The Vanishing Civil Jury Trial in Multnomah County

Report of the Presiding Judge's ADR/Vanishing Civil Jury Trial Committee
November 6, 2009

Introduction

> "Juries, above all civil juries, help every citizen to share something of the deliberations that go on in the judge's mind and it is these very deliberations which best prepare the people to be free."
>
> Alex de Tocqueville
> *Democracy in America*

Jury trials in civil cases establish community norms for reasonable behavior and values for injuries. They provide for the development of the common law. Jury verdicts are the guideposts for settlement.[1] Most citizens have their only direct experience with the court when they serve as jurors, and this experience is essential not only to civic education, but for maintaining the legitimacy of the judicial branch of government. The right to a jury trial in civil cases is protected by the Constitution of the United States and the Constitution of the State of Oregon. That right is in danger of becoming a hollow promise, with neither lawyers nor judges having the knowledge and experience to give it life.

Observers around the country have been describing the disappearance of the civil jury trial for several years. While the trend was first noted in federal courts, it has spread to state trial courts, as well. Many individuals and groups have studied the phenomenon, offered explanations and proposed measures to reverse the tide. In the fall of 2007 a group of judges in Multnomah County Circuit Court looked at local statistics and suggested a closer study of the apparent disappearance of the civil jury trial was in order. These judges were concerned that we are approaching, or perhaps have already passed, the point where there are too few civil jury trials to maintain the skills of lawyers and judges to do them.

The Multnomah County judges raising the alarm also expressed some urgency in addressing the issue, if indeed a problem existed. The last lawyers who have extensive civil jury trial experience are baby boomers, many of whom will be retiring soon. These are the lawyers in the best position to teach younger colleagues trial skills. Perhaps more importantly, they are in the best position to help newer lawyers understand what pleading motions and discovery are truly needed to evaluate a case or prepare to try it.

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[1] "The rational lawyer looks to jury verdicts to decide whether or how to settle. The attorney tries to assess what a jury is likely to do with the matter if it does go to trial, and he does this by considering past verdicts. Looked at this way, jury trials sit atop a pyramid of cases casting light below. Jury trials do not resolve merely a particular dispute; they also give guidance so that the vast majority of other cases can be reasonably settled." RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM, p. 4 (2003).

At the urging of these judges, Presiding Judge Jean Kerr Maurer appointed a committee[2] and gave it the following charge:

1. Identify the reasons for the decline in civil jury trials in Multnomah County;
2. Encourage approaches which allow judges and lawyers to develop and maintain requisite trial skills in civil cases; and
3. Explore whether the circuit court should provide alternatives to full-blown jury trials which include not only mediation and arbitration, but also summary jury trials.

The committee first reviewed some of the literature on the subject of the vanishing civil jury trial. It then conducted an on-line survey of lawyers and several focus groups to explore the reasons jury trials are increasingly disfavored as a means of dispute resolution in civil cases. The committee also sought information in the survey about whether the court was contributing to the decline in ways that could or should be reversed. The committee sought more qualitative information through focus groups. With the cooperation of the Owen Panner Inn of Court, 50 lawyers participated in six focus groups. Eleven judges participated in a separate focus group. The committee also met with two highly experienced mediators to gather information from them about what lawyers and their clients say about problems with taking cases to jury trial. Throughout the committee's work its members gathered information from lawyers, both solicited and unsolicited, in person, by regular mail and by email, on their perceptions of the state of the civil jury trial in Multnomah County.

The committee concluded that civil jury trials are indeed disappearing in Multnomah County and that this is a cause for grave concern if the constitutional right to a jury trial is to remain meaningful. The committee identified several factors and practices that discourage the use of jury trials to resolve civil disputes. Some of those factors and practices are beyond the control of the court, the lawyers or the litigants. Other obstacles to the use of jury trials could be removed with some effort on the part of the court and lawyers. The committee recommends changes that could be implemented by both the bench and bar to preserve the availability of a jury trial in civil cases in which it is appropriate.

[2] The committee originally consisted of judges Eric Bloch, Jerome LaBarre, Kristena LaMar, Marilyn Litzenberger, Judith H. Matarazzo, Adrienne Nelson and Janice R. Wilson (chair). Judges Bloch and LaBarre resigned from the committee well before this report was prepared.

Use of Civil Jury Trials in Multnomah County

Raw Numbers of Civil Jury Trials

Official statistics are available for the trial of civil cases in Multnomah County only since 2001. In the period from 2001 through 2008, the number of civil cases tried, whether to a jury or to the court, declined from 272 in 2001 to 190 in 2008, a 30% decline. Although not a straight line, the general downward trend in unmistakable. The number of trials to the court (a judge without a jury) remained relatively steady while the number of jury trials declined until 2008. In 2007 there was the almost same number of court trials as jury trials (102 court trials and 106 jury trials). In 2008 the trend reversed, with jury trials increasing and court trials declining, although the total number of trials was still down. *See Chart #1.*

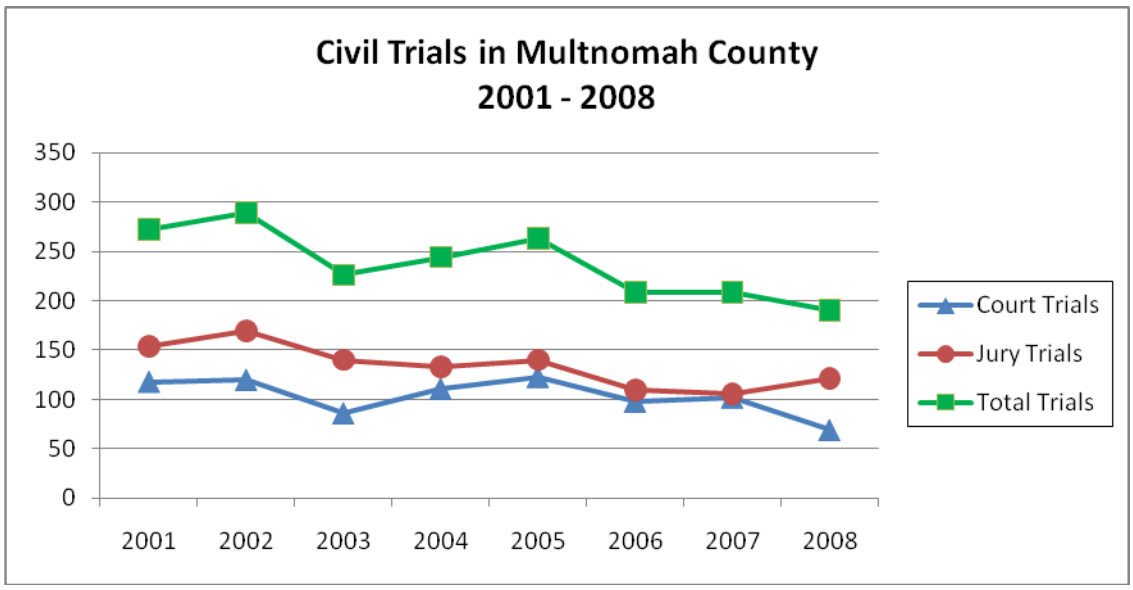


Chart #1

Not only is the percentage of civil cases terminated by trial of any kind declining, it also appears that even when we have trials, the use of juries to decide them in Multnomah County is also below the national average. According to a report from the US Department of Justice Bureau of Justice Statistics, the 2005 Civil Justice Survey of State Courts found that juries decided almost 70% of the civil trials disposed of that year. In Multnomah County, juries decided far fewer of the civil trials in 2005 (53.2%) and juries have not decided 70% of the civil trials in the last eight years. *See Chart #2*.

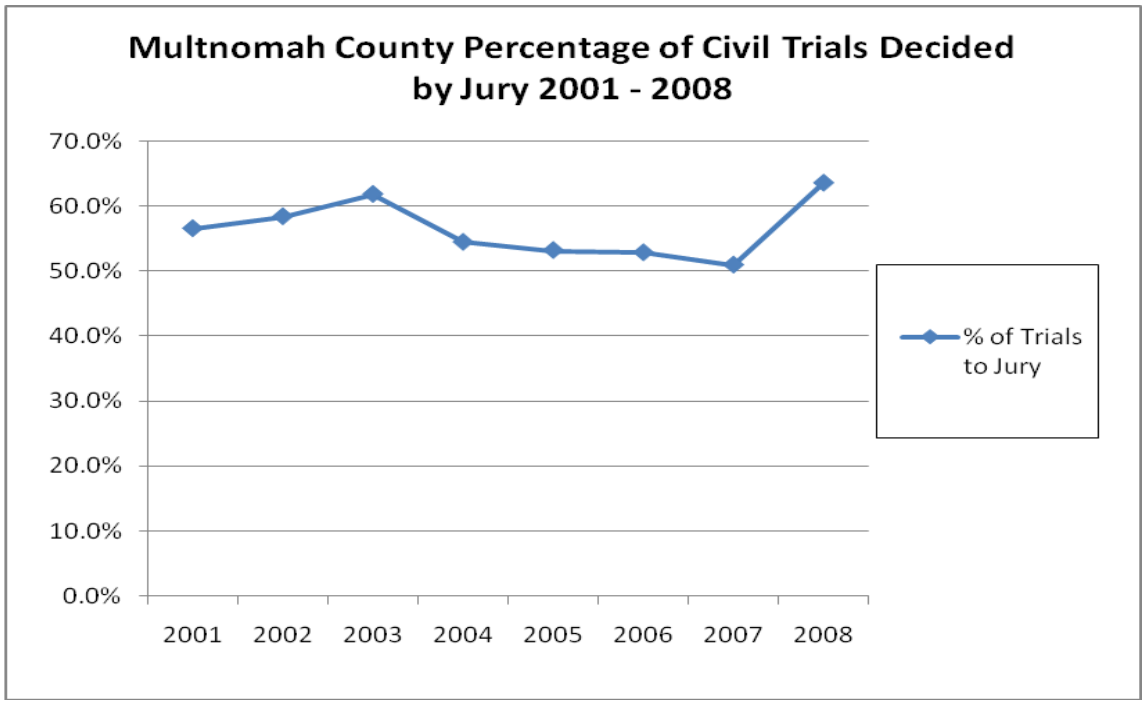


Chart #2

The committee hypothesized that this disparity might be explained by the fact that Multnomah County is the business seat of the state and a higher percentage of its civil cases involve business litigation (as opposed to tort litigation) than the national average. Traditionally, more tort cases are tried to juries while more business cases are tried to the court. Thus, if a lower percentage of the trials in Multnomah County Circuit Court involved tort cases than the national average, the percentage of jury trials would likewise be expected to be lower.

The hypothesis was only half supported by a closer look at the statistics[3]. The Civil Justice Survey of State Courts reflected that in 2005 60.8% of all trials were of tort cases, and of the tort trials 90% were to a jury. In Multnomah County in 2005, 62.5 % of the trials were of tort cases (and that is exactly the average for the nine years from 2000 through 2008). Although the difference is slight, this was a higher, not lower, percentage of cases involving torts than the national average. On the other hand, only 62.8% of those tort trials were to a jury (versus 90% for the national average that year), and the average percentage of tort trials to a jury over the nine years from 2000 through 2008 was still only 73.3%. The converse was true for business cases. While nationally in 2005 36% of contract trials and 26.4% of real property trials were to a jury, in Multnomah County 60% of business trials were to a jury and the average over a

[3] The official statistics kept by the Oregon Judicial Department do not segregate civil cases by type. The analysis in this section was done using statistics published by Multnomah County Circuit Court, but nevertheless characterized as "unofficial."

nine year period was 47.6%. (Contract and real property cases are not separately tracked in Multnomah County.) *See Chart #3.*

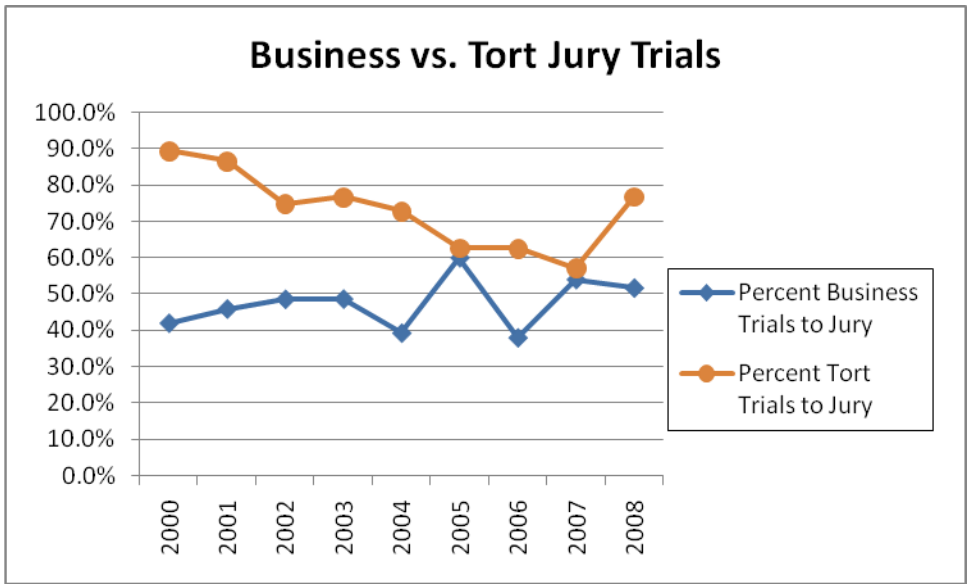


Chart #3

It appears that in Multnomah County business litigators are more willing to try their cases, and willing to try them to juries, than the national average. The committee members observed anecdotally that Multnomah County has a cadre of highly skilled business litigators with extensive jury trial experience which may explain this phenomenon.

Civil Jury Trials in Relation to Case Filings and Terminations

The declining number of civil trials, with or without a jury, is not a reflection of reduced case filings or terminations. Parties still take their disputes to the court – at least initially. Official civil case filing and termination statistics are available going back to 1998. The number of civil cases filed and the number of cases terminated both trended up during that period, especially during the later years. *See Chart #4.* At the same time, the percentage of cases terminated that were terminated with a trial (court or jury) declined from 2.2% in 2001 (with an uptick to 2.3% in 2002) to 1.1% in 2008. In the same period, the percentage of civil case terminations by jury trial declined from 1.2% in 2001 to 0.7% in 2008. *See Chart #4.*

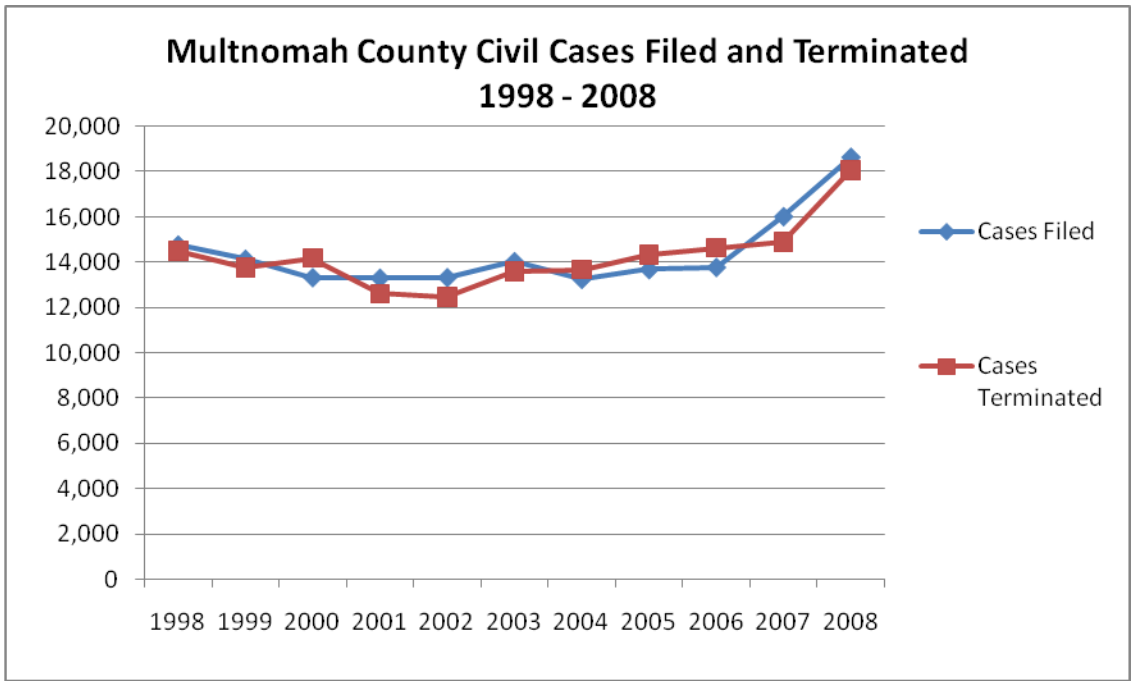


Chart #4

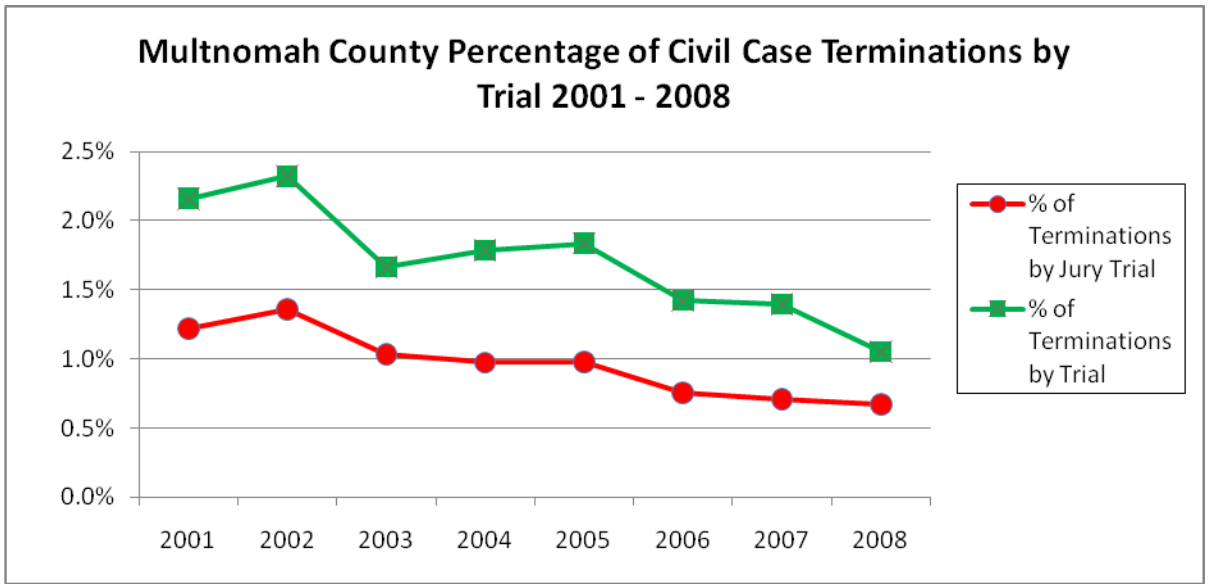


Chart #5

In sum, the decline in civil jury trials in Multnomah County cannot be explained simply by the increased use of other methods of dispute resolution. *Even when cases are resolved by trials in our court, fewer of those trials are to a jury.*

Survey of Lawyers

The committee sought to learn from lawyers what factors influenced their (or their clients') decisions to resolve civil disputes by jury trial or seek other means. Using

SurveyMonkey.Com, a link to a 10-question survey was sent to the Multnomah Bar Association, the Oregon Association of Defense Counsel, the Oregon Trial Lawyers Association, Oregon Women Lawyers and the Oregon State Bar Litigation Section with a request that their members be encouraged to complete it. Many lawyers also sent emails to the lawyers in their firms or other contacts urging them to complete the survey. The survey was open from January 12 to February 1, 2009. The first six questions on the survey were more substantive in nature while the last four questions asked for demographic information and data about the respondent's recent trial experience to allow the committee to engage in filtering and cross-tabulation of the results. The survey questions are attached as *Appendix A*.

Four hundred fifty–two lawyers responded to the survey and 451 completed it. Based on data from the Multnomah Bar Association, the committee estimated this as a response rate of 18% of the civil litigators in Multnomah County who at least occasionally practice in a state trial court.[4]

More than half of the survey respondents added comments in addition to selecting an option in response to a question. Hundreds of comments thus supplemented the quantitative survey results.

Court-Related Factors that Discourage Jury Trials

The first survey question asked "Which, if any, of the following COURT-RELATED factors discourage your, or your client's use of jury trials to resolve civil cases?" The fourteen factors committee members most commonly heard or read about were listed, together with an option of "other." Respondents were asked to check all that applied. Three hundred ninety-nine survey respondents answered the question.

The five most commonly selected answers, by frequency of response, were:

- Not enough certainty case will be tried on trial date (40.9%, 163 respondents);
- Mandatory arbitration (38.8%, 155 respondents);
- Judges not familiar with the issues (32.6%, 130 respondents);
- Rulings on motions not predictable (32.1%, 128 respondents); and
- Not enough management of cases by judges (28.8%, 115 respondents).

See Chart #6.

[4] Although not all lawyers who practice in Multnomah County Circuit Court are members of the Multnomah Bar Association, a large percentage are. There are 4,443 members of the Multnomah Bar Association. Members may identify themselves by practice area. "Civil litigation" is not a practice area that may be designated, but looking at the practice areas that are designated, the committee and the MBA staff calculated that approximately 2,500 MBA members practice some civil litigation that might bring them to a state trial court.

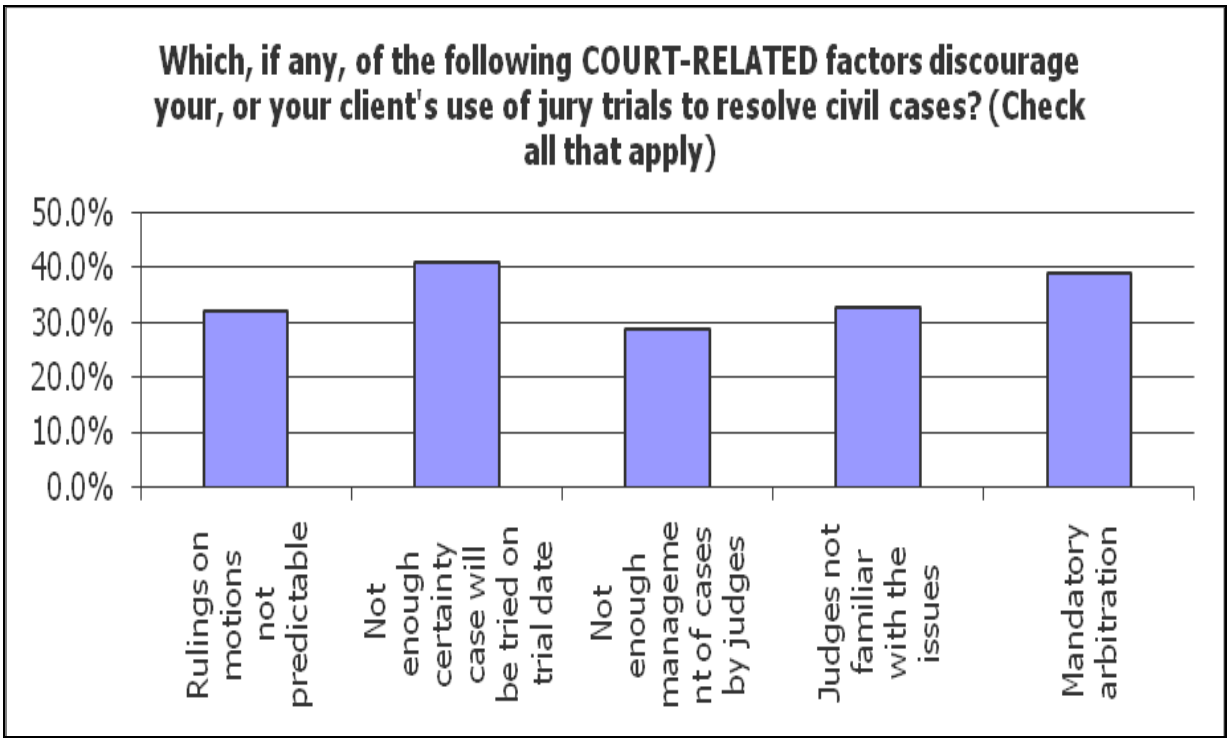


Chart #6

Case Management, Certainty that a Trial Will Start When Scheduled, and Judges' Familiarity with Issues

Survey respondents' additional comments on this question largely concerned the lack of case management under Multnomah County's master docketing system. Many respondents urged the court to adopt and individual case assignment system. While "not enough management of cases by judges" was listed separately as a factor (selected by 28.8% of the respondents), the comments tied this factor to three of the other top-five factors ("rulings on motions not predictable," "judges not familiar with the issues" and "not enough certainty case will be tried on trial date"). The survey did not ask any specific questions about motions for summary judgment. Nevertheless, many lawyers in their comments complained about the unwillingness of state court judges to grant such motions.

> "Most of the judges are unfamiliar with [civil] jury trials, unsure of the law, and hesitate to do anything outside of black-letter law due to a fear that they might be reversed."
>
> Typical survey comment

Under the master docketing system in Multnomah County Circuit Court, the vast majority of civil cases are assigned to a judge for trial from daily "call" the morning before the trial is to begin. (The same is true for most criminal cases.) Pursuant to UTCR 7.030 the presiding judge may designate a case as "complex" and specially assign it to a judge for all pretrial and trial purposes. The presiding judge may also

specially assign a case to a judge for all pretrial purposes (but not trial), or, closer to the trial date, pre-assign the case to a particular judge for trial if the lawyers request it to increase the certainty that they will actually start their trial on the scheduled date.

Presiding judges in recent years have been very mindful of the need for predictability in trial dates and the cost to litigants if a civil trial cannot be sent out for trial on the scheduled date. It has been extremely rare in at least the last five years for a civil trial on the call docket to be carried or set over for lack of an available trial judge. For these reasons, the committee was shocked to see "not enough certainty that the case will be tried on the trial date" as the most-frequently cited court-related factor discouraging the use of jury trials to resolve civil cases.

The committee identified several possible explanations for this survey result. First, it appeared from the comments that some lawyers may have been responding based on their experiences in other counties. Second, because of the declining number of civil jury trials over the last several years, it is possible that many of the lawyers responding to the survey were unaware of the steps taken by the presiding judge to provide greater certainty that civil cases will actually be assigned out on the scheduled trial date.[5] Having a trial postponed at the last minute is an extremely expensive and traumatic experience, one likely to be seared into the memory of a lawyer. Third, the comments suggest that respondents may be referring uncertainty about whether the trial date will be changed sometime before the call date, or uncertainty about when the trial will actually get underway because of the number of pretrial matters that must be dealt with by the trial judge on the morning of trial. The committee recommends further exploration of these issues.

The presiding judges in Multnomah County have historically been reluctant to designate very many cases as "complex" for two reasons: (1) under the court's time-to-disposition guidelines, that designation carries with it an additional year to get to trial; and (2) the more judges have specially assigned cases to manage and try, the less they are available to take matters from the daily call docket. Presiding judges have likewise been unwilling to change to a system of individual assignment for all cases. Multnomah County Circuit Court has long prided itself on having a very timely docket, especially for an urban court of its size, and has attributed much of its efficiency to its master docket system.

[5] The current presiding judge and her predecessor have taken many steps to educate the bar about these steps.

Predictability of Motion Rulings

The committee was concerned (but not entirely surprised) that nearly a third of the survey respondents (32.1%, 128 lawyers) selected "rulings on motions not predictable" as a court-related factor discouraging the use of jury trials to resolve civil disputes. A high level of consistency cannot be achieved with the large number of judges now hearing civil motions in Multnomah County Circuit Court.

> "Too much uncertainty. Too little consistency. Leads to a higher motivation for mediated settlements, even if we think it's a good a case."
>
> Typical survey comment

When Charles Crookham was the presiding judge he ruled on all civil motions and his standard rulings in certain types of motions became known as "the Crookham rule" on the issue. Under Presiding Judge Donald H. Londer the work of hearing civil motions was spread to a group of approximately five judges that became known as the motion panel. Judges were added to the panel by appointment of the presiding judge. The panel met occasionally if concerns were raised by the bar that the motion judges were ruling inconsistently with each other on similar motions. Sometimes such meetings led to the conclusion that there was no inconsistency, instead the motions were dissimilar. Sometimes the discussion at such meetings led some judges to conclude that they had been in error in their rulings and would rule consistently with others in the future. Occasionally one or more judges were persuaded that consistency would be of such benefit to the bar and the litigants that they decided that they would probably rule consistently with the other judges on certain motions in the future. At other times the judges on the motion panel concluded that there simply was a strong difference of opinion among the judges as to the correct ruling and there would be no consistency until the matter was resolved by an appellate court or amendment of a rule or statute.

Under Presiding Judge James R. Ellis and his successors, any judge who wished to hear civil motions could join the motion panel. The number of judges hearing civil motions has grown to approximately twenty for the past several years. Almost every judge not assigned to the family law department or serving as the presiding judge or chief criminal judge or chief ADR judge has joined the civil motion panel.[6] An average of just under eleven judges hear civil motions each week, with an average of just over one hour available for motion hearings for each judge (not counting the time the judge hears motions in specially-assigned cases).

[6] The chief probate judge is assigned to the family law department, but hears motions in probate cases, including non-domestic relations civil cases involving trusts.

A procedure called the "fly paper rule" was adopted by the motion panel to increase the likelihood that all motions other than motions for summary judgment,[7] are heard by the same judge, even though the case has not been specially assigned. The "fly paper rule" was made stickier in 2009 by the abolition of a separate procedure for the assignment of motions needing longer than 30 minutes for a hearing. The former "long motion" scheduling procedure substantially increased the likelihood that motions in a single case would be heard by different judges.

The motion panel publishes a "Statement of Consensus," reflecting many common motion issues on which the judges on the panel have ruled consistently in the past. Although no judge is bound by the statement and may choose not to follow it in any particular case, the statement is published for guidance to the bar. Lawyers can take into account what the ruling on a particular motion has been when deciding whether it is worthwhile to file it or oppose it.

The Statement of Consensus started as a list of the "Crookham rules" to which judges hearing civil motions continued to adhere. Some additional statements of consensus were added over the years. Some statements were removed as new judges joined the panel and indicated that they had not rule similarly on the issue, and thus there was no consensus. No new consensus has been reached by the judges on the motion panel in over five years.

Non-Court-Related Factors that Discourage Jury Trials

"Because they have so little jury trial experience, most lawyers cannot give accurate gauges of the likely outcome of a jury's deliberations on any given issue. As a result, clients lack a key input for making a rational choice between trial and settlement."

Typical survey comment

The second survey question asked "Which, if any, of the following NON COURT-RELATED factors discourage your, or your client's use of jury trials to resolve civil cases?" Again, the nine factors committee members heard or read about were listed, together with an option of "other." Respondents were asked to check all that applied. Four hundred nineteen survey respondents answered the question.

gned under a different system from other civil motions. Motions for summary judgment are assigned first to a judge *pro tempore*. Any party may apply to the presiding judge to have the motion heard by a sitting judge, without being required to file a formal motion for change of judge or "affidavit of prejudice." If such an application is made, the motion is then assigned to the Tax Court Judge, Henry Breithaupt, who has volunteered to help with civil motions in Multnomah and other counties. If Judge Breithaupt is not available or recuses himself, or if a motion for change of judge is filed, the summary judgment motion is assigned to the next Multnomah County judge on a list of all active judges except the presiding judge, the chief criminal judge and those judges assigned to the family law department. The motion for summary judgment may be assigned to a judge who has not heard other motions in the case or who is not on the motion panel at all.

The five most commonly selected answers, by frequency of response, were:

- Jury trials are too expensive (83.3%, 349 respondents);
- Risk of losing (all or nothing nature of jury verdict) (64%, 268 respondents);
- Risk averse client (43.2%, 181 respondents);
- Risk of paying opponent's attorney fees (38.7%, 162 respondents);
- Stress of jury trials (33.2%, 139 respondents).

See Chart #6.

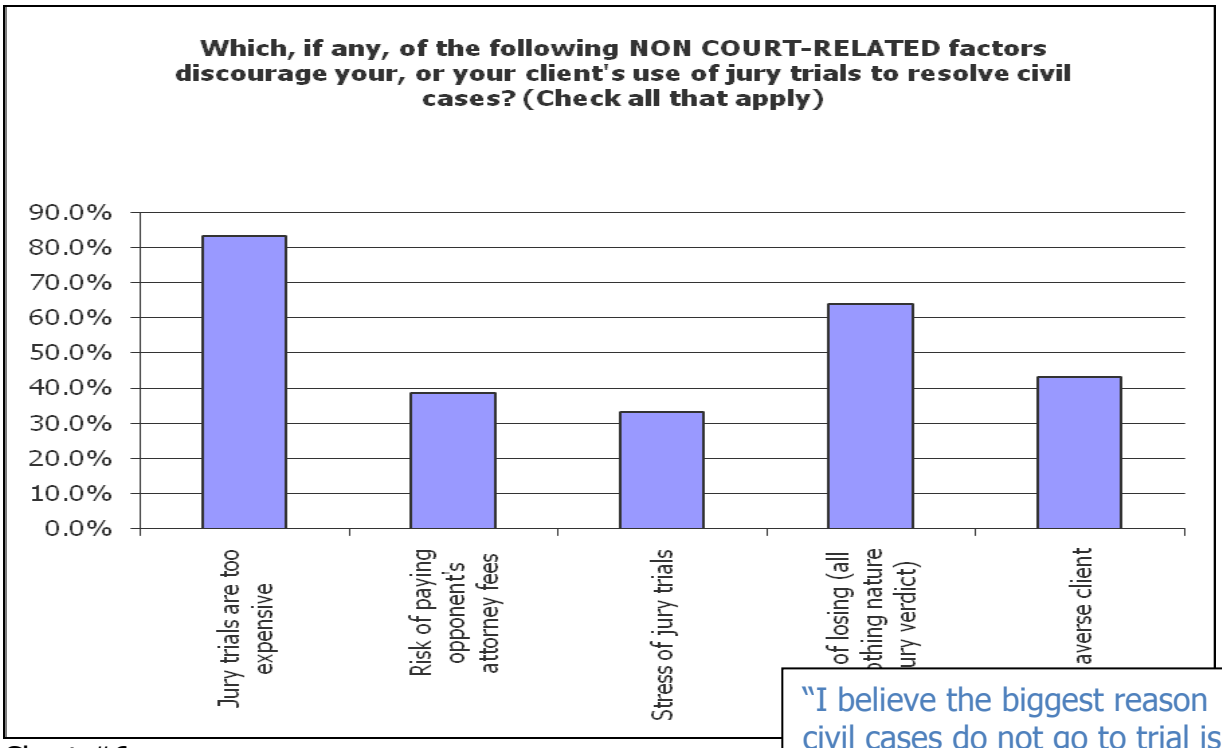


Chart #6.

> "I believe the biggest reason civil cases do not go to trial is that as lawyers have fewer and fewer trials they become less sure of their ability to try a case--and they over-prepare for trial and drive up the costs for the client."
>
> Typical survey comment

What Makes Jury Trials Expensive?

The committee anticipated that many survey respondents would indicate that jury trials are too expensive, and that is a significant factor discouraging their use. Seeking more information about what drives the expense, the third survey question asked "If you selected 'jury trials are too expensive' in response to question 2, please rate the importance of each factor in driving up the expense." The question then listed five factors and asked the respondent to rate each as "very important,"

"important" or "not important." Once again, the respondent had an option of listing other factors and providing comments.[8]

Expert witness fees were rated as by far the most important factor driving up the expense of jury trials, with 98.3% of respondents describing it as "very important" or "important," and two-thirds of the respondents (228) giving it a "very important" rating.

Attorney time and expert consultant fees were also rated "very important" by more than half of the respondents who rated those factors. Preparation of exhibits was rated as an "important" factor by 40.7% of respondents and "very important" or "important" by 52.1%. Only staff support was rated most often as an unimportant factor in making jury trials too expensive. *See Chart #7.*

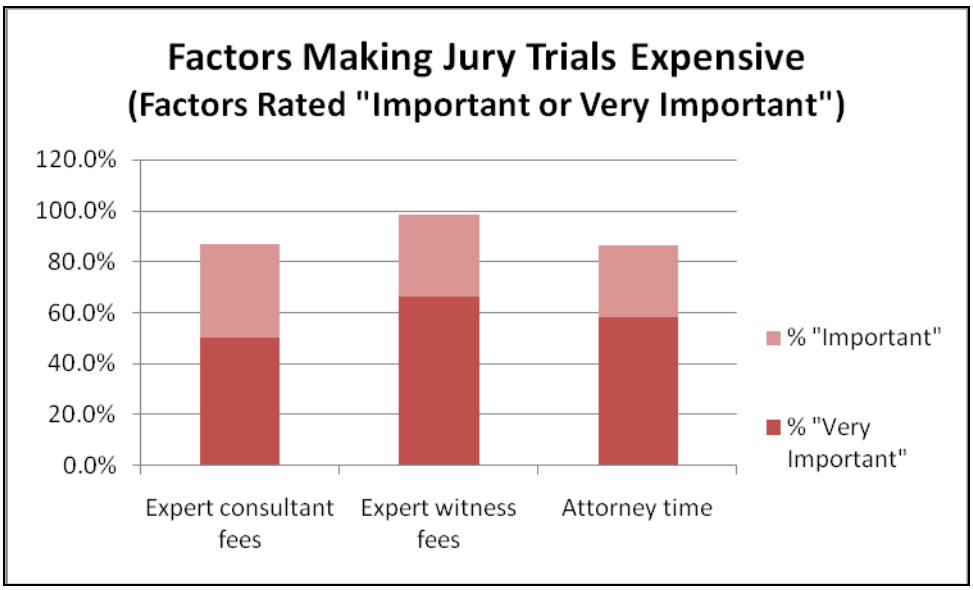


Chart #7

Manipulation of the Current Mandatory Arbitration System

Mandatory court-annexed arbitration began statewide in 1993 for civil cases seeking money damages only of $10,000 or less.[9] The number of cases subject to court-required arbitration has increased over time. Under current statutes, a civil case seeking money damages of $50,000 or less is subject to mandatory court-annexed

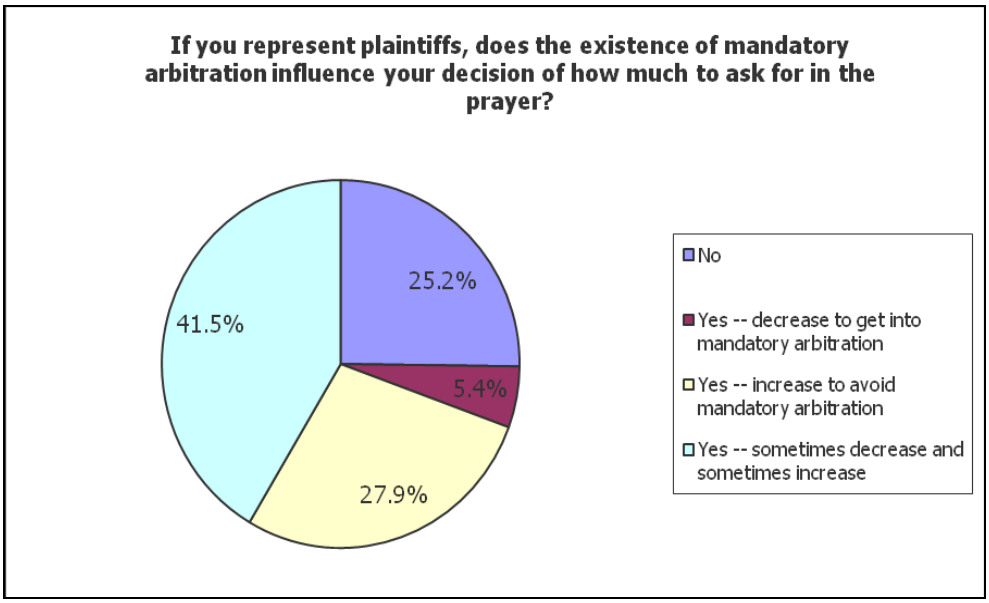
[8] In an anomaly in the survey, 358 respondents answered this question, although only 349 had selected "jury trials are too expensive" in response to question #2. Not all those who gave any response to this question rated each factor, however, and at most 343 respondents rated any one factor.

[9] Presiding Judge Charles Crookham and Judge Robert P. Jones initiated the arbitration program in Multnomah County in the late 1970's.

arbitration.[10] Either party may appeal from an arbitration award and seek a trial *de novo* in the circuit court. If the appealing party's position is not improved after the trial *de novo*, (even if the appealing party obtains a judgment in its favor), that party may be denied costs and attorney fees, and may be required to pay the opposing party's costs in the trial *de novo,* including attorney fees in certain cases.

As reported above, 38.8% of survey respondents selected mandatory arbitration as a court-related factor discouraging jury trials. Members of the committee had heard from some lawyers that they selected the amount sought in the prayer to either take advantage of or to avoid mandatory arbitration. The fourth question in the survey sought to test this hypothesis. It asked "If you represent plaintiffs, does the existence of mandatory arbitration influence your decision of how much to ask for in the prayer?" Two hundred ninety-four respondents answered this question.

The vast majority of respondents (74.8%) answered that existence of mandatory arbitration influenced the prayer in some fashion. More than a quarter (27.9%) said they increased the prayer to avoid mandatory arbitration; 41.5% said they sometimes increased and sometimes decreased the prayer to influence whether the case went into mandatory arbitration. A scant 5.4% of respondents said they decreased the prayer to get into arbitration and 25.2% said existence of mandatory arbitration never influenced the amount sought in the prayer. *See Chart #8.*



[10] The number of attorneys serving as arbitrators has also increased. Originally, those serving as arbitrators were mostly experienced trial lawyers and the group was fairly small. Parties usually chose an arbitrator with experience trying the type of case involved. Over the years, the number of lawyers serving as arbitrators has increased and includes many who have done few, if any, civil jury trials themselves. In 2007, over 300 lawyers actually arbitrated cases in court-annexed arbitration in Multnomah County. The need for further study of the entire court-annexed arbitration system is discussed in a later section of this report.

Chart #8.

Summary Jury Trials

Many judges and attorneys believe that the demise of the civil jury trial can be traced to the introduction of mandatory arbitration for lower-value cases combined with the abolition of the district court.[11] They reason that in the "old days" of a district court of limited jurisdiction and six-person juries, cases without much money at stake were tried quickly and with little motion practice or discovery. New lawyers had the opportunity to try many such cases and acquire the skills to try more complex and serious ones. (This mirrored the way the criminal practice still works: lawyers begin trying misdemeanors and develop their skills before trying felonies.) Experience trying smaller cases to juries also allowed lawyers to develop expertise in assessing how a jury would likely react to a case (valuation skills), and taught them what pleading motion and discovery practices were useful and cost-effective in either evaluating the case or preparing it for trial.[12]

Research by the National Center for State Courts shows that jury trials of civil cases in limited jurisdiction courts (such as Oregon's old district courts) remain more common than in general jurisdiction courts. Including limited jurisdiction courts in its analysis raised the estimated number of civil jury trials in state courts by 40%. The NCSC researchers note: "Possibly because the monetary stakes in these cases are lower than for those in state general jurisdiction courts and in federal district courts, the costs associated with pretrial and trial procedures may be commensurately less, thus placing fewer financial disincentives for proceeding to trial. What does this suggest about the relationship between improved pretrial management, enhanced discovery proceedings and the trend of vanishing trials?" National Center for State Courts, *Civil Action*, Vol. 6, No. 1, Summer 2007.

Several judges and lawyers have suggested recreating the district court jury trial experience. While the Multnomah County committee was doing its work, a statewide committee of lawyers and judges working under the aegis of the American College of Trial Lawyers (ACTL) was also developing proposals to allow jury trials for lower value cases without going through arbitration.[13] One proposal would have imitated the district court experience before the district court was a court of record. At that time, appeals were trials *de novo* in the circuit court. Another proposal would have imitated

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[11] Before the consolidation of the district and circuit courts on January 15. 1998, civil cases seeking money damages of $10,000 or less were in the jurisdiction of the district court and tried to six-person juries.

[12] Such trials also gave *judges* who had done little or no civil practice before taking the bench an opportunity to learn on smaller cases.

[13] The American College of Trial Lawyers "Jury Trial Experience Project" also revived and expanded a program to place newer lawyers from civil firms in the offices of prosecutors and public defenders to give them jury trial experience while providing a public service.

the district court experience after January 1, 1977, when district courts became courts of record and appeals were only for errors of law and went directly to the court of appeals.

The committee included a question in the survey about these types of proposals, asking "Multnomah County Circuit Court is considering a fast track or summary jury trial option. Trials would be concluded in one day. Cases would be tried in 6 months and discovery and motion practice would be limited. If such an option were available, would you use it?" Three hundred ninety-two respondents answered this question.

A slight plurality (39.8%, 156 respondents) answered "no." The second most popular response was "Yes, but only if the loser was limited to a traditional appeal on the record" (33.4%, 131 respondents). The third largest group of respondents checked the option "other" and many said they would need more information about how the system would work, or that it would depend on the type of case. Few respondents – in almost identical numbers – would use such a procedure only if there was no appeal of any kind (13.5%, 53 respondents) or only if the appeal was a trial *de novo* like the current appeal from arbitration (13.3%, 52 respondents). *See Chart #9.*

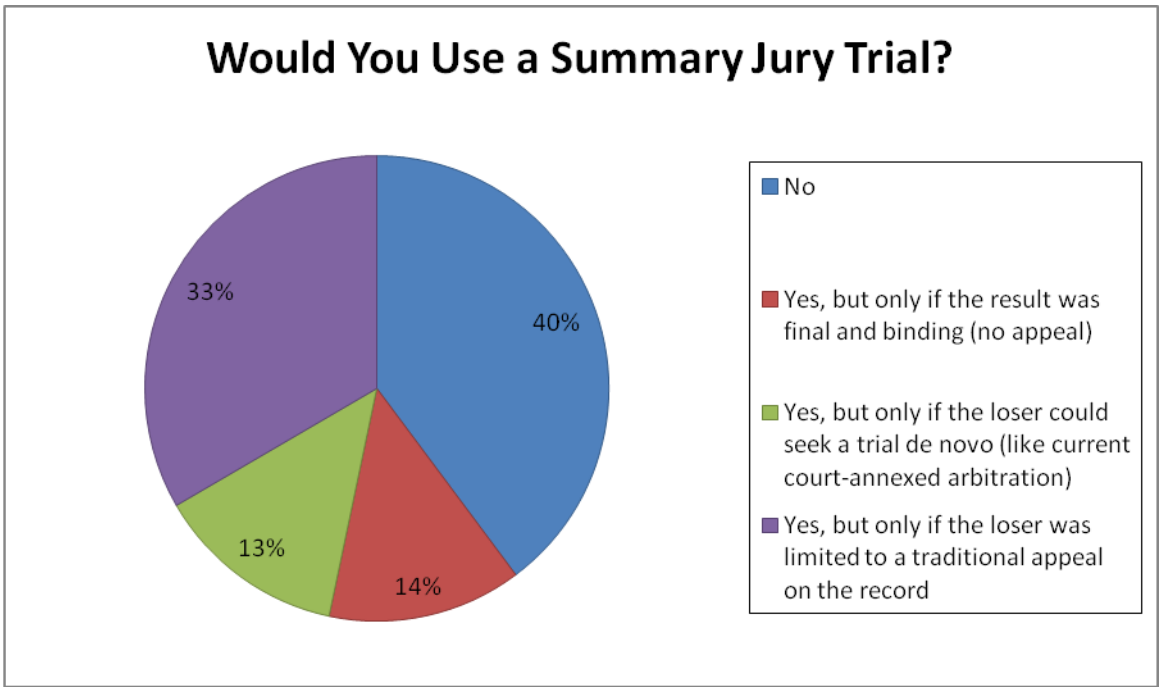

Chart #9

Interestingly, the responses differed very little when filtered by the respondent's primary practice area. Asked "What is the nature of your civil litigation practice?" (and allowed to check all responses that applied) 208 respondents checked "primarily plaintiff" and 178 checked "primarily defense." Chart #9a and chart #9b show the responses of these two groups to the question about using a summary jury trial. Not surprisingly, the biggest differences were that exactly twice the percentage of defense

attorneys as plaintiffs' attorneys would prefer a system that retained a trial *de novo* in the circuit court as the mechanism of appeal, while almost half again as many plaintiffs' attorneys as defense attorneys would prefer a binding result with no appeal at all.

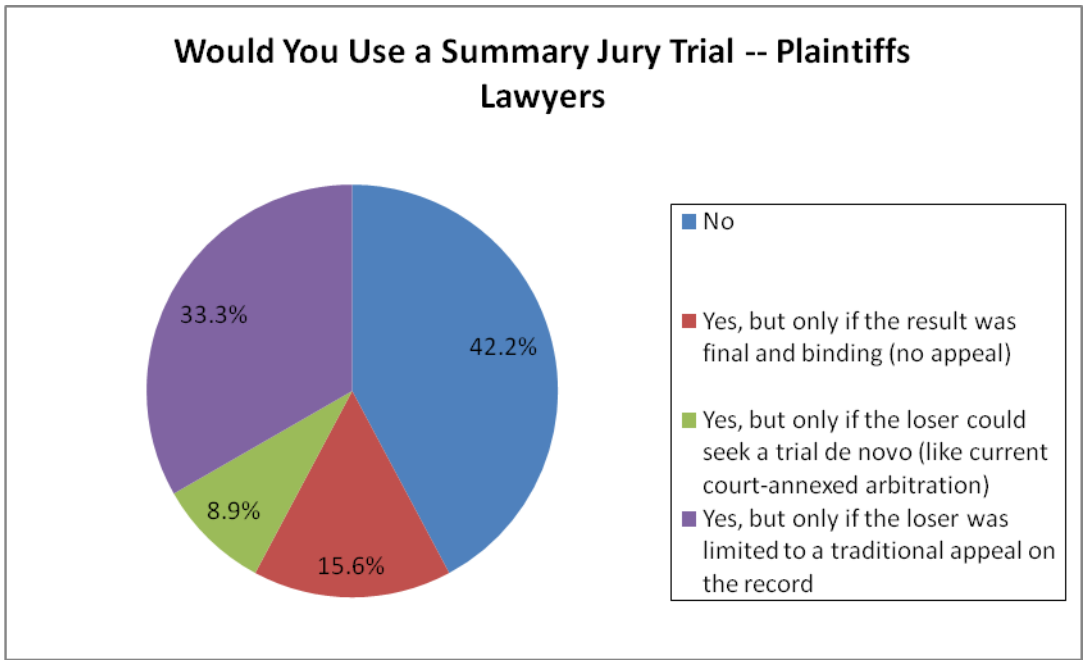

Chart #9a

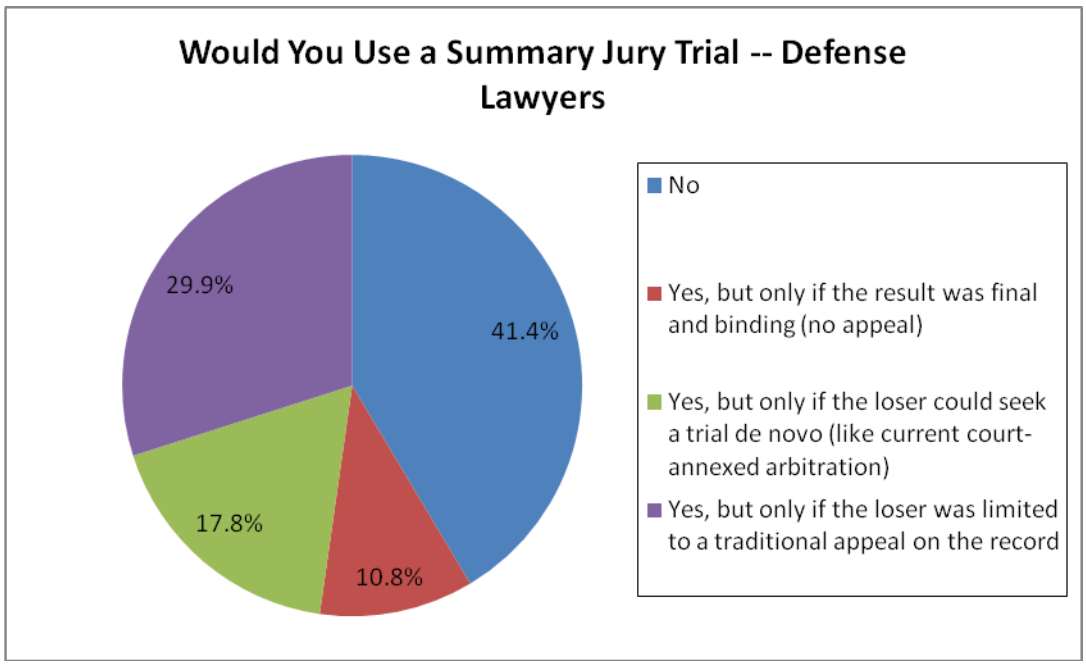

Chart #9b

Changes in Use of Different Dispute Resolution Mechanisms

Anecdotal evidence suggested to the committee that while jury trials were declining as a mechanism to resolve civil disputes, judges were increasingly involved in resolving such cases – but as mediators or settlement judges.[14] There was also circumstantial evidence that more cases were being settled with the use of third-party mediators and fewer as a result of direct attorney-to-attorney discussions. The sixth question in the survey sought to test these hypotheses. The question asked the respondent to indicate whether, over the last five years, each of seven methods of dispute resolution had increased, decreased or remained about the same. Four hundred thirty-one respondents answered this question.

Survey responses generally supported the hypothesis. Use of a private arbitrator was the dispute resolution mechanism that increased the most in the last five years (67.1% of respondents). Court-annexed mediation (judicial settlement conferences) increased second most (45.6% of the respondents). One hundred respondents (24.1%) reported that their use of direct negotiation with opposing counsel had decreased. Only the use of jury trials and court trials had decreased more. *See Chart #10.*

[14] Before 2003, very few judges in Multnomah County, other than the court's Chief ADR Judge, regularly conducted settlement conferences in civil cases. The number of judges conducting such conferences on a regular basis increased dramatically when a statewide budget crisis forced the courts to close to the public every Friday in March, April, May and June 2003. Judges still worked those days, but could do no business that required being in the courtroom or on the record. Many judges began doing settlement conferences in civil cases on those Fridays and continued the practice after courts were re-opened five days a week, but the presiding judge decided not to summon jurors to begin jury trials on Fridays.

So many judges are now doing settlement conferences in civil cases (13 as of the most recent survey of judges) that the current presiding judge has decided to discontinue the position of Chief ADR Judge upon the retirement of the founder of the position and current incumbent, Judge Kristena LaMar. Judge LaMar provided extensive training to her colleagues doing settlement conferences.

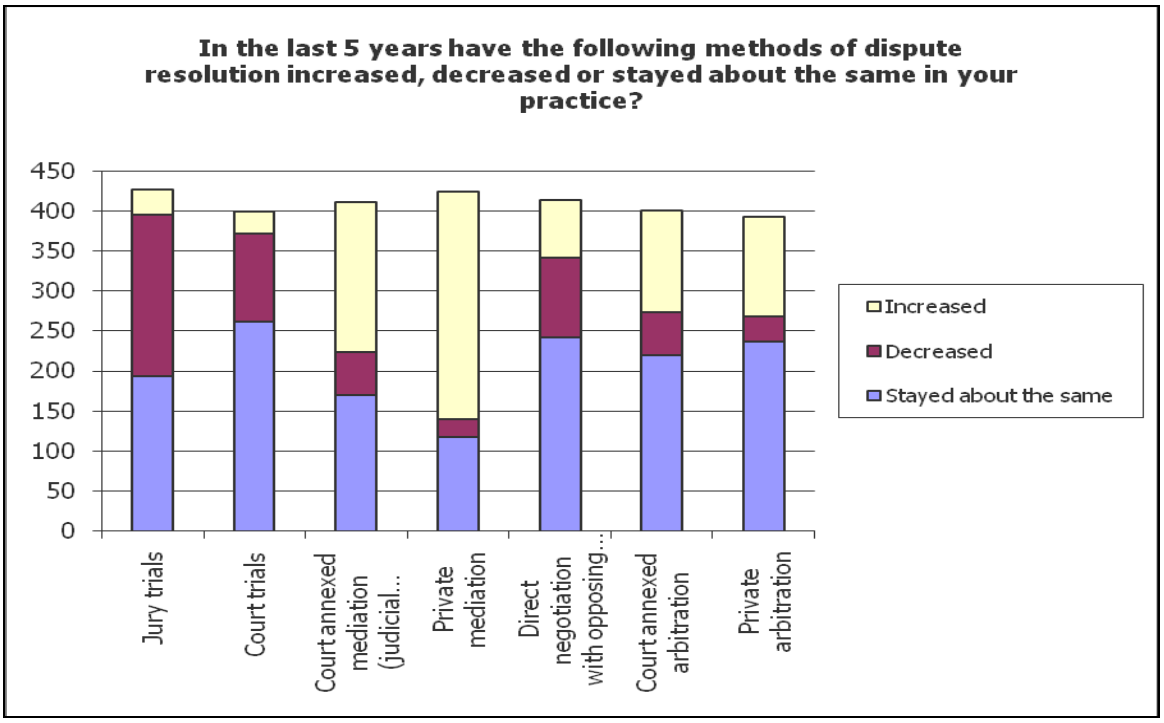

Chart #10

Focus Groups

On March 10, 2009, the committee and the Owen M. Panner Inn of Court partnered to facilitate a discussion about the declining number of civil trials. The Inn members were divided into seven focus groups of approximately ten members. One of those groups was composed entirely of judges from Oregon's federal and state trial and appellate courts. Facilitators for the groups received training from Tsongas Litigation Associates and benefited from the experience of participating in their own focus group conducted by the experts at Tsongas. Each of the Inn of Court focus groups was conducted by one of the Tsongas trained facilitators and assigned a recorder to memorialize the discussion. Participants in the focus group exercise were assured their responses would be recorded anonymously and would not be attributed to them individually.[15]

Facilitators encouraged participants to express their opinions honestly, whether they were critical or complimentary of judges and whether popular or unpopular with other lawyers. Each focus group used the same set of questions and at the conclusion of the 45 minutes allotted for the exercise, each focus group designated one of its members to summarize the discussion and report to the rest of the Inn the

[15] At the invaluable suggestion of Tsongas Litigation Associates, the focus group discussions were audio-recorded, using digital recording devices provided by Naegeli Court Reporters and Inn member Richard Vangelesti, as a means of supplementing the recorders' notes.

group's response to the final focus group question: "What can judges do to promote the civil jury trial?"

The focus groups began by asking the perceptions of participants with respect to whether the civil jury trial was indeed vanishing. They were also asked to relate their own experience and those of other lawyers at their firms in terms of the numbers of jury trials conducted and whether that number had increased, decreased or remained the same over the past two to five years. Many participants confirmed that there is a decline in civil trials overall, but other participants indicated that they try civil cases at the same level as in the past; still others indicated both increases and declines in the number of civil trials they try.

Although there was no consensus about absolute reasons for the decline in civil trials, some comments emerged as themes during the focus group discussions.

- Lack of trial experience creates a fear of trying cases, which has a chilling effect, because these attorneys do not have a point of reference to assess whether to try a case or not.
- Lawyers have no opportunity to try smaller civil cases to a jury.
- The increased complexity of cases and high stakes litigation for business clients and the risk of paying huge amounts in attorney fees discourages jury trials.
- The costs associated with trying a case have increased due to expert fees, use of technology during trial and expanding discovery, as well as the amount of preparation needed before trial.
- Lawyers and clients are uncertain about the jury verdict, due to the perception of jury nullification and runaway juries and this discourages the use of jury trials.
- Judges' rulings in civil trials are unpredictable.
- Who the trial judge will be is unpredictable. (This was the most-mentioned factor.)
- Case scheduling and trial dates are unpredictable and there are too many "false" trial dates.

When asked what can be done to address the decline of civil trials, the participants said that certainty in trial dates, better case management by judges, discovery limitations, prompt and consistent judicial decisions in pretrial matters, and earlier assignment of trial judges would significantly improve our current system. Several participants commented that the state system should be more like the federal system so that litigants know what to expect, leading to increased confidence in the court system. On the other hand, some participants felt that the system need not be changed, because it is working as it should be.

Participants were also asked to address how best to insure that the next generation of lawyers will have the skills, expertise and confidence to try their cases to a jury. Not surprisingly, the most frequent responses were to provide opportunities

for less experienced lawyers to get trial experience. Participants recognized that highly experienced lawyers do not agonize over trial as do "anal-retentive new lawyers" with little or no trial experience.

Many participants recognized the opportunities that already exist through volunteer opportunities with the prosecutor and public defender offices, the trial academies conducted by organizations like the Oregon State Bar, American College of Trial Lawyers, National Institute of Trial Lawyers, Oregon Association of Defense Counsel and the Bill Barton "boot camp." Others suggested more training at the law school level, volunteering to coach high school mock trial teams and encouraging less experienced lawyers to take more risk with the cases they select to try, or to take cases that are more risky because those will need to be tried. Some participants asked whether it was ethical or in the best interest of lawyers' clients to put the lawyer's interest in gaining trial experience over the interest of a client, whose interests might be best served by resolving the case through a less expensive alternative.

The focus groups also discussed perceived barriers or obstacles to resolving cases through the traditional jury trial system. Some of the obstacles mentioned included the heavy financial costs associated with preparing a case for trial, the unpredictability of the result at trial, costs of discovery have gotten out of sight, worries about potential legal malpractice claims, the huge costs associated with false trial dates attendant with the present practice of establishing trial dates with the anticipation that initial and subsequent trial dates will be set over until a "date certain" is established. Other obstacles mentioned were exposure for large awards of attorney fees if the case is lost, the increased complexity of litigation brought about in part by technology that encourages expanded discovery and word processing software that facilitates longer briefs and clients just getting "worn out" with the process or deciding to abandon the litigation because the pretrial expenses have depleted their insurance coverage.

When asked which barriers were out of the lawyers' control, participants answered the mandatory requirement to arbitrate smaller cases, the inability to get the same judge assigned to hear motions and to preside over the trial, lack of judicial management to assist in pretrial resolution of cases and judges who "nudge" settlement when a case is sent to them for trial. Among these, the unpredictability of last minute assignment of the trial judge was mentioned several times. Several participants related that they are better able to predict results and evaluate risks for their clients if they know in advance which judge will try their case and not knowing who the judge will be raises an unacceptable level of uncertainty for both the lawyer and the client. Likewise, some observed it is better to have a single judge assigned to a case, even if that judge does not rule in the client's favor all of the time, than having a new judge assigned for trial who is not familiar with the issues. Educating

the trial judge on issues that were raised by pleading motions, motions for summary judgment, preliminary injunctions and the like further time and expense to the trial.

Focus groups were also asked to identify factors that are considered when deciding to try a case instead of resolving it through ADR or traditional settlement discussions. A wide variety of factors were mentioned, including the need to establish precedent for other similar claims and conversely, the desire to avoid establishing precedent in a case with bad facts. Other factors considered were whether the case involved high stakes and could have wide ranging impact on the client's business, whether the client preferred mediation over trial and whether the clients want resolution of their dispute as quickly as possible. Some of the factors mentioned dealt with the procedural differences between trial and arbitration, such as the rules that will be followed for arbitration (some are as onerous as going to trial), the expense of hiring a panel of expensive professionals to arbitrate the case versus using taxpayer paid judicial officers, and the differences attendant to presentation of an expert at trial versus submission of an expert's report to an arbitrator. It was also noted that lawyers on opposite sides that work well together do not even need a trial date setting to be able to resolve their cases.

As noted, the final question posed to each focus group was the courts can do to facilitate jury trials. Responses were varied but two themes emerged: (1) give us consistency in judges; and (2) give us certainty in trial dates and scheduling other matters. Most participants observed that scheduling is easier with an assigned judge who can schedule all matters in the case with flexibility that takes into account the lawyers and their clients' needs. Other responses suggested that the court set fair trial dates that match the needs of the case, send cases out when they are ready for trial, do away with a "date certain" trial date that in reality is not certain, do away with regular course settings that mean nothing, implement discovery cutoffs, adopt the federal system of managing cases, lower the barriers to proof on some issues that currently require expert testimony (*e.g.*, medical bills), use pretrial conferences to narrow the contested issues for trial, streamline the system by having one judge assigned to the case from the beginning and be more willing to use special jury instructions or modify the uniform jury instructions to reflect the facts of the case. Many participants believed that assignments of civil cases to a single judicial officer would promote trials by identifying cases that ought to be tried and moving those cases along and likewise identifying cases that should not be tried and moving those cases toward a quick resolution.

The committee found the focus groups responses to be very similar to the responses it received from lawyers who completed the committee's online survey questions. The committee also appreciated the candor of the comments received from focus group participants and the insight their candid remarks provided to how the court can better serve civil litigants. Several of the suggestions are incorporated into the committee's recommendations.

Other Input and Observations

Several survey respondents and focus group participants expressed some skepticism about a committee of judges worried about the vanishing civil jury trial. They said that in their experience judges did not want civil jury trials and discouraged them at every turn, from systemic obstacles such as mandatory court-annexed arbitration, to hostility expressed by individual judges. The reported hostility ranged from generalized expressions of disdain for civil jury trials or statements that a trial represents a failure to threats by assigned trial judges to impose sanctions on lawyers or parties who would not settle on the day of trial.

Lawyers wrote, called and emailed members of the committee when they learned of its formation. Committee members also met with interested lawyers in person to hear their concerns and ideas. Although there was some variation in the comments, the themes were the same: jury trials are too expensive and much of that increased expense is due to the unwillingness or inability of judges to manage civil litigation, especially the costs of discovery.

The committee also sought the insights of two very experienced full-time neutrals. One serves only as a mediator, and the other does both mediation and arbitration. The committee asked them to share with us their observations and the comments of the lawyers and parties who appeared before them about why they did not want a jury trial. These neutrals reported many of the factors disclosed by the surveys and focus groups. They also confirmed the critical observation of the judges on the committee who do settlement conferences: the value of a case in settlement is influenced substantially by the trial experience of the lawyers involved. Plaintiff's attorneys without jury trial experience receive lower offers and defendant's attorneys without jury trial experience receive higher demands or offer more than they should.

Experienced arbitrators also told the committee that the advocacy skills of lawyers in arbitration hearings have declined over the years. In other words, experience doing arbitration hearings is not only inadequate to prepare newer lawyers to try cases to juries, it is not making them better "trial" lawyers before arbitrators, either.

Recommendations

The committee concluded that much can be done to return the jury trial to its place as a viable means of resolving civil disputes. The court as a whole, individual judges and lawyers must each make changes if the constitutional right to a jury trial in civil cases is to have meaning.

What the Court as an Institution Should Do

The time is right for Multnomah County Circuit Court to change its approach to the management of civil cases. Twelve of the 38 judges have come to the bench since January 1, 2006. Many are interested in taking a more active role in the management of the court's workload beyond trying the cases sent to them. The presiding judge's decision not to continue the position of full-time Chief ADR Judge upon the retirement of Judge LaMar is the equivalent of adding another trial judge to the Multnomah County bench.

Responding to Attacks on Juries

Multnomah County Circuit Court should respond to attacks on juries in its public outreach efforts. Judges individually should refrain from encouraging parties to settle by suggesting that jurors are not to be trusted.

Juries, especially juries in civil cases, are often portrayed in the media and by those in favor of "tort reform" as irrational and unpredictable. It is certainly true that no one can say with certainty precisely what any particular jury will do in any particular case. Such uncertainty is often a very good reason for parties to settle. Nevertheless, the characterization of jurors as irrational is insulting to the thousands of citizens who serve as jurors and is contrary to the findings of numerous researchers.[16] Many studies have shown that jury verdicts are almost always consistent with what the judge presiding over the trial would have ruled. Attacks on juries have the effect of undermining the legitimacy of the court system and unnecessarily frightening litigants and lawyers with little trial experience.

Improved Case Management

Multnomah County Circuit Court should explore ways to provide better management of civil cases.[17] One option, recommended by lawyers on both the plaintiff and defense side, is to screen cases soon after filing and determine, with input from the parties, an appropriate track for that case. This concept is similar to the "multi-door courthouse" concept widely discussed in the 1980's and now often referred to as the continuum of "appropriate" dispute resolution. The Oregon Judicial Department's *Justice 2020: A Vision for Oregon's Courts* includes as a goal "To help people choose the best way to resolve their disputes." It describes as a suggested

[16] For a sampling of the articles on this subject, the committee recommends that the reader look at the research cited by Professor Michael J. Saks in "Public Opinion about the Civil Jury: Can Reality Be Found in the Illusions?" 48 DEPAUL L. REV. 221 (1998) or many of the articles in VERDICT: ASSESSING THE CIVIL JURY SYSTEM, ROBERT E. LITAN, ed. (1993).

[17] This is recommendation is also consistent with the findings and conclusions of the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, as reflected in its final report published in the spring of 2009.

strategy "offer[ing a] full spectrum of appropriate dispute resolution services" and envisions a system in which "people are able to choose the option most suited to their needs, from mediation to a timely jury trial." The tracks to which a case could be assigned might include early mediation, arbitration, fast track jury trial, ordinary course jury trial with a case management order and presumptive discovery limits, assignment to a team of judges with responsibility for managing certain types of cases or assignment to an individual judge for more intensive management and trial.

Team Approaches to Reduce Inconsistency

Multnomah County Circuit Court should explore the use of smaller teams of judges handling civil motions and civil trials. The court has already recognized that in family and juvenile law and in treatment courts, some continuity and specialization of judges, even if for a limited term, is necessary to serve litigants and the public. It should recognize that this need may also exist in the civil arena. A smaller team approach would promote consistency and predictability for lawyers and litigants. It would strike a balance between the efficiencies of a master docketing system and the intensive management allowed by individual assignment of all cases.

Teams of judges should include both more experienced and less experienced judges to provide mentoring and address concerns that some judges have little or no civil jury trial experience when they take the bench. Terms of assignment should be for two or three years and should be staggered to ensure continuity. Any judge who wishes to be on a civil team should have the opportunity to do so, at least from time to time in his or her career.

Expedited Civil Jury Trials

Multnomah County Circuit Court should implement the proposed Uniform Trial Court Rule expected to be adopted by the Chief Justice by early 2010, allowing parties to have a jury trial quickly and with limited motion and discovery practice. A team of judges, including judges with a great deal of experience in civil jury trials and those with much less experience, should work together to manage these cases. This would provide judges as well as lawyers to develop skills in trying civil cases.[18]

[18] The committee recognizes that less than half of the survey respondents said they would use such an option. The committee nevertheless believes it is worthwhile to offer this track. First, a full third of the respondents indicated that they *would* use it. Second, many of the respondents who answered that they would not use such an option also indicated in the comments that they would need more information about it. Others indicated that they do not believe it is possible to prepare a case for trial in such a short time frame. The committee believes that, given the opportunity, many lawyers would learn otherwise. After all, it was done for well over a century.

Evaluate the Effectiveness of the Current Court-Annexed Arbitration System

Multnomah County Circuit Court should work with the Arbitration Commission to evaluate the effectiveness of the current court-annexed arbitration system. The vast majority of cases that go through the court-annexed arbitration process are resolved to the apparent satisfaction of the parties. Nevertheless, comments in the survey and focus groups, as well as correspondence to members of the committee and exchanges on lawyer list serves raise concerns about whether the current court-annexed arbitration system is working as intended. Many viewed court-annexed arbitration as the "new district court" to provide quick, inexpensive resolution of lower-value civil cases and trial training for newer lawyers. There is growing concern that even court-annexed arbitration is becoming as protracted and expensive as a jury trial and there is substantial doubt that arbitrations provide the kind of experience that prepares lawyers to try cases to juries.

What Judges Should Do

Judges should actively manage cases that need management and take responsibility for the resolution of cases, not simply the decision of an isolated question presented in motions. Judges should not intrude into the litigation strategies of the parties and their lawyers, but they should stop abuses of motion and discovery practices. Judges should take to heart the admonition of Oregon Rule of Civil Procedure 1B: "These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. that the rules should be interpreted to promote the speedy, efficient resolution of cases."

Judges should take care that they do not unnecessarily discourage civil jury trials by conveying (intentionally or unintentionally) that a jury trial represents a failure by the lawyers or a waste of time for the judge or the jury. Although judges may explore whether further settlement discussions might be helpful when a case is sent out for trial, they should also express their willingness to try the case without punishing any party for pursuing the right to a trial by jury.

Judges should acquire and maintain the knowledge and skills necessary to manage and try civil cases by attending appropriate continuing legal education and judicial education programs. They should work in case management teams and informal mentoring relationships and consultation to learn from each other.

What Lawyers Should Do

Lawyers should learn to keep their eyes on the client's best interest in each civil case. They should ask before undertaking any motion or discovery request (or opposition to a motion or discovery request) whether that step is necessary to properly evaluate the case or prepare it for trial.

Lawyers with trial experience must take responsibility to train newer lawyers, even if that training time cannot be billed to a client. They must do so even if it means telling the newer lawyer to reduce billable activity in the case that is not in the client's ultimate best interests. Law firms should provide newer lawyers with the opportunity to handle and try lower-value cases, even if it means doing so at a reduced billing rate. Law firms should also encourage litigation associates to participate in jury trial experience projects with district attorney and public defender offices, such as the Jury Trial Experience Project of the American College of Trial Lawyers.

Lawyers should be certain that they are prepared to try their cases or hand them off to an attorney who can so that they do not (consciously or unconsciously) undermine their clients' position in settlement.

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- The Multnomah Bar Association, the Oregon Association of Defense Counsel, the Oregon Trial Lawyers Association, Oregon Women Lawyers and the Oregon State Bar Litigation, Business Litigation and Product Liability Sections for sending the link to the survey to their members;
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- Irene Libov, Salahudin Ali and Binah Yeung for transcribing the recordings of the focus groups so that the facilitators' notes could be fleshed out without revealing the identities of the focus group participants;
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