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COMMENT

THE CATCH-22^{*} OF MANDATORY SUMMARY JURY TRIALS

I. INTRODUCTION

Since its inception nearly ten years ago, the summary jury trial has received almost unanimous acclaim as an extremely effective means of inducing settlement and avoiding protracted litigation.¹ The settlement technique continued to be used with virtually no opposition² until some courts began using the summary jury trial as a mandatory settlement mechanism.³ Within the federal court system, a split of authority has developed as to the permissibility of a trial judge imposing a summary jury trial settlement procedure on litigants.⁴ *Strandell v. Jackson County, Ill.*⁵ and *McKay v. Ashland Oil, Inc.*⁶ are two of the more

* Catch-22 is defined as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem . . . [or] a situation presenting two equally undesirable alternatives." WEBSTER'S NEW COLLEGIATE DICTIONARY 215 (9th ed. 1983).

1. *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); Bertelsman, *More on Summary Jury Trials*, 52 KY. BENCH & BAR, April 1988, at 28; Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 834 (1986); Ranii, *New Spurs to Settlement: Summary Jury Trials Gain Favor*, NAT'L L.J., June 10, 1985, at 1, col. 6; Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 800-02 (1989); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 499-518 (1984) [hereinafter Lambros, *The Summary Trial*] (collection of letters to Judge Lambros detailing the successes of numerous judges when experimenting with summary jury trials).

2. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986). Judge Posner's criticism is not aimed at the summary jury trial process. Rather, he questions the undoubted fidelity of the advocates of the summary jury trial in light of an absence of scientific evidence to substantiate the claims that summary jury trials are an effective settlement technique. See also *Developments in "Alternative" Dispute Resolution: An Overview*, 115 F.R.D. 361, 371 (1987).

3. See, e.g., *Strandell v. Jackson County, Ill.*, 115 F.R.D. 333 (S.D. Ill. 1987).

4. Compare *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988) with *Strandell v. Jackson County, Ill.*, 838 F.2d 884 (7th Cir. 1987). For other recent cases upholding the power of courts to order participation in summary jury trials see *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *Fed. Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988); *Home Owners Funding Corp. v. Century Bank*, 695 F.Supp. 1343, 1347 n.3 (D. Mass. 1988); *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 117 F.R.D. 597 (S.D. Ohio 1987).

5. 838 F.2d 884 (7th Cir. 1987). *Strandell* stands alone as the only case rejecting the alleged power of federal courts to order parties to participate in a summary jury trial. One writer posits that the absence of decisions similar to *Strandell* is probably due to the difficulty of appealing discovery orders. Comment, *The Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed*, 16 PEPPERDINE L. REV. 251, 258 n.44 (1989) (authored by Nina Jill Spiegel).

recent cases dealing with this issue and represent opposing viewpoints. Through these cases the author will explore the opposing positions of those courts and propose what the author believes is the inherent flaw in forcing litigants to participate in a summary jury trial against their wishes, regardless of whether the participants are allowed to "hold back" on information otherwise protected under the discovery rules of the Federal Rules of Civil Procedure.⁷ Before delving into the issue, however, it may be helpful to discuss the structure of the summary jury trial and its use in the federal courts.

The summary jury trial was created in 1980 by Judge Thomas Lambros of the United States District Court for the Northern District of Ohio in response to an ever-increasing volume of cases which were inundating the court system.⁸ Today, summary jury trials have been used in approximately 100 federal courts⁹ and in approximately 1,000 cases.¹⁰ Judges who experiment with the settlement technique continue to report favorable reactions.¹¹

The summary jury trial was designed as a half-day proceeding in which lawyers representing the parties to a dispute would present a summary of their respective cases to a six-member jury.¹² The jury is selected from the same pool of potential jurors from which regular petit jurors are drawn.¹³ The half-day proceeding begins with the judge conducting a short voir dire of the ten-member venire in a "show of hands" fashion.¹⁴ The parties are then permitted

6. 120 F.R.D. 43 (E.D. Ky. 1988).

7. FED. R. CIV. P. 26-37.

8. Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 798 (1989) [hereinafter Lambros, *A New Adversarial Model*]. For examples of articles questioning the existence (or continued existence) of a "litigation explosion" see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 63 (1983) and Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. ____ (1990).

9. Lambros, *A New Adversarial Model*, *supra* note 8, at 802 (1989). In an article to be published in the University of Oregon Law Review, Professor Shirley Wiegand notes that in a recent telephone conversation, Judge Lambros estimated that summary jury trials may have been used by as many as 150-200 federal judges. Wiegand, *supra* note 8, at ____.

10. Lambros, *A New Adversarial Model*, *supra* note 8, at 802.

11. See Lambros, *The Summary Jury Trial*, *supra* note 1.

12. Lambros & Shunk, *supra* note 8, at 43; Lambros, *A New Adversarial Model*, *supra* note 8, at 801.

13. Some writers have expressed the concern that using regular jurors as summary jury trial jurors, without informing them that their verdict is only advisory, will "poison" the jury pool. The concern is that a normal jury might wrongly believe that its verdict is not binding and thus not consider the evidence and deliberate with the same seriousness of a normal jury. See, e.g., Wiegand, *supra* note 8, at ____.

14. Lambros & Shunk, *supra* note 8, at 47 n.20. By "show of hands" fashion, Lambros means that jurors are questioned as a group instead of individually and jurors raise their hands in response to questions instead of answering verbally.

two peremptory strikes each to arrive at a six-member jury.¹⁵ The voir dire stage of the proceeding is designed to last no more than fifteen minutes.¹⁶ After jury selection, the summary jury trial proceeds to the argument stage.

The argument stage of the summary jury trial varies significantly from a normal jury trial in that all evidence is presented exclusively through counsel.¹⁷ Each side is allotted one hour in which to present a summary of the evidence it would expect to present in an actual trial of the case.¹⁸ Judge Lambros advocates that objections and procedural maneuvering be kept to a minimum so as to allow each party an uninterrupted presentation.¹⁹ When the attorneys conclude their presentations, the jury then receives an abbreviated instruction on the law, retires for deliberations, and later returns to announce its verdict.²⁰ The verdict, of course, is non-binding and is meant only as a catalyst to more productive settlement discussions.²¹ Once the verdict is announced, the judge and the parties hold a short conference at which they discuss the verdict and establish a timetable for settlement discussions.²² If no settlement is ultimately reached, the case is set for trial. The above description represents the summary jury trial as it was designed by Judge Lambros. Other judges employ numerous permutations of the summary jury trial to better adapt the procedure to the case in which it is being administered.²³

The summary jury trial was not designed to be used randomly in any case. Judge Lambros suggests that the procedure be used only in that class of cases in which the primary obstacle to meaningful settlement discussions is an uncertainty as to how a jury will determine a specific issue such as the infamous reasonable man standard.²⁴ In this manner, the advisory verdict may serve as a predictive

15. *Id.*

16. *Id.* at 47 n.20.

17. *Id.* at 48-50. Many lawyers conduct the presentation of witness testimony by reading from the depositions of the witnesses.

18. *Id.* at 47.

19. *Id.*

20. *Id.* at 48.

21. *Id.* at 43.

22. *Id.* at 48. At the post-verdict conference, the attorneys and parties are allowed to discuss the case with the jurors in order to more fully understand the verdict and to assess the strengths and weaknesses of the case and their methods of presentation. Judge Lambros advocates at least a two week wait before setting the case for trial in order to allow the parties to digest the jury's verdict and conduct further settlement discussions.

23. *E.g.*, Lambros, *The Summary Jury Trial*, *supra* note 1, at 475-476. In his most recent article on summary jury trials, Judge Lambros suggests that judges and lawyers "should not hesitate to modify the procedure as they see fit to meet the demands of the cases before them." Lambros, *A New Adversarial Model*, *supra* note 8, at 798-99.

24. Lambros, *The Summary Jury Trial*, *supra* note 1, at 469. Judge Lambros notes, however, that the summary jury trial technique has been used in a great variety of cases including products liability, patent and copyright infringement, antitrust, and employment cases. Lambros, *A New Adversarial Model*, *supra* note 8, at 799.

tool to dispel some of the uncertainty which often works as an impediment to settlement.²⁵ As Judge Lambros proposes, "[a]ll participants should recognize that another jury would probably return a similar verdict if the case were to go to trial."²⁶

II. BASIS OF THE SUMMARY JURY TRIAL IN THE FEDERAL RULES OF CIVIL PROCEDURE

Judge Lambros asserts that the summary jury trial procedure is firmly rooted in the Federal Rules of Civil Procedure (FRCP).²⁷ Against the backdrop of FRCP 1, mandating that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action,"²⁸ the procedure rests mainly within the court's pretrial powers under FRCP 16.²⁹ Rule 16(a)(5) allows the court, in its discretion, to "direct the attorneys for the parties and any unrepresented parties to appear before it . . . for such purposes as . . . (5) facilitating the settlement of the case."³⁰ FRCP 16(c) also allows the parties to

consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . . (10) the need for adopting special procedures for managing potential-

25. Lambros & Shunk, *supra* note 8, at 45. Judge Lambros believes that one of the greatest impediments to settlement is uncertainty as to how a jury might decide an issue of fact in the case. The advisory jury verdict therefore allows the parties to conduct settlement negotiations from a more informed and rational basis rather than under a possibly unrealistic belief as to how the jury will view the evidence.

26. Lambros, *A New Adversarial Model*, *supra* note 8, at 800. Some question how reliable a predictive tool the summary jury trial's advisory verdict is. Wiegand, *supra* note 8, at _____. In her article, Professor Wiegand catalogues several summary jury trials in which two advisory juries were used. After witnessing the identical presentation of evidence at the summary jury trial, the two advisory juries split up, deliberated separately, and returned separate verdicts. The verdicts were drastically different. *See, e.g.*, *Stites v. Sundstrand Heat Transfer*, No. 84-299 (W. Mich. 1987) (where one summary jury trial jury returned a verdict for the defendant and the other summary jury trial jury returned a verdict for the plaintiff for \$2.8 million); *Muehler v. Land O' Lakes, Inc.*, 617 F. Supp. 1370 (D.C. Minn. 1985) (one group of summary jury trial jurors found for the defendants and the other group awarded plaintiff \$2.92 million); Willging, *TRENDS IN ASBESTOS LITIGATION 77* (1987) (reporting situation in which one summary jury trial jury absolved all defendants and the other summary jury trial jury absolved some defendants but awarded \$8.3 million against remaining defendants). *See also* *Compressed Gas Corp. v. United States Steel Corp.*, 857 F.2d 346 (6th Cir. 1988) (where summary jury trial jury awarded \$200,000 in damages to plaintiff and regular jury awarded more than \$1.76 million in damages to plaintiff).

27. Lambros & Shunk, *supra* note 8, at 51-52. For recent cases finding a mandatory summary jury trial to be consistent with the Federal Rules of Civil Procedure *see* *Fed. Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988).

28. FED. R. CIV. P. 1.

29. FED. R. CIV. P. 16.

30. FED. R. CIV. P. 16(a)(5).

ly difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and (11) such matters as may aid in the disposition of the action.³¹

As further support of the summary jury trial's consistency with the federal rules, Judge Lambros notes the similarity between the summary jury trial and the advisory jury whose use is warranted in FRCP 39(c).³²

These rules seem to be consistent with the summary jury trial when the summary jury trial is conducted with the consent of the parties.³³ This is especially true when considered in conjunction with the notes of the advisory committee to FRCP 16(c)(7). The Advisory Committee notes explain that Rule 16 "does not make settlement conferences mandatory because they would be a waste of times in many cases" and the purpose of the rule is not "to impose settlement negotiations on unwilling participants" but instead to attempt to foster settlement negotiations.³⁴ Problems arise in attempting to harmonize the FRCP with the practice of court-mandated summary jury trial.

III. MANDATORY SUMMARY JURY TRIAL

Due, probably, to the remarkable success that judges experience in using the summary jury trial, some courts have ordered the parties to a lawsuit to participate in a summary jury trial despite the party's or parties' objections to it.³⁵ Assuming that the unwilling participant(s) has been ordered to participate in a mandatory summary jury trial, there are two basic methods by which the judge might conduct the compulsory summary jury trial. First, the judge might force full participation in the summary jury trial by imposing sanctions on a participant rendering a feigned or less than full performance. Second, the judge might not force full participation, but instead leave the decision to the participants as to how meaningfully they will participate.

The remainder of this Comment will explore both of the above options and explain the author's belief that regardless of which of the above two options the judge chooses, the mandatory summary jury trial will likely be doomed to failure when forced on unwilling participants. This is the catch-22. The unfortunate result of the mandatory summary jury trial will be that the summary jury trial, instead of functioning as a timesaving settlement device, will operate as an added expense and an added delay to the resolution of the conflict.

31. FED. R. CIV. P. 16(c)(1984 draft amendments note).

32. Lambros & Shunk, *supra* note 8, at 52; FED. R. CIV. P. 39(c). Lambros contends that the primary similarity is the court's opportunity to utilize the jury's perception of the case although it is not binding.

33. Lambros & Shunk, *supra* note 8, at 52.

34. FED. R. CIV. P. 16(c) advisory committee notes.

35. *See, e.g., Strandell*, 115 F.R.D. 333.

**A. Option One: Mandatory Summary Jury Trial
 with the Imposition of Sanctions
 for Non-meaningful Participation**

It seems fairly obvious why a judge would like to have the power to impose sanctions upon parties rendering less than meaningful participation at a summary jury trial.³⁶ The verdict rendered by the summary jury trial jury which witnessed an incomplete presentation of evidence would not be as good a predictive tool since it would not be based on a fully realistic view of all the evidence.³⁷ In order to maximize the settlement inducing characteristic of the advisory verdict, the parties must participate in the summary jury trial as they would at trial by putting forth their best evidence and arguments. Only in this way can the summary jury trial's advisory verdict function as the most accurate indicator of how a full jury might react to the evidence in the case.³⁸ Forcing the attorneys at a summary jury trial to produce all of the evidence they would present at trial, however, may very well lead to fierce objection.

The primary concern of those attorneys who oppose a mandatory summary jury trial is the apparent conflict between the summary jury trial and the work product and privilege rules contained in FRCP 26.³⁹ Critics of court-ordered participation in summary jury trials argue that a summary jury trial would force a party to reveal matters of work product or privilege that would normally be protected by FRCP 26.⁴⁰

The leading example of a case in which a party was ordered to participate in a summary jury trial despite protests that to do so would reveal trial strategy and require disclosure of privileged statements of witnesses is *Strandell v. Jackson County, Ill.*⁴¹ *Strandell* involved a civil rights action filed by the parents of Michael Strandell against Jackson County, Illinois, for an alleged violation of constitutional rights in the arrest, strip search, imprisonment, and eventual suicidal death of Michael Strandell.⁴² Upon noting that the trial of this action would consume 20-25 days and the court's calendar was not amenable to a trial of this size at any time in the near future, the District Court ordered the parties to participate in a summary jury trial.⁴³ Strandell's attorney objected to the order

36. When using the term "non-meaningful participation" I intend to mean that level of participation in the summary jury trial which will not materially contribute to the parties' understanding of the case or the reliability of the jury's advisory verdict.

37. Maatman, *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455, 484. See also *supra* note 26.

38. Maatman, *supra* note 37, at 482 (1988).

39. E.g., *Strandell*, 115 F.R.D. at 336; FED. R. CIV. P. 26.

40. *Strandell*, 115 F.R.D. at 336; FED. R. CIV. P. 26.

41. 115 F.R.D. 333 (S.D. Ill. 1987).

42. *Strandell v. Jackson County, Ill.*, 634 F. Supp. 824 (S.D. Ill. 1986).

43. *Strandell*, 115 F.R.D. at 334, 336.

compelling the summary jury trial on the grounds that the court lacked power to compel a summary jury trial and that his participation in a summary jury trial would require disclosure of witness statements protected under the discovery rules of the Federal Rules of Civil Procedure.⁴⁴ After refusing to take part in the summary jury trial, Strandell's attorney was found in criminal contempt of court and fined \$500.⁴⁵ The attorney, Thomas F. Tobin, filed a motion for reconsideration which was subsequently denied.⁴⁶ On appeal from the denial, the Seventh Circuit United States Court of Appeals vacated the judgment of contempt finding that FRCP 16 does not permit courts to compel participation in a summary jury trial.⁴⁷ The Court of Appeals held that compulsory summary jury trials could easily upset the well-established balance between pretrial disclosure and partial confidentiality "by requiring disclosure of information obtainable, if at all, through the mandated discovery process."⁴⁸

The discovery rules contained in rules 26-37 of the Federal Rules of Civil Procedure⁴⁹ provide for the liberal exchange of information between parties prior to trial.⁵⁰ These rules of discovery do not provide, however, for unlimited discovery of any information possessed by an opponent.⁵¹ The Advisory Committee notes to the 1970 amendments to Rule 26 make it clear that Rule 26(b)(3) "protect[s] against disclosure the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party."⁵² Rule 26(b)(3) is just one of several provisions in the discovery rules which either forbids or imposes limitations on discovery.⁵³ It appears then, in light of the intent of the discovery procedures to protect some matters from being discovered, that the mandatory summary jury trial with the imposition of sanctions to coerce meaningful participation conflicts with the Federal Rules of Civil Procedure regarding discovery. Another very real concern

44. *Id.* at 334.

45. *Id.*

46. *Id.* at 336.

47. *Strandell v. Jackson County, Ill.*, 838 F.2d 884, 888 (7th Cir. 1987).

48. *Id.* at 888. The "process" referred to by the court is the discovery rules imposing time limitations on parties seeking to obtain statements of witnesses. In *Strandell*, the attorney representing Jackson County failed to interview 21 witnesses and had failed to show "substantial need" or "undue hardship" in order to obtain the statements under Federal Rule of Civil Procedure 26(b)(3). Strandell's attorney argued that a summary jury trial in which witness statements would be exposed would allow Jackson County to obtain information to which it was not entitled. *Strandell*, 838 F.2d at 885.

49. FED. R. CIV. P. 26-37.

50. *Id.*

51. *See infra* note 89.

52. FED. R. CIV. P. 26(b)(3), advisory committee notes. This material is what is commonly referred to as "work product" guarded under the U.S. Supreme Court's ruling in *Hickman v. Taylor*, 329 U.S. 495 (1947).

53. FED. R. CIV. P. 26(b)(3) covering "documents" and "things", Rule 26(b)(4) covering experts, Rule 26(c) covering protective orders, Rule 34 covering inspection of documents and land, et al.

of those who oppose mandated summary jury trials is that parties might begin to use the summary jury trial as a means to discover otherwise undiscoverable information concerning the opponent's case and the strategy the opponent intends to employ at trial.⁵⁴

Another recent case dealing with the issue of mandatory summary jury trials is *McKay v. Ashland Oil, Inc.*⁵⁵ *McKay* involved a suit by two former officers of Ashland Oil alleging that they were wrongfully discharged after refusing to take part in a scheme of illegal activities involving bribes to officials of Middle Eastern countries.⁵⁶ Over the plaintiffs' objections, Judge Bertelsman of the United States District Court of the Eastern District of Kentucky ordered the parties to a summary jury trial.⁵⁷ Upon learning of the result in *Strandell*, the plaintiffs filed a motion for reconsideration of the order mandating summary jury trial.⁵⁸ In his order denying the motion for reconsideration, Judge Bertelsman noted that the present case "stands on a somewhat different footing than *Strandell*" because of the effect of a local rule promulgated pursuant to Federal Rule of Civil Procedure 83 which allows a majority of the district court judges to "make and amend rules governing its practice not inconsistent with these rules."⁵⁹ The local rule (Local Rule 23 of the Joint Local Rules for the United States District Courts for the Eastern and Western Districts of Kentucky) permits a judge to order any civil case to a summary jury trial or other alternative dispute resolution proceeding.⁶⁰ In contrast to *Strandell*, the *McKay* Court read the advisory committee notes to Rule 16 to uphold the power of a federal court to force participation in a summary jury trial.⁶¹

54. Maatman, *supra* note 37, at 476. This was the situation in *Strandell* where Strandell's attorney argued that participation in the summary jury trial would mean divulging information that the opposing party failed to discover before the time period for discovery had elapsed. *Strandell*, 838 F.2d at 885.

55. 120 F.R.D. 43 (E.D. Ky. 1988).

56. *Id.* at 44.

57. *Id.* at 43-44.

58. *Id.* at 44.

59. *Id.* FED. R. CIV. P. 83 (emphasis added). Other writers have reached the same result. See, e.g., Lambros, *A New Adversarial Model*, *supra* note 8, at 804; Comment, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483, 499 (1988) (authored by William Craco); Bertelsman, *More on Summary Jury Trials*, *supra* note 1; Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599, 608-09 (1988); Comment, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 KY. L.J. 421, 436 (1989) (authored by Paul Mattingly). But see, Maatman, *supra* note 37; Maatman & Gilbert, *Summary Jury Trial: The Long & Short of It*, 2 CBA RECORD, April 1988, at 18, 22; Comment, *The Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed*, 16 PEPPERDINE L. REV. 251, 262 (1989) (authored by Nina Jill Spiegel).

60. *McKay*, 120 F.R.D. at 44.

61. *McKay*, 120 F.R.D. at 48. The *McKay* Court relied partially on a resolution of the 1984 Judicial Conference endorsing the experimental use of the summary jury trial. The original resolution proposed adoption of the summary jury trial but contained language requiring that summary jury trials

As detailed in the preceding paragraphs, a mandatory summary jury trial can conflict with the discovery rules when participation in a mandatory summary jury trial would require divulging work product or other material protected from disclosure under the discovery rules.⁶² From that premise, the local rule in *McKay* would be inconsistent with the Federal Rules of Civil Procedure and thereby invalid since the very rule which permits local rules conditions their existence on the local rules being "not inconsistent with these rules" (the Federal Rules of Civil Procedure).⁶³ Requiring the parties in a summary jury trial to divulge work product or other privileged information with threats of sanctions, then, presents a patent conflict with the discovery rules.⁶⁴ There is an alternative to threatening sanctions for non-meaningful participation, but common sense suggests that the alternative will also be ineffective in securing the goals of the summary jury trial as a settlement technique.

B. *Option Two: Mandatory Summary Jury Trial
without the Imposition of Sanctions
for Non-meaningful Participation*

The alternative to coercing meaningful participation by the threat of sanctions is, of course, to leave the decision to the parties as to how meaningfully they will participate in the summary jury trial.⁶⁵

According to an analysis of Judge Lambros' theory as originally set out, the violation of work product and privilege argument would be of dubious validity since Lambros' theory of summary jury trial would allow an attorney to not disclose any information that the attorney might deem to be work product or privilege and then factor in the absence of this information when assessing the jury's advisory verdict.⁶⁶ The aforementioned practice of holding back certain

be conducted "only with the voluntary consent of the parties." *Report of Judicial Conference Committee on the Operation of the Jury System Agenda G-13, Page 4, September 1984*. When the final resolution was adopted, however, the quoted language was omitted. *Report of the Proceedings of the Judicial Conference of the United States 88* (1984). The *McKay* Court used that history as authority for the proposition that a mandatory summary jury trial does not conflict with the Federal Rules of Civil Procedure. *McKay*, 120 F.R.D. at 48.

62. *Supra* note 43.

63. FED. R. CIV. P. 83; Maatman, *supra* note 37, at 473 n.81; Maatman & Gilbert, *supra* note 59, at 20.

64. *Supra* note 47.

65. The decision in *McKay* is based on this premise. *McKay*, 120 F.R.D. at 48. The decision, however, fails to address the wisdom of this practice.

66. Lambros & Shunk, *supra* note 8, at 53-54. This suggested use of the summary jury trial by Lambros adds further weight to the argument that the summary jury trial was not meant to be imposed on parties while threatening the use of sanctions for feigned performance. This practice was probably included by Lambros to avoid violating discovery rules but there is still a question as to whether this practice of holding back on privileged information will save the usefulness of the summary jury trial process when the process is imposed on a party contrary to his or her wishes.

bits of information and then factoring in their absence, while appearing to redeem the mandatory summary jury trial, is based on the premise that the parties have only a limited amount of information that they choose not to disclose or that they will otherwise fully participate.⁶⁷ Considering these assumptions in light of the fact that parties to a lawsuit are cautious in their settlement negotiations for fear of providing the opponent with information he or she might not possess, these assumptions might prove to be unrealistic.⁶⁸

If judges were to continue to compel parties to submit their cases to a summary jury trial in hopes of fostering settlement, but fail to require significant participation through the threat of sanctions, many might ask "why bother?" Why should the parties to a lawsuit be forced to participate in a summary jury trial if there will only be feigned participation?

As mentioned earlier, the advisory verdict a jury renders in a summary jury trial proceeding is a tool which allows the parties the opportunity to discover how a jury might react to their cause of action.⁶⁹ However, the advisory verdict is useful as a settlement tool only inasmuch as it reflects an accurate prediction of what would occur should the case proceed to trial.⁷⁰ A party who does not wish to participate in a summary jury trial out of fear of revealing work product, strategy, or privileged material, but who is forced to do so by a judge, will most likely elect to hold back all of its work product, strategy, or privilege. When the jury renders its verdict after witnessing a less than full scale trial, the verdict might well not be a good predictive tool and may very well be useless as a catalyst to settlement.⁷¹

In the scenario detailed above, a party forced into a summary jury trial may very well come away from the proceeding with a verdict which is virtually useless in fostering settlement. This possibly useless verdict will not come, however, without a price. In addition to the expenses incurred in paying for an attorney during the summary jury trial and all of the costs to the parties involved, a party will also pay for the attorney's additional time in preparing for the summary jury trial. Because of the apparent differences between a summary jury trial and a full scale trial, preparation for one is likely to be very different than preparation for

67. As noted in note 25, the summary jury trial is effective only inasmuch as it represents an accurate prediction of how a jury would decide a matter if the case were to go to trial. When a party participates in a summary jury trial while only revealing a fraction of what would be presented at trial, the summary jury trial's advisory verdict no longer serves as a predictive tool and hence the parties occupy the same position they did prior to the summary jury trial; speculating as to how a jury might view the presentation of evidence at trial.

68. Maatman, *supra* note 37, at 484.

69. *Supra* note 25.

70. Maatman, *supra* note 37, at 482.

71. *Id.* The usefulness of a summary jury trial verdict which is rendered after the jury witnesses only a partial exposition of the evidence is reduced even more when considering the unreliability of the summary jury trial verdict as mentioned in note 26.

the other.⁷² The attorney would first have to determine what evidence he or she would want to protect and save as work product or privileged material and what evidence to use at the summary jury trial. Further, if the attorney wanted to protect a strategy from being discovered and more easily countered at trial, the creation of an entirely separate summary jury trial strategy might prove extremely difficult and entail great amounts of extra time and expense. The attorney participating in a summary jury trial will also have to spend time on planning how to present all of the evidence of the case within the hour allotted for the presentation of evidence.⁷³ This may entail preparing summaries of depositions and interviews or any other technique which might allow an attorney to make a quick and efficient summary jury trial presentation as opposed to the more thorough and deliberate exhibition of evidence at a full trial.⁷⁴ In short, the summary jury trial will require additional expenditures than if the case were to bypass summary jury trial and proceed directly to trial. The effect, then, of requiring a party to participate in a summary jury trial which produces an unhelpful verdict is the imposition of additional monetary burdens and delays to an already expensive and protracted resolution of the legal conflict.⁷⁵

In addition to the added expenses that a feigned summary jury trial proceeding would probably produce and the very real possibility of an ineffectual verdict, there also exist questions concerning how the judge will view the evidence at a summary jury trial.⁷⁶ Since the judge who presides at a summary jury trial will very often be the same judge at the trial on the merits, there is concern that a judge may develop a bias or predisposition about the merits of the case based on a summary jury trial at which a party may very well be reserving some of its more powerful witnesses or information for a full scale trial.⁷⁷ Although this

72. Maatman, *supra* note 37, at 481-482; Maatman and Gilbert, *supra* note 59, at 22; Wiegand, *supra* note 8, at ___; Brenneman & Wesoloski, *Blueprint for a Summary Jury Trial*, 1986 MICH. B.J. 888.

73. Maatman & Gilbert, *supra* note 72.

74. Maatman, *supra* note 37, at 475.

75. As noted in note 8, the crowded court dockets and the monetary burdens of a trial were two of the principal reasons for the creation of the summary jury trial. Professor Wiegand notes a study in which more than half of the attorneys participating in summary jury trials reported spending more billable hours on a case than they would have without the summary jury trial. Wiegand, *supra* note 8, at ___.

76. Maatman, *supra* note 37, at 485.

77. *Id.*; *Developments in "Alternative" Dispute Resolution: An Overview*, 115 F.R.D. 361, 370 (1987). There is also the fear that a judge who has presided over a summary jury trial will rely on the summary jury trial in deciding post-trial motions. In one case, the defendant moved for a new trial asserting that the jury decided the case based on passion and prejudice. In denying the new trial motion, the judge noted the remarkable consistency between the jury's verdict and the summary jury trial verdict. *Caldwell v. Ohio Power Co.*, 710 F. Supp. 194 (N.D. Ohio 1989). This apprehension is increased when considering questions concerning the reliability of a summary jury trial verdict as mentioned in note 26.

apprehension may be overstated, it is still a consideration in assessing the ramifications of compelling attendance at a summary jury trial.⁷⁸

Despite the drawbacks of forcing a party to participate in a summary jury trial without requiring meaningful participation by means of sanctions, the practice may have some redeeming attributes.⁷⁹ There is still a possibility that both sides to the dispute will get a better impression of the case and thereby be able to conduct more meaningful settlement negotiations despite the fact that the performances at the summary jury trial might be different than the performances at a full trial. Judge Lambros believes that uncertainty about the jury's reaction to the case is the biggest stumbling block to settlement, and a mandatory summary jury trial without sanctions for feigned performance might at least work to dispel some of that uncertainty.⁸⁰ The compulsory summary jury trial may also relieve parties of risking an appearance of weakness that might be conveyed by asking for a summary jury trial.⁸¹ If one party must ask for a summary jury trial, the other party might view this as an admission of a weak case which might make the non-moving party more reluctant to settle at a reasonable figure. The compulsory summary jury trial might also force into settlement proceedings parties, who, while adamantly opposed to settlement, find the summary jury trial useful and may end up settling.⁸²

In light of the congested dockets of the federal courts, judges probably feel that a mandatory summary jury trial, even without sanctions for specious participation, is worth conducting when considering the fact that much more judicial time will be consumed should the case proceed to trial.⁸³ When gambling with a half-day summary jury trial in hopes of avoiding a protracted jury trial, judges will probably be willing to take that risk.⁸⁴ A mandatory summary jury trial without sanctions might also work to streamline a case for trial by narrowing the issues or merely forcing the parties to spend more time in considering how to effectively and efficiently try their cases.⁸⁵

Judge Lambros also believes that parties to a lawsuit often resist settlement due to their emotional need for a "day in court" at which they can tell their story.⁸⁶ A summary jury trial may provide that "therapeutic release" the parties

78. *Id.*

79. See generally *McKay*, 120 F.R.D. 43.

80. Lambros, *The Summary Jury Trial*, *supra* note 1, at 469.

81. *Id.*

82. *Id.* at 509. Judge Newblatt of the Eastern District of Michigan wrote to Judge Lambros detailing a summary jury trial proceeding into which the parties came adamant against the possibility of settlement but they ended up settling before trial.

83. *McKay*, 120 F.R.D. at 49.

84. *Id.* But this idea is based on the assumption that more cases will settle before trial if judges are allowed to order cases to summary jury trials. This assumption has not been proven. See, e.g., Posner, *supra* note 2.

85. Lambros, *The Summary Jury Trial*, *supra* note 1, at 468.

86. *Id.*

experience as a result of participating in a legal proceeding and may also allow the parties to analyze their individual cases in ways other than through their attorney's counsel.⁸⁷ The opportunity to view the case firsthand may be especially preferable to viewing the case through the attorney since traditionally the attorney "is hired as a gladiator and not a diplomat."⁸⁸

The list of benefits that may be gained through compulsory participation in a summary jury trial, without the threat of sanctions to force meaningful participation, fails to account for that class of cases in which the parties would be willing to reveal some of the information that would otherwise be protected under the discovery rules in hopes of procuring a settlement to the case.⁸⁹ While this class of cases is not readily identifiable, it should at least be considered in weighing the benefits of mandatory summary jury trials.

IV. CONCLUSION

In spite of the lengthy catalogue of possible benefits that might be derived from a mandatory summary jury trial where no sanctions are allowed to prevent spurious participation, the serious expectation of these benefits somehow seems unrealistic. Would not parties being forced into a settlement procedure against their wishes be more likely to hoard information rather than risk divulging ammunition that might later be used against them at a full trial? To ask the question in that way is to answer it. But the question does not seem to be unrealistically framed given the adversarial and often combative stances which parties to litigation often occupy prior to trial.

It seems then that the practice of compelling parties, against their wishes, to participate in a summary jury trial, regardless of whether the judge threatens sanctions to require meaningful participation, will likely be doomed to failure due either to the discovery rules protecting information from disclosure prior to trial or practical considerations as to the adversarial positions parties often occupy prior to trial.

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87. *McKay*, 120 F.R.D. at 50.

88. *Id.*

89. It seems by the nature of work product that almost all cases will involve some degree of it since work product encompasses nearly everything "prepared in anticipation of litigation or for trial" including an attorney's mental impressions, conclusions, opinions, or legal theories concerning a case. J. FRIEDENTHAL, M. KANE, & A. MILLER, *CIVIL PROCEDURE*, 386 (1985).

