THE TEXAS CIVIL JURY TRIAL AND THE CALIFORNIA CONDOR: ENDANGERED SPECIES?

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State Bar of Texas
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CHAPTER 19

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American Board of Trial Advocates Award for Stewardship of the 7th Amendment Right to Trial by Jury (2007).

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"Is the trial an endangered species in our courts? Are the number of trials declining and, if so, why? And should we care?" Refo, Patricia Lee, Chair ABA Section of Litigation, *The Vanishing Trial*, 1 Journal of Empirical Legal Studies, p. *v.* (2004)

"The trial as the normal way to deal with litigation, especially civil litigation, was doomed to decline, and perhaps even to vanish, and probably nothing can stop the process. If the trend can be reversed at all, it will be only slightly. We can, so to speak, keep the California condor and the whooping crane alive, but we cannot make them as common as pigeons or sparrows." Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. Empirical Legal Studies 689, 703 (2004).

"Like Scrooge in *A Christmas Carol*, we may, perhaps with trembling voice, say that these are not necessarily the things that will come to pass but rather the things that might transpire if trends remain unchanged, the 'ghosts' of trial's future." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 979 (2004).

I. THE PRECIOUS RIGHT TO TRIAL BY JURY

A. Federal Constitution

1. U.S. Const. Amend. 7

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the rules of the common law."

2. The Founding Fathers

"… trial by jury is as essential to secure liberty of the people as any one of the pre-existent rights of nature." (James Madison)

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." (Thomas Jefferson)

"Trial by jury is the best appendage of freedom by which our ancestors have secured their lives and property." (Patrick Henry)

B. Texas Constitution

1. Tex. Const. Art. I § 15

"The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."

2. Tex. Const. Art. I § 29

"To guard against transgressions of the high powers herein delegated, we declare that everything in this 'Bill of Rights' [Art. I] is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions, shall be void."

3. Tex. Const. Art. V § 10

"In the trial of all causes in the District Court, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury..."

II. THE DECLINING NUMBER OF JURY TRIALS: THE STATISTICS

A. State Court Jury Trials

Texas district court jury verdicts declined 54.7% from 1996 to 2006. This decline is in the face of an *increase* in both total cases and case dispositions over the same ten years – 13.8% and 19.7%, respectively. Jury verdicts as a percent of total dispositions have fallen from 0.67% in 1996 to 0.26% in 2006. These statistics, from the Texas Office of Court Administration, can be found online at http://data.courts.state.tex.us/OCA. Also, charts summarizing this information can be found in the Appendix.

"Civil jury trials are declining. Despite growing numbers of judges, pending cases, and dispositions, the civil jury system in the United States is 'dying,' 'vanishing,' 'the sickest organ of a sick system,' and 'all but disappeared.' Commentators decry this as 'the most profound change in our jurisprudence in the history of the Republic,' fearing results from the disappearance of experienced trial lawyers, to the erosion of democracy." *Id.* at 191-92. "The decline in civil jury trials is not an American phenomenon. Indeed, perhaps the most interesting question from a global perspective is not why American civil jury trials are declining, but why they survive when they have become extinct everywhere else." Brister, Scott, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 SO. TEX. L. REV. 191, 193 (Winter 2005).

B. Federal Court Jury Trials

"The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline. More startling was the 60 percent decline in the absolute number of trials since the mid 1980s." Marc Galanter, *The*

Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts , 1 J. Empirical Legal Studies 459 (2004).

Jury trials as a percentage of total dispositions fell from 5.5% in 1962 to 1.2% in 2002. During that period dispositions increased from 50,320 to 258,876. *Id.* at 462-63.

"In a nutshell, for the past thirty plus years, there has been a marked decline in the trial of cases. Sometimes that is formulated as a demise of jury trials... Someone likened it to having a beautiful home only to discover that it is riddled with termites; suddenly, it is an empty shell... The last couple of years, the average United States district court judge tried thirteen cases of an average length of two days. In other words, twenty-six trial days out of the entire year." Higginbotham, Patrick E., in *Panel Discussion I*, 47 SO. TEX. L. REV. 367, 368-69 (Winter 2005):

III. THE DECLINING NUMBER OF JURY TRIALS: WHY?

A. The Possible Causes

1. Justice Hecht's Opinion

"For civil cases, various explanations have been offered for the decline in the number of jury trials, but no consensus has developed:

- **Pretrial expense and delay.** Civil litigation is expensive, and a large component of the expense is discovery. Discovery is often crucial in achieving just results, but much of the time and money spent in discovery is wasted, and usually that is the other lawyer's fault. Despite efforts to streamline discovery procedures, there has been little reduction in cost. Improving discovery without impairing it has proven hard. With fewer trials, the wait has been virtually eliminated.
- **Unpredictability and higher stakes.** Encouraged by stories of "runaway juries," the distinct perception among defendants is that the risks of loss in civil litigation do not fall within reasonable bounds and thus should be avoided if at all possible. From the plaintiff's perspective, the stories are plainly exaggerated, remedies provide only reasonable compensation, and the risks are necessary to encourage settlement. The rift seems to be growing.
- **Arbitration.** Since the U.S. Supreme Court wrote in 1984 that "[i]n enacting [the Federal Arbitration Act], Congress declared a national policy favoring arbitration," arbitration has mushroomed. Institutional litigants, usually defendants, view arbitration as less expensive, even though the evidence is inconclusive, less risky, even without a right of appeal, and more favorable for strategic reasons. Even plaintiffs' lawyers, who generally deplore the migration to arbitration, often insist on arbitrating disputes with clients. The sustained growth in arbitration may reflect a popular view that it is a preferred dispute resolution system.
- **Mediation.** Not much used before 1986, mediation is now a prerequisite to trial in many Texas and federal courts. Its success in helping resolve disputes is undoubtedly a positive development in civil litigation, but questions remain whether judicial pressure to mediate is too high and reflects an anti-trial disposition. And the cost of mediation adds to the expense of litigation, but it is not clear whether the addition is significant.
- **Substantive law changes.** Tort reform and changes in workers' compensation laws have certainly affected the number of jury trials in Texas, but neither can fully account for the decrease, and neither explains the similar decline in jury trials in other jurisdictions where such changes have not occurred.
- **Procedural law changes.** Summary judgments have increased in federal courts, but while the Texas rule was broadened in 1997 to match the federal rule, civil-case summary judgments in Texas district courts (the only data available) have declined in number and rate, from 6,600 (1.45 percent of dispositions) in 1986 to 4,271 (0.78 percent) in 2005. The addition of *Daubert* hearings has, of course, added to the expense of litigation, although there is nothing to show that the addition is significant overall.
- **Case management.** There has been some concern expressed in the trial bar that the emphasis on judicial management of dockets has turned judges into supervisors and resulted in a bias against trials. But effective case management has made courts much more efficient.
- **Fewer lawyers with trial skills.** The trial bar has also expressed concern that with fewer cases going to trial, fewer lawyers will develop trial skills, creating a spiral effect. On the other hand, the need for arbitration counsel may promote the development of similar skills.

Hecht, Hon. Nathan L., *Arbitration and the Vanishing Jury Trial: Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B. J. 854, 855-56 (Oct. 2006)

2. Justice Brister's Opinion

"Critics point to a rogues' gallery for this trend. An unsympathetic Congress, unsupportive business community, and unsound appellate courts are accused of trying to seize the justice system from the hands of ordinary Americans for political or economic gain. Meanwhile, a complacent citizenry is faulted for meekly submitting to this loss of their liberties. But is

there a simpler explanation? Public use of the United States Mail is also declining, but whose fault is that? In huge dispersed markets like the mail or civil litigation, a conspiracy seems unlikely. Is trial by jury, like the post office, simply facing new and stiffer competition? If Wal-Mart sold jury trials (this an analogy, not a proposal), what would happen when sales declined? Would it throw in the towel, or demand legislative protection? Would it question the loyalty of its employees or the patriotism of its customers? Or would it try to respond to the market, producing a better product at a lower price?" Brister, Hon. Scott, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 SO. TEX. L. REV. 191, 193 (Winter 2005).

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Stephen B. Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 571 J. Empirical Legal Studies 571 (2004).

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Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. Empirical Legal Studies 689 (2004).

Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Studies 705 (2004).

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Brianj Ostrom, Shauna M. Strickland, and Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts*: 1976-2OO2, 1 J. Empirical Legal Studies 755 (2004).

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Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. Empirical Legal Studies 943 (2004).

Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973 (2004).

IV. THE INCREASING NUMBER OF SUMMARY DISPOSITIONS: THE STATISTICS

A. Increased Arbitration Does not Totally Explain the Decline in Jury Trials

The statistics show that filings and dispositions have increased. *See* the Appendix. Thus, while arbitration may have diverted some filings, increased settlement or summary adjudication would seem to be a more plausible explanation for the diminished rate of disposition of those filed claims by jury trial.

"Recall that the decline in trials I am pointing to is supported by data that looks at the disposition of cases filed in the United States District Courts over the past 30 years. The suggestion that diversion of disputes to private resolution through agreement by the parties is a possible explanation can have force within this set only if the "diversion" occurred after suit was filed, since only filed cases appear in the data set. Diverting cases before filing could have an impact on the described rate of decline only if the diverted disputes were more likely to go to trial than the mix of cases that were filed. And we know that the decline in trials in federal court cuts across all categories of cases. Some of the dismissals of filed cases will reflect cases diverted to private resolution. Whether an arbitration clause is enforceable may be contested, and an agreement to deal out of the courthouse could follow an initial filing. The numbers of such cases, as best I can learn, are small." Hon. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?* 55 SMU L. Rev. 1405, 1412-13 (Fall 2002)

B. Summary Judgments

1. State Court

Over the same ten year period that jury trials have significantly declined the rate of summary disposition of cases has increased. Looking at Texas district courts, the number of summary judgments granted rose 64.8%, from 3,348 to 5,514 – a rate that more than triples the increase in case dispositions. Viewed as a percent of total dispositions, summary judgments have risen from 0.76% to 1.05% from 1996-2006. These statistics can be found online at http://data.courts.state.tex.us/OCA. Also, charts summarizing this information can be found in the Appendix.

It is probably significant that the "no evidence" summary judgment rule went into effect by amendment in 1997. *See* Tex. R. Civ. P. 166a(i).

2. Federal Court

The same trend can be seen in federal court.

"[C]ontrary to the assumption of many who see in the vanishing trial evidence of the increasing role of private dispute resolution and settlement, my technique suggests that the settlement rate may have been *lower* in 2000 than it was in 1970, while the nontrial adjudication rate [summary judgment and dismissal on the merits] may have been significantly higher." Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Studies 705, 711-12 (2004).

"Both popular speech and a great deal of scholarly discourse proceed as if the universe of disposition is made up of trial and settlement, so that a decline in trials must mean an increase in settlements. Analyzing dispositions in federal courts from 1970 to 2000, Gillian Hadfield concludes that settlements were actually 'a smaller percentage of cases were [sic] disposed of through settlement in 2000 than was the case in 1970.' What increased as trials disappeared was not settlement, but nontrial adjudication. This is consistent with a documented increase in the prevalence of summary judgment. Comprehensive and continuous data are not available, but a Federal Judicial Center (FJC) study provides a glimpse of the change. Comparing a sample of cases in six metropolitan districts over the period 1975-2000, the researchers found that the portion of cases terminated by summary judgment increased from 3.7 percent in 1975 to 7.7 percent in 2000. Assuming that these districts were not grossly unrepresentative, we can juxtapose these figures with our data on trials. In 1975, the portion of disposition by trial (8.4 percent) was more than double the portion of summary judgments (3.7 percent), but in 2000 the summary judgment portion (7.7 percent) was more than three times as large as the portion of trials

(2.2 percent)." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,* 1 J. Empirical Legal Studies 459, 483-84 (2004).

"Mindful of the reasonable limitations of most of the existing data, I nonetheless suggest that there is a reasonable basis to conclude that the rate of case termination by summary judgment in federal civil cases nationwide increased substantially in the period between 1960 and 2000, with one plausible (and perhaps conservative) range being from approximately 1.8 percent to approximately 7.7 percent." Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?,* 1 J. Empirical Legal Studies 591, 592 (2004).

C. Directed Verdicts

While still relatively small in number, directed verdicts rose between 1996 and 2006 by 82.2%, from 253 to 461. Viewed as a percent of total dispositions, the percent of directed verdicts has also risen steadily, from 0.057% to 0.087%. These statistics can be found online at http://data.courts.state.tex.us/OCA. Also, charts summarizing this information can be found in the Appendix.

V. JURY VERDICTS ON APPEAL: THE ROLE OF APPELLATE COURTS

A. Reversing Jury Verdicts: The Statistics

Statistics on no evidence rulings by the Texas Supreme Court are not readily available from the Office of Court Administration or the Supreme Court. A recent study by Professor David Anderson is, however, helpful in judging trends in no evidence rulings.

"The most controversial method of producing defendant victories is by holding that there is no evidence to support a plaintiff's verdict. The Texas Supreme Court is doing this far more frequently now than in the past, particularly in tort cases. In a twelve-month period in 2004-2005, the court found no evidence in eighteen (82%) of the twenty-two cases in which a no-evidence claim was presented. All of the decisions holding no evidence favored defendants, and all but three were tort cases. (See Table 2). In seventeen of the decisions, the evidence had seemed probative to the jury, the trial judge, and the court of appeals, but the supreme court reversed. If the court tends to grant review in no-evidence cases only when it has already determined that there is no evidence, it would not be surprising to find that reversals outnumber affirmances. But it seems unlikely that the court reviews the evidence as thoroughly in deciding whether to grant review as it does in cases it accepts, and if it does not, then other factors must explain which cases get accepted for no-evidence review.

Table 2: No-Evidence Claims in Texas Supreme Court

		Total	No-Evidence Claim Denied	No-Evidence Claim Sustained
2005 Term	All cases	22	4	18 (82%)
	Tort cases	19	4	15 (79%)
1986 Term	All cases	16	11	5 (31%)
	Tort cases	8	6	2 (25%)
1966 Term	All cases	15	7	8 (53%)
	Tort cases	8	6	2 (25%)

Twenty years earlier, at the height of the plaintiffs' bar's influence, the court sustained only five (31%) of the sixteen no-evidence claims it entertained, and sustained no-evidence claims in only two of eight tort cases. (See Table 2). Only one of the court's five no-evidence determinations overturned a court of appeals holding that there was evidence to support the verdict. Does this mean the present court is just restoring no-evidence review to the level that prevailed before the plaintiff-friendly court relaxed it? Apparently not. Analysis of cases from 1966 - before the court became politicized to the extent that it has been since the 1980s - shows that the modern court decides more cases on no-evidence grounds, and finds no evidence more often, than it did in 1966. In that year the court decided fifteen no-evidence claims, and sustained the no-evidence claim in eight (53%). Only two of the successful no-evidence claims that year were in tort cases. (See Table 2)." Anderson, David A., *Judicial Tort Reform in Texas,* 26 TEX. REV. LITIG. 1, 18-23 (Winter 2007).

B. The Conclusivity Clause

1. Tex. Const. Art. V § 6

"...Said Court of Appeals shall have appellate jurisdiction... [p]rovided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error."

2. What it Means

a. *Mutual Life Ins. Co. v. Hayward,* 88 Tex. 315, 321-322 (1895).

"...the *judgment* of the Court of Civil Appeals shall be *conclusive* upon the facts of the case; and if the judgment of the Court of Civil Appeals reversing the judgment of the District Court, upon the ground that

the verdict of the jury was unsupported by the evidence, was but a decision on the facts and a judicial expression of the opinion of the court as to what the testimony proved, there would seem to be no question but that their conclusion as to the effect and probative force of the evidence is not subject to review by this court." (emphasis in original)

b. Choate v. San Antonio & A.P.R. Co., 91 Tex. 406, 409 (1898).

"The purpose of [the Conclusivity Clause]... was not to enlarge [the courts of appeals'] power over questions of fact, but to restrict in express terms the jurisdiction of the Supreme Court and to confine it to questions of law... To the people of our state, a jury trial is more than a ceremonial symbol of political freedom; it is a process with real meaning. We cannot permit this right to deteriorate to the point that a jury verdict is allowed to stand only if it agrees with the view of the evidence taken by appellate judges."

c. *Tex. & P.R. Co. v. Levine*, 87 Tex. 437, 440 (1895).

"The credibility of witnesses and the weight to be given to their evidence are matters to be decided by the jury. It is apparent, therefore, that it can not be said that there is no evidence of negligence, when the evidence is such as to give a right of recovery if not rebutted. This being the case, it is not within the power of this court to determine the issue made by the evidence; it is a question of fact, and no matter how overwhelming the rebutting evidence may be, the Constitution and the laws of the State have denied jurisdiction to this court."

d. *Tex. & N.O.R. Co. v. Echols*, 87 Tex. 339, 517-58 (1894).

"This court is bound by the facts found by the Court of Civil Appeals, at least when the evidence is conflicting, as in this case, and we have no authority to go behind the action of that court, whatever our opinion might be on the subject... It is the province of the jury first to pass upon the facts, and the Court of Civil Appeals is vested with the authority to review their finding thereon, but this court has no such authority, if there be any evidence to sustain the conclusions of the Court of Civil Appeals. If we should do as requested and look to the facts, this court would usurp the authority of another court, and deprive the defendant of his right to have the judgment of the Court of Civil Appeals upon the questions of fact."

e. *S.W. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 619-20 (Tex. 2004).

"History provides no clear indication of the framers' purpose in including this 'factual conclusivity clause' or the ratifiers' purpose in adopting it. Since one overall purpose of the amendments was to reduce this Court's workload, the clause may have been intended to help achieve that end, merely as a practical matter. More philosophically, it has been suggested that in restructuring the judiciary, the framers may have come to believe that one appeal regarding case-specific factual issues was enough..."

f. *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 769-71 (Tex. 1987) (Robertson, J., dissenting).

"If two out of three judges sitting on an appellate panel can reweigh the evidence and undo the work of a jury who listened in person to all the evidence, then it can no longer be said that the right of trial by jury is 'inviolate.' Instead, that right is debased and diminished."

g. *Dyson v. Olin Corp*., 692 S.W.2d 456, 458-59 (Tex. 1985) (Robertson, J., concurring).

"We should not interpret the nebulous provision of article V, section 6 in such a way as to diminish or impair the constitutional guarantee of jury trial... Courts are not free to reweigh the evidence and set aside a jury verdict merely because the judges feel that a different result is more reasonable... Some would argue that there exists a distinction between a court reviewing the sufficiency of the evidence and a court substituting its thought processes. However, it is extremely difficult to articulate what the possible distinction could be. I conclude that it is a distinction which exists in semantics and theory only but which does not exist in reality. If a court is weighing the evidence, then it is substituting its thought processes."

h. Powers Jr., William & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 540 (1991).

"There is a paucity of evidence about the framer's precise rationale for giving courts of appeals final authority over questions of fact... The reason, we suggest, is that the supreme court needs jurisdiction over questions of law to insure uniformity throughout the state, uniformity that is not as important on issues of fact that are specific to a particular case."

i. George Braden, et al., The Constitution of the State of Texas: An Annotated and Comparative Analysis 399 (1997).

"The courts of civil appeals were the major innovation of the 1891 reform package. The supreme court was falling so far behind that either the right to appeal had to be severely curtailed or the system had to be radically revised... The theory in creating the courts of civil appeals apparently was that their decisions would be final in most civil cases. The supreme

court's primary function was to be the resolution of conflicts."

C. Friction Between No Evidence Review and the Right to Trial by Jury

1. No evidence review is inherently subjective

"The same problem is faced by appellate courts when asked to consider lower court verdicts. With a paucity of benchmarks, appellate courts have all too frequently been required to rely on their subjective appraisals, rather than utilize more objective factually established standards. The result has been an excessive willingness to reverse the decisions of juries and trial judges." Stephen Landsman, So What? Possible Implications of the Vanishing Trial Phenomenon, 1 J. Empirical Legal Studies 973, 978 (2004).

a. Preponderance Cases

"The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence *if reasonable jurors could*, and disregard contrary evidence *unless reasonable jurors could not.*" [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

"Even if evidence is undisputed, it is the province of the jury to draw from it whatever inferences they wish, *so long as more than one is possible* and the jury must not simply guess... Accordingly, courts reviewing all the evidence in a light favorable to the verdict must assume jurors made all inferences in favor of their verdict *if reasonable minds could*, and disregard all other inferences in their legal sufficiency review." [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 821 (Tex. 2005).

"Clearly, the traditional rule in Texas has never been that appellate courts must reject contrary evidence in every no-evidence review... We do not presume to categorize all circumstances in which contrary evidence must be considered in a legal sufficiency review. Evidence can be disregarded *whenever reasonable jurors could do so, an inquiry that is necessarily fact-specific.* But it is important that when courts use the exclusive standard and disregard contrary evidence, they must recognize certain exceptions to it." [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 810-11 (Tex. 2005).

"Thus, *when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well."* [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 814 (Tex. 2005).

"After we adopted gate-keeping standards for expert testimony, evidence that failed to meet reliability standards was rendered not only inadmissible but incompetent as well. Thus, an appellate court conducting a no-evidence review cannot consider only an expert's bare opinion, but must *also consider contrary evidence* showing it has no scientific basis." [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 813 (Tex. 2005).

"What is worse is the 'equal inferences rule' is not merely unnecessary, it is actually quite harmful. In the hands of a reviewing judge who wants to violate the jury's province so as to impose his or her own idiosyncratic preferences on the case, the 'equal inferences rule' provides an ideal tool. The abuse-of-power demons on the judge's shoulder, need only whisper, "Just to declare that the inferences are 'equal,' even if to do so requires an application of experience that our system entrusts to the jury." Dorsaneo III, William V., *Reexamining the Right to Trial by Jury*, 54 S.M.U. L. REV. 1695 (2001).

"Given its tendency to mislead, or rather to justify judicial imposition, the usefulness of the 'equal inferences rule' is far outweighed by the mischief that it promotes." Dorsaneo III, William V., *Reexamining the Right to Trial by Jury*, 54 S.M.U. L. REV. 1695, 1710-11 (2001).

"If we have lost faith in the ability of the common man to make a reasonable decision in civil cases, we should have the fortitude to say so. Perhaps the reluctance stems from the implications such an admission would have on the other decisions we entrust to ordinary citizens, such as electing our government. The founding fathers' reason for preserving the right to trial by jury is still the best reason for guarding that right today–it protects us from the tyranny, or the potential tyranny, of the judiciary, most of whom are legally or practically insulated from public accountability." Dorsaneo III, William V., *Reexamining the Right to Trial by Jury*, 54 S.M.U. L. REV. 1695, 1737 (2001).

b. Clear & Convincing Cases

"Beginning with the United States Supreme Court's opinion in *Jackson v. Virginia*, appellate courts have recognized that, while 'one slender bit of evidence' may be all a reviewing court needs to affirm a verdict based on the preponderance of the evidence, a higher burden of proof requires a higher standard of review... If the rule were otherwise, legally sufficient evidence to support a preponderance-of-the-evidence verdict would satisfy the higher burdens as well, thus rendering their differences meaningless." *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005).

"Accordingly, we have held that a legal sufficiency review must consider *all* the evidence (not just that favoring the verdict) in reviewing cases of

parental termination, defamation, and punitive damages. In such cases, again, *evidence contrary to a verdict cannot be disregarded*." [emphasis added] *City of Keller v. Wilson*, 168 S.W.3d 802, 817 (Tex. 2005)

"[I]n reviewing the legal sufficiency of evidence to support a finding that must be proved by clear and convincing evidence, an appellate court must 'look at all the evidence in the light most favorable to the finding to determine *whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true*.'" *Id*. at 609. "A reviewing court must assume that the factfinder resolved disputed facts in favor of its finding *if a reasonable factfinder could do so*. A corollary to this requirement is that a court should disregard all evidence *that a reasonable factfinder could have disbelieved or found to have been incredible*." [emphasis added] *S.W. Bell Tel. Co. v. Garza*, 164 S.W.3d 607, 627 (Tex. 2004) [quoting *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002)].

2. Sometimes appellate judges substitute their judgment for that of the jury

a. *S.W. Bell Tel. Co. v. Garza*, 164 S.W.3d 607 (Tex. 2004)(O'Neill, J., dissenting).

"The Court's opinion stretches the definition of 'undisputed evidence' to include any testimony that is not directly contradicted. The Court then weighs this 'undisputed evidence' contrary to the verdict with the evidence supporting the verdict, and finds that the evidence supporting the jury's finding of malice was outweighed by 'a great many other' indications contrary to the malice finding. There are two significant problems with this analysis... First, the Court's opinion inaccurately characterizes certain evidence as "undisputed." It is true that certain facts were uncontested, but the inferences arising from those facts were hotly disputed by the parties at trial. For example, the Court suggests that Garza's 'undisputed . . . lengthy record of safety violations' contributed to make the jury's verdict unreasonable. I agree that it is undisputed that Garza had two prior safety warnings; however, the latest of these warnings occurred more than two years before Garza was disqualified from driving. In the intervening two years, the record reflects that Garza's safety record improved to the point that his supervisor wrote a letter stating '[y]ou made a commitment to be safe on the job and you did a good job. Keep up the good work.' Garza also introduced evidence that his most recent performance appraisal rated him 'satisfactory' for safety. Thus, the question of what inference should be drawn from Garza's safety record was directly disputed at trial, and the jury could reasonably have inferred that Garza's record was not as poor as SWBT suggested... In addition... the Court misstates the role that truly undisputed evidence should play in a legal sufficiency analysis and impermissibly expands the Court's scope of review. It is not clear from the Court's opinion that there is any difference between a factual sufficiency review and a legal sufficiency review in cases governed by the clear and convincing standard. But there is a difference, and that difference is whether countervailing evidence should be weighed as part of the court's review. The question addressed by both reviews is the same: 'whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true.' In a legal sufficiency review, however, the reviewing court may not weigh the evidence; instead, it must disregard any evidence that the jury reasonably could have disbelieved. In a factual sufficiency review, on the other hand, the reviewing court may weigh the disputed evidence to see if it is 'so significant' that a factfinder could not reasonably have formed a firm belief or conviction. Thus, while both types of review attempt to answer the same question, they consider the evidence differently; the reviewing court takes a less deferential view of the evidence when performing a factual sufficiency review... [I]f such [undisputed contrary] evidence is not conclusive, it should not be weighed against countervailing evidence in a legal sufficiency review... The Court's opinion, however, does not merely review the entire record to see whether malice was conclusively negated; instead, the Court gives credence to evidence contrary to the verdict (*i.e.*, Garza's purportedly poor safety record, SWBT's purportedly impartial investigation, and various other 'undisputed' facts), weighs this evidence against the evidence supporting the verdict, and decides that the evidence contrary to the verdict outweighs the evidence supporting it... Because the Court compares conflicting evidence and weighs the competing inferences drawn from that evidence, it exceeds the parameters of a legal sufficiency review and engages instead in a factual sufficiency review. This type of analysis is appropriate only in a factual sufficiency review." *Id*. at 632-635.

b. *Brown v. Parker Drilling Offshore Corp.*, 444 F.3d 457 (5th Cir. 2006) (Stewart, J., dissenting) (joined by King, Higginbotham, Wiener, Benavides, and Dennis, JJ.).

"The Seventh Amendment guarantees litigants a right to a trial by jury and the Supreme Court has repeatedly admonished us not to substitute our judgments for those of the jury, [citations omitted] yet the panel majority's decision can only be understood as such. The jury accepted Brown's version of the events and rejected Parker Drilling's and, as the district court correctly determined, taken in the light most favorable to Brown, there is sufficient evidence in the record to support the jury's verdict. …. But despite the panel majority's protestations to the contrary, this case remains exactly what it was when the panel first heard it - a vigorously tried case by experienced counsel on

both sides before a seasoned trial judge, after which the jury returned a verdict that is (or should be) insulated from appellate fact-finding. And regardless of which chameleonic legalisms the panel majority uses to explain it, the panel majority's decision remains what it was from the beginning - an audacious exercise in violating the Seventh Amendment. The panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own. Brown's petition for rehearing en banc was not an invitation for the full court to re-try this case for a third time, but an opportunity to correct the lamentable message that the panel majority's decision sent to the bench and bar throughout the Fifth Circuit - no jury verdict is invulnerable before this court. The panel majority's decision commandeered the jury's role as fact-finder and it is principally for this reason that I vehemently dissent from the full court's refusal to rehear this case en banc."

c. *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 913-918 (Tex. 2004) (Jefferson, C.J., and O'Neill, J., dissenting).

"[T]his Court lacks constitutional authority to weigh conflicting evidence... While [the expert witness'] causation testimony is neither ironclad nor exhaustive, it is surely *some* evidence [supporting the verdict]... We are supposed to indulge inferences in *favor* of the verdict, not *against* it... [T]he Court sets a dangerous precedent that threatens to fundamentally alter the nature of no-evidence review... [W]hen more than a scintilla of evidence supports an expert's conclusions in a technical area in which judges have no particular expertise, and when that expert's methodology is not challenged on appeal, the question becomes one of factual, and not legal, sufficiency."

d. Sparks, Sam and George Butts, *Disappearing Juries and Jury Verdicts*, 39 TEX. TECH L. REV. 289, 313 (Winter 2007).

"Perhaps, after thorough consideration and upon open discussion and debate, our citizens will choose to amend our constitutions and give up their right of trial by a jury of their peers. However, until that happens it is unconstitutional for courts to disregard jury decisions that are supported by sufficient and competent evidence. We, as lawyers, are sworn to uphold the Constitution of our country and our states. As lawyers, we should identify those instances where proper jury verdicts are discarded. We must tell the guilty judges that it must stop because it upsets the balance between the rights of the people and the power of the judiciary."

e. Baker, James A., *The End of Trends in the No-Evidence Standard of Review* (paper delivered Sept. 12, 2006 to the Mahon Inn of Court, Fort Worth, Texas) (quoted by Anderson, David A., *Judicial Tort Reform in Texas*, 26 TEX. REV. LITIG. 1, 23 (Winter 2007)).

"[What the court is doing now] cannot be reconciled with the Texas Constitution's prohibition of the Texas Supreme Court weighing evidence and judging credibility."

f. Hardberger, Phillip, *Juries Under Seige*, 30 St. Mary's L.J. 1, 141-42 (1998).

"For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts. In every area of the law, the Phillips/Hecht Court has overturned or limited potential recovery by injured individuals. In all areas of the law, concepts of duty, causation, no-evidence, and qualifications of experts have been greatly altered. Because stare decisis is so important in virtually a commandment to both an intermediary appellate court and trial court, these concepts may stay as the Court has crafted them for a long time. Each decision in these various areas of the law chips away at an injured party's ability to present a case to a jury. Although lip service is given to the importance of the jury, the decisions of the Court demonstrate that, in fact, the jury verdict does not mean much. This erosion of the jury's significance undercuts a major tenet of democracy—that the community of the parties in litigation should determine the justice of the dispute. This principle harkens back to the Greek Republic, where the citizens' voice was considered the voice of the Republic. In the final analysis, we trust the wisdom of the people, or we reject the jury in favor of a more elite voice. Predictability in the law is greatly needed. Predictability in the law does not refer to the predictability that a Democrat will vote one partisan way, and a Republican will vote another partisan way; rather, it refers to the predictability that the law will be interpreted consistently, regardless of who the judge is or the judge's party affiliation. Predictability in the law also concerns itself with the idea that the jury will always have the last word in deciding the facts and that a judge will not disturb those findings when he would have held otherwise."

D. Conclusion: Aggressive no evidence review threatens trial by jury

"The jury, not the court, is the fact finding body. The court is never permitted to substitute its findings and conclusions for that of the jury. The jury is the exclusive judge of the facts proved, the credibility of the witnesses and the weight to be given to their testimony." *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792 (Tex. 1951)

"The rhetoric describing trials as a systemic failure or pathology must be challenged, especially among sitting judges. The special value of jury trials in fixing the facts fundamental to deciding criminal punishment, and establishing benchmarks in the wide range of civil cases where damages are hard to calculate, must be recognized and respected. Interventions by appellate courts to overturn factual determinations made by juries must be cabined." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 984 (2004).

"Bit by bit, case by case, state by state, Americans' celebrated right to trial by jury is quietly eroding. How? The study found three primary culprits. First, it identified 41 states that during the past 12 years have passed laws either restricting people's access to juries or limiting the power of juries in certain kinds of cases. Second, it identified dozens of state and federal appellate court decisions that shifted power away from juries into the hands of judges. Third, private binding mandatory arbitration agreements have taken hundreds of thousands of disputes that previously could have been heard by juries and moved them into private, more limited dispute resolution programs." Curriden, Mark, *The American Jury: A Study in Self-Governing and Dispute Resolution*, 54 S.M.U. L. REV. 1691, 1693 (2001) (citing the Dallas Morning News study).

"Are those willing to reduce the role of the civil jury hoping it will suffer the fate of the civil jury in England – all but abolished by habit? While some with a straight face argue for this result, the absolute end is unlikely. Nonetheless, [there has been a] … slow drain of its vigor through expanded appellate review, evidentiary shifts of power from jury to judge, and designations of questions as 'a matter of law' …. Michelle L. Hartmann, *Is It a Short Trip Back to Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*," 54 S.M.U. L. Rev. 1827 (2001)

VI. JUDICIAL ATTITUDES ABOUT TRIAL BY JURY

A. Most judges strongly believe in it

"In what is one of the most salient findings, most judges in the abstract ardently support the civil jury system and approximately 92% agree with the jury's verdict 'most of the time.'" Hartmann, Michelle L., *Is It a Short Trip Back to the Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 S.M.U. L. REV. 1827, 1855 (2001).

B. Some judges don't

"A significant minority of the responding judges believed that the use of jury trials should be scaled back. For example, 30.1% of Texas trial judges stated that juries should decide fewer types of cases, and 19.7% of Texas trial judges said the right to jury trial should be reduced or eliminated. Both statements were supported by 27.4% of the federal trial judges." Attanasio, John B., *Juries Rule Foreword*, 54 S.M.U. L. REV. 1681, 1685 (2001) (citing the Dallas Morning News jury study).

"[N]early one-quarter (24.3%) of the judges believe that the role of the jury in civil cases should be reduced or eliminated." Farrar-Myers, Victoria A. and Jason B. Myers, *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy*, 54 S.M.U. L. REV. 1857, 1873 (2001) (citing the Dallas Morning News study)

C. Judicial bias toward settlement

"As a consequence, as another federal district judge put it, trials are evidence of 'lawyers' failure.'" Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 925 (2000).

"One of the fundamental principles of judicial administration is that, in most cases, the absolute result of a trial is not as high a quality of justice as is the freely negotiated, give a little, take a little settlement." Hon. Hubert L. Will, Hon. Robert R. Merhige, Jr. & Hon. Alvin B. Rubin, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1978).

"In general, courts look upon the settlement of lawsuits with favor because it promotes the interests of litigants by saving them the expense and uncertainties of trial, as well as the interests of the judicial system by making it unnecessary to devote public resources to disputes that the parties themselves can resolve with a mutually agreeable outcome. *Newman v. Stein*, 464 F.2d 689 (2d Cir.1972). Compromise is particularly appropriate in complex class actions. *Armstrong v. Board of School Directors*, 616 F.2d 305, 312-13 (7th Cir.1980) ('In the class action context in particular, there is an overriding public interest in favor of settlement.') (internal quotations omitted); *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 740 (S.D.N.Y.1985), *aff'd*, 798 F.2d 35 (2d Cir.1986) ('In deciding whether to approve this [class action] settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.... There is little doubt that the law favors settlements, particularly of class action suits.') (citations omitted)." *Hispanics United of DuPage County v. Village of Addison, Ill.*, 988 F.Supp. 1130, 1149 (N.D. Ill. 1997).

VII. THE RIGHT TO TRIAL BY JURY IS WORTH FIGHTING FOR

"My own view is not only that the civil jury trial is well worth preserving, but that it must be preserved to assure public participation in civil dispute resolution, the continued development of the common

law, and a bar well-trained in advocacy. A civil justice system lacking in these elements will be very different, and in important respects, deficient. The right to trial by jury, enshrined in both our federal and state constitutions, cannot be allowed to become dead letter without every effort being made to preserve it." Hecht, Hon. Nathan L., *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 SO. TEX. L. REV. 163, 183 (Winter 2005).

A. The jury is an important democratic institution

"[N]o other institution of government rivals the jury in placing power so directly in the hands of citizens. Hence, no other institution risks as much on democracy or wagers more on the truth of democracy's core claim that the people make their own best governors." Jeffrey Abramson, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY p. 2 (2000).

"Tocqueville observed that the jury is not simply a 'judicial' but also a 'political institution.' In its political aspect, the jury is a 'republican' body that places the real direction of society in the hands of the governed.' It is drawn from the community at large and speaks with a voice unmediated by either a political appointment process or a requirement of professional training. The jury is the most effective instrument for incorporating the diverse ethnic, economic, religious, and social elements of American society into the justice system. It is far more effective at this task than the judiciary, which, despite progress, is a far less all-encompassing body. The political benefit of the jury is not limited to diversity alone. The jury is a body connected to or identified with the whole community rather than any segment, branch, or division. The jury has, from its earliest colonial days, been viewed as an instrument of government that ties the American polity together, uniting it in a shared response to the challenges that face it. This unifying effect has been hypothesized to have been an important factor in welding the new nation into a single body, and even today fosters a shared perspective on justice among Americans. The jury is also particularly well suited to speak for the community because of the random manner in which it is selected, randomness making it the whole community's spokesman." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 974 (2004).

"There is nothing inherently wrong with disputes being resolved by interested parties rather than by neutral peers. We should recognize, however, that with fewer trials, there is less democracy. What is lost is the trial's expression of faith in the American people. The rejection of the trial can be read as a critique of 'democracy's core claim that people make their own best governors.'" Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. Empirical Legal Studies 627, 631 (2004).

"The Founders saw trial by jury as a means of protecting Americans from their own government. 'The purpose of the jury trial,' says the Supreme Court, 'is to prevent oppression by the Government.' The Declaration of Independence listed twenty-seven specific complaints against George III's government, one of which was 'depriving us in many cases, of the benefits of Trial by Jury.' Even before the Revolutionary War, Blackstone called trial by jury 'the principal bulwark of our liberties,' as an individual 'cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbo[]rs and equals.' The Founders saw the greatest threat to liberty in the executive branch, with its power of criminal arrest, prosecution, and imprisonment. They thus guaranteed trial by jury in the Constitution only in criminal cases; indeed a motion to include a civil jury guarantee in the Constitution failed. But concerns about governmental power were broader, and a majority of the states conditioned ratification on an explicit guarantee of trial by jury in civil cases, resulting in the Seventh Amendment…. However, the role of trial by jury stands on firmer ground in limiting the judicial branch. As Hamilton argued in the Federalist No. 83, civil jury trials serve as a check against corruption, as 'there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion.' If the justice system is to punish corruption, it must take pains to avoid corruption within. Moreover, Hamilton notes that this protection goes two ways: As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practise upon the jury unless the court could be likewise gained. Here then is a double security; and it will readily be perceived that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. This latter argument, the role of checks and balances, is an important but often overlooked one. Oppression through judicial proceedings may occur at the hands of either judge or jury. The Salem Witch trials, for example, were tried to juries, and one accused chose death rather than trial by a jury sure to convict. In American literature, the jury trial in To Kill a Mockingbird was fictional, but it was based on others that were all too real. It was weaknesses like this in all forms of government that lead early Americans to favor divided government over efficient government, and jury trials were an important part of that plan. As neither judges nor jurors are angels, each must exercise some check on the other. Thus, efforts to 'defend'

juries discouraging any judicial check on their verdicts may be shortsighted. For example, a recent survey of almost 400 state trial judges in Texas found that only 24% had ever reduced a verdict because it was too high, and only 6% had ever taken any action because a verdict was too low. This is not much of a check. Like other checks and balances in American government, the redundancy of having both judge and jury approve each judgment requires extra time, effort, and expense. But the alternatives are generally administrative proceedings run by government employees or private proceedings dependent on government enforcement; when the government itself is one of the litigants, justice may be harder to come by without juries. It is the combination of judicial and citizen involvement that gives trial by jury a unique power that no competitor can match." Brister, Scott, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 SO. TEX. L. REV. 191, 212-15 (Winter 2005).

B. Jury trials are public and open

"The absence of trials renders the law a private affair despite the strong public interests that may exist. Private processes like mediation and arbitration cannot provide an effective substitute for trials because secrecy is their hallmark. Without public trials, critical evidence essential to the assessment of a broad range of political and social claims may be virtually impossible to come by." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 978 (2004).

"By and large, when cases do not go to trial, they settle. In the civil context, the result is that a private contract, not public law, resolves the dispute…. Thus, in civil cases resolved by settlement … the public has less of a say in legal outcomes than it has in trials." Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. Empirical Legal Studies 627, 630 (2004).

"Another issue is access to court-based ADR. My preliminary conclusion from the sources readily available is that the public does not have an easy means by which to watch processes or learn about decision making in alternative dispute resolution programs provided by federal courts…. [L]ittle public information exists about these proceedings. Most of the local rules do not address the question of whether the public has a right to be present at court-annexed arbitrations. Indeed, not all local rules specify where court-annexed arbitrations are to take place…. As to whether nonparticipants could be present, the deputy clerk of one district informed us that the proceedings are private. In another district, where the local rule provides for the arbitration hearing to take place in a room in the courthouse, a clerk explained that nonparties could attend only on the consent of the parties and the arbitrator. In contrast, in the Eastern District of Pennsylvania, court-annexed arbitrations are part of the court calendar, take place in the courthouse, and are open to the public…. As long as courts continue to be places that produce public data in volume and kind outstripping that produced about adjudication in administrative agencies, and as long as private providers do not regularly disseminate information about or provided access to their processes, then with the declining trial rate comes a diminution of public knowledge of disputes, of the behavior of judges, and of the forging, in public, of normative responses to discord." Judith Resnik, *Migrating, Morphing, and Vanishing The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Legal Studies 783, 829-31 (2004).

"Trials harness competition to generate information, a 'public good' that is particularly prized in our postmodern technological society. The evidence trials generate may be of value not only to litigants and the courts but to the public at large. The risks posed by asbestos, cigarettes, and a host of other items would not have been broadcast without the sharing of information obtained in litigation and disseminated at trial. Disputes between multinational corporations may affect not only the disputants but investors, workers, and communities dependent on the fortunes of the antagonists. These onlookers are likely to be provided limited information unless there are trial-related disclosures." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 978 (2004).

C. Jury trials more effectively get at truth

"Vanishing trials evidence an encroaching moral relativism in American society. Compromise is valued over judgment. Right or wrong have less content: the social objective is the gray center. Surely some things are not negotiable, but that is not the story the numbers tell." Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. Empirical Legal Studies 627, 634 (2004).

"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." Hon. Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?* 55 SMU L. Rev. 1405, 1423 (Fall 2002)

"In my view, however, this account of adjudication and the case for settlement rest on questionable premises. I do not believe that settlement as a generic

practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised." Owen M. Fiss, Against Settlement, 93 Yale L. J. 1073, 1075 (1984)

"The numerosity of the jurors also provides the advantage that up to 12 heads can bring to the solution of almost any sort or problem when compared with the limitations of a single judge, no matter how insightful." Stephen Landsman, *So What? Possible Implications of the Vanishing Trial Phenomenon*, 1 J. Empirical Legal Studies 973, 976 (2004).

"In 1966, Harry Kalven, Jr. and Hans Zeisel published the classic study of the American jury. They reported that 78 percent of judges in civil cases would have decided the case the same as the jury. Recent studies confirm this agreement. This study is no stranger. Ninety-two percent of the judges in the SMU study responded that they agreed with the jury verdict "most of the time" (table 10). Further, 76% urged that most jurors coming into a civil case favor neither the plaintiff nor the defendant, and 73% responded that, in general, juries are doing "very well" in actually reaching a just and fair verdict. Despite these significantly positive markers, 47% had decreased or eliminated a jury verdict and 10% had taken steps to increase damages that were set too low. This finding is in line with modern jury constraints such as statutory caps on damage awards as well as the traditional judicial remedy of remittitur." Hartmann, Michelle L., *Is It a Short Trip Back to the Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 S.M.U. L. REV. 1827, 1845 (2001).

"A single question in the SMU survey seeks to uncover the judges' view on jury comprehension. The federal and state trial judges were asked the following question: In general, how well do you think the average juror understands the legal and evidentiary issues in cases? The response options included: "very well," "moderately well," "not very well," or "not at all." As seen in Table 20, approximately 62% of the judges polled asserted that the juries understand the issues "moderately well" and 27% found the juries to understand the issues "very well." Only 9.6% argued that the juries did not understand "very well" and only .2% asserted "no" understanding on the part of the jury." Hartmann, Michelle L., *Is It a Short Trip Back to the Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 S.M.U. L. REV. 1827, 1853 (2001).

"The study questioned judges as to their view of the role of the jury, the accuracy of verdicts, and the precision of jury comprehension in an effort to better understand where the civil jury now stands and where it is likely to stand in the future. In contrast to previous studies, the study spread its base purposefully broad so as to encompass all federal trial judges in the United States and all state trial judges in Texas. This Article broke down responses by demographic variables. In what is one of the most salient findings, most judges in the abstract ardently support the civil jury system and approximately 92% agree with the jury's verdict 'most of the time.' Yet, as the responses indicate, the dichotomy between attitude and behavior cannot be underestimated. While the significant majority praised the jury system, nearly a third of the respondents argued that fewer types of cases should be decided by a jury, nearly a quarter pushed for reductions in an individual's jury right, and federal judges were nearly 40% more likely to have reduced or eliminated a jury verdict than trial judges from a State active in its application of limitations on the jury. Though tremors were not predicted, the data arguably mirror sentiments surrounding the subtle yet deliberate drain on the jury system. What is more, several responding judges indicated that the procedural erosion is and should be still in its youth. 'Four legs good . . .'" Hartmann, Michelle L., *Is It a Short Trip Back to the Manor Farm? A Study of Judicial Attitudes and Behaviors Concerning the Civil Jury System*, 54 S.M.U. L. REV. 1827, 1855 (2001).

"A recent study of the intermediate appellate courts in Texas found that jury verdicts in civil cases were reversed for insufficient evidence at about the same rate that nonjury verdicts were. Moreover, the same study found that when judges granted judgment notwithstanding a jury verdict, fifty-eight percent of the time the courts of appeals agreed with the jury rather than the judge. In the eyes of appellate judges, this limited survey might suggest that juries do as well or slightly better than judges." Brister, Hon. Scott, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 SO. TEX. L. REV. 191, 199 (Winter 2005).

VIII. THE CONDOR IS SAFE – NOW IT'S TIME TO SAVE THE JURY TRIAL

Justice Hecht's Plea: "The decline in the number of jury trials has been pronounced and prolonged. It does not appear to be circumstantial or cyclical. If it continues, the need for trial lawyers, trial judges, appellate judges, and even the common-law system will diminish. An increasingly private dispute resolution system with no right of appeal will leave a vacuum in the development of the law that can only be filled with legislation, and evolution toward a civil-law

system like that used in most of the rest of the world will eventually be irreversible. The bar's investments in extolling the jury system and improving its operation are worthwhile, but if the public is paying attention, it does not appear to be convinced. In business terms, the civil jury trial is losing its market, and recovery will require more than a slicker advertising campaign. ***I think if progress is to be made, the bench and trial bar must engage in an earnest, substantive, candid, open, and determined dialogue with groups of all stripes interested in the civil justice system and with public representatives. Preservation of the justice system enshrined in our constitutions, with public participation through the jury system, is worth every effort the legal system can muster."*** [emphasis added] Hecht, Hon. Nathan L., *Arbitration and the Vanishing Jury Trial: Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B. J. 854, 856 (Oct. 2006).

WHAT CAN WE DO?

A. Judges:

1. **Stand up for trial by jury as an important democratic institution – speak to judicial groups, bar groups, government and civic groups, school groups, jury panels, and to the public generally.**
2. **Recognize that the jury trial is the preferred method of dispute resolution and that settlement and ADR are only necessary expedients.**
3. **Respect and protect the jury trial by deferring to juries in close cases.**
4. **Exercise judicial restraint in reviewing jury verdicts.**

C. Trial Lawyers:

1. **Stand up for trial by jury as an important democratic institution – speak to bar groups, government and civic groups, school groups, and to the public generally.**
2. **When opposing no evidence challenges remind the court that the right to trial by jury is at stake.**
3. **File *amicus* briefs in defense of the right to trial by jury.**
4. **Be vigilant against legislative attacks on the right to trial by jury.**
5. **Do whatever you can to make trial less costly and time-consuming.**
6. **Discuss the right to trial by jury with transactional lawyers in your firm – they write arbitration clauses and jury waiver clauses into contracts.**

D. Transactional Lawyers:

1. **Counsel clients about arbitration and jury waiver clauses, but don't neglect to advise them about the importance of trial by jury.**

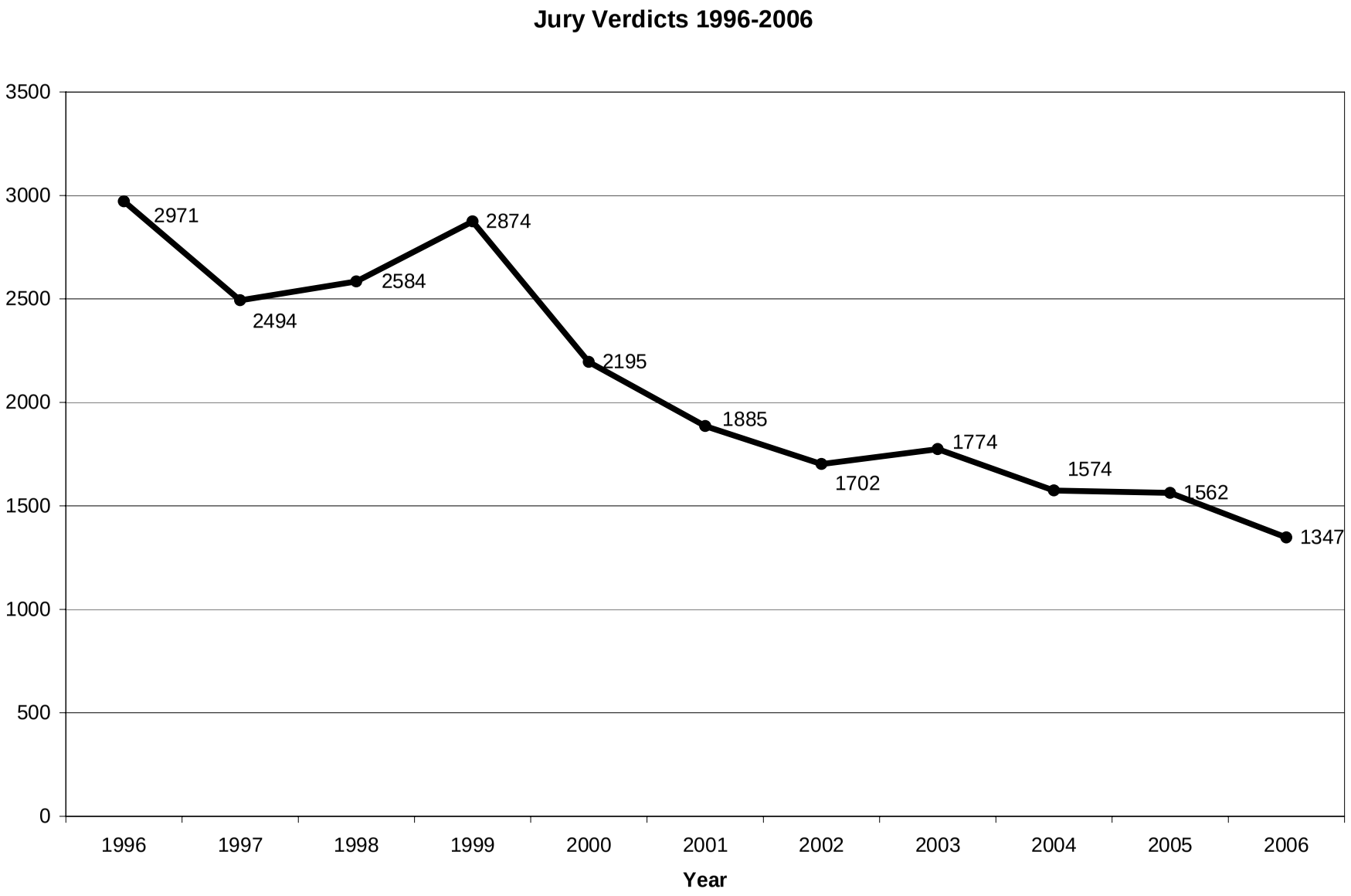
- While you have a duty to give sound advice to your client, you also have a legal duty to support the constitutional right to trial by jury. Tex. Govt. Code 82.037.
- "I, _____ do solemnly swear that I will support the constitution of the United States, and of this State; that I will honestly demean myself in the practice of the law, and will discharge my duties to my clients to the best of my ability. So help me God."

2. **Advise *optional* ADR to clients.**
2002 Survey of Optional Programs:

- Shell Program: "Shell Resolve program involves multiple steps culminating in mediation and OPTIONAL arbitration. Even after arbitration award, and employee may enforce it against the company OR FILE SUIT IN COURT." [emphasis in original] Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. Empirical Legal Studies 843, 903 (2004).
- Texaco Program: "Solutions process involves multiple steps culminating in arbitration. (The employee has the option of skipping all steps prior to arbitration.) The employee may enforce the arbitration award against the company OR FILE SUIT IN COURT; the award may be entered as evidence in court." [emphasis in original] Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. Empirical Legal Studies 843, 903 (2004).
- United Parcel Services Program: "The Employee Dispute Resolution (EDR) program consists of five steps including Open Door, Facilitation, Peer Review, and Mediation, followed by OPTIONAL binding arbitration." [emphasis in original] Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. Empirical Legal Studies 843, 903 (2004).
- UBS Paine Webber Program: "F.A.I.R. Program consists of multiple steps; binding arbitration is OPTIONAL for discrimination, harassment, and retaliation issues; employee may alternatively file suit in court or seek relief before an appropriate administrative agency." [emphasis in original] Thomas J. Stipanowich, *ADR and the "Vanishing*

Trial": The Growth and Impact of "Alternative Dispute Resolution", 1 J. Empirical Legal Studies 843, 903 (2004).

Appendix


Jury Verdicts 1996-2006
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3000
2500
2000
1500
1000
500
0
2971
2494
2584
2874
2195
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1702
1774
1574
1562
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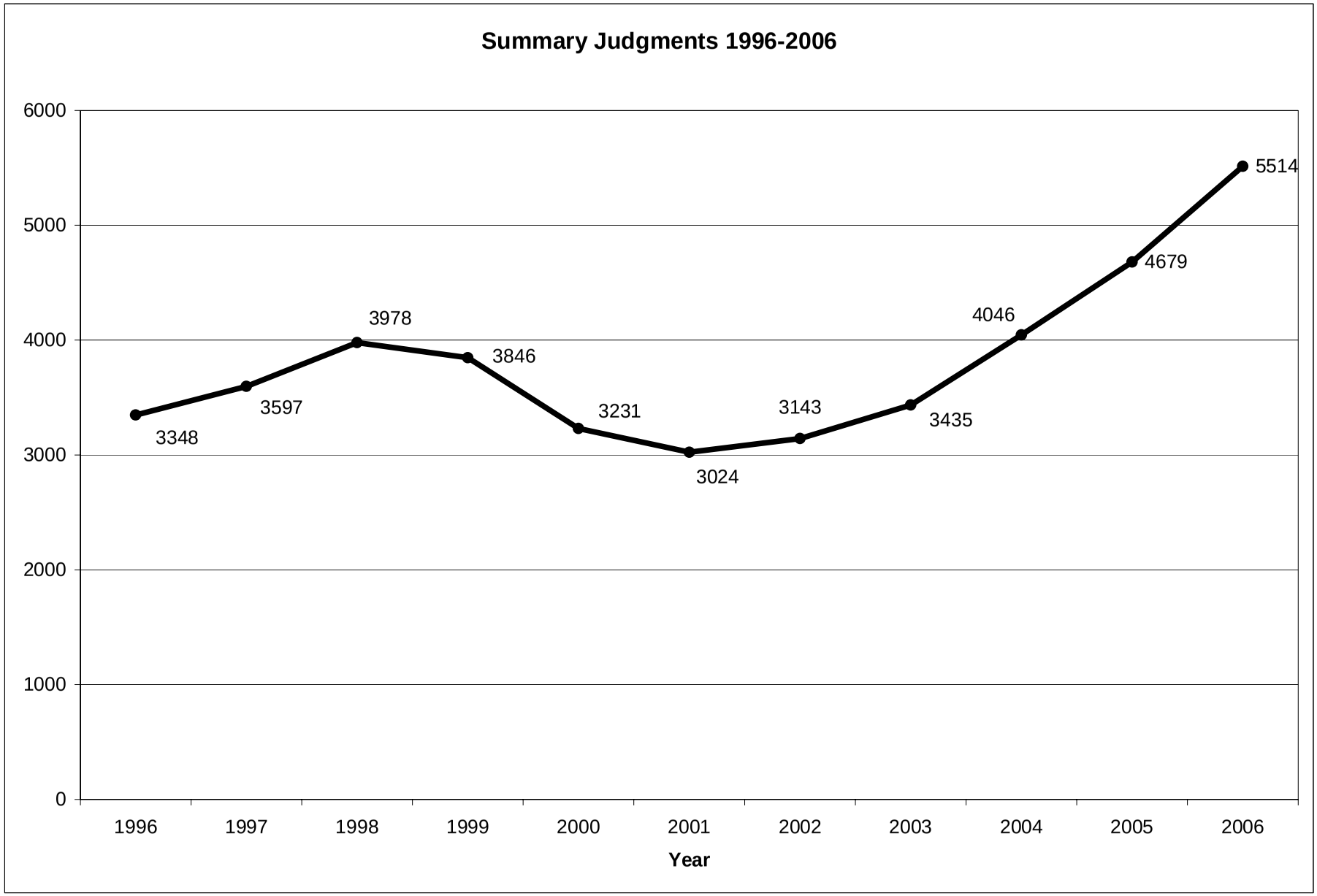
Year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5000
4000
3000
2000
1000
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3597
3978
3846
3231
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4679
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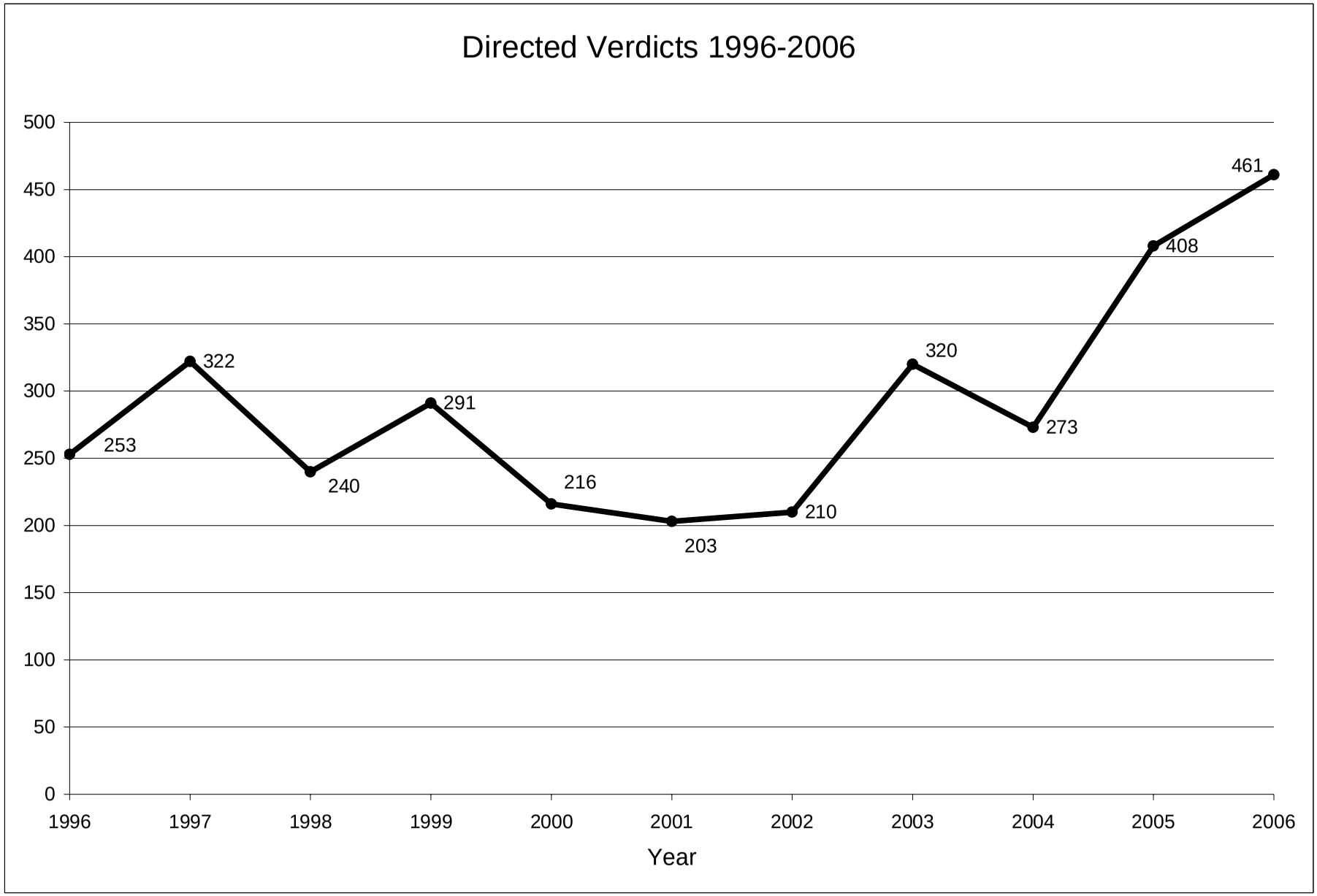
Year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450
400
350
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250
200
150
100
50
0
253
322
240
291
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203
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320
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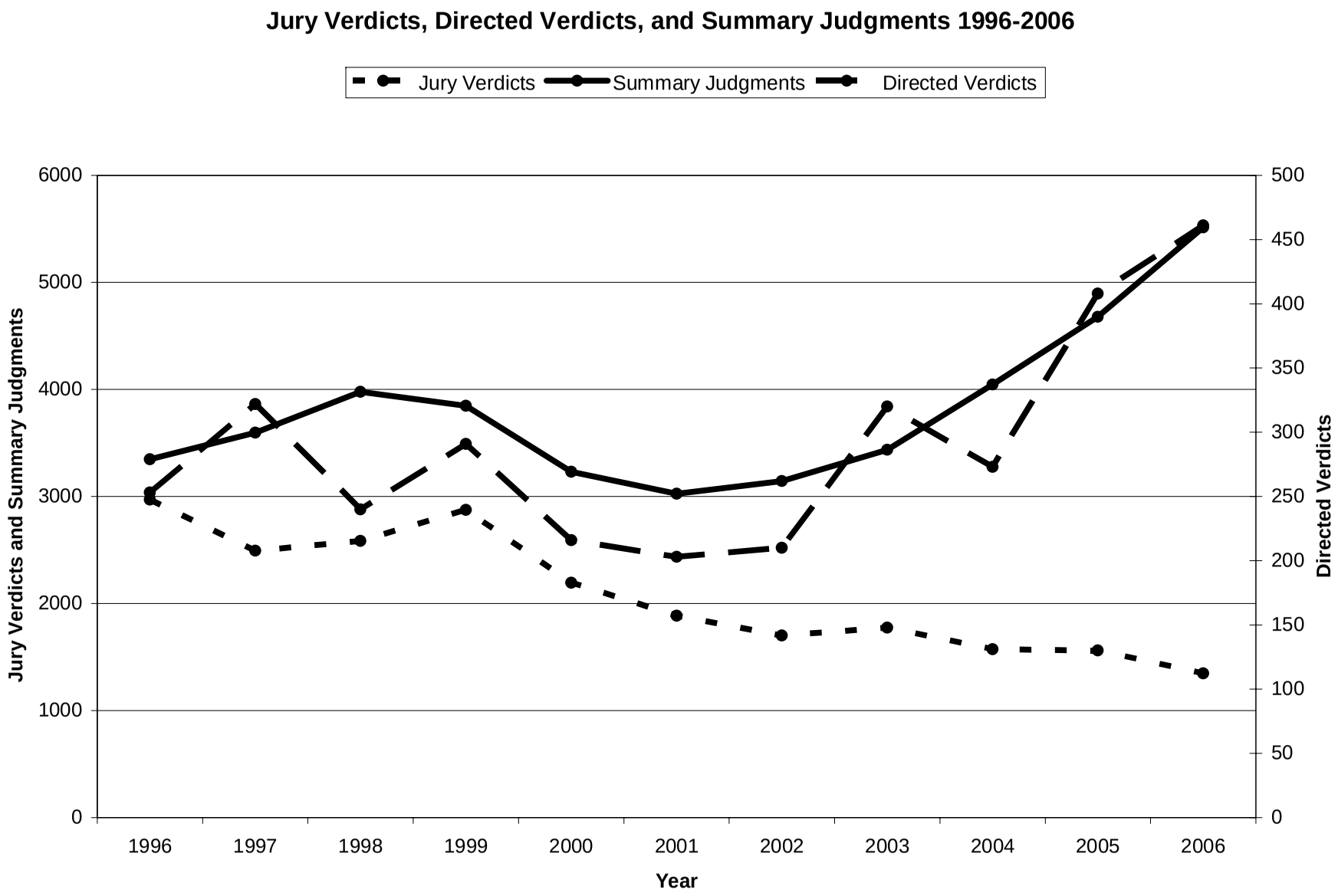
2006
Year


Jury Verdicts, Directed Verdicts, and Summary Judgments 1996-2006
Jury Verdicts
Summary Judgments
Directed Verdicts
Jury Verdicts and Summary Judgments
Directed Verdicts
Year
6000
5000
4000
3000
2000
1000
0
500
450
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100
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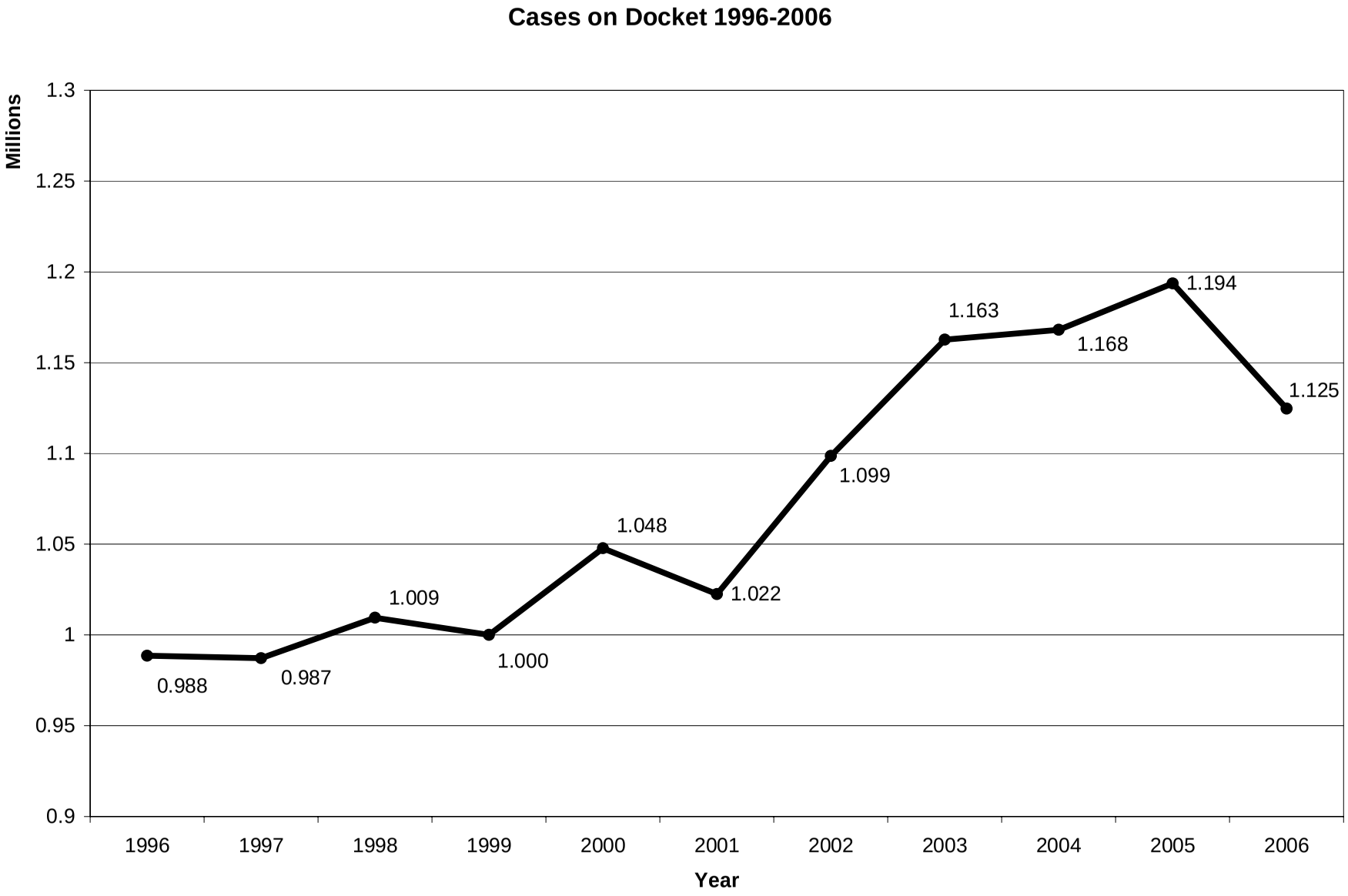
2006


Cases on Docket 1996-2006
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1.25
1.2
1.15
1.1
1.05
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0.95
0.9
0.988
0.987
1.009
1.000
1.048
1.022
1.099
1.163
1.168
1.194
1.125
1996
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2004
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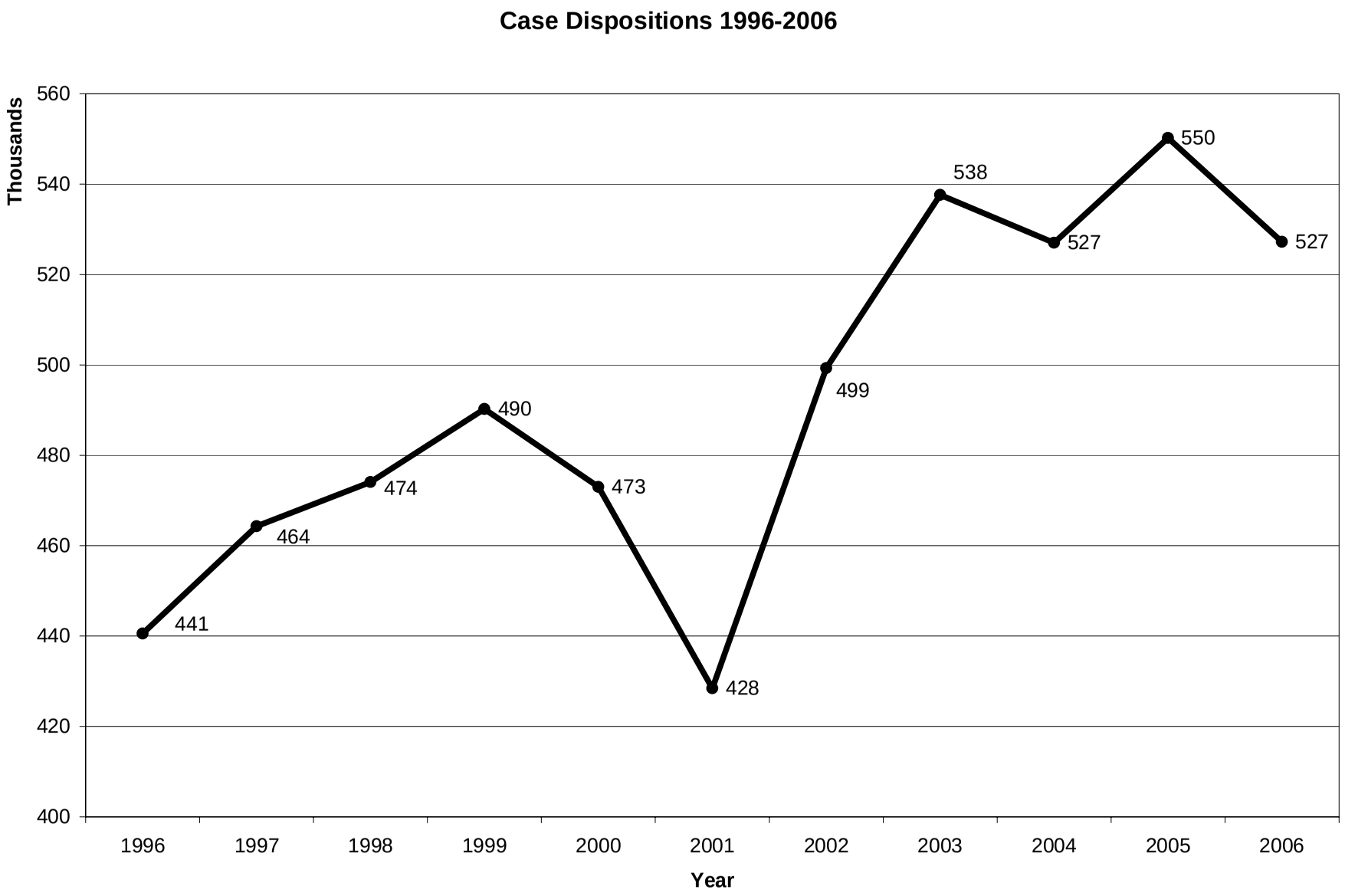
Case Dispositions 1996-2006
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520
500
480
460
440
420
400
441
464
474
490
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428
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538
527
550
527
1996
1997
1998
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2002
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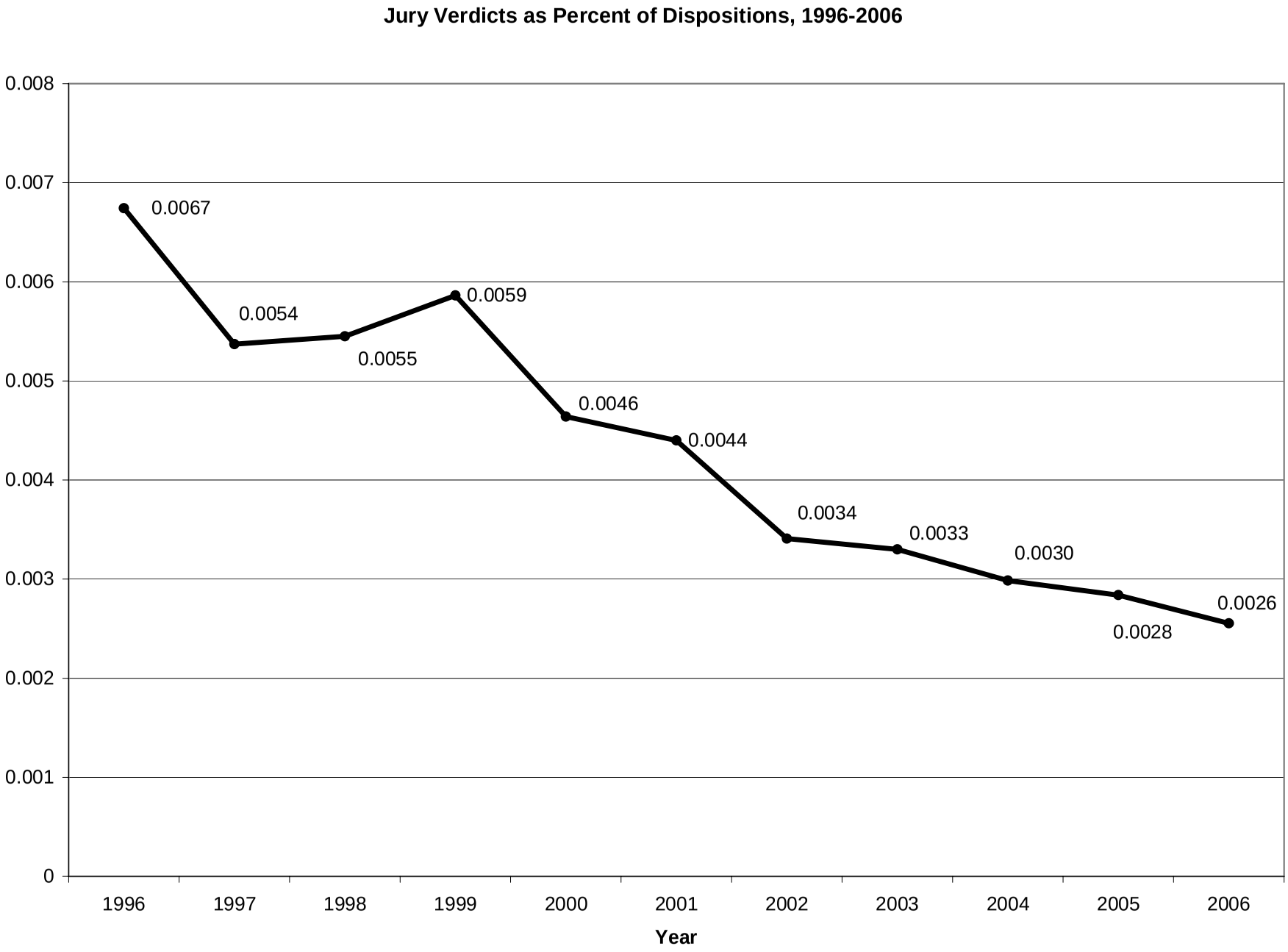
2006
Year


Jury Verdicts as Percent of Dispositions, 1996-2006
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0.007
0.006
0.005
0.004
0.003
0.002
0.001
0
0.0067
0.0054
0.0055
0.0059
0.0046
0.0044
0.0034
0.0033
0.0030
0.0028
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1996
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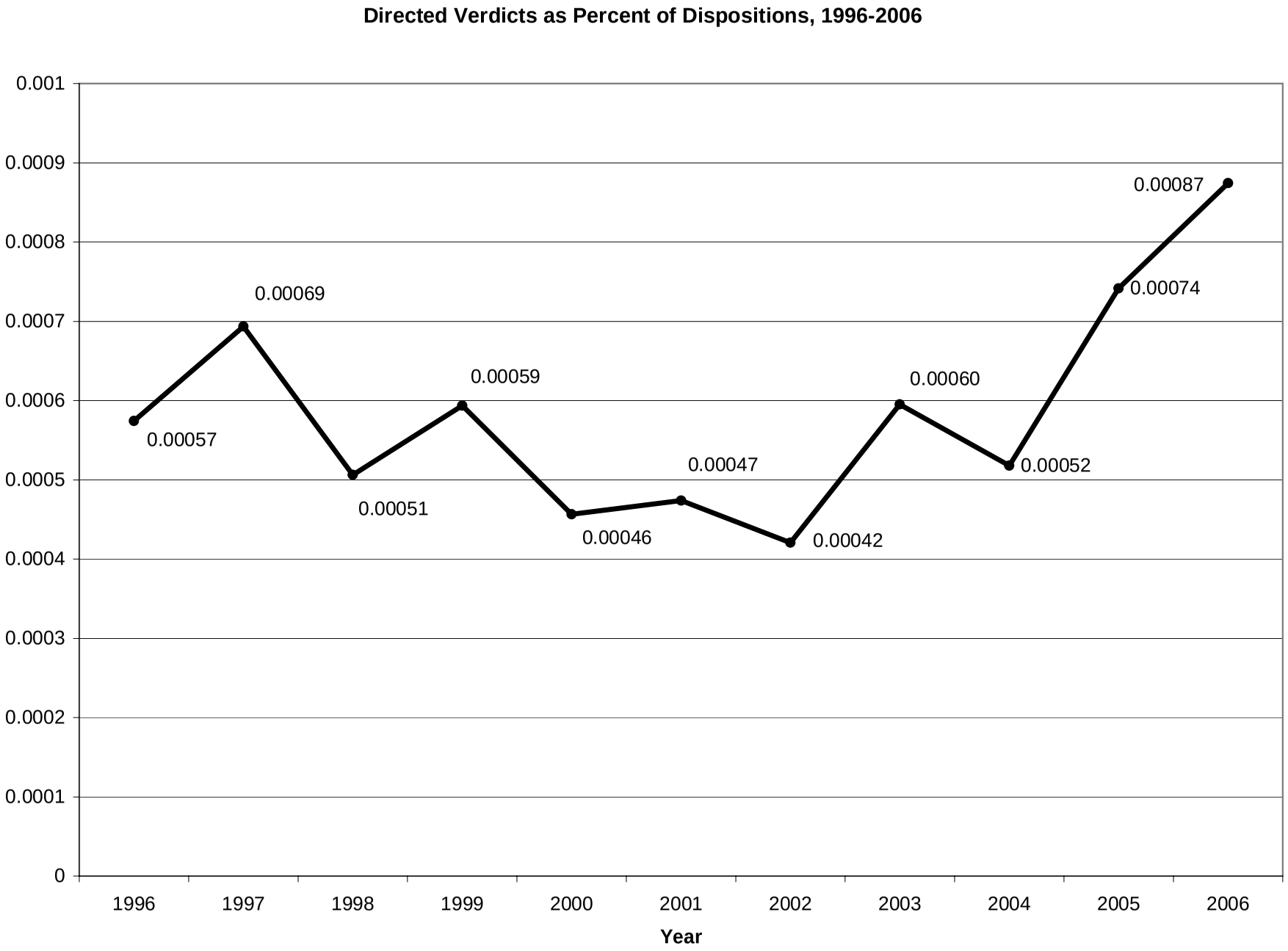
Year


Directed Verdicts as Percent of Dispositions, 1996-2006
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0.0008
0.0007
0.0006
0.0005
0.0004
0.0003
0.0002
0.0001
0
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0.00069
0.00051
0.00059
0.00046
0.00047
0.00042
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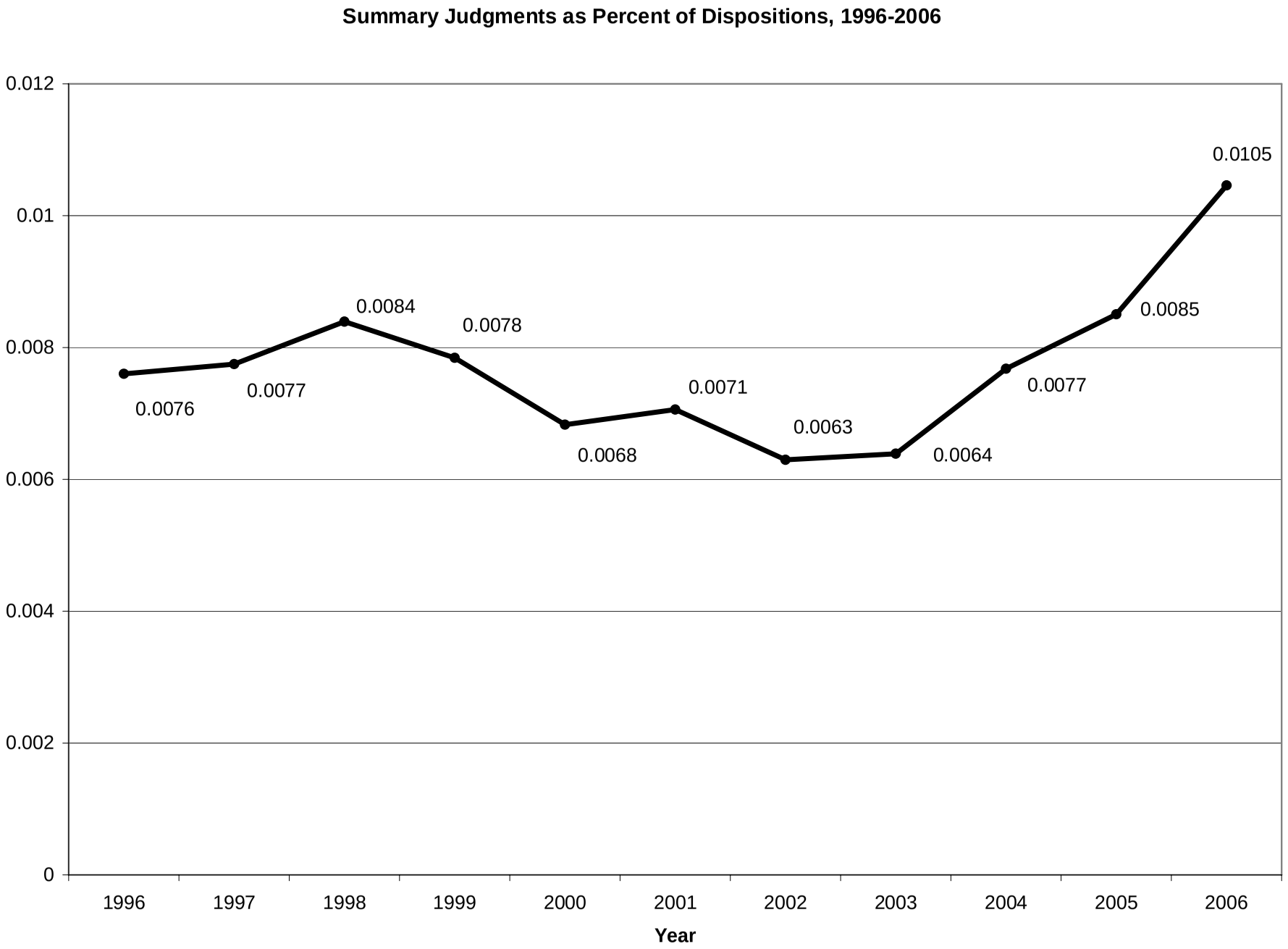
2006
Year


Summary Judgments as Percent of Dispositions, 1996-2006
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0.01
0.008
0.006
0.004
0.002
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0.0076
0.0077
0.0084
0.0078
0.0068
0.0071
0.0063
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0.0105
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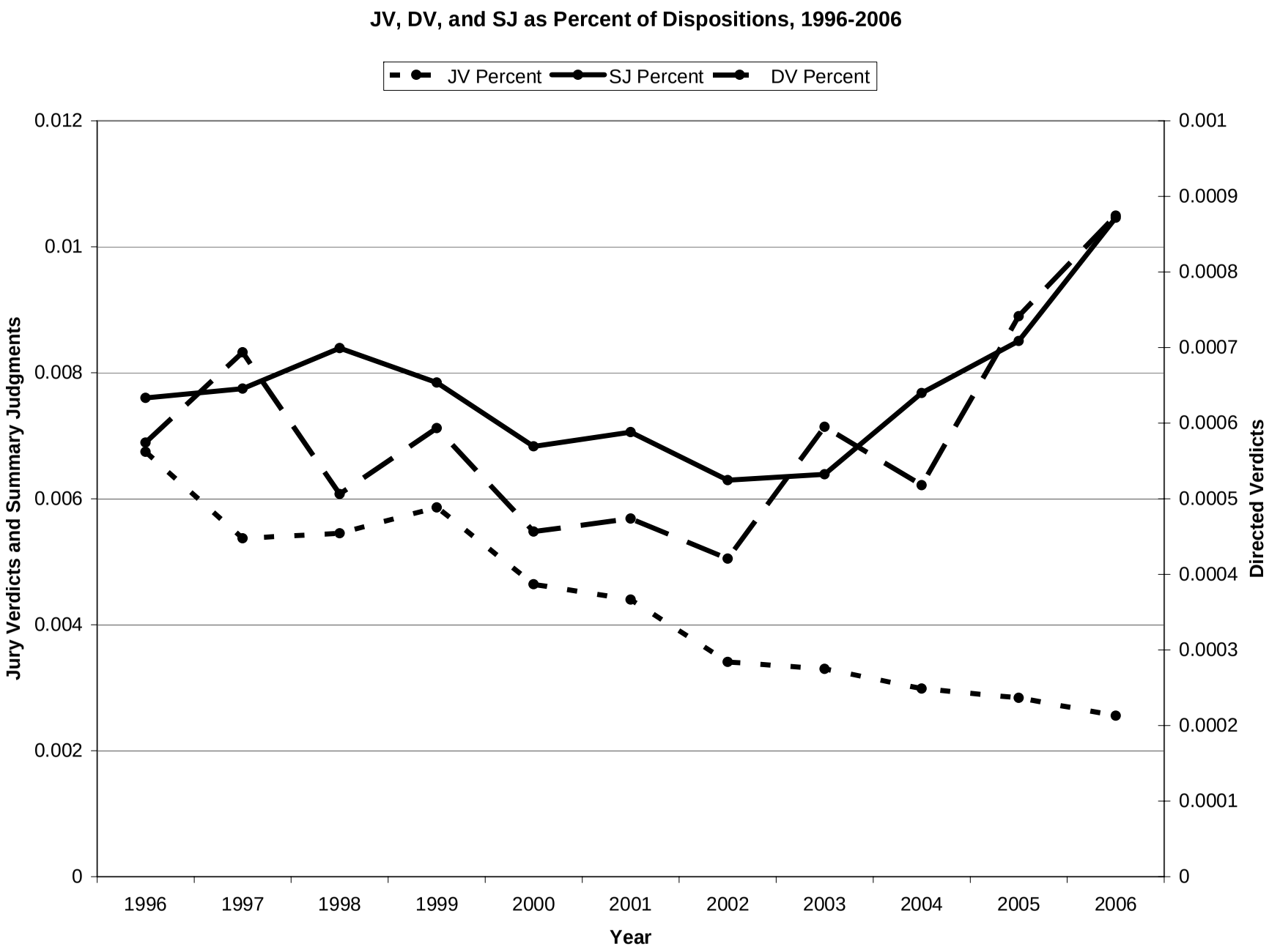
2006
Year


JV, DV, and SJ as Percent of Dispositions, 1996-2006
JV Percent
SJ Percent
DV Percent
Jury Verdicts and Summary Judgments
Directed Verdicts
0.012
0.01
0.008
0.006
0.004
0.002
0
0.001
0.0009
0.0008
0.0007
0.0006
0.0005
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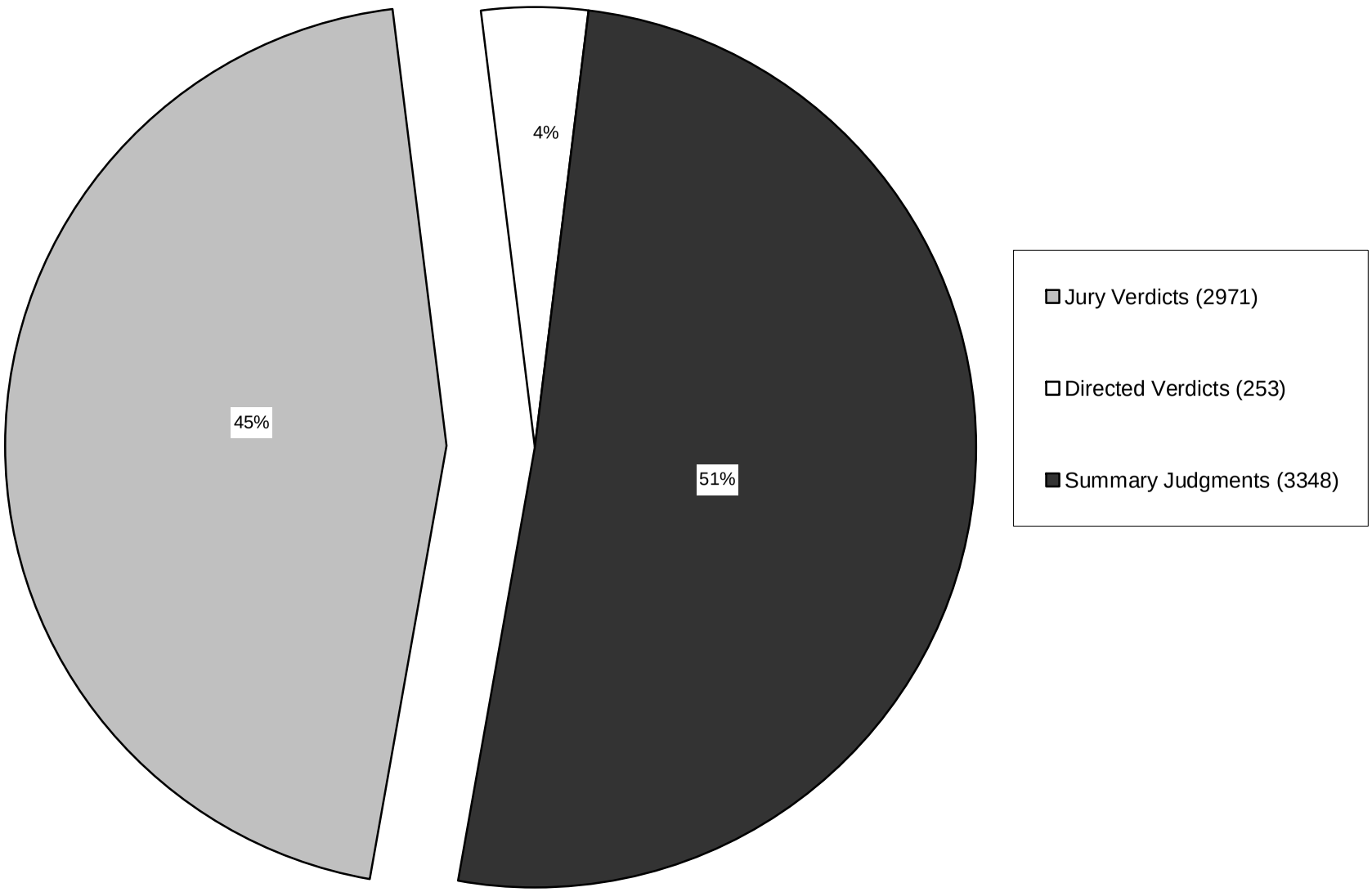
Jury Verdicts, Directed Verdicts, and Summary Judgments - 1996
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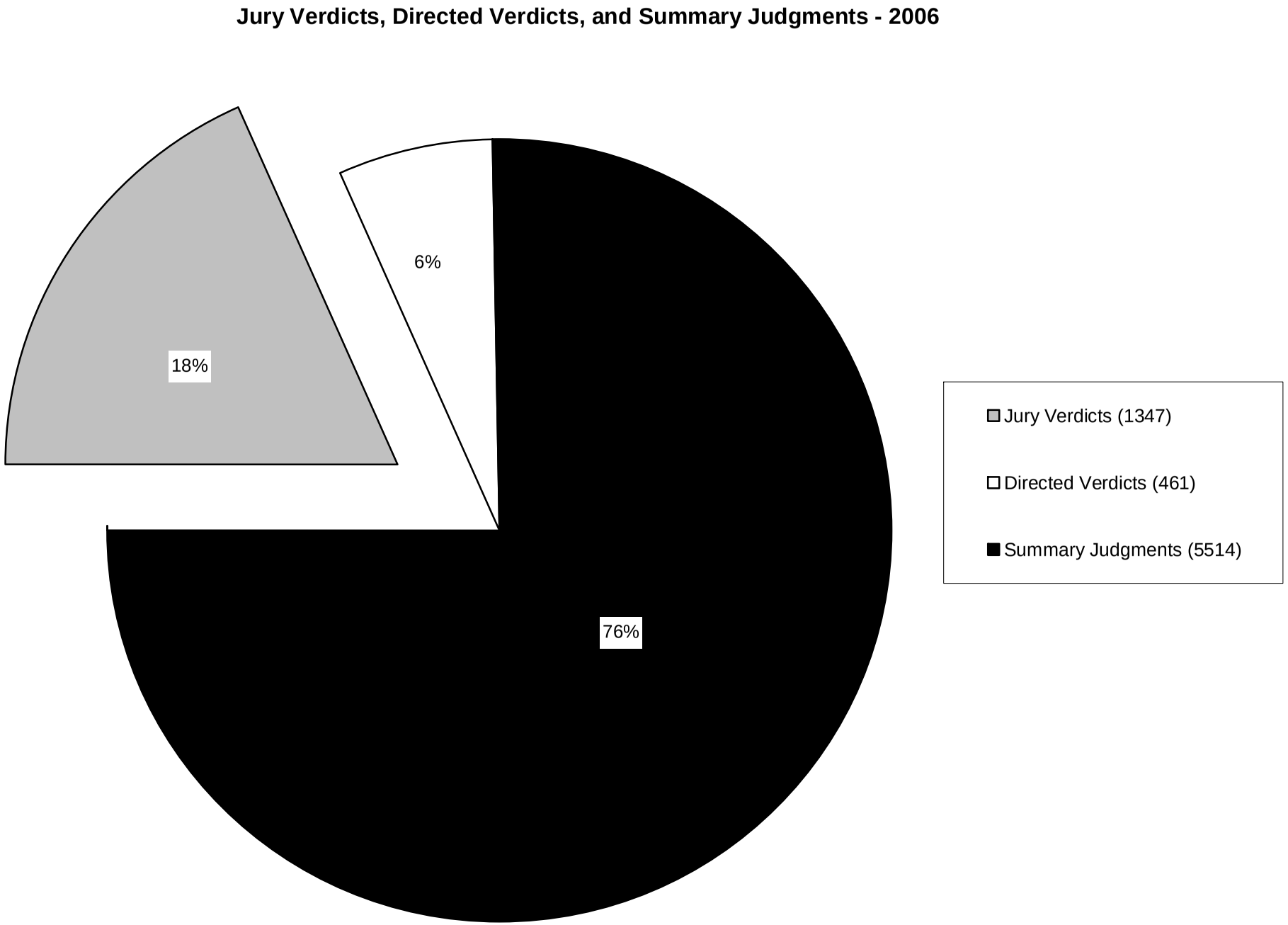
Jury Verdicts (2971)
Directed Verdicts (253)
Summary Judgments (3348)


Jury Verdicts, Directed Verdicts, and Summary Judgments - 2006
6%
18%
76%
Jury Verdicts (1347)
Directed Verdicts (461)
Summary Judgments (5514)