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Alexander B. Denson

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# The Summary Jury Trial: A Proposal From The Bench

*Alexander B. Denson*<sup>1</sup>

## I. INTRODUCTION

Professor Woodley's article is an excellent overview of the issues relating to Summary Jury Trials and offers a menu of sound proposals for their solution. This article is written from the perspective of a trial judge and recommends procedures and case selection criteria found to be effective in the trial arena. A careful reader will note that many of the proposals discussed herein are included in Professor Woodley's article because the undersigned participated in her canvass of judges on the subject.

## II. THE PROCEDURE

As is well known, the Summary Jury Trial ("SJT") is an alternative dispute resolution device authored in 1980 by United States District Judge Thomas Lambros, from the Northern District of Ohio, now retired. It is a procedure presided over by a judge in which counsel for all parties present a summary of their evidence, without calling live witnesses. The jury returns a nonbinding verdict which is used as a basis for settlement. The procedure has proven remarkably effective in settling cases. One considerable advantage that it affords over other types of alternative dispute resolution is that it gives the parties their "day in court."<sup>2</sup> Experience in trials and settlement negotiations has taught me the importance of allowing litigants to tell their story in court. Very often, plaintiffs particularly feel strongly that they have been wronged and have suffered, consequently creating a real need to tell this to a judge or jury. When this strong need is present, the case is not likely to settle unless this need is satisfied.<sup>3</sup> The SJT provides an appropriate forum for plaintiffs to voice their story.

The efficacy of the SJT varies directly with the extent to which participating counsel believe that the summary jury's verdict accurately presages the verdict which would be returned by a trial jury. If all counsel are persuaded that the trial

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1. The author was a trial attorney for fifteen years before his appointment in 1981 as a United States Magistrate Judge for the Eastern District of North Carolina. In his present position he frequently presides over civil trials pursuant to 28 U.S.C. § 636(c). When the Summary Jury Trial procedure was still relatively new, Judge Denson consulted with the author of the procedure, United States District Judge Thomas Lambros and observed Judge Lambros conduct two such trials. Thereafter, Judge Denson presided over two Summary Jury Trials in the Eastern District of North Carolina.

2. Thomas D. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 468 (1984).

3. *Id.*

jury is likely to return the same verdict as the summary jury, then they should agree to settle close to the terms of the summary jury's verdict. Thus, the SJT should be tailored by adoption of those procedures which enhance this confidence of the trial lawyers in the SJT's prophecy. The critical, perhaps only, test of any proposed rule or procedure should be: **Would it bolster confidence in the mantic effect of the summary jury's verdict?**

All attorneys in each case have some opinion about the value of the case. The summary jury trial is most helpful in those cases in which it is difficult to quantify damages in terms of money, such as personal injury or wrongful death, as opposed to actions for breach of contract, because it gives counsel an impartial jury's assessment of the monetary value of damages.<sup>4</sup> However, if the summary jury's verdict is substantially different than the attorney's assessment, the natural inclination would be to scrutinize the summary jury procedure and discount the result if it can be arguably attributed to some procedure that will be different at the full trial. Therefore, it is most important to eliminate every potential avenue for attorneys to rationalize away from the summary jury's verdict.

This consideration mandates that, to the extent possible, rules and procedures governing a trial itself should also govern the summary jury trial procedure. For example, in this judicial district and in two or three others, twelve person juries are provided for most civil trials. Accordingly, in summary jury trials in this district, twelve person juries are used. Similarly, the summary jury trial should take place in the same city and same courtroom as would the actual trial.<sup>5</sup>

This necessarily means that **any set of uniform rules for summary jury trials must allow variations to conform to local practice.** Just as the Federal Rules of Civil Procedure are supplemented on a local level, so must any set of rules applicable to summary jury trials be subject to local modification, as necessary to mirror the practices of each court.

In addition to mirroring the trial procedures of the local court, another corollary of the objective of enhancement of confidence in the SJT verdict is the need for flexibility to modify the procedure to meet the needs of the particular case. For example, Judge Lambros believed it important to conclude a summary jury trial in one day, from start to finish. However, some cases are not amenable to such a short proceeding. I observed Judge Lambros conduct one such procedure that began in the morning and lasted well into the night hours. By the time the jury returned, everyone was exhausted and the quality of the overall proceeding suffered. Tempers were short and the case did not settle. If the case would take two weeks to try,<sup>6</sup> I have difficulty seeing the harm in letting the summary jury trial go into another day. If the case is sufficiently complex that it cannot reasonably be abbreviated into a one day procedure, then there should be no reluctance whatsoever in going into a second day. In fact, in the case just referred

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4. *Id.* at 469.

5. The issue of whether the trial judge should preside over the summary jury trial is discussed in Section V.A.

6. *See infra* Section III.

to, the procedure lasted the hours in two normal working days. It simply continued going until it was finished. It is enough that such marathon sessions are punitive to the participants. They certainly ought not to be required of jurors, who in some judicial districts may be required to travel long distances before and after court.

### III. CASE SELECTION

Not every case is a candidate for the summary jury trial procedure. First, it should be remembered that the SJT is only a device to aid in settlement. Settlement must be agreed to by all parties. If there is any party who simply will not be satisfied with anything except a trial, all settlement efforts, including SJT's, will be futile. The most obvious such litigants are prisoners. Anyone familiar with prisoner litigation well knows that a primary motive for many of these cases is the fact that the prisoner gets to leave the prison and go to the courthouse for trial.<sup>7</sup> Win or lose, the prisoner litigant gets reprieve from his unhappy environs during the trial. When the trial process itself is the objective, obviously the litigant is not going to settle and a summary jury trial should not be undertaken.

For the same reason, summary jury trials should not be forced on unwilling participants. If parties do not want to participate, they probably will not agree to a settlement. Litigants should be entitled to try their cases without participation in unwanted alternative dispute resolution procedures.

The famous French philosopher Blaise Pascal (1623-1662) wrote "I have made this letter longer than usual, because I lack the time to make it short."<sup>8</sup> It is undeniably time consuming to go through deposition transcripts, exhibits and other trial materials to compress their essence into a meaningful, persuasive, summary presentation. Most of this distillation would have little utility in a trial if the summary jury trial does not yield settlement. Since the summary jury trial procedure *might not* be successful, the time and effort of the court and counsel to do it ought not be spent unless there is a significant potential savings in trial time. Therefore, one requirement before considering a case for referral to a summary jury trial should be a minimum threshold of trial time. All parties would agree that it is foolish to take a day to do a summary jury trial of a case that would take only a day to try conventionally. My own belief is that unless the estimated trial time is about two weeks or more a case should not be considered for the SJT procedure.

At the same time, it should be acknowledged that at the other end of the spectrum are some cases which simply may be too complex to be compressed into a brief summary that would be an accurate predictor of trial results. While the maximum trial time varies depending on the kind of case, I doubt that a trial much

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7. Some judges refer to these cases as "excursion litigation."

8. Blaise Pascal, *Lettres Provinciales, No. 16, in 5 OEUVRES DE BLAISE PASCAL* (Leon Brunschvigg et al. eds., 1914). Two centuries later, Thoreau put it: "Not that the story need be long, but it will take a long while to make it short." Letter from Henry David Thoreau to Harrison Blake (Nov. 16, 1957), *in 6 THE WRITINGS OF HENRY DAVID THOREAU*, at 320 (F.B. Sanborn ed., 1968).

exceeding two months would be amenable to the summary jury trial process. I presided over a SJT of a case that would have taken about six weeks to try and it was about all that could have been presented in a two day SJT. Despite my views on the use of SJTs in complex cases, I would leave the ultimate decision to use them to trial counsel. If all the attorneys in a case want to use the SJT procedure in a case that would take even months to try, I would be willing to do it. Counsels' task would certainly be more difficult in such a case; however, there would also be a much richer reward of savings in trial time. Thus, I suggest that summary jury trials are appropriate only in those non-prisoner cases that are estimated to take at least two weeks, but probably not more than two months to try and in which all parties and counsel are willing to consider settlement, but have a good-faith difference in their evaluations of the case.

#### IV. PRE-SUMMARY JURY PREPARATION

##### *A. Timing of the Procedure*

In deciding at what point in the life of a case to undertake a summary jury trial, or any non-binding alternative dispute resolution procedure, there is a tension. The earlier the procedure is done, the more savings can be realized in terms of discovery and trial preparation; however, the later the procedure is done, the more likely it is to result in settlement because more is known about the facts and the issues of law have become narrowed by motion practice. Judge Lambros noted: "[f]or SJT to be truly beneficial, the case must substantially be in a posture for trial. Discovery must be complete and there must be no motions pending."<sup>9</sup> While this statement is undoubtedly true, had the SJT been conducted earlier, if successful, it would have saved the expense of the discovery and motion phases of the litigation. Here, I again advocate for flexibility. If counsel believe that they know enough about the evidence to proceed before extensive discovery, I would agree to an early SJT. Perhaps, a good middle ground would be to conduct the SJT before the conclusion of discovery, but after an opportunity to depose the parties and the critical witnesses, both fact and expert.

Similarly, as to the timing of the SJT relative to the motion practice, Judge Lambros's admonition is that there must be no motions pending or, presumably, planned.<sup>10</sup> The same tension exists: the SJT is more likely to be successful if all motions have been made and ruled upon, but if it is conducted earlier and is successful, the parties save the expense of the motion practice. On balance, I would recommend waiting until after dispositive motions have been ruled upon before conducting the SJT. However, I again would defer to the view of the participating attorneys if such view were unanimous.

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9. Lambros, *supra* note 2, at 470.

10. *Id.*

*B. Preliminary Conference*

When the court and counsel have agreed to do a summary jury trial in a particular case, a preliminary conference should be conducted by the court with the attorneys who are going to participate in the procedure. At this conference, the court should engage in dialogue with counsel about the SJT process and address their concerns. The proceeding should be tailored to give the attorneys confidence in the predictive effect of the SJT. In addition, the court and counsel should discuss and decide on the length of the presentations and a date should be set for a SJT pretrial. Furthermore, counsel should be instructed that their preparations for the SJT pretrial should include: submission of requested voir dire questions, requested jury instructions and a presentation of all possible foreseeable evidentiary objections.

An example of one concern that is often discussed at the preliminary conference is an apprehension that opposing counsel will make a representation to the summary jury of a fact not supported by admissible evidence. To address this concern, some counsel might wish for each side to exchange outlines of their presentation with a source citation to each significant fact representation. These source citations might be depositions, exhibits, answers to interrogatories or admissions in pleadings or requests for admissions. If the source is the testimony of a witness who has not been deposed, an affidavit may be prepared with the essence of the testimony that will be represented to the summary jury. Since it would take a great deal of work to prepare such an outline, I would not require it over objection of any attorney.

*C. The SJT Pretrial*

After the preliminary conference, it is necessary for the court to meet with counsel again before the SJT. While it does not have the formality of a Final Pretrial Conference conducted under Rule 16(d),<sup>11</sup> this second meeting could be called the SJT Pretrial because it performs many of the same functions. This conference should be held about one week before the SJT. At this time, all possible foreseeable evidentiary objections should be made, argued and ruled upon. If counsel have earlier agreed to exchange an outline of presentations, the court can rule on any disputes as to whether an intended representation is or is not supported by admissible evidence.

It is also helpful for the court to review the submitted requested voir dire questions and to indicate which will be used and which will not. It is even more helpful for the court to give this guidance about requested jury instructions. At the conclusion of this conference, the attorneys and the court should have a clear idea of the nature of the forthcoming SJT.

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11. FED. R. CIV. P. 16(d).

## V. CONDUCTING THE SUMMARY JURY TRIAL

### *A. Selection of Presiding Judge*

The question arises whether the SJT should be presided over by the judge who will try the case if settlement is not reached. If the trial judge conducts the SJT, the resulting advantage is that the trial itself is more closely mirrored: counsel will know that the same evidentiary rulings will be made and thus, the SJT procedure is a better predictor of the trial procedure. On the other hand, the disadvantage is that the trial judge cannot meet with the parties *ex parte* as could a judge whose role was strictly limited to settlement. The parties also might be more reluctant to discuss settlement with the trial judge, even in the presence of opposing counsel. It is likely that in many federal judicial districts the trial judge will be a district judge who will have a magistrate judge preside over the SJT and guide settlement negotiations. I have presided over a SJT where I was the trial judge<sup>12</sup> and one in which I was solely the settlement master. From these experiences, I find the competing advantages to be nearly offset. In selecting a presiding judge, the court also should follow the collective wishes of the attorneys in the case.

### *B. Jury Selection*

In order to compress a trial from two weeks or more into one or two days, every part of the trial must be examined for potential time savings. In this judicial district it takes about an hour to an hour and a half to select a twelve person civil jury with only the judge conducting voir dire.<sup>13</sup> In an effort to reduce this time in one summary jury trial, I submitted questionnaires to the jury pool upon their arrival at court.<sup>14</sup> These were designed to elicit any bias in the type of case being tried. My law clerk gathered these questionnaires and made copies which were distributed to counsel. My experience was that this process saved little, if any, time and I conclude that one hour is an irreducible time, for selecting a twelve member jury. With three peremptory challenges per side, at least eighteen jurors must be examined, and, more likely approximately twenty. One hour voir dire allows only about three minutes examination per juror. Thus, jury selection is not a place to look for much time savings in a SJT.

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12. I was the trial judge pursuant to 28 U.S.C. § 636(c) (1988).

13. The Advisory Committee of the Rules of Civil Procedure has recommended a rule that would, in most cases, permit counsel to participate in voir dire. This proposal has not yet been acted upon by the Judicial Conference.

Having also selected six person civil juries, I know that it takes about forty-five minutes to do so as the process is done in this judicial district.

14. Judge Lambros advocates this as normal procedure in a SJT. Lambros, *supra* note 2, at 470.

*C. Structuring The SJT*

The elements of the SJT are:

1. Jury Selection
2. Brief Preliminary Jury Instructions
3. Morning Recess
4. Plaintiff's Opening Statement
5. Defendant's Opening Statement
6. Lunch Recess
7. Plaintiff's Presentation
8. Defendant's Presentation
9. Plaintiff's Rebuttal
10. Afternoon Recess
11. Jury Instructions
12. Jury Deliberation
13. Jury Verdict and Critique

In many, if not most, federal judicial districts, the jury reports to the jury clerk at 9:00 a.m.<sup>15</sup> for processing and orientation.<sup>16</sup> Typically, they are not available for the court until 10:00 a.m. With these parameters, a one day SJT might have the following timetable:

One Day SJT

- 10:00 - 11:00 - Jury Selection<sup>17</sup>  
 11:00 - 11:15 - Brief Preliminary Jury Instructions  
 11:15 - 11:30 - Morning Recess  
 11:30 - 11:45 - Plaintiff's Opening Statement  
 11:45 - 12:00 - Defendant's Opening Statement<sup>18</sup>  
 12:00 - 1:00 - Lunch Recess  
 1:00 - 2:00 - Plaintiff's Presentation  
 2:00 - 3:15 - Defendant's Presentation  
 3:15 - 3:30 - Plaintiff's Rebuttal  
 3:30 - 3:45 - Afternoon Recess

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15. In some judicial districts, this time might be advanced; however, if there is much travel time required for jurors it might well be a burden to do so, particularly during winter months with adverse weather and fewer daylight hours.

16. This orientation might well be altered for those jurors who will participate in the SJT to explain the process.

17. As noted in the preceding section, a six person jury could be selected in about forty-five minutes and the resulting fifteen minute time saving could be allocated elsewhere, possibly in jury verdict critique.

18. It is desirable for each side to have an opportunity for an opening statement before the lunch recess.



- 3:45 - 4:15 - Jury Instructions
- 4:15 - 5:00 - Jury Deliberations
- 5:00 - 5:30 - Jury Verdict and Critique

This timetable would allow an hour and a half per side for opening statements and presentations. The opening statements could be shortened to fifteen minutes per side, advancing the lunch recess and increasing the afternoon presentations. Note that except for the times for the presentations, *the times for all the remaining parts of the SJT are irreducible!* The jury must have a fifteen minute morning recess and afternoon recess. In most locations an hour is needed for the jury to go outside the courthouse, have lunch and return. The jury selection and instructions cannot be much abbreviated over those times allowed here. This means that if the attorneys want longer than an hour and a half for their presentations, the procedure will last later than 5:30 p.m. or go into a second day.

As noted earlier, I have no problem with taking a second day for the procedure as many cases require it. A timetable for a longer SJT, appropriate in a more complicated case, allowing two hours and fifteen minutes per side for presentations would be:

### Two Day SJT

#### First Day

- 10:00 - 11:00 - Jury Selection
- 11:00 - 11:15 - Brief Preliminary Jury Instructions
- 11:15 - 11:30 - Morning Recess
- 11:30 - 12:00 - Plaintiff's Opening Statement
- 12:00 - 12:30 - Defendant's Opening Statement
- 12:30 - 1:30 - Lunch Recess
- 1:30 - 3:00 - Plaintiff's Presentation
- 3:00 - 3:30 - Defendant's Presentation
- 3:30 - 3:45 - Afternoon Recess
- 3:45 - 5:00 - Defendant's Presentation
- 5:00 - 5:15 - Plaintiff's Rebuttal
- 5:15 - Day One Adjournment

#### Second Day

- 9:00 - 9:30 - Jury Instructions
- 9:30 - 10:30 (or later)- Jury Deliberations
- 10:30 (or later) - Jury Verdict and Critique

The problem with allowing longer than two hours and fifteen minutes per side for presentations is that part of the presentations would have to be given the second day. I feel that it is desirable from a flow standpoint to conclude the presentations the first day and reserve the second for instructions, deliberations and

critique. If the presentations do go into a second day, the defendant should be given some time the second day as well as the plaintiff.

#### *D. Conducting the SJT*

If the SJT has been properly planned and pretried, it should go smoothly, with no interruptions for objections or otherwise. It is important that the agreed time frame be followed carefully. A clerk or law clerk should be the time keeper and give signals to counsel of time remaining, as in a moot court argument.

Wise counsel will plan their presentations to include "props" such as charts, real evidence, slides and the like knowing that a speech lasting two hours or so will surely put a jury to sleep, no matter how skilled the orator. One SJT that I tried involved insulation used in modular homes. Counsel in that case used a mock-up of an installation, showing its insulation product, to keep the jury's interest. Another showed a film of how the product was made and used. Disputes about the use of such materials should be decided at the SJT Pretrial.

Probably, the foremost criticism of the SJT procedure is that it does not permit the jury to hear the testimony of a party or witness. Thus, if an attorney finds the SJT results to be very unfavorable, that attorney might rationalize away the SJT's verdict by saying that the trial jury will surely hold differently because his or her client or expert witness is so credible that they will persuade the jury. For this reason, I strongly advocate allowing counsel to use, as part of their presentation, excerpts of video depositions. It would be a mistake to allow the calling of live witnesses because there would be inadequate control over the content of their testimony and because it would be difficult for it to be sufficiently compressed.

The use of these video depositions would be subject to the same rule of completeness under Rule 32(a)(4)<sup>19</sup> as the use of depositions at trial.<sup>20</sup> Obviously, opposing counsel could show other portions of the video deposition, such as cross-examination. Such showings would count on the total time of the attorney presenting it.

#### *E. Instructing the Summary Jury*

Most experienced trial lawyers, judges and even jurors, would agree that the typical set of jury instructions are designed not so much for the jury's benefit as for the appellate court's! Case law over the years has resulted in many instructions that we all recognize to be difficult for an average juror to decipher. Ordinarily, the SJT, as a settlement procedure, is not recorded. In any event, it certainly will not be appealed. This creates an opportunity for the judge to be

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19. FED. R. CIV. P. 32(a)(4).

20. FED. R. CIV. P. 32. Of course, Rule 32(a) requirements of unavailability of the deponent would not apply.

succinct and to use plain terms in instructing the jury.<sup>21</sup> One should be cautious in making too great a departure from the trial jury instructions, however, because of the overriding interest in making the procedures as similar as possible to foster the credibility of the SJT verdict. At a minimum, the jury instructions for the SJT procedure can be abbreviated over those for the full trial.

### F. Mediating Settlement

While the summary jury is deliberating, the judge should confer with counsel, *ex parte* and *seriatim*, to mediate settlement, pointing out that if the summary jury returns a verdict adverse to that party his or her settlement value will change materially.<sup>22</sup> I was able to persuade the parties in one case to settle just as the summary jury was knocking on the jury room doors to indicate it had reached a verdict. If little progress is made towards the same settlement figure by both sides, the judge might explore the possibility that the parties would agree on a "high-low", or bracketed settlement, using the summary jury verdict figure for settlement between the brackets. That is, the defendant would agree to pay a minimum amount, the "low", even if the summary jury returned a lower amount or found no liability and the plaintiff would agree to accept a maximum amount, the "high", even if the summary jury returned a higher verdict. Also, the parties might simply agree to be bound by the summary jury verdict. By one device or the other, the chances should be good for agreement on a settlement formula during the summary jury deliberations.

### G. The Summary Jury Verdict and Critique

One technique, sometimes used by Judge Lambros, is to divide a twelve person summary jury into two six person panels and have them deliberate separately and return separate verdicts. His rationale is that if jurors returned the same or similar verdicts, those verdicts would be very strong. On the other hand, if they returned very different verdicts, that would be a message to both sides that a future jury might view their positions unfavorably.

If, after a reasonable amount of time under the timetables set out above in Section C, the summary jury has not reached a verdict, they can be called in and told to return two, or more verdicts, disclosing how many voted for each. This result might also provide enlightening information to parties and counsel.

After the summary jury returns its verdict, the counsel and perhaps even the parties, should be allowed to question the panel, in a non-hostile fashion, about why they reached the verdict they did and how they viewed particular portions of the evidence. This education may be useful to the court and the parties in further settlement negotiations based on the work of the summary jury.

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21. The opportunity was one that I found irresistible in one trial, to the shock and dismay of my law clerk who had labored for days on a perfect set of instructions.

22. This shall not apply if the judge is also the trial judge. See *supra* Section A.

## VI. CONCLUSION

The bench and bar is indebted to Judge Lambros for developing the summary jury trial because it promotes settlement in a class of cases that are not likely to settle by other methods. In using this procedure, however, it is important to tailor it to the practices of the local court and to the specific needs of the case. I agree this article will assist in that effort.

