

Spring 1993

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Recommended Citation

Molly M. McNamara, *Summary Jury Trials: Is There Authority for Federal Judges to Impanel Summary Jurors?*, 27 Val. U. L. Rev. 461 (1993).

Available at: <https://scholar.valpo.edu/vulr/vol27/iss2/6>

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SUMMARY JURY TRIALS: IS THERE AUTHORITY FOR FEDERAL JUDGES TO IMPANEL SUMMARY JURORS?

I. INTRODUCTION

The Federal Rules of Civil Procedure guarantee a “just, speedy, and inexpensive determination of every action”¹ for all litigants in the United States federal courts. Yet, the United States has become an increasingly litigious society, making the guarantee of a just and speedy trial difficult for the federal courts to uphold.² Although scholars disagree as to the cause of America’s increased litigation,³ none deny that this increase has created a severe backlog problem in the federal court system.⁴ In an effort to alleviate the backlog problem, scholars and judges have proposed solutions such as the use of magistrates,⁵ pretrial conferences,⁶ and the creation of additional judgeships.⁷

1. FED. R. CIV. P. 1 states: “These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.”

2. Chief Justice Warren Burger has stated:

One reason our courts have become overburdened is that Americans are increasingly turning to courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal “entitlements.” The courts have been expected to fill the void created by the decline of family, and neighborhood unity.

Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). One commentator has estimated that by the year 2000, federal appellate courts will decide one million cases. John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975); cf. Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111 (1976).

3. See Burger, *supra* note 2, at 274. But see Richard A. Posner, *The Summary Jury Trial and Other Methods of Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 389 (1986) (arguing that federal courts are overutilized, a problem that could be solved by increasing the minimum amount in controversy in diversity cases, increasing filing fees, or increasing state courts’ legal responsibilities).

4. In 1990, 258,961 civil and criminal cases were filed, 55,000 more cases than were filed in 1989. Civil filings have decreased 24% since the 1985 high of 278,778. 211,626 civil cases were filed in U.S. district courts in 1990. While total civil filings have declined, filings of complex cases such as civil rights suits and labor suits have continued to increase. Fewer civil cases were terminated in 1990, down six percent to 212,497. Despite the decline in total pending cases, the number of cases pending three years or more has climbed eight percent, from 25,222 to 27,254, since 1989. Administrative Office of the United States Courts, *Federal Judicial Workload Statistics*, Dec. 31, 1990, at 3-6.

5. See 28 U.S.C.A. § 631-39 (West 1968 & Supp. 1991) (providing for the appointment, use, compensation, and jurisdiction of United States Magistrates).

6. FED. R. CIV. P. 16. “Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage

More radical proposals argue for the elimination of both diversity jurisdiction and jury trials.⁸ The diverse solutions proposed to remedy the backlog problem are not limited to the litigation phase.⁹

In 1983, the Federal Rules of Civil Procedure were amended to provide for increased judicial involvement in the pretrial phase of litigation and to encourage settlement through the use of extrajudicial and alternative dispute resolution (ADR) methods.¹⁰ ADR can take the form of mediation, negotiation, or arbitration.¹¹ One particularly effective, yet controversial, method of ADR is the Summary Jury Trial (SJT).¹²

The summary jury trial is a pretrial settlement technique that serves as a catalyst for settlement negotiations.¹³ The SJT is a brief procedure in which

in the litigation as possible." FED. R. CIV. P. 16 advisory committee's note.

7. See 28 U.S.C.A. § 133 (West 1968 & Supp. 1991) (providing for the appointment and number of United States District Court Judges).

8. Posner, *supra* note 3, at 389 (arguing that federal courts are overutilized and that lasting reforms can be achieved only by increasing the amount in controversy and increasing the filing fees). *But cf.* Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 44 (1980) (arguing that eliminating diversity jurisdiction and jury trials will ruin valuable aspects of the United States judicial system).

9. See *infra* notes 14-24 and accompanying text (discussing pretrial settlement, particularly the summary jury trial).

10. 1985 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY. Easing the courts' loaded dockets is not the only reason for using ADR. As Justice Brennan stated:

A case settled is a case best disposed of because then one of the parties certainly avoids the heartache of losing at trial. Settlements are voluntary, consensual and not coerced and when the terms are understood by the parties, settlements are preferred to adjudication. If this premise is accepted, the basic purpose of our courts is best accomplished by assuring that lawyers are prepared to settle the case.

DISPUTE RESOLUTION DEVICES IN A DEMOCRATIC SOCIETY, 6 (Roscoe Pound Foundation) [hereinafter DISPUTE RESOLUTION DEVICES].

11. FED. R. CIV. P. 16 advisory committee's note. "In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse." *Id.*

12. This note will focus on SJT as a method of dispute resolution. Explanation of other types of alternative dispute resolution is beyond the scope of this note. For an overview of other types of ADR, see WAYNE BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT, A HANDBOOK FOR LAWYERS AND JUDGES 15-88 (1982); A. Leo Levin & Deirdre Golash, *Alternative Methods of Dispute Resolution, an Overview*, 37 U. FLA. L. REV. 1 (1985).

13. See William E. Craco, Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REVIEW 483, 494-95 (1988). Conflict exists as to whether SJT is designed to foster settlement by ensuring that settlement negotiations are based on a realistic expectation of the litigants' chances of success at trial or whether SJT is itself settlement negotiations. See *United States v. Kentucky Utilities Co.*, 124 F.R.D. 146, 153 n.7 (E.D. Ky. 1989); *cf.* Craco, *supra*. The author believes this distinction is merely semantic. The determination depends on the outcome of the SJT. If the parties accept the jury's verdict, the SJT is a settlement negotiation. If the parties settle independently, or fail to settle after the SJT, it is a

counsel present abbreviated versions of their cases to the jury.¹⁴ After considering the arguments and evidence presented, the jury returns a nonbinding verdict.¹⁵ The SJT brings litigants closer together—in terms of the value of the claims—so that they can then engage in meaningful settlement negotiations.¹⁶ If, following SJT, negotiations do not result in settlement, the parties proceed to a full de novo trial.¹⁷

In 1980, Federal Judge Thomas D. Lambros, of the U.S. District Court for the Northern District of Ohio, created SJT¹⁸ in a products liability claim.¹⁹ Summary jury trial is often perceived as only being effective for single party actions²⁰ involving basic theories for recovery, such as negligence.²¹ However, SJT is successfully used in multi-party actions involving complex legal issues, such as toxic torts.²² Parties have used SJT to settle actions involving a variety of legal theories, including products liability, toxic tort, negligence, contract, personal injury, age, gender and race discrimination, admiralty, and antitrust.²³

device to foster settlement.

14. See *infra* notes 56-62 and accompanying text (discussing the SJT proceeding).

15. See *infra* note 61.

16. See *supra* note 13 (discussing the purpose of SJT).

17. See *infra* note 99. Judge Lambros hoped that SJT would provide an alternative to the drastic measures proposed to decrease federal court backlog. See *supra* note 8. Instead of eliminating the participation of the general public in the judicial process, SJT allows the lay public to participate while providing federal courts with a means to accommodate diversity cases. Lambros & Shunk, *supra* note 8, at 45. See Judicial Conference of the Sixth Circuit of the United States, The Summary Jury Trial, May 16, 1985, app. C at 7 [hereinafter 6th Circuit Conference] (arguing that if alternatives such as SJT are not adopted, the right to a jury trial will be lost as courts become so inundated with trial backlog that it becomes impossible to dispose of cases). But see Posner, *supra* note 3, at 388 (arguing that SJT is unlikely to affect the settlement rate).

18. Lambros & Shunk, *supra* note 8, at 43 n.1.

19. JUDGE THOMAS D. LAMBROS, THE SUMMARY JURY TRIAL AND OTHER ALTERNATIVE METHODS OF DISPUTE RESOLUTION: A REP. TO THE JUDICIAL CONF. OF THE UNITED STATES COMM. ON THE OPERATION OF THE JURY SYSTEM, 103 F.R.D. 461 (1984) [hereinafter SJT REPORT].

20. M. DANIEL JACOUBOVITCH & CARL M. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO 32 (Federal Judicial Center 1982) (recommending that a narrow profile of cases suitable to SJT treatment be formulated and suggesting that only single-plaintiff/single-defendant cases be included in the profile despite the partial success of SJT in multiparty actions); cf. 6th Circuit Conference, *supra* note 17, at 14-19, app. A addendum I (reporting that SJT has been successful in multiparty asbestos cases).

21. See SJT REPORT, *supra* note 19, at 463 (reasoning that uncertainty of how a jury perceives damages often arises in cases involving a "reasonable" standard, such as in personal injury and negligence cases).

22. See *infra* note 30 (discussing the groundwater contamination case over which Judge Ensler presided). See generally 6th Circuit Conference, *supra* note 17, at app. A, addendum I (discussing Judge Lambros' success in conducting SJT in asbestos cases in clusters of 10 cases per SJT).

23. See SJT REPORT, *supra* note 19, at 472.

Flexibility is the key factor for selecting cases for SJT.²⁴ One purpose of SJT is to dispose of potentially lengthy²⁵ cases that should settle, but do not because the litigants fail to objectively consider the strengths and weaknesses of their cases.²⁶ Generally, SJT is used when the litigants' refusal to settle is based on differing expectations of jury evaluation of the evidence.²⁷ Because a jury hears, evaluates, and actually returns a verdict based on evidence presented at the SJT, the process can provide insight into the decision of a jury

24. JACUBOVITCH & MOORE, *supra* note 20, at 3. No solid criteria exist for selecting cases for SJT. Judge Lambros has stated that SJT is suitable for any case in which a jury trial has been requested, discovery has been completed, and all other pretrial procedures have been exhausted. *Id.* Another commentator has stated that there is no pattern of cases best suited for SJT, but SJT is used whenever the judge believes a jury's verdict would prompt resolution. Hugh W. Brenneman, Jr. & Edward Wesoloski, *Blueprint for a Summary Jury Trial*, MICH. B. J., Sept. 1986, at 888 [hereinafter *Blueprint*]. Judge Enslin, of the U.S. District Court for the Western District of Michigan, uses three criteria for selecting cases for SJT: 1) similar competence level of attorneys for both sides, 2) genuine dispute as to the monetary value of the case, and 3) a day in court might be cathartic for the parties. Clifford J. Zatz, *Toxic Tort Case Unlikely to Have Settled Without Summary Jury Trial*, *Lawyer Says*, in ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 107, 108 (Martha A. Matthews ed., 1990) [hereinafter Zatz]. These three different approaches evidence the discretion judges have in determining which cases are suitable for SJT.

25. *See infra* note 29. "Most agree . . . that summary jury trials should be reserved for cases that are likely to take more than a few days to try." D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 15 (Federal Judicial Center 1986) [hereinafter SETTLEMENT STRATEGIES]; *see* Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill.) (noting that a five to six-week trial was scheduled for a two-day SJT), *vacated* 838 F.2d 884 (7th Cir. 1987); McKay v. Ashland Oil Co., 120 F.R.D. 43 (E.D. Ky. 1988) (noting that a six-week trial was scheduled for a five-day SJT); "Courts typically convene summary jury trials where there has been a jury demand in a protracted case which relies heavily on circumstantial evidence as opposed to those cases where the credibility of witnesses is paramount." Nina J. Spiegel, *Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed*, 16 PEPP. L. REV. S251, S255 (1989).

26. Lambros & Shunk, *supra* note 8, at 46 (reasoning that where recovery hinges on jurors' perception as to liability and damages, SJT is valuable because it will provide a jury's perception as to the outcome without affecting the parties' right to a full trial). David Ranil, *Summary Jury Trials Gain Favor: New Spurs to Settlement*, NAT'L L.J., June 10, 1985, at 1. A major impediment to out-of-court settlements is that attorneys and their clients are unable to realistically assess the value of their cases. *Id.* Many times lawyers cannot assess the fair settlement value of a case because they lose their objectivity. Their evaluations are often based on hopes and expectations rather than on the actual strengths and weaknesses of their cases. *Id.* Another reason why cases fail to settle is that opposing sides are unwilling to discuss settlement. *See* John H. Wilkinson, *ADR is Increasingly Effective, Averts Litigation in Many Cases*, NAT'L L.J., April 4, 1988, at 22 (explaining that a case that was believed by both sides to be unsettleable was settled because the SJT compelled participants to communicate).

27. SJT REPORT, *supra* note 19, at 463. "If only parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury *would* do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full trial." *Id.* (emphasis in original).

and thereby promote settlement negotiations.²⁸ Settling these potentially lengthy cases allows more efficient adjudication of the remaining docket.²⁹ Many judges who have employed SJT agree that it conserves a significant amount of both the court's time and resources.³⁰

The parties' voluntary use of SJT as a settlement device is well accepted by both judges and commentators.³¹ Concerns remain, however,³² about judicial

28. SJT weakens the optimism that parties feel about their cases by providing the parties with more information prior to trial. See Charles F. Webber, *Mandatory Summary Jury Trial: Playing By the Rules?*, 56 U. CHI. L. REV. 1495, 1496 (1989); SJT leads to settlements that satisfy both parties by making both sides aware of the strengths and weaknesses of their case. See Craco, *supra* note 13, at 488.

29. "When courts provide consensual alternatives for certain categories of disputes, they reduce the length of conflicts, prevent unnecessary adjudication, and hasten disposition of other cases that require adversarial resolution." Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086, 1093 (1990). "By avoiding trial, mandatory mediation and SJT make more time available for cases that most merit consideration by traditional courts, such as those that involve constitutional issues or important new issues of law." *Id.* at n.55. See, e.g., Hon. Richard A. Enslin, *Federal Judge Says Summary Jury Trial Can Help Settlement in Toxic Tort Cases*, in ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 105 (Martha A. Matthews ed., 1990) (A "gigantic" groundwater contamination case settled for \$3.5 million after a three-day SJT. It was estimated that a full trial would have taken 9-14 months. Prior to the SJT, defendants had over 60 witnesses, had 2 full-time attorneys, and had spent \$2.5 million on discovery). Questions remain as to whether SJT actually reduces the number of cases tried. See Posner, *supra* note 3, at 388-89 (arguing that SJT is not likely to affect the settlement rate). If SJT settles some cases that otherwise would be tried, other cases will advance on the docket, judges will put less pressure on those parties to settle, and refer fewer cases to magistrates. There still will be the same number of trials. *Id.* But cf. 6th Circuit Conference, *supra* note 17, app. C at 299 (stating that SJT settled a 10-year-old Daiflon antitrust case that had gone through a full trial, had been to the 10th Circuit Court of Appeals twice, and had been to the United States Supreme Court once). SJT makes it less time-consuming for parties in potentially protracted cases to reach the courthouse doors. 6th Circuit Conference, *supra* note 17, app. C at 2 (implementing the SJT procedure increased the settlement rate in the Western District of Oklahoma from 84% to 96% and decreased the time from filing to disposition from six-months to five-months, during a period in which filings had doubled).

30. Honorable Arthur Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 834 (1986) (eight summary jury trials saved 102 trial days of a 200 trial day year); District Judge Bertelsman "used the time saved to work six days a week instead of seven for awhile, perhaps saving [him] from a heart attack." *McKay v. Ashland Oil Co.*, 120 F.R.D. 43, 49 n.19 (E.D. Ky. 1988); SJT REPORT, *supra* note 19 at 500-09 apps. G-J (letters explaining judges' successful experiences with SJT).

31. *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987) (holding that mandatory SJT is inappropriate, but if engaged in with the consent of both parties, it is authorized); Bobby M. Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 TEMP. L.Q. 799, 815 (1990) (stating that courts have authority to convene consensual SJT). But cf. Posner, *supra* note 3, at 835 (stating that he is uncertain Congress has authorized SJT).

32. See, e.g., *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1987). See *infra* notes 105-170 and accompanying text.

authority to mandate participation in SJT.³³ While no express statutory authority compels participation in SJT, proponents of the procedure argue that Federal Rule of Civil Procedure 16,³⁴ read in light of Rule 1,³⁵ provides the authority to mandate SJT participation.³⁶ The Court of Appeals for the Seventh Circuit has found no express or implicit statutory authority for judges to mandate SJT.³⁷

Concern also remains about judicial authority to impanel jurors for SJT.³⁸ Judge Battisti, of the U.S. District Court for the Northern District of Ohio, for example, finds no authority to use jurors from the regular jury pool as summary jurors and holds that the Jury Selection and Service Act of 1968 does not authorize this practice.³⁹ Proponents of SJT argue that the summary jury is similar to the advisory jury provided for in Federal Rule of Civil Procedure

33. See generally, Posner, *supra* note 3, at 385-86 (reasoning that the 1983 amendments authorize the discussion—not implementation—at the pretrial conferences of extrajudicial procedures and arguing that SJT is not an extrajudicial procedure); Gerald L. Maatman, Jr., *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455, 471-72 (1988) (arguing that Rule 16 is intended to be noncoercive and, to the extent that mandatory SJT interferes with a party's determination of settlement techniques, a court exceeds the scope of its case management power under Rule 16); N. Spiegel, *supra* note 25, at S259 (arguing that SJT is not a conference within the meaning of Rule 16, but a procedure far more intrusive than a conference because it requires parties to reveal their trial strategy); Webber, *supra* note 28, at 1495 (reasoning that because one party will use the SJT verdict to put a monetary value on the action, the SJT is more than a discussion about settlement negotiations, the SJT is itself a settlement negotiation beyond the scope of Rule 16).

34. FED. R. CIV. P. 16(a)(1) and (5); (c)(7) and (11) state 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. . . .

(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; . . . (11) [or] such other matters as may aid in the disposition of the action.

35. FED. R. CIV. P. 1; see *supra* note 1.

36. Judge Lambros initially relied on Rule 16(a)(1) and (5), read in light of Rule 1, and on the court's inherent power to manage and control its docket for authorization to conduct SJT. Lambros & Shunk, *supra* note 8, at 51 (asserting that although not expressly authorized by the rules, SJT is squarely grounded in the rules both technically and in spirit). After the 1983 amendments to Rule 16, proponents for SJT based the judge's authority to compel participation in SJT on Rule 16(c)(7) and (11). SJT REPORT, *supra* note 19, at 469. Judge Lambros recognized that Rule 16(c)(7) and (11) merely recommended that settlement be discussed, suggesting that while Rule 16 might authorize consensual use of SJT, it did not provide for its mandatory use. *Id.*

37. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987) (holding that there is no legislative authority for mandatory SJT).

38. Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990).

39. *Id.* at 508; see 28 U.S.C.A. § 1861 (West 1966 & Supp. 1991); see *infra* notes 156-58.

39(c).⁴⁰ This is a poor analogy, however, given the history and spirit of that rule.⁴¹ Because SJT utilizes a judge and jury, it resembles an actual trial and therefore gives the parties confidence and faith that their case is being tried fairly and impartially, and that the verdict is similar to one they would receive at a full trial.⁴² The presence of the jury distinguishes SJT from other forms of ADR, and thus express statutory authority to impanel a jury for SJT is necessary.

This Note argues that federal judges currently lack express statutory authority to impanel jurors for voluntary SJT proceedings. Part II of this Note discusses the development of the SJT procedure by focusing on Judge Lambros' model for SJT.⁴³ Part III addresses the current status⁴⁴ of SJT by considering the decisions of *Strandell v. Jackson County*⁴⁵ and *McKay v. Ashland Oil, Inc.*⁴⁶ These cases best illustrate the split between the Sixth and Seventh Circuits on whether judges can mandate the use of SJT. Part III also discusses whether courts have legislative authority to impanel jurors for SJT and concludes that federal judges lack express authority to do so.⁴⁷ Part IV compares the advantages and disadvantages in the use of regular jurors⁴⁸ for SJT.⁴⁹ Finally, Part V asserts that employing regular jurors as summary jurors is a permissible method when invoking a voluntary SJT procedure, but that the Federal Rules of Civil Procedure should be amended to provide express authority for impanelling SJT jurors in a voluntary SJT.

40. Lambros & Shunk, *supra* note 8, at 52 (stating that the idea behind SJT is similar to an advisory jury); Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1367 (1984) [hereinafter *Judge's Role*] (stating that the concept of SJT is analogous to the advisory jury proceeding that is authorized by Rule 39(c)).

41. See *infra* notes 187-93 (discussing the origin in equity of Rule 39(c)).

42. *Judge's Role*, *supra* note 40, at 1367 (arguing that because SJT resembles a full trial, it is a successful means of dispute resolution, given the public's continued confidence in the judiciary).

43. See *infra* notes 50-104 and accompanying text (discussing the development of SJT and its variant forms).

44. See *infra* notes 108-52 and accompanying text (discussing the current status of SJT in federal courts).

45. 115 F.R.D. 333 (S.D. Ill.), *vacated*, 838 F.2d 884 (7th Cir. 1987).

46. 120 F.R.D. 43 (E.D. Ky. 1988) (stating that the court finds itself in respectful disagreement with the 7th Circuit on inherent powers and Federal Rules allowing for mandatory SJT).

47. See *infra* notes 155-97 and accompanying text (discussing the theories advanced for impanelling SJT jurors).

48. Throughout this note, the term 'regular juror' will be used to indicate a petit juror selected to serve on a jury for a full jury trial pursuant to 28 U.S.C.A. § 1861 (West 1966 & Supp. 1991).

49. See *infra* notes 198-223 and accompanying text (discussing the advantages and disadvantages of SJT in general and the use of regular jurors for SJT).

II. DEVELOPMENT OF THE SUMMARY JURY TRIAL

The summary jury trial was developed in 1980 by Judge Thomas D. Lambros for the Northern District of Ohio,⁵⁰ after he presided over two cases that he felt should have been settled rather than tried.⁵¹ Summary jury trial was first used in a products liability case concerning a defective football helmet.⁵² In that case, the court held an SJT after other pretrial procedures had failed to produce a settlement.⁵³ When the court finally used SJT, the parties settled the case without a costly and lengthy trial.⁵⁴

According to Judge Lambros' model,⁵⁵ SJT is a half-day procedure⁵⁶ in which counsel for each side, with the parties present,⁵⁷ each have one hour⁵⁸

50. Lambros & Shunk, *supra* note 8, at 43 n.1.

51. SJT REPORT, *supra* note 19, at 463 (explaining that Judge Lambros conceived the SJT idea while trying a Federal Employers' Liability Act (FELA) case and a diversity automobile accident case, both of which he thought should have settled prior to trial but did not because the parties for both sides thought they could obtain a more favorable resolution from a jury than from their pretrial settlement negotiations).

52. *Id.*

53. *Id.*

54. *Id.* (stating that the SJT was held only after all possible pretrial settlement techniques had failed and explaining that SJT is to be used as the final alternative before a full trial).

55. For the purposes of this note, Judge Lambros' model will be used to discuss the process because it is the general model from which other jurisdictions have made modifications.

56. Jurisdictions using the SJT procedure differ on how long the presentations will last. According to Judge Lambros' model, an SJT lasts one-half day. SJT REPORT, *supra* note 19, at 469. In the Western District of Michigan, judges are committed to allowing the attorneys one hour each to present their cases.

Attorneys often feel that one hour is not enough time to present a case in its entirety.

The economical use of our time is a necessity, however, if we are to comfortably complete the entire procedure, including the jury's deliberations, within a single day.

There really are few cases, properly organized, that cannot be summarized in 60 minutes.

Blueprint, *supra* note 24, at 891. But in 1990, the average SJT lasted one to two days. Anne C. Morgan, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Courts: Strandell v. Jackson County*, 40 CASE W. RES. L. REV. 491, 494 (1990). Even in the Western District of Michigan, the procedure has been modified to provide for longer presentations. Judge Enslin conducted an SJT in a groundwater contamination case that lasted three days. Enslin, *supra* note 29, at 105. One of the attorneys that participated in the groundwater contamination SJT, while finding the procedure advantageous, suggested that the SJT procedure should be extended to four to five days. Zatz, *supra* note 24, at 112.

57. SJT REPORT, *supra* note 19, at 470 (explaining that because SJT is performed for its effect on the litigants, clients are expected to attend the SJT unless they have previously sought leave of court excusing them from attendance). Most judges conducting SJTs require that the parties be present for the SJT. The presence of the parties is so important to one judge that his court has gone so far as to issue "writs of habeas corpus to obtain the presence of plaintiffs confined in institutions" *Blueprint*, *supra* note 24, at 489-90. In one instance, the defendant was a Norwegian cruise ship line, and the settlement had to be personally approved by the company's director; at the court's

to present their cases⁵⁹ to a six-person jury.⁶⁰ The SJT verdict is nonbinding unless the parties agree to be bound by the verdict.⁶¹ The use of an impartial jury enables litigants to feel confident that their rights have been vindicated by an SJT proceeding.⁶² Although counsel may not call witnesses,⁶³ they may explain the expected testimony of the witnesses to the jurors.⁶⁴ Counsel may also produce exhibits.⁶⁵ Because the SJT is less formal than a full trial, neither the rules of evidence nor the rules of procedure apply.⁶⁶ Also, because of time

direction, a director flew from Europe to attend the SJT. *Id.* But cf. N. Spiegel, *supra* note 25, at S251 n.17 (asserting that defects in a case are easy to determine without the aid of adversaries).

58. See *supra* note 29. Depending on the complexity of the case, some judges allow for longer presentations. See, e.g., Enslin, *supra* note 29, at 105 (discussing a groundwater contamination case in which the plaintiff was allowed a six-hour presentation and defendant was allowed a five-hour presentation).

59. Generally, during the SJT proceeding, only the attorney is allowed to make the presentation, but Judge Enslin allows the parties or expert witnesses to speak to the jury at the attorney's discretion. *SJT, "Mediation," and Mini-Trials in Federal Court: An Interview with Judge Richard A. Enslin*, ALTERNATIVES TO THE HIGH COST OF LITIG., Oct. 1984, at 6 [hereinafter *Interview*].

60. The number of jurors used in SJT has also been modified. Judge John McNaught, U.S. District Court for the District of Massachusetts, uses a five-person jury to assure that the jury will not return a tie verdict. Judge Lucius Bunton, of the U.S. District Court for the Western District of Texas, reported using a three-person jury. SETTLEMENT STRATEGIES, *supra* note 25, at 73 n.184. Judge Lambros has used multiple jury panels in asbestos SJTs. *Id.* at 70 n.174; 6th Circuit Conference, *supra* note 17, app. A addendum I at 5 (explaining that Judge Lambros used two jury panels to ascertain areas of consistency in the verdicts and to determine whether asbestos cases would follow a particular pattern). Judge Enslin used two panels of six jurors in the groundwater contamination SJT. Enslin, *supra* note 29, at 105.

61. Lambros & Shunk, *supra* note 8, at 43 (stating that the parties may agree in advance to be bound by a unanimous verdict; otherwise, the verdict is purely advisory).

62. N. Spiegel, *supra* note 25, at S254.

63. Craco, *supra* note 13, at 487 (explaining that the exclusion of live witnesses saves time). Without live witnesses, no cross-examination occurs, which may pose serious problems in determining credibility. See *infra* notes 175-79 and accompanying text. But see *infra* note 117 (stating that a scheduled SJT allowed for a limited number of live witnesses). One SJT, in which witness credibility was an issue, attempted to alleviate the problem by allowing the parties to present videotape testimony. See Enslin, *supra* note 29, at 105; for a discussion of the preparation and contents of the parties' videotapes, see Zatz, *supra* note 24, at 108-09.

64. The attorney may read depositions, read affidavits, or tell the summary jury that he has spoken to the witness to ascertain the witness' testimony. SJT REPORT, *supra* note 19, at 471; see also A. Spiegel, *supra* note 30, at 831 (explaining that attorneys may read from depositions, interrogatories, or other documentary evidence, but that no testimony may be mentioned unless the reference is based on discovery or a sworn statement).

65. SJT REPORT, *supra* note 19, at 483 (explaining that because evidentiary and procedural rules are few and flexible, attorneys are free to adduce exhibits for the jury).

66. *Id.* (reasoning that because the SJT is nonbinding, there is no need for strict evidentiary or procedural rules).

constraints, objections are discouraged.⁶⁷

The case must be substantially ready for trial before the judge conducts an SJT.⁶⁸ The parties should have completed discovery and the judge should have heard all motions prior to the proceeding.⁶⁹ Not later than three days before the scheduled SJT, counsel for both parties must submit trial briefs and proposed jury instructions.⁷⁰

On the day of the SJT, a jury panel of ten members is selected from the regular jury pool.⁷¹ The judge gives potential jurors a brief description of the nature of the case, the parties, and the attorneys.⁷² The potential jurors fill out short questionnaires that the judge and counsel then use during voir dire.⁷³ The

67. *Id.* at 470-71. "Although the court discourages objections during the proceeding, it will entertain an objection if counsel oversteps the bounds of propriety." Robert Y. Gwin, *Summary Jury Trial: An Explanation and Analysis*, 52 KY. BENCH & B. 16, 17 (1988); *cf. Interview, supra* note 59, at 6 (explaining that Judge Enslin does not allow objections but tells the attorneys that if they make false or misleading factual representations to the jury, he will give the nonoffending party an extra 10 minutes at the end of the presentation to explain to the jury how they were misled by the lawyer's false factual representation).

68. SJT REPORT, *supra* note 19, at 470 (reasoning that for SJT to be a truly successful and realistic prediction of the outcome of the case, "[d]iscovery must be complete and there must be no motions pending").

69. Magistrate Brennehan has the parties themselves determine what evidence will be allowed at the SJT so that the parties will be confident that the verdict is reliable. His experience reveals that most evidentiary disputes are settled by the parties so that the need for evidentiary pre-trial motions is slight. *Blueprint, supra* note 24, at 888-89.

We urge both sides to let their opponents "have their best shot" when deciding whether to allow evidence, on the premise that at a SJT an attorney is not only selling the jury on the merits of the case, but the other side as well. If the opponent does not feel that there has been a fair hearing, it is likely that the SJT verdict will be given little credence.

Id. at 889. If an evidentiary matter cannot be resolved by the parties, the judge will decide the issue on a motion in limine. *Id.*

70. SJT REPORT, *supra* note 19, at 470.

71. *Id.* See DISPUTE RESOLUTION DEVICES, *supra* note 10, at 3 (explaining that in conducting an SJT, the judge impanels a jury from the regular jury trial pool to hear counsel present abbreviated cases). Some courts separate the pool of summary jurors from the pool of regular jurors, but this is done after jury selection. *Interview, supra* note 59, at 7; *see also* A. Spiegel, *supra* note 30, at 830 (stating that jurors who participated in SJT are separated from the regular jury wheel).

72. SJT REPORT, *supra* note 19, at 470.

73. *Id.* The juror profile contains information pertaining to the potential jurors' personal knowledge of parties and attorneys in the case and any prejudicial attitudes that the potential jurors might have about issues in the case. 6th Circuit Conference, *supra* note 17, app. D at 298; in asbestos cases, the jurors fill out a more extensive questionnaire. *Id.* app. A addendum I at 5.

judge then asks questions during voir dire⁷⁴ that tend to indicate bias of potential jurors.⁷⁵ The proceeding allows counsel to exercise two peremptory challenges⁷⁶ each to the venire to reduce the panel to six jurors.⁷⁷

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."⁷⁸ 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.⁷⁹ 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

74. Voir dire for SJT is an informal "show of hands" type voir dire that rarely lasts more than fifteen minutes. Lambros & Shunk, *supra* note 8, at 47 n.20. This procedure can be modified depending on the nature of the case. Judge Enslin presided over a groundwater SJT that had a more extensive voir dire that lasted three to four hours. Enslin, *supra* note 29, at 105; *see also* 6th Circuit Conference, *supra* note 17, app. A addendum I at 5 (explaining that voir dire in asbestos cases was conducted like voir dire in a full trial).

75. Lambros & Shunk, *supra* note 8, at 48 (explaining that jurors signaling affirmative to certain questions, such as whether they have ever been in an automobile accident, will be questioned more closely to determine possible bias in an automobile accident case).

76. A. Spiegel, *supra* note 30, at 830; *cf.* 6th Circuit Conference, *supra* note 17, app. A addendum I at 5 (allowing for-cause challenges in asbestos cases).

77. A. Spiegel, *supra* note 30, at 830. *But see supra* note 60.

78. Lambros & Shunk, *supra* note 8, at 47. Although jurors are told the difference between the procedures, they are not told that their verdict is not binding on the parties. The jurors are also not told that they are in no way obligated to serve on the summary jury. The judge does not tell the jury that this is not a normal trial. The jurors are led to believe that they are performing regular jury service. 6th Circuit Conference, *supra* note 17, app. D at 298.

79. The practice regarding when, if ever, the jury is told its true function is not uniform. *See* Posner, *supra* note 3, at 386-87 (describing various methods district courts use to inform jurors of the nonbinding nature of their decisions and the potential problems this might create). "Most courts wait until after the jury reaches a verdict before informing them that their decision is non-binding. Many judges believe that the jury may not deliberate as diligently if they know they will render a non-binding verdict." Gwin, *supra* note 67, at 16. The Western District of Michigan also has decided not to tell the jurors of the nonbinding nature of the verdict until after the jury has returned.

One of the more difficult decisions we have made is in waiting until the verdict is returned to tell the jurors that the SJT is a non-binding procedure. Consequently, the jurors assume their verdict is final. While we have felt somewhat uncomfortable in not being totally candid with this experimental approach, both the attorneys and jurors have told us they approve of it.

Blueprint, *supra* note 24, at 890. *But cf.* A. Spiegel, *supra* note 30, at 830 (stating that Judge Spiegel's court follows the formalities of an actual trial to impress upon the jury the importance of the proceedings, but does not mislead the jury into believing that they are participating in a regular jury trial). *Cf. Recent Development—Procedure: Summary Jury Trials in United States District Court, Western District of Oklahoma*, 37 OKLA. L. REV. 214, 217 (1984) (stating that jurors are not informed that their verdict is nonbinding).

system.⁸⁰

Once the jury panel has been selected, the attorneys present their abbreviated cases,⁸¹ bringing forward the evidence most likely to be admitted at trial.⁸² Actual presentation of the abbreviated cases resembles closing arguments.⁸³ The attorneys combine factual representations with conjecture, argument, and persuasion.⁸⁴ No court reporter is present unless the parties have arranged for one.⁸⁵

At the close of the arguments, the judge verbally instructs the jury about both the law⁸⁶ and the proper completion of the verdict sheet.⁸⁷ The jury does

80. Posner, *supra* note 3, at 386 (expressing concern that the nonbinding nature of the SJT verdict will decrease incentives for jurors to perform well); see *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990); see *infra* notes 216-18 and accompanying text.

81. See *supra* notes 54-66. The time allotted each attorney can be divided to allow for rebuttal and closing arguments. SJT REPORT, *supra* note 19, at 471.

82. SJT REPORT, *supra* note 19, at 471 (explaining that although the rules of evidence do not apply to SJTs, factual representations must be based on discoverable materials such as depositions, documents, affidavits, etc); Lambros & Shunk, *supra* note 8, at 49. The first SJTs had no evidentiary rules, but it became apparent that attorneys could easily abuse this freedom by inventing or misrepresenting facts to bolster their argument. In later SJTs, facts represented by attorneys must have a basis in a product of discovery or in an affidavit.

83. *Blueprint*, *supra* note 24, at 891 (explaining that presentations are in the form of closing arguments with attorneys free to blend evidence and argument). *But cf.* A. Spiegel, *supra* note 30, at 831. Judge Spiegel conducts his SJT in the form of an actual trial. Counsel make brief opening statements; then each side is afforded the opportunity to present its respective case. During this presentation, the attorneys may not characterize or interpret the evidence. Each side is then given time for closing arguments. At closing arguments, counsel are allowed to characterize the evidence and argue inferences to be drawn. *Id.* Chief Judge James Battin, of the U.S. District Court for the District of Montana, divides the SJT proceeding into opening statements, cases-in-chief, and closing arguments. The parties may divide their allotted time between the three trial segments as they choose. 6th Circuit Conference, *supra* note 17, at 16.

84. Gwin, *supra* note 67, at 17. The procedure has been described by one judge as "a trial lawyer's dream": "He doesn't have to worry about responses from witnesses; he is essentially doing a peroration to the jury without any hindrance whatsoever. He can argue in any fashion he wants to. He is not bound by any rules of evidence. There are no objections going on." SETTLEMENT STRATEGIES, *supra* note 25, at 73 (quoting Judge Enslin).

85. Gwin, *supra* note 67, at 17.

86. In one district, the attorneys are required to furnish a joint set of short, substantive jury instructions 10 days before the scheduled SJT, which the court edits and adds to its own instructions. Each side is then given a set of these instructions on the day of the SJT. *Blueprint*, *supra* note 24, at 892.

87. SJT REPORT, *supra* note 19, at 471. For examples of the verdict sheets used in the Northern District of Ohio, see *id.* app. D at 492. While most judges have only the jurors deliberate as to liability and damages, Judge Enslin has the law clerk, court recorder, and anyone else present in the courtroom vote by secret ballot. He has found this to be very effective when all six jurors and everyone in the courtroom voted the same. *Interview*, *supra* note 59, at 7.

not receive written instructions.⁸⁸ While the jury is deliberating, judges in one federal court explain to the litigants that “six disinterested strangers are about to decide their case, and should the case go to a full-scale de novo trial, six other such strangers would do the same thing.”⁸⁹

The jury may return a consensus verdict, or, if a consensus cannot be reached, the jurors may return individual verdicts as to liability and damages.⁹⁰ When the jury has returned its verdict or verdicts, the parties and attorneys have the opportunity to question jurors about their decisions.⁹¹ At the conclusion of the SJT proceeding, the parties once again attempt to negotiate a settlement. Some jurisdictions require a settlement conference immediately after the SJT proceeding.⁹² Other jurisdictions require the parties to wait a short period of time before continuing negotiations.⁹³

The SJT procedure is to be used in cases where the main obstacle to a pretrial settlement is the difference in the case's predicted outcome. Summary jury trial is designed to settle actions that should settle when none of the other pretrial settlement techniques are successful.⁹⁴ Generally, potential SJT cases

88. *Blueprint*, *supra* note 24, at 892 (reasoning that it is unnecessary to furnish written instructions for the jurors in an abbreviated trial setting).

89. *Id.* at 889. This court seems to be too coercive in its attempts to persuade the parties to settle. The court further asks the parties: “Is there any reason to believe . . . that the jurors at a second trial would return a substantially different verdict than the jurors at the SJT?” *Id.*

90. SJT Report, *supra* note 19, at 471 (asserting that consensus verdicts are encouraged, but where a consensus cannot be reached, individual verdicts afford counsel substantial insight into the juror's individual perceptions and may suggest a basis for reasonable settlement). *But cf. Blueprint*, *supra* note 24, at 892 (requiring a unanimous verdict). There is a provision that if the jurors do not return a unanimous verdict within a reasonable time, they are allowed to return individual verdicts, but the summary jurors are not told this, and it has never been necessary for the court to use this provision. *Id.* It is estimated that a split verdict occurs in approximately 10% of SJTs. Rnil, *supra* note 26, at 1.

91. *See Interview*, *supra* note 59, at 7 (Judge Enslin leaves the courtroom and allows the jurors to speak with the lawyers and parties and to give their analysis of the case and the tactics used by the lawyers in the courtroom); DISPUTE RESOLUTION DEVICES, *supra* note 10, at 43 (Lawyers may question the jury about the verdict and the deliberations); Enslin, *supra* note 29, at 105 (During the post-SJT interview with the attorneys, jurors were not at all intimidated and actually verbally scolded certain parties and attorneys); *Blueprint*, *supra* note 24, at 892 (Jurors are asked what arguments were effective and answer hypothetical questions. The questioning reveals much about the jury's decision-making process and allows each side a greater understanding of the case's further potential).

92. *Blueprint*, *supra* note 24, at 892.

93. Judge Lambros does not hold a settlement conference immediately after the SJT and allows a few weeks for negotiation before a full trial. SETTLEMENT STRATEGIES, *supra* note 25, at 75.

94. *See Lambros & Shunk*, *supra* note 8, at 45-46, which states that courts, attorneys, and litigants feel frustrated over the need to try a case that neither side wishes to litigate and would be willing to settle if only the jury's perception of the case could be obtained. In these instances, the attorney's legal training is a disadvantage because knowledge of the law precludes an ability to see the case as a lay jury would. *Id.* 6th Circuit Conference, *supra* note 17, app. D at 298 (reasoning

fail to settle because the attorneys and the litigants cannot objectively evaluate the strengths and weaknesses of their cases and thus demand their day in court.⁹⁵ Summary jury trial provides litigants with an abbreviated "day in court" that enables the litigants to predict how jurors will decide the issues of liability and damages.⁹⁶ The parties, armed with this knowledge,⁹⁷ may then negotiate a realistic settlement, thereby avoiding the time and expense of litigation.⁹⁸ If SJT fails to produce a settlement, the parties may then litigate their action.⁹⁹

Federal and state court judges quickly adopted and occasionally modified¹⁰⁰ the SJT procedure. By 1984, Judge Lambros reported that ten districts other than the Northern District of Ohio were using SJT as a final pretrial settlement method.¹⁰¹ Although a lack of reporting makes a

that when the parties disagree as to liability and damages, the clients' posture during settlement negotiation is often based on their lawyers' analysis of similar cases, which may be of little value).

95. Judge Lambros has stated:

Absent the opportunity to hear both sides of the case presented to the finders of fact, a lawyer and his client may be unable to objectively recognize the weaknesses in their position. The lawyer and his client may believe they can "pull off" a weak case if only they can get it in front of a jury. These reasons, among others, act as barriers to settlement; barriers which often result in protracted litigation and expense.

SJT REPORT, *supra* note 19, at 468.

96. *See supra* notes 26-27 and accompanying text (discussing jury verdicts); *See also* Zatz, *supra* note 24, at 111 (explaining that after a jury came back with a verdict for the defendant, the judge asked the jurors to deliberate further and return a damage figure that assumed they had found for the plaintiff).

97. *See supra* notes 13-16 and accompanying text. *But cf.* Jack L. Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480, 489-90 (1967) (arguing that the greatest factor in settlement is the unknown).

98. SJT REPORT, *supra* note 19, at 468 (commenting that when confronted with opposing counsel's arguments, the lawyer and the client can more objectively evaluate the weaknesses of their case). *But cf.* N. Spiegel, *supra* note 25, at S254 n.20 (noting that by solidifying issues and exposing parties' strategies, SJT may actually encourage litigation).

99. SJT does not affect the parties' right to a trial *de novo*, thus avoiding potential Seventh Amendment problems. The SJT jury decision is strictly advisory. Neither the jury findings nor any statement made by counsel during the SJT is admissible at a trial on the merits or may be used as judicial admissions. A. Spiegel, *supra* note 30, at 831.

100. *See supra* notes 56-93 (discussing variation of Judge Lambros' SJT model); *cf. Interview*, *supra* note 59, at 4 (stating that variations in Judge Enslin's SJT procedures evolved out of necessity from the types of cases in which he was employing SJT); DISPUTE RESOLUTION DEVICES, *supra* note 10, at 3 (extolling the dynamic way in which SJT is being used. Various types of SJT are being used by the same court and even by the same judge).

101. SJT REPORT, *supra* note 19, at 474-75. It is difficult to determine exactly how many districts have employed SJT because of the lack of reporting. It is estimated that at least 65 federal judges have employed the procedure. Paul Marcotte, *Summary Jury Trials Touted*, A.B.A. J., Apr. 1, 1987, at 27.

determination of the number of courts currently using SJT difficult,¹⁰² at least 100 state and federal judges have tried the procedure.¹⁰³ Not only are district courts using SJT, but several district courts have followed the lead of the Northern District of Ohio and have adopted local SJT rules.¹⁰⁴

III. THE CURRENT STATUS OF SUMMARY JURY TRIALS

While the use of SJT has increased dramatically since its introduction in 1980,¹⁰⁵ the procedure has generated a considerable amount of debate both for and against its use.¹⁰⁶ One point of contention between SJTs proponents and its opponents is whether judges have the authority to mandate unwilling litigants to participate in SJT. Another point of contention is whether summary jurors can be selected from the regular juror wheel. This Section discusses the court decisions on mandatory SJT and the court decisions concerning impanelling an SJT jury.

A. The Mandatory Summary Jury Trial Debate

The controversy over the authority of judges to compel participation in SJT proceedings was sparked by the *Strandell v. Jackson County*¹⁰⁷ and *McKay v. Ashland Oil, Inc.*¹⁰⁸ decisions. In *Strandell*, the district court held the plaintiff's attorney in criminal contempt for failing to participate in a mandatory

102. Because SJT is a pretrial settlement procedure, not to be used as a trial if settlement is not reached, it is not recorded. Therefore, there are few cases documenting its use. Also, to date, there has been no comprehensive study conducted on the procedure.

103. In 1989, Judge Lambros estimated that SJT had been employed by at least 100 judges across the country. 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). Professor A. Leo Levin has commented on the popularity of SJT, finding its success particularly remarkable because the widespread use of SJT came about as a result of its adoption by individual judges rather than through the promulgation of local rules. DISPUTE RESOLUTION DEVICES, *supra* note 10, at 3.

104. See, e.g., N.D. INDIANA RULE 32 (West 1993); JOINT LOC. RULES OF THE EASTERN AND WESTERN DIST. OF KENTUCKY L.R. 23 (West 1993); W.D. MICH. CIV. R. 44 (West 1993); MONTANA STANDING ORDER 6A (D. Mont. 1983), reprinted in 103 F.R.D. 461 at 496; N. DISTRICT OF OHIO LOC. RULE 7:5.1-5.3 (West 1993); W. D. OKLA. LOC. RULE 17(J) (West 1993); E. D. PENN. LOC. RULE 8 (West 1992); MIDDLE DIST. PENN. LOC. RULE 513 (West 1992).

105. See *supra* note 81.

106. See *supra* note 33; cf. Harges, *supra* note 31 (analyzing SJT procedure and determining that SJT is an effective ADR device and that federal judges should increase its effectiveness by compelling parties to participate); Craco, *supra* note 13 (arguing that mandatory SJT is within the authority vested in federal courts by statute and by inherent judicial power).

107. 115 F.R.D. 333 (S.D. Ill. 1987) (holding plaintiff's attorney in contempt for refusing to participate in court ordered SJT), vacated, 838 F.2d 884 (7th Cir. 1987) (vacating the district court's contempt judgment, holding that Rule 16 does not authorize compelled participation in SJT).

108. 120 F.R.D. 43 (E.D. Ky. 1988) (holding that mandatory SJT is authorized by local rule and the Federal Rules of Civil Procedure).

SJT.¹⁰⁹ The Seventh Circuit vacated the contempt judgment and held that the judge had no legal authority to compel attorneys or litigants to participate in SJT proceedings.¹¹⁰ Several months after the Seventh Circuit decision was announced, the U.S. District Court for the Eastern District of Kentucky decided *McKay*. In adopting the reasoning of the *Strandell* district court decision, the *McKay* court held that mandatory SJT is legislatively authorized,¹¹¹ and the court stated that it found itself in “respectful disagreement” with the Seventh Circuit.¹¹²

1. *Strandell v. Jackson County*

In *Strandell v. Jackson County*, the plaintiffs brought a section 1983 civil rights action against Jackson County, Illinois, alleging that the defendants violated the decedent's constitutional rights because of the alleged unconstitutional arrest, strip search, beating, and death of the decedent while in custody in the county jail.¹¹³ The trial judge, focusing on the length of time a trial in the case would take, ordered the parties to participate in an SJT.¹¹⁴ The plaintiffs' counsel refused to participate in the SJT, arguing that he would be required to reveal his trial strategy to the defendants, and that the court had no authority to require him to participate in the procedure.¹¹⁵ The court found his arguments to be without merit and adjudged him to be in criminal contempt

109. *Strandell v. Jackson County*, 115 F.R.D. 333, 336 (S.D. Ill. 1987).

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

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

112. *Id.* at 44 (stating that the court disagreed with the Seventh Circuit regarding the inherent power and Federal Rules issues).

113. *Strandell*, 838 F.2d at 884; Maatman, *supra* note 33, at 468 (1988) (Mr. Maatman represented the plaintiffs in *Strandell* and argued the case before the United States Court of Appeals for the Seventh Circuit).

Judge Enslin believes that police cases are inappropriate for SJT. *Interview, supra* note 59, at 9 (reasoning that for emotional reasons, lawsuits against police officers for brutality or prisoner complaints within the county jail system are not amenable to SJT treatment). Under this rationale, the Seventh Circuit *Strandell* opinion is correct.

114. *Strandell*, 115 F.R.D. at 334. The district court's findings in *Strandell* indicated that it was an ideal case for SJT resolution. The estimated length of the trial was to be 20 to 25 days, which would actually take at least five to six weeks. At the time of the final pretrial order, the admissibility of over 300 exhibits had not yet been determined. The district court informed the plaintiff's attorney that it did not have time available to try the case, nor would it have time for a trial “in the foreseeable months ahead.” *Strandell*, 838 F.2d at 885 (citing the trial transcript of March 31, 1987, at 5).

The district court's resolution of *Strandell* focused on the length of time the trial would take, but it did not discuss the facts of the case. *Strandell*, 115 F.R.D. at 334. The court of appeals, however, focused on the facts and did not accept the inherent power argument. *Strandell*, 838 F.2d at 888 (reasoning that a crowded docket does not permit a court to avoid adjudication of cases properly within its congressionally mandated jurisdiction).

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

for failing to comply with the court's order to participate in jury selection for the SJT.¹¹⁶ The district court found authority to mandate SJT¹¹⁷ in its inherent power to manage and control its docket¹¹⁸ and in Federal Rules of Civil Procedure 16(c)(7) and (11).¹¹⁹

The Seventh Circuit, however, vacated the district court's contempt judgment. It found no authority to compel unwilling litigants to participate in SJT.¹²⁰ The court relied on the original draft of the resolution adopted in 1984 by the Judicial Conference of the United States, which "endorsed summary jury trials 'with the voluntary consent of the parties.'"¹²¹ Since the Seventh Circuit *Strandell* decision, one commentator agreeing with that decision has argued that

116. *Id.* at 336 (reasoning that in modern litigation, full discovery leaves little surprise to litigants as to what their opponent's theory of the case will be, and relying on the 1984 Judicial Conference Resolution endorsing experimental use of SJT). 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 jury 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). *Cf.* WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 67 (1988) (stating that a disadvantage of SJT is that it forces counsel to disclose at least some of their trial strategies).

117. The *Strandell* SJT was to be a modified SJT lasting one to two days with a limited number of live witnesses. BRAZIL, *supra* note 116.

118. *Link v. Wabash R.R.*, 370 U.S. 626, 629-30 (1962) (holding that sua sponte dismissal of a case for failure to prosecute was authorized by the court's inherent power). Inherent power is "governed not by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.* at 630-31. The *Strandell* district court found that its obligation under the Speedy Trial Act, 18 U.S.C. § 3161 (1988), and the number of lengthy civil cases to be tried before the *Strandell* case—which itself was to last five to six weeks—required the court to order the parties to participate in SJT. *Strandell*, 115 F.R.D. at 336 (citing statistics stating that as of March 1987, there were 80 criminal and 1,093 civil cases pending in the district, which had only two judgeships in existence at that time).

119. *Strandell*, 115 F.R.D. at 335. FED. R. CIV. P. 16(c)(7) and (11) provide that: "(c) the participants of 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 matter as may aid in the disposition of the action."

120. *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987) (interpreting the Rule 16 pretrial conference as being intended to foster settlement through the use of extrajudicial procedures, but not intended to require that an unwilling litigant be sidetracked from the normal course of litigation).

121. *Strandell*, 838 F.2d at 885. The lower court in *Strandell* relied on the final draft of the resolution, which omitted the phrase "with the voluntary consent of the parties." *Id.* (quoting the REP. OF THE PROCEEDINGS OF THE JUDICIAL CONF. OF THE UNITED STATES, Sept. 1984, at 88).

even though the Judicial Conference Report excluded the term 'voluntary' from its final draft of the resolution, the meaning of the resolution was unchanged.¹²²

The Seventh Circuit, relying heavily on language found in the advisory committee notes to Rule 16,¹²³ found that Rule 16 does not authorize mandatory participation in SJT.¹²⁴ The court found that mandatory SJT was inconsistent with the spirit of Rule 16 as articulated in *Kothe v. Smith*.¹²⁵ In *Kothe*, the court held that Rule 16 "was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise."¹²⁶ The *Kothe* court, specifically addressing Rule 16(c)(7), stated that this rule was added in the 1983 amendments to encourage pretrial settlement discussion, but was not added to "impose settlement on unwilling litigants."¹²⁷ The district court relied on Rule 16(c)(7) as authority for requiring participation in SJT, contrary to the spirit of that rule. The court of appeals therefore reversed the district court decision because Rule 16(c)(7) does not provide authority for compelling participation in SJT.¹²⁸

The *Strandell* court further stated that mandatory use of SJT would violate

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. N. Spiegel, *supra* note 25, at S263. *But cf.* DISPUTE RESOLUTION DEVICES, *supra* note 10, 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).

123. The *Strandell* court noted:

The drafters of Rule 16 certainly intended to provide, in the pretrial conference, "a neutral forum" for discussing the matter of settlement. FED. R. CIV. P. 16 advisory committee's note While the drafters intended that the trial judge "*explor[e]* the use of procedures other than litigation to resolve the dispute,"—including "urging the litigants to employ adjudicatory techniques outside the courthouse,"—they clearly did not intend to *require* the parties to take part in such activities.

838 F.2d at 887 (citing FED. R. CIV. P. 16 advisory committee's note) (emphasis added).

124. *Strandell*, 838 F.2d at 887; FED. R. CIV. P. 16. "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 litigant be sidetracked from the normal course of litigation." *Strandell*, 838 F.2d at 887.

125. 771 F.2d 667 (2d Cir. 1985) (holding that imposition of sanctions against a doctor for failing to settle before trial was a pressure tactic by a trial judge to coerce settlement and was impermissible under Rule 16(c)(7)).

126. *Id.* at 669.

127. *Id.* (citing advisory committee's note, 97 F.R.D. 205, 210 (1983)).

128. *Strandell*, 838 F.2d at 887 ("We must respectfully disagree with the district court. We do not believe that [the provisions of Federal Rules of Civil Procedure 16(c)(7) and (11)] can be read as authorizing a *mandatory* summary jury trial.") (emphasis in original).

the work product doctrine.¹²⁹ The court found that the federal rules were adopted to reflect the balance between the "need for pretrial disclosure and party confidentiality."¹³⁰ The court reasoned that mandatory SJT may upset this balance and that the Supreme Court and Congress would not attempt such a dramatic change in procedure in such an implicit fashion.¹³¹

2. *McKay v. Ashland Oil, Inc.*

Like the district court in *Strandell*, the Eastern District of Kentucky in *McKay v. Ashland Oil, Inc.*¹³² found that mandatory SJT is a valid pretrial settlement device.¹³³ *McKay*, however, seemed to be a more appropriate case for mandatory SJT than *Strandell*.¹³⁴ While the *Strandell* case involved constitutional claims¹³⁵ and a single plaintiff and defendant, the *McKay* case was a wrongful discharge claim that involved multiple parties.¹³⁶

129. *Strandell*, 838 F.2d at 888. In this instance, it seems that use of the mandatory SJT would infringe upon the work product doctrine. See *Hickman v. Taylor*, 329 U.S. 495 (1947); FED. R. CIV. P. 26(b)(3). During discovery, the plaintiffs took statements of 21 witnesses, the identity of whom the plaintiffs learned from the defendant. After discovery was closed, the defendant filed a motion to compel production of the witnesses' statements. The motion was denied because of lack of undue hardship or substantial need. *Strandell*, 838 F.2d at 885. Under these circumstances, it is right to deny a mandatory SJT because the SJT proceeding would constitute free discovery for an apparently lazy defendant. *Id.* at 888. See *Maatman*, *supra* note 33, at 472 (reasoning that a party should not be required to participate in SJT if it would force the litigant to divulge privileged information prior to a full trial on the merits). In most cases, this concern is unwarranted given the liberal discovery rules in federal court. See *Harges*, *supra* note 31, at 808-09 (asserting that the situation in *Strandell* is rare and, generally, mandatory SJT would not infringe on the work product privilege).

130. *Strandell*, 838 F.2d at 888; *cf.* A. Spiegel, *supra* note 30 at 835 (stating that Judge Spiegel has had no work product doctrine problems in conducting SJTs). In Judge Spiegel's experience, lawyers have been prepared and have diligently presented their cases. He also stated, "Lawyers in my court know that I will not countenance any surprises, blindsiding, or trial by ambush, and that this philosophy applies to discovery, pretrial proceedings, summary jury trials, and the trial on the merits, so the likelihood of that concern being realized is remote." *Id.*

131. *Id.* See *Maatman*, *supra* note 33, at 472-77 (arguing that a district court's power to promote judicial efficiency cannot subordinate the individual's rights or upset the balance embodied in the Federal Rules of Civil Procedure).

132. 120 F.R.D. 43 (E.D. Ky. 1988).

133. *Id.* at 49 (holding that "participation in summary jury trials may be mandated by trial courts in their discretion even aside from the existence of a local rule").

134. See *supra* note 113 (explaining that cases involving police brutality are not amenable to SJT).

135. *Id.*

136. *McKay*, 120 F.R.D. at 44. The *McKay* case concerned alleged illegal bribes to Middle Eastern officials by Ashland Oil representatives. The plaintiffs asserted that their refusal to participate in the illegal activities resulted in their wrongful discharge. For more background information on the *McKay* case, see the related shareholder derivative suit, *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987).

In holding that it had authority to compel the parties to participate in mandatory SJT, the *McKay* court relied on the existence of a local rule that allowed the judge discretion to set any civil case for SJT.¹³⁷ Kentucky's Local Rule 23 was adopted pursuant to Federal Rule of Civil Procedure 83, which authorizes districts to make rules governing their practice as long as those rules do not conflict with the Federal Rules.¹³⁸ The *McKay* court criticized the Seventh Circuit *Strandell* opinion and held that even absent the existence of a local rule,¹³⁹ "a trial court's requiring participation in a summary jury trial is all but expressly authorized by [the] provision of Rule 16."¹⁴⁰

The conflicting opinions of *Strandell* and *McKay* have generated substantial debate about whether the Federal Rules of Civil Procedure authorize mandatory SJT and whether local rules providing for mandatory SJT make a stronger argument for the validity of mandatory SJT.¹⁴¹ The *McKay* court argued that it was in a stronger position than the *Strandell* court because it relied upon a local rule providing for mandatory SJT.¹⁴² This argument is questionable, because whether mandatory SJT is consistent with the provisions of Rule 16 is uncertain.

Judge Lambros, in reconciling the cases, cited Rule 83 as providing

137. See *supra* note 104. LOCAL RULE 23 states: "A judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution" (quoting *McKay*, 120 F.R.D. at 44).

138. FED. R. CIV. P. 83 states: "Each district court . . . may . . . make and amend rules governing its practice not inconsistent with these rules."

139. *McKay*, 120 F.R.D. at 49 (stating that the *McKay* court was in a stronger position than the *Strandell* court because of the existence of Local Rule 23, but holding that SJT may be mandated at the discretion of the trial court even without the existence of a local rule).

140. *Id.* at 48. The court stated that the SJT procedure does not conflict with the provisions in Rule 16, which authorize the trial court to "take action" with regard to "the use of extrajudicial procedures" and other matters that would aid in the disposition of the action. *Id.* (citing FED. R. CIV. P. 16(c)(7) and (11)). It is questionable whether SJT is an extrajudicial procedure within the meaning of Rule 16(c). The SJT procedure encourages settlement by offering a prediction of the trial outcome. The SJT occurs under close judicial supervision and consumes significant court resources. The direct involvement of judges, magistrates, and jurors makes the procedure effective and also makes the procedure resource intensive, which inhibits frequent use. See SETTLEMENT STRATEGIES, *supra* note 25, at 67-68. The advisory committee note to Rule 16(c)(7) suggests that SJT would not qualify as an extrajudicial procedure. "In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging litigants to employ adjudicatory techniques outside the courthouse." FED. R. CIV. P. 16 advisory committee's note. The phrase "outside the courthouse" suggests that the committee was referring to private ADR.

141. For a balanced treatment of arguments for and against mandatory SJT, compare Harges, *supra* note 31 (arguing that mandatory SJT is within the court's inherent powers) and Maatman, *supra* note 33 (arguing that mandatory SJT is not statutorily authorized and questioning the legality of consensual SJT).

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

authority for local rules mandating SJT.¹⁴³ According to Judge Lambros' rationale, because Rule 83 authorizes local rules that are not inconsistent with the federal rules and SJT is consistent with the provisions of Rule 16, Rule 83 authorizes local rules providing for mandatory SJT.¹⁴⁴ Many commentators support the notion that the federal rules and the court's inherent power to control its docket authorize mandatory SJT.¹⁴⁵ Others find SJT to be inconsistent with the provisions of Rule 16, because the Federal Rules do not authorize mandatory participation in SJT.¹⁴⁶ Thus, the question of whether Rule 16 provides for mandatory SJT is still a matter for debate.

The main arguments for not compelling unwilling litigants to participate in SJT are the need for double preparation if a settlement is not reached,¹⁴⁷ problems related to the work product doctrine,¹⁴⁸ and disputes about the effectiveness of SJT.¹⁴⁹ Evidence also supports the notion that the high

143. FED. R. CIV. P. 83. See *supra* notes 34-36 and accompanying text (discussing Judge Lambros' foundation for SJT).

144. Under this analysis, both the *Strandell* and the *McKay* cases would be correctly decided. Because Kentucky had a local rule providing for mandatory SJT, it was proper to require the parties to participate. In *Strandell*, there was no local rule, so compelling participation was improper. Paul Mattingly, Comment, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 KY. L.J. 421, 433 (1989) (stating that a fundamental difference between *Strandell* and *McKay* is the existence of Local Rule 23 in the Eastern District of Kentucky).

145. See Craco, *supra* note 13, at 495-98 (arguing that accepted uses of inherent powers in the federal courts indicate that no further expansion of that doctrine is required to validate summary jury trials).

146. See generally Harges, *supra* note 31 (arguing that while there is no express authority to hold mandatory SJT, the federal rules should be amended, and judges should continue to use the process under implied authority); Webber, *supra* note 28 (arguing that mandatory SJT is not authorized by the Federal Rules, the court's inherent power, or the Judicial Conference Resolution).

147. Harges, *supra* note 31, at 807 (asserting that SJT is less expensive than a full trial but is a labor intensive undertaking—an attorney must prepare the entire case, brief legal issues, reduce the case to a one hour oral presentation, and draft jury instructions); A. Spiegel, *supra* note 30, at 835 (citing that counsels' main complaint about SJT is the extra work and expense); *Interview*, *supra* note 59, at 7 (stating that both lawyers and clients had put so much time and energy into the SJT that they were psychologically unwilling to try the case on the merits).

148. See generally, *Strandell v. Jackson County* 838 F.2d 884 (7th Cir. 1987); Maatman, *supra* note 34, at 472-77; *supra* notes 130-32.

149. See *supra* note 30. The effectiveness of SJT has not been scientifically verified. Judge Posner conducted an admittedly crude study that suggested that the use of SJT does not increase judicial efficiency. Posner, *supra* note 3, at 381. Judge Lambros stated a 90% success rate that saved the Northern District of Ohio approximately \$73,000.00. SJT REPORT, *supra* note 19, at 472-74. One commentator has noted:

We know that approximately 90% of all federal cases eventually settle. Are the cases in which we have successfully used a summary trial ones which would have settled anyway? . . . We cannot be sure. We feel, however, that when all the pretrial stages of a case have been completed without demonstrating any likelihood of settlement, and the case then continues through the entire SJT procedure before settling, this is some indication that the case was one of the 10% that could otherwise have been expected to

settlement rate of SJT proceedings merely reflects the ninety percent settlement rate of the federal courts in general.¹⁵⁰ Even those commentators who oppose SJT, however, acknowledge its popularity.¹⁵¹ Some commentators, despite finding no express authorization for invoking the procedure, agree that the rules should be amended to allow for its use.¹⁵²

B. Impanelling Jurors for Summary Jury Trial

Notwithstanding the debate over judicial authority to compel participation in SJT, judges do not have express authority to impanel a jury to sit for SJT even when the use of SJT is voluntary. The use of a jury is the foundation of the SJT procedure that distinguishes it from other methods of dispute resolution.¹⁵³ At least one court has expressed doubts about the judicial authority to impanel jurors from the regular jury pool to serve as SJT jurors.¹⁵⁴ The following sections examine the bases that have been proposed as providing authority for using regular jurors in SJT proceedings. The sections conclude that federal judges lack express statutory authority to impanel jurors for participation in SJT proceedings.

1. The Jury Selection and Service Act of 1968 Does Not Authorize Judges to Impanel Summary Jurors

Judge Battisti, of the Northern District of Ohio, has held that Congress has

go to trial.

Blueprint, *supra* note 24, at 888.

150. Gwin, *supra* note 67, at 57. *But cf.* *Blueprint*, *supra* note 24, at 888 (arguing that although 90% of all cases settle, it is unclear whether the cases that settle through SJT would have settled without the procedure).

151. *See* Posner, *supra* note 3, at 368 (stating that while he does raise questions about SJT, he recognizes that the procedure has energized the field of procedural reform); Webber, *supra* note 28, at 1498 (recognizing the spread of the use of SJT to federal and state courts).

152. *See, e.g.*, Harges, *supra* note 31. Although there is no express statutory authorization for judges to conduct SJT, the SJT has proven to be an effective form of ADR and judges should continue to use it, even if the Federal Rules are not amended. *Id.*

153. Judicial involvement in the procedure gives SJT validity. Judicial involvement gives the participants confidence that the settlement is "correct" and that their rights have been vindicated. SETTLEMENT STRATEGIES, *supra* note 25, at 74 (asserting that judicial involvement in SJT is important because the mechanism is designed to convince a client that the likelihood of prevailing at trial is not as great as the client perceives it to be); *Judge's Role*, *supra* note 40, at 1375 (reasoning that jury participation is important for the SJT to meet courtroom objectives and expectations of the litigants).

154. *Hume v. M & C Management*, 129 F.R.D. 506 (N. D. Ohio 1990) (holding that federal district judges have no authority to summon persons to serve as summary jurors). Interestingly, in *Strandell* the Seventh Circuit left open the question of whether district courts have the authority to impanel jurors for SJT. The issue was raised by plaintiffs' counsel, but the Seventh Circuit did not address the issue. Maatman, *supra* note 33, at 477 n.98, and accompanying text.

not authorized the impanelling of jurors to participate in SJT. In *Hume v. M & C Management*,¹⁵⁵ Battisti denied the parties' joint motion to submit the case to a summary jury trial.¹⁵⁶ Further, he has refused to use summary jurors from the qualified jury wheel as long as regular jurors are selected from the same wheel.¹⁵⁷ The *Hume* decision raises important questions about the authority of judges to impanel jurors to sit for SJTs.

The first section of the Jury Selection and Service Act of 1968¹⁵⁸ provides that "all citizens shall have the opportunity to be considered for service on grand and petit juries in district courts of the United States and shall have an obligation to serve as jurors when summoned *for that purpose*."¹⁵⁹ There is, however, no similar obligation for citizens to serve as jurors for SJT.¹⁶⁰ Although citizens have no obligation to serve as summary jurors, it is unlikely that those impanelled on a summary jury would have the opportunity to refuse to serve. To ensure a conscientious verdict, many summary juries are not told until the verdict is returned that their verdict is for purposes of facilitating settlement only and is not binding.¹⁶¹

Because citizens have no obligation to serve as jurors for SJT, they cannot be punished for refusing to do so. The Jury Selection and Service Act provides

155. 129 F.R.D. at 506.

156. *Id.* at 510. ("The Joint Motion is overruled. Until Congress authorizes the federal courts to summon citizens for service other than for grand and petit juries, the result obtained through this Order seems to be the only one permissible in law."). It is very unusual that the parties themselves would move for participation in SJT.

157. *Hume*, 129 F.R.D. at 506; *United States v. Exum*, 744 F. Supp. 803, *aff'd*, 748 F. Supp. 512 (1990) (stating that no jury trials will be conducted in any case assigned to Judge Battisti's docket until a new jury wheel is selected in accordance with the duly enacted laws of the United States, because the language of 28 U.S.C.A. § 1867 demands this result). 28 U.S.C.A. § 1867 states in pertinent part, "If the court determines that there has been a substantial failure to comply with the provisions of this title in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with this title." 28 U.S.C.A. § 1867(d) (West 1966 & Supp. 1992).

158. 28 U.S.C.A. § 1861 (West 1968 & Supp. 1991).

159. *Id.* (emphasis added).

160. "The fact that Congress appropriates money for jurors without indicating how jurors are to be used does not empower federal judges to summon jurors to serve as mediators." N. Spiegel, *supra* note 25, at S264. *But cf.* 28 U.S.C.A. § 1861 (West 1968 & Supp. 1991) (indicating that jurors are to be used only as grand or petit jurors).

161. *See supra* note 75. This presents the question of whether this practice would constitute false imprisonment or involuntary servitude. "Jury service is a form of conscription; and conscription is not popular in this or any other country." Posner, *supra* note 3, at 386. This is especially egregious when the jurors are under the impression that they must serve or face the possibility of imprisonment. 28 U.S.C.A. § 1866(g) (West 1966 & Supp. 1991) (stating that "any person who fails to show good cause for noncompliance with a summons may be fined not more than \$100 or imprisoned not more than three days, or both"). *See infra* notes 162-63 and accompanying text.

for punishment of those persons who fail "to show good cause for noncompliance with the summons."¹⁶² Those individuals who fail to show good cause for noncompliance either may be fined not more than \$100, imprisoned not more than three days, or both.¹⁶³ Because summary jurors are neither grand nor petit jurors, and therefore not bound by the Jury Selection and Service Act, they cannot be punished for not complying with the summons. But, because summary jurors are not told until after the case is decided that they are not serving on a regular jury, the summary jurors are unaware that they cannot be punished for noncompliance until it is too late.

The purpose of the petit jury and the summary jury differ greatly. A petit jury is defined as "the ordinary jury for the trial of a civil or criminal action"¹⁶⁴ In contrast, a summary jury is convened solely to facilitate pretrial settlement between the parties in an effort to avoid trial.¹⁶⁵ The Sixth Circuit relied heavily on this distinction in holding that the First Amendment right of access does not apply to SJT proceedings.¹⁶⁶

A petit jury's verdict binds the parties, while the parties can accept or refuse a summary jury verdict. In *Cincinnati Gas & Electric Co. v. General Electric Co.*,¹⁶⁷ the court relied on this distinction in holding that the public has no right of access to SJT proceedings.¹⁶⁸ The appellants in that case argued that SJT proceedings should be open to the public because the settlement

162. 28 U.S.C.A. § 1864(b) (West 1966 & Supp. 1991) (stating that "any person who fails to appear pursuant to [a summons to appear for failure to return a juror qualification form] or who fails to show good cause for noncompliance with the summons may be fined not more than \$100 or imprisoned not more than three days, or both").

163. *Id.* Although the Act provides punishment for citizens unwilling to serve, this is rarely done. In the past 50 years, only two citizens have been held in contempt of court for failure to serve. See *United States v. Hillyard*, 52 F. Supp. 612 (E.D. Wash. 1943) (contempt action against member of Jehovah's Witness dismissed); *In re Jaye*, 90 F.R.D. 351 (E.D. Wis. 1981) (holding that where an individual refused to take his seat in the jury box and exited the courtroom displaying aggressive and willful behavior, summary contempt proceedings were appropriate, and the individual had to serve 48 hours of confinement).

164. BLACK'S LAW DICTIONARY 768 (5th ed. 1979).

165. *Hume v. M & C Management*, 129 F.R.D. 506, 508-09 (N.D. Ohio 1990).

166. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 905 (6th Cir. 1988) (reasoning that SJT is, at every turn, a pretrial settlement technique and, historically, settlement techniques have been closed to the press and public). Just as the public is not entitled to observe traditional negotiations leading to settlement, the claim of the public's right of access to this information fails. *Id.*

167. 854 F.2d at 900.

168. *Id.* at 905 (reasoning that settlement negotiations do not have a history of openness and that there is no matter presented to the court for adjudication because SJT is not binding). 6th Circuit Conference, *supra* note 17, app. D at 298 (stating that SJT proceedings are not open to the public). *But cf.* DISPUTE RESOLUTION DEVICES, *supra* note 10, at 20 (asserting that SJT is usually public).

has a final decisive effect on the litigation.¹⁶⁹ The appellants equated SJT proceedings with preliminary criminal hearings that must be open to the public because of their decisive effect on criminal cases.¹⁷⁰ The Sixth Circuit rejected this argument, stating that the proceedings in *Press-Enterprise Co. v. Superior Court*¹⁷¹ “resulted in a binding judicial determination which directly affected the rights of the parties.”¹⁷² In contrast, the *Cincinnati Gas* court found that the SJT “does not present any matter for adjudication by the court.”¹⁷³ This court stated that “it is the presence of the exercise of a court’s coercive powers that is the touchstone of the recognized right to access, not the presence of a procedure that might lead *the parties* to voluntarily terminate the litigation.”¹⁷⁴ The parties themselves agree whether they are to be bound by the verdict; thus, the judge and jury play no adjudicative role in SJT proceedings.

Another significant difference is the manner in which evidence is presented to the juries. A primary function of the petit jury is to evaluate witness credibility.¹⁷⁵ Ordinarily in SJT, live witness testimony is not allowed.¹⁷⁶

169. *Cincinnati Gas*, 854 F.2d at 904. Appellants asserted that public access to the proceedings would have therapeutic community value because of the importance of the nuclear power and utility rates issues raised in the case. The court disagreed, reasoning that the appellees had a legitimate interest in confidentiality and that public access to the SJT would have an adverse effect on the utility of the procedure as a settlement device. *Id.*

170. *Id.* (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-13 (1986)).

171. 478 U.S. at 1.

172. *Cincinnati Gas*, 854 F.2d at 905 (rejecting the appellant’s argument, the court noted that the public would have no entitlement to observe any negotiation leading to a traditional settlement of the case).

173. *Id.* (rejecting this argument, the court equated SJT with other traditional forms of settlement negotiations as opposed to a preliminary hearing, which has a binding or decisive effect).

174. *Id.* (emphasis added).

175. Evaluation of witness demeanor is recognized as an important function of the jury that is lost in SJT. *See infra* notes 176-80 and accompanying text. Therefore, it is generally believed that in cases where witness credibility is important, SJT is inappropriate. Maatman, *supra* note 33, at 483. Some attorneys believe witness credibility is always important to the outcome of a case. N. Spiegel, *supra* note 25, at S255 n.27. The disadvantage of not having the opportunity to evaluate witness credibility has not gone unnoticed by the summary jurors. Some jurors responding to an open-ended question about the difference in understandability between a full trial and SJT commented: “All depended on the presentation of two lawyers—no witnesses, no cross-examination, no arguments. Too much seemed left unsaid”; “You really do not hear enough of the evidence.”; “The summary jury trial left too much to the imagination, whereas the regular jury trial gave a clearer picture through visual contact with the persons involved.” JACUBOVITCH & MOORE, *supra* note 20, at 22.

176. In some instances, the SJT procedure has been modified to allow for a limited number of live witnesses. *See Strandell v. Jackson County*, 115 F.R.D. 333, 334 (S.D. Ill. 1987). Also, one judge has allowed videotaped testimony from expert witnesses to be viewed by the summary jury. *See supra* note 63. Generally, it is believed that in cases in which witness credibility is a substantial factor, SJT is inappropriate. A. Spiegel, *supra* note 30, at 835. *But cf.* Harges, *supra* note 31, at

Relaxed evidentiary and procedural rules allow summary juries to base their decisions on evidence that would normally be excluded at a formal trial.¹⁷⁷ A summary jury hears only the lawyer's representations of the facts and issues.¹⁷⁸ The summary jury's verdict turns on the credibility of the attorney rather than the credibility of the witnesses.¹⁷⁹ Given the different purposes served by petit and summary juries, the Jury Selection and Service Act cannot be read so broadly as to include or authorize summary juries.¹⁸⁰

2. Federal Rule of Civil Procedure 39(c) Does Not Expressly Authorize the Impanelling of Summary Jurors

Judge Lambros equates the use of a summary jury with that of an advisory jury and thus uses Rule 39(c)¹⁸¹ as the foundation for impanelling a summary jury.¹⁸² According to Rule 39(c), "In all actions *not triable of right by a jury*, the court upon its own motion or of its own initiative may try any issue with an advisory jury"¹⁸³ Judge Lambros believes that while Rule 39(c) provides for advisory juries only in cases not triable as of right by a jury, such as in equity cases, the idea of the summary jury fits within the spirit of the rule.¹⁸⁴ According to Judge Lambros, "[T]he 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."¹⁸⁵ Judge Lambros' interpretation of Rule 39(c) is overbroad.¹⁸⁶

811 (asserting that very few cases are determined solely by the credibility of a witness as judged by his or her demeanor on the stand; thus, concern about SJT use when witness credibility is a factor is without merit).

177. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988) (citing A. Spiegel, *supra* note 30, at 830-31).

178. *But see supra* note 74.

179. Gwin, *supra* note 67, at 57 (asserting that a primary disadvantage of SJT is the inability of the judge and jury to assess witness credibility, and the opportunity to judge only the lawyers' credibility).

180. *See Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990).

181. FED. R. CIV. P. 39(c) states:

(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.

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

183. FED. R. CIV. P. 39(c) (emphasis added).

184. Lambros & Shunk, *supra* note 8, at 52 (stating that the idea behind SJT is similar to Rule 39(c) of the Federal Rules of Civil Procedure—the advisory jury).

185. EXPERIMENTATION AND THE LAW: REP. OF THE FEDERAL JUDICIAL CENTER ADVISORY COMM. ON EXPERIMENTATION IN THE LAW 41 (Federal Judicial Center 1981).

Historically, a judge in a court of equity—where there was no right to a trial by jury—could appoint an advisory jury to “enlighten . . . the conscience of the chancellor.”¹⁸⁷ The advisory jury was used to give the judge a sense of the standards and morality of the community.¹⁸⁸ In fact, one state supreme court has held that a court of equity must use an advisory jury when deciding certain types of obscenity claims.¹⁸⁹ Using an advisory jury to evaluate facts in light of community standards is the purpose of advisory juries, and Rule 39(c) was intended to codify this use.¹⁹⁰ Rule 39(c) was intended to expand the traditional practice of advisory jury use to include trials where no right to a jury exists.¹⁹¹ Contrary to the provisions in Rule 39(c), however, summary juries are impanelled in actions that are triable to a jury as of right.¹⁹² The differences in the rationale behind the use of advisory juries and summary juries suggest that a summary jury is not an advisory jury within the meaning and spirit of Rule 39(c).¹⁹³

186. *Hume v. M & C Management*, 129 F.R.D. 506, 508 n.5 (N.D. Ohio 1990) (explaining that Rule 39(c) is an authorized exception to 28 U.S.C. § 1861 for the narrow purpose of aiding the judge).

187. Richard E. Guggenheim, *A Note on the Advisory Jury in Federal Courts*, 8 FED. B.J. 200 (1947); Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1364 (1987) [hereinafter *Advisory Jury*]. In equity, an advisory verdict was only “the discretionary right of the court to have its ‘conscience enlightened’” *Vosburg Co. v. Watts*, 221 F. 402, 408 (4th Cir. 1915).

188. Charles Hatfield, Note, *The Summary Jury Trial: Who Will Speak for the Jurors?* 1991 J. DISP. RESOL. 151, 155 (stating that Federal Rule 39(c) reflects the awareness of the courts’ historical need for community input since the chancellor in pre-Constitution courts of equity enjoyed authority to impanel an advisory jury in cases requiring application of community standards); *Advisory Jury*, *supra* note 187, at 1364.

189. *McNary v. Carlton*, 527 S.W.2d 343, 348 (Mo. 1975) (en banc) (holding that although jurors are not ordinarily involved in cases for injunctive relief, in obscenity cases the judge should permit jurors to ascertain contemporary community standards).

190. Hatfield, *supra* note 188, at 156 (stating that judges have historically used advisory juries in cases that would not be triable as of right to a jury but need the input of the community and that Rule 39(c) codifies that practice). See *Computer Systems Eng’g Inc. v. Qantel Corp.*, 571 F. Supp. 1365, 1373 (D. Mass. 1983) (reasoning that using an advisory jury for trial of legal issues in which a jury right has been waived is permissible because a jury is better equipped to handle legal issues).

191. N. Spiegel, *supra* note 25, at S262 n.75. See, e.g., *Kohn v. McNulta*, 147 U.S. 238, 240 (1893) (stating that the advisory jury verdict is not binding on the court. The court can adopt it in full, in part, or completely disregard it); *Cities Serv. Co. v. Ocean Drilling & Exploration Co.*, 758 F.2d 1063, 1071 (5th Cir. 1985) (holding that an advisory jury does no more than advise the judge).

192. SJT has been used to settle a variety of cases, such as negligence, personal injury, products liability, toxic tort, contract, discrimination, admiralty, and antitrust actions. SJT REPORT, *supra* note 19, at 472. Most, if not all, of the cases assigned to SJT are triable as of right to a jury, contrary to the Rule 39(c) advisory jury provision. See JACOUBOVITCH & MOORE, *supra* note 20, at 3 (stating that SJT is used in cases that would normally go before a jury).

193. See Posner, *supra* note 3, at 385 (arguing that Rule 39(c) excludes SJT because SJT is used in actions triable of right to a jury. The advisory committee’s note to Rule 39(c) explains that Rule 39(c) codifies the traditional practice in equity, maritime law, and other nonjury fields whereby judges could convene juries to advise them on questions of fact); Maatman, *supra* note 33, at 478

The purpose of the advisory jury is to aid the judge in determining issues of fact in a case not triable as of right to a jury.¹⁹⁴ In contrast, the purpose of the summary jury is to aid the parties in their settlement negotiations. In his article, *Summary Jury Trials and Other Methods of Dispute Resolution*, Judge Posner stated:

[T]he summary jury is not an advisory jury. It does not advise the judge how to decide the case, but is used to push the parties to settle. It is therefore outside the scope of rule 39(c) of the Federal Rules of Civil Procedure, which deals with advisory juries.¹⁹⁵

Advisory juries were intended to aid *the judge* in deciding equity cases.¹⁹⁶ They were not intended to provide a pretrial settlement tool for *the parties*.¹⁹⁷ Given the competing objectives behind the use of advisory juries and summary juries, interpreting Rules 39(c) to authorize the convening of a summary jury is tenuous at best.

IV. THE ADVANTAGES AND DISADVANTAGES OF USING REGULAR JURORS AS SUMMARY JURORS

This Section examines the advantages and disadvantages of using regular jurors as SJT jurors and concludes that the use of regular jurors as SJT jurors is a valid and efficient practice. Arguments have been made that using the regular jury pool for the selection of summary jurors alters the jury selection process.¹⁹⁸ In *United States v. Exum*,¹⁹⁹ Judge Battisti again questioned and criticized the use of regular jurors as summary jurors. Judge Battisti examined the jury selection plan for the Northern District of Ohio and found that the use of summary jurors from the qualified jury pool altered the regular jury selection process.²⁰⁰

(stating that Rule 39(c) authorizes the district court to call an advisory jury only in equity cases, and therefore provides no support for convening a jury for SJT); *Hume v. M & C Management*, 129 F.R.D. 506, 508 (N.D. Ohio 1990) (asserting that six persons convened solely for the purpose of facilitating settlement is unauthorized by the legislature). *But cf.* Harges, *supra* note 85, at 817 (stating that summary jury is analogous to a Rule 39(c) advisory jury).

194. FED. R. CIV. P. 39(c) advisory committee's note.

195. Posner, *supra* note 3, at 385.

196. CHARLES A. WRIGHT & ARTHUR R. MILLER, 9 FEDERAL PRACTICE § 2335 (1971) (emphasis added).

197. "The [advisory] jury acts merely as an aid to the judge . . ." JAMES WM. MOORE & JO D. LUCAS, 5 MOORE'S FEDERAL PRACTICE ¶ 39.10[1], at 39-40 (2d ed. 1991) (emphasis added).

198. *United States v. Exum*, 744 F. Supp. 803, *aff'd*, 748 F. Supp. 512 (1990).

199. *Id.*

200. *Exum*, 744 F. Supp. at 804 (arguing that using summary jurors from the regular jury pool distorts juror utilization statistics because it appears that more jurors were used than actually were).

According to the jury selection plan for the Northern District of Ohio, upon a judge's request, a panel of prospective jurors is drawn from the qualified jury wheel. These potential jurors can be: 1) called to the jury box, serve as jurors, and be discharged, 2) called to the jury box, challenged, and returned to the qualified jury wheel, or 3) not called to the jury box (leftover jurors), and retained on the qualified jury wheel.²⁰¹ In the Northern District of Ohio, summary jurors are selected from either the qualified jury wheel or from the leftover jurors.²⁰²

According to Judge Battisti, the use of leftover jurors creates a "distortion in juror utilization statistics by creating the appearance of higher juror utilization."²⁰³ The appearance of higher juror utilization occurs because jurors impanelled to serve as summary jurors do not serve immediately and many times are not given a specific date for actual service.²⁰⁴ Sometimes, jurors impanelled for summary juries never serve at all if the SJT does not go forward.²⁰⁵

Proponents of SJT, however, argue that the use of regular jurors as summary jurors actually increases juror utilization and decreases government expense.²⁰⁶ In many instances, those who serve as summary jurors are leftover jurors who will be paid for one day of jury service even though they did not serve on a petit jury.²⁰⁷ Participating in an SJT allows leftover jurors to "earn" the money they would otherwise receive even though they did not participate on a regular jury.²⁰⁸

201. *Id.*

202. *Id.* Initially, summary jury panels were only drawn directly from the qualified jury wheel. Since April 1990, leftover jurors have also been selected for summary jury duty.

203. *Id.*

204. *Id.* "[A]pproximately 200 potential jurors have been diverted from petit jury service to summary jury service." Many of these jurors were still waiting for the selection of the date of the SJT for which they were to serve as jurors. *Id.* But for their assignment to summary jury service, these individuals would have remained in the qualified jury wheel. *Id.*

205. *Id.* In these instances, potential jurors are excused from jury service without ever having served on a jury. In April 1990 in the Northern District of Ohio, 37 summary jury panels had been sworn in, but only eight of those SJTs had actually occurred. *Id.*

206. SJT REPORT, *supra* note 19, at 473, explaining that 49 SJTs saved \$73,702 or roughly \$1,504 per case. This was accomplished because jurors are only used—and therefore only paid—for one day as compared to four days for an average trial. Also, only 10 perspective jurors are called, thereby eliminating a long line of challenged, and thus unused—but compensated—jurors. *But see supra* notes 198-205 and accompanying text.

207. SJT REPORT, *supra* note 19, at 473 (asserting that SJT actually can increase juror utilization by recycling jurors—using jurors who have been challenged or have not been selected to serve on SJT. The jurors are being compensated whether they are utilized or not, so it makes sense to use them whenever possible.)

208. *See* Hatfield, *supra* note 188, at 151; SJT REPORT, *supra* note 19, at 473-74 (citing statistics on the savings of using jurors in SJT).

Courts and commentators have expressed concern that the use of jurors in SJT might compromise the integrity of the judicial system and thereby diminish public confidence in the system.²⁰⁹ To encourage conscientious deliberation, most judges do not tell the jury until after it has rendered its verdict that the outcome is nonbinding.²¹⁰ To calm jurors' suspicions about the absence of live witnesses and the shortened trial, one judge explains to the jury that the parties have elected a streamlined procedure for resolving their dispute.²¹¹ If this method of telling the summary jurors white lies or half-truths continues, it is feared that an overall decline in jury conscientiousness and confidence in the system will result.²¹² If jurors have the notion that in some cases they are exercising a governmental power in rendering a binding verdict and in other cases merely acting as fact-finding mediators in a private dispute, the conscientiousness of the jurors' decisions will decline in both SJT proceedings and in full trials.²¹³

The concern about the long-term effects of SJT on the conscientiousness of jury verdicts will be eliminated if the jurors are told in advance that they will be participating in an SJT, which is already done in some jurisdictions.²¹⁴ However, although arguments have been made that telling jurors in advance that

209. See generally *Hume v. M & C Management*, 129 F.R.D. 506 (N.D. Ohio 1990) (stating that SJT may compromise the integrity of the jury system because jurors will become less conscientious about their duties if they learn that some verdicts are nonbinding); Posner, *supra* note 3, at 387 (arguing that as word spreads that juries sometimes make decisions and sometimes simply referee fake trials, the conscientiousness of jurors as a whole will decline).

210. See *supra* note 76 and accompanying text.

211. *Zatz*, *supra* note 24, at 107-08 (reasoning that not telling jurors until after the verdict is returned that their decision is nonbinding encourages realistic and conscientious deliberations).

212. *Hume*, 129 F.R.D. at 508 n.4 (arguing that using jurors in a summary jury without the jurors' knowledge raises ethical considerations about the propriety of using individuals in an experimental setting without their knowledge or consent); Hatfield, *supra* note 188, at 57 (using the regular jury panel to call summary jurors affects the judgment of jurors in regular trials as well as summary jury trials).

213. See Posner, *supra* note 3, at 386-87. While Posner argues that not telling jurors at the outset of the SJT that the verdict is nonbinding will undermine the jury system, he believes that telling the jurors in advance will reduce the verdict's informational value, eliminate the principal advantage of SJT, and call into question the entire rationale of the device. *Id.* at 386. Posner suggests holding summary bench trials in lieu of SJT, but then rejects the idea because bench trials in the federal system are usually only half as long as jury trials, and thus the potential benefits are smaller. *Id.* at 387.

214. Harges, *supra* note 33, at 809-10. United States District Court Judge William Young, of the District of Massachusetts, believes that concern with jury conscientiousness is unwarranted. In SJTs conducted in his court, the jurors are told in advance that their verdict is nonbinding, and he believes the summary jurors take their jobs seriously and render verdicts that fairly predict the result of a full trial. *Id.* But see Posner, *supra* note 3, at 386-87 (arguing that to inform the jurors in advance defeats the purpose of the SJT procedure and that jurors' knowledge of nonbinding verdicts undermines the system no matter when in the proceeding the jurors are told).

the verdict is nonbinding will change the verdict,²¹⁵ jurors generally have indicated that this is not the case.²¹⁶ In fact, summary jurors who were interviewed indicated that they did not mind being told after the verdict was entered that their decision was nonbinding.²¹⁷ The vast majority of these jurors believed it would be detrimental to tell jurors in advance that the verdict is nonbinding.²¹⁸

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.²¹⁹ 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.²²⁰ The

215. SETTLEMENT STRATEGIES, *supra* note 25, at 73 n.186. Studies indicate that this concern is invalid. Mock jurors who are aware of the hypothetical nature of their deliberations show a high degree of emotional involvement in their work, and their verdicts fairly predict actual trial results. *Id.* See also Harges, *supra* note 31, at 809 (arguing that concern about jury conscientiousness is invalid). But see *Blueprint*, *supra* note 24, at 890. In difficult or highly emotional cases, jurors have conceded that knowing in advance that their verdict was nonbinding would have made a difference. *Id.* For example, an SJT was held in a case in which an infant had been crippled for life by scalding water. The defendant was a Fortune 500 company that was able to pay any damage award. The summary jurors returned a verdict of nonliability. While the decision was difficult because the jurors had seen the child in the courtroom, they nevertheless felt bound by the law not to award damages. Several of the jurors admitted that had they known the verdict was only advisory, they would have found liability in an effort to help the child reach a settlement with the defendant. *Id.*

216. Enslin, *supra* note 29, at 106. Judge Enslin had the summary jurors in the groundwater contamination SJT fill out an exit questionnaire, which he now uses in all SJTs. *Id.* Of the 10 jurors questioned, all agreed that they should not have been told in the beginning that it was an SJT. *Id.* Nine out of the 10 said that they would have reached the same decision if they had known the verdict was nonbinding. *Id.*

217. Zatz, *supra* note 24, at 112 (stating that of the 10 jurors interviewed, none was angry about the way they were told about the nonbinding nature of their verdict or about the way their time had been used). This was so even though one juror revealed that she had not slept either night of the SJT because of the burden of her responsibility. *Id.*

218. *Blueprint*, *supra* note 24, at 890 (citing juror approval of waiting until the verdict is returned to tell jurors SJT is a nonbinding procedure); JACUBOVITCH & MOORE, *supra* note 20, at 21-25 (citing results from a survey of jurors in SJT which indicated that jurors believe SJT is a worthwhile procedure for the litigants and a worthwhile use of the jurors' time); see also *supra* note 216.

219. See *supra* notes 100-04 (discussing proliferation of SJT use in federal district courts).

220. "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." *McKay v. Ashland Oil Inc.*, 120 F.R.D. 43, 49 (E.D. Ky. 1988). After an SJT presentation to more than 200 attorneys in the Western District of Michigan, the concept was so well received that attorneys are welcoming SJT as a worthwhile tool in resolving disputes. 6th Circuit Conference, *supra* note 17, at 15; see also *id.* at app. C at 6 (stating that lawyers and litigants are automatically opposed to anything new and innovative, if they have not thought of it themselves, but after a trial run almost all of them react favorably to the SJT procedure and attempt to make it work).

main reason expressed for the success of SJT is that the parties receive the opinion of a jury without the time and expense of a lengthy jury trial.²²¹ Even if the SJT fails to result in settlement, the nonbinding nature of the verdict has no effect on a party's right to a full *de novo* trial.²²² Also, attorneys have found that participation in an SJT enables them to prepare their cases well in advance and, if the SJT does not result in a settlement, offers a unique opportunity to "practice" their case.²²³

V. PROPOSED REFORM

Despite questionable support from the legislature, the SJT procedure receives strong support from the judiciary.²²⁴ Even with judicial endorsement of the experimental use of SJT, however, Judge Battisti's assertion that judges lack authority to impanel jurors for SJT deserves careful consideration. The authority for federal district court judges to impanel summary jurors from the court's jury pool is currently based on the assertion that summary juries are advisory juries.²²⁵ As Judge Posner has indicated, jury service is a form of conscription, albeit a mild one.²²⁶ Courts should not deceive jurors into believing that serving on an SJT jury is a duty of citizenship, because it is not. Congress must give courts express authority to impanel jurors to sit for SJT.

There have been solutions proposed to remedy the problem of lack of express authority to impanel jurors, but none of these proposals are sufficient. Some courts have attempted to solve the problem of jury-tainting by having a separate jury wheel for SJT jurors.²²⁷ This solution is inadequate because it does not address the fundamental problem: the courts' lack of authority to impanel summary jurors.

221. Harges, *supra* note 33, at 805-06 (reasoning that because SJT usually lasts no more than a day, endless days in court, high attorneys fees, and witness costs are avoided while still allowing the litigants to have their day in court); Morgan, *supra* note 56, at 500 (stating that SJT gives the litigants their day in court and forces them to fully prepare their cases).

222. SJT REPORT, *supra* note 19, at 469 (explaining that SJT is a nonbinding, predictive tool that in no way affects the parties' rights to a full trial on the merits).

223. SETTLEMENT STRATEGIES, *supra* note 25, at 76 (stating that SJT reduces demands on courts even when settlement does not occur, because SJT acts as a "dress rehearsal" for the full trial).

224. *See supra* note 116.

225. *See supra* notes 181-97 and accompanying text (discussing the traditional use of advisory juries).

226. *See supra* note 161.

227. *See Lambros & Shunk, supra* note 8, at 47 n.22 (explaining that summary jurors are kept on separate duty tracks); A. Spiegel, *supra* note 30, at 830 (noting that jurors who participate in SJT are segregated so they will not participate on full trials thereafter); *Interview, supra* note 59, at 7 (noting that summary jurors are kept on a separate list so jurors won't mingle and discuss the two different types of trials—a full trial as compared to an SJT).

Also, encouraging district courts to enact local rules to provide for summary jury use,²²⁸ which might seem to be an effective solution, will not solve the problem of lack of express authority. Nothing in the Federal Rules authorizes the use of summary jurors. Federal Rule of Civil Procedure 83 provides: "Each district court . . . may . . . make and amend rules governing its practice *not inconsistent with these rules.*"²²⁹ Rule 39(c) provides for the use of advisory juries used at common law to aid the judge in equity cases.²³⁰ However, the advisory jury is impaneled to help the judge render a binding decision, while the summary jury is impanelled to help the parties decide the monetary value of their case. The use of summary juries is inconsistent with the spirit of Rule 39(c).

Federal courts are courts of limited jurisdiction, and Congress must authorize any expansion of their power. Congress can and should amend the Federal Rules of Civil Procedure to provide for the use of summary jurors. Specifically, Congress should amend Rule 39 to provide for the use of summary juries. For example, Federal Rule of Civil Procedure 39(d) could be added to provide for summary jury trials by stating, "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." Such an amendment would not represent a dramatic procedural change, but would merely codify the existing practice of many district courts.²³¹

One merit of the amendment is that it would resolve Judge Battisti's contention by providing statutory authority for calling citizens to summary jury service.²³² The proposed amendment would also encourage reluctant jurisdictions to try the procedure by giving courts the express authority to impanel summary jurors. Another merit of the amendment is that it provides for voluntary use of SJT and thus resolves the dispute between the Sixth and Seventh Circuits. Finally, the amendment would create uniformity in SJT practice throughout the federal court system.

228. See *McKay v. Ashland Oil Inc.*, 120 F.R.D. 43 (E.D. Ky. 1988)

229. FED. R. CIV. P. 83 (emphasis added).

230. See *supra* notes 187-93 and accompanying text (discussing the historical purpose of advisory juries).

231. See *supra* notes 101-04 (discussing the proliferation of SJT use).

232. See *Hume v. M & C Management*, 129 F.R.D. 506, 510 (N.D. Ohio 1990) (holding that federal judges have no authority to summon citizens to serve as settlement advisors).

VI. CONCLUSION

While no single proposal will solve the problem of congestion of the federal courts' dockets, SJT has proven to be a popular and effective means of providing litigants with a just, speedy, and inexpensive resolution of their disputes. With the endorsement of the Judicial Conference, SJT proponents believe that the future of the judicial system depends on mechanisms such as SJT.²³³ A lack of clear legislative authority, however, hinders the use of SJT and creates tension between the federal circuit courts. This tension is best illustrated by the conflicting decisions of *Strandell* and *McKay* concerning whether Congress has granted authority to hold mandatory SJTs. Also, lack of express legislative authority leads to the result—as in the *Hume* and *Exum* decisions—that federal judges are not authorized to impanel jurors to sit for SJTs.

Regardless of the setbacks caused by the lack of express legislative authority, SJT is being used with great success in several jurisdictions at both the state and federal levels.²³⁴ Summary jury trials are beneficial to the court system, the individual litigants, and the jurors. The courts benefit by disposing of potentially lengthy cases in a short period of time. Litigants benefit by avoiding the high attorneys' fees and witness costs associated with litigation, but still have their day in court. Because SJT usually lasts a single day, jurors benefit by satisfying their jury service requirement without a substantial disruption of their routine. By amending Rule 39 to provide express authority for impanelling summary jurors in a voluntary SJT, Congress will merely be codifying the current practice of many jurisdictions, and thus will encourage reluctant courts to utilize SJT as a potential means of reducing federal court backlog.

Molly M. McNamara

233. See *Interview*, *supra* note 59, at 10 (asserting that unless we find alternative methods to resolve disputes, we will end up blindly creating more judgeships and courthouses).

234. See *supra* notes 101-04.