



## 'The Vanishing Trial' Report

### An alternative view of the data

By John Lande

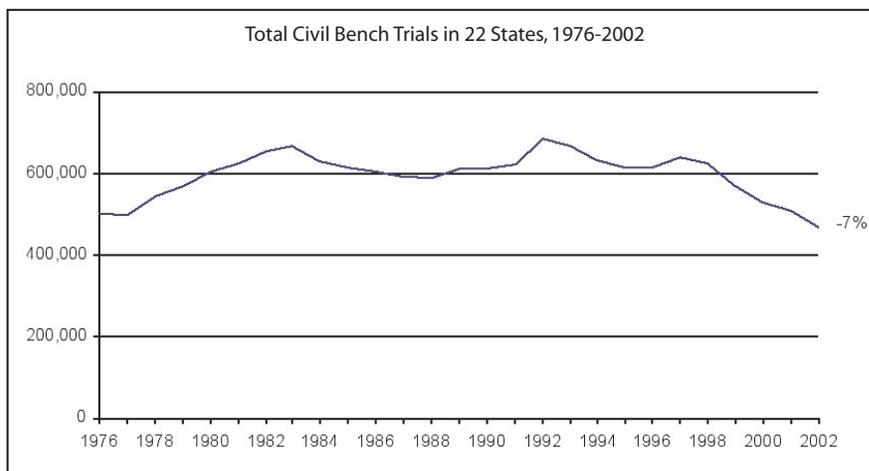
SOME IN THE ALTERNATIVE DISPUTE resolution community are afraid that ADR will be blamed for the apparent disappearance of trials. A close look at the data, however, suggests that changing patterns of litigation are not necessarily bad and that the growth of ADR is probably as much a result of these changes as a cause of them.

As part of the ABA Litigation Section's Civil Justice Initiative, Professor Marc Galanter compiled an impressive report, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts."<sup>1</sup> He documents an apparent paradox: The proportion of cases going to trial have dropped sharply during the past 40 years despite substantial increases in many other legal indicators including the number of lawyers, the number of cases filed and the amount of published legal authority. The most stunning fact is that the civil trial rate in the federal courts steadily dropped from 11.5 percent in 1962 to 1.8 percent in 2002. Even as the number of federal cases filed grew, the absolute number of trials decreased.

The title of the report and emphasis on this data imply that something has gone terribly wrong with the legal system. Like Mark Twain's reported death, however, accounts of the demise of the trial may be exaggerated.

This article shows that Galanter's report could just as well have been titled, "The Amazing Success of Judicial Case Management." Relying primarily on data cited in his report, this article shows that (a) there are many trials in the state courts, which have substantially higher trial rates than federal courts, (b) the expansion of pretrial activity and the increased complexity

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Source: Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002* (National Center for State Courts 2004).

of cases have added reasons for litigants to settle, (c) courts have shifted some of their efforts from trials to pre-trial work, and (d) declining trial rates have not reduced the production of case law. This article describes why a report about "vanishing trials" touches a nerve in the ADR and judicial communities — and why it would be inap-

propriate to blame ADR for changing patterns of litigation. Finally, it offers suggestions for analyzing litigation and ADR as a system.

for State Courts (NCSC) shows that in 1999, for example, "state courts of general jurisdiction resolve nearly 28 times as many civil cases and 82 times as many criminal cases as federal district courts."<sup>3</sup>

The NCSC study analyzes data from 22 states between 1976 and 2002 and shows that the civil trial

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rate dropped by more than half, primarily because the number of filings more than doubled during that period. According to the study: "The number of [civil] bench trials rose from approximately 500,000 in 1976 to 667,000 in 1983. They then varied between 600,000 and 700,000 for the next 15 years before falling to less than 470,000 by 2002." Similarly, "from 1976 through 1998, the number of civil jury trials hovered between 23,000 and 25,000 per year, but then fell abruptly to less than 18,000 by 2002." (See chart.) During this period, the total number of civil dispositions in these courts

#### Changes in litigation patterns

*Comparing trial rates in state courts.* Although trial rates in state courts have declined in recent decades, state courts still resolve a substantial number of cases by trial.<sup>2</sup> Galanter's report focuses primarily on federal courts, though it also presents data on trials in the state courts, where the vast majority of litigation occurs. A recent analysis by the National Center

of civil dispositions in these courts

increased fairly steadily, from about 1.5 million cases in 1976 to about 3.1 million cases in 2002.<sup>4</sup> As a result, the trial rate dropped from 36.1 percent to 15.8 percent. Even so, the lowest

to pretrial work. The workload of federal district judges has grown substantially as the caseload of district judges “more than doubled, from 196 in 1962 to 443 in 2002.” Galanter states that

would help them. Indeed, further proliferation of legal signals could aggravate problems of legal complexity and information overload.

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state court civil trial rate is substantially higher than the highest federal court civil trial rate since 1962, which is 11.5 percent. Similarly, the number of state court trials dwarfs the largest number of federal civil trials shown in Galanter’s report, which was 11,280 trials in 1982.

**Increasing size and complexity of cases.** Cases are bigger and more complex than they used to be. Before litigants can get to trial, they often have to deal with the increased use of discovery, expert testimony, legal research and pretrial conferences and hearings. Moreover, lawyers and judges use ever more sophisticated technologies and services including fax, email, online legal services, overnight delivery, teleconferencing, jury consultants and focus groups. Lawyers often use paralegals to develop sophisticated means of tracking box loads of documents. Galanter presents data indicating that, on average, court files are fatter and trials are longer than they used to be. As a result, there is an apples-and-oranges phenomenon when comparing 1960s-era trials with their modern counterparts. Thus, contrasting trial statistics from different eras can be misleading.

Some cases settle these days because each side knows more about the case before trial than it would have known in earlier eras. Moreover, litigation costs are higher, which increases incentives to settle. Thus, it should not be surprising — or particularly disturbing — if litigants use litigation to help resolve disputes short of trial.<sup>5</sup>

**Judges doing more pretrial work.** Galanter’s report indicates that federal judges continue to work hard and have shifted some of their efforts from trials

“[c]learly, courts are more involved in the early resolution of cases than they used to be.” A recent major study found that federal judges are actively involved in holding pretrial conferences, setting pretrial schedules and trial dates, setting limits on discovery and ruling on motions. In more than half the cases, the judges described their level of pretrial management as moderate or intensive.<sup>6</sup> Moreover, Galanter cites data showing that the decrease in the trial rate has been accompanied by an increase in the rate of summary judgments.

**Increasing case law.** Although Galanter argues that trials have been vanishing, he does not find a problem of vanishing case law. He reports that the number of pages of federal opinions published yearly has more than doubled since 1962. If there is too little precedent to guide lawyers and judges,

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presumably it would be more appropriate to increase the publication rate of appellate decisions<sup>7</sup> than to increase the number of trials.

Smaller numbers of trials do, however, reduce the number of trial judgments that provide legal “signals” for lawyers and judges to use in settling and adjudicating future cases. But it is not clear that lawyers or judges suffer from a lack of such signals in most cases or that additional trial judgments

### **Villains or heroes?**

Rhetoric of “vanishing trials” feeds the fears of “litigation romanticists”<sup>8</sup> who lament the passing of an era when it was easier to get to trial, and a judge’s primary role was to try cases with little thought of “managing” cases. Such critics argue that by settling cases without court adjudication, ADR impedes the development of public norms and vindication of public values.

In a time of fiscal constraints, moreover, some politicians could predictably cite startling data about “vanishing trials” to criticize courts for being unproductive and over funded. This, in turn, could prompt some judges to use ADR as a scapegoat and cut court-connected ADR programs, trying to increase trial rates and regain legitimacy.

Careful reading of Galanter’s report suggests that ADR should not be blamed for reducing trial rates as he doubts that ADR resulted in the “disappearance” of many trials. He identifies numerous possible causes for the decline but does not conclude which factors were most responsible. Possibilities include (a) increased complex-

ity and cost of litigation and trial, (b) changes in the definition and nature of a case as a unit of measurement, (c) growing tendency of defendants to settle for fear of large judgments, (d) enhanced role of judges as case managers and promoters of settlement, (e) expanded discretion of judges, (f) “failing faith” in trial by the public as well as by judges and lawyers, and (g) greater use of ADR.

All the changes in the litigation

environment in recent decades that reduced the trial rate probably also increased ADR use. Given the increases in many aspects of the legal system, such as judicial caseloads and the complexity of litigation, courts are quite prudent to devote more resources to pretrial case management and ADR.

Telling this story as a success would cast ADR as one of the heroes rather than a possible villain. Similarly, judges would be applauded as wise managers of public institutions rather than suspected of shirking their duty and letting trials vanish.

### Need to analyze litigation and ADR

Professor Galanter has performed a great service by compiling and analyzing so much data on litigation trends in his usual insightful way. His report does not reach firm conclusions about the causes or consequences of these complex trends. Thus, further analysis and discussion are needed.

There is no simple benchmark for the "right" number of trials. If there is value in establishing such indicators for the legal system, that task would require a complex analysis, including consideration of constituencies' values and interests, characteristics of the parties and cases, attributes of various procedural options, norms and values of local legal cultures and available resources.<sup>9</sup> Moreover, many parts of the legal system are intricately interconnected, as Galanter's report shows. Thus, we should focus on the operation of the system overall rather than on a single element such as the trial rate.

The dispute resolution community should cooperate with leaders in the bar and judiciary in analyzing litigation trends. We should respond to Galanter's report confidently and reasonably, supporting use of trials and other forms of dispute resolution as appropriate.

### Endnotes

<sup>1</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal*

*and State Courts* (2004), available online at <http://www.abanet.org/litigation/vanishingtrial>. This report is still in draft and thus subject to change.

<sup>2</sup> The states vary greatly in the operation of their legal systems and the statistics that they collect. Thus, it is very difficult to provide an overall analysis of state court trends, especially in the space available for this article. One could create more or less dramatic depictions of vanishing trials depending on the data selected. The data presented in this article is intended to provide a reasonable snapshot of empirical reality.

<sup>3</sup> Brian J. Ostrom, Shauna Strickland & Paula Hannaford, *Examining Trial Court Trends in State Courts: 1976-2002*, 4 (March 31, 2004). Statistics for civil cases exclude domestic relations cases. *Id.* at 27.

<sup>4</sup> Between 1992 and 2002, the number of dispositions fluctuated between about 3 million and 3.4 million cases.

<sup>5</sup> Two decades ago, Galanter coined the term "litigotiation" referring to this strategic pursuit of

settlement by use of litigation, which has long been the predominant pattern of litigation. See Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

<sup>6</sup> James S. Kakalik et al., *An Evaluation of Judicial Case Management Under the Civil Justice Reform Act 258-61* (1996).

<sup>7</sup> See Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 189 (1999) (citing studies showing that approximately 60 to 90 percent of appellate decisions are unpublished).

<sup>8</sup> Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995).

<sup>9</sup> See James E. McGuire & Frank E.A. Sander, *Some Questions About "The Vanishing Trial,"* DISP. RESOL. MAG., Winter 2004, at 17-18 (recommending identification of stakeholders and their interests and inquiry about whether their interests are met by the courts).

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