



AMERICAN CIVIL TRIAL BAR ROUNDTABLE

*A White Paper Containing
An Overview of the Civil Justice System*

Collaborative Points Of Agreement
By National Legal Associations
Concerned With The Trial
Practice And Known As

The American Civil Trial Bar Roundtable

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AMERICAN CIVIL TRIAL BAR ROUNDTABLE

A WHITE PAPER

A collaborative Position Paper addressing critical issues affecting the civil trial practice and endorsed by the following legal organizations representing attorneys engaged in various types of civil trial practice. Adopted September 2000 by:

*American Bar Association
ABA Section of Litigation
ABA Tort Trial and Insurance Practice Section
American Board of Trial Advocates
American Association for Justice
Defense Research Institute
International Association of Defense Counsel
Federation of Defense & Corporate Counsel
Association of Defense Trial Attorneys
International Academy of Trial Lawyers
Academy of Rail Labor Attorneys
Association of Defense Counsel of Northern California*

Dedication

To the participating legal organizations collaborating as the “American Civil Trial Bar Roundtable” and to other state, local or specialty bars, which promote open dialogue, forums and discussions on the Civil Justice System and the efforts of the federal and state courts, which respect the service provided by jurors and the many juries contributing their many hours to this unique, but critical service.

Foreword

This “White Paper” is a collaborative effort of numerous and diverse segments of the United States Civil Trial Bar, collectively known as the “American Civil Trial Bar Roundtable.” The Roundtable over several years fostered and encouraged frank and open discussion and dialogue on the status of the United States civil justice system. The paper is not intended to be an end, but a beginning, of continuing and evolving dialogue with the ultimate goal being the improvement of the civil justice system as the 21st century unfolds.

AN OVERVIEW OF THE CIVIL JUSTICE SYSTEM

POINTS OF AGREEMENT BY AND AMONG LEGAL ASSOCIATIONS CONCERNED WITH THE CIVIL TRIAL PRACTICE And Known As The American Civil Trial Bar Roundtable

I INTRODUCTION

Since 1996 the American Board of Trial Advocates (ABOTA) has sponsored a series of meetings of representatives of legal associations representing a broad segment of the civil trial practice. The original meeting was convened at the invitation of Michael F. Colley of Columbus, Ohio, who was then President-elect of ABOTA. The pre-Roundtable meetings were chaired by Claude H. Smart, Jr. of Stockton, CA, Chair of the ABOTA then called "Bar Coordinating Committee" 1995-96. In attendance at various times were representatives of the Academy of Trial Lawyers (ATL), the American Bar Association (ABA), ABA Section of Litigation, ABA Tort Trial and Insurance Practice Section, (TIPS) the Association of Defense Trial Attorneys (ADTA), the American Association for Justice (AAJ), the Defense Research Institute (DRI), the Federation of Defense & Corporate Counsel (FDCC), the International Association of Defense Counsel (IADC), the International Academy of Trial Lawyers (IATL), the Association of Defense Counsel of Northern California (ADCNC), The International Society of Barristers (ISOB), and the Federal Bar Association (FBA). Since 1997 the joint meetings have been entitled the American Civil Trial Bar Roundtable and the participating groups have been referred to as the Roundtable participants or organizations.

The meetings were organized to bring together representatives of the most significant law or Bar related organizations and trial practitioners representing diverse viewpoints in the civil trial Bar and to gain their expert assessment of the state of the civil trial system and make recommendations in that regard. The participants acknowledged the lack of consensus about the validity of some issues, but they stressed the importance of having a forum in which to exchange ideas. This White Paper contains a general statement

of principles on which agreement has been reached and is intended to be the first in a series of reports that may become more specific in nature.

II BACKGROUND

A) Many of the changes proposed in the civil justice system debated in legislatures and other forums in the recent past have not emanated from the civil trial Bar. For nearly 20 years, others from outside the system have played a leading role in crafting proposals and offering ideas to change America's civil justice system. The vast experience of the practicing trial bar has not been sufficiently tapped in assessing whether the proposed changes in the civil justice system are needed or whether they will work to accomplish the reforms envisioned.

B) Some general propositions supported by the Roundtable groups include the following:

1. America's civil justice system is often the envy of other nations in both the developed and developing world.
2. The civil justice system operates best when each party is on as level a playing field as possible with regard to trial resources, and litigants are represented by qualified and competent counsel.
3. A sophisticated economic system like that in place in the United States needs a reliable judicial system rendering fair and impartial justice.

C) The civil justice system is designed to accomplish many competing or complementary goals and objectives that include fairness, confidence of the citizenry and litigants in the outcomes, impartial judges and juries, deterrence of wrongdoing and compensation for injury caused by wrongful conduct. Moreover, cases should move through the system expeditiously and efficiently.

D) An advocacy system allowing vigorous cross examination is the best means in a democratic society for finding the truth and the jury trial still represents in most cases the best system devised for determining facts and reaching a just result when adverse parties

are involved in a dispute.

E) The Roundtable participants discussed civil justice system issues and reached general agreement about the following:

- 1) The Current Condition of the Civil Justice System
- 2) The Status of the Civil Trial Practitioner Today
- 3) The Role of Jurors and the Status of the Jury System
- 4) The Condition of Court Systems in the United States

III ISSUES EXAMINED

1) THE CURRENT CONDITION OF THE CIVIL JUSTICE SYSTEM

It is recognized that the civil justice system and civil trial practitioners have come under intense study and criticism over the past two decades. But much of the study and criticism has been the result of expedient political debate and not predicated by scholarly attempts to review or truly reform the system. The general public and legislative bodies and policy makers need to receive a more balanced view of how the civil justice system operates. Individual lawyers and organizations, including those participating in the Roundtable, need to better educate the public on the role each participant plays in the system and the benefits provided to the public by the system. The organized Bar needs to take the lead in this effort and should be considered one of the appropriate groups to take formal positions on all proposals to change the legal system.

As documented in “Examining Trial Trends in State Courts: 1976-2002” the use of trials in the state courts of general jurisdiction has been declining for over twenty years. From 1976 to 2002, jury trials decreased by 32 percent for civil cases, while bench trials declined by 7 percent. At the same time, dispositions increased by over 100 percent. Default judgments and settlements/dismissals continue to make up a substantial portion of civil dispositions. Three general factors are most often cited as contributing to the

decline in trials, increased emphasis on case flow management, growth in alternative dispute resolution, and procedural controls such as extensive discovery.

Each organization participating in the Roundtable may adopt its own policy positions and programs to address the public debate surrounding the civil justice system. Legal organizations involved in the civil justice system should as often as possible work together to speak with one voice to address unfounded and distorted criticisms of the civil justice system.

According to an ABA-commissioned national survey released in February 1999, 80 percent of Americans believe that “in spite of its problems, the American justice system is the best in the world.” The survey also suggests that perceptions of some components of the system have improved over the past 20 years, when compared to a similar survey in 1978.

“Perceptions of the United States Justice System” found that the root support seems to lie in the jury system, with 78 percent of respondents saying it is the fairest way to determine guilt or innocence. More than two-thirds (69 percent) believe that juries are the most important part of our justice system.

In a 2004 Harris interactive Poll for the ABA which surveyed Attitudes Toward Jury Service, 75% of Americans responded that if they themselves were on trial they would want their case to be decided by a jury rather than a judge.

More efforts must be made to educate the public about the true conditions that exist within the justice system. Strong leaders and appropriate inter-Bar structures are needed within the legal community to assure the cooperation of the disparate legal organizations. If the public and its elected and appointed representatives receive a more balanced view concerning the facts surrounding the legal policy issues affecting the trial practice, a better civil trial system will result. The public debate needs the input and opinion of those who know most about the civil justice system—the civil trial bar is one of the groups most familiar with how the system works and performs on a daily basis.

2) THE STATUS OF THE CIVIL TRIAL PRACTITIONER TODAY

In public and doubtless private discourse, the legal system and the civil trial practice in particular have come under rather sharp

attack. Lack of respect and confidence seems to have developed in the public's mind for the trial practice and trial practitioners of all types. Much of the criticism appears without justification but nevertheless it has taken hold.

Precise causes for the decline in the profession's standing are hard to pinpoint, and often are based on anecdotal evidence or misperceptions. Tasteless advertising has no doubt contributed to a growing disrespect for trial practitioners. Also, the perceptions that the legal practice has evolved from a "noble profession" to a mere "business enterprise" has probably played a major role in eroding the public's perception of lawyers and the legal system. The perception that attorney's fees and firm income have too often become commodity items for negotiation among lawyers and clients and considered more important than service is another reason for the decline in respect for lawyers in general and trial practitioners in particular. Finally, the perception of a lack of civility of lawyers toward one another leading to "win at any cost" tactics and hardball ultimatums have reduced the public's esteem of lawyers generally and trial practitioners in particular.

Lawyers individually and legal organizations must work together to restore the American public's respect for its lawyers and legal system, and especially so for trial lawyers and the civil trial Bar. One creative way to achieve respect would be to develop methods to inform the public about the value of the civil justice system and the role of lawyers.

Legal organizations should work with law schools and other organizations that formulate curriculum changes in law schools to advance courses that instill a sense of professionalism in the future practitioners. Roundtable organizations and legal organizations of all types should encourage their members to persuade their partners and associates to help in the effort to restore a sense of professionalism in younger colleagues through mentoring and other programs that stress fair and ethical treatment of fellow and opposing counsel.

State Courts, State Bar Associations or other regulatory bodies should promulgate compliance with Rules 7.1 through 7.5 of the "ABA Model Rules of Professional Conduct" governing advertising and promotional activity of lawyers to ensure orderly regulation of the profession. Sufficient funds also need to be

made available to ensure vigorous but balanced enforcement. All interested legal organizations should promote and pursue the recommendations of the ABA's Commission on Advertising.

An aggressive affirmative media relations program should be implemented to respond to attacks on the trial Bar and to implement process for restoring the public's view of the civil justice system, the trial Bar and the trial practitioner. This media relations program should be undertaken by each Roundtable organization and should be implemented on the local level. Participation in and support of the work of the existing ABA Standing Committee on Strategic Communications is encouraged to help foster a unified approach within the entire legal community to address the public education issue.

3) THE ROLE OF JURORS AND THE STATUS OF THE JURY SYSTEM

The right to trial by jury is a fundamental right ensured in the 7th Amendment to the Constitution of the United States and the Constitutions of the States, and is an essential and dynamic element in the Anglo-American traditions of justice. To ensure that the jury system remains a vital part of our democratic structure into the next century, courts and legislatures must be sensitive to the changing needs and expectations of the American people and individuals called to serve as jurors. The civil justice system is designed to accomplish many competing or complementary goals and objectives that include access and fairness, confidence of the citizenry and litigants in the outcomes, impartial and independent judges, and representative and impartial juries.

Juries have received much study and attention in recent years and, responding to that background, the Roundtable organizations examined the condition of the jury system in the United States today looking in particular at the role of the jury in the judicial system, the public's participation in the jury system, and critiques that have been made about the fairness, efficiency and effectiveness of the jury system. In addition, the impact of ADR programs on the jury system and the future of the jury system in state and federal courts were also reviewed. The role of the lawyer in relation of the jury system, the high cost of taking a case to jury trial, the public's perception of the jury system after the recent series of high profile cases, the ever-increasing use of consultants and outsiders in projecting jurors' attitudes, the entire

jury selection (including *voir dire*) process and the treatment and utilization of jurors during their period of service were other topics examined by the participating organizations.

Juries “must” continue to play an integral role in the civil litigation process. High standards of fairness need to govern the selection and treatment of jurors. Proposals for change must be thoroughly justified in terms of serving the public generally so that there is no appearance of favoring the demands of competing groups or special interests.

The jury trial is a potent symbol of the quality of justice rendered in America largely free from political influence or economic pressure. Unwarranted attacks on and distortions concerning the jury and civil justice system should not go unanswered by trial lawyers and their organizations. Education of the public regarding the history, role, value and benefits of the jury system, should be undertaken.

With funding from the State Justice Institute, the Jury Initiatives Task Force of the American Bar Association Section of Litigation and the National Center for State Courts have produced a manual entitled *Jury Trial Innovations*. Its first chapter describes how jurors conceptualize evidence and testimony to arrive at their verdict and suggests innovations that may improve the effectiveness of the jury as an integral component of our civil justice system. Succeeding chapters present a series of innovations and techniques in a neutral and objective fashion without specific endorsement or criticism.

One of the innovations deals with the length of jury service. Under this proposal, a person’s term of jury service is limited to the completion of one trial. If a prospective juror is not selected for a jury on the first day, the prospective juror is deemed to have fulfilled the jury service term by having been available on that one day. Persons may be on call for several days, but once they report, their service is completed by serving one day or one trial. The one-day/one-trial concept has been adopted by many jurisdictions.

Other suggestions describe various means to make the selection process more efficient; to provide jurors with written information about the case and their responsibilities; and with the ability to take notes. Some of these suggestions may be helpful to the process in specific cases.

The American Board of Trial Advocates (ABOTA) and the Federation of Defense & Corporate Counsel (FDCC) jointly sponsored a jury trial summit in affiliation with other organizations. They included: Academy of Rail Labor Attorneys; Tort Trial and Insurance Practice Section of the American Bar Association; the American Association of Justice; Association of Defense Trial Attorneys; Defense Research Institute; International Academy of Trial Lawyers; International Association of Defense Counsel; International Society of Barristers; National Center for State Courts; Trial Lawyers for Public Justice; Federal District Court Judges Association and the American College of Trial Lawyers.

The Summit was titled “The American Jury Trial – do we allow its death or lead its re-birth?” and was held in Las Vegas, from March 31 through April 2, 2005. The Summit featured details for the present state and future of the 7th Amendment right to trial by jury. Among other things, the Summit reviewed startling statistics pertaining to the vanishing jury trial in America. There was an in depth discussion concerning the historical and sociological impact of trial by jury; how the reduction of jury trials came to pass; and how public attitude has affected the phenomenon. The organizations involved and in support of the Summit planned to assist in coordinating ongoing activities to promote and preserve the 7th Amendment right to a jury trial.

A variety of public outreach strategies also are described through which the community learns about the concept of trial by jury, including the importance of jury service. Examples include:

1. Press conferences with leaders of all branches of government pronouncing Jury Service Appreciation Week;
2. Public service advertising campaigns using newspaper, television, mass transit, public buildings, libraries, grocery stores, courthouses and schools;
3. Targeted media outreach using informal radio and television interviews with trial judges, other court personnel, and attorneys;
4. Targeted educational outreach to high school government studies, speech, United States history, or

civics classes wherein judges explain the role of the jury in the judicial process;

5. The development of educational videos that put student audiences in the role of a simulated jury, hearing evidence and jury instructions and deciding cases.

For further study, documents that may be reviewed include the American Bar Association “American Jury Project” “The ABA Standards Relating to Juror Use and Management: and the “ABA Civil Trial Practice Standards.”

The National Center for State Courts has embarked upon a National program to increase citizen participation in jury service through jury innovations. One of the tools for technical assistance being developed is the “State of the States” in jury reform. This detailed documentation of the jury system in each state will provide an excellent mechanism to publicize innovations in this area and allow for greater transferability to other jurisdictions.

Trial practitioners and legal organizations to which they belong need to cooperate in the presentation of balanced programs on the jury system and the way in which it can be improved. In particular, such programs should be presented at local and state bar associations, judicial conferences, and as a part of classes or special lectures at law schools.

4) THE CONDITION OF COURT SYSTEMS IN THE UNITED STATES

While the courts of this country remain strong and vital, two potential causes of concern are present today. First, there are attacks on the independence of the judiciary, including attacks on judicial opinions, jurisdiction stripping, changes in methods of judicial selection and efforts to remove judicial immunity. It is incumbent upon all associated with the judicial process to resist this effort to weaken our judicial system by undermining the cornerstone of its success. We must strengthen support for the judiciary so as to ensure its continued accountability to the Constitution and the Rule of Law.

The second concern, which can erode the viability of both the state and federal courts, is lack of funding. In most states the budget for the court system represents approximately one percent of the state’s general fund budget. Failure to provide sufficient judges, court staff, technology and judicial salaries places the courts in

the untenable situation of not being able to adjudicate cases in a quality and timely fashion. This in turn reduces public trust and confidence in the courts and weakens their fundamental role in maintaining an orderly society and enabling a productive economy. Lawyers and business leaders must come together to build a constituency of support for the judicial system.

Unless judicial salaries are equitable it will be difficult to attract and retain high quality, experienced lawyers willing to serve in the judicial branch. With regard to the federal judiciary, the present mechanism for setting judicial compensation has failed to protect federal judges from erosion in real after-inflation compensation. Congress should delink the salaries of the federal judiciary from those of Members of Congress so that federal judges receive the same Cost-of-Living-Adjustments (COLA's) granted general schedule federal employees. Sufficient resources also must be allocated to the judicial branch for staffing and facilities. Adequate staffing is needed to help move cases through the system efficiently.

Additional funds are also needed for new and updated facilities to meet the practical physical demands created by ever-increasing caseloads. Additional funds are also required to purchase and install equipment for adequate courthouse security and to ensure the safety of judicial personnel, the public and the legal community. Local, state and federal bar associations must take a more active leadership role to work with their judiciaries to ensure that judicial branch funding allocated by the government is sufficient to meet the demands of a changing legal system, which has increasing demands and expectations made of it by both legislatures and the public.

There continues to be a need to reduce the cost of litigation and eliminate delays in the litigation process. The Bench and Bar need to find ways for litigants, interested parties and the public to achieve greater satisfaction with the civil justice system.

Early judicial intervention and effective case management can improve court efficiency and reduce costs and delays. These techniques should be employed subject to the consideration of additional litigation costs that can be burdensome in some circumstances. Alternative dispute resolution methods that are selective should be encouraged. Modalities such as mediation, early neutral evaluation and pretrial settlement conferences that assure every party's constitutional and other legal rights and

remedies are protected have proven to be effective in this regard.

Under our system of jurisprudence, the courts must resolve disputes according to the law, rather than the wishes of some segment of the public. Preserving the power of the courts to do what is right while sustaining their legitimacy in the eyes of the public is one of the most delicate balancing acts of our constitutional system. If the courts alienate the public and lose the public's support and participation, they cannot carry out their appropriate constitutional role.

Elected and appointed judges, like all other public officials, are ultimately accountable to the people. Accountability can be accomplished through merit selection and retention mechanisms, which are recommended for all jurisdictions. Judicial candidates should be evaluated based on their professional competence and integrity as well as perceived judicial temperament.

The judicial branch should have full opportunity to participate in continuing education programs to assure that judges and court personnel keep abreast of substantive developments in the law and court administration. In addition, if the judiciary believes it is appropriate, funds should be available to provide training for judges in effective ways to communicate the needs of the judiciary to the Bar, the legislature, and the public at large.

A goal of our judicial system must be to resolve disputes expeditiously and inexpensively – with resolutions that are perceived by litigants, attorneys and other members of the public to be both procedurally fair and substantively just. The effective operation of the civil justice system depends on citizen confidence that there exists a public forum in which they can secure a fair and just resolution of disputes.

Efforts should be made to enhance understanding of the courts and ensure that the fundamentals of the litigation process are understood by all who utilize the system. Feed-back from the public should be encouraged on how successfully the civil justice system meets the public's expectations regarding the administration of justice.

Information on how to utilize the court system should be provided through community institutions and in formats aimed at an increasingly diverse citizenry. Outreach programs should be brought to educational and community organizations and other

public institutions. Relationships with the courts and law schools should be maintained and enhanced by lawyer organizations participating in legal education and training programs and activities. Those institutions should also be enlisted in educating the public about the legal system. Press and public access to court proceedings should be presumptively unrestricted, and experimentation with the use of televised trials at the federal level should continue. Public access should be balanced, however, with the court's primary mission to administer justice.

IV CONCLUSION

Civil Trial Practitioners, as well as all other lawyers, have a responsibility to appreciate and enhance their role as lawyers and to promote the Civil Justice System in the broader society. We also must always strive for improvement in the civil justice system. This requires that lawyers must participate in the issues of the day and time, and speak out on critical issues with a clear and positive voice. Collaborative efforts by legal organizations like those participating in the American Civil Trial Bar Roundtable must serve to fulfill this obligation.

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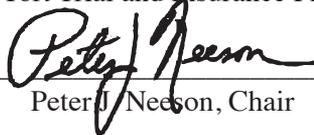
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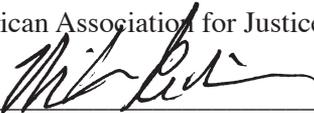
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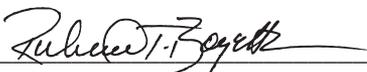
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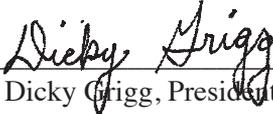
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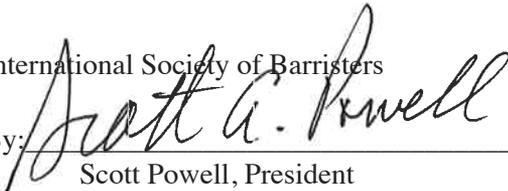
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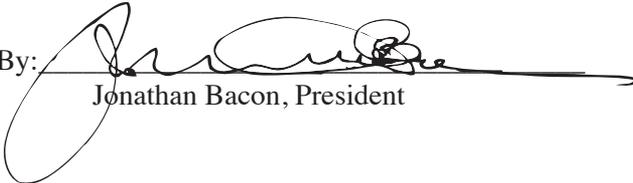
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