and I don't think the public has effectively heard the other side."[11]

Those of us who labor in the trial vineyard as criminal defense lawyers, prosecutors, insurance defense counsel, plaintiff specialists, or business litigators have done an extremely poor job of defending the justice system in general and the jury system in particular. We know that many well-publicized verdicts are rare aberrations or gross distortions. We know that jurors do not serve as keepers of a smorgasbord where deep-pocket defendants provide a feast for undeserving plaintiffs led by unscrupulous, greedy, self-centered personal injury lawyers. Rather than defend our system, however, many among us who represent the establishment have, in fear of offending large clients, echoed the sentiments and perpetuated the myths concerning the poor quality of our justice system.

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11 STARR AND MCCORMICK, *supra* note 4, at 263–64.

In his book *We, the Jury,* the political scientist Jeffrey Abramson points out that no other institution of government places so much power directly in the hands of citizens. The jury thus manifests and probes a fundamental American truth: that the people are capable of governing themselves. In turn, our respect (or disrespect) for the jury system, as citizens and lawyers, shows how seriously we take the concept of self-governance.[12]

Only five percent of criminal trials in Britain now are decided by juries, and the jury's role has likewise diminished across much of Europe. Many suggest that we are clinging to an outmoded system—the New World slipping behind the Old.[13]

Alexis de Tocqueville marveled at the importance of juries in the United States. He noted that the jury gives the citizens another voice in their government. He wrote that jury service educates citizens about their rights and their institutions. It gives citizens "habits of the judicial mind," which are conducive to freedom. And it reminds the citizen of his responsibilities to those around him. In Tocqueville's communitarian-sounding phrase, "By making men pay attention to things other than their own affairs, [juries] combat that individual selfishness which is like rust in society."

Juries act as a check on official power. They bring the public into the judicial branch of government. They operate as a school for citizenship. They reassure the litigants. And they provide an outlet for the community to refine and to express its moral will. Our juries do not always achieve these outcomes, but then none of our democratic institutions is altogether failsafe.[14] Juries become part of the grass-roots administration of public justice. They play an indispensable role in our experiment of government by the people. Our system and the jurors who serve it are better for having done so.

Lord Justice Patrick Devlin has said of the English jury:

> Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution; it is the lamp that shows that freedom lives.

It can be neither reasonably expected nor desired that jurors leave their everyday experiences at the courthouse door. Moreover, a jury is attitudinally

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[12] Address by Independent Counsel Kenneth W. Starr, State Bar of Texas Meeting, Dallas, Texas, June 20, 1996.
[13] *Id.*
[14] *Id.*

composed of, or is at least significantly influenced by, the sum total of its composite experiences. It is a given that jurors should be reflective of a cross section of our community. However, our country seems to be increasingly experiencing polarization of community views and beliefs, resulting in untoward effects on our jury system. Critics would suggest that verdicts are, in fact, conclusively predictable once a jury is selected. Cynics claim society has become so "me oriented" that fairness and impartiality are unobtainable goals. Could it be that we have developed such an intractable rancor among the competing elements of our society, whether on an economic, racial, geographic, or occupational basis, that trial by an impartial jury, as that term is understood, is an unrealistic objective? Has our society become so entrenched in its diverse but self-serving beliefs that these beliefs have become intractable biases that evidence cannot displace? Hopefully not, but, if so, the jury system can no longer serve as an integral part of our jurisprudential system. If fairness, impartiality, and verdicts based on evidence cannot be expected as the rule rather than the exception, we will necessarily be required to join the Old World order and leave fact-finding problems to entities other than juries. Judges, commissioners, agencies, and others who would have their senses dulled by the repetitiveness of their function would replace the jury. Should this, in fact, come to pass, we will have lost one of our dearest, most sacred and honored liberties. Lawyers should be bold in defense of our entire judicial system and particularly outspoken in defense of our precious system of trial by jury. Our efforts in recent years have been woefully inadequate. Benign timidity by the bar has allowed the fight to go as if by default.

We should learn from our experiences in *King, Simpson*, and other less notorious verdicts. Lawyers should defend the system and acknowledge that no system of self-government is perfect; but we should resist the temptation of the public to throw the baby out with the bath water because of a few unpopular and perhaps erroneous results. We should, however, insist on a fair and impartial jury.

The jury's legitimacy has always rested in its capacity to express fairly the community's conscience; what has changed over the centuries is how a jury best expresses the community's conscience. Different definitions of "peer" and "community" are therefore not just of academic interest but help determine how well the jury can fulfill its role. Ensuring the jury's integrity may necessitate different approaches in today's complex society than in medieval England or colonial America.[15]

Our dedication to freedom of expression prevents any effort aimed at controlling or curtailing what any group or interest, corporate or otherwise, wishes to do relative to influencing or even brainwashing our population and thus ulti-

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[15] J. VAN DYKE, JURY SELECTION PROCEDURES 6-9 (1977).

mately juries. Efforts by many to create a favorable jury matrix and reap the benefits of a pre-trial voir dire will simply have to be dealt with by both bar and bench. These phenomena can and should be dealt with and effectively. We must be forever conscious of the efforts of those in our society who would undertake to precondition jurors and shape attitudes that would prevent evidence from dislodging preexisting proclivities. Countermeasures by the bar are surely in order as a matter of balance and honesty. Many deserving cases are lost. It is not nearly as one-sided as tort reformers would suggest. As a matter of fact, in our current environment, quite the contrary is true. The most effective solution, it is submitted, lies with the courts. We should encourage or, better yet, insist upon judicial involvement. Judges should be forever watchful for those who possess not just strong beliefs but prejudicial partiality, harmful warps, and impermissible proneness. There can be no room for these attitudes on any jury because they are totally inconsistent with fair, impartial, and balanced administration of public justice. Courts should be forever vigilant in the protection of the jury system and liberally discharge any juror who manifests the slightest partiality, bias, prejudice, or disbelief in either parties' claim or defense. Judges are not merely masters of ceremony, if you will, but must themselves champion the cause and insist upon a jury that can be proper, legitimate, straightforward, and aboveboard. Then and only then will trial by jury of one's peers be what it was envisioned to be.

We are all entitled to impartial jurors—unbiased, unprejudiced, and unbigoted. A jury that is objective but not detached or disinterested. Neutral and without favoritism. A body that is evenhanded, fair-minded, true, and square.

After thirty-three years of representing the halt, the lame, the blind, the crippled, the dispossessed, tattered, and disfigured members of society, it is probably an inescapable bias favoring the plaintiff's perspective that fashions the matrix of my views. On the other hand, my proclivity is somewhat softened by my representation, in recent years, of several Fortune 500 companies. Having, however, confessed my probable prejudice, even though obviously tempered by the fact that my practice is financially more balanced than many, there is one unassailable truth that I have observed about tort reform through the years—and it does not matter whether we are talking about an astronaut's widow, a major corporate president, a clergyman, a college professor, or a blue-collar worker. That truth is simply this: When it happens to others and they seek redress at the courthouse, it is clearly lawsuit abuse, but when it happens to oneself or one's loved ones, it is a quest for justice that requires filing of the inevitable suit.

Reformation of our tort reparation system is troubling to most of us. What the trouble is depends upon the perspective of each of us in relation to our jury system and how it should be reformed or eliminated.

It has been said: "With most people, unbelief in things is founded upon blind belief in another." And so it probably is with me.

COMBATTING CHILD ABDUCTION AND SERIAL KILLERS†

William Hagmaier*

In my nineteen years in the F.B.I., one of my concerns always has been that we got away from some of the activities that I think the American public really wants the FBI to take care of, chief among them the protection of the most precious of our possessions—not the money in the bank and not the jewelry in the vault, but our children. We were chasing spies around the world and protecting the secrets of the satellites, but I think the key thing the American public wants to know—and I want to know as a parent and a taxpayer—is that if something happened to one of my children, the best in the world would be there for me. And I perceive the best to be the resources of the F.B.I. in partnership with state and local investigators.

Louis Freeh hadn't been director for three weeks when he called me and said, "I'm going to do something about your concerns; I'm going to make something happen. We've got the best tools, the best resources in the free world, and we're going to use them to try to protect children." He created the unit that I'm privileged to be managing. Then Congress somewhat duplicated the effort by creating an excellent task force—they didn't fund it, but they created it (and the funding problem is a mere oversight, I'm sure). We are trying very hard to protect our children better, and I'll share some information about our efforts with you today.

I want to begin by telling you about a case that we have worked on very closely and that I thought appropriate for this group. It's the Jimmy Rice case, out of Miami, Florida. Mr. and Mrs. Rice are attorneys, and they are fairly wealthy people. They worked hard to get where they are. They have a family, and they built a fortress for that family, with an electronic fence, a big gate, and dogs. Inside the fence is a beautiful playground and swimming pool for their children. Their children were never allowed to go out by themselves, until this year. This year, their youngest son, Jimmy, said, "I want to walk to the bus stop by myself. I don't want the other kids on the bus to think that I can't walk that last quarter mile from the gate of our house to the bus." Mom and Dad, who are great people, said, "Fine. You're old enough to do that." On about the fourth

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†Excerpts from an address delivered at the Annual Convention of the International Society of Barristers, Westin La Paloma, Tucson, Arizona, March 6, 1997.

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day of school Jimmy didn't show up at home after he was let off the bus. The rest is history. Jimmy had been kidnapped.

I met Mr. and Mrs. Rice when we were on the Oprah Winfrey show together, and we became friends. They would call me almost every week to ask what else they could do to help us find their son. Finally, one weekend I learned what had happened to Jimmy, and on Sunday morning, as my wife and I were getting our children ready for church, I got a call from Mr. and Mrs. Rice. They said, "You know they found Jimmy. We want to talk about it. Do you know Jimmy is in three pieces in three different barrels?" This was their little boy that they had protected so carefully.

It was through the Rices' efforts that we are now putting pictures of missing children in federal buildings around the country. Mr. and Mrs. Rice feel strongly that the federal kidnapping statute should be changed so that the F.B.I. can help in all cases. Right now, we can't help unless the kidnapping is interstate, although current policy is to assume federal jurisdiction whenever a child is abducted under suspicious circumstances until we know otherwise. Once the child is found in state, however, dead or alive, we're out of the case other than in a purely consultative role.

F.B.I. ASSISTANCE TO LOCAL POLICE DEPARTMENTS

Given the state of the law, one focus of our attention has to be local police departments. There are 17,514 police departments in this country. Seventy-two percent of them have twenty or fewer officers. They are dedicated, loyal, well-prepared police officers, but on any given day in one of those areas covered by seventy-two percent of our police departments, there are only eight officers on duty. If a serial killer like Ted Bundy moves in and starts dropping people every three or four weeks, or if a child predatory creature (as I call them) starts grabbing kids from the bus stop or the dressing room of the swimming pool, are they prepared to deal with that? Usually not. That is one concern for us.

Children who are kidnapped and murdered usually die within the first thirty-six hours after the abduction. Many times when I get a call in the middle of the night and I hear the circumstances of the case, I know in my heart that we can't save that child's life, and our efforts will end up being two-fold: trying to recover the child's body, and trying to stop the person from doing it again. But in some of the cases we do have some time. A lot of the people who commit these crimes don't prepare beyond the abduction and whatever gratification they achieve with the child, so there's a time period when they're not sure what to do. That's when law enforcement has to make a difference. We can't worry about red tape, and we can't make mistakes; the stakes are just too great.

To address this situation, we put together what we call a child abduction response plan, which is being placed in the hands of every police department in this country. This plan is not the F.B.I. telling a police department how to run a case but rather represents the culmination of input from about 6,000 police officers and departments. It sets out, step by step, the most logical course of action. We believe this will be helpful because, as you know if you've ever prosecuted or been involved in one of these cases, there is complete pandemonium for the first twenty-four hours, then confusion if not pandemonium for the next forty-eight—and that's the critical time period. That's when the right decisions have to be made. The plan should help to ensure that the most logical steps have been followed. We're telling them to shape it to meet their local needs and to fill in the names of the best local botanist, their best forensic odontologist, and so on; but certain fundamentals, such as DNA collection, must be done quickly and right because there's no way to make up for a failure. The crime scene is there for only a short period, particularly if it is outside; and if you don't get the evidence the first time, there isn't a second time. Or if you have a suspect and the interview isn't done correctly the first time, there isn't a next time because he's become a fugitive or has hired a defense attorney who is saying, "Stay away from him." That, in turn, may cost someone else a life down the road.

I want to say a little more about DNA, which has become so important. I'm hopeful that someday in the not too distant future we will have a nationwide database on DNA, and when a person is arrested, we will get not only fingerprints and photographs but also a swab of saliva. That will be an extremely useful resource—it will exonerate some people and identify the bad folks. We're working on something called mitochondria DNA now, a process pioneered by the F.B.I., which can get DNA from skulls, from teeth, from old hairs. So now when a child is missing we're trying to get hairs out of the hairbrush as well as fingerprints. We're getting the DNA samples from the mother or grandmother because this type of DNA carries only the maternal line.

We learned the hard way that we should use maternal DNA in any event, even if we're using regular DNA processing. We had a case where babies were stolen from hospitals soon after birth. Babies change so much that after the first few days, even the parents can't identify them, so we were using parental DNA to try to match recovered babies with their parents. In one situation, our agents told the parents, "We got a baby back, but it's not your baby. It doesn't match the DNA." But we had used the father's DNA. We then determined that the baby *was* theirs—the mother's anyway—so the agents went back and gave the parents the good news. (This brought out some bad news: After the agents returned the baby, they had to arrest the father for punching the mother when he found out he wasn't the father!)

The DNA samples will help tremendously, especially when child remains are found many years later, perhaps a thousand miles away, and perhaps after the parents are also deceased.

Something else that would help would be mandatory reporting of statistics in this country. When I am asked how many children are actually kidnapped every year in this country, or how many are missing, I cannot answer. All I know is what we are told voluntarily. There is no mandatory reporting. The National Center for Missing and Exploited Children reports that there are 2,200 children missing every day in this country—the great majority of whom come back, but many do not, unfortunately. I cannot confirm or deny that information.

SERIAL KILLERS AND CHILD PREDATORS

The homicide rate in the United States continues to climb, and the clearance rate continues to decline. That's extremely frustrating. There are more police on the street now than there ever were. The problem is that a lot of these crimes are considered to be the work of serial killers. On any given day we have between fifty and seventy-five serial murderers working in this country. Right now I have twenty-eight open serial murder cases, representing about 180 victims.

What's happening is that the perpetrators are getting brighter, much brighter. Why? I don't want to blame it on the media, but the reenactment shows are educating these folks about what they can do and what evidence they should not leave behind. Criminals now, particularly in the areas of serial murder and child abduction, are much more sophisticated than ever. And when we talk to the ones in the prisons, they tell us they deliberately go to the rural areas or the less populated areas because they feel that the local police will not be able to keep up with them.

When I met Ted Bundy for the first time, he brought with him about six folders. In those folders were forensic journals put out by the F.B.I. and journals from the A.B.A. on ways to prosecute cases. A guy on Death Row had the ability to get all this. Serial killers used to get ideas from detective magazines, which we called "the serial killer's Bible." As you may recall, on the cover of almost every detective magazine, there would be an adult male in a menacing stance over a female who looked terrified but still sexy, with part of her breast or leg exposed. There was a chemistry of sex and violence together—pleasure and power—which appealed to certain marginal members of our society. When Ted Bundy killed his victims, he was basically reenacting the covers of detective magazines. (Something that is still not generally known about Ted Bundy is that some of his victims were found wearing nail polish that wasn't theirs or with their hair styled or dyed differently than was their habit, because he had kept them sometimes for days, not alive but dead. He was into necrophilia, as a

number of serial murderers have been.) So killers such as Bundy got ideas from the fiction on the covers of detective magazines; today's criminals watch television and movies.

There are other disturbing statistics, such as those on rape. Over half of the reported rapes are unsolved, and only three in ten rapes are reported, so rape is a high percentage crime for the perpetrator. The chances of getting caught are about one in twenty, and a good rapist can get away with it for a long, long time. We have interviewed people who have raped hundreds of women. We have interviewed fathers who have trained their sons to be rapists and taken them out to rape the same women together. It's amazing what goes on in some of the social subcultures in our criminal society.

We consult on about a thousand cases a year, cases not involving federal crimes but belonging to the state and local prosecutors and investigators. Some of these are mass murders, which we define as four at one time in one place. They are easy cases to solve because in almost every one the perpetrator is on the site. The perpetrator kills several people, the police come in, and the perpetrator either kills himself or throws the gun out and surrenders. Occasionally, a mass murderer commits something we call suicide by cop; he is afraid to kill himself and he doesn't want to go to jail, so he makes threatening gestures and effectively forces a police officer to kill him.

One type of serial killer—the spree killer—is similar to the mass murderer and usually gets caught fairly quickly. This perpetrator kills three or four people in a short period of time, often having escaped from prison or in the course of a Bonnie-and-Clyde kind of crime spree. The second type—the classic serial killer, the Ted Bundy type—is more difficult to catch. The most extensive unsolved file right now is called the Green River murders. The murderer here has killed between thirty-seven and fifty-eight people, maybe more; we still don't know who it is. There hasn't been a Green River murder for a while, and we don't know if the person was run over by a truck, is in jail on another offense, or has moved to some other location and started all over again.

These killers can be very proficient, and the transiency of it is just overwhelming. About eight years ago, we started looking at truck drivers and ended up with about fifteen serial murderers who were over-the-road truck drivers. When you find a body beside the road, and the next day the murderer is 400 miles away, it's difficult to pursue them, and it's extremely difficult for any local police department to mount a successful investigation or prosecution.

This is, at least in part, why I am fervently opposed to federalizing who can buy cigarettes and various other matters that have been federalized or are proposed to be federalized. Federalizing all these necessarily takes resources away from other matters I think are more important—such as having a centralized reporting place and coordinator looking for these transient pedophiles and tran-

sient serial killers. If there were a central agency that could put people in touch with each other, to compare notes and track these mobile criminals, we'd have a better chance of catching them.

We were called in on a case in Los Angeles. They had a series of child abductions in which a guy was going into homes, taking children—boys and girls—out in a laundry bag, molesting them, and then letting them go. They also had a series of homicides. Some victims were beaten to death with hammers, some were strangled, some stabbed, and some shot. The homicide investigator in Los Angeles was certain that one man was doing all of this. We didn't believe it could be one person, but we took a task force out there for about a month and found out that the investigator was right. And as powerful as any judge is, as powerful as any mayor is, as powerful as any chief of police is, one serial killer, frankly, can be more powerful in adjusting the life style of a whole city over a short period of time. When we were out there and this guy was dropping people every couple of days, even the police department commanders were telling their detectives and police officers not to come to work if they didn't have somebody staying with their families because in at least two circumstances, this killer had tried to get into police officers' houses.

These people get titles. The first killing is usually an accident or an impulsive act of violence, or perhaps displaced aggression where the killer is mad at his mother or girlfriend and takes it out on a stranger. Then, as Ted Bundy would say, "We all have lines in life." These are lines of conduct defining what we consider to be socially acceptable behavior. Once you go over a line, you may come back, but it's always easier to go over again and then extend that line. An all-too-common example is spousal abuse. A man argues with his wife. Then one time he throws the newspaper, the next time he slams the door, the next time he kicks the dog. The next thing he knows, he's into spousal abuse. The line keeps moving because he's getting away with it, and he almost feels good about it. There's a feeling of power. A similar progression occurs with serial murderers. After the first accidental or impulse killing, it is easier to kill again. After they kill three or four, they get a title and become the "Ted" or the "Night Stalker." All of a sudden they have power over the media and over law enforcement, and they feel compelled to move and kill some more.

That's why from our point of view it's extremely dangerous when politicians, police officers, retired F.B.I. agents, or other public figures say things in the media about cases they know nothing about. Many times the perpetrator is out there listening to and reading everything. There's one psychologist who is on every media Rolodex and who usually says, "This is a very inadequate killer. He can only kill prostitutes," or, "He only preys on old ladies (or children)." That might be true, but the perpetrator who reads or hears that perceives a challenge,

and we don't want to challenge them. If possible, we want to say things that will keep them quiet.

The same thing applies when a child is missing. I go crazy when a chief of police or some official says, "We're going to find this kid, and we're going to *nail* the guy who took him." A lot of these people are sexually motivated predators who don't plan to kill anyone, but when they read or hear something like that, they decide it's time to get rid of the evidence and not take a chance. We have to be careful.

There was one classic case where somebody killed twenty-seven people in a particular area. The media interviewed a sheriff in an adjoining county, right across the river, and asked the sheriff if he was worried. The sheriff responded, "It couldn't happen in my county. I don't allow that stuff here." Twelve hours later, six feet inside his county line was another body. Did he cause the murder? No, he didn't cause it, but he did feed into the frenzy and motivated the perpetrator to act more quickly than he might have.

Serial killers and child predators are difficult to deal with, but proper response, cooperation among agencies, central reporting and coordination, and avoidance of provocation would help.

PLAYING HARDBALL

Perry S. Bechtle* and Carol Nelson Shepherd**

Much has been said and written about so-called hardball tactics and Rambo methods of conducting litigation.[1] Old people always refer to the so-called "good old days." When we reflect realistically, we are not sure they were really as good as we like to believe they were; but so far as we are concerned, litigation practice was better then than it is today. This has been recognized not only by us but by courts in the course of opinions discussing lawyers and clients who engage in disruptive, obstreperous, and otherwise rude and unprofessional conduct.

Our subject is a complex one because it deals with the interaction of human beings in various situations where there may be conflicting duties to the client and to the court or tribunal, and individual factual circumstances must be taken into account in any effort to determine where the line between professional and unprofessional conduct is crossed. We cannot reduce to a set of ironclad rules that which involves matters of judgment and decency in dealing with others. The most that we can hope to do is to set forth a set of principles or guidelines that you might find helpful when dealing with the obstreperous, Rambo-type lawyer.

Preliminary Considerations

We should point out at the outset that many of these people don't appear to act in an outrageous manner. Indeed, many of them are polite at all times, but the things they do are outrageous, and you must be on guard against being misled by the fact that the lawyer on the other side appears to be a "pleasant" person.

We think you should also bear in mind that some of the lawyers who engage in the tactics we are talking about do so as a response to their own problems. For that reason, do not jump to the conclusion that the lawyer is a bad person because of the way he or she acts. Try to deal with the person on the basis of an assumption that he or she is a decent person, and change your approach only when it becomes obvious that the contrary is true. Some people have low self-esteem which in turn accounts for outrageous conduct. Some lawyers are heav-

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[1]A bibliography of articles and rules worth reading, if you are either tempted to get involved in this kind of situation or trying to defend against it, appears at the end of this article.

ily laden with personal and family problems involving illness and domestic difficulties, and some lawyers unfortunately are the victims of alcohol or drug abuse. We suggest that if you suspect any of these situations, you confer with others in seeking ways to proceed. We are not suggesting that lawyers ought to be psychiatrists or that you should refer people to treatment centers for their personal problems or abuses. On the other hand, it has been our experience that you cannot solve a problem until you identify it.

GUIDELINES FOR DEALING WITH RAMBO TACTICS

Though we know of no universally effective antidotes for unacceptable litigation behavior, we do have suggestions that may be helpful.

First, a practical point: When meeting with the obstreperous lawyer, it is almost always best to do so in his or her office. For one thing, it enhances his ego for some strange reason; but more importantly, if you conduct depositions and other meetings there, you can always leave. If you insist on meeting in your office, you are being as petty as the other lawyer, and you can't easily get rid of him when you want to.

Some lawyers engage in unacceptable litigation behavior to upset you, to get you angry and distract you from handling the case as it should be handled. If you get angry and respond in kind, the obstreperous lawyer has won the day. For this reason, never get angry unless you do so on purpose.

Similarly, don't let the obstreperous lawyer and his or her attitude, language, and tactics dictate how you feel. You are entitled to your own feelings. It has been our experience that we do our best work when we feel good about ourselves and our case. If you allow outside influences such as obnoxious behavior to interfere with your judgment, you are permitting another person's problems, whatever they are, to become your problems and thereby doing a disservice to your client as well as yourself.

Try to maintain a good sense of humor. After all, practicing law is only a part of your life, albeit a large part, and you should have fun doing what you do. We believe that the best way to do that is to maintain a good sense of humor in all settings.

Also, do not carry a grudge. As mentioned above, you don't know what burdens your opponent is struggling with, personal or professional. His or her tactics, which often involve being downright rude, may be nothing more than a response to a personal or professional problem. Give the person the benefit of the doubt and help where you can. This doesn't always work, but it has yielded very positive results for us in some situations.

Above all, do not respond in kind when faced with outrageous behavior or other oppressive legal tactics. Our experience has been that with people like

this, you can never beat them on their terms; you simply cannot win if you have an ounce of decency. In addition, you should not expend your energy, be it intellectual or otherwise, trying to get even.

As odd as this may seem, it's been our experience that turning the other cheek is generally the best way to handle the situation, even though at the moment it might seem a blow to your pride. The fact of the matter is, if you achieve your goal in an honorable way, you have not only accomplished the best result for your client, but you have also put the lawyer in a position where he or she "owes you one." As everybody who has been in practice for any period of time knows, what goes around comes around.

Consistent adherence to ethical standards, legal and otherwise, ultimately prevails regardless of your opponent's conduct. You may lose some short-term battles, but in the vast majority of situations your client will be served best by adhering to this concept. Beyond that, while some people say that honesty is the best policy, it is our view that honesty is the only policy. Consistent with that, adherence to the above is not the best policy, but the only policy.

Last, but not least, do not go to the court for help unless it is absolutely necessary and until you have exhausted all other means of controlling outrageous behavior. In the bibliography that follows, you will see various references to court-controlled obstreperous behavior. As you read these articles and the cases to which they refer, you will see that judges become annoyed, and properly so, with experienced and educated lawyers who don't make appropriate efforts to settle disputes that often are petty. It is a waste of the court's time to become involved in this kind of satellite litigation, and it strains our limited judicial resources. For these reasons a reasonable lawyer acting in the best interest of his or her client will go the extra mile, or even two miles, to attempt to resolve problems that arise in the course of discovery, etc. Only when you are up against the wall and clearly correct in your position, such that it would be obvious to anyone looking at the record that you are right, should you seek redress from the court.

Others might disagree with this advice and take the position that reasonable lawyers should nip obstreperous conduct in the bud. This is a question on which reasonable minds may differ. Based upon our experience, however, we believe that the approach advised here is the best approach.

When you do decide, in your client's interest, that it is necessary to go to court in a discovery or other dispute between counsel, make sure you do so properly. Present the court with the thinnest possible record that you can, in terms of number of pages. You simply cannot expect a judge to go through reams of paper to determine, for example, whether deposition questions or interrogatory objections are correct or incorrect. Present the court with a record that "jumps out," so to speak, so that the judge who reviews the motion can tell from

the first paragraph that you are probably right and knows by the end of the first page that you are certainly right.

You should also bear in mind that regularly seeking the protection of the court through Rule 11 and similar sanction provisions can in itself be the type of unacceptable conduct that is the subject of our comments. It is distressing to see the number of lawyers who seek monetary sanctions for the most frivolous reasons. It is our belief that if you cannot make enough money lawyering, you should not try to make supplementary income in the form of sanctions you are not entitled to.

This is but a summary of some of our thoughts about methods for dealing with the type of lawyer about whom we speak. A trial lawyer with any experience knows that we all run into this problem, and we have to learn to deal with it, just as we have to learn to deal with stress. The bibliography that follows may give you additional help when you find yourself dealing with the obstreperous lawyer who engages in outrageous litigation conduct.

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UNDER THE SURFACE: ADDRESSING UNMET INTERESTS IN NEGOTIATION†

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Why do litigation settlements frequently occur on the courthouse steps, after the parties and counsel have made grueling and costly trial preparations? The eleventh-hour settlement usually involves a significant change of position for one or more parties who had clearly communicated that such change would never come. What do the parties and counsel know on the eve of trial that they did not know, and could not have known, much earlier?

Frequently, parties fail to settle earlier not out of a lack of knowledge, but because they avoid negotiation due to apparently insurmountable obstacles. Negotiation obstacles are difficult to diagnose and even more difficult to dislodge. The postponement of negotiations results in months, sometimes years, of costly litigation efforts.

One of the most prevalent obstacles to settlement is unmet interests. Professional negotiators, mediators, and academics studying the negotiation process have focused on this problem. In a formal mediation, the mediator constantly monitors each participant, party and attorney, for this obstacle; only an intuitive and experienced negotiator, with access to confidential information, is able to recognize each participant's interests.

Hiding beneath the demands and counterdemands are the interests driving each negotiator, party, and attorney. The demands communicate how the other side can satisfy one's interests. But frequently, the demands cannot or will not be met; the gap between the positions has prolonged the litigation.

Nevertheless, satisfying one's own and the other side's interests underlying those positions will lead to a satisfactory result, even if the formal demands are not met. Successful settlements can be "creative" in satisfying the parties' and the attorneys' interests, while not meeting the particulars of their demands.

For example, a plaintiff may demand a figure in settlement that is beyond the defendant's contemplation or ability to pay. Perhaps it is an unrealistic position given the probable trial outcome, discounted by the likely appeal. However, the plaintiff demands this figure because, in the industry, the plaintiff needs to publicize that the defendant agreed to pay, under the duress of the lawsuit, a large number; it is a matter of principle or self-respect.

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If counsel involves the plaintiff in a discussion of why she wants that figure, the interests of reputation and industry status will likely emerge. Then, elements of a settlement package could include noneconomic items that enhance the plaintiff's reputation. Settlement terms satisfying the plaintiff's interests, but costing less money to the defendant, can be explored.

Even though most attorneys and parties defend their positions as their true interests that must be satisfied if a settlement is to be reached, this is rarely the case. A person's interests are almost always different in some way from the negotiation position taken. In a negotiation, appearances and reality overlap; rarely are they congruent. Acceptable alternatives are available, provided the underlying interests are recognized and satisfied.

The attorneys' interests also need to be considered. Even in the most ethical of attorney-client relationships, the nature of the attorney-fee agreement affects how a settlement proposal is viewed. A contingent fee agreement motivates that attorney to look more favorably on an all-cash settlement rather than on a combination economic/noneconomic settlement. The contingent fee agreement can even affect the hourly fee attorney on the other side of the case, who may resist a certain settlement amount because of the perception of an undeserved windfall to the contingent fee lawyer.

Attorneys are conscious of, and motivated by, their clients' perceptions of them in light of various settlement proposals. Here are three typical scenarios in which an attorney's underlying interests affect the client's negotiation position:

- It is difficult for an attorney to urge a great settlement offer on a client if the client perceives the attorney's advice as an abandonment of loyalty and zealous advocacy.
- The hourly fee attorney has the awkward role of advising the client on a settlement proposal, which if accepted could substantially diminish that attorney's income or eliminate a career-enhancing trial.
- When an attorney takes the position, "I have never accepted a settlement above or below a certain dollar amount; I always take those cases to trial," the interest underlying that position may well be maintaining a certain reputation or self-image.

One must not accept at face value that the positions and demands of the parties coincide with their interests. In many cases, parties and attorneys have taken positions and have made demands without consciously exploring and understanding their own interests. Confidential caucusing frequently permits the recognition of these interests. A neutral mediator can motivate parties to confidentially acknowledge their own interests.

The next step is to understand the other side's interests, which underlie his stated position. This can be accomplished in various ways; asking questions is

usually the simplest and most direct. What are you trying to accomplish here? Why do you want that? Of course, research and information from third parties can be useful.

It is tempting to dismiss the other side's interests as irrational or unreasonable. This is where truly great negotiators are separated from good ones. No matter how unfathomable a person's position seems, it has some logic from his point of view. It may be based on values not shared by the other negotiators, which makes it all the more incomprehensible. Nonetheless, this logic and these values will disclose what that person's underlying interests are. This knowledge will permit the negotiator to develop an acceptable settlement short of accepting that person's demands.

Sometimes the other side's unmet interests are noneconomic. A good negotiator monitors for basic human needs, even in the settlement of business litigation.

One is the need for recognition or acknowledgment—sometimes an attorney or party needs to be recognized in a certain light or have a certain personal fact acknowledged.

Another is the need for an apology—feelings of hurt or betrayal, even in a business context, can be so strong that no settlement can be accomplished without a genuine, heartfelt apology.

A third is the need for privacy—diversity of views about the confidentiality of the settlement terms can supplant money as the most contentious issue.

When both sides understand their own and the other side's interests, settlement often can be reached, even when the positions seem far apart and entrenched. A neutral mediator is essential if some of these interests are confidential or difficult to comprehend. A negotiation can overcome the obstacle of unmet interests when the parties' interests, which underlie their stated demands and positions, have been understood and satisfied. The impossible settlement has become possible, and much earlier than the eve of trial.

ANATOMIC PATHOLOGY REPORTS: A PRIMER FOR TRIAL LAWYERS

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The civil or criminal trial lawyer may encounter many reports from the anatomic pathology laboratory, including autopsy, surgical pathology, and cytology reports. Therefore, the attorney should be familiar with their typical contents and aware of the information obtainable from them. Brief descriptions of what those reports contain, and of the information the trial lawyer can derive from them, follow.

I. Autopsy Reports

The autopsy report can be the most informative and illuminating report available to the trial lawyer. It often provides not only information about the cause of death but also data regarding the decedent's general state of health that may be relevant in a wrongful death lawsuit. A good autopsy report contains a brief summary of the decedent's clinical course, usually focusing on the events leading up to the decedent's demise; a description of the external surface of the body; a description of the decedent's organs as they appear to the naked eye, both in situ and after dissection; a description of tissues examined microscopically; a list of diagnoses; and an opinion on the cause of death. These elements are not all invariably present, and they may not occur in the order given above. Of course, reports differ from laboratory to laboratory, from case to case, and even from pathologist to pathologist within the same laboratory. In any event, the report will almost always contain some information of use to the attorney.

A. The Clinical Summary

This section should appear near the beginning of the report. It is typically very brief. It does not recount everything that happened to the patient before death. Rather, it usually includes short statements about what brought the patient to the hospital, what the clinical impressions were, what major diagnostic and therapeutic procedures the patient underwent, how the patient progressed, what happened right before the patient expired, and what the treating physician thought precipitated death. It is important to remember that the autopsy pathologist looks at all the available clinical information (e.g., physicians' and nurses'

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notes, radiology reports, blood tests) with the benefit of hindsight. The pathologist knows what ultimately happened, and since the patient is dead, there is no need to rush to any diagnosis or struggle to find a cure. Rather, the pathologist can take time to review the medical records, study the organs and slides, and consult colleagues, all in an attempt to establish the true cause of death. Having reached conclusions regarding the patient's death, the pathologist can select from a plethora of available data only the information that is relevant to the patient's course. For these reasons, this section of the autopsy report is often very valuable to the trial lawyer because it can save much time in reviewing medical records and permit focus on the critical aspects of the case.

B. The External Examination

This section of the report also tends to be quite short, sometimes reading like a mere form that has had the blanks filled in with identifying data. It typically includes measurements of height and weight; hair and eye color; notations of any scars, tattoos, or other distinguishing characteristics; a list of any lines, tubes, or drains in the body; and descriptions of any skin lesions. Of course, the importance of this section to the personal injury attorney differs with the nature of the case. For example, in the case of a patient who progressively declined over several months, this examination may contain only "standard form" (and therefore not very useful) information, whereas in the case of a person who died in an automobile crash, it may contain detailed descriptions of all the abrasions, contusions, lacerations, etc., that the patient suffered, which may be crucial to the lawsuit.

C. The Gross Description

After examining the body surface, the pathologist removes the skull cap in order to expose the brain and makes a standard "Y"-shaped incision from the shoulders, across the chest, and down to the pubis in order to expose the viscera. Observation is first made of the organs as they exist in the body (i.e., in situ). The pathologist notes whether they are in their normal positions and have their normal appearances and relationships to one another. The presence of any fluid collections (e.g., blood, pus, ascites), foreign bodies, or tumors is recorded. Samples of blood (e.g., if the decedent is suspected of alcohol or drug intoxication or infection) or of any abnormal fluids may be sent to the chemistry or microbiology laboratories for testing.

After the in situ examination, the pathologist removes the various organs and examines them individually, usually recording their dimensions and weights, describing their shapes, colors, and textures, and noting any lesions. Then the pathologist slices them to examine them further for abnormalities. According to the needs of the case, some organs are evaluated more extensively than oth-

ers. For example, in a patient with known coronary artery disease, the heart will be given a careful examination, while the pancreas may be given only cursory treatment; or in a patient with Alzheimer's disease, only the brain may be evaluated in detail. In any case, after the gross examination, ordinarily only those tissues manifesting or suspected of abnormalities are submitted for microscopy.

D. The Microscopic Description

After the gross examination of the organs, tissues submitted are processed and made into slides for routine study under the light microscope. Examination of these slides allows the pathologist to identify more particularly any abnormalities observed grossly or to identify lesions not visible to the naked eye. Under the microscope, the pathologist can observe the cells that make up the tissues sectioned to determine whether those cells are normal (e.g., malignant cells may be larger and have darker-staining nuclei when compared to benign counterparts), whether they have maintained their normal relationships to one another (e.g., tissues may be fragmented in traumatic injuries), or whether cell types or other entities not ordinarily present in those particular tissues are nonetheless there (e.g., metastatic carcinoma in lymph nodes or microorganisms in the brain). After reviewing the routine slides, the pathologist may order further special studies (e.g., Gram or silver stains for bacteria and fungi). By correlating these microscopic findings with the gross findings and with the clinical information, the pathologist is able to put together a list of diagnoses.

E. The List of Diagnoses

After completing review of the pertinent medical records, gross and microscopic autopsy findings, and any ancillary studies ordered, the pathologist must give names to the changes observed. This naming process generates a list of diagnoses. Usually the elements in that list occur in descending order of importance, with the diagnosis most closely related to the patient's death at the top of the list and any incidental findings unrelated to the patient's clinical course at the bottom. (Some laboratories persist in listing the diagnoses organ system by organ system.) Note that the list proceeds in order of medical importance in relation to the cause of death, not in order of legal importance in relation to a damages claim. Hence, findings that the pathologist considers merely incidental may nevertheless be quite important to the personal injury attorney. For example, the finding of metastatic ovarian carcinoma in a middle-aged woman who died from trauma in an automobile crash may be only incidental as far as the pathologist is concerned but may be very important to the attorney in his assessment of recoverable damages in a wrongful death action. Therefore, every diagnosis, however unrelated to the cause of death, must be considered for potential impact on other issues in a personal injury action.

F. The Opinion on the Cause of Death

Though this is a separate section in some reports, more commonly it is not. When it is not, the cause of death is usually apparent from the list of diagnoses, especially when read in conjunction with the clinical history around the time of death. In order to form an opinion, the pathologist must synthesize all the information available in the medical records with the anatomic findings. As with the formation of any other opinion, the pathologist's formation of an opinion on the cause of death requires judgment, which in turn requires interest and experience in the subject matter. Again, because the pathologist has the benefits of hindsight and time, a good pathologist can correlate and prioritize all the available data in a form quite useful to the personal injury attorney. On the other hand, a pathologist who is not interested in autopsies, does them on a fee-per-autopsy basis, or views them as a waste of time that could be spent studying specimens from the living is probably more intent on getting the reports done than on making sure they are complete and accurate. This possibility must be kept in mind in evaluating autopsy reports.

II. SURGICAL PATHOLOGY REPORTS

The bulk of the work in most anatomic pathology laboratories involves surgical pathology reports. These reports provide diagnoses for living patients based on specimens removed at surgery or by some other procedure (e.g., needle biopsy). A good surgical pathology report contains the clinical indication for submission of the specimen, the tissue submitted and the procedure used to obtain it, gross and microscopic descriptions of the specimen, and a diagnosis. Sometimes a report recommends additional diagnostic studies.

A. The Clinical Indication

The clinical indication is the reason the clinician submitted the specimen to the pathology laboratory. It indicates to the pathologist what diagnoses the clinician is considering and therefore what the pathologist should be on the lookout for when evaluating the sample. Although the indication should appear somewhere near the beginning of the report, unfortunately it often is not provided. Even when it does appear, it usually is very short, sometimes only a word or two. For example, a lung biopsy may be accompanied by the words "smoker with spot on lung," or a colon biopsy by the word "diarrhea." The pathologist who is trying to provide a correct diagnosis for a living patient must interpret anatomic observations against a clinical background. The personal injury attorney involved in a medical negligence case needs to know what diagnoses the clinicians were entertaining and what steps they were taking to rule them out or establish them.

B. The Specimen Type

This section is very short, too. It states the name of the organ, or the organ and site, from which the specimen was taken and the procedure that was used to obtain the sample (e.g.: lung, right/pneumonectomy; prostate/resection; muscle, diaphragm/biopsy). The pathologist needs this information to determine whether to order any special studies and to confirm that the clinician obtained the appropriate tissue. The personal injury attorney needs to know whether the clinician was looking in the right place and performed the proper procedure.

C. The Gross and Microscopic Descriptions

These sections are generally similar to their counterparts in autopsy reports, described above. Because the patient is still alive, however, more attention is often devoted to the gross and microscopic examinations. The gross and microscopic anatomic findings form the basis for the pathologist's diagnosis, which is finalized after consideration of the clinical scenario. Unfortunately, many surgical pathology reports either provide no microscopic description or contain a "standard form" description that is generated to correspond to the diagnosis. Equally distressing is the commonplace occurrence of blending the microscopic description with the diagnosis, converting the report into a long and jumbled series of observations with very little synthesis. When, however, a good microscopic description is given, the personal injury attorney should be sure that the description corresponds to each and every grossly identified lesion; otherwise, the abnormal tissue may not have been adequately sampled. Similarly, the diagnosis should account for any and all elements in the microscopic description; otherwise, the diagnosis may have been incorrect or an additional diagnosis missed.

D. The Diagnosis

This is probably the most important part of a surgical pathology report and definitely the part that most interests the patient and clinician. It represents the pathologist's opinion on what disease the patient has, based on review of the anatomic findings in the context of the clinical setting. Because they determine to a large extent the course of therapy and because of time constraints, diagnoses in surgical pathology reports tend to be more guarded than those in autopsy reports, though they use the same terminology. Sometimes the pathologist lists the anatomic findings and concludes with a statement such as this: "These findings are consistent with Disease X." Or the pathologist may suggest alternatives: "These findings are consistent with either Disease X or Disease Y. Clinical correlation is necessary." This forces the clinician to make the ultimate diagnosis and select the appropriate therapy. In reviewing this section of the surgical pathology report, the personal injury attorney should determine whether the

pathologist made a definitive diagnosis or whether the pathologist left the clinician with alternatives. After making that determination, the attorney needs to investigate whether the clinician proceeded appropriately in treating the patient.

III. CYTOLOGY REPORTS

The last of the major report types issued by the anatomic pathology laboratory, and perhaps the type least often encountered by attorneys, is the cytology report. These reports contain descriptions and diagnoses based on the microscopic examination of cells. By far the most common are those for cervical specimens submitted by gynecologists and stained by the Papanicolaou method—"Pap" smears. Other specimens that may be the subjects of cytology reports include fine-needle aspirates of tumors and preparations from body fluids. Common to all these specimens is the relative paucity of cells as compared to tissues obtained at autopsy or surgery. Although cytology can be and is used for diagnosis, its most common application is as a screening tool. In the case of Pap smears, women have them annually to screen for the early signs of cancer so that their gynecologists can, if necessary, intervene at an early time to prevent development of invasive cancer. Similarly, when a tumor is detected on a radiograph, the first approach may be fine-needle aspiration of the mass to attempt diagnosis, or at least to narrow the differential diagnosis. Then a more definitive diagnostic procedure, or even a therapeutic procedure, may be arranged. Although cytology is useful and is becoming increasingly important in everyday anatomic pathology, its use as a diagnostic tool is limited when compared to examination of tissues at autopsy or following surgery.

The contents of the cytology report are similar to those of the surgical pathology report: specimen type (e.g., thyroid gland/fine-needle aspirate, pleural fluid/smear), gross and microscopic descriptions, and diagnosis. Due to the limited nature of the specimen and to the limited utility of cytology in diagnosis, the diagnoses rendered in cytology reports tend to be even more guarded than those in some surgical pathology reports. For example, some cytology reports simply say, "Suggestive of inflammation," or "Within normal limits." Occasionally, and usually when the patient's diagnosis is already known, a report may be more definitive: "Malignant cells seen, consistent with breast primary." In general, however, the cytology report offers less diagnostic information than a comparable surgical pathology report.

Although generally similar to other anatomic pathology reports, the cytology report has two unique features. First, it provides expressly for assessment of the adequacy of the sample. For example, for an apparently normal Pap smear to be adequate, it must contain preserved ectocervical cells and endocervical cells in sufficient numbers. Specimens which are not what they are supposed to be

are of course inadequate (e.g., "lymph node aspirate" that is only blood, or "lung mass" aspirate that is only skeletal muscle). Any inadequate sample should be rejected; no diagnosis can be rendered thereon. Furthermore, the clinician who submitted the specimen should be notified so that another can be obtained. The personal injury attorney should make sure that any such information was conveyed to the clinician and the clinician appropriately followed up on it.

The second feature unique to cytology reports is the provision of recommendations for further work-up. Cytology is basically a screening procedure; based on what the cytology slides show, the pathologist can recommend that the patient have close follow-up, a repeat procedure in a certain period of time, biopsy, or other treatment. These are only recommendations and are usually based solely on anatomic findings. The final decisions in patient management rest with the clinician. Nevertheless, the personal injury attorney should be sure to note any recommendations that the pathologist made and to determine whether the clinician considered them.

IV. CONCLUSION

Anatomic pathology reports can be confusing to a non-physician. However, with study, they can become a valuable source of information for the trial lawyer who is able to evaluate and understand their contents. If necessary, the lawyer should consult with a pathologist, but such consultations should take place only after the lawyer has thoroughly reviewed the reports. With that preparation, the consultation will be better focused and far more productive.

EINSTEIN'S SISTER†

Seymour Kurland*

What do we see when we examine the day to day practice of law?

Stan is graduating from a top thirty law school in the middle of his class. The picture is bleak. He has already had over twenty interviews, still no offer. He faces the cram course and then the Bar exam with its recently imposed high failure rate which in one swoop can negate years of accredited study and tremendous financial sacrifice. If he passes and finally gets a job, the alternatives are to hustle business from nowhere or work over 2,000 hours a year writing memoranda, engaging in do-or-die discovery and never arguing in court or trying a case, with the ultimate expectation of becoming a tired, washed-out, anxiety-ridden success at making money in a profession presently hated and ridiculed by almost everyone. He wonders whether he has made a giant mistake in career choice.

Louise, eight years out, is a senior associate, on her way to partnership. She has handled some complex corporate deals and successfully tried a few small cases. She runs a committee of the Bar association, belongs to the Chamber of Commerce, is politically active and has already brought a few small but promising clients to the firm. She and her husband Andy finally make enough to buy that house they want and take a winter vacation. Still, the nights in the office, the relentless pressure to produce billable hours, the no fun at work, the unpleasantness of fighting with other lawyers, internal politics, networking, and satisfying unreasonable judicial deadlines are never ending. Finish one deal, settle a case, and start another immediately. And all for what? So mostly childish men can take unreasonable macho positions in their never ending quest for power and money. And there are still partnership politics ahead and the inexpressible fear that there really is a glass ceiling. How selfish and guilty she continually feels about the time not spent with her two year old son, the continual postponement of that second child, and the gnawing doubt that she bought into the wrong value system.

So, Max, you're a partner now! Well, why did it feel good for only about twenty-five minutes? Because nothing really changed. The struggle continues. Now it's moving up the partnership ladder; just another version of internal politics. Plus, in addition to all the billable hours still required, you're also responsi-

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ble for producing the money that's needed to pay those fixed and ever growing expenses. Where indeed will all those deals and cases continue to come from to replace the ones that paid for last year in this shrinking and competitive market when longtime relationships between lawyers and clients based on mutual trust and respect have been replaced by "beauty contests" and competitive bidding? Well, law is still a noble profession. Profession my foot! It's business, social Darwinism, pure and simple. Survival of the fittest. You eat what you kill. Am I a happy partner? Ha, happy! Happy is for children. This is reality, and it's what I'll face daily for the next twenty-five years. If I'm lucky.

Pat beat the game. He made it, he's free at sixty-three. No more time sheets, clients to chase and entertain, or cases to try before cranky judges for never-satisfied clients. His health is good and he doesn't need the big bucks anymore. So he can sit back and be the senior wise man, get involved in the matters he chooses, teach, consult, and give advice to the youngsters. But (isn't there always a but) no one suddenly cares about his wisdom or seeks his advice. The young lawyers want a rabbi that can help them move ahead. The clients want a younger, more aggressive partner to try their cases. Everybody wants to be a consultant or teach. Overnight he has become irrelevant and powerless. Just a senior guy taking up an office that can be better used by a "producer." Lunch has become a lonely time. And as for his "wisdom" and "experience"—well, he can just shove it.

So too are judges surrounded by white mountains of motion papers and briefs and pressured to move more and more cases to trial. Docket control dominates their day.

Small practitioners are facing extinction on an almost daily basis and searching for an association or specialty or that ad that will bring in the one big case. And inside counsel is considered a nay-sayer who has only a negative impact on profits and is avoided as much as possible.

Well, is this an accurate picture of legal life in America today? Partly, yes. It's certainly the picture that dominates lawyers' day to day private conversations at the Bar. But it's a fragmentary, overblown, one-sided presentation, and it's what the public tells us we are. Much of this atmosphere is a result of our present day economy. Admittedly, we are in the throes of a great global economic transformation, and the American economic downsizing in today's world of cultural materialism aggravates this picture.

But this economic transformation does not mean that our identity, our institutions, our values, and what we stand for and care about as lawyers have been totally reduced to dollars and cents. Our problem instead is that because of the economic intensity we face daily, our focus has so narrowed that we have forgotten the wonderful institution of which we are a part and have in fact suffered a loss of legal spirit.

Some months ago, I had to argue a summary judgment motion in federal court in Chicago. I prepared hard the day before but still felt anxious and had a restless night. I took an early flight and arrived at O'Hare tired and even more nervous. Sitting in the cab for the long ride to town, it all started to seem silly and stupid. What was I doing here, a sleepy, frightened lawyer from a different city, in uniform (freshly pressed blue suit, white shirt, red tie, polished dark shoes and executive hose, with briefcase), come to fight in the town with "broad shoulders" against a lawyer from a big firm representing a big corporation, in front of a judge who probably knew him intimately? I'd get killed, and for what? So businesses can trade money neither of them really needs? Is this what my life is about?

Then I walked into the courtroom in the federal building, saw the United States seal behind the judge's chair, the jury box, the witness stand, the counsel tables, and suddenly I was home, comfortable, ready, right where I belonged. The judge was middle-aged, comfortable in his robe, alert, friendly, and patient. He had read the briefs and closely questioned both counsel. And in what seemed minutes, it was all over.

Later, as I walked the Chicago streets, it was "my city." I was comfortable, secure, happy. My life had purpose and meaning. Of course, much of that feeling came from the full use of my powers, my training as a lawyer. The satisfaction of craft well-performed. But it was more; it was my participation in a process, in an institution of which I was a member, which I supported and which supported me: THE LAW. I was not an isolated legal Rambo come to engage in a personal life struggle, but an essential member of a wonderful institution larger than and beyond self. And then I thought of Einstein's sister.

The story goes: Einstein's sister had incurable cancer and was severely depressed. To help her, Einstein told her to try thinking less about herself and her condition, and to try instead thinking about and identifying with nature. The more she could do this, feel a part of and at one with nature, its beauty, its ultimate order, its timelessness, she would find peace. And whatever happened, she would never fall out of the universe.

So, too, we must remind ourselves over and over again, regularly, that we are indeed lawyers, an integral part of a profession and process essential to the application and preservation of principles on which the very foundation of civilized society rests. If we lose our faith and self-respect, the entire structure of which we are integral pillars is threatened.

Picture yourself a small branch in a large hedge surrounding a field of chaos. Mostly, we can't see the hedge and are concerned daily with being crowded out of existence by surrounding branches within our immediate view. But if we rise, helicopter-like, from time to time, we see before us that splendid whole of which we are a part. What each of us continues to do as a lawyer each and

every day for our client in a case, giving advice, negotiating a deal, conducting discovery, handling a divorce or an estate in these especially turbulent and changing times, remains ever so important. All together it becomes that hedge against chaos even if it's hard to see. And we should never despair, but instead continue to seek roles of leadership and hold onto a society based on law.

Sometimes an outsider sees it and expresses it even better. When asked for a rationale for intervening in Bosnia in a recent interview, Vaclav Havel, President of the Czech Republic, said:

> I believe that what is at stake in Bosnia is not Bosnia alone. What is at stake is the very principles underlying a peaceful and integrated Europe. Abandoning these principles is the same as cutting the branch on which our own bottom sits, a civil society based on the rule of law and not on race, religion or creed. Bosnia is not primarily a conflict between historical ethnic enemies but rather a conflict between two notions of society. On the one side is the modern concept of an open civil society in which people of different nationalities, ethnic roots, religions can live together. On the other side is the archaic concept of a tribal state as a community of people of the same blood.[1]

It is here in Philadelphia, Pittsburgh, Chicago, New York, Los Angeles, and indeed throughout our society that this struggle is being fought every day. Nowhere else, and at no other time in the history of the world have people from all parts of our world come together and attempted to live under the rule of law with its emphasis on personal liberty and equality under law as embodied in our Constitution with its Bill of Rights. And if we can't do it here, in this, the most powerful and prosperous country in the history of the world, how can we expect it to happen in Bosnia, Ireland, Israel, or anywhere else?

Of course the practice of law has the warts and blemishes I have described. So what? Everything does. Every yin has its yang. And things are on the upswing: Time sheet billing is losing favor to value billing; young lawyers care more about the quality of life; pro bono representation is increasing and has become standard operating procedure in all big firms; legal services to the poor continue to receive funding despite all the protests; judges are taking a lead in ending Rambo tactics; Inns of Court to help young lawyers and restore professionalism are flowering; and senior lawyers are reemerging as ad hoc judges, arbitrators, and mediators.

With it all, aren't we indeed lucky to be right smack in the middle of this glorious adventure?

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[1]Philadelphia Inquirer, Oct. 17, 1995, at A35.

THE GHOST OF LAW PRACTICES PAST, PRESENT, AND FUTURE†

Alan G. Greer*

I am The Ghost of Law Practices Past, Present, and Future and I come to "rattle my chains in your face." Conjure up the image of Ebenezer Scrooge hunched over his counting desk on Christmas Eve grumbling bitterly because Bob Cratchit wants to take Christmas Day off instead of doing what Scrooge would do—work, work, work!

We all reject that image, don't we? We would never engage in such mean-hearted and miserly conduct in our modern day practice of law—would we?

I beg to differ. Today, too many of us have become Scrooges, driving those around us like they were poor Bob Cratchits. We look on our practices as NHL hockey games, played in suits and ties or in high heel shoes, except our games are in perpetual overtime.

Lawyers regularly used to be legislators, pillars of the community, scout masters, lay leaders in their churches and synagogues, and paragons of family support. But no more. Now, by and large, we don't do those things. We are too busy making money. Doing good deeds costs us too much time taken away from our practices.

To make my point, I'd like to share with you the story of George (not his real name, by the way), a lawyer I know from Orlando. George was married with two kids and the head of a very prosperous law practice to which he devoted every waking moment.

Then one day, his law partners told him they were departing and taking the firm's practice with them, leaving him with only the expensive lease on their space. Soon thereafter, his wife declared she wanted a divorce to marry her personal trainer. Following this, George's daughter called to say she had been admitted to the most expensive medical school in the country. Finally, he got a letter from his son's psychiatrist telling him it would cost about $150,000 in therapy to cure the boy's anxiety complex and lack of self-esteem. It seems that George always, always arrived at little league games during the final inning to see his son strike out because the lad was anxiously looking over his shoulder to see if dad had finally shown up.

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As you can imagine, George was stunned. He had never contemplated being alone. So, he went to his church sanctuary the next morning to pray. "Lord, you know I have always followed your commandments," lamented George. "I have never killed anyone, never stolen, and don't over-bill a minute [I think his fingers were crossed on that one]. I honor my father and mother and I've never committed adultery. Quite frankly, I've never had the time. Lord, I need your help. I'm desperate for money and have to win the lottery. It's my only hope."

George waited a week and nothing happened, so he went back to church and pleaded again: "Please, Lord, I've got to win the lottery. I've always given generously, but now I truly need your charity and help."

Another week went by and still nothing. So finally George returned to the sanctuary, fell to his knees, and begged: "Please, Dear Lord, I absolutely have to win the lottery, I'm desperate." Suddenly the church was filled with a booming voice that said, "George, meet me halfway. Buy a ticket."

The message for us as attorneys is clear: We have to meet life halfway, and too few of us are doing that. We've got to buy a ticket, so to speak. It does no good for us to grumble that we don't have time to do the things we enjoy, complain about our quality of life, and bemoan our disenchantment with the practice of law.

Most of the lawyers I know are running as hard as they can go, piling up professional accomplishments, vacation homes, cars, boats, and other "trappings of success." But they are too busy to enjoy them. Nonetheless, they are sure that if they can just add that next glittering award or expensive bauble to their lives, they will finally be happy.

But what these lawyers are really doing is building up walls that separate them from the only thing that truly matters—family and friends. I am constantly amazed when I watch our brothers and sisters at the bar demand unbelievable sacrifices from those closest to them—spouses, children, family, friends, and fellow law partners—all in the name of their own personal success, but not their happiness.

Why are we so desperate to win the approval of strangers or clients who will forget us tomorrow when we are no longer of any use to them? Too many attorneys are living their lives backwards. It's time to change what we put first.

I was impressed by a definition of success I read in an interview of actor Ralph Fiennes of "Schindler's List" and "The English Patient" fame. He was asked, "Don't fame and success isolate you from what you were before and those you love?"

"No," he said. "I call people successful not because they have money or their business is doing well, but because as human beings they have a fully-developed sense of being alive and are engaged in a lifetime task of collaboration with other human beings—their mothers and fathers, their family, their friends, their loved ones, the friends who are dying, the friends who are being born.

"Success," he went on emphatically, "don't you know, is all about being able to extend love to people. Really, not in a big capital letter sense, but in the everyday, little by little, task by task, gesture by gesture, word by word way."

I don't think we as lawyers are doing that. Like Willie Loman in "Death of a Salesman"—a man whose whole life depended on his next sale and was lost without it—we have let our sense of success be dependent on our next client, our next win, when it should be based on our family, friends, and what we do for others in our communities.

Our next client, while important in the economic sense, does not have to define us as a person, as so many lawyers seem to believe. Clients deserve our loyalty and best professional services, but not the sacrifice of the well-being of our family, partners, and friends.

Most lawyers just naturally hate change. But each of us must begin to change and redefine what we view as success and what—as well as whom—we are willing to sacrifice to achieve it. Here are some ideas. You will have to look into your own hearts to find others, but you may be surprised at how easy they are to locate if you'll just look.

First, every one of us should have an avocation to help balance our lives. We should be leaders outside the bar in our communities and especially in our families' daily lives. Nothing makes you feel better prepared for hard work than the periodic absence from it. It is from family, friends, and community that you will acquire and keep your bearings, what I call your "moral IQ." As you read this, I know you must be thinking, "That's easy enough for him to say, but where do I get the time?" Make the time! It's there if you want it to be.

One other suggestion that may help many of you is to realize that perfection is a disease. Give it up. We spend a great amount of time getting something 98 percent perfect. I guarantee you it takes twice as much time to move from 98 percent to 100 percent perfection. The only difference is you. You'll be amazed at how much time you buy yourself if you are willing to say 98 percent perfect is good enough. And your clients will truly love the reductions in their hourly bills. Success that over-bills our clients, that sacrifices, consumes, or harms those we love is an unacceptable definition.

Finally, don't lose sight of what is going on around you with those you love—with what is important. In a world where everything in morals and life seems to be shifting toward tones of gray—especially lawyer gray—let us all strive to be vibrant primary colors, first to our families, then to our friends and community, and finally to our clients.

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