STATE BAR LITIGATION SECTION REPORT

THE ADVOCATE

COMMERCIAL LAW DEVELOPMENTS AND DOCTRINE

VOLUME 56

FALL

2011

LITIGATION IN THE 21ST CENTURY: THE JURY TRIAL, THE TRAINING & THE EXPERTS

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LITIGATION IN THE 21ST CENTURY HAS BEEN THE SUBJECT of vigorous substantive debate and commensurate study. Opinions are pointed and varied as to the state of litigation and whether systemic reform is truly needed. Commentators question whether the civil justice system is broken or simply "is in serious need of repair."[1] With institutions seeking a "roadmap for reform" in our 21st century civil justice system, issues of costs and length of time for resolution of matters are at the forefront of the debate.[2] This paper will address three topics worthy of additional scrutiny and conversation: (i) commercial litigation trial work in the 21st century—the aftermath of the "vanishing trial";[3] (ii) lawyer training in this era where opportunities are scarce, "the price of justice is high," and arguably "access is being compromised"[4]; and (iii) the use and selection of experts in the second decade after *Daubert*.[5]

I. Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

Undoubtedly, "[j]ury trials have become the road less traveled."[6] Whether we are witnessing "the most profound change in our jurisprudence in the history of the Republic,"[7] as one respected U.S. District Judge has articulated, the decades-long decline in jury trials (both at the state and federal levels, civil and criminal) is documented and seemingly permanent. Members of the judiciary, academia and the bar have identified many causes for this decline—high costs of litigation in this information age, inundated dockets, escalation of alternative dispute resolution methods such as arbitration and mediation, unnecessary delays, and the unpredictability and arbitrary nature of the court system.[8]

Predicated with the inquiry "where have all the juries gone,"[9] the statistics are startling and exemplify the "vanishing trial" mantra.[10] Indeed, to many it appears that trial courts "are losing their business."[11] In the thirty-year period from 1970 through 1999, the total number of civil cases filed in federal courts increased by 152%. During that same period, the number of cases tried decreased by 20%.[12] While traditionally only a *de minimus* percentage of cases are tried, the decline in the relative number of cases tried has changed from 12% in 1970 to 1.8% in 2002.[13] While data on the status of state court trials is "more limited, harder to collect, and difficult to compare," according to one study, "state courts appear to be experiencing a trend similar to what is occurring in the federal courts."[14] In Texas, in 2005 (excluding family cases) 0.46% of the civil law cases in Texas's civil district courts were tried by jury. This number dropped to 0.36% by 2009.[15] Morbidly stated by a prominent jurist, "[t]he American jury system is dying. It is dying faster in the federal courts than in the state courts. It is dying faster on the civil side than on the criminal side, but it is dying."[16]

Commentators have coined the aftermath as the "ripples caused by the near cessation of trials."[17] Scholars ask, "Litigators in name only?"[18] Accordingly, some argue that a more apt definition of the 21st century litigator might be "'one who uses the court system only as a last resort if a dispute cannot be resolved outside its bounds.'"[19]

II. Training Young Lawyers in an Era of Fewer Jury Trials

A predictable consequence of the "vanishing trial" phenomenon is the conundrum of lawyer training in this 21st century reality. In these times of fewer jury trials and clients' heightened sense that the stakes are too high in those cases that actually are tried, it is a challenge for young lawyers to get practical hands-on training. To address this gap in training, law schools and law firms have become creative in their training methods. Many law schools now have strong trial advocacy programs that include competitions in, among other things, client counseling, mediation, moot court, and mock trial. Several law schools also work with the local judges, allowing their students to attend mock summary judgment hearings so that the students get experience arguing a case in a real courthouse and in front of a real judge, albeit in a "pretend" case. Many firms now have their own "universi-

ties" where associates are instructed on all aspects of a trial and then participate in a mock trial with extensive critique. Other firms have looked for opportunities outside the firm, such as with the District Attorney's offices in Harris County (and other counties), for their associates to try misdemeanor cases so that they get some real time in front of a jury. Judges also contribute to young lawyer training by judging mock trials and mock hearings (as mentioned above), and by providing internships for law students so that they have an opportunity to get a bird's eye view of the trial process. In essence, law firms and other institutions must explore innovative approaches to ensure that when their lawyers do appear in a trial, they are "trial ready."

III. The Use and Selection of Experts and the Effect of *Daubert* on Trial Work in the 21st Century

Over a century ago, Judge Learned Hand astutely observed that "[n]o one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best."[20] The genesis of the dialogue about experts and ultimately of *Daubert* and its progeny has been the need and desire to find an efficient and effective methodology for the use of experts. Unfortunately, "[e]xperience has shown that opposite opinions of persons professing to be experts may be obtained to any amount...wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue."[21]

The inquiry propounded by Judge Hand was squarely addressed 92 years later by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which spawned a new generation of expert examination —the "*Daubert* challenge."[22] Plagued with concerns that "[a]n expert can be found to testify to the truth of almost any theory, no matter how frivolous,"[23] the U.S. Supreme Court proclaimed in *Daubert* the debut of a new era in judicial gatekeeping.[24]

The Court's landmark 1993 ruling articulated standards for trial judges to assess whether expert testimony should be admitted, including determining whether the reasoning upon which the testimony is based is scientifically sound and whether the reasoning and methodology are relevant to the facts of a particular case.[25]

In the decades since *Daubert*, the expert testimony jurisprudence has permanently impacted how lawyers and experts approach litigation. It is clear that "*Daubert* has changed the way many courts view technical evidence, because of the greater pretrial scrutiny that is required." [26] Further, the stakes are high because expert opinions are important to almost every type of litigation and the exclusion of expert testimony can become outcome-determinative. [27]

Today, extensive pretrial *Daubert* hearings are now almost *de rigueur*, with each side seeking to strike the other's expert(s) in all types of cases. While legitimate challenges exist in many cases, occasionally such hearings do not resemble the challenge contemplated by the *Daubert* and *Robinson*[28] courts, and more closely resemble a case of "my expert is better than your expert; therefore, your expert should be excluded."

IV. Musings and Teachings

Four legendary trial lawyers share their insights about litigation, training and experts in the 21st century. As expected, the conversation is thoughtful, candid and proffers innovative suggestions and solutions.

DAVID J. BECK

Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

Much has been written about the "vanishing" jury trial, and rightfully so.[29] There has been an overall decline in the number of cases tried to a jury both in state court and in federal court. The decline in Texas has been drastic—civil jury trials dropped 60% from 1986 to 2008.[30] Even the number of non-jury trials has plummeted in both state and federal court. Today, less than 2% of federal cases are resolved by trial. In 2009, in Texas state courts, only 0.4% of civil cases were resolved by a jury or directed verdict.[31] This "withering away"[32] of the jury trial may be blamed on several things: increased use of mandatory arbitration clauses, tort reform, heightened pleading standards, heightened expert witness standards and the costs associated with expert testimony, and the increased granting of summary judgment, just to name a few. However, in my view, the escalating cost of discovery is one of the most significant factors in reducing the number of cases that proceed to trial. Matters of relatively low dollar amounts in dispute can generate substantial costs in depositions and even in discovering and producing only documentary evidence. Plainly, the potential enormous cost of litigation has contributed to the number of disputes that are resolved in some manner other than trial.

But regardless of the *cause* of the drastic reduction in trials—and especially jury trials, its inexorable result has serious long-range consequences. Indeed, it would be easy enough to dismiss the warning calls about the vanishing jury trial as just the lamentations of self-interested trial lawyers

looking to preserve their way of life. More importantly, however, this pattern of dwindling trials threatens one of the fundamental underpinnings of our society: a strong, vibrant, and independent judicial system.

What are the practical consequences of the eroding away of the jury trial? Among other things, there are fewer jury verdicts upon which an attorney can form a solid basis for predicting the outcome of a particular dispute in the community, thereby making it exceedingly more difficult for an attorney to evaluate a case and to properly advise his or her client. Without a measurable number of jury (or judges') decisions on a similar dispute or type of claim, it will be almost impossible to form a reasonable basis for predicting the outcome of a particular case or determining its value. The lack of development of the common law is another serious consequence. Fewer cases going to trial means that fewer jury verdicts are appealed to higher courts. This, in turn, means that there are fewer appellate decisions, the opinions that form the contours of our common law. The inexorable by-product is uncertainty in the law, unpredictability, and inconsistency in case outcomes.

Distrust and skepticism about the fairness of the judicial process, and ignorance about its value, will serve only to weaken the institution and result in waning support for the judicial independence so necessary for our democratic form of government.

Perhaps most significantly, the diminishing number of jury trials means a decline in the public's participation in our justice system. Most people who serve on a jury walk away believing strongly in the fairness of our system and the importance of the jury in resolving disputes. Fewer members of the public having the opportunity to perform their civic duty and serve on a jury may result in a diminished trust in our judicial system. Distrust and skepticism about the fairness of the judicial process, and ignorance about its value, will serve only to weaken the institution and result in waning support for the judicial independence so necessary for our democratic form of government.

Finally, another unfortunate consequence is the lack of opportunity for attorneys to ply their trade and to hone their skills so that they are better prepared to represent the next client. No one becomes a great—or even good—trial advocate without having tried a significant number of cases. Unfortunately, in this day those opportunities are difficult to come by. Indeed, we have seen a shift from the days of the "trial lawyer" to the days of the "litigator."[33] With so many of today's disputes terminating in a manner other than by a trial, the focus has turned to extensive pretrial work and motion practice. Many lawyers begin working on a case with the intent, or certainly the belief, that it will never get to trial, and they act accordingly. Two commentators have recently argued that because "clients of all types assume that *litigators* are trial lawyers and that trial experience is important," the "lack of trial experience must be disclosed to prospective clients," and that a failure to make such a disclosure should be actionable conduct against the lawyer.[34]

Training Young Lawyers in an Era of Fewer Jury Trials

The "vanishing trial" phenomenon certainly has had a huge impact on training new lawyers. Today, young lawyers face a tougher time getting trial experience than did those of us who began our careers many years ago. Adding to the problem is the fact that today many of the cases that go to trial are high stakes, bet-the-company type of cases. These are not the kind of cases on which young lawyers can develop their skills and techniques in the courtroom. Although every case is important to the client, smaller matters and lower-dollar disputes are the prime opportunities for young lawyers to gain the experience needed to become an accomplished trial lawyer. Unfortunately, those opportunities are not as numerous as they once were.

What can be done to provide the necessary training for our young lawyers? Advocacy training and trial technique clinics are good ways for young attorneys to develop the skills they will need when they do enter the courtroom. Our firm utilizes in-house training classes as well as trial academies such as the one offered by the International Association of Defense Counsel. These classes and seminars offer our young attorneys valuable trial skill training. Also, the lawyers in our firm actively participate in the bar's *pro bono* initiative. One of the real benefits from our *pro bono* efforts—aside from the pride we feel in performing a valuable service to those in need—is that our young lawyers have the chance to get into the courtroom and develop their skills, and in return the client receives great assistance and representation that he or she would otherwise not be able to afford. One of our first year associates, for example, recently accepted a *pro bono* custody matter and tried the case to a successful jury verdict. The client received the relief she sought, the young attorney won because he gained valuable trial experience and helped someone who would otherwise have gone without representation. Our firm also benefited because we now have a first year lawyer who has some jury trial experience.

Training today's young lawyers is also different in other ways. To the extent the focus of litigation has moved from trial work to motion practice and discovery issues, young lawyers today are steeped in these issues early on. And although learning to navigate a courtroom, examine a witness, cross-examine an expert, or deliver a powerful closing argument is certainly important—indeed, it is essential—the complexity of today's commercial litigation is such that a young attorney also must be an expert in the intricacies of document review, discovery and motion practice beyond that necessary so many years ago. Today's complex commercial cases more than provide the facility for that experience.

The Use and Selection of Experts and the Effect of *Daubert* on Trial Work in the 21st Century

Expert testimony is now critical to almost every case. *Daubert*[35] and its Texas counterpart have had a significant impact on commercial litigation. Judges now have more control over expert evidence than they ever did before *Daubert*. Although according to the Advisory Committee Notes to Rule 702, "rejection of expert testimony is the exception rather than the rule," there is no doubt that challenges to experts have increased significantly since the Court expanded *Daubert*'s reach to all types of experts in *Kumho Tire v. Carmichael*.[36] Indeed, a recent study conducted by PricewaterhouseCoopers on the effect of *Daubert* and financial experts demonstrates that while challenges to experts have drastically increased, the success rate has remained relatively steady.[37] Challenges to all types of experts rose over 340% from 2000 to 2009, but the percentage of all experts excluded in whole or in part has remained relatively consistent at around 45%, ranging from the highest of 50% in 2003 to the lowest of 41% in 2002.[38] Interestingly, at least for challenges to financial experts, the Fifth Circuit heard the second most number of challenges of all federal circuits, behind only the Second Circuit.[39]

The study also showed that generally plaintiff's experts are challenged more frequently—70% of the challenges are to financial experts—but that defendant's experts are more frequently excluded.[40] These numbers, of course, are not surprising given that the exclusion of expert testimony obviously affects plaintiffs more than it does defendants because in most cases if a plaintiff has no expert testimony he will be unable to prove a prima facie case.[41] And a plaintiff is not likely to make a *Daubert* challenge of a defendant's expert until he knows for sure that his case is going forward.[42] Some argue that because of this, *Daubert* has made it more difficult for plaintiffs to successfully litigate their cases.[43] But, given that the exclusion rates have remained about the same since *Kumho*, it is difficult to say that is true.

To be sure, *Daubert* and its exacting standards have had an effect on the costs of litigation, which in turn has probably contributed to the diminishing number of cases going to trial.[44] If a plaintiff's lawyer must hire multiple experts and fend off a *Daubert* challenge to avoid the experts' testimony being stricken, he or she is likely to only take on cases with certain high-value potential. Consequently, lower value cases are left unprosecuted.[45]

Another likely effect of *Daubert* in many states has been to persuade plaintiffs—to the extent that they have a choice to file in state or federal court—to prefer state court, a forum in which they may believe they stand a better chance of surviving a challenge to their expert.[46] While this is not of as much concern in states like Texas that have adopted or incorporated the *Daubert* elements into their expert evaluation standards, it is particularly true in states like North Carolina that have rejected *Daubert*.[47]

Courts have taken very seriously their *Daubert* "gatekeeper" role. Yet, there remains a debate about whether the *Daubert* elements that were intended to be flexible guidelines are, or can be, consistently applied by judges with little understanding of scientific methods or an unsophisticated view of complex scientific subjects.[48] Nevertheless, I believe *Daubert* has at least provided us with an adequate framework with which to measure experts—for both the plaintiff and the defense—and the value of their opinions. Given that the factors are generally being applied by non-scientifically trained judges, it stands to reason that there will always be times when an otherwise qualified expert is excluded or where an expert opinion based on an obviously flawed scientific method is allowed. But all things considered, *Daubert* and its application, in my view, have significantly improved the way expert testimony is used in today's litigation.

The primary reason for exclusion of expert testimony is lack of reliability—the misuse of accepted methods, rather than the introduction or use of untested approaches, more often leads to exclusion.[49] From a practical standpoint, this means that trial counsel must retain and use an expert who is well versed in the proper methodology or scientific approach that underlies his or her theory. In a case involving a battle of experts, the battle is often won by the party who secures the best expert in the field.

LISA BLUE

Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

"Justice denied anywhere diminishes justice everywhere."[50]

The steep decline in the number of cases tried by juries has a substantial effect on the work of all litigators in the 21st century. Any hope of lessening this decline depends on investigating the cause of the trend. From my observation, the demise of the jury trial and the resulting difficulties that attorneys and their clients face can be linked to one main culprit: tort reform. Specifically, tort reform and the decline of the jury trial add a layer of difficulty that inhibits attorneys' ability to advocate for clients in need of legal assistance. In the end, compromising the right to trial by jury—which is the cornerstone of justice—creates instability in the structure of our legal system. The effects of this decline may be disastrous for litigators and parties alike.

Attorneys will be the first to experience the tremors created by the fall of the jury trial. These effects range from *where* an attorney practices law to *how* the attorney approaches a case. For example, case selection becomes more stringent when individual states and the federal government place a cap on pain and suffering and economic damages. Attorneys are unable to accept clients who may have strong claims but are barred from recovery due to limits imposed by tort reform. These difficulties force lawyers, especially those in Texas, to either switch areas of practice or go outside of that state to practice law. In the end, the client is deprived of a legal remedy and the purpose of our legal system is defeated. For these reasons, the right to trial by jury, what John Adams described as the "heart and lungs of liberty," is in need of resuscitation.

The uneven balance of bargaining power in favor of big business intensifies the difficulties created by tort reform. One way in which corporations are able to manipulate the process in which individuals receive justice is by incorporating mandatory arbitration clauses into form contracts. Thus, assuming the individual is aware of the clause, the remaining choice is accept to the contract "as is" or forfeit needed services. This poses a significant disadvantage to private individuals since businesses have more time and resources to devote to drafting these clauses. The jury waiver is another tool used against individuals by large corporations. Businesses seek to justify these one-sided agreements by claiming that individuals will still have their "day in court" with a judge deciding the case. When businesses coerce individuals to give up fundamental rights, this is an inappropriate use of corporate power. Furthermore, these agreements interfere with the freedom of the individual to have the case heard by a jury and place a burden on the attorney to remedy the consequences and to ensure that individual rights are maintained. It is essential that the doors to the courthouse, specifically the jury room, remain open so justice may be preserved.

Furthermore, proponents of tort reform often use their resources to prejudice the public before the case is ever heard in court. These tort reform groups attack the public perception of trial work by circulating rumors of a litigation crisis and implicating that people are becoming "sue crazy." Despite the inaccuracy of the rumors,[51] these assertions make it more difficult for trial attorneys to present their case to an unbiased jury. Because jurors are exposed to the tort reform publicity onslaught, they become more skeptical about the judicial system. Damage to the public perception is exacerbated by the fact that there are fewer opportunities to try cases in front of a jury. This leads to a more frustrating trial process since attorneys have less experience in preparing for and advocating during a jury trial.

Corporations also seek to increase the difficulty in bringing class action lawsuits as another tool to strong-arm individual litigants. For example, although aimed at reducing class action lawsuit abuse, the Class Action Fairness Act of 2005 harms individuals with legitimate claims due to the increased difficulty in bringing class action lawsuits.[52] This act makes it too difficult and expensive for a consumer to bring a class action lawsuit; thus, it is more difficult to hold the corporate giant in check. Class action suits are invaluable because they afford consumers the opportunity to bring collective claims against large corporations that would otherwise be too small to bring separately. Absent the deterrent effect of class action litigation, corporations can profit at the expense of vulnerable consumers.

The perceived "advantages" of resolving disputes outside of the courtroom do not justify compromising the fairness of the process by forfeiting the right to trial by jury. The significant disadvantages imposed upon those who need legal assistance and the added layer of complication to trial work outweigh the time and money saved, if any, through these alternative processes. An attorney should put forth the same evidence, call the same witnesses, and spend the same amount of time preparing a case regardless of where the case is heard. For this reason, my approach to jury work remains the same regardless

of where the case is being heard. The goal is to extract as much information about those who will render the verdict, including their belief system and life experiences. Although this does not remedy all the negative effects of tort reform, it ensures that the attorney will fulfill his or her obligations to the client and act as an effective advocate.

Training Young Lawyers in an Era of Fewer Jury Trials

There is no better experience for young attorneys than to practice in front of a jury. As a young litigator at the District Attorney's Office, I tried over 125 cases. Each of those trials was an invaluable contribution to my development as an advocate. From those experiences, I have learned there is something very important about having twelve jurors decide whether the plaintiff deserves relief, as opposed to three arbitrators determining the result of the case. This is central to our system of justice, and the fairness provided through a jury trial forms the core foundation on which our county was built. Being in front of a jury is a profound experience, one I would desire for every young lawyer. It is my sincere regret that so few young attorneys will be able to take advantage of this critical educational opportunity.

For these reasons, it is important to train young lawyers to oppose arbitration and fight for the right of trial by jury. The first step in this process is to teach young lawyers how the system works. Through this understanding, I am confident that young attorneys will become engaged in the art of advocacy and work hard to protect their clients' rights. In conducting this training there are a few words of advice that I would pass to every young lawyer. First, young lawyers should get a specialty. If attorneys choose the general practice of law, nothing will stand out about that person and he or she will blend into the backdrop of every other attorney looking for a job. Second, new attorneys should take as many bar exams as possible, especially those of states in which that attorney might want to practice. Being licensed in multiple states looks very desirable to employers. Taking this approach minimizes the negative effects of young lawyers' limited opportunity to try cases before a jury.

Law schools should also have an increased incentive to better prepare students before entering the workforce. I believe that the medical community sets a great example by requiring young professionals to complete an internship or residency before practicing on patients without supervision. In the same way, I would propose that law schools require internships so that young lawyers are prepared for practice from the moment they enter a firm. This reduces the risk of inadequate legal representation of a client who may not know the young lawyers' experience level or who may be unable to afford a more experienced attorney. Similarly, a mentoring program where law students are paired with older attorneys would be a practical benefit for both the young lawyer and the mentor since firms could utilize the training and skills of the student.

The Use and Selection of Experts and the Effect of *Daubert* on Trial Work in the 21st Century

The *Daubert* decision has had a chilling effect on all civil litigation by requiring judges to encroach on the role of the jury and complicating the job of trial lawyers.[53] Essentially, *Daubert* allows a judge to determine the credibility of scientific evidence and expert witnesses. Judges are becoming triers of fact and, thus, usurping a role that was traditionally reserved for the jury. The result is an increased and unbalanced burden of proof by requiring that the plaintiffs win twice: once in the *Daubert* proceeding and again at trial.[54] This decision ultimately produces the following effects: (1) increases the cost of litigation for the plaintiff; (2) lowers the probability that a case will ever be filed in the first place; and (3) increases the chance that the judge will terminate the case. *Daubert* gives an enormous amount of power to judges, whose rulings in these motions can make or break a case. These effects hit especially hard in toxic tort law where science is the essential aspect of this type of litigation.

The *Daubert* standard has affected my experience as a litigator by making case selection more difficult and adding a layer of complication to trial work. Cases that I would have taken ten years ago, I am unable to look at now because it is too difficult to get past the science. The standard set out in *Daubert* can be insurmountable and leaves many legitimate claims without a proper remedy. These concerns shift the focus of attorneys from what is important—like how bad the disease is or how negligent the defendant acted—to whether the case can get past *Daubert* standard. Furthermore, although *Daubert* sets out general criteria to guide a judge's decision making, it leaves a lot of room for judicial discretion in applying the criteria. The result of this flexibility is that litigators face a lack of uniformity among different courts.[55] For instance, in trying a *Daubert* case, I always look into how the particular judge has applied the standard in the past. Few wise lawyers will take a case if it cannot get past *Daubert* and, as a result, many people in need of a legal remedy will not receive a fair chance at trial.

Assuming that the case gets through the heightened selection process, I then look at how the experts in the case will withstand the *Daubert* standard in both the trial and

appellate courts. Under *Daubert*, the selection of experts becomes indispensable. The job of the attorney at this phase is to make sure that the expert passes all parts of *Daubert*. However, finding experts who will testify in trial becomes more difficult because those experts do not want to risk the stigma of being struck as an expert by a judge who may have no scientific background. Furthermore, fears of having a witness struck are exacerbated by concerns that opposing counsel will use a former *Daubert* ruling to discredit the expert in subsequent trials. The jury should be able to judge the credibility of experts and we should trust the system that was created for that purpose.

In the end, *Daubert* motions are overused, impose an unfair expense on plaintiffs, and give too much power to trial judges by putting them in the role of jury. The judge, as a neutral decision-maker, wears a robe, which represents a separating veil between him and the litigants. This veil is torn and neutrality compromised when a judge is asked to step in and interpret the facts. The justice system was designed so that the community interprets the facts and the judge applies the law to the facts in order to resolve the dispute. The jury represents the standard of fairness required by this system, and justice cannot be served if the access to justice is denied. Sadly, fewer people will receive much needed assistance as a result of this insurmountable standard.

MELANIE GRAY

Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

Commercial trial lawyers often bemoan the fact that so few cases go to trial. I have practiced for over thirty years, and throughout that time, most large, complex commercial cases settled before trial, as well they should. Settlement often is in the client's best interest because the client has more control over the outcome. At trial, either before a judge or a jury, the results are unpredictable and often affected by factors having little or nothing to do with the merits of the case. My recommendation to young lawyers who want to try cases: your best bet is to refocus your practice on the few areas where cases still go to trial or instead find fulfillment in all the other aspects of oral advocacy.

Commercial litigation, whether in a court, an arbitration, or a mediation, is replete with opportunities to use our oral advocacy skills. What is the difference between oral advocacy at trial and a blistering cross or a strategic direct examination of a witness in a deposition, a masterful argument at a *Daubert* hearing, or a compelling presentation of the strengths of your case to a mediator using the masterful storytelling techniques possessed by every great trial lawyer? In my view, two key differences are that a trial usually garners a larger audience (which strokes our egos) and we know that one side will win and the other will lose (which satisfies our competitive nature). Given our professional responsibilities, we should not want to go to trial to have our egos stroked or our competitive spirits sated.

That said, if there are fewer trials today, will the future generations of lawyers be devoid of the legendary trial lawyers of days gone by? First, let's not kid ourselves—while there are many, many very good trial lawyers, there have never been that many *great* trial lawyers. For those who are extraordinary, I do not think they are extraordinary because they have done it over and over (although, I admit, experience doesn't hurt), but because they are wired a certain way that sets them apart the very first time they step into a courtroom. Nonetheless, good lawyers can become much better the more they practice and experiment with their oral advocacy skills, which is why it is so important to nurture the next generation with training and opportunity.

Good lawyers can become much better the more they practice and experiment with their oral advocacy skills, which is why it is so important to nurture the next generation with training and opportunity.

Training Young Lawyers in an Era of Fewer Jury Trials

When commercial cases do go to trial, it is the *sine qua non* of what we do. As I noted before, it is critical that we invest ourselves in teaching our younger colleagues key advocacy skills and then open the doors of opportunity to them. Many firms have sophisticated training programs based upon the learning-by-doing technique. I find these programs the most effective, but only when the gifted, senior trial lawyers commit themselves to participating actively in them. Young lawyers that do not have access to in-house training programs can take advantage of the numerous advocacy CLEs sponsored by local bar associations or the State Bar of Texas. In addition, they can participate in advanced trial advocacy programs sponsored by local law schools or attend one of the national trial training programs, like those sponsored by the National Institute of Trial Attorneys. While these programs may carry hefty registration fees and a significant time commitment, the benefit to a young lawyer's career is worth that investment now.

However, no matter how good the training, if it cannot be put to use because opportunities are not provided, the learned skills can atrophy just like muscles that are not regularly exercised. This is where clients, judges, law firms, and senior attorneys can become more engaged. First, clients should insist that depositions, court appearances, and other presentations be assigned to the most junior level appropriate given the stakes involved. Unfortunately, when business is slow and those opportunities more scarce, senior attorneys seem less willing to share them - because they may then have less to do or because they may be less willing to take any risks with the client. As a profession, we do ourselves a disservice if we do not step aside and allow attorneys in their early years of practice to meaningfully experience each stage of a case leading up to, and including, trial.

Second, judges can be more active in encouraging law firms to give their associates courtroom experience. I recently heard about a pilot program under consideration in which a court may require firms to send their junior lawyers to argue routine pretrial motions. Further, judges should actively encourage firms that accept *habeas* and other matters to allow the more junior attorneys to handle as much of the representation as possible (with appropriate supervision, of course).

Third, just as clients should request that depositions, hearings, and presentations be assigned to more junior attorneys, law firms should not be shy about discussing the merits of involving junior attorneys with clients. By its nature, commercial litigation is, in large part, driven by businesses that hope to be around for a long time and they should be willing to provide as many opportunities as possible to the next generation of lawyers who may be called upon to represent them in the future. Law firms also should invest in *pro bono* matters that will provide trial experience. Not only is it the right thing to do, but also a very effective way for young lawyers to get "on their feet" experience. Finally, law firm management should hold senior lawyers accountable for providing opportunities to junior lawyers by requiring periodic reporting by the senior lawyers and by including such "training" as a factor in their compensation.

The Use and Selection of Experts and the Effect of *Daubert* on Trial Work in the 21st Century

With the proliferation of "experts" and the expert/consulting industry, *Daubert* hearings have become more prevalent. In the years since *Daubert* was decided, I believe less junk science has been presented to the fact-finder. Further, clients are becoming more vigilant in understanding whether the proposed expert or expert testimony will be subject to challenge and are increasingly resistant to spending the time and money on such an expert if it is a close call. While judges are more comfortable striking experts and their testimony, I believe more can be done. I am surprised by lawyers **and** clients who search for experts on just about every aspect of the case, believing that if there is an "expert" who testifies on each issue, their chances of winning increase. I often question this approach, as the very essence of a trial lawyer's skill is translating complex issues (except those requiring clear technical or scientific expertise) into ordinary concepts by telling stories, drawing analogies, and relying on common sense. The more lawyers rely on experts to explain the case, the less they learn how to master their oral advocacy skills. Finally, as litigation continues to evolve, with judges either being pushed or mandated to dispose of cases earlier and earlier, I believe hearings that eliminate claims or limit the evidence will increase. These are also important opportunities to advance a trial lawyer's skills.

STEPHEN D. SUSMAN

Commercial Litigation in the 21st Century—the Aftermath of the "Vanishing Trial"

Most Americans, including lawyers and appellate judges, think that a jury trial in a civil case is something to be avoided because the result is too unpredictable and the pretrial discovery expense necessary to make it less so, is too burdensome. Judicial doctrines like *Twombal,*[56] *Daubert* and *Matsushita,*[57] as well as expansive application of preemption and compulsory arbitration, are all reflections of an explicit distrust of jury verdicts. What can be done to make Americans regard the Seventh Amendment as at least as important as the Second Amendment? Simply put, we must reduce discovery expense and improve the perception of juror comprehension.

In the mid-1990s, I served as the Chair of the Texas Supreme Court's discovery rules committee. While Texas was one of the first states to expressly address e-discovery and deposition abuses, I found the rule-making process slow and frustrating for several reasons. First, the rules normally must accommodate all kinds of cases and all kinds of lawyers. Second, because they remain in place for a long time, everyone is fearful of experimentation. As an alternative, I began thinking about the possibility of persuading opposing counsel to agree to a set of rules that would govern a particular case and that would not require the court's permission to adopt. Because I was blessed by being involved only in complex commercial cases and with good opposing counsel, I was able to develop

a set of Pretrial Agreements that my firm has been proposing to opposing counsel for over a decade. Some of these agreed rules already have been largely embodied in the federal rules, such as the inability to discover communications between counsel and expert witnesses or prior drafts of expert reports. Other suggested rules, such as the limitation of depositions to three hours and the elimination of expert depositions entirely, are "hot off the press."

The key to the efficacy of such a Pretrial Agreement has always been to attempt to reach agreement on as many of these items as possible before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other; therefore, it is hard to reach agreement at that point. Some of my proposed pretrial agreements are always accepted and some are more controversial. To assist trial lawyers in this process, I have established a working website called TrialByAgreement[58] where these agreements discussed above, as well as other suggested agreements, can be found and debated among trial lawyers.

Because my Pretrial Agreements have worked so well, I have taken the concept a step further and have created a list of possible Trial Agreements, largely intended to improve juror comprehension. The start of discovery is not too early to begin discussing and trying to reach agreement on simple things like using a jury questionnaire, a juror notebook and pattern jury charges where they exist. These items seem like good ideas at the start of a case, but may not appear so benign on the eve of trial. I truly believe that Trial Agreements are worthy of full discussion among experienced trial lawyers and judges well in advance of pretrial. My attitude is to take whatever agreements I can get—the idea being that any such agreements advance the ball and make pretrial and trial more professional and efficient, not to mention making trial more understandable to the jury. Trial by Agreement is a way of reducing expense, stress and the uncertainty of pretrial rulings and a jury trial. In my experience, most judges welcome it and I speak at many continuing education programs to encourage them to urge lawyers to consider these type of agreements.

I also am creating a website called WeThePeople, WeTheJury as a place where those who have served on state or federal juries can go to discuss their experiences, anonymously and without mentioning proper names. Nothing like this exists and I believe that jurors who go to such a website are likely to express satisfaction with the experience. I also believe that trial lawyers and judges can use these comments to improve how they conduct jury trials.

If trial lawyers are willing to cooperate, there is no inherent reason that JAMS or AAA should be winning the dispute resolution competition. Businesses can incorporate into their contracts agreements for arbitration-like discovery rules to govern preparation for a trial. Alternatively, good trial lawyers can agree to their own streamlined rules. Trials have other advantages over arbitration—no need to pay judges by the hour and the availability of appellate review of legal issues, to name a few.

If a lawyer is paid by the hour, there is little incentive to reduce the time spent on pretrial discovery. Other than preaching the virtues of alternative fees that reward lawyers for results and not for effort, there is little we can do to get rid of this impediment to efficiency. However, we should reconsider the ethical ban on compensating testifying experts on a contingent fee basis. Expert expenses, along with the expense of reviewing electronic documents before they are produced, are probably the largest part of the cost of any trial or arbitration. Most jurors find that overall the experts cancel each other out and are not outcome determinative. If that is true, we should be asking ourselves why are we spending hundreds of thousands of dollars to hire them. Can we not trust the fact-finder, if fully informed of an expert's compensation, to give the appropriate weight to his testimony?

Training Young Lawyers in an Era of Fewer Jury Trials

In this time of "vanishing" trials, I feel like an old dinosaur hunter. There is no need to teach those skills to youngsters if there are no dinosaurs around. That said, I do think there are many opportunities for young lawyers to practice their litigation skills by participating in mock trials. We also have a rule at our firm that any lawyer that works on a case is entitled to stand-up time at the trial. We can only teach by sharing the limited trial experiences that we have. Jurors love to see a young lawyer get opportunities to question witnesses.

The Use and Selection of Experts and the Effect of *Daubert* on Trial Work in the 21st Century

Trial lawyers tend to overuse experts because we find it a helpful way of getting non-expert evidence before the jury. I have heard many lawyers say that it is the best way to get the other side's bad documents before the jury. I think we need to change the rules to allow for a more direct approach, e.g., for counsel to just display documents and use interim arguments to explain what they mean. But in a time-limited trial, getting the facts before the jury with some explanation by using an expert is just fine. I also find that *Daubert* motions are abused. They get filed in every case and greatly increase the cost of litigation. I believe that courts tolerate

this because many do not trust juries. If we trusted juries, then what is the need for a gatekeeper? In my view, juries are fully capable of distinguishing the wheat from the chaff and I would only allow *Daubert* motions in those cases where the scientific theory is obviously voodoo.

V. Final Observations

A spirited debate about the cause(s) of the "vanishing trial" continues. However, there is no doubt that trials have decreased significantly and that the rising costs of discovery, among a litany of other considerations, are clearly a contributing factor. With the decline in jury trials, it is now, more than ever, a challenge for young lawyers to be able to "cut their teeth" in real trials. It requires creativity and a willingness on the part of the lawyers, clients and judges to give young lawyers opportunities to develop and hone their oral advocacy skills, whether in mediation, arbitration, hearings, or trials. There also seems to be consensus that the number of *Daubert* hearings has escalated with a wider range of experts being subjected to a challenge. As a result, such hearings are now costly and time consuming for all involved. Some litigators question putting the judge into a gatekeeping function to such an extent that the judge effectively becomes the jury, rather than proceeding with fewer experts; having the lawyer present the key documents to the jury; and trusting the jury to "make the call." One thing is certain: trial lawyers, clients and judges alike should be invested in preserving the right to trial by jury and making the pretrial and trial process open, fair, and cost efficient to all.

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3 *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 3 J. EMPIRICAL LEGAL STUD. 459 (2004).

4 *See* AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & CIVIL JUSTICE, *supra* note 2, at 1.

5 *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

6 Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 200 (2010).

7 Hon. William G. Young, *An Open Letter to U.S. District Judges*, THE FEDERAL LAWYER 30 , 30 (July 2003); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U.L. REV. 67, 92 (2006) ("The future, of course, is unpredictable. But this much I know is true: history will not deal kindly with that generation of jurists that allowed the American jury to fall into desuetude. Lincoln said it best: 'we cannot escape history....[It] will light us down, in honor or dishonor, to the latest generation.' How will history 'light us'? I know not how the institutional judiciary will respond.") (footnotes omitted).

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9 *See* Sparks & Butts, *supra* note 8 at 295; *see also* Walters McCormack & Bodnar, *supra* note 6.

10 *See generally* Galanter, *supra* note 3.

11 *See* Higginbotham, *supra* note 8 at 1420.

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17 Walters McCormack & Bodnar, *supra* note 6 at 200.

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19 *Id.* at 163.

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33 *See* Tracy Walters McCormack & Christopher John Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEGAL ETHICS 155, 200 (2010) ("We are just beginning to assess the ripples caused by the near cessation of trials. Most litigators, especially those practicing less than ten years, have little or no trial experience.").

34 *Id.* at 200.

35 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

36 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999).

37 Daubert *Challenges to Financial Experts: A Ten-Year Study of Trends and Outcomes 2000–2009*, PriceWatershouseCoopers (2010), *available at* http://www.pwc.com/us/en/forensic-services/assets/2009-daubert-study.pdf

38 *Id.*

39 *Id.*

40 *Id.*

41 *See* Margaret A. Berger, *What Has a Decade of* Daubert *Wrought?*, 95 AM. J. PUB. HEALTH S59, S64 (2005).

42 *Id.*

43 *See id.*

44 *Id.*

45 *Id.* at S65 ("The number of product liability cases filed in federal court has dropped precipitously. *Daubert* may be stifling access to the courts at the same time it is fueling demands for tort reform by escalating awards.").

46 *Id.*

47 *See Howerton v. Arai Helmet, Ltd.*, 597 S.E.2d 674, 693 (N.C.

2004) ("North Carolina is not, nor has it ever been, a *Daubert* jurisdiction.").

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[56] *Bell A. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

[57] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

[58] *See generally* http://trialbyagreement.com.