

TRIAL BY AGREEMENT

Lessons Learned

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I. Most Americans, including lawyers and appellate judges, think that a jury trial in a civil case is something to be avoided because the result is too unpredictable and the pretrial discovery expense necessary to make it less so, is too burdensome. Unless we trial lawyers and trial judges make the dispute resolution product we are promoting, more affordable and safer, we will continue to lose in our competition with JAMS and AAA.

A. We have obviously brought this upon ourselves. Judicial doctrines like Twombal, Daubert and Mashushita, expansive application of pre-emption and compulsory arbitration, and restrictions on class

actions, are all reflections of an explicit distrust of jury verdicts and an assumption that jury trial are so expensive that the threat of one constitutes blackmail. How we instruct juries, when we instruct them, how we find out about and respond to their questions are so bound in tradition that we can only wonder how they can get it right.

- B. So what can be done to make Americans regard the 7th Amendment at least as important as the 2d?
- C. In a word, we have to reduce discovery expense and improve the perception of juror comprehension.

II. Reducing Discovery Expense

- A. Before the trial starts there are three areas of major expense: depositions, e-discovery and expert witnesses. Here are my proposals for all three:

1. *Depositions:* Reduce the length from 7 hours to 3 hours and make sure that the three hours are just like cross in court by preventing defending counsel from saying anything. This will alone reduce discovery expense by 50%.
2. *E-Discovery:* the expense here is not in locating or searching the documents, but in reviewing them for responsiveness and privilege. That expense can be eliminated if the court requires the parties to produce every email in the files of a limited number of key witnesses regardless of responsiveness or privilege, except those written by or exclusively to an attorney.
3. *Expert Witnesses:* First, just as we have eliminated discovery of the expert's communications with counsel or drafts of reports,

we should eliminate depositions of experts and instead require and limit them to detailed written reports. Both are totally unnecessary. Second, we should consider allowing testifying experts to be compensated based upon the outcome of the case: with real skin in the game, we will get expert's who really believe in what they say.

III. I do not expect or even suggest that these proposals be embodied in rule changes. Instead, I hope to get opposing counsel to agree to a set of rules that govern a particular case, that include some of these ideas and that we don't even need the court's permission to adopt.

A. Because I was blessed by being involved only in complex commercial cases and with good opposing counsel, I was able to develop a set of Pretrial Agreements that my firm has been suggesting to

opposing counsel for over a decade. The most recent version is in your materials.

1. Some have already been largely embodied in federal rules, like the inability to discover communications between counsel and expert witnesses or prior drafts of expert reports.
2. Others, like the limitation of depositions to 3 hours and the elimination of expert depositions entirely, are hot off the press.

B. The key has always been to attempt to reach agreement on as many of these as possible before discovery begins. Once you are in the heat of battle, what appears to be good for one side is often deemed to be bad for the other and it is hard to reach agreements.

- C. Some of my proposed pretrial agreements are always accepted and some are more controversial. The former will undoubtedly make their way into court rules somewhere some day.
- D. I have never kept a record of how many times a particular paragraph is agreed to, either as written or modified by opposing counsel, but intend to do so going forward. I am also establishing a website called TrialByAgreement where these and other suggested agreements can be found and debated among trial lawyers.
- E. Because my Pretrial Agreements have worked so well, I have also created a list of possible Trial Agreements, largely intended to improve juror comprehension.
 - 1. The start of discovery is not too early to begin discussing and trying to reach agreement on

many of these items—simple things like using a jury questionnaire, a juror notebook and pattern charges where they exist, seem like good ideas at the start of a case, but may not appear so neutral on the eve of trial.

2. Each one of these Trial Agreements is worthy of a full discussion among experienced trial lawyers and judges.
3. My attitude is to take whatever agreements I can get.

IV. Trial by Agreement is a way of reducing expense, stress and the uncertainty of pretrial rulings and a jury trial. Most judges welcome it, and I go around speaking on programs like this to encourage them to urge lawyers to agree on these types of things.

- V. I am also creating a website called WeThePeople, WeTheJury as a place where those who have served on state or federal juries can go to discuss their experiences, anonymously and without mentioning proper names.
- A. Nothing like this exists and I believe that most jurors who are likely to go to such a website, are likely to express satisfaction with the experience.
- B. I also think that trial lawyers and judges can use these comments to improve how they conduct jury trials.
- VI. If trial lawyers cooperate, there is no inherent reason that JAMS or the AAA should be winning the dispute resolution competition.
- A. Businesses can incorporate into their contracts agreements to arbitration-like discovery rules to govern preparation for a trial. Alternatively, good trial lawyers can agree to their own streamlined rules.

- B. Without the need to pay judges by the hour and with the availability of appellate review of legal issues, trials have other advantages over arbitrations
- VII. If a lawyer is paid by the hour, there is little incentive to reduce the time spent on pretrial discovery. Other than preaching the virtues of alternative fees that reward lawyers for results and not effort, there is little we can do to get rid of this impediment to efficiency.
- A. But we should reconsider the ban on compensating testifying experts on a contingent fee basis.
 - B. Expert expenses, along with the expense of reviewing electronic documents before they are produced, are probably the largest part of the cost of any trial or arbitration.
 - C. We should reconsider the ethical ban on paying testifying experts on a contingent fee basis. Most

jurors find that the experts cancel each other out and are not outcome determinative. If so, why are we spending hundreds of thousands of dollar to hire them? Can't we trust the fact-finder, if fully informed of an expert's compensation, to give the appropriate weight to his testimony?