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Where Have You Gone, Spot Mozingo? A Trial Judge's Lament Over the Demise of the Civil Jury Trial

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> [T]he American jury system is dying. It is dying faster in the federal courts than in state courts. It is dying faster on the civil side than that on the criminal side, but it is dying.[2]

ABSTRACT

The following article was adapted from a November 20, 2009 South Carolina Bar Continuing Legal Education seminar entitled *A Look Back: Lessons and Legacies from the Trenches*. The program featured a select few of South Carolina's most experienced litigators recounting successful trial stratagems from their most noteworthy cases.

United States District Judge Joseph F. Anderson, Jr. documents the dramatic decline in the number of civil cases being tried to a verdict and explains why he believes the decline may have undesirable side effects. Finally, Judge Anderson offers suggestions for making trials less protracted and expensive to litigants.

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1. United States District Judge, District of South Carolina.

2. William G. Young, U.S. District Judge for the District of Mass., Address at the Florida Bar's Annual Convention (June 28, 2007), http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf (follow "Archives" hyperlink; then follow "2007" hyperlink; then follow "07/15/2007" hyperlink; then follow "Judge William G. Young's speech at Annual Convention" hyperlink).

The late Bear Bryant, who enjoyed a spectacular run as head football coach at the University of Alabama, consistently produced teams that competed for the National Championship. After he retired in 1982, the university quickly ran through a succession of coaches who were by most standards successful, but who failed to produce teams with the magic inspired by "the Bear." When the third coach started a losing season, a radio talk-show host suggested that there was only one thing the university could do to satiate the demands of the passionate 'Bama followers.[3] He suggested that the university erect a giant screen on one end of the football stadium—remember this was in the era *before* there were giant screens in football stadiums—and, once a week, allow the faithful to gather in the stadium to watch old films of the Bear's teams in action.[4]

What, you ask, does this have to do with a continuing legal education program on trial advocacy? I will give you the answer that lawyers frequently give me in the courtroom: "Just bear with me, I'm going to connect it up later."

As anyone who has ever tried cases to a jury knows, one of the most dramatic moments in the human experience is the scene played out in a courtroom when a jury returns with its verdict. John Grisham describes one such scene in his most recent book, *The Appeal*:

> Mr. Bailiff, bring in the jury.
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> The door next to the jury box opened, and somewhere a giant unseen vacuum sucked every ounce of air from the courtroom. Hearts froze. Bodies stiffened. Eyes found objects to fixate on. The only sound was that of the jurors' feet shuffling across well-worn carpet.[5]

Although I have served as a trial judge for twenty-three years, I still get anxious every time the jury marches into the courtroom to announce its verdict. There are few occupations you can work in for twenty-three years and still get butterflies. I think the only other jobs might be astronauts, bomb technicians, and field goal kickers. But, to be quite honest with you, I have not been getting many butterflies lately because—well—because we have not been trying many cases to a jury. The civil jury trial is said to be

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3. Douglas S. Looney, *Loaded for Bear: New Coach Gene Stallings is 0-2 at Alabama, and Tide fans are Furious*, SPORTS ILLUSTRATED, Sept. 24, 1990, at 58, 59 ("Birmingham radio talk-show host Ben Cook thinks he knows how to make 'Bama fans happy.").

4. *Id.* ("[E]very fall, pick a year from the past, put up big-screen televisions throughout the stadium, sell tickets and show a game film each Saturday from the good old days. Bryant would be back coaching, which is what they want, and they'd win all the time. It's the perfect solution.")

5. JOHN GRISHAM, THE APPEAL 12 (2008).

going the way of the buggy whip, the Edsel automobile, the typewriter, and the American textile industry.

The phenomenon that came to be known as the "vanishing jury trial" was first explored at length in an American Bar Association Symposium in 2003.[6] Subsequent studies and articles have concluded that despite ever-increasing caseloads, the civil jury system—as we know it—has "all but disappeared."[7] Indiana lawyer Jeff Rasley laments in *Newsweek* magazine, "It's clear that the curtain is falling on the jury trial. It was a hell of a show."[8]

In the federal court system, statistics kept by the Administrative Office of the United States Courts reveal that in 1962—the earliest year records were kept—there were 5,800 civil trials, making up 11.5 percent of all case dispositions.[9] In 2004, when there were eight times as many cases filed, there were only 3,900 federal civil trials, making up 1.7 percent of case dispositions.[10]

In the District of South Carolina, the trend is even more pronounced. For fiscal year 2008-2009, our twenty trial judges (thirteen district judges and seven magistrate judges) tried a total of twenty-seven cases.[11] That is less than one and one-half trials per judge. Twenty-seven trials represent one-half of one percent of all civil filings in our district.[12] In 1996, I tried sixteen civil cases to a jury verdict. In calendar year 2009, I tried four civil cases.

Although statistics are harder to come by, the trend appears in state courts as well. Two years ago, there were about forty-seven jury trials in Spartanburg County in the calendar year—fewer than one per week.[13] In my home county of Edgefield, only three trials were conducted over a two-year period of 2008 and 2009.[14] The deputy clerk of court for Richland

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6. *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459 (2004) (discussing the decline in the portion of cases that are terminated by trial and the decline in absolute number of trials in various American judicial fora).

7. Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 142 (2002).

8. Jeff Rasley, *The Revolution You Won't See on TV: It May Not Make For Good Drama, But Mediation Is Changing The Face Of The American Legal System*, NEWSWEEK, Nov. 25, 2002, at 13.

9. Galanter, *supra* note 6, at 459, 461.

10. *Id.* at 472.

11. Memorandum from Stacey Wilson, Sys. Adm'r, U.S. Dist. Ct. for the Dist. of S.C. (June 16, 2009) (on file with author).

12. *Id.*

13. Interview with Kenneth Anthony, S.C. Att'y, in Spartanburg, S.C. (July 8, 2009).

14. Telephone Interview with Shirley Newby, Clerk of Court of Edgefield County, S.C.

County, South Carolina's largest county, told me that there were sixty-nine civil jury trials during calendar year 2009.[15] Compare these figures to the distant past: Abraham Lincoln is reported to have tried three thousand cases—civil and criminal—during his career as a lawyer.[16]

According to one of his former law partners, legendary South Carolina attorney James P. "Spot" Mozingo tried more than six hundred cases—again, civil and criminal—before his death at age fifty-nine.[17] Those who knew and worked with Mozingo said he was the consummate lawyer—never afraid to put his client's fate in the hands of a jury, and always ready with a quip to disarm his opponents. Mozingo loved to tell a story about a speech he once gave to a gathering of lawyers in Washington and recalled that after the program was over, one of the lawyers from New York City remarked to him: "Mr. Mozingo, I've enjoyed coming to know you. When and if you are in New York, I would be glad to have you come by and visit with me. I occupy the twenty-third floor of the Empire State Building." Mozingo replied, "Thank you very much . . . . If you are ever in Darlington, South Carolina, I would be glad to have you drop by and visit with me. My office is upstairs over Cogshall's Grocery Store."[18]

One of Mozingo's most significant trials, in terms of development of the common law in South Carolina, owes its beginnings to an occurrence in the sleepy town of Rock Hill in 1962.[19] On a summer evening, seventeen-year-old Janet Mickle was riding with her boyfriend, Kenneth Hill, in a 1949 Ford automobile.[20] As they drove to the intersection of Jones Avenue and Black Street, they crashed into another car driven by Larry Blackmon.[21] The collision threw young Janet across the front seat, where she struck the gear shift lever and her impact shattered the knob.[22] Now spear-like, the shift lever entered Janet's torso behind her left armpit, penetrated to her spine, and caused complete and permanent paralysis.[23] Janet's parents

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(June 23, 2009).

15. Interview with Ann Kelly, Chief Deputy Clerk of Court for Richland County, S.C. (Feb. 11, 2010).

16. Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 304 n.16 (1990).

17. Telephone interview with J. A. Lee Chandler, former S.C. Supreme Court Justice (June 12, 2008).

18. BRUCE LITTLEJOHN, LITTLEJOHN'S HALF CENTURY AT THE BENCH AND BAR (1936-1986), at 69 (1987).

19. Mickle v. Blackmon (*Mickle I*), 166 S.E.2d 173 (S.C. 1969); *see also* Mickle v. Blackmon (*Mickle II*), 177 S.E.2d 548 (S.C. 1970).

20. *Mickle I*, 166 S.E.2d at 173.

21. *Id*.

22. *Id*. at 195.

23. *Id*.

eventually made their way to the law office of Spot Mozingo, and promptly filed a lawsuit against the other driver, against Cherokee Inc., a construction company repairing the roadway, and against Ford Motor Company, the manufacturer of the automobile in which Janet was a passenger.[24]

The case, *Mickle v. Blackmon*,[25] is significant in South Carolina legal lore because it recognized for the first time liability for negligent design of a motor vehicle. Spot Mozingo's theory of liability focused on the gearshift knob that shattered during the collision. The knob, which was white in color and oval in shape, was made out of acetate butyrate.[26] The evidence at trial showed that the exposure to the ultraviolet rays of sunlight caused this material to deteriorate and become brittle.[27]

The following is a portion of Mozingo's summation from the transcript (understanding, of course, that an argument that was permissible then may not pass muster in today's courtroom).

> [The defense lawyer] talks about me trying to put a lump in someone's throat. I'm not trying to put a lump in anybody's throat. I may be trying to take a lump out of somebody's pocketbook that can afford it, and is the cause of it, but that is all I am trying to do, and I don't make any bones about it. . . .
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> . . . .
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> . . . I don't say you should go back to the old T Model Ford. I used that as an illustration to show him that there are plenty of places you can put a gearshift lever without running it on the outside of the steering wheel. Henry Ford himself put one [on the floor]. He talks about seat belts, and no knowledge of them. Ford made a tri-motor plane back there 30 years ago that had seat belts in them, and, of course, it is appalling to me that these gentlemen from Ford don't even know that they made an airplane. Do you believe that they have been fair with you? Do you believe that a fellow works for Ford Motor Company, and he will sit on that stand and tell you he don't know whether they've made a Ford airplane or not? A high executive? I may be a country boy, and I am, but I know that when I flew out of a pea field in one of them once or twice,

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24. *Id*. at 178-79.

25. *Id*. at 173 ("[A]n automobile manufacturer knows with certainty that many users of his product will be involved in collisions, and . . . [the] extent of injury . . . will frequently be determined by the placement, design and construction of such interior components . . . . By ordinary negligence standards, a known risk of harm raises a duty of commensurate care. We perceive no reason in logic or law why an automobile manufacturer should be exempt from this duty.").

26. *Id*. at 187.

27. *Id*. at 187-88.

> and I have seen them, and I know they know, and I know what they are doing. They have all been told that when you get down there to that little town, if you just tell them you don't know nothing, that ain't your department. Just tell them that it's somebody else; that you don't know about that, and they keep shifting it around, and that is exactly what they take us for.
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> . . . You know there is something bad wrong about these ['49 Fords]. When I first heard about it, it worried me because the car was an old car, but the deeper we dug into this case, members of the jury, the more I found about the troubles they were having at Ford when they made this car. If you recall the testimony of Mr. Burnett, he said that there had been a big argument at Ford, and part of them left, and part of them went away, and they went out to get a new team, and they came in there, and this is the first automobile that all the new crowd tried to get together on, and tried to manufacture, and everybody was wanting to have his say about it there. There hadn't been any automobiles, and the war had been on, and the public was automobile hungry, so what they did they all came in from new places, each jealous of the other, with his own ideas, and they all sat down and one said, "This is what we are going to put on it," and the other said, "No, we are going to design it this way," and there wasn't a safety man in the crowd or anybody that cared, and what they did they let the interior decorators tell the public what they had because the knob was pretty, and because they said they found out it fit the average person's hand.
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> . . . Can you imagine, members of the jury, a company the size of Ford coming in here and expecting us down here to believe that this ball is safe because some fellow heated it real warm, a plastic ball, and pushed it on there one inch a minute. Not one inch a second. One inch a minute. Have you ever heard of anybody being in an accident thrown one inch a minute. Why, it would take you two weeks to go from here to the back of the courtroom [at one inch per minute].
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> . . . You just remember, Mr. Foreman and gentlemen of the jury, if you are in an accident, and you just get thrown one inch a minute, you will be all right in that Ford.[28]

When the case was over, Mozingo had received his usual handsome verdict and South Carolina had a new law on the books. Mozingo died the year before I started law school, but I think he would be shocked at the slow death and decline of the civil jury trial in the United States. So what

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28. Transcript of Record at 1047-1053, Mickle v. Blackmon, 166 S.E.2d 173 (S.C. 1969) (No. 18869).

happened to glory days where cases were decided by juries? Scholars have identified some ten or twelve causes of the decline of the jury trial in this country,[29] but in my view they can all be grouped into three main categories.

The first is the mindset preached by the Administrative Office of the United States Courts in Washington, D.C.: judges need to "manage their dockets" rather than try cases that are ready for trial.[30] This has led to an even more pernicious notion—a trial represents a "failure" of the judicial system to properly perform its mission of resolving disputes.[31] Lawyers then begin to worry the judge—let me rephrase: the public servant whose job title is "trial judge"—is going to be irate with counsel when he or she learns settlement efforts have been unsuccessful, thereby necessitating a trial.

Secondly, alternative dispute resolution (ADR)—commonly known as arbitration and mediation—has thrived in recent years. On the federal level, there is a well-established body of statutory[32] and case law that favors mandatory arbitration agreements.[33]

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29. *See generally* Scott Brister, *The Decline in Jury Trials, What Would Walmart Do*?, 47 S. TEX. L. REV. 191 (2005); William G. Young, *An Open Letter to U.S. District Judges*, 50 FED. LAW. 30 (2003).

30. *See, e.g.*, JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR app. at 85, 107 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (showing the statistics that are regularly kept and published by the Administrative Office, such as the number of cases pending and the time for handling these cases. Naturally, any judge would not want their respective district to look bad under the scrutiny of the public statistics); *see generally* R. Lawrence Dessem, *Judicial Reporting Under The Civil Justice Reform Act: Look, Mom, No Cases!*, 54 U. PITT. L. REV. 687 (1993) (discussing the case management pressures placed on judges from Congress, via the Civil Justice Reform Act of 1990, and the Admin. Office of the U.S. Courts); *see also* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 ("Under the experts' guidance, judges have begun to experiment with schemes for speeding the resolution of cases and for persuading litigants to settle rather than try cases whenever possible.") (citation omitted).

31. *See* Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 SMU L. Rev. 1405, 1423 (2002) (stating that while settlements in cases are a good thing, we still desperately need trials because trials help the whole process; and it is a shame that some view a trial as the failure of dispute resolution); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925 (2000) (documenting a statement made by a federal judge at a Los Angeles Federal Bar Association meeting that ninety-two percent of the cases in federal court ended short of trial and that the remaining eight percent represented a "failure" of the system).

32. *See, e.g.*, Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2006).

33. *See, e.g.*, *In re* Am. Express Merchs.' Litig., 554 F.3d 300 (2d Cir. 2009) ("This Court frequently enforces mandatory arbitration clauses . . . . We do so on the principle that it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we have often and emphatically applied.") (citing Arciniaga v. Gen. Motors Corp., 460 F.3d 231, 234 (2d

Let me see a show of hands. How many of you are signatories to ten or more mandatory arbitration agreements? I see very few hands. All of you need to go home tonight and read the fine print on your automobile purchases, investments in the stock market, and even your cell phone user agreement. I would venture to say that everyone in this room is a party to ten such agreements. Yale Law Professor Judith Resnik had this point driven home to her when she read the fine print of her cell phone contract. She learned from perusing this document that by opening the package that contained the cell phone, she had already agreed to mandatory arbitration of any and all disputes she might have with the company. She also learned that she had forever given up her right to participate in a class action against the phone company. Then, in a spirit of true equanimity, the phone company gave up its rights to participate in a class action against her![34]

Let me just say a word about voluntary mediation. We have all heard the saying: "A bad mediation is better than a good trial any day." Certainly there is a lot to be said for the process by which parties to a dispute amicably resolve their disagreement before a neutral mediator trained to draw the parties to the middle so that they may peacefully and quietly walk away from the controversy.

At the risk of sounding like a complete heretic, permit me to offer a few observations. Unlike many judges, I am not in favor of mandatory mediation in every case. At one end of the spectrum, there are some cases so frivolous that they do not deserve mediation, and I say this as a former plaintiff's lawyer. Once in mediation, these worthless cases instantly have a settlement value because, as everyone knows, the only way a case is going to settle is through the exchange of money. Additionally, the threat of looming mediation deadlines may force unwarranted nuisance value settlements.

At the opposite end of the spectrum are high-liability, high-damages cases. Once in mediation, the settlement value of these cases is pushed to the middle by a mediator determined not to fail and thereby have to resort to a trial. The result is a one-size-fits-all system of justice where worthless cases and high-damages cases are all thrown into the mix and homogenized. As California attorney Patricia Refo has written:

> [T]here are important and intangible social benefits that flow from the public trial. Trials can be about catharsis and healing. Trials can educate

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Cir. 2006)) (quotations removed).

34. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1135-36 (2006).

> and enlighten. Trials can be a catalyst for change. Trials can bring the light of public scrutiny into what would otherwise be the dark corners of our social landscape. Settlement and compromise can be viewed as just another step toward moral relativism where there are only shades of grey. Trials are about right and wrong, good and bad, innocence and guilt.[35]

Judge Patrick Higginbotham of Texas espoused a similar view when he said:

> Ultimately, law unenforced by courts is no law. We need trials, and a steady stream of them, to ground our normative standards—to make them sufficiently clear that persons can abide by them in planning their affairs—and never face the courthouse—the ultimate settlement. Trials reduce disputes, and it is a profound mistake to view a trial as a failure of the system. A well-conducted trial is its crowning achievement.[36]

Finally, one more quotation from an avowed opponent of mandatory ADR, Arkansas Federal Judge Thomas Eisele:

> With all due respect, it is not fair to describe ADR programs as only different in some negligible or unimportant degrees from traditional trials in federal courts. They are clearly different in kind and in basic philosophy. In real trials, the objective is to arrive at the truth, vindicate rights, and to do justice. The evidence presented at a real trial is all important. . . . Not so with ADRs. They operate in a different atmosphere: where fault, guilt or innocence, right or wrong are not central to the process; where one-tenth of a loaf is better than none; . . . where the evidence is de-emphasized; where every claim is assumed to have some value; where true justice is considered too expensive or an unattainable abstraction.[37]

Contrast Judge Eisle's opinion with the remark I overheard at a recent judicial conference. There, one of my colleagues on the federal bench commented that he had not tried a single civil case in the preceding calendar year. Some had been pruned from the docket with orders granting summary judgment or motions to dismiss, and the rest were put to bed with successful ADR tactics—mediation before an appointed mediator or bare-knuckled settlement conference with the judge. That judge concluded his glowing self-assessment with the observation, "After all, we're in the dispute resolution business."

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35. Patricia L. Refo, *The Vanishing Trial*, 30 LITIG. 1, 4 (2004).
36. Higginbotham, *supra* note 31, at 1423.
37. G. Thomas Eisele, *The Case Against Mandatory Court-Annexed ADR Programs*, 75 JUDICATURE, June-July 1991, at 34, 36.

The oath that we Article III judges take when we assume the bench says nothing about dispute resolution. Instead, the oath commands that we "will *administer justice* . . . and do equal right to the poor and the rich . . . ."[38]

The third fundamental reason for the decline in jury trials—and this is the one where we judges and lawyers bear much of the blame—is the fact that jury trials have become protracted, cumbersome, and costly. Let me give some real life examples. Last year, in our courthouse, a property damage and business interruption claim was tried. Between them, the parties proposed to introduce ten thousand documents for the jury to review. Ten thousand documents! The trial judge ordered the parties to collaboratively determine how many would be admitted without objections. How many did they agree upon? Two. In that same case, there were twenty-four experts, and can you guess how many *Daubert* challenges?[39] That's right, twenty-four.

In 2007, the story broke that a Washington, D.C. administrative law judge had sued his dry cleaner for $54 million because it had allegedly lost a pair of his pants.[40] The case dragged on for two years,[41] complete with testimony on how the cleaner maintained his records and what it really meant by the sign that read "Satisfaction Guaranteed."[42] At trial, the cleaner prevailed, but not before spending more than $100,000 in legal fees, closing his business, and considering moving back to his native country.[43]

In 2009, a *Wall Street Journal* article examined the furor that followed industrial giant AIG paying bonuses totaling $165 million to employees of its financial products division; a division that was said to have contributed

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38. "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution of the United States. So help me God.'" 28 U.S.C. § 453 (2010).

39. *See generally* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (setting the standard for governing expert testimony).

40. Henri E. Cauvin, *Court Rules for Cleaners In $54 Million Pants Suit*, THE WASHINGTON POST, June 26, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/25/AR2007062500443.html.

41. *Id*. ("He initially sought as much as $67 million in damages, scaling back the demand shortly before trial. During the past two years, he rejected offers to settle, first for $3,000, then for $4,600 and finally for $12,000.").

42. *Id*. ("According to [the plaintiff-judge], the litigation is about safeguarding the rights of every consumer in the District who might fall prey to signs like [Satisfaction Guaranteed] once posted in Custom Cleaners.").

43. *Id*. ("[The court] will consider making [Plaintiff-Judge] also pay the [dry cleaner's] attorneys' fees arising from the two-year legal battle. With the legal costs likely to exceed $100,000, however, the [dry cleaner isn't] counting on [Plaintiff-Judge] being able to pay . . . .").

to the great financial collapse of 2008.[44] The bonuses were paid[45] and "[g]overnment lawyers concluded abrogating the contracts [regarding the bonuses] would cost more in legal fees than letting the bonuses go forward."[46] Did everyone get that? More than $165 million to defend a breach of contract action!

Today, most judges and lawyers view the decline in jury trials as a positive sign. They say that ADR is working and that litigants are settling cases for fair sums without spending exorbitant amounts of money preparing for trial.[47] There are, however, in my view, detriments to a system in which settlements are presumed to occur in virtually every case, and jury trials are seen as aberrations. What are some of the drawbacks to the system as we have it today?

First, a world without trial gives us no benchmarks or standards. In other words, the drop in the number of trials is resulting in a drop in the number of legal precedents—standards that govern the conduct of citizens in a nation that values the Rule of Law. The decline in jury trials then feeds on itself because with no precedent, going to trial is even more of a gamble in those relatively few cases that do make it to the courtroom. Simply put, without trials it is difficult to assess the worth of a case on its merits; the settlement value is virtually dictated by the cost of defending the case.

A second deleterious effect of substantially-reduced jury trials is the gradual, but sure reduction of the quality of the legal work performed by attorneys in cases that actually do go to trial. Trial skills are quickly becoming relics of a bygone era. The forensic skills required of a good mediator are few: a general knowledge of the controversy and the gift of gab. Not so with trial lawyers. They must know the substantive law that applies to the case; all aspects of trial procedure; that maddening code that is the Federal Rules of Evidence; and the local customs, rules, and mores of the jurisdiction where the case will be tried. To quote Judge Eisele once again:

> Any experienced trial judge will tell you that it is the proof and the evidence that determine the outcome of over 95 per cent of the cases and

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44. Jonathan Weisman, Naftali Bendavid, & Deborah Solomon, *Treasury Will Make Grab to Recoup Bonus Funds*, WALL ST. J., Mar. 18, 2009, at A2.

45. *Id*. (according to White House Spokesman Robert Gibbs the bonuses were already too far gone in the process of being paid out).

46. *Id*.

47. *See* Higginbotham, *supra* note 31, at 1416 ("[Many factors] enhance[] the chances for settlement and undoubtedly reduces the number of trials. . . . There is little question but that civil litigation is expensive, beyond the means of most persons. Without contingent fee contracts, few persons could afford to pursue a civil claim to trial.").

> not the eloquence or histrionic talents of the lawyers. And the procedures, rules, and the evidentiary safeguards incident to true trials ensure a high degree of reliability with respect to the results obtained. . . . [In mediation,] the debating skills of attorneys—and not their truth-revealing, fact-establishing trial skills—are glorified . . . [and] the evidence is de-emphasized . . . .[48]

With a dramatic decline in trials and courtroom skills atrophy, the Rules of Evidence become an unnecessary annoyance and the well-read, flamboyant trial lawyer—an advocate in the truest sense of the term—goes the way of the dodo bird. Young lawyers lose the once-considered indispensable opportunity to observe attorneys in the courtroom. The phenomenon then feeds on itself as more and more lawyers—having no courtroom experience—settle cases, at least in part, because of the fear of going to trial. With the growth in unseasoned trial lawyers, it follows that in the not too distant future, judges as well will occupy the bench with little trial experience. These trial judges will be shipped off to new judges' school where they are carefully instructed to aggressively manage their cases, prune their dockets, and look to a settlement in every case,[49] and with a mindset being: It's not how good you are, but how quick you are.

Finally, and perhaps most importantly, the demise of the civil jury trial means the loss of an important aspect of participatory democracy. Federal Judge Bill Young of Boston has said:

> The most stunning and successful experiment in direct popular sovereignty in all history is the American jury. Properly constrained by its duty to follow the law, the requirement of jury unanimity, and evidentiary rules, the American jury has served the Republic well for over 200 years. It is the New England town meeting writ large. It is as American as Rock'n'Roll.[50]

An often cited reason for the decline in civil jury trials is a growing distrust of juries. Judge William Wilson of the federal bench in Arkansas recently opined:

> Over the past several years, I believe all three branches of government have become more and more distrustful of juries. They seem to forget that a jury is a cross section of the citizens who elected them to office (or elected those who appointed them). In political campaigns these citizens

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48. Eisele, *supra* note 37, at 4.

49. *See generally* Royal Furgeson, *Civil Jury Trials RIP? Can It Actually Happen in America?* 40 ST. MARY'S L.J. 795 (2009) (providing a federal judge's similar sentiments on the demise of the civil jury trial).

50. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK L. REV. 67, 69 (2006).

> are paragons of virtue; but when they are called for jury service, they somehow become incapable of making important decisions. The language in the decisions favoring preemption is high flown; but, at bottom, it reflects distrust of the randomly selected citizens who sit on juries. Perhaps our public officials, including judges, have read too much Plato and too little Alexis de Tocqueville.

"Trial by jury is the essence of government reposed in the people. We should trust this institution in fact, not just in word."[51]

What can be done to ensure that our time-honored system of resolving disputes before lay jurors survives? When posing the resolution to stopping the decline of trials, Texas Supreme Court Justice Scott Brister frames the question this way: "What would Walmart do?"[52] Justice Brister then answers his own question by stating the obvious. If Walmart sold jury trials and saw its sales decline, the company would not "throw in the towel, or demand legislative protection . . . [Nor would Walmart] question the patriotism of its customers[.]"[53] Instead, it would "try to respond to the market, producing a better product at a lower price."[54] Using Judge Brister's Walmart analogy, I offer herewith my humble suggestions on improving our product and lowering the price.

First and foremost, something must be done to reign in the cost of expensive and unnecessary discovery in civil litigation.[55] Despite all the efforts of the various committees of the Federal Judicial Conference, rule changes have had only a marginal effect on the cost and breadth of discovery in today's civil litigation. As Judge Higginbotham has aptly observed, "The discovery beast has yet to be tamed."[56]

Many judges—myself included—have noticed a rise in the number and complexity of discovery disputes that seem to coincide with the decline in civil jury trials. My own theory about this is lawyers—who, as we all know, have combative instincts in their DNA—now view discovery as the battleground where the adversary process is played out. In other words, the focus is no longer on who ran the red light, who shot the clerk, or who

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51. Scroggin v. Wyeth (*In re* Prempro Prod. Liab. Litig.), MDL Docket No. 4:03-cv-1507-WRW (E.D. Ark. Apr. 16, 2008) (Supplement to Apr. 10, 2008 Order denying Defendant's Motions for Judgment as a Matter of Law or for a New Trial on the issue of liability).

52. Scott Brister, *The Decline in Jury Trials, What Would Walmart Do?*, 47 S. TEX. L. REV. 191 (2005).

53. *Id*. at 192-93.

54. *Id*. at 193.

55. *See* Higginbotham, *supra* note 31, at 1416 ("The most costly feature of federal practice, by most accounts, is the discovery process . . . .").

56. Higginbotham, *supra* note 31, at 1417.

breached the contract. Instead, the focus in many situations seems to be on who can catch the other side withholding or destroying a document that might have only tangential reference to the merits of the case. The search for the truth has been replaced by the quest for the "gotcha" moment. In my view, if this trend holds, future generations of lawyers will tell war stories about their discovery battles, not their trials. My theory is supported by a law review article written several years ago by Columbia University Law Professor Charles Yablon, who said:

> [In modern times] the only distinct cultural artifact produced and valued by litigators is the "war story," an oral epic in which tribal elders recount, for the edification of junior associates, the heroic deeds they performed and the smashing victories they obtained during pretrial discovery in cases which ultimately settled.[57]

It is long past time for our rule makers to authorize trial judges to put reasonable limits on discovery according to the individual case. A slip and fall at a big box department store should not justify searching through "millions of documents"—as was urged of me in a recent slip and fall case. Existing limitations on discovery, such as the number and length of depositions, are waived by mutual consent of the parties in virtually every case assigned to me. The judge needs authority to set firm limits on discovery in an effort to substantially reduce the economic burden of preparing for trial.

Next, there should be severe penalties for attorneys who engage in hardball tactics and otherwise abuse the system. Judges have the authority to do this now;[58] the problem is, judges are loathe to use the authority granted them to sanction lawyers, even when egregious behavior is found. The reasons are twofold: In a small state like South Carolina, we judges know most of the lawyers. It is an unwelcome aspect of our job to sign our name to a paper finding that a lawyer has behaved unethically or improperly. Secondly, appellate courts, which sometimes consist of many judges who have never sat on a trial court bench, seem to be especially forgiving of lawyers who misbehave at the trial court level. Trial judges do not like to be reversed, especially when the reversal involves a sanction imposed on an attorney. If we are to rescue our system from the downward spiral in which we find ourselves, trial judges must find the backbone to sanction lawyers when appropriate and appellate courts need to develop a

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57. Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM . L. REV. 1618, 1639 (1996).

58. *See, e.g.*, FED. R. CIV. P. 11(c) & 37(b).

better appreciation of the trial judge's unique perspective in order to suitably gauge misconduct and punishment of the wrongdoer.

Although not a problem in South Carolina, extensive lawyer-conducted voir dire, such as that found in California,[59] must be sharply curtailed. Except in death penalty cases, where voir dire of prospective jurors is especially important, trial judges should handle most of the voir dire, and questions should be limited to excluding jurors who are incapable of giving both sides a fair trial.

Next, there should be less emphasis on the judge managing the pretrial aspects of the case, and more emphasis on the judge managing the trial itself. In my view, and that of nearly every jury that I have canvassed,[60] most cases are over-tried. Existing evidentiary rules give trial judges the authority to ensure that a trial is conducted fairly, without undue repetition, or needless presentation of cumulative evidence.[61] Judges need to be more assertive in exercising the broad discretion granted in these rules.

One little-used, but highly effective method of trial management is for the judge to establish definite time limits—the legal equivalent of basketball's shot clock—during which attorneys must complete the presentation of their case-in-chief.[62] On the few occasions I have employed this device, the lawyers begrudgingly went along. In each of those cases, neither side utilized the entire amount of time I had allotted them and the juries still complained about the repetition.

Beyond time limits, judges need to be more assertive in minimizing duplication and delay. In my view, no jury, during a trial, is going to seriously examine more than seventy-five to one hundred documents. Consequently, judges should use every means at their disposal to encourage lawyers to pare down their evidentiary presentations; carefully rehearse their oral speeches to the jury; minimize sidebar conferences by taking up

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59. *See generally* CAL. CIV. PROC. CODE §§ 222.5 & 223 (West 2006) .

60. JOSEPH F. ANDERSON, JR., EFFECTIVE COURTROOM ADVOCACY 68 (2010) (recounting juror surveys indicating significant juror dissatisfaction with undue repetition and cumulative evidence).

61. *See* FED. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."); FED. R. EVID. 104 ("[T]he admissibility of evidence shall be determined by the court . . . ."); FED. R. EVID. 611 ("The court shall exercise reasonable control over the mode and order of . . . presenting evidence so as to (1) make the . . . presentation effective . . . [and] (2) avoid needless consumption of time . . . .").

62. *See, e.g.*, United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1986) (opining that the court has the power and authority to impose reasonable time limits on both civil and criminal cases in the exercise of its reasonable discretion, but the court must analyze each case to assure the time limits set are not arbitrary).

evidentiary issues and procedures with the judge after hours or over a lunch break; and stipulate to all of the undisputed facts in a trial.

Attorneys could contribute to the renaissance of the civil jury trial by honing their advocacy skills. One example should suffice. In his famous discourse on cross-examination, Irving Younger set out ten commandments for lawyers to follow when cross-examining a witness.[63] The principal commandment: Be brief![64] In my courtroom, there are many sinners; I see lawyers violating Younger's commandments on a regular basis. In fact, most cross-examinations in my courtroom resemble discovery depositions.

The bench and bar also need to encourage and exploit mediation in every possible scenario. In my view, mediation should occur earlier in the process, before significant amounts of money and time have been spent on discovery. However, in our district, the lawyers on our District Court Rules Advisory Committee suggested that the mediation deadline set in our scheduling orders should be a date after all discovery has been completed.[65] This means that the litigants will experience substantial transaction costs before getting in front of the mediator. To be sure, there are some cases, such as medical malpractice and products liability cases, where the parties need to know what the other's expert will say before a meaningful ADR session can be conducted. In many cases, however, the facts are not in significant dispute. In my view, early mediation in those cases would benefit the litigants and our system of justice immensely. Such a procedure would certainly reduce the number of billable hours available to the attorneys in the case; however, it is simply the right thing to do.

Finally, those of us involved in the administration of justice in America need to learn to think outside of the box. Our time-honored common law traditions need to be tweaked from time to time. For example, I strongly believe that we should allow jurors to ask questions during trial. Frequently, when I try a case sitting without a jury, it is not at all unusual for me to ask over one hundred questions. Sometimes I simply did not hear what was said and wish to have it repeated; sometimes I have a more substantive question that needs to be answered before I can properly decide the case. It strikes me as odd that we do not allow jurors the same opportunity in our search for the truth. Nevertheless, appellate courts have

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63. Irving Younger, *Cicero on Cross-Examination*, *in* THE LITIGATION MANUAL: TRIAL 387, 387-393 (John G. Koeltl & John Kiernan eds., 1999).

64. *Id*. at 389.

65. *Contra* D.S.C. R. 16.07(b) (explaining that the initial mediation conference, which begins the mediation process, shall not be scheduled in order to delay the discovery process).

traditionally opposed this practice,[66] and unless and until the appellate courts change their stance or the rules change, questions by juries remain taboo.

Other innovations might include mini-summations given by the lawyers at appropriate points during the trial. During these sessions, attorneys can summarize and interpret evidence the jury has heard on a specific aspect of the case. This helps the jury follow the issues and compartmentalize their thinking in a way likely to produce a better result.

Additionally, we need to promote transparency in litigation but in the right way and at the right time. Let me explain what I mean by giving two real-life examples.

Deep within the bowels of the federal courthouse in Birmingham, Alabama, there is a vault.[67] Contained within that vault is the entire file of a case involving a child injured by a product manufactured by a maker of children's toys.[68] That is all we know about the case because the trial judge signed an order authorizing the sealing of the file at the conclusion of the case.[69]

Now, we go to California, where attorney Mark Geragos went on national television to discuss a controversy where a young teenager died after being turned down for a liver transplant by her health care provider. Here is what Geragos said two days after the child's death:

> [T]hey used every pretext in the book to claim [the liver transplant] was experimental, even though the doctors unanimously at UCLA said she needs it, she's a good candidate and they actually gave the odds at 65% over six months for somebody similarly situated and then some bean counter over at CIGNA decided that they not only didn't want to pay for that, but that they did not want to pay for the after care.
>
> . . .
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> . . . [T]he thing that's just so gauling [*sic*] about this, is that . . . there's people who are not even doctors, they've got nurses, people trained there

66. *See, e.g.*, United States v. Polowichak, 783 F.2d 410, 413 (4th Cir. 1986) ("We disapprove of the district court's inviting juror questioning . . . as well as permitting a juror to state his question within the hearing of the other jurors."); DeBenedetto v. Goodyear Tire & Rubber Co., 754 F.2d 512, 516 (4th Cir. 1985) ("One simply cannot compare the questioning by the trial judge—who is trained in the law and instructed to 'see that justice is done'—with the questioning by members of the jury—who are untutored in the law, and instructed to sit as a neutral fact-finding body.").

67. *See generally* TED GUP, NATION OF SECRETS: THE THREAT TO DEMOCRACY AND THE AMERICAN WAY OF LIFE 225-27 (2007).

68. *Id.*

69. *Id.*

> supposedly to make these decisions, but they're practicing medicine without a license. . . . [O]ne of the reasons I've called for and I'm going to continue to call for, and submit to the D.A. here, literally a request for a filing on CIGNA for manslaughter or murder, . . . I've gotten hundreds, if not thousands of e-mails today from people who [used to] work at CIGNA who said that they have a corporate policy of saying, deny, deny, deny, and hopefully the people will die and that will be the end of it.[70]

Many would agree if "bean counters" at a major U.S. health insurance corporation ignored the unanimous opinions of physicians, practiced medicine without a license, or committed murder, and these allegations were supported by countless former company employees, the public has a legitimate right to the details of these wrongdoings. Yet, we have no proven facts, only Geragos's incendiary and possibly unethical comments issued before the first deposition was taken.

The time for the public to scrutinize what actually happened in this case is after the facts have been developed in the process of adversary litigation. Unfortunately, if this case plays out as most cases do, the public will never know if Geragos's sensationalized allegations are true. This is because the attorneys will attempt to shroud discovery in secrecy with a comprehensive protective order and any settlement will likely be kept secret. As Professor Scott A. Moss points out:

> Lawsuits are tales that begin with great fanfare and suspense, with fire-and-brimstone pleadings telling dueling stories of injustice and lies, followed by contentious pretrial battles. Yet most lawsuits are tales that end abruptly, with a whimper of a one-page voluntary dismissal that ends the dispute without explanation, making it appear that the plaintiff simply gave up. . . . [S]o many lawsuits . . . [end] with the legal equivalent of never mind.[71]

In other words, we need less talking at the beginning of the litigation because the complete facts have yet to come to light and more openness at the conclusion of the case when the facts have been tested on the cold, hard anvil of sharp litigation.

Perhaps Geragos should have taken a cue from Perry Mason, the venerable television lawyer from the '50s and '60s. In one episode, Mason defends his erstwhile secretary, Della Street, who is accused of murder. In one scene, Mason and Street walk out of the courthouse, fighting their way

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70. *Geraldo at Large* (Fox News television broad. Dec. 23, 2007) (transcript available through Westlaw, 2007 WLNR 25375574).

71. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869-70 (2007) (quotation marks removed).

through a pack of reporters hurling questions at them. The following colloquy ensues:

> REPORTER #1: Ms. Street, how do you feel about having Mr. Mason as your attorney?
>
> REPORTER #2: Mr. Mason, can you comment on the prosecution's case against Ms. Street?
>
> REPORTER #3: When do you expect to go to trial?[72]

After Mason and Street are comfortably seated in his convertible, and before starting the engine, Mason deadpans: "Answers to your questions: No comment, no comment, no comment . . . but, you can quote me!"[73] Before you are quick to condemn Mason for failing to use the opportunity to reach potential jurors, let me remind you that Mason tried close to three hundred cases and only lost three.[74]

Today's program carries the subtitle of "War Stories," referring to the lessons we speakers have learned about the practice of law and life in general from some of the giants in our profession who have gone before us. Before I conclude, let me pass along a little known story about our system of justice that you may find interesting.

Every judge in South Carolina draws inspiration from the admirable career of federal Charleston Judge J. Waties Waring, who served our district in the '40s and '50s, an era of great social upheaval when many judicial decisions did not meet with the approval of a majority of South Carolinians. Judge Waring was a man of cool courage, readily agreeing to take the controversial cases the other judges shunned. His infamy was such that once, "[w]hen lightening struck a house next to his summer cottage on Sullivan's Island beach, its owner nailed up a neatly lettered sign: 'Dear God, he lives next door.'"[75]

One of my favorite Judge Waring stories involves a case early in his career that apparently had a great influence on his growing commitment to civil rights in South Carolina. The case concerned Isaac Woodward, Jr., a twenty-seven-year-old black gentleman whose wife was then living in

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72. *Perry Mason: Perry Mason Returns* (NBC television broadcast, Dec. 1, 1985).

73. *Id.*

74. *See generally* BRIAN KELLEHER & DIANA MERRILL, THE PERRY MASON TV SHOW BOOK: THE COMPLETE STORY OF AMERICA'S FAVORITE TELEVISION LAWYER (1987) (explaining that Mason lost *The Case of the Witless Witness*, *The Case of the Terrified Typist*, and, his most famous loss, *The Case of the Deadly Verdict*).

75. *South Carolina: The Man They Love to Hate*, TIME, Aug. 23, 1948, *available at* http://www.time.com/time/magazine/article/0,9171,798991,00.html (last visited Mar. 25, 2010).

Winnsboro, South Carolina.[76] In February 1946, Woodward left the Army at Camp Gordon, which is located near Augusta, Georgia.[77] He bought a bus ticket and settled in for the one hundred mile trip to return home to his wife.[78]

Unfortunately, in Batesburg, a quaint village outside of Columbia, South Carolina, Woodward was pulled off the bus by law enforcement and placed under arrest.[79] Woodward was brought in front of the Batesburg Mayor's Court and subsequently pleaded guilty to public drunkenness and disorderly conduct.[80] During this ordeal, his eyes were red and swollen and, later that day, Woodward was taken to the local veteran's hospital.[81] After three months of treatment and care, Woodward was released from the hospital—completely blind.[82]

Civil rights groups took up Woodward's cause and argued that Batesburg's Police Chief Lynwood Shull had forcefully jammed his nightstick into Woodward's eye sockets.[83] Soon the case had become a national cause and Police Chief Shull was indicted on federal civil rights violations.[84] South Carolinians soon stood behind Chief Shull.[85] Law enforcement agencies protested the involvement of federal authorities in a "purely local matter."[86]

Batesburg was the hometown of another federal judge, George Bell Timmerman, who knew Chief Shull and did not want to try the case.[87] As always, Waring agreed to travel from Charleston to Columbia to serve as trial judge.[88] The three-day trial involved a significant battle between the lawyers and included episodes in which Judge Waring attempted to curtail racists appeals by Shull's counsel.[89] One lawyer's closing argument included the statement: "If delivering a verdict against the federal

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76. TINSLEY E. YARBROUGH, A PASSION FOR JUSTICE: J. WAITES WARING AND CIVIL RIGHTS 48 (1987).

77. *Id*.

78. *Id*.

79. *Id*.

80. *Id*.

81. *Id*.

82. *Id*.

83. *Id*. ("'I hit him across the front of the head after he attempted to take away my blackjack,' Shull explained. 'I grabbed it away from him and cracked him across the head.'").

84. *Id*. at 49 ("[T]he Department [of Justice] had decided to bring misdemeanor charges against [Police Chief] Shull . . . .")

85. *Id*.

86. *Id*.

87. *Id*.

88. *Id*.

89. *Id*. at 52.

government means that South Carolina'll have to secede again . . . then let's secede!"[90]

It was quite obvious to Judge Waring that the all-white jury would return a verdict for the defendant, and courthouse observers expected a so-called "swinging door" verdict.[91]

Judge Waring told the bailiff that while the jury was deliberating, he was going to take a twenty-minute walk around downtown Columbia to get some fresh air and clear his mind after the hard-fought trial.[92] The bailiff responded that Judge Waring would probably be better advised to simply wait on the verdict and then take his walk. Judge Waring countered to the bailiff: "They're going to stay out twenty minutes . . . because they can't come in until I come back, and I'm not going to be back here for twenty minutes."[93] Judge Waring then walked out of the courtroom to explore Columbia.[94] When he returned to the courtroom, he received the unanimous verdict of not guilty, which was rendered only a few minutes after the jury went in the deliberation room.[95]

According to Yarborough, Judge Waring's walk was a feeble attempt to lend "a little more atmosphere of respectability" to the proceedings.[96] I believe Judge Waring was acutely aware that the national press was focusing on South Carolina and a quick verdict, if one was returned, would only further damage our state's image around the country. I have to confess that on at least two occasions I have presided over a trial where I was fairly certain there was going to be a quick verdict. One way or the other, I have taken a walk—perhaps using the same streets Judge Waring traveled—to lend a little respectability to the proceedings and to assuage the feelings of the losing litigant.

Before I conclude, I need to link the Bear Bryant story as promised. For me, today's program is, in a sense, a bittersweet one. Those of us in the auditorium today will enjoy a nostalgic review of the exploits of current-day lawyers and some who have gone before us in the courtroom trying cases. We will be reliving the glory days of yesteryear. In a sense then, we are not unlike those Alabama fans, coming together to enjoy the warmth, humor, and successes of some of the giants of our profession.

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90. *Id.* (internal quotations removed).

91. *Id.* A swinging-door verdict is one in which the door on the jury box has not stopped moving before the jury returns to announce that it has reached its decision.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Thirty years from now, the South Carolina Bar may not be able to sponsor a program on war stories or trial advocacy. If it does, I seriously doubt the program could match the one in store for you today. Imagine, if you will, the keynote speaker of the South Carolina Bar's Trial Advocacy Program in the year 2049 who begins to relate a war story to the next generation of trial lawyers and says to the audience, "I looked that mediator right in the eye and then I said . . . ."

My remarks today necessarily included some criticism of our profession and the legal system that we all hold dear. I have probably offended lawyers, federal judges, mediators, the appellate courts, and rules committees. I have always tried to keep my remarks to groups of lawyers upbeat and positive, but today I felt it necessary to say some things that simply needed to be said. If I have offended any of you or stepped on your toes in any way, I would like to avail myself of what I call the Bubba Ness Rule, which leads to my final war story.

Julius B. "Bubba" Ness was a decorated war hero, state legislator, very fine circuit judge, and eventually chief justice of the South Carolina Supreme Court.[97] Early in his career as a trial judge, Justice Ness was assigned to Lexington County, where he presided over a condemnation suit against the state brought by Milo Smith, who was Lexington's counterpart to Spot Mozingo.[98] Justice Ness eventually dismissed the case, finding the suit lacked all possible merit.[99] Afterwards, Milo was summoned to the judge's chambers where Justice Ness passed him a note: "You have twenty-four hours in which to call me any kind of name you want. After that, you will be in contempt of court."[100] The irrepressible Milo immediately replied, "Your [H]onor, this case is of such a magnitude that I think I should have an extension of time."[101] So, harping back to the Bubba Ness Rule, if I have offended anyone today, you have until ten o'clock tomorrow morning to call me any kind of name you want. After that, you will be in contempt of court. No extensions of time will be granted.

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97. Sol Blott, *Memorial to Chief Justice Julius B. Ness*, *in* Vol. 303, SOUTH CAROLINA REPORTS (1991) (the memorial was inserted before the South Carolina cases published in the reporter); see also Bruce Littlejohn, *Memorial to Chief Justice Julius B. Ness*, *in* Vol. 303, SOUTH CAROLINA REPORTS (1991) (same).

98. T. FELDER DORN, THE GUNS OF MEETING STREET: A SOUTHERN TRAGEDY 153 (2001).

99. *Id.*

100. *Id.*

101. *Id.*