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## Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties

Ann E. Woodley

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## SAVING THE SUMMARY JURY TRIAL: A PROPOSAL TO HALT THE FLOW OF LITIGATION AND END THE UNCERTAINTIES

*by Ann E. Woodley<sup>1</sup>*

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1. The author, Ann E. Woodley, is an Associate Professor of Law at The University of Akron School of Law. The author wishes to thank Dean Richard Aynes, of The University of Akron School of Law, for his comments and suggestions on earlier drafts of this article. She also would like to thank Dana Janini, Thomas Saxer, Andrew Baldwin and Colleen Bonk for their research.

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## I. INTRODUCTION

The summary jury trial is a beneficial federal court-annexed settlement device -- but its use and effectiveness is being threatened. Although the summary jury trial was created nearly fourteen years ago, uncertainties remain today about the authority for its use and other basic issues, and have resulted in time-consuming, costly litigation, as well as informal challenges and criticism. Federal judges and magistrate judges have voiced their concerns about these issues, and it is near the end of a Congressionally-imposed experimental period designed to find ways to reduce cost and delay in the federal courts. The time to remedy the situation is now.

Until fairly recently it was generally assumed that the primary function of judges was to decide cases.<sup>2</sup> It is only in the last decade or so that courts have viewed substantial involvement in facilitating settlement as a primary function of the judge and that the notion of 'the managerial judge' has entered the judicial vocabulary.<sup>3</sup> And the burgeoning caseloads in many courts, particularly urban ones, have created increasing pressure for judges to process more expeditiously their swelling dockets.<sup>4</sup>

The subject of settlement has assumed a new importance as a result of The Civil Justice Reform Act of 1990 ("The Civil Justice Reform Act" or "Act"),<sup>5</sup> in which Congress created an experimental period designed to find ways to reduce cost and delay in the federal litigation system.<sup>6</sup> One portion of the Act required each federal judicial district to set up an Advisory Committee to develop a plan dealing with congestion and delay, including appropriate consideration of alternatives to adjudication.<sup>7</sup> The summary jury trial is an important device

2. STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 243 (2d ed. 1992).

3. *Id.* (citing Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982)).

4. *Id.*; see also *Proposed Civil Justice Reform Legislation: Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 980 (1992) [hereinafter *Memorandum*]:

America has become a litigious society. In 1989 nearly 18 million new civil cases were filed in the state and federal courts. This amounts to one lawsuit for every ten adults. In the federal courts alone, the number of lawsuits filed each year has almost tripled in the last thirty years -- from approximately 90,000 in 1960 to more than 250,000 in 1990.

This dramatic growth in litigation carries with it very high costs for the U.S. economy. A recent article in *Forbes* estimates that individuals, businesses and governments spend more than \$80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to \$300 billion indirectly, including the cost of efforts to avoid liability.

*Id.*

5. GOLDBERG, *supra* note 2, at 243; see Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833, 835 (1994) (referring to the passage of the Civil Justice Reform Act of 1990). The Civil Justice Reform Act of 1990 comprises Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089-98 (1990) (codified as amended at 28 U.S.C. §§ 471-482 (1988 & Supp. 1992)) [hereinafter *The Civil Justice Reform Act* or *Act*]. Johnston, at 835 n.9.

6. See Johnston, *supra* note 5, at 835.

7. GOLDBERG, *supra* note 2, at 243; see also Johnston, *supra* note 5, at 833. The background of the Act was described as follows:

The CJRA followed, in large part, from the work of a task force ("Brookings task force") convened by the Brookings Institution and the Foundation for Change at the request of Senator Joseph Biden. In 1988, Senator Biden prompted the Brookings task force to "develop a set of recommendations to alleviate the problems of excessive cost and delay" in civil litigation. The membership of the task force was selected to provide a broad spectrum of authorities representing the competing interests in the civil justice system . . . .

After discussing and debating reform proposals over a nine month period, the Brookings task force produced a lengthy set of recommendations for reducing costs and delays in federal civil litigation. The recommendations addressed three broad aspects of

designed to achieve that goal and is specifically mentioned in the Act.<sup>8</sup> The Act also requires that by the end of 1995, the Judicial Conference must report to

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federal civil litigation: procedure, judicial resources, and the activities of attorneys and clients that affect cost and delay. The majority of the recommendations concerned changes in procedure, i.e., steps that courts and judges could take to reduce cost and delay in civil litigation. Through its recommendations for procedural reform, the Brookings task force hoped to provide participants in the civil justice system with the "proper incentives" to minimize cost and delay.

Less than six months after the Brookings task force issued its report, Senator Biden introduced his initial version of the CJRA in the Senate on January 25, 1990. Senator Biden's bill relied heavily on the procedural recommendations of the Brookings task force. Although both the House of Representatives and the Senate made amendments to the CJRA before adopting it, the CJRA never shifted its focus from the reduction of cost and delay in the federal courts.

The first recommendation of the Brookings task force called for a statute requiring each district court to develop and adopt a formal plan to reduce cost and delay in civil litigation. Similarly, at the heart of the CJRA lies the requirement that each district court implement a "civil justice expense and delay reduction plan" by December 1, 1993. The stated purpose of this requirement is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." Despite this broadly stated purpose, the Act concentrates on only two of the announced goals -- the reduction of cost and delay.

*Id.* at 837-41 (footnotes omitted).

It should be noted that:

[a]fter adoption of a Plan, the CJRA requires repeated annual assessments by each district court, in conjunction with its advisory group. Moreover, these annual assessments must be conducted "with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court."

*Id.* at 843 (footnotes omitted).

In addition, "[t]he most significant practical restriction on judicial discretion is the Act's requirement that advisory groups and courts contemplate adoption of the specific methods of litigation management and cost and delay reduction set forth in the CJRA. First, the Act requires consideration of six identified 'principles and guidelines of litigation management and cost and delay reduction.'"

*Id.* One of these six principles includes court-authorized reference of cases to SJTs. See The Civil Justice Reform Act, 28 U.S.C. § 473(a)(6) (1988); see also Shelby F. Grubbs, *A Brief Survey of Court Annexed ADR: Where We Are & Where We Are Going*, TENN. B. J. 20, 23 (Jan.-Feb. 1994). The author states: "Without doubt, the greatest impetus to the development of ADR in the history of the federal system is the enactment of the Civil Justice Reform Act of 1990." *Id.*

8. The Civil Justice Reform Act, 28 U.S.C. § 473(a)(6) (1988). Section 473(a)(6) of the Act provides:

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in conjunction with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

- (6) authorization to refer appropriate cases to alternative dispute resolution programs that -
- (A) have been designated for use in district court; or
  - (B) the court may make available, including mediation, minitrial and summary jury trial.

*Id.*

Congress it's assessment of the results of the diverse experience of the district courts in their efforts.<sup>9</sup>

Quite aside from issues of congestion and delay, judges are increasingly becoming aware of the advantages in certain cases of using ADR techniques to provide more satisfactory outcomes than are possible through litigation.<sup>10</sup> Thus for many judges the question is no longer whether to encourage settlement but how best to do so.<sup>11</sup> The Senate Report for P.L. 101-650, The Judicial Improvements Act of 1990 (which includes the Civil Justice Reform Act of 1990) notes that the last fifteen years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts.<sup>12</sup>

One settlement technique used with growing frequency in the federal courts is the summary jury trial ("SJT").<sup>13</sup> Briefly stated, in a SJT, both sides present

9. See Johnston, *supra* note 5, at 847-48:

As part of the pilot program study, the Judicial Conference must provide a report to Congress by the end of 1995. The report must include an assessment of the extent to which cost and delay have been reduced as a result of the program. In addition, the report must compare the experiences of the pilot districts with the experiences of ten "comparable" districts for which adoption of the Act's principles of cost and delay reduction had been "discretionary." Perhaps most importantly, the pilot program report also must contain a recommendation as to whether some or all of the district courts should be required to include in their Plans the Act's principles of cost and delay reduction. If the Judicial Conference does not recommend an expansion of the pilot program's requirements, the Conference must identify "alternative, more efficient cost and delay reduction programs" for implementation.

Senator Biden accurately described the practical effect of the pilot program in prompting the adoption of the Act's principles of cost and delay reduction. In advocating passage of the CJRA to the Senate, Senator Biden stated: "Within a set number of years, then, this legislation insures that one of two things will occur. Either the six principles of litigation management and cost and delay reduction that Congress has specified in this legislation will be part of district court plans nationwide, or some other program, that has been shown to be demonstrably better, will be in place. One way or the other, the situation is bound to improve."

*Id.* (footnotes omitted).

The Act itself expires on December 1, 1997, and will not bind district courts after that date. *Id.* at 835 n.10 (referring to § 103(a), 104 Stat. at 5096).

10. GOLDBERG, *supra* note 2, at 243.

11. *Id.*

12. S. REP. NO. 416, 101st Cong., 2d Sess. 28 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6831.

13. See Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 802 (1989) [hereinafter *New Adversarial Model*] (in which Judge Lambros estimated that at least 100 federal and state judges had deployed the SJT in the resolution of approximately 1,000 disputes).

The use of summary jury trials in state courts, where it is less prevalent, is not addressed herein. However, many of the same concerns and proposed solutions would apply in that system as well. See, e.g., *Nibert v. BancOhio Nat'l Bank*, No. CA 86-05-012, 1987 WL 10359, at \*2 (Ohio Ct. App. Apr. 27, 1987).

See also N.D. OF OHIO R. 7, ch. 6. The United States District Court for the Northern District of Ohio also uses a device called a "summary bench trial" in which, obviously, a judge is the decisionmaker rather than a jury. *Id.* (This variation is beyond the scope of this article.).

a summary of their evidence to an actual jury. The jury deliberates and then renders an advisory verdict which becomes the basis for settlement discussions between the parties.<sup>14</sup>

The SJT was created in 1980 by the Honorable Thomas D. Lambros of the United States District Court for the Northern District of Ohio.<sup>15</sup> In September 1984, the Judicial Conference of the United States passed a resolution recognizing the usefulness of the SJT in resolving prolonged civil litigation.<sup>16</sup> As of 1987, the summary jury trial had been used in an estimated sixty-five federal district courts.<sup>17</sup> And it was specifically included in the Civil Justice Reform Act of 1990 as one of the tools federal courts now have at their disposal.<sup>18</sup>

The SJT's intended time and cost reductions have been realized on many occasions,<sup>19</sup> but during nearly fourteen years of use, a number of basic uncertainties have threatened its use and effectiveness. The challenges to the SJT can be organized into five primary issues. First, the authority for SJTs in general is uncertain and no authority appears to exist for mandating participation in a SJT. Second, no authority exists for summoning jurors from the regular jury pool to serve as SJT jurors. Third, uncertainty exists concerning the right of access to SJTs by the press and public. Fourth, uncertainty exists regarding the confidentiality, and future use, of SJT information and verdicts. Fifth, uncertainty exists about the appropriateness of, and the authority for, awarding sanctions in the SJT context.<sup>20</sup>

These issues are fundamental to the use of the SJT. The time and cost involved in such litigation and criticism are clearly inconsistent with the purpose of this device. Indeed, those who do attempt to raise SJT issues in a particular lawsuit often must resort to extraordinary measures to do so -- thus increasing the

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See also N.D. OF OKLA. R. 16.3(I). The United States District Court for the Northern District of Oklahoma also uses a device called an "executive summary jury trial," which it describes as a summary jury trial where chief executive officers of corporate parties participate as part of a three-judge trial panel. *Id.* (Again, this variation is beyond the scope of this article.).

14. See Thomas D. 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* 9-10 (Jan. 1990) [hereinafter *Report to the Judicial Conference*].

15. See Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1373 (1983-84).

16. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (Sept. 1984). The September 1984 resolution passed by the Judicial Conference of the United States read as follows: "RESOLVED, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases." *Id.*

17. See Paul Marcotte, *Summary Jury Trials Touted*, A.B.A. J. 27 (Apr. 1987).

18. See The Civil Justice Reform Act, 28 U.S.C. § 473(a)(6) (1988).

19. See discussion *infra* part II.B (concerning the benefits of SJTs).

20. See Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity In Its Use* (1995) (unpublished manuscript, on file with Professor Woodley, The University of Akron School of Law) (addressing other issues affecting the use and effectiveness of SJTs).

time and cost involved.<sup>21</sup> To avoid jeopardizing the continued use of this beneficial settlement device,<sup>22</sup> this article discusses proposed solutions to these basic uncertainties.

As part of the justification for the proposed solutions, this Article offers a unique perspective on the SJT device.<sup>23</sup> In addition to a review of the pertinent litigated cases and the scholarly articles on the subject, input on the issues raised by the use of SJTs has been obtained from those persons who actually conduct them: federal district court judges and federal magistrate judges from across the country. Lengthy surveys were submitted to these federal district court judges and

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21. See *In re NLO, Inc.*, 5 F.3d 154, 159 (6th Cir. 1993). The district court ordered a SJT over the defendant's objections and then refused to certify the issue for an interlocutory appeal under 28 U.S.C. § 1292. *Id.* at 155. The defendant filed a petition for mandamus in the Sixth Circuit. *Id.* In evaluating the first guideline from *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 304 (6th Cir. 1984) (regarding whether mandamus is appropriate), "(1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired," the Sixth Circuit stated:

A direct appeal of the order to participate in a summary jury trial will never be possible; a final decision on the merits would necessarily take place after such a proceeding had already occurred.

One possible alternative would be for defendants to refuse to participate in the summary jury trial and risk being held in contempt; the criminal contempt order could then be appealed to this court. But the purpose of criminal contempt is punitive; it vindicates the authority of the court.

*In re NLO*, 5 F.3d at 156, 159 (citation omitted).

22. See discussion *infra* part II.B (concerning the benefits of SJTs).

23. See Molly M. McNamara, *Summary Jury Trials: Is There Authority For Federal Judges to Impanel Summary Jurors?*, 27 VAL. U. L. REV. 461, 475 n.102 (1993) (noting that to date, no comprehensive study has been conducted on this procedure); see also explanation of survey conducted for this article *infra* note 24. While the survey responses from federal judges across the country which are analyzed in this article may not qualify as a comprehensive study, they certainly offer more insight into the actual process than has been available thus far.



federal magistrate judges,<sup>24</sup> and the responses received contribute significantly to the discussion below.<sup>25</sup>

While these problems could be addressed in a number of ways, what is critical now is that they be resolved. Therefore, the proposed federal summary jury trial statute included herein explicitly authorizes federal district courts to conduct SJTs and to mandate participation in them, authorizes courts to summon SJT jurors pursuant to the regular process, provides that the SJT is a confidential process to which the public and press have no access (unless the parties otherwise agree), clarifies the confidentiality and future use of SJT verdicts and information, and explicitly provides for sanctions for misuse of the process.<sup>26</sup> These statutory proposals stem, in part, from suggestions made by the judges and magistrate judges contributing to this effort, from local court rules currently in use, from case law, and from other scholars.<sup>27</sup> And, obviously, this proposed statute is directed to those legislative decisionmakers who could ensure its implementation in the federal court system. If adopted by Congress, the proposed summary jury trial statute will add clarity to the process so that summary jury trials can achieve the

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24. Ann E. Woodley, *Compilation of Judicial Responses to Professor Ann E. Woodley's Survey on Summary Jury Trials* (Spring 1994) (unpublished survey) [hereinafter *Judicial Survey Responses*]. (A 40-question survey was sent to all of the chief judges of the United States District Courts along with a cover letter asking them to pass copies of the survey on to all of their colleagues (including both district court judges and magistrate judges). A separate mailing of the survey was also made to all of the district court judges and magistrate judges in the United States District Court for the Northern District of Ohio, since the SJT's creator, Judge Lambros, is a judge in that district. Responses were received from 57 district court judges and magistrate judges from 25 states, including Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. These responses were updated, where necessary, in the Spring of 1994.)

Twenty-one of the responding judges indicated that they have conducted SJTs, 33 indicated that they have not, and 1 stated that Judge Lambros conducted one for him. *Id.*, Question 1, at 1. Judges from the Middle District of Alabama, the Northern District of Alabama, the Southern District of Florida, and the District of Hawaii who stated that they have not conducted any SJTs added that they were also speaking for all of their colleagues in those districts. *Id.*

The surveyed judges who have conducted SJTs have conducted anywhere between one and sixty of them. *Id.*, Question 7, at 10.

25. Ann E. Woodley, *Compilation of Attorney Responses to Professor Woodley's Survey on Summary Jury Trials* (Spring 1994) (unpublished survey) [hereinafter *Attorney Survey Responses*]. (A similar 28-question survey on this subject was sent to the head litigation partner at the 100 largest law firms in Cleveland and Akron, Ohio that list litigation in their *Martindale, Hubbell* entry. Although fewer than ten lawyers responded to this survey, their views have been included where appropriate.).

26. See *infra* part IV.

27. Note, however, that the scholars have offered, at best, piecemeal approaches to the problem of sustaining the SJT. And although this article too is not entirely comprehensive, it addresses the most basic problems. See also Woodley, *supra* note 20 (responding to remaining concerns not addressed in this article).

result that was intended by their creation: the reduction of the time and cost involved in litigation by fostering settlement.<sup>28</sup>

The discussion below is divided into four parts. Part II is a background section describing the summary jury trial process and its intended benefits, as well as briefly identifying the five litigated issues and basic uncertainties discussed here. Part III describes the five litigated issues and basic uncertainties in detail, describes how judges have attempted to deal with them, and discusses potential solutions. Part IV contains specific statutory language embodying the proposed solutions. And, finally, Part V offers a brief conclusion.

## II. BACKGROUND

By way of background, this article will briefly describe the summary jury trial process and its benefits, as well as the litigated issues and basic uncertainties challenging the use and effectiveness of this unique settlement device.

### A. The Summary Jury Trial Process

As noted in the Senate Report to The Judicial Improvements Act of 1990, the SJT was borne out of a need to develop a settlement alternative that preserved the involvement of a jury in the decisionmaking process.<sup>29</sup> The Report added that a SJT recognizes that often the only bar to settlement of a case is a difference of opinion on how a jury will perceive evidence presented at trial.<sup>30</sup> However, it is clearly a settlement tool which neither limits or expands the rights of the parties involved.<sup>31</sup>

A SJT is generally used in a case after discovery is complete and no motions are pending.<sup>32</sup> The process has been described as follows:

In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides the settlement of the case. Normally, six mock jurors are chosen after a brief voir dire conducted by the court. Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and

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28. Johnston, *supra* note 5, at 848. The legislative history of the Civil Justice Reform Act of 1990 "indicates that Congress pursued judicial reform on its own through the CJRA because of a perception that the courts could not effectively use their powers under the Federal Rules of Civil Procedure to reduce cost and delay." *Id.*

29. S. Rep. No. 416, *supra* note 12, at 1.

30. *Id.*

31. See Jones-Hailey v. Corporation of TVA, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (quoting Thomas D. Lambros, *The Summary Jury Trial*, 103 F.R.D. 461, 469 (1984)). The court held that TVA's participation in a summary jury trial was not a constructive consent by TVA to a jury trial. *Id.*

32. *Report to the Judicial Conference, supra* note 14, at 12.

evidentiary objections are discouraged. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial.<sup>33</sup>

Following counsels' presentations, the jury is given an abbreviated charge and then retires to deliberate. The jury then returns a "verdict." To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. "Also, the court and jurors join the attorneys and parties after the 'verdict' is returned in an informal discussion of the strengths and weaknesses of each side's case."<sup>34</sup>

Elements of the process omitted from the above description include: either a judge or magistrate judge may preside at the SJT;<sup>35</sup> the SJT jury panel is drawn from the pool in the same manner as is a regular petit jury;<sup>36</sup> the jury is told that the case is being presented in an abbreviated form, but usually is unaware before it deliberates that its verdict is merely advisory;<sup>37</sup> and clients or officers of clients with authority to negotiate a settlement are normally required to attend the summary jury trial.<sup>38</sup> Obviously, if settlement discussions fail, the case will be tried. The entire process usually lasts less than one day,<sup>39</sup> but can take up to several days.<sup>40</sup>

The SJT is designed to facilitate settlement by providing what is hoped to be a reasonably accurate forecast of the outcome of the trial, and, in fact, the Sixth

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33. *Id.*

34. *See* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 904 (6th Cir. 1988).

35. Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 47 (1980). From this point on in this article the term "judge" will refer to both United States District Court Judges and United States Magistrate Judges.

36. *See* Lambros & Shunk, *supra* note 35, at 47.

37. *See* McNamara, *supra* note 23, at 471-72. The author writes:

Commentators disagree about whether potential jurors should be told of the nonbinding nature of the SJT proceeding. According to Judge Lambros' model, the judge tells the potential jurors about "the nature of the summary trial" with an emphasis on "the difference between the summary trial and a trial on the merits." Most commonly, the jurors are not told about the nonbinding nature of the SJT verdict until after they have already returned what they were led to believe would be a binding verdict. One commentator has expressed concern that telling the jurors of the nonbinding nature of SJT will lead jurors to decide the case less carefully and thus compromise public confidence in the legal system.

*Id.* (footnotes omitted).

*See* Stephen W. Myers & Howard Armstrong, *Court tests summary jury trial: Two judges try the 'cutting edge' venture*, THE MARICOPA LAWYER June 1990, at 1 (Maricopa County, Ariz.). Some courts make SJT verdicts binding if all of the counsel consent in advance. *Id.* In addition, some courts are trying a hybrid of sorts. *Id.* In "high-low" binding verdict cases, the plaintiff agrees to have his award limited to a given high figure, if there is a plaintiff's verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict. *Id.* The parties really are asking the jury to determine the award amount between the high and low figures. *Id.*

38. *Report to the Judicial Conference*, *supra* note 14, at 13.

39. *See* S. REP. NO. 416, *supra* note 12, at 29 (quoting from Lambros, *The Summary Jury Trial -- An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (Feb.-Mar. 1986)).

40. *See* *Judicial Survey Responses*, *supra* note 24, Question 10, at 13-14.

Circuit has referred to it as a highly reliable predictor of the likely trial outcome.<sup>41</sup>

When the surveyed judges who have conducted SJTs were asked to describe the basic SJT procedure they have used, the responses revealed some variations in the amount of time allotted for the attorneys' presentations.<sup>42</sup> The estimates provided by the judges varied from 30 minutes per attorney<sup>43</sup> to 6-8 hours per side, with the most common time period being between an hour and 1 1/2 hours per side.<sup>44</sup>

The surveyed judges' procedures also varied somewhat in the structure of the presentation. For instance, one judge indicated that he has parties combine opening statements and closing arguments in their presentations and then gives plaintiffs limited rebuttal time; another judge has parties give opening statements, a summary of each case, closing arguments and then final arguments; and another judge has the parties address the jury twice: the first such address combining the opening statement and the presentation of evidence, with the second address being the closing argument.<sup>45</sup>

In addition, if the case turns on the credibility of the parties, at least one surveyed judge allows full direct and cross-examination of the parties and/or the showing of videotaped depositions during the SJT.<sup>46</sup> Another surveyed judge noted that in proper cases it may be an appropriate device for the testing credibility of a few main witnesses.<sup>47</sup>

Other judges vary in what they require prior to the start of the SJT, one requiring a pre-SJT agreement on exhibits and statements of fact; one requiring testimony and summaries to be agreed upon in advance; and one making evidentiary rulings in advance.<sup>48</sup> Finally, two other variations in the procedure used are that at least one judge selects the same number of jurors as a "real" trial will have; and another tells the jury in advance that the SJT is only advisory.<sup>49</sup>

Most of the procedures used by the surveyed judges are in writing.<sup>50</sup> More than half of these judges use the Lambros procedure, and most of the remaining ones appear in local court orders or rules.<sup>51</sup>

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41. See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988).

42. See *Judicial Survey Responses*, *supra* note 24, Question 10, at 13-14.

43. *Id.*, Question 10, at 13. One of the judges who gives each attorney a total of 30 minutes for his or her presentation stated that he had been willing to give this much time to each of the 12 attorneys involved in a particular SJT he conducted. *Id.*

44. *Id.*, Question 10, at 13-14.

45. *Id.*

46. *Id.* at 14.

47. *Id.*, Question 3a, at 5.

48. *Id.*, Question 10, at 13-14.

49. *Id.* at 13.

50. *Id.*, Question 11, at 15. Twelve of the judges responding to this question said that their SJT procedures were in writing, and six of the judges said that they were not. *Id.*

51. *Id.*

*B. The Benefits of SJTs*

There are a number of intended benefits in using summary jury trials, which despite the litigated issues and basic uncertainties, appear to be borne out.<sup>52</sup> The responding judges had an overwhelmingly favorable view of SJTs.<sup>53</sup> The Senate Report to the Judicial Improvements Act of 1990 noted that while the data is not yet complete, studies of various ADR programs have shown generally favorable

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52. See McNamara, *supra* note 23, at 491:

While there is a lack of express authority for using potential petit jurors as summary jurors, it is clear that the SJT process has enjoyed a great deal of success. Both judges and attorneys who have participated in SJT find it to be beneficial. Even attorneys who were initially skeptical of the procedure -- and reluctant to use it -- have found SJT to be successful and beneficial.

*Id.* (emphasis added) (footnotes omitted).

53. See *Judicial Survey Responses*, *supra* note 24, Question 3, at 4-6; Question 3a, at 4-5; Question 8, at 11; Question 9, at 12; Question 15, at 20; Question 21, at 27-28; Question 22, at 29-31; Question 29, at 44-45; and Question 40, at 69-70. (One judge (#34) wrote in his cover letter that "The summary jury trial is in my view the finest advance in the federal trial system in the last decade."); see also *Attorney Survey Responses*, *supra* note 25, Question 1f, at 3; Question 1g, at 3; Question 5, at 7; and Question 27, at 20.

When judges who had conducted SJTs were asked if they have been generally satisfied, partly satisfied or dissatisfied with the process, most identified themselves as "generally satisfied," a few said that they were "extremely satisfied" or "greatly satisfied" and a few said they were "partly satisfied." *Judicial Survey Responses*, *supra* note 24, Question 3, at 4. No judge identified himself as "dissatisfied." *Id.* One judge stated that he had insufficient experience to form an opinion (since he has only done one SJT), but he added that it does seem to pitch parties toward settlement. *Id.*

In response to the question as to whether summary jury trials should ever be used in federal courts, an overwhelming majority responded in the affirmative. *Id.*, Question 21, at 27-28. Twenty-five out of the thirty-two judges responding to this question answered yes. *Id.* These judges also provided numerous reasons for their positive views, all of which are mentioned below. *Id.*

When the judges were asked whether they would conduct another SJT in the future, nearly all of them responded in the affirmative. *Id.*, Question 15, at 20. Nineteen of the twenty-one judges responding to this question answered yes. *Id.*

results.<sup>54</sup> The public in general has a positive view of ADR mechanisms,<sup>55</sup> and courts and commentators have extolled the virtues of the SJT as well.<sup>56</sup>

As previously mentioned, the primary benefit of a SJT is the saving of the time and cost involved in a lengthy trial (and appeal) if the process results in the settlement of the case.<sup>57</sup> However, even if the case does not settle and it goes on to trial, the SJT process itself yields other benefits.<sup>58</sup>

54. S. REP. NO. 416, *supra* note 12, at 1. "'Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested publics.' [Quoting Fed. Cts. Study Comm. 101st Cong., 2d Sess. Report, 83]. The Committee strongly agrees with this assessment." *Id.*

55. See Grubbs, *supra* note 7, at 25, where the author stated:

Although there is, as yet, little empirical data demonstrating that ADR does, in fact, result in a speedier, more expeditious, and less expensive resolution of civil disputes, there is no question that the public, and particularly the business community, thinks it does. Under the auspices of the Center for Public Resources, more than 500 of the country's largest corporations have signed a pledge obligating them to explore ADR to resolve disputes with other signatories.

*Id.* (footnotes omitted).

He added that most recently the Center for Public Resources has sponsored a program to secure a pledge from leading law firms to designate lawyers who will be knowledgeable about ADR and "when appropriate" discuss such procedures with clients. *Id.* at 30 n.29 (citing A. DiResta, *Law Firms Adopt Policy Requiring Their Litigators to Explore ADR with Clients*, LITIGATION NEWS 3 (Feb. 1993)).

56. See McNamara, *supra* note 23 at 461, 491. See also *Day v. NLO, Inc.*, 147 F.R.D. 148 (S.D. Ohio 1993), *vacated on other grounds*, In re *NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993). In *Day*, the court stated: "Crowded dockets, the increasing expense of litigation, and the trauma of trial for the parties have forced the courts to develop innovative techniques to settle cases. One method this Court has used with great success is the summary jury trial." *Id.* at 150.

57. See *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4-5; see also *Memorandum*, *supra* note 4, at 992:

The primary advantage of alternative dispute resolution is that it allows parties to avoid the time and expense of formal court proceedings. Unfortunately, this benefit may not be adequately publicized. Lawyers, business leaders, and government officials should take the initiative in disseminating the important message that ADR achieves justice.

*Id.*

In the President's Council on Competitiveness' report, "Agenda for Civil Justice Reform in America," the recommendation is that before a contest would be set for trial, the parties would attend a mandatory conference to identify the areas in controversy. *Id.* At this conference, the parties would be given the opportunity to resolve their claims through a variety of alternative dispute resolution mechanisms, including early neutral evaluation, mediation, arbitration, minitrial, and summary jury trial. *Id.* Note, however, that the recommendation does not suggest that parties be required to participate in any particular ADR mechanism. *Id.* (proposed legislation has not, as yet, been adopted by Congress.) See also McNamara, *supra* note 23, at 491-92 (main reason expressed for success of SJT is that parties receive opinion of jury without time and expense of lengthy jury trial) (footnote omitted).

58. See *infra* part II.B.2.

### 1. The Settlement of Cases

Although statistics on the success of SJTs are somewhat sparse,<sup>59</sup> the available information indicates a fairly high chance of settlement. First, the creator of the process, Judge Lambros, reports extremely high success rates.<sup>60</sup> In fact, the Senate Report on The Judicial Improvements Act of 1990 quotes Judge Lambros as saying that a full jury trial after a SJT is "almost always unnecessary because the procedure fosters settlement of the dispute."<sup>61</sup> Second, the surveyed judges who have conducted SJTs also reported an impressively high ratio of SJTs to settlements.<sup>62</sup> The settlement figures for the Western District of Oklahoma

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59. See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49 (E.D. Ky. 1988). The court wrote:

It is true that to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington [Kentucky], but I intend to expend a considerable sum to go there as soon as I get the chance.

*Id.*

60. See *New Adversarial Model*, *supra* note 13, at 800, where Judge Lambros reported: Between 1983 and 1986, of 150 cases that were assigned by me to summary jury trial, 62 settled prior to the commencement of the procedure. Of 88 SJTs conducted, 82 ultimately resulted in settlements. Over 90% of the cases assigned to SJT settled. In addition to the savings generated to individual litigants by avoiding a protracted jury trial, the success rate of the SJT has had a significant effect on the use of the jury, and related costs. As I described in my Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System, the savings aspects of SJT with respect to the costs of jury service are substantial.

*Id.* (footnotes omitted).

Judge Lambros then described his calculation of the jury service savings and concluded: My research indicated a savings associated with the processing of 60 Summary Jury Trials of \$90,730.00, or roughly \$1,512.17 per case. This savings was based on not requiring jurors to serve the total average number of days for a full jury trial plus the reduced number of potential jurors initially required for voir dire.

*Id.* at 800-01 (footnotes omitted).

61. S. REP. NO. 416, *supra* note 12, at 28 (quoting from Lambros, *The Summary Jury Trial -- An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986)).

62. See *Judicial Survey Responses*, *supra* note 24, Question 8, at 11. According to those judges, the number of cases in which SJTs were used that settled after the SJT and before or during trial were as follows: 30 (of 33); 1 (of 1); 80% (of 27); 4 (of 5); 1 (of 2); 10 (of 10); 4 (of 4); 28 or 29 (of 30); all of them (of 10-15); 2 (of 2); 5 (of 6); 2 (of 2); 43 (of 53); 1 (of 1); 1 (of 1); and 0 (of 1). *Id.* (Although the pool of reporting judges is not statistically significant, it is quite likely that those judges who have conducted the most SJTs and/or have the highest interest in the process were the ones who responded.); see also *Attorney Survey Responses*, *supra* note 25, Question 1f, at 3. Of those cases in which the surveyed attorneys participated in SJTs, slightly more than half of them settled before or during the subsequent trial. *Id.* (Again, however, this was an extremely small sample.)

and the Western District of Michigan are impressive as well.<sup>63</sup> Finally, there are some reported individual examples of success.<sup>64</sup>

While the fact of settlement alone is beneficial to the litigants and the court system, since SJTs are often used in cases where the trial time would be quite lengthy, settlements after SJTs also often result in significant time and cost savings.<sup>65</sup>

63. DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 40 (John H. Wilkinson, Esq. ed., Cum. Supp. 1992):

In the Western District of Oklahoma, 187 cases were referred to summary jury trial between early 1983 and December 1989. Of those, 70 settled before the summary jury trial was conducted. Of the remaining 117 cases, 79 settled prior to trial. For a more complete account of the summary jury trial program in the Western District of Oklahoma, see 8 ALTERNATIVES TO THE HIGH COST OF LITIGATION 83 (May 1990).

In federal court in the Western District of Michigan, almost 70 summary jury trials have been held since 1983. Of these cases, 75 percent settled before the summary jury trial; of the remainder, all but 2 settled before trial. 4 INSIDE LITIGATION 12 (Apr. 1990).

*Id.*

See also S. REP. NO. 416, *supra* note 12, at 29. The Senate Report to The Judicial Improvements Act of 1990 confirms the above statistics from the Western District of Michigan and notes that Judge Enslin of that district stated that the mere scheduling of a summary jury trial results in settlement before the scheduled summary jury trial date in 75 percent of the cases. *Id.* (quoting from Enslin Written Statement, at 31-32).

64. See, e.g., *Day v. NLO, Inc.*, 147 F.R.D. 148 (S.D. Ohio 1993), *vacated on other grounds*, In re NLO, Inc., 5 F.3d 154 (6th Cir. 1995) (where the court described a successful summary jury trial in an earlier case involving the same defendant and the same factual circumstances). The case involved the Feed Materials Production Center ("FMPC") located in Fernald, Ohio, at which defendant National Lead of Ohio, NLO was involved in certain aspects of developing and manufacturing nuclear weapons for our country's armed services. *Id.* at 150. The court explained:

In a previous case, the residents around the FMPC brought suit alleging that NLO had exposed them to radiation and other hazardous materials. In re Fernald, Case No. C-1-85-149 (S.D. Ohio) (J. Spiegel). The residents claimed that they suffered emotional distress, personal injury, and property damage by virtue of being a neighbor of the FMPC. The Defendants in that case steadfastly refused to discuss settlement. In light of the prospect of a lengthy and complex trial on the merits, this Court decided to hold a summary jury trial in an effort to promote settlement. The Defendants argued in that case that the proceeding should have been closed to the public. As will be discussed in more detail later in this Order, we disagreed with the Defendants' argument and opened the summary jury trial to the public. Following the summary jury trial, the two parties settled the In re Fernald case for \$78 million.

*Id.*

65. See *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4. One surveyed judge commented that two SJTs taking one and a half days each ended up saving a total of eight to nine weeks of estimated trial time. *Id.* Another judge commented that a SJT had saved about two months of complicated jury trial sessions. *Id.*, Question 15, at 20; see also DONOVAN LEISURE, *supra* note 63, at 39, describing a case where a significant amount of money was saved:

*Texas Utilities Co. v. Santa Fe Industries, Inc.*, 627 F. Supp. 44 (D.N.M. 1985), involved an antitrust challenge to a long-term agreement whereby Texas Utilities Co. leased approximately 300 million tons of coal in New Mexico from Santa Fe Industries. The damage claim was \$250 million before trebling. The parties had spent approximately \$60 million on discovery since 1981, and it was estimated that trial and appellate costs would be in the neighborhood of \$200 million. Following a two-day summary jury trial, however, the case settled on the basis of a new long-term agreement for the lease of the



There are several reasons why summary jury trials can be, and usually are, successful in stimulating such settlements. First, many judges consider them to be fairly reliable predictors of trial results (and this view has been communicated to lawyers practicing before them). Judge Lambros has clearly reached this conclusion and has explained it in terms of how juries reach decisions.<sup>66</sup> One of Lambros' explanations as to why SJT verdicts are reliable and the decision-making process of jurors is as follows:

The summary jury trial is an alternative that is intended for cases in which settlement cannot be achieved because the parties have differing perceptions of how the jury will evaluate the evidence. It brings the facts of a case to life, and it isolates the key issues involved therein . . . the litigants are able to make an informed assessment of the strengths and weaknesses of their respective positions.

Most jurors, however, reach their verdicts deductively; they immediately latch onto a few fundamental premises and fit the facts they perceive over the course of the trial to these premises. Most jurors strive to reach verdicts which do not conflict strongly with cognitions in place at the beginning of trial. Through careful inquiry into the cognitions of the members of the advisory jury, counsel can use the summary jury trial experience to predict a future reaction by a jury at the actual trial. . . . All participants should recognize that another jury

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same amount of coal on less restrictive terms.

Judge West (W.D.OKla.) handled the summary jury trial in the New Mexico federal court at the invitation of the Chief Judge of the New Mexico court. Judge West has conducted 117 summary jury trials in his district. For a more complete account of this summary jury trial, see 4 Alternative Dispute Resolution Report (BNA) 2 (Apr. 26, 1990).

*Id.*

See also *McKay*, 120 F.R.D. at 49, where the court wrote (in a section entitled "Some Personal Observations" at the end of the opinion):

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not [citing footnote 19]. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure. In the case at bar I am gambling a five-day summary jury trial against a six-week real trial. Six to one is pretty good odds.

*Id.*

The court added:

I also don't know if other cases moved "up the queue" or not. In fact, I used the time saved to work six days a week instead of seven for awhile, perhaps saving me from a heart attack. This, too, was a benefit to the system. (At least I think so, although you could probably find a few dissenters among the members of the local bar.) . . .

*Id.* at 49, n.19.

66. See *New Adversarial Model*, *supra* note 13, at 799.

would probably return a similar verdict if the case were to go to trial.<sup>67</sup>

The surveyed judges' responses support this conclusion as well. When the surveyed judges were asked whether they thought a SJT was a reliable indicator of what the actual trial verdict would be, an overwhelming majority of the responding judges stated that it was generally reliable.<sup>68</sup> This conclusion was based on their own experience, or that of Judge Lambros, or that of other judges they had heard about, or statistics.<sup>69</sup> They indicated that the evidence is the same, the lawyers "have their best shot," and that the jury for the actual trial will be drawn from the same source and in the same manner as the SJT jury.<sup>70</sup> One judge simply referred to a SJT as a "yardstick to measure settlements."<sup>71</sup> There were a number of qualifications stated, however.<sup>72</sup>

When the surveyed judges who have conducted SJTs were asked whether, in those cases that were tried after the completion of a SJT, the trial verdict differed

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67. *Id.* at 799-800 (footnotes omitted) (emphasis added); see also *Report to Judicial Conference, supra* note 14, at 9-10. Judge Lambros explained the reliability of SJT verdicts in yet another way:

The SJT can be an effective predictive process for ascertaining probability of results. It is my perception that the sole bar to settlement in many cases is the uncertainty of how a jury might perceive liability and damages. Such uncertainty often arises, for example, in cases involving a "reasonableness" standard of liability, such as in negligence litigation. No amount of jurisprudential refinement of the standard of liability can aid the resolution of such cases. Parties' positions during settlement negotiations in cases of this type are based on an analysis of similar cases within the experience of counsel as to juries' determinations of liability and findings of damages. Such comparison is usually of little value, however, as parties tend to aimlessly grope toward some notion of a likely damage award figure upon which to base their negotiating positions. The parties and the Court may become frustrated in cases, especially where neither party wants to fully try the case on the merits and the only roadblock to a meaningful settlement is the uncertainty of how a jury might perceive liability and damages.

The half-day proceeding is designed to provide a "no-risk" method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money . . . .

After preparation and presentation of the case at a SJT, the possibility of settlement becomes much more real to both sides. Unreasonable demands and offers are reevaluated, and mutually agreeable compromises are worked out in light of the jury's findings.

*Id.*

68. See *Judicial Survey Responses, supra* note 24, Question 29, at 44-45 (Twenty-one judges said yes, five said no, and four others were unsure or did not have enough experience to reach a definitive conclusion.).

69. *Id.*

70. *Id.*, Question 29, at 44.

71. *Id.*, Question 3a, at 4.

72. *Id.*, Question 29, at 44-45. Some of the qualifications included: if the parties are given sufficient time to adequately summarize their version of the case; if the parties have all actively participated in good faith; it depends on the caliber of the attorneys; and there might be a difference based upon the demeanor of live witnesses before a regular jury. *Id.*

significantly from the SJT verdict, most of the judges stated that they were consistent with or the same as the SJT verdicts.<sup>73</sup>

Comments by judges in reported cases and in information supplied to attorneys by judges supports this conclusion about the reliability of SJT verdicts as well. For example, the Sixth Circuit has referred to the SJT as a highly reliable predictor of the likely trial outcome.<sup>74</sup> And in a case decided by Judge Lambros, *Caldwell v. Ohio Power Co.*,<sup>75</sup> he noted that the summary jury trial verdict in the case had been for plaintiff in the amount of \$2.5 million, while the actual trial verdict was for plaintiff in the amount of \$2.2 million.<sup>76</sup> Judge Lambros referred to these verdicts as being "remarkably consistent" with each other.<sup>77</sup> In addition, one surveyed magistrate judge distributes an SJT information sheet to attorneys listing "Accuracy of the result" as one of the advantages of the process and explaining his conclusion.<sup>78</sup>

Second, SJTs can stimulate settlements because the process often satisfies a psychological need of the parties and/or their counsel for an in-court confrontation, particularly since it involves a real jury.<sup>79</sup> Judge Lambros has written that the

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73. *Id.*, Question 9, at 12; see also *Attorney Survey Responses*, *supra* note 25, Question 1g, at 3. When the (few) surveyed attorneys who have participated in SJTs were asked whether, in those cases that were tried after the SJT was completed, the trial verdict differed significantly from the SJT verdict, most of them indicated that there were some significant differences. *Id.*

74. See *Cincinnati Gas & Elec. Co.*, 854 F.2d at 904.

75. 710 F. Supp. 194 (N.D. Ohio 1989).

76. *Id.* at 196, 202.

77. *Id.* at 202.

78. In responding to Question 10 of the judicial survey (regarding the basic SJT procedure used), one responding magistrate judge (D. Neb.) attached a copy of the SJT information sheet he wrote to distribute to lawyers. On that sheet he lists "Accuracy of the result" as one of the advantages of the process, and includes the following explanation: "In those cases which have not settled following a summary jury trial, but have instead gone to a 'real' trial, the actual verdicts following days of testimony are remarkably similar to the verdicts of the summary juries." *Judicial Survey Responses* at *supra* note 24, at 5-6 n.2.

And in footnote two, page six, of the information sheet, the magistrate wrote:

For example, an article in the *National Law Journal* (6-10-85) points out two cases as examples: a) A Chicago anti-trust case: SJT -- \$27 million; Verdict (after a 7-week trial) -- \$24 million; b) Oklahoma fed. dist. court: SJT -- \$219 thousand; Verdict (after trial) -- ("within \$10,000"). Consistency in defense verdicts was noted as well. Other literature also appears to support this conclusion.

*Id.* at 6 n.2.

79. *McKay*, 12 F.R.D. at 50. District Judge Bertelsman explained:

[T]he summary jury trial gives the parties a taste of the courtroom and satisfies their psychological need for a confrontation with each other. . . . When emotions run high, whether between parties or attorneys, cases may not settle even when a cost-benefit analysis says they should. A summary jury trial can provide a therapeutic release of this emotion at the expenditure of three days of the court's time instead of three weeks. After the emotions have been released the parties are more likely rationally to do the cost-benefit analysis, and the case may then settle.

*Id.*

See also *Myers & Armstrong*, *supra* note 36 at 16. Attorney Barry Fish of Lewis and Roca, a law firm in Phoenix, Arizona, and Superior Court Judges Daniel E. Nastro and Barry C. Schneider

SJT works, among other reasons, because the parties "derive the satisfaction of having their story heard."<sup>80</sup> One surveyed judge wrote that a SJT satisfies the psychological need of parties to ventilate pent-up emotions, and another stated that it appears to give parties their day in court.<sup>81</sup> And in the above-mentioned SJT information sheet distributed by a surveyed magistrate judge, "Day in Court" is listed as one of the advantages.<sup>82</sup>

Third, a SJT allows a party and his or her lawyer to see how a real jury will view the case, which may alter their perceptions of it and lead to settlement.<sup>83</sup> Judge Lambros has reported that SJTs work because the parties are generally more receptive to settlement after they observe juror reactions to conflicting evidence and sense the strengths and weaknesses of their respective cases.<sup>84</sup> One surveyed judge commented that summary jury trials should be used in federal courts because they provide economical resolution of cases and they are philosophically satisfying to the parties -- primarily because of their faith in the fairness of the jury system.<sup>85</sup>

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were quoted as stating that they think the summary jury trial will leave the parties feeling better about their case and the judicial system than does mandatory arbitration, for example, because they get to see and hear their case presented to a jury. *Id.* "One of the critical points here, whether it's small, medium or large, is that the litigant, the parties, I think, really do feel they've had their day in court before a jury of their peers," Fish said. *Id.* "I think it's important that it's a jury and not a judge, and I think that parties like to hear their counsel argue the very best their case can be and they're impressed by it." *Id.*

80. See *New Adversarial Model*, *supra* note 13, at 799.

81. *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4-5.

82. *Supra* note 78. In this SJT information sheet, the surveyed magistrate judge (D. Neb.) describes the "Day in Court" advantage. *Id.* at 5. He states:

This technique gives the litigants an opportunity to air their grievances in a courtroom before a judge and jury, and in a proceeding with all of the "trappings" of a real trial save the actual presentation of testimony. As during a real trial, the parties must confront, both rationally and emotionally, their opponent's case against them. The proceeding may raise their anxieties because their previous negotiating positions will likely either be confirmed or totally undermined by the verdict. The verdict is the considered judgment of six impartial citizens selected in the same fashion as a real jury. Unless the proceeding is somehow fatally flawed, there is little to justify speculation that repeating the drama for real will yield significantly different results. Thus, parties may be in a better frame of mind to settle the case after having subjected it to a summary proceeding.

*Id.*

83. *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4. One judge specifically stated that he was able to get a couple of tough cases settled when the plaintiffs' presentation did not impress the jury as much as plaintiffs felt it would. *Id.*; see also Question 21, at 27; Question 22, at 29; see also *Attorney Survey Responses*, *supra* note 25, Question 2a, at 5 (Several attorneys stated that they are generally or partly satisfied with the process because it gives them a feel for how a jury relates to the facts.).

84. See *New Adversarial Model*, *supra* note 13, at 799.

85. *Judicial Survey Responses*, *supra* note 24, Question 21, at 27.

Fourth, a SJT gives the parties a chance to see the costs and emotional stress of an actual trial, as well as seeing the other side's case first hand.<sup>86</sup> One judge wrote that a SJT serves as a process of "reality therapy" for both attorneys and clients.<sup>87</sup>

Finally, it provides one more step in the litigation process that acts as an incentive to settle so that it can be avoided.<sup>88</sup> One judge stated that even the suggestion of a SJT has helped settle cases.<sup>89</sup>

## 2. Benefits of the Process Apart From Settlement

Even if a case does not settle after a SJT has been conducted it still yields certain benefits. First, the process forces the parties to prepare for trial and may make the actual trial more efficient.<sup>90</sup> The court in *Arabian American Oil Co. v. Scarfone*<sup>91</sup> described this benefit as follows:

Even if the summary procedures do not culminate in settlement of the case, the value of the summary trial in crystallizing the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their roles and the trial procedure.<sup>92</sup>

Second (particularly since the lawyers discuss the process with the jurors at the end of the SJT), it provides an opportunity for the lawyers and parties to learn what a real jury views as the strengths and weaknesses of their case, as well as

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86. *McKay*, 120 F.R.D. at 50. District Judge Bertelsman stated:

Summary jury trials also give the clients a chance realistically to appraise the cost and emotional stress of an actual trial and require them to sit and listen to the other side's case and see how a jury reacts to it. The summary jury trial may be the client's first opportunity to look at the other side of the case first hand rather than through his or her attorney. The attorney is often not in a position to give the client an objective view of the merits. After all, he was hired as a gladiator not a diplomat.

*Id.*

See also *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4-5 (One judge also noted that a SJT lets a party compare their counsel with opposing counsel.).

87. *Judicial Survey Responses*, *supra* note 24, Question 3a, at 5.

88. See *New Adversarial Model*, *supra* note 13, at 799. Judge Lambros wrote:

The summary jury trial produces the same tensions present immediately prior to jury trial. The shadow of an approaching summary jury trial will intensify the parties' efforts toward settlement. Because clients and key figures with settlement authority are required to attend the summary jury trial, the procedure is particularly effective where the legal labyrinth begins to tax the patience of the litigants involved.

*Id.*

89. *Judicial Survey Responses*, *supra* note 24, Question 40, at 69.

90. *Id.*, Question 3a, at 4-5.

91. 119 F.R.D. 448 (M.D. Fla. 1988).

92. *Id.* at 449.

perceived strategic errors.<sup>93</sup> Stated another way, it offers "a unique opportunity to 'practice'" the case.<sup>94</sup>

### *C. Identification of the Litigated Issues and the Basic Uncertainties*

Despite the benefits of the SJT process described above, however, serious issues have arisen that threaten its continued use and effectiveness. The problems mentioned by the surveyed judges,<sup>95</sup> as well as those raised by scholarly criticism, and those litigated in the courts, appear to fall into two categories: basic issues threatening the use and effectiveness of the SJT, and other existing and potential issues, which, while still important, merely impact upon it.<sup>96</sup>

As stated above, five basic issues threaten the future existence of the SJT. The first issue is that, despite congressional legislation mentioning summary jury trials and a recent amendment to Federal Rule of Civil Procedure ("FRCP") 16,<sup>97</sup> the authority for conducting SJTs remains uncertain and there appears to be no authority for mandating participation in a SJT over the parties' objections. The second issue is that while courts regularly summon SJT jurors from their regular jury pools, no actual rule or statute authorizes such a practice. The third issue is whether SJTs should be treated as regular trials in terms of access to them by the press and the public, or whether they should be treated as analogous to confidential settlement discussions, as at least one court has held.<sup>98</sup> The fourth issue is whether any information or strategies (not otherwise admissible) revealed during the SJT process, or the SJT verdict itself, should be allowed to be used or referred to in the actual trial or for any other purpose. For example, a SJT may force a party to prematurely reveal his trial strategy or may be used by opposing counsel merely as an additional discovery device. Finally, the fifth issue is about whether sanctions should be applied to attorneys who violate SJT rules and, if so, what the authority for such sanctions might be. Except for the fourth issue, these

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93. See *Judicial Survey Responses*, *supra* note 24, Question 3a, at 4-5; see also *Attorney Survey Responses*, *supra* note 25, Question 5, at 7 (one surveyed attorney wrote that he would participate in a SJT voluntarily in the future since it cannot hurt and may even lead to settlement or a good read of the trial strategy of opposing counsel).

94. See McNamara, *supra* note 23, at 492.

95. See *Judicial Survey Responses*, *supra* note 24, Question 21, at 28. In responding to the question as to whether summary jury trials should ever be used in federal courts, some surveyed judges responded negatively, expressing some general concerns about SJTs. *Id.* In responding to the question as to the reasons why they have only been partly satisfied with the SJT process, judges described a number of problems. *Id.* Question 3b, at 5-6.

96. Woodley, *supra* note 20 (discussing potential issues impacting upon the use of the SJT).

97. See The Civil Justice Reform Act, 28 U.S.C. § 473(a)(6) (1988), and Federal Rule of Civil Procedure 16(c)(9), amended December 1, 1993.

98. See *Cincinnati Gas & Elec. Co.*, 854 F.2d at 904.

issues (and others) were addressed in the survey sent to the federal district court judges and magistrate judges.<sup>99</sup>

### III. ISSUES THREATENING THE USE AND EFFECTIVENESS OF SJTs AND THE PROPOSED SOLUTIONS

The discussion below will address the issues threatening the use and effectiveness of SJTs, and will propose solutions to them. Specifically, the discussion will focus upon the need to clarify the authority for SJTs and create authority for mandated participation in them, the need to create authority for summoning SJT jurors, and the need to clarify the issues of access to SJTs, the confidentiality and future use of SJT information and verdicts, and the general appropriateness of, and the authority for, sanctions in the SJT context.

#### *A. Uncertainty About the Authority for SJTs and Lack of Authority for Mandated Participation in Them*

Despite the passage of The Civil Justice Reform Act, and the December 1, 1993 amendment to FRCP 16,<sup>100</sup> the authority for SJTs remains uncertain. There is no direct, clear, uncontradicted authority for mandating participation in them.

The United States Supreme Court has not addressed the issue of authority for SJTs, and the lower courts that have considered it in passing have provided no consistent guidance for trial court judges and practicing lawyers. Although a number of law review articles have considered the issue of mandatory use of SJTs,<sup>101</sup> none have directly or completely addressed the more fundamental question of whether SJTs, mandatory or consensual, are authorized under the Federal Rules of Civil Procedure, local federal district court rules, or the inherent powers of the court. Nor do any of these articles make specific recommendations with respect to creating or clarifying the authority for use of summary jury trials.

While the issue of mandated participation has received a fair amount of attention in the courts, the results have been mixed. The Court has not ruled on the issue, only one case has been decided since the passage of the Act and no cases have been decided since the December 1, 1993 FRCP amendments. In addition, most of the scholarly input on this issue, mentioned above, occurred prior to the recent legislation and rule changes.

The discussion below includes a summary of the legal challenges to these issues, a description of what judges have relied on as authority for SJTs and for mandated participation of them, an analysis of the effect on these issues of the

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99. See *Judicial Survey Responses*, *supra* note 24, Questions 1-40, at 1-71.

100. See discussion *infra* parts III.A.1(c) and III.A.2(c) regarding legislative and rule changes.

101. See discussion *infra* part III.A.2.

passage of the Act and the FRCP amendments, and an argument for the need to clarify the authority for SJTs and to create clear authority for mandating participation in them.

### 1. Uncertain Authority for SJTs in General

For a number of years after the SJT was created, parties and federal district court judges alike seem to have assumed that the federal courts had the authority to conduct SJTs.

In 1984, the SJT's creator, Judge Lambros, explained to the Judicial Conference his views on the basis for authorizing SJTs. In his 1984 report to the Judicial Conference on the SJT, he explained that, in light of FRCP 1, the SJT was within the court's pretrial powers pursuant to FRCP 16(a)(1), (5), (c)(11), and the court's inherent power to manage and control its docket.<sup>102</sup> Judge Lambros also wrote that the use of a SJT is consistent with FRCP 39(c) (re: advisory juries) and FRCP 83 (providing that district courts may regulate their practice in any manner not inconsistent with the federal rules of civil procedure).<sup>103</sup>

#### (a) Legal Challenges

The few courts that have considered the issue of general authority for SJTs have done so in passing. For example, in 1986, in *Fraley by Fraley v. Lake Winnepesaukah, Inc.*,<sup>104</sup> the district court directed counsel for the parties to confer and report to the court their interest in a SJT.<sup>105</sup> The court stated that pursuant to FRCP 16(c)(7), it would hear from counsel as to whether a SJT would help in the disposition of this case.<sup>106</sup> No other discussion of the court's authority for conducting this process was included.

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102. *Report to the Judicial Conference*, *supra* note 14, at 10. Judge Lambros continued to explain, as follows:

Rule 1 of the Federal Rules of Civil Procedure states that the Rules, "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 16(a), concerning pretrial activities, states, "In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case."

Furthermore, the Rules recommend that settlement be discussed, as well as potential alternatives to trial. Newly adopted Fed. R. Civ. P. 16(c)(7) and (11) provide that "[t]he participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action."

*Id.* at 10-11 (citations omitted).

103. *Id.* at 11.

104. 631 F. Supp. 160 (N.D. Ga. 1986).

105. *Id.* at 163.

106. *Id.*



In 1988, several court decisions were issued that touched on the issue. In *Strandell v. Jackson County*,<sup>107</sup> a Seventh Circuit decision, the general issue of authority for SJTs was raised, but the court only decided that litigants may refuse to participate in a SJT when ordered to do so by a district court judge.<sup>108</sup> And in that same year, three lower courts in other circuits<sup>109</sup> reached the opposite conclusion on this narrow issue, which is discussed more fully below.<sup>110</sup>

And in *Cincinnati Gas & Electric Co. v. General Electric Co.*,<sup>111</sup> another 1988 decision, the Sixth Circuit indicated, in dicta, that SJTs were authorized either under Rule 16 or as a matter of the court's inherent power to manage its cases.<sup>112</sup> The precise issue on appeal in that case was whether the first amendment right of access attaches to the summary jury proceeding in this case, and the appellate court concluded that it does not.<sup>113</sup> In the course of its discussion, the court did indicate the above-mentioned authority for SJTs,<sup>114</sup> but this conclusion was not necessary to its opinion, and the issue had not been raised below.

As stated above, the United States Supreme Court has not ruled on either the issue of the authority for consensual SJTs or the issue of whether participation in SJTs can be mandated.

#### (b) What Judges Have Relied Upon

When the surveyed judges were asked under what authority they have conducted SJTs, the responses varied. These responses included reliance upon local court rules or court orders, FRCP 16 and 39(c), the inherent power of the court, and consent by the parties, as authority for conducting SJTs.<sup>115</sup> Several surveyed judges also indicated that they thought The Civil Justice Reform Act authorized their use.<sup>116</sup>

First, a number of the surveyed judges stated that the authority for conducting SJTs was based upon local rule, or court order, in their districts.<sup>117</sup> While some local rules were adopted prior to the passage of The Civil Justice Reform Act, the

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107. 838 F.2d 884 (7th Cir. 1988).

108. *Id.*

109. See *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988).

110. See *infra* discussion in part III.A.2.(a).

111. 854 F.2d 900 (6th Cir. 1988).

112. *Id.* at 903 n.4 (citing *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962) and *Thomas D. Lambros, The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 469 (1984)).

113. *Id.* at 902-03; see *infra* part III.C. for a more complete discussion of this case.

114. *Id.* at 903 n.4.

115. See *Judicial Survey Responses*, *supra* note 24, Question 4, at 7.

116. *Id.*; see also discussion *infra* part III.A.1(c) (regarding the effect of the passage of The Civil Justice Reform Act on this issue).

117. See *Judicial Survey Responses*, *supra* note 24, Question 4, at 7.

impetus provided by that act has led additional district courts to adopt local rules - or include provisions in their Civil Justice Expense and Delay Reduction Plans - with respect to SJTs. In creating these rules or provisions, the district courts have tended to take one of two approaches: adopting a rule (or provision in their Civil Justice and Delay Reduction Plan, pursuant to The Civil Justice Reform Act) that merely allows SJTs to take place and not specifying the circumstances, rules or procedures for such an occurrence,<sup>118</sup> or adopting a rule specifically setting forth in detail how and when SJTs will be conducted.<sup>119</sup>

Second, some of the surveyed judges relied upon FRCP 16, and some specifically mentioned subsections (a)(1), (5), and (c)(11) (which is now (c)(16)).<sup>120</sup> Federal Rule 16 provides, in pertinent part: "(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; . . . (5) facilitating the settlement of the case."<sup>121</sup>

Other potentially relevant portions of Federal Rule of Civil Procedure 16, as amended on December 1, 1993, include:

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . .

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118. See N.D. ALA. PLAN, § IV.A; S.D. CAL. R. 37.1(f); D. CONN. R. 36; CENT.D. ILL. R. 1.4 (re: magistrate judges); S.D. ILL. R. 34; N.D. IND. R. 53.2; S.D. IND. R. 16.1(d)(2)(J) (parties must discuss the possibility of ADR in their Case Management Plan); D. KAN. R. 214; E.D. KY. R. 23; W.D. KY. R. 23; E.D. LA. PLAN, Art. 4; M.D. LA. PLAN, Art. 4; W.D. LA. PLAN, § II.B.4 (parties must discuss possibility with court at settlement conference); N.D. MISS. PLAN, § 5; S.D. MISS. PLAN, § 5; W.D. MO. EARLY ASSESSMENT PROGRAM, § VII.B.5; D. NEV. R. 185; S.D. OHIO R. 53.1; N.D. OKLA. R. 16.3(I); W.D. OKLA. R. 17(J); M.D. PA. R. 1010; W.D. TENN. R. 15(c); E.D. TEXAS PLAN, Pt. 1, Art. 6(7); S.D. TEX. R. 20(B); W.D. TEX. R. CV-88(h). (The local rules of the United States District Court for the Northern District of Ohio used to include such a rule (17.02). But, Judge Lambros did provide SJT participants with a copy of his HANDBOOK AND RULES OF THE COURT FOR SUMMARY JURY TRIAL PROCEEDINGS. On December 13, 1991, however, the Northern District of Ohio adopted a Differentiated Case Management Plan. The local rules promulgated pursuant to that plan contain fairly detailed provisions for both summary jury trials and summary bench trials. See Rules 7:5.1 through 7:6.3).

119. See D. MASS. R. 16.4(C)(3); W.D. MICH. R. 44; N.D. OHIO R. 7:1.1-7:5.3; M.D. TENN. R. 602; W.D. WASH. R. CR 39.1(e); COCHISE COUNTY, ARIZ. SUPER. CT. R. 12; N.C. SUPER. CT. R. 23; N.C. DIST. CT. R. 23; VA. CODE ANN. §§ 8.01-576.1 (Miche 1988); WYO. R. CIV. P. 40; MINN. STAT. § 604.11 (1992) (medical malpractice) (all authorizing SJTs); MICH. SUP. CT. ADMIN. ORDER 1988-2; N.H. SUPER. CT. R. 171; TEX. CODE § 154.026 (1987); WIS. CODE § 802.12 (1994) (all authorizing SJTs and providing some details in their statutes or rules).

120. See *Judicial Survey Responses*, *supra* note 24, Question 4, at 7. One judge suggested that he had conducted SJTs under the authority of district court judges in Connecticut and the recommendation of the U. S. Judicial Conference. *Id.* Attached to this judge's response was a copy of the District of Connecticut's description of the SJT procedure. *Id.* Section III of this document provides that a SJT is within a district court's pretrial power under Rule 16 in the inherent power to control its docket. *Id.*

121. See FED. R. CIV. P. 16(a)(1), (5).

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule; . . .

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; . . . and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.<sup>122</sup>

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.<sup>123</sup>

In addition, as mentioned above, Judge Lambros has relied upon Federal Rule of Civil Procedure 39(c) as a source of authority.<sup>124</sup> Federal Rule of Civil Procedure 39(c) provides:

(c) Advisory Jury and Trial by Consent. In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.<sup>125</sup>

The surveyed judges have also relied (or think they would rely) upon what they refer to as the court's inherent power (to manage its own docket or to settle cases), or the supervisory power of the court to administer its own docket, as authority for conducting SJTs.<sup>126</sup>

Other judges frankly acknowledged the lack of specific authority for SJTs but had conducted them based upon their own decision, or the lack of objections from the parties, or the specific consent of the parties or counsel, or based upon "cajoling."<sup>127</sup>

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122. Cf. FED. R. CIV. P. 1. Of course, this subsection mirrors the language of Federal Rule of Civil Procedure 1, which states, in pertinent part: "These rules . . . shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.*

123. See FED. R. CIV. P. 16(c)(9), (12), (16). See also FED. R. CIV. P. 16(f), providing, *inter alia*, for sanctions for parties' failure to obey a scheduling or pretrial order or to appear at a scheduling or pretrial conference.

124. *Report to the Judicial Conference*, *supra* note 14, at 11.

125. FED. R. CIV. P. 39(c) (1937).

126. See *Judicial Survey Responses*, *supra* note 24, Question 4, at 7.

127. *Id.* Question 4, at 7.

Finally, as noted above, several judges commented that they thought the issue was settled now by virtue of the passage of The Civil Justice Reform Act.<sup>128</sup> One judge said the SJT was authorized by a District Plan pursuant to the Act.<sup>129</sup>

(c) The Effect of Recent Legislation  
and Rule Changes

Although the combination of the passage of the Act and the recent amendment to Federal Rule of Civil Procedure 16 might lead some to conclude that clear authority exists for conducting SJTs, the effect of these is too uncertain and tenuous to warrant such a conclusion.

First, as stated above, Section 473(a)(6) of the Act provides that in formulating its civil justice expense and delay reduction plan, a district court "shall consider and may include" the "(6) authorization to refer appropriate cases to alternative dispute resolution programs that . . . (B) the court may make available, including mediation, minitrial and summary jury trial."<sup>130</sup> The Senate Report to The Judicial Improvements Act of 1990 (which includes the Civil Justice Reform Act of 1990) states:

The sixth and final binding principle or guideline of litigation management pertains to alternative dispute resolution. Section 473(a)(6) authorizes each district court to refer appropriate cases to ADR programs that have been designated for use in a district court or that the court may make available, including mediation, minitrial, and the summary jury trial.<sup>131</sup>

This provision is based on the committee's view that active judicial case management should encompass the exploration of alternative means of resolving disputes. Some doubt has been raised as to whether the Summary Jury Trial is an authorized procedure permissible in the Federal courts. While the authority for a summary jury trial does appear to lie in Rules 1 and 16 of the Federal Rules of Civil Procedure and in the court's "inherent power to manage and control its docket," subsection (a)(6) eliminated any doubt that might exist in some courts.<sup>132</sup>

Although the above-quoted legislative history seems to indicate that Congress thought it was clearly authorizing SJTs, there are a number of difficulties with reaching that conclusion based upon the language of the Act. First, the legislation itself does not indicate on what basis SJTs may be authorized and does not contain

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128. *Id.*

129. *Id.*

130. 28 U.S.C. § 473(a)(6) (1988).

131. S. REP. NO. 416, *supra* note 12, at 57.

132. *Id.*

any specific rule or statutory provisions regarding them. Second, the Act merely states that courts shall consider and may include such a program. Third, and probably most important, the entire Act sets up a nationwide experiment designed to reduce cost and delay and contemplates that more permanent, uniform changes may be made after the Judicial Conference reports back to Congress by the end of 1995. As stated above,<sup>133</sup> the Act itself expires on December 1, 1997, and will not bind district courts after that date. If the intent was to create clear, permanent authority for conducting SJTs, the intent was not realized.

The other legislative change that occurred quite recently was the December 1, 1993 amendment to FRCP 16. Prior to the amendment, FRCP 16(c)(7) stated:

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to . . .

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.<sup>134</sup>

Upon amendment, this provision became Federal Rule of Civil Procedure 16(c)(9), which now reads as follows:

(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . .

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.<sup>135</sup>

The Advisory Committee Notes state, in pertinent part:

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. sections 473(a)(6), 473(b)(4), 651-58; Section 104(b)(2), Pub. L. 101-650. The rule does not attempt to

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133. See Johnston, *supra* note 5.

134. FED. R. CIV. P. 16(c)(7) (1993).

135. FED. R. CIV. P. 16(c)(9).

resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.<sup>136</sup>

Although this provision does appear to authorize SJTs, that authorization appears limited to situations in which a statute or local court rule exists on the subject. As discussed above, the only federal statute concerning SJTs -- Section 473(a)(6) of the Act -- does not provide clear, permanent authority for conducting them. In addition, if the Act does not authorize SJTs and there is no judicial or scholarly agreement about any other source of authority, what can the underlying authority be for local court rules on the subject? And, in any event, since less than a third of the federal districts have SJT rules, this amendment does not provide any uniform or permanent authority either.

## 2. Lack of Authority for Mandating Participation in SJTs

An additional issue with respect to the authority for conducting SJTs is whether authority exists for mandating participation in them over the parties' objections. Based upon the discussion below, it appears that there is no clear, existing common law, statutory, or rule authority for such compelled participation. And while there have been a number of law review articles written on the subject,<sup>137</sup> nearly all of them were written prior to the recent legislation and rule changes, and most of them only analyze the first case that decided this issue: *Strandell v. Jackson County*.<sup>138</sup>

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136. FED. R. CIV. P. 16 (advisory committee's notes).

137. See, e.g., William E. Craco, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 *FORDHAM L. REV.* 483 (1988); Gerald L. Maatman, Jr., *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 *J. MARSHALL L. REV.* 455 (1988); Paul Mattingly, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 *KY. L.J.* 421 (1988-89); Nina Jill Spiegel, *The Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed*, 16 *PEPP. L. REV.* S251 (1989); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 *WILLAMETTE L. REV.* 743 (1989); Charles F. Webber, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56 *U. CHI. L. REV.* 1495 (1989); Jennifer O'Hearne, *Compelled Participation in Innovative Pretrial Proceedings*, 84 *NW. U. L. REV.* 290 (1989); Anne C. Morgan, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court: Strandell v. Jackson County*, 40 *CASE W. RES. L. REV.* 491 (1989-90); Andrea M. Kuntzman, *Incongruity in the Seventh Circuit: Do Federal Courts Have the Authority to Order Summary Jury Trials?*, 6 *OHIO ST. J. ON DISP. RESOL.* 131 (1990); Daniel K. O'Toole, *The Catch-22 of Mandatory Summary Jury Trials*, 1990 *J. DISP. RESOL.* 135 (1990); Bobby Marzine Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 *TEMP. L. REV.* 799 (1990); and Molly M. McNamara, *Summary Jury Trials: Is There Authority for Federal Judges to Impanel Summary Jurors?*, 27 *VAL. U. L. REV.* 461 (1993).

138. 838 F.2d 884 (7th Cir. 1988).

## (a) Legal Challenges

Of the courts that have fully considered the issue, two Circuit Courts of Appeals have held that no authority exists for mandating participation in SJTs,<sup>139</sup> and three federal district courts have reached the opposite conclusion.<sup>140</sup> The U.S. Supreme Court has not ruled on the issue.<sup>141</sup>

In 1988, the U.S. Court of Appeals for the Seventh Circuit was the first court to decide the issue of mandated participation in SJTs. In *Strandell*,<sup>142</sup> the court held that FRCP 16 did not authorize mandated participation in SJTs.<sup>143</sup> The court wrote that, at the trial level, after discovery was closed and the case set for trial, the district court judge had suggested that the parties consent to a SJT.<sup>144</sup> The plaintiffs' attorney advised the court that he would not be willing to submit his client's case to a SJT, but that he was ready to proceed to trial immediately.<sup>145</sup> He claimed that a SJT would require disclosure of 21 privileged witness statements that he had successfully protected previously under the work-product doctrine.<sup>146</sup> The district court rejected this argument and ordered the parties to participate in a SJT.<sup>147</sup> When the parties appeared for selection of the jury for the SJT, plaintiffs' attorney again objected, and the court again overruled his motion.<sup>148</sup> The plaintiffs' attorney then declined to proceed with the jury selection process, and the court consequently held him in criminal contempt for refusing to proceed with the SJT.<sup>149</sup> At the criminal contempt hearing, the plaintiffs' attorney reiterated his view that the court lacked the power to compel a SJT, and argued that his clients' rights would be violated by participating in such a proceeding.<sup>150</sup> The district court entered a criminal contempt judgment of \$500 against the plaintiffs' attorney, and he appealed.<sup>151</sup>

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139. See *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988); *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) (discussed *infra*). The *Strandell* case was the first decision on this issue, and the *In re NLO* case is the most recent decision on it.

140. See *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603 (D. Minn. 1988) (discussed *infra*).

141. See also *New Adversarial Model*, *supra* note 13, at 804. While the SJT's creator, Judge Lambros, wrote in 1989 that compelled participation in SJTs was warranted under Federal Rule of Civil Procedure 16 and local court rules, he also indicated his hope that any proposed legislation would provide trial courts with the discretion to require participation in ADR activities. *Id.*

142. 838 F.2d 884 (7th Cir. 1988).

143. *Id.* at 888.

144. *Id.* at 885.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

The district court in *Strandell* had justified its decision to order a SJT by noting that the trial in this case was expected to last five to six weeks, that the parties were "poles apart in terms of settlement," and that SJTs had been used with great success in such situations.<sup>152</sup> The district court argued that it had the power to mandate participation in a SJT based upon: (1) a resolution adopted in 1984 by the Judicial Conference of the United States which originally endorsed SJTs "with the voluntary consent of the parties" but omitted this phrase in the final draft;<sup>153</sup> (2) FRCP 16(a), which authorizes a court in its discretion to require attorneys "to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and . . . (5) facilitating the settlement of the case" and 16(c), which provides that "[t]he participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and . . . (11) such other matters as may aid in the disposition of the action" (although acknowledging that "its discretion in this context is not unbridled"); and (3) its obligations under the Speedy Trial Act, 18 U.S.C. Section 2072, noting that the Southern District of Illinois ranked second in the Seventh Circuit and fourteenth in the country for case filings per judgeship.<sup>154</sup>

The Seventh Circuit in *Strandell* narrowly defined the issue on appeal as: Whether a trial judge may require a litigant to participate in a SJT to promote settlement of the case.<sup>155</sup> It did not specifically consider the issue of whether authority exists generally for SJTs. The court first noted that a lower court's power to control and manage its docket must be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure (created through the process set forth in the Rules Enabling Act).<sup>156</sup> It added: "Therefore, in those areas of trial practice where the Supreme Court and the Congress, acting together, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judicial officer must conform to that balance."<sup>157</sup> The court then reviewed the sections of the Federal Rules of Civil Procedure cited by the lower court and concluded that they could not be read as authorizing a mandatory SJT.<sup>158</sup> It stated: "In our view, while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling

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152. *Id.* (citing the district court's memorandum opinion, *Strandell v. Jackson County*, 115 F.R.D. 333, 334 (S.D. Ill. 1987)).

153. *Strandell*, 838 F.2d at 885 (citing *Strandell v. Jackson County*, 115 F.R.D. 333, 335 (S.D. Ill. 1987) (quoting REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON THE OPERATION OF THE JURY SYSTEM AGENDA G-13, at 4 (Sept. 1984) and REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 88 (Sept. 1984)).

154. *Strandell*, 838 F.2d at 885-86 (citing *Strandell v. Jackson County*, 115 F.R.D. 333 (S.D. Ill. 1987), at 334-36).

155. *Strandell*, 838 F.2d at 886.

156. *Id.*

157. *Id.* at 886-87.

158. *Id.* at 887.



litigant be sidetracked from the normal course of litigation."<sup>159</sup> The court relied upon advisory committee notes on these and other portions of FRCP 16, and noted that their interpretation was consistent with two Seventh Circuit decisions decided prior to the 1983 amendments affecting FRCP 16(c)(7),(11).<sup>160</sup>

The Seventh Circuit also noted that the use of a mandatory SJT as a pretrial settlement device would affect seriously the well-established rules concerning discovery and work-product privilege.<sup>161</sup> It concluded that the Supreme Court and the Congress could not have intended to allow the carefully-crafted balance reflected in the discovery and work-product rules to be radically altered by a mandatory SJT not even specifically mentioned in FRCP 16.<sup>162</sup> It concluded by stating: "If such radical surgery is to be performed, we can expect that the national rule-making process outlined in the Rules Enabling Act will undertake it in quite an explicit fashion."<sup>163</sup> The court finally noted that crushing caseloads and the Speedy Trial Act do "not permit the court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."<sup>164</sup>

The Seventh Circuit vacated the contempt judgment of the district court, on the grounds that "the parameters of Rule 16 do not permit courts to compel parties to participate in summary jury trials."<sup>165</sup>

But three federal district courts have reached the opposite conclusion, holding that authority exists for mandating participation in SJTs. The first of these decisions was *Arabian American Oil Co. v. Scarfone*,<sup>166</sup> decided less than three

159. *Id.*

160. *Id.* at 887-88 (citing *J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp.*, 542 F.2d 1318 (7th Cir. 1976), holding that a district court could not use Rule 16 to compel parties to stipulate facts to which they could not voluntarily agree); *Identiseal Corp. v. Positive Identification Sys.*, 560 F.2d 298 (7th Cir. 1977), holding that district courts lacked the power under Rule 16 to order that a party undertake further discovery).

161. *Id.* at 888 (citing *FED. R. CIV. P. 26(b)(3)* and *Hickman v. Taylor*, 329 U.S. 495 (1947)).

162. *Strandell*, 838 F.2d at 888.

163. *Id.* (citing n.5 that legislation has been offered in Congress that would allow district courts to convene mandatory summary jury trials, citing H.R. REP. NO. 473, 100th Cong., 1st Sess. (1987), 133 CONG. REC. H157 (daily ed. Jan. 7, 1987) ("ALTERNATIVE DISPUTE RESOLUTION PROMOTION ACT OF 1987"); SEN REP. NO. 2038, 99th Cong., 2d Sess. (1986), 132 CONG. REC. S848 (daily ed. Feb. 3, 1986) ("ALTERNATIVE DISPUTE RESOLUTION PROMOTION ACT OF 1986")).

164. *Strandell*, 838 F.2d at 888 (referring to *Thermtron Prods. v. Hermansdorfer*, 423 U.S. 336, 344 (1976)). The court did not address the district court's argument that the 1984 Judicial Conference resolution on SJTs gave it power to compel a SJT.

165. *Id.*; see also GOLDBERG, *supra* note 2. As stated in the teacher's manual:

One is led to wonder why the Court of Appeals for the Seventh Circuit insisted on a general ruling that mandatory summary jury trials are impermissible, when a far more limited ruling geared to the specific facts of the case would have been available. The court might have held that in this case where it had rejected the defendant's attempt to obtain the 21 statements of witnesses secured by the plaintiffs on the ground that these constituted work-product, it would reverse the judge's mandatory submission of the case to a summary jury trial, since that would amount to an indirect way of giving the defendant what the court had concluded it was not directly entitled to.

*Id.* at 140.

166. 119 F.R.D. 448 (M.D. Fla. 1988).

months after *Strandell*. In *Arabian American Oil Co.*, Defendant Robert Work moved to excuse his participation in the SJT set by the court, alleging that there was no possibility of settlement in the case, that even if settlement were possible the settlement had to occur between the plaintiff and defendant, and that he wished to avoid the expenditure of time and money that participation in the SJT would require, relying upon the *Strandell* decision.<sup>167</sup> Another defendant, Jerry Konidaris, filed a similar motion eight days later, adding that he was an individual with limited financial resources who lives and works in Greece and that it would be "absolutely meaningless and highly expensive for Konidaris to have to attend a Summary Jury Trial through himself or through his counsel."<sup>168</sup> The district court denied the motions to be excused from participation in the SJT insofar as the motions were based upon a suggestion that the court cannot require that parties participate in such proceedings, rejecting *Strandell* as unpersuasive and not binding precedent to that court.<sup>169</sup>

The court in *Arabian American Oil Co.* based its decision upon its conclusion that: "The obvious purpose and aim of Rule 16[(a)(1) and (5) and (c)(11)] is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition. Whatever name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16."<sup>170</sup> The court also pointed to the congested docket of the Middle District of Florida, adding that that court had effectively utilized SJTs since 1985 and without it, "opportunity for resolution is delayed, and, justice is denied."<sup>171</sup> It also stated that a SJT in this case would be a two-day investment on a real trial projected by the parties to consume 210 courtroom hours, or seven courtroom weeks, and said: "[l]itigants are entitled to their day in court, but not, to somebody else's day."<sup>172</sup>

It noted the court's responsibility under Article Three of the United States Constitution to promptly administer justice and its inherent jurisdiction to determine, set, and use management policies, and the benefits of the SJT procedure in securing to civil litigants the just, speedy, and inexpensive determination of their claims.<sup>173</sup> The court concluded by finding the SJT to be a "legitimate device to be used to implement the policy of this Court to provide litigants with the most expeditious and just case resolution."<sup>174</sup> (Like the *Strandell* case, this case did not involve a local court rule expressly authorizing the use of SJTs.)

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167. *Id.* at 448 (citing *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988)).

168. *Arabian Am. Oil Co.*, 119 F.R.D. at 448 (quotes in original).

169. *Id.* at 449. (Note: it added that any contention that individual defendants should be excused from participation based on reasons, such as inability to appear for financial reasons, should be addressed by the magistrate before whom the summary trial is scheduled.).

170. *Id.* at 448.

171. *Id.* at 448-49.

172. *Id.* at 449.

173. *Id.*

174. *Id.*

In *McKay v. Ashland Oil, Inc.*,<sup>175</sup> decided just four days after *Arabian American Oil Co.*, the court overruled the plaintiffs' motion for reconsideration of the setting of a SJT over the plaintiffs' objection. The motion for reconsideration had been filed promptly after the Seventh Circuit's *Strandell* decision. In this case the SJT was to be limited to five days, and if it failed, the trial was set to last six weeks.<sup>176</sup> The court first held that, unlike the *Strandell* case, a valid local rule existed here which allowed trial judges to require participation in SJTs.<sup>177</sup> It quoted the applicable rule, Local Rule ("LR") 23 of the Joint Local Rules for the United States District Courts of the Eastern and Western Districts of Kentucky, as follows: "A judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution."<sup>178</sup>

In a footnote, the judge pointed out that although some argument might be made that this rule is ambiguous with regard to whether a SJT may be mandatory, he was the drafter and, therefore, had personal knowledge that the intent was to afford trial judges full authority to employ SJTs and other methods of alternate dispute resolution.<sup>179</sup>

The court then discussed the issue of whether the adoption of this local rule fell within the authority of FRCP 83, which allows district courts to "make and amend rules governing its practice not inconsistent with these rules."<sup>180</sup> It stated that there could be no doubt that LR 23 is valid under FRCP 83, since far greater intrusions into the autonomy of trial lawyers and parties have been upheld under the aegis of FRCP 83, and that the Supreme Court has recently commented that district courts have the power to enact local rules necessary for the courts to conduct their business.<sup>181</sup> The court cited examples of local rules upheld,<sup>182</sup> including those authorizing district judges to refer certain cases to mandatory mediation and impose costs if the party did not better the evaluation of the mediators by ten percent after trial;<sup>183</sup> those providing for routine reference of cases to mandatory nonbinding arbitration;<sup>184</sup> those providing for the imposition of costs as a sanction for last-minute settlements entered into after the taxpayers have incurred the expense of bringing in the jury;<sup>185</sup> and a local rule providing

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175. 120 F.R.D. 43 (E.D. Ky. 1988).

176. *Id.* at 44.

177. *Id.* at 46.

178. *Id.* at 44.

179. *Id.* at n.3.

180. *Id.* at 44.

181. *Id.* at 45 (citing *Frazier v. Heebe*, 482 U.S. 641, 645 (1987)).

182. *McKay*, 120 F.R.D. at 45-46.

183. *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985).

184. See, e.g. *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F. Supp. 788 (D.Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980); See also *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712 (E.D.Pa. 1983); *Kimrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979).

185. *White v. Raymark Indus., Inc.*, 783 F.2d 1175 (4th Cir. 1986); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985).

for civil jury trials by juries of six, at a time when this was an innovation.<sup>186</sup> The court concluded by stating:

A summary jury trial is far less intrusive into the independence of the trial lawyer or litigant than the local rules upheld by the above authorities. No presumption of correctness attaches to the verdict of the summary jury, nor is any sanction imposed for failure to accept its advisory verdict. It is merely a useful settlement device. It may require an expenditure of time and preparation but so do pretrial orders, memoranda, conferences, marking of exhibits, etc. In no way is the summary jury trial 'outcome-determinative' under the Supreme Court's *Colgrove* test.<sup>187</sup>

Therefore, the court in *McKay* concluded that the local rule in effect was valid.<sup>188</sup>

Despite this conclusion, the court went on to analyze the issue under the inherent power and FRCP strands of the *Strandell* decision. The court in *McKay* stated that in its opinion, the trial court opinion in *Strandell* expresses the better view.<sup>189</sup> It pointed out that a trial court's requiring participation in a SJT is all but expressly authorized by FRCP 16(a)(5), (c)(7), (10), (11).<sup>190</sup> It added that certainly the SJT procedure is not in conflict with these provisions, which authorize the trial court to "take action" with regard to "the use of extrajudicial procedures," special procedures for complex cases, and "such other matters as may aid in the disposition of the action."<sup>191</sup> Further, the court stated, FRCP 16(f) authorizes the court to compel attendance at pretrial conferences, and this has been held to apply to settlement conferences.<sup>192</sup> In addition, FRCP 83 provides in its last sentence: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."<sup>193</sup> The court added that SJTs may be used as an extended pretrial conference to clarify the issues for the trial judge, with laymen sitting in and giving their reactions.<sup>194</sup>

What the court in *McKay* found most persuasive, however, is the fact that the Judicial Conference of the United States had passed a formal resolution endorsing the experimental use of SJTs as a potentially effective means of promoting settlements.<sup>195</sup> It stated that the Judicial Conference was well aware that SJTs

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186. *Colgrove v. Battin*, 413 U.S. 149 (1973).

187. *McKay*, 120 F.R.D. at 46.

188. *Id.*

189. *Id.* at 47.

190. *Id.* at 48.

191. *Id.*

192. *Id.* at 48 n.15 (citing *Lockhart v. Patel*, 115 F.R.D. 44 (E.D. Ky. (1987))).

193. *McKay*, 120 F.R.D. at 48.

194. *Id.*

195. *Id.*

were not expressly authorized by the Federal Rules of Civil Procedure, and language limiting the resolution to SJTs held "only with the voluntary consent of the parties" had purposely been deleted from a previous draft.<sup>196</sup> The court concluded that it was apparent that the Judicial Conference believed that mandatory SJTs were authorized by the Federal Rules of Civil Procedure.<sup>197</sup>

Finally, the court in *McKay* concluded that the Seventh Circuit's concern (in *Strandell*) with violation of privilege or protection of work product also seemed misplaced since "it is hard to see how anything would be disclosed by a SJT that would not be disclosed at the real trial and would not already be contained in the pretrial order, which is also an overview of the real trial."<sup>198</sup> The court also concluded that mandatory SJTs would seem to be within the inherent power of the court,<sup>199</sup> making reference to the scholarly discussion of the court's inherent powers in *Eash v. Riggins Trucking, Inc.*<sup>200</sup>

The court in *McKay* therefore held that participation in a SJT "may be mandated by trial courts in their discretion even aside from the existence of a local rule," and that where a local rule exists the power of the court is even clearer.<sup>201</sup>

In *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*,<sup>202</sup> the magistrate also overruled the parties' objections to participation in a court-ordered SJT.<sup>203</sup> It concluded, that in light of the court's inherent power to manage and control its docket, Federal Rules of Civil Procedure 1 and 16, and Local Rule 3 of that court, that the court possessed the authority to compel participation and attendance in a SJT.<sup>204</sup>

In *Federal Reserve Bank*, the parties objected to the setting of a three-day SJT on the following grounds: (1) the process was too expensive, as it would cost each party approximately \$50,000; (2) the SJT would not be an accurate synopsis of a jury trial because several major evidentiary rulings would not be made by the trial judge until the last week in December, whereas the SJT was to take place December 12-14; (3) the parties were truly at loggerheads and the possibility of settlement was extremely remote and advancement to trial definite; and (4) the SJT process would use valuable trial preparation time without contributing significantly to clarification of issues or attorney preparation for trial.<sup>205</sup>

The opinion first points out that the Supreme Court has long acknowledged the inherent power of the court to control and manage its docket, a power not dependent upon any express statute or rule conferring it.<sup>206</sup> After listing the

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 48 n.17.

200. 757 F.2d 557 (3rd Cir. 1985).

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

202. 123 F.R.D. 603 (D.Minn. 1988).

203. *Id.* at 608.

204. *Id.* at 604.

205. *Id.*

206. *Id.* (citing *Link v. Wabash*, 370 U.S. 626 (1962)).

benefits of SJTs in eliminating barriers to settlement, the magistrate discussed the existing authority outside its jurisdiction on whether courts can mandate SJTs.<sup>207</sup> The magistrate adopted the reasoning of the courts in *McKay* and *Arabian American Oil Co.*, and disagreed with that in the *Strandell* decision. It pointed out that contrary to the Seventh Circuit's reasoning in *Strandell* that compelled participation would result in litigants' loss of their right to proceed to trial and forced courthouse settlements, the parties in that case were not denied their right to trial altogether or informed that a SJT was the only allowable mechanism of adjudication for resolution of their dispute.<sup>208</sup> In addition, the Seventh Circuit's concern about the violation of privilege or work product was misplaced since anything that would be disclosed at a SJT would ultimately be disclosed at the actual trial.<sup>209</sup> The magistrate also rejected the *Heileman* decision<sup>210</sup> as inapplicable to this case since LR 3 specifically allows the court to order parties to attend pretrial conferences (as opposed to only attorneys and unrepresented parties), and as premature since the panel opinion had been withdrawn, and the matter reheard en banc with the disposition yet pending.<sup>211</sup>

In addition, the magistrate relied upon FRCPs 1, 16(a)(1), (5), (c)(7), (11), and its own LR 3(A), which provides that "each judge may prescribe such pretrial and discovery procedures as the judge may determine appropriate," and LR 3(C), which provides that "each judge, on their own initiative, on motion of any party to an action, or by stipulation of the parties, may order the attorneys and the parties to appear for a pretrial conference to consider the subjects specified in

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207. *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, 123 F.R.D. 603, 605 (D.Minn. 1988) (citing *McKay v. Ashland Oil Co.*, 120 F.R.D. 43 (E.D.Ky. 1988)); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D.Fla. 1988); cf. *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985); *Strandell v. Jackson County, Illinois*, 838 F.2d 884 (7th Cir. 1987); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415, *reh'g granted* (7th Cir. 1988).

208. *Id.* at 605-06.

209. *Id.* at 606.

210. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415 (7th Cir. 1988) (reversing the lower court's decision sanctioning the corporate defendant for failing to send a representative besides its attorney to a settlement conference as ordered).

211. *Federal Reserve Bank of Minnesota*, 123 F.R.D. at 606. Upon rehearing *en banc*, the Seventh Circuit held, in *G. Heileman Brewing Co.*, 871 F.2d at 656-57, that the district court was entitled to order a represented litigant to appear before it in person at a pretrial conference for the purpose of discussing settlement of the case, and that the district court did not abuse its discretion by imposing sanctions upon the corporation for failing to comply with such order.

Cf. FED. R. CIV. P. 16 (after the *G. Heileman Brewing Co.* decision, FED. R. CIV. P. 16 was amended to specifically allow such an order). The last paragraph of FED. R. CIV. P. 16(c) now states:

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

FRCP 16, or other matters determined by the judge.<sup>212</sup> The magistrate added that SJTs are consistent with FRCP 39(c) and 83.<sup>213</sup> It pointed out that the 1983 amendments to the Federal Rules of Civil Procedure were intended to promote case management, of which settlement is a valuable tool, and that the Judicial Conference of the United States had passed a formal resolution endorsing the use of the SJT as a potentially effective means of promoting settlement (knowing there was no specific authorization for them in the rules, and deliberately deleting the consent language).<sup>214</sup> Therefore, the magistrate concluded that compelled attendance and participation in SJTs was consistent with the Federal Rules of Civil Procedure.<sup>215</sup>

Finally, the magistrate addressed the parties' concerns as follows: (1) an investment of time and money for a three-day SJT when compared to a potential real jury trial lasting four-to-six courtroom weeks is reasonably proportionate; (2) even if the SJT procedure does not lead to settlement, it will be of substantial benefit in this case by clarifying issues for trial, both for the parties and the court; (3) the pending evidentiary motions will have no effect since because of the nonbinding nature of the SJT procedure, evidentiary rules are more flexible than in an actual jury trial -- and, in any event, this court could decide crucial evidentiary issues for the purpose of the SJT proceeding; (4) any concerns about the potential for premature publicity and public disclosure as a result of the SJT can be alleviated by this court's agreement to close the SJT to the public.<sup>216</sup> Therefore, the parties' objections to participation in the SJT were overruled.<sup>217</sup>

In 1993, in the *In re NLO, Inc.* case,<sup>218</sup> the U.S. Court of Appeals for the Sixth Circuit granted a petition for writ of mandamus vacating a district court order requiring a SJT.<sup>219</sup> This case was a class action brought against NLO on behalf of all NLO employees, subcontractors and employees of sub-contractors, who were present for a specific period of time at the Feed Materials Production Center in Fernald, Ohio, a uranium processing facility owned by the United States and managed by NLO.<sup>220</sup> The plaintiff class claimed that NLO had intentionally or negligently exposed them to hazardous levels of radioactive materials,

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212. *Federal Reserve Bank of Minnesota*, 123 F.R.D. at 606-07. See also FED. R. CIV. P. 1, 16(a)(1), (5), (c)(7), (11); 7th Cir. R. 3(A).

213. *Federal Reserve Bank of Minnesota*, 123 F.R.D. at 607.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 608. See also *Home Owners Funding Corp. of Am. v. Century Bank*, 695 F. Supp. 1343, 1347 n.3 (D.Mass. 1988). (The court, without discussion, stated that it had the power to order a SJT pursuant to FED. R. CIV. P. 16 (citing *McKay v. Ashland Oil Co.*, 120 F.R.D. 43 (E.D. Ky. 1988); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. 1988); but see *Strandell v. Jackson County*, 838 F.2d 884, 888 (7th Cir. 1988)).

218. 5 F.3d 154 (6th Cir. 1993).

219. *Id.* at 160.

220. *Id.* at 155.

increasing their risk of cancer and subjecting them to emotional distress.<sup>221</sup> The district court ordered all parties to participate in a SJT, which would be open to the media and the public, and enforceable by sanctions against counsel for anything less than full participation.<sup>222</sup> NLO moved for a reconsideration of this ruling or, in the alternative, for interlocutory appeal, and the district court denied this motion.<sup>223</sup> NLO filed a petition for mandamus in the Sixth Circuit,<sup>224</sup> seeking emergency review of the court's order denying its motion for reconsideration.<sup>225</sup> An emergency panel granted a stay and set the case for oral argument.<sup>226</sup>

In vacating the SJT order, the Sixth Circuit rejected several previously-asserted bases of authority for SJTs. The Court first noted that although the district court had relied upon *Cincinnati Gas & Electric Co.*,<sup>227</sup> as permitting compulsory SJTs in the Sixth Circuit, the issue of the power to compel participation was not squarely addressed in that case.<sup>228</sup>

Second, the court stated that while district courts "unquestionably have substantial inherent power to manage their dockets," that power "must be exercised in a manner that is in harmony with the Federal Rules of Civil Procedure."<sup>229</sup> The Court focused on FRCP 16 and, relying upon the decision in *Strandell*,<sup>230</sup> as well as the language of FRCP 16 and the corresponding Advisory Committee Notes, held that Rule 16 does not permit compulsory participation in settlement proceedings such as SJTs.<sup>231</sup> It added that requiring participation in a SJT, where such compulsion is not permitted by the Federal Rules, is "an unwarranted extension of the judicial power."<sup>232</sup> (Note, however, that the version of FRCP

221. *Id.*

222. *Id.* at 156.

223. *Id.* at 155.

224. *Id.* The petition for writ of mandamus also sought a writ vacating the district court's order certifying a class under FED. R. CIV. P. 23(b)(2), and the Sixth Circuit denied that portion of the petition. *Id.* at 159-60.

225. *Id.* at 155.

226. *Id.*

227. 854 F.2d 900 (6th Cir. 1988), *cert. denied*, 489 U.S. 1033 (1989).

228. *In re NLO*, 5 F.3d at 156-57.

229. *Id.* at 157.

230. 838 F.2d 884 (7th Cir. 1987).

231. *In re NLO*, 5 F.3d at 157.

232. *Id.* at 157-58 (footnotes omitted). At the time of this decision, September 17, 1993, the applicable portions of Rule 16(c) were:

The participants at any conference under this rule may 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 potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems . . .

*Id.* at 157.

See also FED. R. CIV. P. 16(c)(12); FED. R. CIV. P. 16(c)(9). In the amendments taking effect December 1, 1993, however, while FED. R. CIV. P. 16(c)(10) remains the same (although it has been renumbered and is now (e)(12)), FED. R. CIV. P. 16(c)(7) has been altered. It is now FED. R. CIV. P.



16(c) in effect at the time of this decision was altered several months later when the most recent amendments to the federal rules took effect on December 1, 1993.).<sup>233</sup> The court added, in a footnote, that Congress has considered on several occasions a specific grant of such compulsory authority to district courts, none of which has passed.<sup>234</sup> It stated that Section 473(a) of the Civil Justice Reform Act of 1990 permits district courts to consider "'principles and guidelines of litigation management and cost and delay reduction,' including referral of appropriate cases to alternative dispute resolution programs that 'the court may make available,' such as summary jury trials, Section 473(a)(6)(B)."<sup>235</sup> However, it pointed out that in Section 473(b), the court is authorized to require participation in several techniques developed from these principles and guidelines and SJTs are not mentioned.<sup>236</sup> It noted that an alternate bill<sup>237</sup> would have amended 28 U.S.C. Section 473(a) to permit courts to mandate such alternative dispute resolution techniques as SJTs, but this bill did not pass.<sup>238</sup> In addition, the court pointed out that several recent bills have encouraged use of alternative

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16(c)(9) and it reads: "(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule; . . ." FED. R. CIV. P. 16(c)(9).

233. See *supra* note 228.

234. *In re NLO*, 5 F.3d at 158 n.1 (6th Cir. 1993) (citing *Strandell*, 838 F.2d at 888 n.5).

235. *Id.*

236. *Id.* See also The Civil Justice Reform Act, 28 U.S.C. § 473(b) (1988). Section 473(b) states:

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

237. S. 2027, 101st Cong., 2d Sess. § 3 (1990).

238. *In re NLO*, 5 F.3d at 158 n.1.

dispute resolution and all of them have referred to SJTs as an option available to willing litigants.<sup>239</sup>

Third, the court held that mandatory participation in SJTs cannot be based on the pure inherent authority of the court, rejecting the reliance upon this rationale by the court in *McKay*,<sup>240</sup> and by Judge Lambros in his writings.<sup>241</sup> Some of the cases mentioned above have relied, at least in part, upon the 1984 resolution adopted by the Judicial Conference, in which it endorsed the experimental use of SJTs. However, it is unclear whether the approval extended to mandated participation in them.<sup>242</sup>

Finally, there have also been legal challenges in state courts in analogous circumstances, such as the mandatory use of other ADR devices in courthouse settings. In a state case decided in the same month as *In re NLO, Inc., Twitty v. Minnesota Mining & Manufacturing Co.*,<sup>243</sup> the court reached the opposite conclusion. It held that the court has inherent power to order the parties to participate in a non-binding SJT.<sup>244</sup> The court stated:

239. *Id.* (referring to H.R. 4150, 2306(b)(6) 102nd Cong., 2d Sess. (1992); S. 2217, 2306(b)(6) 102nd Cong., 2d Sess. (1992); H.R. 4155, 7(b)(6) 102nd Cong. 2d Sess (1992); S. 2180, 7(b)(6) 102nd Cong., 2d Sess. (1992). (No action was taken on S. 2180, which was introduced on February 4, 1992, as the Access to Justice Act of 1992. It was reintroduced on March 16, 1993, as S. 585 and no action had been taken as of September 2, 1994).)

240. 120 F.R.D. 43, 48 (E.D. Ky. 1988).

241. *In re NLO*, 5 F.3d at 158 (referring to Thomas D. Lambros, *The Summary Jury Trial, and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 469 (1984)).

242. See McNamara, *supra* note 23, at 477 n.116:

The initial draft of the 1984 Judicial Conference Resolution provided: "RESOLVED, the Judicial Conference endorses the use of summary jury trial, only with the voluntary consent of the parties, as a potentially effective means of promoting the fair and equitable settlement of lengthy civil jury trials." REP. OF JUDICIAL CONF. COMM. ON THE OPERATION OF THE JURY SYSTEM AGENDA 6-13, Sept. 1984, at 4. The final draft, however, omitted the language regarding voluntary consent and stated: "RESOLVED, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective way of promoting the fair and equitable settlement of potentially lengthy civil trials." REP. OF THE PROCEEDINGS OF THE JUDICIAL CONF. OF THE UNITED STATES, Sept. 1984, at 88. *But see infra* note 122 (arguing that the change in language did not change the meaning of the resolution) . . .

*Id.* See also *Id.* at 478 n.122:

The term "experimental use" includes the notion of voluntariness, as is emphasized by the conference's refusal to include the word "mandatory" in its final resolution. [citing Nina J. Spiegel, *Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed*, 16 PEPP. L. REV. S251, at S263 (1989).] *But cf.* [DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY, 6 (Roscoe Pound Foundation), at 43] (arguing that by endorsing the experimental use of SJT, the Conference rejected the suggestion that SJT be used only when the parties voluntarily agree to it).

*Id.*

243. 16 Pa. D. & C. 4th 458 (C.P. of Philadelphia County 1993).

244. *Id.* at 459. The Court relied primarily on broad and analogous Pennsylvania statutes and procedural rules, but also referred to the then pending amendments to Federal Rule of Civil Procedure 16(c). *Id.* at 464-67. (See the discussion below.)

Conducting a summary jury trial using jurors in the service of the Philadelphia Court of Common Pleas does not constitute an obstruction of justice, the misuse of a jury, or the deprivation of Mr. Twitty's right to a jury trial. In fact, the overwhelming use and commendation of the summary jury trial as a tool for dispute resolution -- both on the federal and state levels -- points the other way.<sup>245</sup>

In a situation that is arguably analogous, such as mandatory nonbinding arbitration,<sup>246</sup> many cases have upheld required participation.<sup>247</sup>

### (b) What Judges Have Relied Upon

It would appear from the responses of many of the surveyed judges, that their lack of comfort in ordering lawyers to participate in a SJT in the face of opposing case law and less than clear authority for doing so has led to the under-utilization of this settlement device.<sup>248</sup>

A number of the surveyed judges have not conducted any SJTs at all because they have been unable to convince lawyers to consent to the process.<sup>249</sup> Of those judges who have conducted SJTs, very few of them have ever ordered one over the parties' objections.<sup>250</sup> The judges are clearly concerned about the controversial nature of such a decision in light of the lack of clear authority for doing so.<sup>251</sup> Some of the reasons judges gave for refusing to compel

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245. *Id.* at 467.

246. *See McKay*, 120 F.R.D. at 45 (describing a SJT as "essentially nonbinding arbitration with an advisory jury instead of arbitrators").

247. *See, e.g.*, *Davison v. Sinai Hosp. of Baltimore, Inc.*, 462 F. Supp. 778 (D.Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980).

*See also* *New England Merchants Nat'l Bank v. Hughes*, 556 F. Supp. 712 (E.D. Pa. 1983); *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979); *McKay*, 120 F.R.D. at 45; *cf. also* *Rhea v. Massey-Ferguson, Inc.*, 767 F.2d 266 (6th Cir. 1985) (upholding a local rule authorizing district court judges to refer certain cases to mandatory mediation and impose sanctions if a party does not better the evaluation of the mediators by ten percent after trial).

248. *See Judicial Survey Responses*, *supra* note 24.

249. *Id.*, Question 16, at 21-22; Question 18, at 24.

250. *Id.*, Question 14, at 19. (Only four of nineteen judges said they had ordered a SJT over the parties' objections.).

251. *Id.*, Question 14, at 19; Question 35, at 58. One judge wrote that when his district first began experimenting with SJTs parties were ordered to participate so the court could get a feel for the process. *Id.*, Question 14, at 19. This was done under the court's inherent authority to manage its caseload. *Id.* Now it would be rare for him to order an objecting party to participate. *Id.* But, he added, in the circumstances of a lengthy trial, with relatively simple facts, and parties whose settlement postures are quite disparate, he would seriously consider doing so. *Id.*

Another judge who has compelled participation in SJTs wrote that after the Civil Justice Reform Act of 1990, mandating participation may be less controversial. He added that an attorney might be more likely to challenge it in a district where the trial judge did not create it. He also stated that it does not help to challenge the SJT order and annoy the judge unless the attorney is willing to go to the Court of Appeals. *Id.*

participation in SJTs were: it would cause the process to lose its psychological impact and credibility; you need willing participants for it to work; and since it is only a settlement vehicle it cannot be forced on parties.<sup>252</sup> Of those judges who have compelled participation, one said that there was very little question of it, and another stated that upon completion of the SJT, the objecting parties endorsed the SJT as "the greatest thing since sliced bread."<sup>253</sup>

However, largely due to the impetus provided by the Civil Justice Reform Act of 1990, a number of jurisdictions now have adopted rules -- or provisions in their Civil Justice Expense and Delay Reduction Plan -- with respect to SJTs.<sup>254</sup> Of the twenty-five district courts with rules merely allowing SJTs to occur (and not providing any detailed procedures for conducting them), fifteen allow the court to order the SJT over the parties' objections.<sup>255</sup> Of the five district courts with detailed SJT rules, three of them allow mandated participation in SJTs.<sup>256</sup>

### (c) The Effect of Recent Legislation and Rule Changes

The issue of authority for mandated participation in SJTs has not been settled by the passage of The Civil Justice Reform Act or the December 1, 1993 amendment of FRCP 16.

Section 473(a)(6) of The Civil Justice Reform Act<sup>257</sup> cannot be viewed as providing authorization for mandated participation in SJTs for at least five reasons. First, the language itself does not explicitly address this issue. Section 473(a)(6) provides only that any civil justice delay reduction plan must consider and may include authorization to refer appropriate cases to ADR programs that the court may make available, specifically mentioning SJTs.<sup>258</sup> This section does not

252. *Id.*, Question 14, at 19.

253. *Id.*

254. *See supra* note 124.

255. *See* S.D. CAL. R. 37.1(f); S.D. ILL. R. 34; E.D. KY. R. 23; W.D. KY. R. 23; E.D. LA. PLAN, Art. 4; W.D. MO. EARLY ASSESSMENT PROGRAM, VII.B.5; D. NEV. R. 185; S.D. OHIO R. 53.1; N.D. OKLA. R. 16.3(I); W.D. OKLA. R. 17(J); M. D. PA. R. 1010; W.D. TENN. R. 15(c); S.D. TEX. R. 20(B); W.D. TEX. R. CV-88(h) (15 districts with local rules allowing mandated participation in SJTs). *See also* N.D. ALA. PLAN, § IV.A; D. CONN. R. 36; C.D. ILL. R. 1.4 (re: magistrate judges); N.D. IND. R. 53.2; S.D. IND. R. 16.1(d)(2)(J); D. KAN. R. 214; W.D. LA. PLAN, § II.B.4; N.D. MISS. PLAN, 5; S.D. MISS. PLAN, 5; E.D. TEX. PLAN, Pt. 1, Art. 6 (7) (remaining local rules in this category either require the parties' consent, merely require the parties to consider the possibility, or are unclear).

256. *See* D. MASS. R. 16.4(C)(3); W.D. MICH. R. 44; N.D. OHIO R. 7:1.1 - 7:5.3; *but cf.* M.D. TENN. R. 602; W.D. WASH. R. CR 39.1(e) (remaining two districts' local rules do not allow mandated participation in SJTs). (Three state statutes or rules authorize mandated participation in SJTs, five do not, and another statute is unclear. Those authorizing mandated participation include: Cochise County, ARIZ. SUPER. CT. R. 12; N.H. SUPER. CT. R. 171; and WIS. CODE § 802.12. Those allowing SJTs only with the consent of the parties include: N.C. SUPER. CT. R. 23; N.C. DIST. CT. R. 23; VA. CODE § 8.01-576.1; WYO. R. CIV. P. 40; MINN. CODE § 604.11 (medical malpractice); MICH. SUP. CT. ADMIN. ORDER 1988-2. The statute that is unclear on this issue is TEX. CODE § 154.026.).

257. *See* The Civil Justice Reform Act, 28 U.S.C. § 473(a)(6) (1988).

258. *Id.*

clearly state whether participation in SJTs can be mandated over the parties' objections and contains no specific rule or statutory provisions regarding SJTs.<sup>259</sup>

Second, the available legislative history of the statute does not support an interpretation that mandatory participation is authorized. According to an ADR practice book, the Senate Judiciary Committee did not take a specific stand on a court's power to compel a summary jury trial in its report on The Civil Justice Reform Act (as part of the Judicial Improvements Act of 1990).<sup>260</sup> The book notes, however, that perhaps it is significant that the Committee did specifically approve the majority decision in *Heileman*,<sup>261</sup> quoting from the Senate Report as follows:

On appeal, the Seventh Circuit [in *Heileman*] affirmed en banc by a 6-to-5 vote, relying on the "inherent authority" of the district court to manage its docket. The majority acknowledged that the district court could not compel settlement, but found it could compel the parties to discuss settlement at a neutral conference.

By specifically authorizing this technique for use by district courts, it is the committee's intent to acknowledge agreement with the majority in *Heileman*.<sup>262</sup>

The effect of Congress singling out *Heileman* for specific approval is discussed further in the teacher's manual for an ADR textbook.<sup>263</sup> The manual states:

Given the fact that Congress was well aware of the *Strandell* case at the time it passed the Civil Justice Reform Act of 1990, the ambiguity of the statute is puzzling. Does the phrase "authorization to refer appropriate cases to alternative dispute resolution programs that . . . the court may make available, including . . . summary jury trial" mean simply encouragement of voluntary referral or does this cryptic phrase overrule the *Strandell* case? The legislative history is not helpful, which is all the more puzzling in view of the fact that it specifically

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259. *Id.*; see also DONOVAN LEISURE, *supra* note 63, at 41. It refers to the mention of SJTs in Section 473 of The Civil Justice Reform Act (as part of the Judicial Improvements Act of 1990), and then comments: "Whether this will be interpreted as an authorization to compel summary jury trials, however, is not entirely clear." *Id.*

260. *See id.*

261. *See supra* note 207 (stating that in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 848 F.2d 1415 (7th Cir. 1988), the Seventh Circuit reversed the lower court's decision sanctioning the corporate defendant for failing to send a corporate representative to a settlement conference as ordered); *but see G. Heileman Brewing Co.*, 871 F.2d at 656-57. Upon rehearing, *en banc*, the Seventh Circuit held that the district court was entitled to order a represented litigant to appear before it in person at a pretrial conference for the purpose of discussing settlement of the case, and that the district court did not abuse its discretion by imposing sanctions upon the corporation for failing to comply with such order. *Id.*

262. *See* DONOVAN LEISURE, *supra* note 63, at 42 (citing S. REP. NO. 416).

263. *See* GOLDBERG, *supra* note 2, at 141.

addressed the analogous *Heileman* issue. With respect to the latter, the Senate Committee Report specifically states that an analogous provision in the Act was intended to affirm statutorily the *Heileman* decision. Perhaps, in that light, the ambiguous language relating to *Strandell* should be interpreted similarly to the ambiguous language pertaining to *Heileman* (i.e., that as regards *Strandell*, Congress intended to overrule that case when it used the term "authorization"). Conversely, it might be contended that in light of the specific reference to *Heileman* in the Committee Report, the absence of a similar reference to *Strandell* is significant.<sup>264</sup>

Third, as explained in *In re NLO*,<sup>265</sup> The Civil Justice Reform Act does contain authorization to require participation in several techniques, but SJsTs are not included. In *In re NLO*, the Sixth Circuit stated that Section 473(a) of the Act permits district courts to consider "principles and guidelines of litigation management and cost and delay reduction," including referral of appropriate cases to alternative dispute resolution programs that "the court may make available," such as summary jury trials, Section 473(a)(6)(B).<sup>266</sup> The court pointed out, however, that in Section 473(b) of the Act, the court is authorized to require participation in several techniques developed from these principles and guidelines and SJsTs are not mentioned.<sup>267</sup>

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264. *Id.* (internal page references omitted).

265. 5 F.3d 154 (6th Cir. 1993).

266. *Id.* at 158 n.1.

267. *Id.* See The Civil Justice Reform Act, 28 U.S.C. § 473(b)(1988). Section 473(b) of the Act states:

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

*Id.* (Notably, the fifth principle mentioned above does involve the holding in the *Heileman* case.).

Fourth, as noted by the court in *In re NLO*, an alternate bill<sup>268</sup> would have amended 28 U.S.C. Section 473(a) to permit courts to mandate such alternative dispute resolution techniques as SJTs, but this bill did not pass. Several recent bills have encouraged use of alternative dispute resolution and all of them have referred to SJTs as an option available to willing litigants.<sup>269</sup>

Fifth, and probably most important, The Civil Justice Reform Act sets up a nationwide experiment designed to reduce cost and delay and contemplates that more permanent, uniform changes may be made after the Judicial Conference reports back to Congress by the end of 1995. As stated above, the Act itself expires on December 1, 1997,<sup>270</sup> and will not bind district courts after that date. If the intent was to create clear, permanent authority for mandating participation in SJTs, the intent was not realized.

The other, very recent, change affecting the issue of authority for mandated participation in SJTs was the December 1, 1993 amendment to FRCP 16. Although it appears to provide some authority for mandated participation, the authority is quite limited.

As indicated above, prior to the amendment, FRCP 16(c)(7) stated: "(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute."<sup>271</sup>

After the amendment was adopted in December 1, 1993, this provision became FRCP 16(c)(9), which now reads as follows: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."<sup>272</sup>

The Advisory Committee Notes state, in pertinent part:

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, summary jury trials, mediation, neutral evaluation, and nonbinding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. The rule

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268. S. 2027, 101st Cong., 2d Sess. § 3 (1990).

269. *In re NLO*, 5 F.3d at 158 n.1 (referring to H.R. 4150, 102nd Cong., 2d Sess. § 2306 (b)(6) (1992); S. 2217, 102nd Cong., 2d Sess. § 2306(b)(6) (1992); H.R. 4155, 102nd Cong., 2d Sess. § 7(b)(6) (1992); S. 2180, 102nd Cong., 2d Sess., § 7(b)(6) (1992)). (No action was taken on S. 2180, which was introduced on February 4, 1992, as the Access to Justice Act of 1992. It was reintroduced on March 16, 1993, as S. 585, and no action had been taken as of September 2, 1994.).

270. See *supra* note 9.

271. FED. R. CIV. P. 16(c)(7) (1992).

272. FED. R. CIV. P. 16(c)(9) (1993).

acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties. See 28 U.S.C. sections 473(a)(6), 473(b)(4), 651-58; Section 104(b)(2), Pub. L. 101-650. The rule does not attempt to resolve questions as to the extent a court would be authorized to require such proceedings as an exercise of its inherent powers.<sup>273</sup>

Although this provision appears to authorize mandated participation in SJTs, that authorization is clearly limited to situations in which a statute or local court rule exists on the subject. As discussed above, the only federal statute concerning SJTs -- Section 473(a)(6) of The Civil Justice Reform Act -- does not provide clear or permanent authority for mandated participation in them. In addition, if the Act does not authorize mandated participation in SJTs and there is no judicial or scholarly agreement about any other source of such authority, there is a question as to the existence of any underlying authority for a local court rules on the subject. And, in any event, since less than a third of the federal districts have SJT rules (and not all of those provide for mandated participation), this amendment does not provide any uniform or permanent authority for mandated participation either.<sup>274</sup>

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273. See also *Twitty v. Minnesota Mining & Mfg. Co.*, 16 Pa. D. & C.4th 458 (C.P. of Philadelphia County) (1993). In that case, the state court, although of course not bound by federal rules, referred to the then proposed amendment to Federal Rule of Civil Procedure 16(c) which took effect on December 1, 1993, as support for its general statement that the SJT has gained national acceptance. *Id.* at 464. The court quoted the above-mentioned "Committee Notes" following the proposed amendment (which were not altered in the final version), and said that it was worthy to note that the comment provides that a court may authorize, through statutes and local rules the "use of some of these procedures even when not agreed to by the parties." *Id.* at 465. It added that as noted in the Committee Note to the proposed amended Rule 16, the Conference rejected a suggestion that the summary jury trial should only be conducted when all parties voluntarily agree. *Id.* at 466 (referring to *S. GOLDBERG ET AL., DISPUTE RESOLUTION 282-83 (1985)*).

274. See *Grubbs*, *supra* note 7, at 29 n.21. The commentator noted that the continued vitality of the decisions in *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993) and *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), both of which held that the parties could not, under Federal Rule of Civil Procedure 16, be compelled to participate in a SJT, may be in doubt given the amendment to Federal Rule of Civil Procedure 16(c) effective December 1, 1993. *Id.* He added that Federal Rule of Civil Procedure 16(c) now authorizes consideration and "appropriate action" regarding "settlement and use of special procedures to assist in resolving the dispute when authorized by statute or local rule." *Id.* The Committee Comment (with respect to the Civil Justice Reform Act of 1990) expressly notes that "the judge and attorneys can explore possible use of alternative procedures such as mini trials, summary jury trials, mediation and non-binding arbitration." *Id.* (Of course, the key word here is "doubt." At this point in the history of the SJT we can ill afford any further doubt as to the authority for requiring participation in them. Such doubt engenders future lawsuits and confusion.).



### 3. Clarifying the Authority for SJTs and Creating Authority for Mandated Participation in Them

It is quite clear that there is a need to both clarify the authority for SJTs in general, and create authority for mandated participation in them. These issues will be addressed separately in the two sections below.

#### (a) Authority for SJTs in General

Since the purpose of SJTs is to reduce the costs and delays involved in litigation, allowing the current uncertainty as to their authority to continue will only lead to more confusion, debate, and possible litigation. But since it is unlikely that there will be many direct challenges to consensual SJTs, waiting until the issue reaches the United States Supreme Court does not appear to be a wise course of action. Therefore, to preserve the SJT, its authority must be clarified through appropriate legislative and/or rule changes.

Although the surveyed judges did not give an overwhelmingly positive response to the question of whether the authority for (consensual) SJTs needs to be created or clarified,<sup>275</sup> that response is understandable. Parties are unlikely to challenge procedures to which they have assented. But that does not eradicate the necessity of clarifying the situation. Of the surveyed judges who thought that the authority should be created or clarified, one judge stated that obviously not all courts agree that the authority exists now,<sup>276</sup> and another stated that it would make it more clear that authority does exist.<sup>277</sup> One judge merely commented that it helps if the procedures are "approved."<sup>278</sup> Three of those judges responding negatively indicated that The Civil Justice Reform Act had taken care of the problem (although one of them pointed out that at least two Courts of Appeals have not caught on).<sup>279</sup>

The first issue that must be resolved is where such changes should appear. Some of the surveyed judges thought the language should be in the FRCPs.<sup>280</sup> One of these judges explained that using a local court rule or standing order instead might not provide satisfactory authority for some judges.<sup>281</sup> Another

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275. See *Judicial Survey Responses*, *supra* note 24, Question 35, at 58-60. (When the surveyed judges were asked whether the authority for (consensual) SJTs needs to be created or clarified, approximately one-third responded in the affirmative: ten judges said yes; twenty-one said no; and one did not answer directly.).

276. *Id.* at 58. (at the time some of the initial judicial responses were received, the Biden legislation had not yet been adopted).

277. *Id.*

278. *Id.*, Question 35b, at 59.

279. *Id.* at 58.

280. *Id.*, Questions 35a, 35b, at 59; see also *Attorney Survey Responses*, *supra* note 25, Question 22a, at 16 (where the same suggestion was made by a surveyed attorney).

281. *Judicial Survey Responses*, *supra* note 24, Questions 35a, 35b at 59.

such judge suggested that the language appear either in the FRCPs or a federal statute since either has greater weight than local rule or standing orders.<sup>282</sup>

It appears that a federal statute on SJTs would be the most appropriate choice. First, adding language to the federal rules concerning SJTs would appear to be unnecessary in light of the recent amendment to FRCP 16. As stated above, as of December 1, 1993, one of the subsections of FRCP 16(c) (Subjects for Consideration at Pretrial Conferences) is "(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule . . . ." However, this alone is not sufficient. While some federal courts already have local rules on SJTs,<sup>283</sup> there is no uniform treatment of this issue and a great deal of uncertainty exists as to the basis for such authorization. Therefore, a new federal statute clearly authorizing SJTs seems to be the appropriate course of action.<sup>284</sup>

When the surveyed judges were asked, in the context of whether the authority for SJTs needs to be created or clarified, what language should be used, several judges said that it should provide that the court may require participation in them.<sup>285</sup> One judge suggested the following language: "Summary jury trials are authorized by these civil rules and the parties shall attend as directed by the court."<sup>286</sup> Another judge suggested the language of (former) LR 513, from the Middle District of Pennsylvania: "Summary Jury Trials. A judge may in his discretion set any civil case for summary jury trial, provided, however, he gives consideration to any reasons advanced by the parties as to why such a trial would not be in the best interests of justice."<sup>287</sup> Finally, another judge attached to his response a copy of a Nebraska state statute authorizing SJTs (but not providing for mandated participation) in state district courts, which he described as a "weak attempt."<sup>288</sup> One judge suggested that language be included concerning a time

282. *Id.*

283. *See supra* note 24.

284. *See Judicial Survey Responses, supra* note 24, Question 35b, at 59 (where several judges suggested that such authorization should appear in a federal statute).

285. *Id.*, Question 35a, at 58-59.

286. *Id.* at 58.

287. *Id.* at 59; *see also* M.D. PA. R. 1010. As of January 1, 1994, this rule became Local Rule 1010, Local Rules for the United States District Court for the Middle District of Pennsylvania, and the language has been revised slightly. The rule states:

A judge may in his or her discretion set a civil case for an alternative method of dispute resolution approved by the court's Civil Justice Reform Act Expense and Delay Reduction Plan: the Mediation Plan, the Settlement Officer Program, or the Summary Jury Trial Program; provided, however, that he or she gives consideration to any reasons advanced by the parties as to why such particular alternative method of dispute resolution would not be in the best interests of justice.

*Id.*

288. *Judicial Survey Responses, supra* note 24, Question 35a, at 58 (attachment including Nebraska law sections 25-1154 through 25-1157 (effective August 30, 1987)); *see also* NEB. REV. STAT. § 25-1154 (1987). (The Nebraska state legislature passed four statutes with respect to summary jury trials that took effect August 30, 1987. They authorize summary jury trials, but do not allow courts to order mandatory participation in them.) The first statute, NEB. REV. STAT. § 25-1154, states:

period for either litigants and/or the court to indicate that a SJT request is made.<sup>289</sup>

Based upon the above suggestions, it would appear that a federal statute authorizing SJTs and specifically authorizing mandated participation in them -- at the judge's discretion -- would be in order.

(b) Authority for Mandated Participation in SJTs

The danger in leaving the issue of mandated participation unresolved is even greater than that involved in maintaining the status quo with respect to the uncertainty about the authority for SJTs in general. If parties are forced to participate in SJTs -- when the court's authority for doing so is so unclear -- they are much more likely to challenge such an order. Such challenges lead to the ill effects that threaten the very existence of the SJT.

Judges clearly support the notion that they should be able to compel parties to participate in a SJT when they think it is appropriate to do so. When the surveyed judges were specifically asked whether authority creating or clarifying SJTs should also provide that federal judges and magistrate judges may compel parties to participate in a SJT, most of the responding judges said yes.<sup>290</sup> When asked for general suggestions about improving the SJT process, one judge wrote that there should be approval of mandatory SJTs in the civil rules or statutes,<sup>291</sup> and another judge wrote that the rules should be amended to allow judges to order SJTs despite parties' objections.<sup>292</sup>

Those judges who thought SJT authority should provide for mandated participation gave the following reasons: parties seldom agree; most lawyers resist change; if the procedure is in place, the judicial officer should be able to order it; some district court decisions have already upheld mandatory participation; the

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25-1154. Legislative purpose and findings. The purpose of sections 25-1154 to 25-1157 is to provide an alternate dispute resolution technique, to be known as the summary jury trial, for use by the parties to civil court actions. The Legislature finds that the procedures set forth in such sections will save valuable court and juror resources, promote prompt resolution of disputes, and increase settlement of disputed actions prior to a jury trial. The Legislature declares that courts should liberally construe such sections and employ summary jury trials in appropriate civil actions to effectuate the purposes and findings set forth in this section.

*Id.* See also NEB. REV. STAT. § 25-1155 (1987). The second statute, § 25-1155, states:

25-1155. Motion; when granted; contents. In any civil action, the district court may grant a summary jury trial upon the written motion of all parties or their oral motion in court entered upon the record. The motion for summary jury trial may contain a stipulation of the parties concerning the use or effect of the summary jury verdict.

*Id.*

289. *Judicial Survey Responses*, *supra* note 24, Question 35a, at 58.

290. *Id.*, Question 35c, at 59-60. (Seven of nine judges responding to this question answered in the affirmative.).

291. *Id.*, Question 24, at 34.

292. *Id.*

parties should not be bound by the results, but the court should be allowed to require parties to try and resolve disputes short of trial; it saves the parties thousands of dollars and the court's time; and the SJT is an effective settlement tool and federal judges should have the right to compel parties to submit to it.<sup>293</sup>

In *McKay v. Ashland Oil, Inc.*,<sup>294</sup> the judge wrote his own explanation for why mandated participation in SJTs should be allowed. The judge wrote:

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure. In the case at bar I am gambling a five-day summary jury trial against a six-week real trial. Six to one is pretty good odds.<sup>295</sup>

For the reasons stated above, a federal statute both authorizing SJTs in general and providing that a judge may compel the parties to participate in one seems to be the best approach to take. One good source of ideas for statutory language is, of course, the existing federal court local rules on the subject.

Federal district courts that have adopted local court rules allowing judges to mandate participation in SJTs have taken slightly different approaches.<sup>296</sup> Nearly all of the rules clearly make the judge's decision a discretionary one, but some of them give the judge additional guidance. For example, one local rule allows mandated participation only if the presiding judicial officer determines at any time that the case will benefit from alternative dispute resolution.<sup>297</sup> Another rule adds that the judge must give consideration to any reasons advanced by the parties as to why such particular alternative method of dispute resolution would not be in

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293. *Id.*, Question 35c, at 59-60; see also *Attorney Survey Responses*, *supra* note 25, Question 22c, at 16. One surveyed attorney said that such authority should provide that parties' participation can be compelled. *Id.* He wrote that in order for any rule to be effective, the judge must have the ability to compel what the rule seeks to accomplish. *Id.* He noted, however, that the Sixth Circuit recently ruled that a SJT cannot be imposed upon the parties. *Id.* (presumably referring to *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993)).

294. 120 F.R.D. 43 (E.D. Ky. 1988).

295. *Id.* at 49 (in a section of the opinion entitled "Some Personal Observations") (footnotes omitted; emphasis added).

296. See S.D. ILL. R. 34; N.D. IND. R. 53.2; M.D. LA. PLAN, Art. 4 (on Alternative Dispute Resolution); E.D. LA. PLAN, Art. 4 (on Alternative Dispute Resolution); D. MASS. R. 16.4(C)(3); M.D. PA. R. 1010 (effective January 1, 1994); W.D. MICH. R. 44; N.D. OHIO R. 7:1.1; N.D. OHIO R. 7:1.2; N.D. OHIO R. 7:5.1; N.D. OHIO R. 7:5.2; W.D. OKLA. PLAN, § 6.4; W.D. OKLA. R. 17(J); W.D. TEX. R. CV-88(h); S.D. CAL. R. 37.1(f).

297. See E.D. LA. PLAN, Art. 4; M.D. LA. PLAN, Art. 4 (on Alternative Dispute Resolution).

the best interests of justice.<sup>298</sup> One court plan provides that a summary jury trial may be ordered by the court where the expense is reasonably justified by the circumstances, or by the potential for resolution of the case.<sup>299</sup> Another rule allows a court to conduct a summary jury trial in cases "where alternative dispute resolution procedures have proved unsuccessful and a complex and lengthy trial is anticipated . . . provided that the court finds that a summary jury trial may produce settlement of all or a significant part of the issues and thereby effect a saving in time, effort and expense for all concerned."<sup>300</sup> Another rule provides that a judge can order a SJT where the judge finds -- after a hearing with an opportunity to be heard -- that "(1) the potential judgment does not exceed \$250,000 and (2) that the use of this procedure will probably resolve the case."<sup>301</sup> The same rule indicates that the judge must consider "the costs of the procedure and the costs that may be saved by ordering such a non-binding trial" and that the judge may consider "any other relevant factors."<sup>302</sup>

The uncertainties outlined above could be remedied by a federal SJT statute addressing the issues of clarifying the authority for SJTs in general and of creating authority for mandated participation in them. I propose the following statutory language for this purpose:<sup>303</sup>

(a) A "summary jury trial" (SJT) is a court-annexed process in which the parties' attorneys summarize their case to a six-person jury with a judge or magistrate judge presiding and then use the decision of the jury and information about the jurors' reaction to the legal and factual arguments as an aid to settlement negotiations. Unless the parties stipulate otherwise, the SJT verdict is non-binding.

(b) A judge or magistrate judge may order a SJT:

(1) with the agreement of all parties, either by written motion or their oral motion in court entered upon the record, or

(2) upon the judge or magistrate judge's determination that a SJT would be appropriate, even in the absence of the agreement of all the parties.

(c) In exercising his or her discretion under subsection (b)(2), the judge or magistrate shall give consideration to the costs of the procedure, the costs that may be saved by ordering the SJT, the potential for resolution of the case, and any reasons advanced by the parties as to why a SJT would not be in the best interests of justice.

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298. See M.D. PA. R. 1010 (took effect Jan. 1, 1994).

299. See W.D. OKLA. PLAN, § 6.4 (re: summary jury trials).

300. See W.D. TEX. R. CV-88(h).

301. See S.D. CAL. R. 37.1(f).

302. *Id.*

303. See *infra* part IV (incorporating this language into a proposed, comprehensive federal SJT statute).

*B. Lack of Authority for Summoning SJT Jurors*

The lack of authority for summoning SJT jurors seems clear, although there are only two short scholarly pieces and decisions in two cases (by the same judge) on this issue.<sup>304</sup>

## 1. Legal Challenges

The only cases addressing this issue were decided by the late U.S. District Court Judge Battisti, while he was sitting on the same court as Judge Lambros -- the originator of the SJT.<sup>305</sup>

In February of 1990, Judge Battisti<sup>306</sup> held in *Hume v. M & C Management*<sup>307</sup> that federal district court judges have no authority to summon persons to serve as summary jurors. The court denied the parties' joint motion for a summary jury trial, finding that since there is no authority in law for using persons as summary jurors, summoned pursuant to 28 U.S.C. § 1866(a) (1982), such a procedure is not permissible in the federal courts.<sup>308</sup>

304. See Charles W. Hatfield, *The Summary Jury Trial: Who Will Speak For the Jurors?: Hume v. M & C Management*, 1991 J. DISP. RESOL. 151 (1991); McNamara, *supra* note 23; *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990); *United States v. Exum*, 744 F. Supp. 803 (N.D. Ohio 1990); *United States v. Exum*, 748 F. Supp. 512 (N.D. Ohio 1990).

305. See *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990); *United States v. Exum*, 744 F. Supp. 803 (N.D. Ohio 1990); *United States v. Exum*, 748 F. Supp. 512 (N.D. Ohio 1990).

306. Judge Battisti was a U.S. District Court Judge in the Northern District of Ohio. He passed away in October of 1994.

307. 129 F.R.D. 506 (N.D. Ohio 1990); see also Karen E. Henderson, *Battisti Contests Process: Halts Firearm Case Over Jury System*, CLEVELAND PLAIN DEALER, June 14, 1980, at B-1 (stating that on or about June 12, 1990, Judge Battisti issued an order in the *United States v. Exum* criminal case, halting jury selection on the morning it was to begin, to challenge the system of selecting jurors for summary jury trials). Judge Battisti issued his order as jury selection was to begin in the second trial of Willie E. Exum, a 57-year-old Cleveland man being retried on a charge of possession of a firearm by a convicted felon. *Id.* Exum's first trial ended June 6 in a mistrial because of a hung jury. Since this was to be Battisti's first jury trial since his *Hume* decision [information from his law clerk], Battisti issued his order to challenge the process that allows those who serve as summary jury trial jurors to be drawn from the same pool as those who serve on petit juries. *Id.* Battisti said the system reduced the number of people available for petit juries by about 30%, which is the number of jurors set aside to serve on summary jury trials. Battisti said that after already facing a mistrial for failure to reach a verdict in this case, he did not want to face a void verdict at the end of this trial. *Id.* Citing his decision in *Hume*, Battisti said federal judges have no authority to summon people for service as summary jury trial jurors. He also said that the method of empaneling jurors in the Northern District of Ohio "is not in accordance with the Jury Selection and Service Act of 1968 or with the Jury Selection Plan for the Northern District of Ohio adopted June 6, 1989, and approved by the Sixth Circuit Judicial Council." *Id.* Battisti ordered lawyers in the case to look into the process of selecting potential jurors and to report to him in 10 days. *Id.* He scheduled a hearing on the issue at 10 a.m. June 27. *Id.*

308. *Hume*, 129 F.R.D. at 507.

The court states that the Congress has spoken clearly and definitively: except for advisory juries, the only purpose for which a citizen may be required to serve as a juror, and thus the only authority vested in the federal district courts to summon a juror, is to sit on a "grand" or "petit" jury.<sup>309</sup> The court quotes from the first section of the Jury Selection and Service Act of 1968,<sup>310</sup> in pertinent part, as follows: "It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."<sup>311</sup>

The court adds that the statute imposes no obligation on citizens of the United States to serve as summary jurors and to imagine that Congress meant the phrase "petit juries" to include a summary jury is to disregard the fundamental distinctions between these bodies.<sup>312</sup> It pointed out that while a petit jury is "[t]he ordinary jury for the trial of a civil or criminal action . . ."<sup>313</sup> a summary jury is "assembled for settlement purposes only."<sup>314</sup> It added that due largely to this distinction, the Sixth Circuit held that the First Amendment right of public access does not apply to SJTs.<sup>315</sup> The court also notes:

In addition to the difference in purpose between a Summary Jury Trial and a real trial, a summary juror hears no direct testimony, and, therefore, does not pass on the credibility of witnesses, one of the primary functions of a present-day petit jury. A summary jury listens only to lawyers' arguments, which, unless corroborated, are never to be regarded as trial evidence. In addition to the lack of live witnesses, evidentiary objections are discouraged, thus further increasing the likelihood that evidence disclosed to the summary jury would be inadmissible at a real trial. Most importantly, unlike an ordinary jury verdict, a summary jury "verdict" is not binding.<sup>316</sup>

The court states that these distinctions are "so sharp and tear so deeply into the legitimate functions of today's juries that a summary jury cannot possibly fall within the meaning of the phrase 'petit juries.'"<sup>317</sup> The court concluded that:

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309. *Id.* at 508. The court also rejects Judge Lambros' opinion that Rule 39(c), with respect to advisory juries, provides the theoretical underpinnings for the use of jurors on a summary jury, stating that his interpretation of Rule 39(c) is overbroad. *Id.* at 508 n.5.

310. 28 U.S.C. § 1861 (1982).

311. *Hume*, 129 F.R.D. at 508-09 (footnote omitted).

312. *Id.* at 509.

313. *Id.* (quoting BLACK'S LAW DICTIONARY 768 (5th ed. 1979)).

314. *Id.* at 509.

315. *Id.* at n.8-9 (citing *Cincinnati Gas & Elec. Co.*, 854 F.2d at 904-05).

316. *Id.* at 509 (footnotes omitted).

317. *Id.* at 510.

Federal judges, therefore, have no authority to summon citizens to serve as settlement advisors, just as they would have no authority to summon citizens to serve as hand servants for themselves, lawyers or litigants. Persons should be pressed into service of the United States as summary jurors, thereby depriving them of their liberty, only by plain, unambiguous and constitutional enactment of the Congress, not by inference, or Procrustean application of summary juries into the well-established law regarding "petit" and "advisory" juries. Since Congress has granted no authority to summon citizens for Summary Jury Trials, questions arising under the Fifth and Thirteenth Amendments to the United States Constitution would also seem to be implicated.<sup>318</sup>

In this case, *Hume v. M & C Management*,<sup>319</sup> the court also points out that in Judge Lambros' handbook for SJT proceedings, he opines that FRCP 39(c) provides the theoretical underpinning for the use of jurors on a summary jury.<sup>320</sup> The court states that according to Judge Lambros, "the clear purpose behind the Rule . . . is to give the court and the parties the opportunity to utilize a jury's particular expertise and perception when a case demands those special abilities."<sup>321</sup> The court in *Hume* added, however, that Judge Lambros' interpretation of FRCP 39(c) is overbroad.<sup>322</sup> It stated that FRCP 39(c) is an authorized exception to 28 U.S.C. § 1861 (1982) for the narrow purpose of aiding the judge.<sup>323</sup> Thus, FRCP 39(c) allows a judge to have the assistance of a jury in deciding cases, but it does not provide the basis for giving parties such assistance in order to reach settlement.<sup>324</sup> It concludes that until legislation similar to FRCP 39(c) is enacted to permit the use of jurors for SJTs, such a procedure remains unauthorized in law. It noted that although two bills mentioning SJTs in the context of setting out procedures to promote the use of alternative dispute resolution devices have been referred to the Committee on the Judiciary,<sup>325</sup> neither bill has been enacted into law.<sup>326</sup>

As might be expected, Judge Lambros, the creator of the SJT, reacted negatively to the *Hume* decision. In an interview he stated that Judge Battisti's decision was "out of sync" with the growing popularity of ADR, and that after 10

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318. *Id.* (footnotes omitted).

319. *Id.* at 506.

320. *Id.* at 508 n.5 (citing M.D. Jacobovitch & C. Moore, *Summary Jury Trials in the Northern District of Ohio* 23 FEDERAL JUDICIAL CENTER (1982)).

321. *Id.* (emphasis added).

322. *Id.* at 509 n.5.

323. *Id.* (cites omitted).

324. *Id.* at 509 n.5.

325. H.R. 473, 100th Cong., 1st Sess. § 5, (1987); S. 12038, 99th Cong., 2d Sess. § 3, (1986).

326. *Hume*, 129 F.R.D. at 509. (Of course, as mentioned above, The Civil Justice Reform Act was enacted in the same year that this case was decided, but it did not mention summoning persons to serve as SJT jurors.).



years of successful use, "laches has set in" on the issue of authority to use the technique.<sup>327</sup> Moreover, Judge Lambros is quoted as saying that a SJT constitutes a petit jury within the meaning of the federal jury selection statute.<sup>328</sup> Lambros also said that the 10-year history of successful SJT use, the fact that ADR is the fastest growing process in the courts, and the approval manifested by the bench and bar, make *Hume* a "bah humbug" decision.<sup>329</sup> It reflects "dragging feet," Lambros continued, when "we should be moving forward."<sup>330</sup> "After 10 years, laches has set in for re-examining the authority to use jurors on summary jury trials," Lambros suggested.<sup>331</sup> He said he believes that "the duties and responsibilities of a trial judge to facilitate dispute resolution are so abundantly provided for" that the *Hume* ruling was "not appropriate."<sup>332</sup> He also noted that in 1983, Judge Battisti joined in adopting the Northern District of Ohio's local rule that states that the summary jury trial is an appropriate means of dispute resolution.<sup>333</sup>

Later in the same year, Judge Battisti published two opinions in the same case, *United States v. Exum*, on this subject as well.<sup>334</sup> Notably, however, this was a criminal case and no attempt was made to use a SJT in that proceeding. The first opinion,<sup>335</sup> dated August 30, 1990, discusses the two issues raised *sua sponte* by Judge Battisti. The court stated:

It must now be determined: (1) whether the use of citizens drawn from the qualified jury wheel for summary jury service impermissibly alters the jury selection process in the Northern District of Ohio and thus, the jury selection in the instant matter; and (2) if so, the most efficient and least intrusive remedy.<sup>336</sup>

The court points out that since April 1990, approximately two-hundred potential jurors have been diverted from petit jury service to summary jury service and that but for their assignment to summary jury service, these individuals would have remained in the qualified jury wheel.<sup>337</sup> After a review of the applicable law, focusing largely on his prior decision in *Hume*,<sup>338</sup> Judge Battisti concluded:

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327. See *Ruling Against Use of Jurors in SJT Is "Out of Sync," Judge Lambros Says*, ALTERNATIVE DISPUTE RESOLUTION REPORT (BNA) 83 (March 15, 1990).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. See *United States v. Exum*, 744 F. Supp. 803 (N.D. Ohio 1990); *United States v. Exum*, 748 F. Supp. 512 (N.D. Ohio 1990).

335. 744 F. Supp. 803 (N.D. Ohio 1990).

336. *Id.* at 804.

337. *Id.* at 804-05.

338. 129 F.R.D. 506, 510 (N.D. Ohio 1990) (see discussion in *Exum*, 744 F. Supp. at 804-06).

Intentional deviations from the statutory jury selection process cannot be allowed when they are perceived prior to a trial, before significant resources have been expended in trying a case. Therefore, the court cannot in the instant matter condone, prior to trial, the fact that jurors called to serve in this matter have emerged from a jury selection process involving a use of jurors, namely for summary jury service, that is clearly unauthorized by the Act, the Plan, and case law and, although no opinion is asserted on this issue, may be unauthorized by the Constitution and violate certain of its provisions. Accordingly, the jury selection process in the Northern District of Ohio from which the panel in the instant matter emerged has been impermissibly altered.<sup>339</sup>

Judge Battisti then instructed the clerk to draw four hundred names from the master wheel and place them in the qualified jury wheel.<sup>340</sup> From this qualified jury wheel, he ordered jurors to be called before him to try the case and stated that none of the jurors from the wheel would be used to serve as summary jurors either before or after a panel for the case was called.<sup>341</sup> He concluded by suspending all criminal and civil jury trials pending before him until further order of the court.<sup>342</sup>

Questions were raised in the press as to the motivations for Judge Battisti's action in this case,<sup>343</sup> and, twelve days later, at the monthly judges' meeting of the Northern District of Ohio, Judge Battisti's colleagues apparently discussed his opinion in *United States v. Exum*. At the September 11, 1990 judges' meeting,

339. *United States v. Exum*, 744 F. Supp. 803, 808 (N.D. Ohio 1990) (referring to The Jury Selection and Service Act, 28 U.S.C. § 1863(a) and Plan for the Northern District of Ohio).

340. *Id.*

341. *Id.*

342. *Id.*

343. *See Battisti stops all jury trials in his courtroom: Selection process is issue in dispute*, AKRON BEACON JOURNAL, Aug. 31, 1990, at page 1B. In reference to Judge Battisti's order, the article stated that "some observers" say it is "a continuation of the long-standing feud between the federal judges in Cleveland." *Id.* It quoted an anonymous Cleveland lawyer as saying that many court observers will interpret Battisti's order as another shot in the feud, however, he thinks that Battisti believes that summary jury trials are illegal. *Id.* The story also points out that Battisti was chief judge of the Northern District of Ohio for more than twenty years and stepped down early this year amid controversy over an order holding the chief probation officer of the district in contempt of court. *Id.* Judge Lambros (the creator of the SJT) replaced Battisti as chief judge. *Id.*

*See also* Karen E. Henderson, *Battisti halts his civil, criminal trials over jury issue*, THE PLAIN DEALER, Sept. 6, 1990, at B2. This story states, in part:

Battisti's order is his latest attack on the summary jury trial, a system devised 10 years ago by U.S. District Judge Thomas D. Lambros as a way to speed decisions in civil cases. Battisti has been taking shots at Lambros since Lambros replaced Battisti as chief judge last January.

Battisti stepped down as chief judge last year, thus ending a dispute between Battisti and his colleagues over how the court should be run. Battisti contended he was in charge while his colleagues wanted the court administered by majority rule.

*Id.*

General Order No. 119 was approved by the nine judges attending the meeting (which constituted more than a majority).<sup>344</sup> Therefore, Chief Judge Lambros,<sup>345</sup> for the court, issued this administrative order entitled "Juror Utilization," which specifically referred to the calling of jurors for summary jury trials.<sup>346</sup>

Judge Battisti's second *United States v. Exum* decision<sup>347</sup> is a response to the issuance of General Order No. 119. In that opinion, he stated that General Order No. 119 constitutes an unwarranted interference with the Article III powers of a United States District Judge acting in a case or controversy.<sup>348</sup> He added that the appropriate course of action would have been to allow the parties to appeal the August 30, 1990 order.<sup>349</sup> He notes that there is no suggestion that the General Order is meant to be an amendment to the district's jury selection plan and concluded:

The judges of this district, acting in an administrative capacity, have no power to choose by majority action to disregard the laws of the United States concerning amendment of the jury plan. In addition, they place the Clerk in a most uncomfortable position. Regardless of the Clerk's response, however, the order of August 30, 1990 stands. No jury trials will be conducted in any cases assigned to my docket until a new wheel is drawn in accordance with the duly enacted laws of the United States. Due to the mandatory nature of [28 U.S.C. §] 1867 there is no alternative. The parties are, of course, at liberty to waive their right to a jury trial if they so desire. Accordingly, all criminal and civil jury trials pending on my docket remain stayed until further order of this court, and the government's motion to advance the instant case to trial is DENIED. As this matter involves an impermissible jury selection practice, "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial."<sup>350</sup>

The United States Attorney's Office in Cleveland then asked the United States Court of Appeals for the Sixth Circuit to intercede in the dispute between

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344. See *United States v. Exum*, 744 F. Supp. 803 (N.D. Ohio 1990) (decided on September 28, 1990, and amended on October 3, 1990); see also Karen E. Henderson, *Court kills Battisti bid to split jury pools*, THE PLAIN DEALER, Sept. 12, 1990, at B7 [hereinafter *Court kills bid*]. The story stated that "Battisti, who has been feuding with his colleagues, did not attend the meeting. The judges said Battisti was fishing in Montana." *Id.*

345. As noted above, Judge Lambros is the creator of the summary jury trial.

346. See *Exum*, 748 F. Supp. at 513; cf. *Court kills bid*, supra note 342, at B7. In that interview, Judge Lambros stated that Battisti, as chief judge, had signed the 1983 order approving use of SJTs by the court. *Id.* He added, "I don't know why he waited so long to find fault with it." *Id.*

347. *Exum*, 748 F. Supp. at 512.

348. *Id.* at 513.

349. *Id.*

350. *Id.* at 513-14 (footnote omitted); see 18 U.S.C. § 3161(h)(8)(A) (1988).

Judge Battisti and the majority of the remaining judges in the Northern District of Ohio.<sup>351</sup> According to the newspaper account, U.S. Attorney Joyce J. George asked the Sixth Circuit to order Judge Battisti to schedule trial dates for seven criminal cases "as soon as practical" and to impanel juries at those trials.<sup>352</sup> The motion stated that if the court determined that a valid jury could not be impaneled under the present jury selection procedure, its alternative request was that the court exercise its supervisory powers and direct the U.S. District Court for the Northern District of Ohio to implement an appropriate jury selection method to allow those cases to proceed expeditiously.<sup>353</sup> However, the Sixth Circuit never ruled on the motion since the matter became moot on November 7, 1990. On that date, Judge Battisti removed his stay in the *Exum* case in light of Congress' endorsement of the experimental use of SJTs in The Civil Justice Reform Act.<sup>354</sup>

In a recent state court decision, *Twitty v. Minnesota Mining and Manufacturing Co.*,<sup>355</sup> the judge gave short shrift to a protest against using regular jurors for a SJT. The total discussion of the issue was as follows: "[t]he claim of Robert J. Murphy, Esquire, counsel for Twitty, that somehow the rights of the jurors were violated is without merit, particularly since the Court followed his suggestion and excused any potential juror who did not want to participate in the proceeding."<sup>356</sup>

The author of a student note on the subject of authority to summon jurors for SJTs concludes that notwithstanding the debate over judicial authority to compel participation in a SJT, judges do not have express authority to impanel a jury to sit for a SJT even when the use of the SJT is voluntary.<sup>357</sup> The author first concludes that The Jury Selection and Service Act of 1968 does not authorize judges to impanel SJT jurors, citing Judge Battisti's decision on the subject.<sup>358</sup> She adds that because citizens have no obligation to serve as jurors for a SJT, they cannot be punished for refusing to do so.<sup>359</sup> However, because SJT jurors are not told until after the case is decided that they are not serving on a regular jury, the SJT jurors are unaware that they cannot be punished for noncompliance until it is too late.<sup>360</sup> Second, the author concludes that FRCP 39(c) (re: advisory juries) does not expressly authorize the impanelling of SJT jurors.<sup>361</sup>

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351. See *Appeals court asked to intercede: U.S. Attorney wants Battisti ordered to begin criminal trials*, THE PLAIN DEALER, Oct. 27, 1990, at B1.

352. *Id.*

353. *Id.* at B1, B6.

354. See order in *United States v. Exum*, 89-CR146 (6th Cir. Nov. 7, 1990).

355. 16 Pa. D. & C.4th 458 (C.P. of Philadelphia County 1993).

356. *Id.* at 459.

357. See McNamara, *supra* note 23, at 482.

358. *Id.* at 482-83 (citing *Hume v. M & C Management*, 129 F.R.D. 506 (N. D. Ohio 1990)).

359. *Twitty*, 16 Pa. D. & C.4th at 483.

360. *Id.* at 484.

361. *Id.* at 486. McNamara explains:

Advisory juries were intended to aid the judge in deciding equity cases. They were not intended to provide a pretrial settlement tool for the parties. Given the competing

In the other scholarly piece addressing this issue, the author discusses Judge Battisti's opinion in *Hume v. M & C Management* and then states:

The judge in this case obviously opposes the use of the summary jury trial. Nevertheless, his decision raises a question which the case law has yet to address. If the federal courts lack authority to summon jurors for summary jury duty, parties wishing to use the procedure will be forced to find voluntary, perhaps privately paid, jurors. Such a development would likely spell the death of the summary jury trial in federal court. There would be no real economic advantage to electing the SJT over a regular trial. There would also be many procedural problems arising from private parties trying to draw a jury, such as how to ensure that a random sample of the potential jurors is drawn even when some of them do not respond to requests to serve or refuse to participate once contacted.<sup>362</sup>

The author of this piece makes no specific proposal for correcting this situation, but concludes by stating: ,

Everyone agrees that the SJT is a major innovation in dispute resolution. It will obviously take some time for the judicial system to work out all the considerations involved. Until such a time, there will be judges, such as Judge Battisti, who are not comfortable with the SJT. While it is clearly in the discretion of any judge to deny the use of the procedure, it is time that Congress considers some of the issues that the instant decision raises. As long as the current ambiguity in the rules remains, there will be room for various interpretations and decisions which certainly lead to disparate results, or even disparate rights, among, or in this case within, judicial districts. If Congress feels that the summary jury trial is an important enough innovation to justify the conscription of citizens for service as jurors, it needs to codify that belief.<sup>363</sup>

Although Section 473(a)(6) of The Civil Justice Reform Act provides that any civil justice delay reduction plan shall include authorization to refer appropriate cases to ADR programs that the court may make available, including

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objectives behind the use of advisory juries and summary juries, interpreting Rules (sic) 39(c) to authorize the convening of a summary jury trial is tenuous at best.

*Id.* at 488 (footnotes omitted).

362. See Hatfield, *supra* note 304, at 157 (footnotes omitted).

363. *Id.* at 159.

summary jury trials, it makes no mention of any authority for summoning SJT jurors.<sup>364</sup>

## 2. What Judges Have Relied Upon

Clearly no specific authority exists for summoning SJT jurors, but judges have justified doing so on a variety of grounds. When the surveyed judges were asked whether citizens can be compelled to serve as jurors for SJTs, nearly twice as many of those responding said yes rather than no.<sup>365</sup> But when asked -- in the same question -- under what authority SJT jurors can be compelled, the answers given were less than compelling. The judges' responses tended to fall into four categories.

The first category of justifications for summoning SJT jurors was the notion that they serve similar functions as "real" jurors, so that they fall within the regular juror statute.<sup>366</sup> One judge stated that it is jury service and fulfills a useful civic function which helps dispose of court cases; another judge wrote that it is a legitimate use of jurors since it unquestionably disposes of cases -- and in less time than required for conventional trials; and a third judge indicated that the SJT is just one variety of jury trial, such as the number of jurors, which can, and does, vary.<sup>367</sup>

The second category of justifications was that since citizens can be compelled to serve as advisory jurors on non-jury issues at trial (an apparent reference to FRCP 39(c)), it should be permissible to compel them to serve as advisory jurors in a SJT.<sup>368</sup> The third category of justifications for summoning SJT jurors was that it was authorized by the particular district through a local court rule or court order.<sup>369</sup>

The fourth category consisted of more equivocal justifications, such as "why not?," "no one has ever objected;" "I believe so (and have been doing it for years)," and "yes -- but not sure -- never thought of it."<sup>370</sup> One judge stated that they do it, but the statutory authority may be somewhat ambiguous.<sup>371</sup> He added that his thinking was that it matters not to an individual juror whether he serves

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364. Cf. DONOVAN LEISURE, *supra* note 63, at 42. As stated in this ADR practice book, the *Hume* case was specifically disapproved by the Senate Judiciary Committee in its report on The Civil Justice Reform Act (as part of the Judicial Improvements Act of 1990). *Id.* Furthermore, the book adds, the Senate Committee made clear that subsection (a)(6) of the Act "eliminates any doubt that might exist in some courts" as to "whether the summary jury trial is an authorized procedure permissible in the federal courts." *Id.* (citing S. REP. NO. 416 (1990)).

365. See *Judicial Survey Responses*, *supra* note 24, Question 36, at 61-62 (seventeen judges said yes; nine judges said no; and three did not directly answer the question).

366. *Id.*

367. *Id.* at 62.

368. *Id.* at 61.

369. *Id.* at 61-62.

370. *Id.* at 61.

371. *Id.*

on a "real" trial or a SJT, so long as the case is resolved.<sup>372</sup> He added that people who have served in SJT juries have generally liked the procedure and suggested that it be used more extensively.<sup>373</sup> One judge stated that he has never had a problem, but the circuits appear to be split on this question.<sup>374</sup> Finally, another judge, in responding to the question about compelling SJT jurors to serve, wrote: "Why do that? If one person won't serve, OK, forget it. Otherwise you may get a ruling you can't summon them."<sup>375</sup>

### 3. Creating Clear Authority for Summoning SJT Jurors

Based upon the case law, the scholarly input, and the judicial responses discussed above, it is clear that if one wants a viable SJT process to exist authority must be created to summon SJT jurors.

There are several sources of ideas for how to address this problem: several surveyed judges suggested amending the current juror selection statutes; the failed amendment to FRCP 16 sought to address the issue; one scholar suggested an amendment to FRCP 39(c) on advisory juries; and several courts have created local rules on the subject.

First, when the surveyed judges were asked where language authorizing SJTs should appear, one judge stated that a statutory change may be necessary to "clarify" the calling of jurors to serve in an "advisory" capacity; otherwise, amendments to the Federal Rules of Civil Procedure would probably suffice.<sup>376</sup> When the surveyed attorneys were asked whether citizens can be compelled to serve as SJT jurors, one wrote that SJT jurors cannot be summoned under existing statutes, but the statutes could be amended.<sup>377</sup> Presumably these suggestions are that The Jury Selection and Services Act of 1968, 28 U.S.C. Sections 1861-1878, should be amended to refer to the summoning of citizens to serve as jurors for summary jury trials.<sup>378</sup>

Second, a proposal affecting the calling of SJT jurors was included in a March 1991 working draft of proposed amendments to the federal rules that had not been approved by the Advisory Committee but were to be considered at the Committee's next meeting in May of 1991.<sup>379</sup> But that amendment was never adopted. The proposed amendment would have altered FRCP 16(c)(9) to read: "(9) the possibility of settlement and the use of special procedures to assist in

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372. *Id.*

373. *Id.*

374. *Id.* at 62.

375. *Id.*

376. *Id.*, Question 35b, at 59.

377. *Attorney Survey Responses*, *supra* note 25, Question 23, at 17.

378. See *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990) (note suggestion of Judge Battisti).

379. See Advisory Committee on Civil Rules, Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure and Federal Rules of Evidence, *FED. R. CIV. P.* 16 (1991).

resolving the dispute such as the appointment by the court of one or more persons, who may be persons otherwise summoned for service as jurors, to evaluate claims and defenses of the parties . . . .<sup>380</sup>

The Committee Notes describing this amendment stated:

Paragraph (9) is revised to enhance the court's powers in utilizing a variety of procedures to facilitate settlement, such as through mini-trials, mediation, and non-binding arbitration. The court may appoint one or more persons to evaluate the claims or defenses of the parties. Explicit authorization is provided for use of persons otherwise summoned as jurors to act as panelists in a "summary jury trial." The selection of such persons is not governed by Rule 47, nor is a stipulation from the parties under Rule 48 required for the reception of a non-unanimous "verdict" from such a panel.

The revision of paragraph (9) should be read in conjunction with the revision later added to the subdivision, authorizing the court to direct that the parties or the authorized representatives of parties or their insurers attend a settlement conference or participate in special proceedings designed to foster settlement. Parties should not be forced by the court into settlements, and the disinterest of a party in engaging in settlement discussions may be a signal that the time and expense involved in pursuing settlement may be unproductive. Nevertheless, the court should have the power in appropriate cases to require parties to participate in proceedings that may indicate to them -- or their adversaries -- the wisdom of resolving the litigation without resort to a full trial on the merits. Of course the court should not impose unreasonable burdens on a party as a device to extract settlement, such as by requiring officials with broad responsibilities to attend a settlement conference involving relatively minor matters.<sup>381</sup>

As stated above, however, when the federal rules were amended (effective December 1, 1993), the new FRCP 16(c)(9) did not include this reference to jurors. It merely states: "(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule."<sup>382</sup> The part of subsection (c)(16) referred to above authorizing the court to direct parties or their representatives or insurers to participate in special proceedings in an effort to foster settlement was not adopted either. The relevant portion of the December 1, 1993, version of FRCP 16(c)(16) merely states: "If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."<sup>383</sup>

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380. *Id.*

381. *Id.* (citations omitted).

382. *See* FED. R. CIV. P. 16(c)(9).

383. *See* FED. R. CIV. P. 16(c)(16).



Third, the author of one of the two scholarly pieces on this issue<sup>384</sup> proposes an amendment of the Federal Rules of Civil Procedure to add subsection FRCP 39(d), which would state:

The district court, with the consent of all parties to the suit, may impanel from the regular jury pool a summary jury to sit for a summary jury trial, the purpose of which is to render a nonbinding verdict, unless all parties agree to be bound, in an effort to assist the parties in settlement negotiations.<sup>385</sup>

Finally, several district courts have local rules which mention the summoning of jurors for SJTs, but they do not provide any direct authority for doing so.<sup>386</sup>

All of these approaches seem to have problems. First, it would be quite cumbersome to amend every applicable federal juror statute so as to include SJT jurors. Second, the proposed FRCP 16 amendment failed and FRCP is probably not the appropriate place for details about one of several ADR/settlement procedures. Third, amending FRCP 39 makes little sense since that provision deals with non-jury cases, the suggested amendment seems to create a two-tiered consent requirement (first for the SJT itself and then for the use of jurors from the regular jury pool). Additionally, if the SJT jurors are treated comparably to jurors serving on petit juries, there seems to be a need for a cross-reference to The Jury Selection and Service Act of 1968.

Therefore, the best approach would seem to be to create the authorization for summoning SJT jurors as part of a federal SJT statute, with a cross-reference to The Jury Selection and Service Act of 1968. The proposed language for this part of the statute is as follows: "SJT jurors shall be drawn from the regular juror pool and entitled to the same rights and subject to the same responsibilities as other

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384. See McNamara, *supra* note 23, at 461.

385. *Id.* at 493.

386. See D. MASS. R. 16.4(C)(3): "(3) Summary Jury Trial. . . (b) There shall be six (6) jurors on the panel, unless the parties agree otherwise . . . ." See also N.D. OHIO R. 7:5.3:

RULE 7:5.3 PROCEDURAL CONSIDERATIONS . . . (e) Size of Jury Panel. Usually the jury shall consist of six (6) jurors. To accommodate case concerns, the size of the jury panel may vary. Because the summary jury trial is usually concluded in a day or less, the judge may choose to use the challenged or unused panel members as a second jury. This procedure can provide the Court and counsel with additional juror reaction.

*Id.* See also N.D. OKLA. R. 47.2:

LOCAL RULE 47.2 COMMUNICATION WITH JURORS. No person shall communicate with any juror concerning said juror's service in any trial prior to the juror's discharge from the case. Upon discharge from service, each juror is free to discuss, or refuse to discuss, said juror's service with any person if the juror so desires. Attorneys who are officers of this court and those acting on behalf of such attorneys are prohibited from approaching jurors in any matter at any time concerning said juror's service, except on leave of court upon a showing of good cause. This restriction shall not apply to jurors selected in summary jury trials conducted in connection with a court-supervised settlement effort.

*Id.*

jurors summoned pursuant to The Jury Selection and Services Act of 1968, 28 U.S.C. Sections 1861-1878. Any restrictions on post-trial communications with jurors do not apply to SJT jurors.<sup>387</sup>

*C. Uncertainty About the Right of Access  
to SJTs by the  
Press and the Public*

The issue of access to SJTs by the press and the public has been addressed directly by one Sixth Circuit case<sup>388</sup> and one district court case,<sup>389</sup> and by a number of articles written about the appellate court case.<sup>390</sup> The circuit court held that the process could be closed to the press and the public, over the objections of the press, but the district court held that the process could be open to the press and public, over the objections of the parties.<sup>391</sup> And the issue has not been addressed by the U.S. Supreme Court, by Congress, or by the creators of the federal rules.

1. Legal Challenges

In 1988, in *Cincinnati Gas & Electric Co. v. General Electric Co.*,<sup>392</sup> the Sixth Circuit decided the issue of whether the press and the public should have access to SJTs.<sup>393</sup> In that case, the Southern District of Ohio issued an order requiring the parties to participate in a SJT.<sup>394</sup> The order included a provision closing the proceeding to the press and the public.<sup>395</sup> Several newspapers then moved to intervene in the underlying action for the limited purpose of challenging the order closing the SJT.<sup>396</sup> According to this opinion, the district court had

387. See proposed federal SJT statute *infra* part IV.

388. See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (discussion *infra*).

389. See *Day v. NLO, Inc.*, 147 F.R.D. 148 (S.D. Ohio 1993), *vacated on other grounds*, In re NLO, Inc., 5 F.3d 154 (6th Cir. 1993).

390. See *Summary Jury Trials: Should the Public Have Access? Cincinnati Gas & Electric Co. v. General Electric Co.*, 854 F.2d 900 (6th Cir. 1988), *cert. denied sub nom. Cincinnati Post v. General Electric Co.*, 109 S.Ct. 1171 (1989), 16 FLA. ST. U. L. REV. 1069 (1989); *Cincinnati Gas & Electric Co. v. General Electric Co.: Extinguishing the Light on Summary Jury Trials*, 49 OHIO ST. L. J. 1453 (Winter, 1989); *Summary Jury Trials: A "Settlement Technique" That Places a Shroud of Secrecy on Our Courtrooms?* 23 IND. L. REV. 949 (1990).

391. See discussion *infra*.

392. 854 F.2d 900 (6th Cir. 1988).

393. As stated above, see *infra* part III.A.1.(a), the court also indicated, in dicta, that SJTs were authorized either under Rule 16, or as a matter of the court's inherent power, to manage its cases. *Id.* at 903 n.4 (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962), and Thomas D. Lambros, *The Summary Jury Trial, A Report to the Judicial Conference of the United States*, 103 F.R.D. 461, 469 (1984)).

394. *Id.* at 901.

395. *Id.* at 902.

396. *Id.*

denied the motion, holding that the press had no first amendment right of access because: (1) there is no tradition of access to summary jury trials or to other recognized settlement devices; and (2) public access "does not play a particularly significant positive role" in the functioning of the summary jury trial because "the proceeding is non-binding and has no effect on the merits of the case, other than settlement."<sup>397</sup>

The precise issue on appeal was whether the first amendment right of access attaches to the summary jury proceeding in this case, and the appellate court concluded that it does not.<sup>398</sup> The court first explained the standard for analyzing a first amendment access claim, as set forth in *Press-Enterprise Co. v. Superior Court*,<sup>399</sup> hereinafter *Press-Enterprise II*:

In *Press Enterprise II*, the Court held that . . . the analysis of a first amendment claim of access involves two "complimentary considerations." First, the proceeding must be one for which there has been a "tradition of accessibility." This inquiry requires a court to determine "whether the place and process [to which access is sought] has historically been open to the press and general public." Second, public access must play a "significant positive role in the functioning of the particular process in question." Moreover, even if these elements are satisfied, the right of access is a qualified one and must be outweighed by a strong countervailing interest in maintaining the confidentiality of the proceedings.<sup>400</sup>

The Sixth Circuit first concurred with the district court that "there is no historically recognized right of access to summary jury trials in that this mechanism has been in existence for less than a decade."<sup>401</sup> It pointed out that summary jury trials are designed to settle disputes and that historically settlement techniques have been closed rather than open.<sup>402</sup>

The court also rejected appellants' argument that SJTs are structurally similar to ordinary civil jury trials, which have historically been open to the public.<sup>403</sup> The court stated: "However, it is clear that while the summary jury trial is a highly reliable predictor of the likely trial outcome, there are manifold differences between it and a real trial."<sup>404</sup> It listed the differences between the two processes and then noted: "To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no

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397. *Cincinnati Gas & Elec. Co.*, 854 F.2d at 902 (citing the Joint Appendix at 180, 190) (footnote omitted).

398. *Id.* at 902-03.

399. 478 U.S. 1 (1986).

400. 854 F.2d at 903 (citing *Press-Enterprise II*, 106 S.Ct. at 2740-41) (citations omitted).

401. *Cincinnati Gas & Elec. Co.*, 854 F.2d at 903 (citing the Joint Appendix at 180).

402. *Id.* at 903-04 (citations omitted).

403. *Id.* at 904.

404. *Id.*

liability. Also, the court and jurors join the attorneys and parties after the 'verdict' is returned in an informal discussion of the strengths and weaknesses of each side's case.<sup>405</sup> It added: "At every turn the summary jury trial is designed to facilitate pretrial settlement of the litigation, much like a settlement conference. It is important to note that the summary jury trial does not present any matter for adjudication by the court."<sup>406</sup> Therefore, the court concluded that the "tradition of accessibility" element had not been met.<sup>407</sup>

With respect to the second criterion -- whether access "plays a significant positive role in the functioning of the particular process in question" -- the court stated that where a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the SJT in facilitating settlement.<sup>408</sup> Therefore, public access to SJTs over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device.<sup>409</sup> Allowing access thus would undermine the substantial governmental interest in promoting settlements, and would not meet the standard.<sup>410</sup> And, finally, since SJTs do not present any matters for adjudication by the court, they need not be open to the public.<sup>411</sup> The Sixth Circuit affirmed the lower court's denial of the newspapers' motion to intervene.<sup>412</sup>

In January of 1993, the district court in *Day v. NLO, Inc.*,<sup>413</sup> ordered a SJT to be open to the public.<sup>414</sup> The court quoted its earlier decision involving the same defendant and the same facility<sup>415</sup> on that issue as follows:

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405. *Id.* (citing Lambros, *The Summary Jury Trial -- An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 289 (Feb.-Mar. 1986)).

406. *Id.* at 904.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.* at 905.

412. *Id.* (citations and footnotes omitted). *See also* United States v. Kentucky Utils. Co., 124 F.R.D. 146 (E.D. Ky. 1989), where the court noted in dicta that courts can maintain the confidentiality of settlement negotiations and apparently placing SJTs in that category. *Id.* at 153 n.7. The court stated that the Sixth Circuit has held that a summary jury trial may be closed to the public. *Id.* (citing *Cincinnati Gas & Elec. Co.*, 854 F.2d at 903). It added that the Federal Rules of Evidence specifically prohibit the admissibility of any statement made in the course of settlement negotiations. *Id.* (citing FED. R. EVID. 408).

413. 147 F.R.D. 148 (S.D. Ohio 1993).

414. *Id.* at 151 (the Sixth Circuit later reversed this court's order compelling participation in the summary jury trial; *see In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1993)) but it did not specifically address the issue of whether the district court could require that it be a public proceeding).

415. *See In re Fernald*, No. C-1-85-149, 1989 WL 267039 (S.D. Ohio, Sept. 29, 1989); *see also Day*, 147 F.R.D. at 150. The defendant in both cases, National Lead of Ohio ("NLO"), was involved in certain aspects of developing and manufacturing nuclear weapons for our country's armed services at the Feed Materials Production Center ("FMPC") in Fernald, Ohio. *Id.* The first suit (*In re Fernald*) was brought against NLO by the residents around the FMPC, alleging that NLO had exposed them to radiation and other hazardous materials. *Id.* The next year, the workers and frequenters at the FMPC, along with their families, brought this lawsuit. *Id.*

We conclude that determining whether a summary jury trial should be open or closed to the press is within our managerial discretion. In the instant case, we decline to close the summary trial. We agree with plaintiffs that it would be impracticable to do so given the large number of plaintiffs involved. Realistically, it is unlikely that developments in the trial could be kept from the press. Further, this is not a strictly private dispute.<sup>416</sup>

It added that these same considerations dictate that this case should not be closed to the public.<sup>417</sup> The court noted that the Sixth Circuit had permitted federal district courts to close SJTs to the public on the ground that a SJT is a settlement technique rather than a trial on the merits.<sup>418</sup> But the court concluded that if a federal district court holds the greater power to close a SJT, then a federal district court must have the lesser power to keep open a SJT.<sup>419</sup> Closing a SJT raises First Amendment concerns, the court stated; whereas, opening a SJT does not.<sup>420</sup>

The court also rejected the defendants' argument that an open SJT would thwart their right to receive a fair trial on the merits since media coverage of it would pollute the jury pool for the actual trial.<sup>421</sup> The court stated that recent history had shown that the defendants could receive a fair trial in that community despite adverse publicity before trial and that, in any event, if it appeared to the court during voir dire that the defendants could not obtain a fair trial in Cincinnati, the court would entertain a motion to try this case in another venue.<sup>422</sup> The court cited several law review articles in support of its decision.<sup>423</sup>

Finally, the court stated that it would be particularly inappropriate to close the scheduled SJT in this case for two reasons: (1) it is a class action, the

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416. 147 F.R.D. at 151 (quoting *In re Fernald*, No. C-1-85-149 at 2).

417. *Id.*

418. *Day v. NLO, Inc.*, 147 F.R.D. 148, 151 (S.D. Ohio 1993), *vacated on other grounds*, *In re NLO, Inc.* 5 F.3d 154 (6th Cir. 1993) (citing *Cincinnati Gas & Elec. Co.*, 854 F.2d at 903-05).

419. *Day*, 147 F.R.D. at 151.

420. *Id.*

421. *Id.* at 152.

422. *Id.*

423. See 147 F.R.D. at 152 (the court referred to Charles R. Richey, *Rule 16: A Survey and Some Considerations for the Bench and the Bar*, 126 F.R.D. 599, 609 (Apr. 3, 1989) (Judge Richey disagreed with the Sixth Circuit's decision in *Cincinnati Gas*, noting that "the public and the press should be permitted access to summary jury trial proceedings.")); Susan Tillotson, Note, *Constitutional Law/Alternative Dispute Resolution -- Summary Jury Trials: Should the Public Have Access? -- Cincinnati Gas & Electric Co. v. General Electric Co.*, 16 FLA. ST. U. L. REV. 1069, 1094 (1989) (although cited by the Defendants in support of their argument, this commentator actually contends that the trial court should have discretion in determining whether a summary jury trial should be open or closed); *Judges Should Have the Call on Use, Closure of Proceeding*, *Lambros Says*, 2 ALTERNATIVE DISPUTE RESOLUTION REPORT (BNA) 251, 252-53 (July 21, 1988) (contrary to the Defendants' assertion, Judge Lambros, the architect of the summary jury trial, holds his summary jury trials in open court and states that a trial judge "should have the call" in deciding whether to open or close a summary jury trial).

settlement of which requires court approval, and class members should have access to information about the reasonableness of the settlement; and (2) defendants are being indemnified by the United States government in this case so the nation's taxpayers would have to pay any judgment and thus have an interest in attending the SJT.<sup>424</sup>

The issue of access by the press and public to SJTs was raised again before the Sixth Circuit, but the case settled before it could be decided.<sup>425</sup> On September 10, 1993, USAir, Inc. filed an "Emergency Application For Writ of Prohibition" with the United States Court of Appeals for the Sixth Circuit to attempt to close to the public the SJTs Judge Lambros had scheduled in eight of the cases arising out of the March 22, 1992, crash of USAir Flight 405 at LaGuardia Airport.<sup>426</sup> The suits filed by passengers were consolidated in a multidistrict litigation and Judge Lambros was presiding over 36 of them.<sup>427</sup> On that same day, the Sixth Circuit granted a temporary stay of all SJTs scheduled in Multidistrict Litigation Docket No. 936, pending consideration of the petitioner's motion for a regular three-judge panel of that court.<sup>428</sup> However, this order was terminated when the case was dismissed on October 1, 1993.<sup>429</sup>

Despite the fact that no final ruling was made on the issue, USAir's arguments may be instructive. In its emergency application, USAir stated the issue as follows:

Whether, in light of the clear taint to the jury pool and irreparable harm to USAir's business reputation which will result, Judge Lambros may compel USAir, Inc. to participate in the summary jury trial process without first closing the courtroom to all persons other than the parties, their representatives, and insurers with an interest in the outcome of the litigation.<sup>430</sup>

In its Emergency Application, USAir explained Judge Lambros' denial of its motion for closure as follows:

On September 1, 1993, Judge Lambros indicated that he intended to have the summary jury trials open to the public to insure that the concept of summary jury trials, which are still largely experimental, would be favorably received by the public. Specifically, Judge Lambros expressed concerns that if the summary jury trials were closed, the

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424. *Day*, 147 F.R.D. at 152.

425. See Emergency Application For Writ of Prohibition, In Re USAir, Inc., App. No. 93-3973 (6th Cir., Sept. 10, 1993) [hereinafter *Emergency Application*].

426. *Id.*

427. *Emergency Application*, *supra* note 425 at 2-3.

428. See Sept. 10, 1992 Order in In Re USAir, Inc., App. No. 93-3973 (6th Cir. 1992).

429. Interview with Sixth Circuit Clerk, United States Court of Appeals for the Sixth Circuit (Sept. 22, 1994).

430. *Emergency Application*, *supra* note 425, at 2.

process would receive a reputation as a "Star Chamber." On September 9, 1993, Judge Lambros formally denied USAir's closure motion, noting as reasons his concern that summary jury trials would get a "bad name" and that "academia" would take "critical shots" at the procedure if closed. Further, Judge Lambros refused to grant USAir's motion for a stay of the summary jury trials pending this Court's review of the foregoing emergency application.<sup>431</sup>

USAir pointed out that the Sixth Circuit had already ruled in *Cincinnati Gas & Electric Co. v. General Electric Co.*<sup>432</sup> that the First Amendment is not implicated in the summary jury process, and that the public should be barred from SJTs where one of the parties has a legitimate interest in maintaining confidentiality.<sup>433</sup>

It stated that the court in that case examined the summary jury process and concluded that:

[W]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement. Thus public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device. Therefore, allowing access would undermine the substantial governmental interest in promoting settlements, and would not play a "significant positive role in the functioning of the particular process in question."<sup>434</sup>

USAir added that unlike many of the matters to which the SJT process is applied, this matter does not involve a suit by a lone claimant in which there is little general public interest.<sup>435</sup> It noted that this multidistrict litigation involves thirty-six separate lawsuits arising from a "spectacular air disaster which received both intensive live television coverage and extensive coverage over the following months by both the print and broadcast media. . . . There is, as can be expected in such a high profile matter, an interest in the outcome of these suits by both the public and the media."<sup>436</sup>

USAir next argued that the court should keep in mind that since the SJT is not really an adjudication, but rather a settlement tool, many of the procedural safeguards of a real trial are absent.<sup>437</sup> It concluded: "Given the nature of this case, the potential jury pool for the thirty-six trials on the merits will be

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431. *Id.* at 4.

432. 854 F.2d 900 (6th Cir. 1988).

433. *Emergency Application*, *supra* note 425, at 7.

434. *Id.* (quoting *Cincinnati Gas & Elec. Co.*, 854 F.2d at 904).

435. *Emergency Application*, *supra* note 425, at 9.

436. *Id.*

437. *Id.*

irreparably tainted by the inevitable media reports of what are at best 'preliminary' and at worst 'grossly inequitable' presentations, as well as media reports depicting highly inflammatory and clearly inadmissible evidence."<sup>438</sup>

USAir added that this unfair prejudice will be further compounded by the court's scheduling order, which sets the thirty-six trials on the merits to begin less than six weeks after the beginning of the SJTs.<sup>439</sup> It concluded that there would not be time for the results of the SJTs to fade from the minds of potential jurors to a sufficient degree to eliminate the threat of unfair prejudice.<sup>440</sup>

USAir also argued that the SJT was created solely as a mechanism to facilitate settlement and traditionally the settlement process has been closed to the public and has been a matter strictly between the parties at interest.<sup>441</sup> USAir stated that the crash of Flight 405 had attracted nationwide interest and the sheer number of SJT verdicts alone (five in three days) was likely to attract media attention.<sup>442</sup>

Finally, USAir argued that the SJTs on punitive damages alone would be misleading since the plaintiffs would not have to show facts to legally support such an award.<sup>443</sup> It stated:

If a summary jury hears evidence on punitive damages based upon the relaxed standards of proof at the summary jury trial, the reputation of USAir in the business community and among prospective passengers will be harmed and settlement efforts will be hindered rather than aided. This harm will be irreversible, as no amount of subsequent publicity is likely to blunt the erroneous impression created by reports of the summary jury trials.<sup>444</sup>

USAir concluded that Judge Lambros' order was a clear abuse of discretion, and requested that the Sixth Circuit issue the requested Writ of Prohibition preventing Judge Lambros from compelling USAir to participate in open SJTs.<sup>445</sup>

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438. *Id.* at 10. Note that USAir also describes an example of what it referred to as "inflammatory 'evidence'" which Judge Lambros was going to allow at the SJTs. *Id.* It is a 15-minute videotape to be used by plaintiffs as their opening statement, which consists of shots of simulated plane crashes, explosions and wreckage -- some coming from a network television show "20/20" and some from a 1989 crash of an Air Ontario flight at Dryden, Ontario. *Id.* at 10-11. USAir stated: "This videotape alone, which would not be admissible at a trial on the merits, will certainly receive sensational coverage by the media, and will severely prejudice USAir." *Id.*

439. *Id.* at 11.

440. *Id.*

441. *Emergency Application*, *supra* note 425, at 13.

442. *Id.*

443. *Id.* at 14.

444. *Id.*

445. *Id.* at 14-15.



## 2. What Judges Have Relied Upon

The surveyed judges were not asked about this issue, and it unclear what the usual practice is with respect to the access to SJTs by the press and public. Although several current local federal court rules provide that the process will be considered confidential and/or make inadmissible the transcript of a SJT,<sup>446</sup> none of them appear to specifically mention the ability to close a SJT to the press and the public.

## 3. Preserving the Confidentiality of the SJT Process

Again, based upon the discussion above, the issue of whether the press and public have access to a SJT, and whether the parties or the courts make that decision, remains unresolved. Although the issue was not directly before it in *Cincinnati Gas & Electric Co.*,<sup>447</sup> the Sixth Circuit did state that public access to SJTs over the parties' objections would have significant adverse effects on the utility of the SJT as a settlement device.<sup>448</sup> Without waiting for the precise issue to be decided by an appellate court or the United States Supreme Court, it seems appropriate to guarantee that the process remain confidential, unless the parties agree otherwise.

Therefore, the suggested statutory language to address this issue -- to be included as part of a fairly comprehensive federal SJT statute -- is as follows: "Unless all parties agree otherwise, SJTs will not be recorded or reported, will be treated as confidential settlement proceedings under Federal Rule of Evidence 408, and will be closed to the press and the public."<sup>449</sup>

### *D. Uncertainty About the Confidentiality and Future Use of SJT Information and Verdicts*

There are at least two basic issues with respect to information revealed during the SJT and the resulting verdict: must they be treated as confidential in future proceedings, and can they be used as the basis for any post-trial motion by the losing party.

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446. See, e.g., D. CONN. R. 36(5); D. MASS. R. 16.4(C)(3); N.D. OHIO R. 7:5.3; W.D. WASH. R. CR 39.1(e)(6); see also NEB. REV. STAT. § 25-1157 (1987).

447. 854 F.2d 900 (6th Cir. 1988).

448. *Id.* at 904.

449. See *infra* part IV, for the complete version of the proposed federal SJT statute.

## 1. Legal Challenges

The first issue was raised in *Russell v. PPG Indus., Inc.*,<sup>450</sup> in which the plaintiff's counsel revealed to the Seventh Circuit the SJT verdict it had received, in an effort to support its argument on appeal.<sup>451</sup> The Seventh Circuit concluded that:

Courts conduct summary jury trials with the cooperation of the parties. Given that participation in the procedure is voluntary in this Circuit, we suggest that those who do so abide by the rules. It is inappropriate to attempt to bring to this Court's attention information which obviously was intended to remain within the confines of the summary jury trial process.<sup>452</sup>

The court first pointed out that plaintiff's participation in the SJT was voluntary, adding, "He chose to play the game and, having done so, must live by the rules."<sup>453</sup> The court stated that whatever the merits of the SJT,<sup>454</sup> any potential it might have as a settlement tool will be undermined if the parties who participate "do not adhere to the basic strictures of the process."<sup>455</sup> It added:

The purpose of the summary jury trial is "to motivate litigants toward settlement by allowing them to estimate how an actual jury may respond to their evidence. . . ." The potential for risk in this "no-risk" procedure would increase significantly if confidentiality could be disregarded and information gleaned from the process used in later proceedings.<sup>456</sup>

The Seventh Circuit next stated that SJT in no way mirrors a full trial on the merits, pointing out that it involves abbreviated procedures and evidentiary

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450. 953 F.2d 326 (7th Cir. 1992).

451. *Id.* at 333.

452. *Id.* at 334.

453. *Id.* at 333.

454. *Id.* (noting that the reviews are mixed, comparing Richard Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) and McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D.Ky. 1988)).

455. *Russell v. PPG Indus., Inc.*, 953 F.2d 326, 333 (7th Cir. 1992).

456. *Id.* at 334 (citations omitted). The Court added, in a footnote:

Indeed, commentators have stressed the closed nature of the summary jury trial. *See, e.g.*, Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 831 (1986) ("neither the jury findings nor any statement of counsel during the summary jury trial are admissible in the trial on the merits or may be construed as judicial admissions."); Tillotson, Note, *Summary Jury Trials: Should the Public Have Access?*, 16 FLA. ST. U. L. REV. 1069, 1073-74 (1989) ("It is viewed solely as a technique for facilitating settlement. Thus, neither the jury findings nor any statement by counsel made during the summary jury trial are admissible in a future trial on the merits.").

*Id.* at n.6.

flexibility, lawyers' arguments that would not be evidence in an actual trial, possible assessment of damages even where the jury finds no liability, etc.<sup>457</sup> Therefore, it should be treated as comparable to settlements, offers to settle, and settlement negotiations -- which are all inadmissible to prove liability under Federal Rule of Evidence 408.<sup>458</sup> It stated that if parties were allowed to offer information from a SJT to this court, "its utility as a settlement device would be significantly undermined and parties' willingness to participate in the process substantially decreased."<sup>459</sup>

This issue was also raised in a district court opinion in the *Day v. NLO, Inc.* case deciding plaintiffs' motion for judgment notwithstanding the verdict or for new trial.<sup>460</sup> One of the issues plaintiffs raised in their motion was the admissibility of a SJT verdict and the resulting settlement agreement.<sup>461</sup> After the parties in a previous case, *In re Fernald*,<sup>462</sup> involving the same defendant conducted a SJT and then settled the case, it was a topic of "great debate" whether evidence of the SJT and settlement agreement would be admissible at the statute of limitations trial in the subsequent *Day v. NLO* case.<sup>463</sup> Before the statute of limitations trial, the defendants filed a motion to exclude evidence of the prior SJT and settlement; plaintiffs opposed the motion.<sup>464</sup> This court issued an order granting in part and denying in part the defendants' motion.<sup>465</sup> Relying upon Rule 408 of the Federal Rules of Evidence, the court concluded:

[E]vidence of the summary jury trial and the settlement agreement in the Fernald residents' suit must not be mentioned by either party during *voir dire* or in their respective opening statements. However, if such evidence is offered at trial for an allegedly permissible purpose, any objections will be ruled upon at that time.<sup>466</sup>

Plaintiffs then moved for a judgment notwithstanding the verdict or for new trial, arguing, in part, that this limitation upon the evidence presented an "artificial

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457. *Id.* at 334.

458. *Id.*; see also FED. R. EVID. 408:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

*Id.*

459. *Russell*, 953 F.2d at 334.

460. 798 F. Supp. 1322 (S.D. Ohio 1992).

461. *Id.* at 1330.

462. No. C-1-85-149 (S.D. Ohio May 24, 1989).

463. *Id.*

464. *Id.*

465. *Id.*

466. *Day*, 798 F. Supp. at 1330.

situation" and was grounds for the requested relief.<sup>467</sup> The court quoted from Federal Rule of Evidence 408, and noted that it barred evidence of both settlement and settlement negotiations.<sup>468</sup> However, it added that Rule 408 also provides: "[t]his rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."<sup>469</sup>

The court also pointed out that Rule 402 provides, "Evidence which is not relevant is not admissible," and concluded that the *Fernald* SJT and settlement were not relevant (and, therefore, were not admissible) to the statute of limitations trial.<sup>470</sup> In addition, the court noted that plaintiffs had not even attempted to offer evidence of the *Fernald* SJT and settlement.<sup>471</sup>

Finally, the court stated that even if the evidence could be construed as relevant, any relevance was outweighed by the danger of prejudice and confusion.<sup>472</sup> Here there was great potential for jury confusion since both cases had received substantial media attention, and unfortunately, media representatives had frequently referred to both of them by the same name.<sup>473</sup> In addition, the jury in the latter case was to determine only whether the statute of limitations had run as to the *Day v. NLO* plaintiffs -- and was not to consider the merits of plaintiffs' claims. The court denied plaintiffs' motion for judgment notwithstanding the verdict or for new trial.<sup>474</sup>

No case appears to address directly the second issue raised in this context: whether, when the parties refuse to settle after a SJT and the case is tried, either party should be able to rely upon the SJT verdict as the basis for a renewed motion for judgment as a matter of law, or a motion for new trial on the ground that the verdict was against the weight of the evidence, or a motion for a remittitur of the damages awarded, or a response to any such motion.<sup>475</sup>

The only case which comes close to addressing this issue is *Caldwell v. Ohio Power Co.*,<sup>476</sup> a personal injury action decided by Judge Lambros. In that case, the jury awarded \$2.2 million to the plaintiff, and the defendant then filed a motion for a new trial and/or amendment of judgment.<sup>477</sup> Defendant contended

467. *Id.*

468. *Id.*

469. *Id.* (citing FED. R. EVID. 408).

470. *Id.*

471. *Id.*

472. *Id.* at 1330-31 (citing FED. R. EVID. 403).

473. *Id.* at 1331.

474. *Id.*

475. For instance, assume a SJT occurs. The jury renders a "verdict" for the defendant. The parties, still unable to agree, go to a real trial at which on the basis of substantially the same evidence, the jury returns a very substantial verdict for the plaintiff. Can the defendant point to the SJT verdict as evidence that the actual verdict was against the weight of the evidence and should be set aside?

476. 710 F. Supp. 194 (N.D. Ohio 1989).

477. *Id.* at 195-96.

"that the verdict was rendered under the influence of passion or prejudice and was not reasonably based on the evidence."<sup>478</sup> Defendant argued "that the jury merely adopted the calculation of future damages of Dr. Burke, an economist called by plaintiff, and that Dr. Burke's testimony was speculative."<sup>479</sup> Among other arguments, defendant also suggested that the jury's decision was influenced by the visible emotion displayed "by plaintiff's mother during the trial, and by the time of year (shortly before Christmas)."<sup>480</sup>

Judge Lambros responded to these (and other) arguments and then finally noted that the result in this case was "remarkably consistent" with the verdict reached in a SJT conducted on November 24.<sup>481</sup> The court continued:

The [summary] jury reached an advisory, non-binding verdict in favor of plaintiff in the amount of \$2.5 million. The jury instructions used during the SJT were substantially the same as those used during the trial. The SJT was not conducted during the holidays. Also, neither plaintiff's mother nor an economist testified. This would seem to support the Court's finding, based on the evidence presented at trial, that the verdict was not influenced by passion or prejudice. The Court is not inclined to conclude that two separate panels evaluating the same case would return verdicts based on passion or prejudice.<sup>482</sup>

Although it is unclear whether the plaintiff based part of its response to defendant's motion for new trial on the SJT result, the court clearly took it into account in this case. Such conduct certainly raises the issue as to whether limitations on such use of SJT verdicts should be in place.

## 2. What Judges Have Relied Upon

The surveyed judges provided their views with respect to the two issues mentioned above concerning the confidentiality and future use of SJT information and verdicts.

When the surveyed judges were asked whether information, strategies, and evidence revealed in the SJT (as well as the outcome thereof) should be admissible in the actual trial, approximately three times as many judges said no as said yes.<sup>483</sup> Of those responding negatively, there were several bases for this opinion.

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478. *Id.* at 196.

479. *Id.*

480. *Id.*

481. *Id.* at 202.

482. *Id.* (emphasis added).

483. See *Judicial Survey Responses*, *supra* note 24, Question 31, at 50-51. (Twenty-two judges said no in response to this question; eight judges said yes; and three judges made some other type of response. One of these judges said yes in part and no in part.); see also *Attorney Survey Responses*, *supra* note 25, Question 19, at 15. The question asked of the surveyed attorneys was slightly different. *Id.* It stated (with emphasis added): "Should information, strategy, and evidence revealed in the

Most of the judges likened this to disclosing settlement discussions.<sup>484</sup> For example, one judge wrote that a SJT is simply a settlement negotiating procedure and should not be mentioned during the actual trial; nor should it affect the conduct of the actual trial.<sup>485</sup> Another judge stated that a SJT is only a settlement technique and that otherwise parties will be too guarded as to what they will do in these negotiations.<sup>486</sup> Another said that a SJT is a settlement device, not a trial; what happens there should not be used in a trial unless it is proper evidence from a witness or exhibit.<sup>487</sup>

Responding judges also said that the case should be retried in its entirety, and that the parties should "start fresh."<sup>488</sup> Others said that such use would destroy the effectiveness of the SJT as a settlement tool, would defeat the purpose of the SJT, would not be fair, and would be highly prejudicial.<sup>489</sup> One judge specifically stated that the SJT verdict should not be admissible in the actual trial, under Federal Rule of Evidence 408.<sup>490</sup> Another added that anything revealed at the SJT should not be admissible and the outcome should not be revealed since it is not probative.<sup>491</sup> Finally, one judge stated that the fact that there was a SJT should never be disclosed to the regular sitting jury.<sup>492</sup> Most of the judges that said SJT information, strategies, and evidence should be revealed in the actual trial based this on the assumption that evidence should be admissible if consistent with the rules of evidence.<sup>493</sup>

The second issue deals with post-trial use of a SJT verdict for strategic advantage by a losing party. When the judges were asked whether a party, after a SJT and a trial, should be able to use a SJT verdict as the basis for a JNOV motion (now, renewed motion for judgment as a matter of law), or a motion for new trial on the ground that the verdict was against the weight of the evidence,

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summary jury trial (as well as the outcome thereof) be admissible in the actual trial (e.g., if the actual trial differs significantly?)? Why or why not?" *Id.* One attorney responded negatively to this question but indicated that this problem might be avoided if the judge or magistrate obtained trial briefs in advance of the SJT that will govern the actual trial. *Id.*

484. See *Judicial Survey Responses*, *supra* note 24, Question 31, at 50-51.

485. *Id.* at 50.

486. *Id.* at 51.

487. *Id.*

488. *Id.*

489. *Id.* at 50; see also *Attorney Survey Responses*, *supra* note 25, Question 19, at 15. One of the surveyed lawyers who responded negatively explained: "First, it defeats the purpose of an inexpensive, streamlined summary jury trial, and, second, it would be impossible to monitor. It would make phony Rule 11 claims and motions to disqualify counsel look like child's play." *Id.* Other lawyers responding negatively said that it would discourage use of the process and that SJTs are artificial mechanisms that should have no binding effect in any way. *Id.*

490. *Judicial Survey Responses*, *supra* note 24, Question 31, at 51.

491. *Id.*

492. *Id.*; see also *Attorney Survey Responses*, *supra* note 25, Question 19, at 15. A surveyed lawyer said that the SJT is a settlement-promoting mechanism and that even a reference to it in a real trial would be extremely prejudicial. *Id.*

493. *Judicial Survey Responses*, *supra* note 24, Question 31, at 50.

or a motion for a remittitur of the damages awarded, or a response to any such motion, all but one judge responded negatively.<sup>494</sup>

The judges thought these options should not be available for a variety of reasons: a SJT is merely a settlement device; attorneys will not agree to participate in SJTs, or will be less willing to do so if these options exist; they would undermine the value and effect of a SJT; and too many variables can affect the decision to settle, and it would be an improper deterrent to the exercise of the right to trial.<sup>495</sup>

A number of the judges also justified their responses by pointing out the following differences between SJTs and actual trials: the regular trial might have differed because of the demeanor and credibility of live witnesses; different evidentiary problems may exist; the same exact standards are not used in both proceedings; the rules of evidence are not followed in SJTs, so nothing at a SJT should serve as a basis for subsequent motions; and the SJT has no protections which would protect a party's due process rights.<sup>496</sup>

### 3. Preserving the Confidentiality, and Limiting the Future Use, of SJT Information and Verdicts

Based upon the discussion above, it is clear that judges generally do not favor the admissibility of SJT information, SJT strategies or the SJT verdict (unless otherwise admissible under the Federal Rules of Evidence) or the future use of such as the basis for a post-trial motion. Since such use would appear to cause additional problems and controversy, the limitations on it should be clarified.

Local federal court rules address these issues in slightly different ways.<sup>497</sup> Some specifically provide that no statement made or document produced as part of the SJT, or the SJT verdict itself, shall be admissible at trial, unless otherwise admissible under the rules of evidence.<sup>498</sup> Others merely state that unless the

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494. *Id.*, Question 34, at 56. Of the 31 judges responding to this question, only one said yes. *Id.* The judge responding in the affirmative did not explain his answer. *Id.* In fact, one judge stated that the SJT verdict should have no validity for other purposes. *Id.* at 57.

495. *Id.*, Question 34, at 56-57. One judge commented, "No one will participate if they imagine such a scenario." *Id.* at 56. Another judge added that the SJT is a settlement device and as soon as it is something more, no one will use it. *Id.*; see also *Attorney Survey Responses*, *supra* note 25, Question 20, at 15. When the attorneys were asked this same question, one stated that this would discourage use of the SJT process, and another said that SJTs are artificial mechanisms that should have no binding effect in any way. *Id.* Another attorney responding negatively stated that "The real thing and summary jury trials are like night and day. No comparison!" *Id.*

496. See *Judicial Survey Responses*, *supra* note 24, Question 34, at pages 56-57. One judge added that the SJT is designed to help parties see the case through an outsider's unbiased sight of a summary trial -- not the actual trial. *Id.* at 57.

497. See discussion *infra*.

498. See, e.g., D. CONN. R. 36(5); D. MASS. R. 16.4(C)(3); N.D. OHIO R. 7:5.3; see also NEB. REV. STAT. § 25-1157 (1987); see also the magistrate judge's SJT order attached to judicial survey response #27 (D. Neb.), Professor Ann E. Woodley's Summary Jury Trials ("SJTs") Questionnaire Responses (1994) (on file with Professor Woodley, The University of Akron School of Law). It states:

parties agree otherwise, the proceedings will not be reported or recorded, and will remain confidential.<sup>499</sup>

After a review of these statutes, the proposed statutory language to address this problem is as follows:

(a) Unless all parties agree otherwise, SJTs will not be recorded or reported, will be treated as confidential settlement proceedings under Federal Rule of Evidence 408, and will be closed to the press and the public.<sup>500</sup>

(b) In the event that no settlement is reached following the SJT, and the case is returned to the trial docket:

(1) No statement made or document produced as part of the SJT, not otherwise discoverable or obtainable, shall be subject to discovery.

(2) A judge or magistrate judge shall not admit at a subsequent trial, or any other legal proceeding, any evidence that there has been a SJT, the nature or amount of any SJT verdict, any statement made or document produced in the SJT, or any other matter concerning the conduct of the SJT, the discussions with the jurors or negotiations related to it, unless:

(i) The evidence would otherwise be admissible under the Federal Rules of Evidence; or

(ii) The parties have otherwise stipulated.

(c) A non-binding SJT verdict shall not be appealable.<sup>501</sup>

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7. . . . In the absence of agreement to the contrary, the following procedures will be applicable . . .

f) Unless specifically ordered by the court, the proceedings will not be recorded.

g) Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the court, or may stipulate to any other use of the verdict that will aid in resolution of the case. Unless such a stipulation is entered, the jury's verdict will be advisory only, not to be used in any future court proceedings. Immediately following the summary jury trial, counsel and the parties shall remain for a settlement conference with the court.

8. These rules shall be construed to secure the just, speedy, and inexpensive conclusion of the summary jury trial procedure.

9. Neither the statements of counsel during the summary jury trial, nor any statements made by participants at the settlement conference following the summary jury trial, shall be used by any party with respect to any aspect of the litigation or trial of this case.

*Id.*

499. See, e.g., W.D. WASH. R. CR 39.1(e)(6); see also D. CONN. R. 36(5), which does both (and specifically refers to the protections of FED. R. EVID. 408 and FED. R. CIV. P. 68).

500. See *infra* part IV, the same language is proposed for use in dealing with the issue of access to SJTs by the press and the public.

501. See *infra* part IV, for the complete proposed federal SJT statute.



*E. Uncertainty About the Appropriateness of  
and the Authority for  
Awarding Sanctions in the SJT Context*

The final primary issue threatening the use and effectiveness of SJTs is the uncertainty about the appropriateness of, and the authority for, awarding sanctions in the SJT context.

1. Potential Legal Challenges

Although there have been no challenges to SJT sanctions in reported decisions, issues concerning the award of sanctions in analogous contexts have been litigated -- with mixed results.

For example, some appellate courts have upheld local rules providing for the imposition of costs as a sanction for last-minute settlements entered into after the taxpayers have incurred the expense of bringing in the jury.<sup>502</sup> But in *Kothe v. Smith*,<sup>503</sup> the appellate court reached the opposite conclusion.

In the *Kothe v. Smith* case, the appellate court vacated a judgment directing a defendant to pay \$1,000 to plaintiff's attorney, \$1,000 to plaintiff's medical witness, and \$480 to the Clerk of the Court as a sanction for settling the case for \$20,000 after one day of trial when the court had recommended that the case be settled for between \$20,000 and \$30,000 during the pretrial conference held three weeks prior to the trial.<sup>504</sup> The lower court judge had directed the parties to conduct settlement negotiations at that time and had warned them that "if they settled for a comparable figure after the trial had begun, he would impose sanctions against the dilatory party."<sup>505</sup> The appellate court stated that "although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion."<sup>506</sup> It added that FRCP 16 "was not designed as a means for clubbing the parties -- or one of them -- into an involuntary compromise."<sup>507</sup> Although subsection (c)(7) of FRCP 16, "added in the 1983 amendments of the Rule, was designed to encourage pretrial settlement discussions, it was not its purpose to 'impose settlement negotiations on unwilling litigants.'"<sup>508</sup> Although SJTs were not at issue in this case, some of the court's language might be persuasive since SJTs are often likened to settlement negotiations.<sup>509</sup>

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502. See *McKay*, 120 F.R.D. at 45 (citing *White v. Raymark Indus. Inc.*, 783 F.2d 1175 (4th Cir. 1986); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985)).

503. 771 F.2d 667 (2d Cir. 1985).

504. *Id.* at 669.

505. *Id.* at 668-69.

506. *Id.* at 669.

507. *Id.*

508. *Id.* (quoting *Advisory Committee Note*, 97 F.R.D. 205, 210 (1983)).

509. See, e.g., *U.S. v. Kentucky Utils. Co.*, 124 F.R.D. 146, 153 n.7 (E.D. Ky. 1989).

And in *J.F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*,<sup>510</sup> involving a fact pattern that could be considered analogous to failure to participate in a SJT in good faith, the appellate court reversed the award of sanctions under FRCP 16.<sup>511</sup> In that case, when one of the parties, Anderson, would not agree to a stipulation of facts for the purpose of trial, the district court entered an order striking Anderson's pleadings, dismissing Anderson's complaint against Westinghouse, entering judgment against Anderson on Edwards' complaint "subject to jury verdict on the dollar amount of damages proven in ex parte proceedings," and dismissing Westinghouse's complaint against Anderson as moot.<sup>512</sup> The appellate court reversed, holding that FRCP 16 does not compel a stipulation of facts, so that sanctions for failure to file one are not available.<sup>513</sup> The appellate court noted that obviously a trial court has the power to make effective a pre-trial order within the four corners of FRCP 16, but an order forcing parties to stipulate facts is not authorized by that rule.<sup>514</sup> It also quoted the reporter of the United States Supreme Court's Advisory Committee on the Rules of Civil Procedure as follows:

So the proper function of pre-trial is not to club the parties -- or one of them -- into submission. . . . Pre-trial, in purpose and in its most successful use, is informational and factual, rather than legal and coercive. It may well lead to settlement as the parties come to know their case better, but that must remain an uncoerced by-product.<sup>515</sup>

The court also rejected Rule 41(b) and the inherent power of the court as support for the sanctions imposed.<sup>516</sup> The court noted that:

Behind the face of Rule 16, a narrowly circumscribed area of power has developed which the judge may employ to compel obedience to his requests and demands relating to the pre-trial conference. This power may be founded either upon Rule 41(b) or upon the inherent power of courts to manage their calendars to have an orderly and expeditious disposition of their cases. Whatever the exact genesis of this power to compel obedience, the key is a failure to prosecute, whether styled as a failure to appear at a pre-trial conference, failure to file a pre-trial statement, failure to prepare for the conference or failure to comply with the pre-trial order. Therefore Rule 41(b), dealing with involuntary

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510. 542 F.2d 1318 (7th Cir. 1976) (per curiam).

511. *Id.* at 1322, 1325.

512. *Id.* at 1320-21.

513. *Id.* at 1322, 1325.

514. *Id.*

515. *Id.* at 1325 (citations omitted).

516. *Id.* at 1323.

dismissals, and the inherent power of district courts do not support the sanctions imposed.<sup>517</sup>

And because the party that would not agree to a stipulation of facts was clearly not attempting to avoid trial, the district court's order dismissing its case was reversed.<sup>518</sup>

In *Identiseal Corp. of Wisconsin v. Positive Identification Systems, Inc.*,<sup>519</sup> the appellate court held that the district court lacked authority under FRCP 16 to compel involuntary discovery, and thus reversed the court's order dismissing the complaint for failure to conduct such discovery.<sup>520</sup> The court stated:

In our judgment this appeal is controlled by *J.F. Edwards [Construction Co. v. Anderson Safeway Guard Rail Corp.]*, 542 F.2d 1318 (7th Cir. 1976) (per curiam)]. Like the appellant in *J.F. Edwards*, plaintiff in the case at bar did not engage in conduct that could be characterized as a failure to prosecute. Plaintiff was ready to go to trial, and simply disagreed with the district court about the desirability of eliminating the need to develop all of the facts at trial. Although we recognize that its order was based on a commendable desire to simplify the lawsuit, the court had no more authority under Rule 16 to command discovery than the district court in *J.F. Edwards* had to require a stipulation of facts. The limit of the court's power was to compel plaintiff to consider the possibility of conducting discovery, and there is no evidence in the record that plaintiff's attorney rejected the district court's preferred method of litigating the action without giving it serious consideration.

Our decision is predicated on more than the absence of express authority in Rule 16 authorizing compulsory discovery. It is also based on the traditional principle that the parties, rather than the court, should determine litigation strategy. It was the judgment of plaintiff's attorney that his client's chances of prevailing would be maximized if he did not conduct discovery but instead developed his entire case at trial. We cannot say whether this decision was correct. We can say, however, that the decision was for plaintiff's attorney, and not the district court, to make.<sup>521</sup>

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517. *Id.* (citations and footnotes omitted).

518. *Id.* at 1325.

519. 560 F.2d 298 (7th Cir. 1977).

520. *Id.* at 299.

521. *Id.* at 302 (citations and footnotes omitted).

The court noted that its resolution of this issue was in conflict with the Third Circuit's decision in *Buffington v. Wood*,<sup>522</sup> but stated that a majority of the court did not favor a rehearing *en banc* on the question of this conflict.<sup>523</sup>

In *Eash v. Riggins Trucking Inc.*,<sup>524</sup> the issue before the Third Circuit was whether a district court could order an attorney to pay to the government the cost of impanelling a jury for one day as a sanction for the attorney's abuse of the judicial process.<sup>525</sup> One of the grounds for challenging this order was that the district court did not have the inherent power to impose such a sanction.<sup>526</sup> The court held that a district court does have the inherent authority to impose such a sanction,<sup>527</sup> overruling its previous decision in *Gamble v. Pope & Talbot, Inc.*<sup>528</sup> It went on to suggest that while a local court rule on sanctions was not necessary, it might be a beneficial idea.<sup>529</sup> It stated:

The rulemaking power of the district courts is now codified at 28 U.S.C. § 2071 (1982), which provides that the district courts may make rules prescribing the conduct of court business. The only statutory requirement is that the local rules promulgated be consistent with acts of Congress and the rules prescribed by the Supreme Court. The Federal Rules of Civil Procedure permit the district courts to make and amend rules governing their practice not at variance with the other Federal Rules. We agree with the Second, Ninth, and Tenth Circuits that the district courts have the power, absent a statute or rule promulgated by the Supreme Court to the contrary, to make local rules that impose reasonable sanctions where an attorney conducts himself in a manner unbecoming a member of the bar, fails to comply with any rule of court, including local rules, or takes actions in bad faith.<sup>530</sup>

Finally, several cases have held that sanctions were appropriate under FRCP 16(f) for being "substantially unprepared to participate" in a pretrial conference, where a party had failed to obey a court order to bring to the conference a representative with authority to settle the case.<sup>531</sup>

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522. 351 F.2d 292 (3d Cir. 1965).

523. *Identiseal Corp. of Wisconsin*, 560 F.2d at 302, n.7.

524. 757 F.2d 557 (3d Cir. 1985) (*en banc*).

525. *Id.* at 559.

526. *Id.* at 560.

527. *Id.* at 568.

528. 307 F.2d 729 (3d Cir.), *cert. denied*, 371 U.S. 888 (1962).

529. *Eash*, 757 F.2d at 569.

530. *Id.* (citations omitted) (Note, however, that the Third Circuit did find in this case that the imposition of a monetary sanction by the district court without affording the attorney prior notice and an opportunity to be heard violated due process. *Id.* at 570).

531. See, e.g., *Divorak v. Shibata*, 123 F.R.D. 608 (D. Neb. 1988); *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (*en banc*). In *Divorak*, the court awarded the plaintiff:

## 2. What Judges Have Relied Upon

Although the surveyed judges were asked several questions about under what specific circumstances sanctions might be appropriate in the SJT context,<sup>532</sup> they were not asked directly whether sanctions are ever appropriate and under what authority they might be awarded.

## 3. Creating Authority for Awarding Sanctions in the SJT Context

Based upon the discussion above, uncertainty exists as the general appropriateness of sanctions in the SJT context and the authority for such sanctions. Clearly sanctions may become appropriate -- and thus authority for them is necessary -- once participation in a SJT can be mandated. At that point, it will be necessary for judges to have tools to enforce compliance with SJT rules.<sup>533</sup>

One example of a current local federal district court rule on this subject is from the Western District of Texas,<sup>534</sup> which states: "The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation of this rule."<sup>535</sup> This concept is amplified somewhat in the following suggested proposed language for the federal SJT statute: "The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation by parties or attorneys of this statute or any local court rule setting forth SJT procedures."<sup>536</sup>

## IV. SPECIFIC LEGISLATIVE PROPOSAL

Below is the proposed, comprehensive federal SJT statute that includes provisions resolving all of the issues raised in this article: authorization for SJTs; authorization for mandated participation in SJTs; authorization for use of regular jurors for SJTs; access to SJTs by the press and public; confidentiality and future

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the expenses he incurred in travelling to Lincoln, Nebraska for his attendance at the settlement conference scheduled November 30, 1988, including mileage, lodging, lost wages, if applicable, and other out-of-pocket expenses, and further, his attorneys' fees incurred for the portion of the conference, two-thirds hour, devoted to the discussion of settlement.

*Divorak*, 123 F.R.D. at 611.

532. See Woodley, *supra* note 20 (in which these issues are addressed).

533. See also *Judicial Survey Responses*, *supra* note 24, Question 35a, at 58. When the surveyed judges were asked, in the context of whether the authority for SJTs needs to be created or clarified, what language should be used, one judge volunteered the necessity for sanction provisions.

534. W.D. TEX. R. C.V. 88(j).

535. *Id.*

536. See *infra* part IV, for the complete version of the proposed federal SJT statute.

use of SJT information and verdicts; and authority for sanctions in the SJT context.<sup>537</sup>

#### V. PROPOSED SUMMARY JURY TRIAL STATUTE

(a) A "summary jury trial" (SJT) is a court-annexed process in which the parties' attorneys summarize their case to a six-person jury with a judge or magistrate judge presiding and then use the decision of the jury and information about the jurors' reaction to the legal and factual arguments as an aid to settlement negotiations. Unless the parties stipulate otherwise, the SJT verdict is non-binding.

(b) A judge or magistrate judge may order a SJT:

(1) with the agreement of all parties, either by written motion or their oral motion in court entered upon the record, or

(2) upon the judge or magistrate judge's determination that a SJT would be appropriate, even in the absence of the agreement of all the parties.

(c) In exercising his or her discretion under subsection (b)(2), the judge or magistrate shall give consideration to the costs of the procedure, the costs that may be saved by ordering the SJT, the potential for resolution of the case, and any reasons advanced by the parties as to why a SJT would not be in the best interests of justice.

(d) SJT jurors shall be drawn from the regular juror pool and entitled to the same rights and subject to the same responsibilities as other jurors summoned pursuant to The Jury Selection and Services Act of 1968, 28 U.S.C. Sections 1861-1878. Any restrictions on post-trial communications with jurors do not apply to SJT jurors.

(e) Unless all parties agree otherwise, SJTs will not be recorded or reported, will be treated as confidential settlement proceedings under Federal Rule of Evidence 408, and will be closed to the press and the public.

(f) In the event that no settlement is reached following the SJT, and the case is returned to the trial docket:

(1) No statement made or document produced as part of the SJT, not otherwise discoverable or obtainable, shall be subject to discovery.

(2) A judge or magistrate judge shall not admit at a subsequent trial, or any other legal proceeding, any evidence that there has been a SJT, the nature or amount of any SJT verdict, any statement made or document produced in the SJT, or any other matter concerning the conduct of the SJT, the discussions with the jurors or negotiations related to it, unless:

(i) The evidence would otherwise be admissible under the Federal Rules of Evidence; or

(ii) The parties have otherwise stipulated.

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537. Sources of ideas for this statute include: N.D. OHIO R. 7:1.2; D. MASS. R. 16.4(C)(3); M.D. PA. R. 1010; W.D. MICH. R. 44; N.D. OKLA. R. 47.2; W.D. TEX. R. CV-88(j); W.D. WASH. R. CR 39.1(e)(6); N.D. OHIO R. 7:5.3; D. CONN. R. 36(5); and N.H. SUP. CT. R. 171.

- (g) A non-binding SJT verdict shall not be appealable.
- (h) The specific procedures for a SJT will be controlled by local court rule.
- (i) The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation by parties or attorneys of this statute or any local court rule setting forth SJT procedures.

## VI. CONCLUSION

The use and effectiveness of the SJT, a beneficial, court-annexed settlement device, is being threatened by the litigated issues and basic uncertainties described above. The general authority for SJTs is uncertain and no authority appears to exist for mandating participation in them; no authority exists for summoning jurors from the regular jury pool to serve as SJT jurors; uncertainty exists about the right of access to SJTs by the press and the public; uncertainty exists about the confidentiality, and future use, of SJT information and verdicts; and uncertainty exists about the appropriateness of, and the authority for, awarding sanctions in the SJT context. All of these issues are addressed in the proposed federal SJT statute.<sup>538</sup>

If the proposed federal SJT statute is adopted by Congress, SJTs can achieve the result that was intended by their creation: the reduction of time and cost involved in litigation by fostering settlement. As one commentator noted:

While ADR is not without its detractors, the trend will be toward more, not less, ADR in our courts. This will result, at least in part, from consumer demand . . . Moreover, the Civil Justice Reform Act and the proliferation of commissions and task forces around the country indicate widespread belief among public policy makers -- legislators, governors and courts -- that ADR offers some hope for a civil justice system in which many people have lost faith.<sup>539</sup>

Now is the time to restore faith in the summary jury trial and assure its continued success by the adoption of the proposed federal SJT statute.

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538. See *supra* part IV.

539. See Grubbs, *supra* note 7, at 25.