

## OPINION & COMMENTARY

FROM DAILY BUSINESS REVIEW EDITORS & GUESTS

# The Ever Decreasing Jury Trial Rate: Why Is It on Life Support?

Commentary by  
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The jury trial is sacred in American jurisprudence. It is enshrined in our state and federal constitutions. It is the reason courthouses have courtrooms and not just chambers. In law schools throughout the nation, it is revered as the crescendo of our legal process. After all, juries search for the truth, they stand between the government and the accused, and they settle disputes between bickering parties. The jury trial is also in mortal danger of becoming a footnote in our justice system.



Silverman

### THE MODERN ERA

It has long been rumored that the jury trial is on life support. The 2017 civil circuit jury trial statistics for the Eleventh Judicial Circuit not only confirm this, but seemingly show



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that the jury trial is closer to death than ever before. For the first time in our modern era, the number of jury trials in Miami dropped below 200. This past year, there were only 184 civil circuit juries selected in Miami. The number of verdicts is no doubt even lower due to mid-trial settlements, mistrials, and directed verdicts.

The reduction in the number of jury trials is a trend both within our county and state. It is not an anomaly. Nor is it a reflection on our judiciary. This trend is further complicated in our county, because judges are competing daily for limited courtrooms in our cramped 90 year old Dade County Courthouse. Setting aside for a moment the

overwhelming daily systemic impediments facing judges, if there are fewer parties going to trial, it is axiomatic that there will be fewer trials.

### **JUDGES ARE WORKING EVEN HARDER**

Judges try cases when they have cases to try and a place in which to try them. Are judges working hard under these arduous conditions and achieving results under trying—pardon the pun—conditions? Without a doubt they are. In 2017, they closed 7 percent more cases than they did in the preceding year resulting in 8 percent fewer cases pending at the end of 2017.

### **POSSIBLE REASONS**

The decreasing jury trial rate is due to the sheer expense of going to trial, the uncertainty of jury outcomes, and the effectiveness of alternative dispute resolution. Lawyers and litigants routinely recognize that it is preferable to have control over the outcome of one's dispute, than to leave it in the hands of a briefly questioned venire. Most appear for jury duty to do their public service or simply to avoid the unknown consequences of not appearing; and some have little or no interest of serving on a jury at all.

### **THE EFFECT OF PRE-SUIT MEDIATION CLAUSES**

Fewer cases are also being filed in our circuit. In 2017, there were 30,350 cases filed—a 9 percent reduction from the previous year's 33,330. Are people in our community becoming less litigious? Are they shying away from conflict and opting for other means of resolving their disputes? So long as there are causes of action for negligence and breach of contract, there will always be legal disputes. There may, however, be at least a partial explanation for the decreased number of filings.

One significant trend I am seeing in the area of commercial mediation is the use of pre-suit mediation. While parties are free to agree to submit their disputes to a mediator at any time, it is routinely becoming a contractual obligation to do so—and it is working.

It is common for transactional lawyers to draft and incorporate into their client's contracts pre-suit escalation clauses. Briefly stated, these clauses require that before any formal legal action can commence, identified corporate officers must meet and discuss the dispute with an eye towards resolving it. If that doesn't work, the contract then requires the prospective parties to mediate their disagreement at a recognized ADR firm, such

as JAMS. In the event the mediation impasses, the shackles are removed and they can sprint to the courthouse.

### **THE ODDS OF A JURY TRIAL**

Under most circumstances, regardless of which party gets to the courthouse first to file the suit, statistically, it is likely to be a waste of time and money for all concerned. Our circuit's 2017 statistics show, there is a 99.4 percent chance their newly filed civil dispute will be resolved by some means other than a jury trial.

With the civil jury trial a rarity, pre-suit mediation, whether contractually compelled or agreed upon by disputing parties, has and will continue to be a viable and effective means of resolving conflict before litigation commences.

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