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Opening Statement

Trial Rescue

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It is time to rescue the civil trial. From the Section's tremendously successful project this year on the "Vanishing Trial," we have learned that the absolute number of trials in federal courts has been in decline—dramatic decline—for a number of years. Our federal district courts actually conducted fewer civil trials in 2002 that in 1962, despite five times more civil filings, many more judges, and a lot more lawyers. The trends in state courts, to the extent we can discern them through the available data, appear to be the same. Unless something changes, the trial will continue to diminish as a means for resolving civil disputes in our country. *See* "The Vanishing Trial," Vol. 30, No. 2 Litigation at 1 (Winter 2004).

We are the largest organization of trial lawyers in the country that includes lawyers from both sides of the caption. And individually, we are lawyers who, every day, ably represent our clients in the litigation process. Or we are judges who preside in our nation's courtrooms. Or we are the law professors who prepare and inspire the next generation of advocates. Together, we need to start working on how to rescue the trial. We have to make civil trials cheaper, faster, and better, and we have to get the word out that our civil trial system works—and works well.

It is that simple, and that hard. Finding ways to make civil trials cheaper, faster, and better—and, as you will see, by "better" I mean more comprehensible to jurors, thereby producing more predictable results—is what we as the trial lawyers of our country need to be about. Along with educating the public about the fundamental role of the jury in our democratic society, this is the most important issue facing our civil justice system today.

A Question of Balance

No one, least of all me, is saying that all, or most, or even many of the civil cases filed in our courts should be tried. We can agree that, for many, many reasons, the substantial majority of cases should be disposed of or otherwise resolved short of a trial. Chief Judge William G. Young of Boston, a leading evangelist on the jury trial who generously worked with the Section on the Vanishing Trial Project, recently wrote:

> Of course, most cases ought settle. Of course, we must embrace all forms of voluntary ADR. Of course we must be skilled managers. But to what end? To the end that we devote the bulk of our time to those core elements of the Article III judiciary—trying cases and writing opinions.

William G. Young, "An Open Letter to U.S. District Judges," *Fed. Law.* (July 2003).

The relevant question is, what is the appropriate balance between cases that are tried and those that are not? In 2002, nationwide, only 1.8 percent of federal civil cases went to trial. Of course, in some jurisdictions the percentage was even lower. In the Northern District of Illinois, for example, where Chief Judge Charles P. Kocoras devoted much of his recent State of the Court address to the vanishing trial phenomenon, there were only 12 trials per judgeship in 2003. "Judge raps discovery excess for drop in trials," *Chicago Daily L. Bull.* (July 16, 2004). We can with confidence say that whatever the "right" balance is, that isn't it.

In the months and years ahead, the Section of Litigation will be working on these issues. Incoming ABA President Robert Grey has announced that his primary ini-

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tiative for the year will focus on the American jury. He has asked me to chair the newly formed American Jury Project, which will develop ABA standards relating to all aspects of jury trials and convene a major conference on the standards at Washington & Lee next fall. He also will appoint a blue ribbon commission to work on, among other things, celebrating the jury in our public dialogue.

As all of this important work commences, I offer some initial thoughts on how we might improve our civil trials, and have more of them, by making them cheaper, faster, and better.

Making Trials—and Getting to Trials—Cheaper

There is consensus that at least one of the significant driving factors in the vanishing trial phenomenon is cost. And it is not so much the cost of the actual trial that is the issue; it is the cost of getting to the trial. As Judge Pat Higginbotham of the Fifth Circuit has written:

> There is little question but that civil litigation is expensive, beyond the means of most persons. Without contingent fee contracts, few persons could afford to pursue a civil claim to trial. Yet an actual trial is not the main cost in a large number of cases. Rather, it is the preparation for a trial that is a virtually non-occurring event.

Patrick E. Higginbotham, "Judge Robert A. Ainsworth, Jr., Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?" 55 *SMU L. Rev.* 1405, 1416 (2002).

Discovery and motion practice are simply too expensive. Indeed, the 2000 amendments to the Federal Rules of Civil Procedure were designed precisely to tame the overblown and much-too-costly civil discovery beast. For example, the presumptive durational limits on depositions added to Rule 30 came about because "[t]he Committee has been informed that overlong depositions can result in undue costs and delays in some circumstances." Fed. R. Civ. P. 30, advisory committee notes. But the changes to the rules have not been enough.

Too many depositions are still too long. Last year, I sat through a ten-day deposition in a case in federal court. And at least half of it (and believe me, I am being generous here) was unnecessary and entirely wasteful. If the case were ever tried, most of it would be useless. Indeed, it is hard to imagine that a real trial lawyer—one who actually believes that her case will go to trial —ever would spend ten days deposing a single witness, or that a judge would permit her to do so. Enforcing the Rule 30 limits and similar limits in the state rules (Arizona's is four hours) is an essential component of getting discovery costs under control.

We also have to curb the ever-rising cost of "document" production. When I started practice, document production meant a dusty warehouse, shelves of banker's boxes, and lots of paper cuts. Today, it means hiring an IT expert to assist you in collecting and reviewing the electronic data. Because our clients today store in their computers exponentially more data and information than was ever put on paper in the old days, the costs of collecting and reviewing such enormous volumes of material can quickly overwhelm any case. The Section's proposed Electronic Discovery Standards are an important milestone in beginning to deal with these issues. *See* www.abanet.org/litigation/taskforces/
electronic.

Revised Standard 29 of the Civil Discovery Standards, originally adopted by the ABA in 1999,

addresses preservation and production of electronic information. It includes a checklist of potential data as to which your adversary could contend that a duty to preserve might exist under governing law, and various matters counsel should consider in crafting a request for electronic data. The revised standard also lists the "factors that experience and the developing case law have identified as pertinent to the Court's decision" in resolving motions to compel and motions to allocate discovery costs.

Revised Standard 31 focuses on the discovery conference, offering a comprehensive list of issues relating to electronic discovery that counsel should consider at the very outset of the case. The sooner in the case that these matters are addressed and dealt with, the more significant the potential cost savings.

Revised Standard 32 deals with the difficult—and almost always very expensive—issue of how to protect the attorney-client privilege in the context of a production of electronic information. It suggests several possibilities, including appointment of an independent IT consultant as well as nonwaiver agreements and other procedures designed to reduce the costs to a producing party of protecting the privilege. It is a good start—but there is much more to do to reduce the costs associated with privilege review. As the standards themselves recognize, agreements between parties in one case on innovative procedures to reduce the costs of privilege review may result in a third party's being able to assert that the producing party waived the privilege—the very scenario that the parties endeavored to avoid. Lawyers and their clients spend too much time and money reviewing, logging, and fighting over purportedly privileged documents that, in the end, no one really cares about. The producing party incurs these costs not because every document withheld contains a piece of privileged information that would be somehow harmful in itself if disclosed but because the producing party is terrified that its opponent (or a third party in subsequent litigation) will argue that the production of an innocuous privileged document was a waiver of the attorney-client privilege as to the entire subject matter.

Finding more efficient and less costly ways to address this vexing problem merits continued attention.

Making Trials Faster

Many trials take too long. Juries certainly think trials last too long—especially when they are sitting in the jury room and being given no information about why the start of the trial has been delayed or why they are being sent home early. Here are some thoughts about how trials might be shortened.

Timed Trials. Before the trial starts, the judge should consult with the lawyers for all parties and discuss how long they think they will need to try the case (this usually excludes voir dire, opening, and closings). The judge should then set time limits—e.g., ten hours per side. The clock runs whenever the lawyer (or a witness) for that side is standing up and sound is coming out of her mouth. That includes direct examination, cross-examination, objections, sidebars, whatever. Time limits focus the mind. If some unforeseen development occurs during the trial, the limits can be adjusted as justice and due process require. *See* ABA Civil Trial Practice Standard 12.

Oversized Trials. Isn't it time we talked about an outer limit on how long any single trial should take? Should it be four months? Six months? Doesn't there come a point at which no finder of fact can reasonably be expected to continue to retain, process, and evaluate more evidence—a point of no more return? Moreover, why should one civil case be allowed to consume a disproportionate share of court resources?

Streamline. Jurors often complain that even the best lawyers repeat the same point over and over. We repeat ourselves because we worry the jurors still might not have heard our point the third or fourth time, much less understood it. Perhaps we should consider giving jurors more credit and streamlining our presentations.

Full Trial Days. Get as much done in every trial day as you can. Start early, keep breaks and interruptions to the minimum possible, and go the full day. Short trial days are a big time waster, usually for everyone involved. In Arizona, the tradition is four full trial days per week, with the courtroom dark the fifth day. In terms of the trial participants—especially the jury—four full days is a more efficient use of time than five partly full days.

Making Trials Better

We also need to make trials better. In a jury trial, this means that we must give the jurors every possible tool to help them understand, process, remember, and evaluate the evidence they hear in the courtroom.

Juror Note Taking. Of course jurors should be allowed to take notes. When was the last time you listened to clients or other witnesses talk for days at a time without taking notes, hoping that you would somehow accurately remember everything of importance? Never. Jurors routinely should be allowed to take notes during the trial and to use them during deliberations.

Juror Questions. The notion of jurors being allowed to ask questions makes some lawyers and judges nervous. It shouldn't. With appropriate control by the court, juror questions can make the trial better by allowing the lawyers to clarify and explain something not understood by one or more jurors. In the first case I tried in which juror questions were permitted, there was testimony about a transaction that necessitated at least a passing understanding of the term "debenture." Both sides thought we had explained the term well enough that the jurors understood it. But after the first break following the testimony, the jury came back with a written question: "What's a debenture?" We were thrilled, both to get the heads-up that they had not understood the testimony and to have the chance to explain it again, and more clearly. We clarified the confusion and went on with the remaining testimony with the jury able to understand what we were talking about.

Preliminary Instructions. The jury

needs a context into which to place the evidence it hears from the witness stand and gleans from the documents. Giving jurors instructions on some of the legal concepts governing the claims and defenses before they hear the evidence almost certainly helps the jury to comprehend the evidence and to reach a more informed verdict.

Comprehensible Instructions. In recent years, much effort has gone into trying to make jury instructions understandable—simple non-legalese. We can do still better. Even pattern instructions often sound as though they are from law school exams. Put extra effort into drafting, and redrafting, straightforward jury instructions. Read them to people who aren't lawyers to see whether they understand them correctly.

Lastly, let's rescue the trial by celebrating it. We all know the press pays disproportionate attention to "bad" verdicts and that media attention leaves a misimpression that juries are often wrong, misguided, or just plain goofy. Every trail lawyers knows that is absolutely wrong. Juries get it, and they get it right. They do justice every day in disputes, big and small, that come before them. American juries are democracy at work. They deserve our utmost respect.