Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers

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The summary jury trial (SJT) has been touted as an effective means to facilitate case settlement. Created and promoted by Judge Thomas Lambros of the United States District Court for the Northern District of Ohio, it is characterized as "counsels' presentation to a jury of their respective views of the case and the jury's advisory decision based on such presentations."[1]

The Lambros model envisions a half-day proceeding before a six-member jury selected from those summoned for a regular jury trial. Following an abbreviated *voir dire* and opening comments by the presiding official, counsel present their cases in narrative form, reading from statements, reports, or depositions. Live witnesses are not permitted, and formal objections are discouraged. At the close of counsels' presentations, the presiding official gives the jury abbreviated instructions on the law, and the jury retires to deliberate. When the jury returns its verdict, counsel are given an opportunity to question jurors regarding the verdict. This SJT experience then provides a focal point for ensuing settlement discussions.

Although the use of the SJT has become widespread,[2] it has recently come under attack on legal and policy grounds. In *Strandell v. Jackson County*,[3] the United States Court of Appeals for the Seventh Circuit held that a federal district court may not require a party to participate in an SJT over the party's objection. In *Strandell*, the district court held the attorney for the plaintiff in criminal contempt of court for failure to comply with its order to participate in an SJT.[4] The attorney

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1. Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 468 (1984). *See also* Lambros & Shunk, *The Summary Trial*, 29 CLEV. ST. L. REV. 43 (1980); Lambros, *The Summary Jury Trial - An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286 (1986).

2. *See* Marcotte, *Summary Jury Trials Touted*, A.B.A. J., Apr. 21, 1987, at 27; D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 75-76 (1986); Ranaii, *Summary Jury Trials Gain Favor*, Nat'l L.J., June 10, 1985, at 1, col. 4; Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

3. 838 F.2d 884 (7th Cir. 1988).

4. Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988).

had refused to comply with the order because he did not want to reveal his trial strategy and case preparation prior to trial. In reversing the district court, the Seventh Circuit rejected the district court's notion that Rule 16 of the Federal Rules of Civil Procedure gives federal courts the authority to require the parties to participate in an SJT.[5]

Regardless of a court's authority to require the SJT, Judge Richard Posner questions whether it is sound judicial policy for the courts to encourage the use of the SJT.[6] Posner argues that the SJT may not remove the parties' uncertainty over how a real jury will deal with a case to an extent great enough to actually increase the chances of settlement.[7] He also criticizes the SJT on efficiency grounds, pointing out that scientific techniques have not been used to evaluate this Alternative Dispute Resolution (ADR) experiment objectively.[8]

This article presents information that should assist in informing the debate about the efficacy of the summary jury trial. It analyzes data collected in conjunction with two parallel case studies of the SJT. The data collected for the case studies were derived from court records, interviews with SJT participants, and mail questionnaire surveys of attorneys participating in SJTs in Florida's Nineteenth Judicial Circuit and the United States District Court for the Middle District of Florida.[9]

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5. "[W]hile 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 side-tracked from the normal course of litigation. The drafters of Rule 16 certainly intended to provide, in the pretrial conference, 'a neutral forum' for discussing the matter of settlement. However, it is also clear that they did not foresee that the conference would be used 'to impose settlement negotiations on unwilling litigants . . . .'" *Id.* at 887. *But see* Arabian American Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil Co., 120 F.R.D. 43, 48 (E.D. Ky. 1988) (concluding that Rule 16 "all but expressly authorize[s]" participation in an SJT).

6. *See* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

7. Posner points out that the uncertainty may persist because (1) the jury's primary function is to assess the credibility of witnesses, but in the SJT witnesses do not take the stand and jurors are thus assessing only the credibility of the lawyers; (2) if different juries would render substantially different verdicts in the same case, one such verdict has limited informational value; and, (3) as lawyers become more familiar with the SJT, they may resort to holding back on evidence or arguments in order to gain an advantage in a subsequent trial on the merits. *Id.* at 374. *See also* Brunet, *Questioning the Quality of Dispute Resolution*, 62 TUL. L. REV. 1, 39-40 (1987) (questioning "whether attorney evidence summaries constitute an adequate reality surrogate to a real trial").

8. Posner, *supra* note 6, at 382. Although not aimed at scientifically assessing the efficiency of the SJT, an empirical study commissioned by the Federal Judicial Center surveyed attitudes of attorneys, jurors, and magistrates who had participated in at least one SJT in the Northern District of Ohio and revealed general satisfaction with the process. M. JACOUBOVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (1982).

9. Case specific questionnaires were mailed in the summer and fall of 1987 to all attorneys identified in court records as representing parties in cases assigned to SJT—53 cases in the state court and 104 cases in the federal court. The state court SJT assignments were made between 1983 and 1987, while the federal court SJT assignments were made

The analysis focuses primarily on the views of the lawyers representing parties in forty-three state court SJT cases and fifty-one federal court SJT cases.[10]

I. THE STATE COURT SJT PROGRAM

The summary jury trial has become a relatively popular dispute resolution device in Florida's Nineteenth Judicial Circuit. The circuit is comprised of four counties along Florida's Atlantic coast: Indian River (Vero Beach), Martin (Stuart), Okeechobee (Okeechobee), and St. Lucie (Fort Pierce). The first SJT was held in Martin County in 1983 and was proposed by a judge who had learned of its use at a seminar and obtained SJT literature from the Federal Judicial Center. The SJT is now being used throughout the circuit. In calendar year 1987, approximately twenty-five SJTs were held in the circuit.[11]

In the two counties within the nineteenth circuit in which SJT data were available for this study (Martin and Indian River), SJT practices vary somewhat. In Martin County, the SJT is usually initiated and held with little or no involvement of the judge assigned to the case. Plaintiff's and defense counsel normally agree between themselves that a particular case is suitable for SJT treatment, ask the deputy clerk who acts as jury supervisor to arrange for the SJT, and hold the SJT with the deputy clerk presiding. In Indian River County, on the other hand, the judge assigned to the case normally discusses the case with counsel at a pretrial conference and presides over the SJT. In both Martin and

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in 1986 and 1987. Analysis of survey results and court records revealed that SJTs were actually held in 43 of the state cases and 51 of the federal cases.

10. Of the 90 state court SJT questionnaires mailed, 75 were returned for a response rate of 83%. Responses were received from at least one lawyer in 42 of the 43 state court SJT cases. Overall, 44% of the state court SJT questionnaires were completed by plaintiffs' attorneys, while 56% were completed by defense counsel.

Of the 224 federal court SJT questionnaires mailed, 130 were returned, for a response rate of 58%. The poorer response rate from the federal court lawyers was due, in part, to a lack of cooperation from the lawyers in 9 cases involving asbestos claims. The plaintiffs in all of these cases were represented by the same lawyer, who, although declining to complete the questionnaires, did grant an in-person interview. The defendants' lawyers in these cases apparently declined to participate in the survey because of the sensitive nature of asbestos litigation. *See* T. WILLGANG, ASBESTOS LITIGATION (1987). Excluding the 9 asbestos cases, responses were received from at least one lawyer in 40 of the 42 remaining cases. Overall, 32% of the federal court lawyers responding represented plaintiffs, 61% represented defendants, and 7% represented others.

11. The number of SJT cases on a circuit-wide basis can only be approximated because of erratic and non-uniform recordkeeping practices with regard to SJT cases. Although cases are frequently assigned to SJT in the three most populous counties—Martin (Stuart), Indian River (Vero Beach), and St. Lucie (Fort Pierce)—only the court clerk's offices in Martin and Indian River Counties regularly keep track of SJT cases. This study is limited, therefore, to SJT cases in these two counties.

Indian River counties, however, the decision to proceed with an SJT is clearly a voluntary one.

Nineteenth circuit attorneys and judges generally expressed very positive opinions about the SJT's utility as a settlement device in interviews and in open-ended responses to the mail questionnaire survey.[12] However, the attorneys were not uncritical of certain SJT practices and procedures.

The attorneys held a general view that assignment to cases to SJT should continue to be on a voluntary basis. Although one experienced lawyer was open to the possibility of adopting a mandatory SJT program, most lawyers interviewed felt that judges should not assign cases to SJT unless the parties believe at the outset that it will assist in settlement of the case. Attorneys generally agreed that presently the only cases that are subjected to SJT treatment are those in which the parties and their attorneys truly believe that SJT may facilitate settlement. However, some of the earlier cases were assigned to SJT by the judge at a pretrial conference even though one or both attorneys expressed strong reservations concerning its utility. Lawyers involved in these earlier cases were unanimous in their opinion that the SJT is a waste of time and money unless both attorneys voluntarily submit to the procedure. Some expressed a view that conducting an SJT under such circumstances may actually make settlement even less likely. They believe that some attorneys will be reluctant to "show all their cards" and may simply use the SJT to discover certain aspects of their opponents' cases or sharpen their own cases for trial through gamesmanship.

The judges in the nineteenth circuit now appear to be in general agreement that the attorneys must exhibit a cooperative spirit in voluntarily submitting to SJT. Indeed, one judge stated that he has turned down a request by attorneys for an SJT because he believed that the attorneys were not making the request in "a good faith effort at settlement," but were simply using it as a strategy to better prepare for trial.

The need for a cooperative spirit among the attorneys was underscored by attorneys who had participated in numerous SJTs and who felt that every effort must be made to insure the predictive value of the SJT. They expressed concern over attempts by some "overly competitive" attorneys to present evidence that would be otherwise inadmissible at trial. Indeed, they opposed the use of any technique that would influence an SJT jury in ways that would not be possible in a real jury trial.

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12. Completed questionnaires and transcripts of personal interviews conducted in the nineteenth circuit and the Middle District are on file at the Florida Dispute Resolution Center. Because interviewee and survey respondents were assured that their comments would be confidential, subsequent citations to interviews and survey responses are to the internal numbers assigned to interviewees and questionnaires.

Some of the lawyers also believed that too much adversarial zeal at the SJT may force an SJT jury to return a verdict that is unrealistic. In a post-SJT communication to his client, one defense attorney explained why the SJT verdict would not facilitate settlement even though it favored his client:

> Because [opposing counsel] took such an extremist position on both the liability and damages issues, I was forced to do likewise. I didn't feel I could take a middle ground at that point because that might have led to a compromise verdict which would have been much too high. . . . As things turned out, the advisory verdict came in at even a lower figure than the bottom of the offered range.[13]

As far as this lawyer was concerned, "overlawyering" at the SJT had sacrificed the SJT's predictive value.

This need for cooperation among the attorneys to insure that the SJT is as accurate a predictor of the real trial as possible (without sacrificing the brevity of the SJT process) was a constant theme in our discussions with the more experienced attorneys in the nineteenth circuit. They were even willing to allow their opponents to deviate from SJT norms if necessary to test jury reactions. In one personal injury case, for example, a plaintiff's attorney was allowed to have his client demonstrate before the jury her bent-over posture and limp. In another case, a defense attorney was permitted to show a ten-minute portion of a video-taped deposition of a doctor.

The notion that the SJT should emulate the essential elements of a real trial was reflected in a widespread desire for enough formality to encourage the SJT jury to be as serious as a real jury. Both plaintiff and defense attorneys tended to agree that a judge should preside over the proceedings in a courtroom, if possible. Those who had participated in SJTs in both Indian River and Martin Counties tended to prefer the more formal Indian River County setting to that in Martin County, where the jury supervisor often presides over the proceeding outside the courtroom. The lawyers also feel that jurors are less likely to make the required effort if they are informed that their verdict will not be binding.

Even though the attorneys would like to have the SJT approximate a real jury trial, they apparently believe that the abbreviated nature of the proceedings places limitations on the kinds of cases that are appropriate for SJT treatment. The attorneys interviewed were unanimous in their belief that an SJT should not be used in a case in which there is a genuine issue of fact. They pointed out that determinations of issues of fact generally depend on jury assessments of eyewitness testimony which is not permitted in the SJT. One attorney explained:

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13. Letter from Attorney #S015 (Mar. 23, 1985). *See supra* note 12.

> Where you have six eyewitnesses to an accident and three say the light was green and the other three say it was red how in the world can you ask a jury in a summary setting to believe this? That kind of case really isn't going to work in this type trial, it's hard enough in a regular trial.[14]

On the other hand, the attorneys believe that the SJT juries generally render believable verdicts in cases in which issues of fact are not critical and only the amount of damages is in question. They also feel that the SJT juries do a good job of determining comparative negligence between a single plaintiff and a single defendant. However, they are less confident in the verdicts when the jury has to apportion fault among multiple parties.

The attorneys interviewed during the study believed that the SJT has great potential for enhancing communications between attorneys and their clients over acceptable settlement offers. Both plaintiff and defense lawyers related cases where they believed that, prior to the SJT, their clients had adopted unrealistic attitudes concerning the strength of their case and had thereby made settlement negotiations difficult. In each of these cases they stated that their clients' witnessing the SJT had influenced them to adopt a more realistic settlement posture. The SJT verdict gave the attorneys and their clients a clearer focus on settlement possibilities and made it easier for the attorneys to explain the relative strengths and weaknesses of their cases.

One defense attorney who has participated in numerous SJTs makes it a regular practice to follow up each SJT with a letter to the insurance company official with settlement authority, describing and analyzing the SJT and recommending a settlement offer or strategy. He explains that his insurance company clients develop a good appreciation of the SJT after witnessing two or three and thereafter he generally does not encourage their attendance except in unusual cases.

II. THE FEDERAL COURT SJT PROGRAM

In the United States District Court for the Middle District of Florida, the cases under study here were assigned to SJT on a mandatory basis. Most of these cases were assigned to summary jury trial in connection with an accelerated docket program conducted by the court in 1986 in an effort to clear up its civil case backlog. All the trial-ready cases in each of the district's three divisions (Jacksonville, Orlando, and Tampa) were set for trial during three concentrated three-week periods with the oldest cases being scheduled first. During each division's accelerated docket period, all nine judges in the district converged on that division

14. Questionnaire #01-020-034. *See supra* note 12.

to conduct the trials. Because this accelerated program could not accommodate cases requiring excessive amounts of trial time, cases predicted to require more than five days of trial time were assigned to SJT before a federal magistrate.

Since the accelerated docket program, relatively few federal cases have been assigned to SJT with only one of the federal judges inclined to use this ADR device with any regularity. Interviews with the judges and court administrative personnel suggest a general attitude that the district's court-annexed arbitration program pre-empts the need for other forms of ADR.

The unpopularity of the SJT in the Middle District at present is also due to a perception that the SJT has not been well received by the bar. Many lawyers who participated in SJTs in the Middle District have negative opinions of the SJT and SJT practices. Most of their criticisms appear to relate, at least in part, to the fact that the program is mandatory. The notion that they were being compelled to participate in a nonbinding substitute for a real trial, in combination with the fact that opposing counsel were much less likely to know each other, precluded the spirit of cooperation that appears pervasive in the nineteenth circuit program.

The absence of a cooperative, problem-solving approach to the SJT resulted in the Middle District lawyers being less willing to accommodate themselves to the abbreviated nature of the proceeding and insisting that it more closely approximate a real trial. For example, the lawyers' single most frequent complaint in open-ended responses to the mail questionnaire survey was the need for additional time to present their cases. This was true even though the Middle District lawyers generally were allowed considerably more time to present their cases than the nineteenth circuit lawyers.[15]

Even if the Middle District attorneys had adopted a more cooperative attitude toward the SJT, the general desire for additional time still might have been present in light of certain basic differences between the federal and state SJT cases. One critical difference was the amount in controversy. The stakes in the federal SJT cases were considerably higher than those in the state cases and the lawyers might have felt that abbreviated proceedings are inappropriate for high stakes cases. Perhaps more important was the fact that the federal cases were generally more complex, involving multiple parties and presenting more issues of fact and law. One attorney stated:

> Use only in simple cases with a very small number of fact questions for the jury. My impression in talking to jurors in this and in [case name] is

15. *See* Table 5 *infra*.

> that they had no idea what had happened in the transaction giving rise to the litigations.[16]

Case complexity, combined with the generally uncooperative attitudes of counsel, apparently encouraged gamesmanship in a number of cases. One attorney explained:

> In our complex products liability case, the presence of the SJT merely added another layer of gamesmanship ... already underway to complicate the case as much as possible, create as many disputes as possible, delay settlement as much as possible, etc.[17]

This belief that the SJT proceeding provides an uncooperative party with gamesmanship opportunities that compromises the predictive value of the SJT was mentioned by a number of attorneys. One attorney stated that the proceeding "plays up the personalities and talents of the lawyers too much and minimizes the evidence." In an interview, another attorney recounted a case in which opposing counsel was permitted to present portions of the deposition testimony of a key witness by having the lawyer's (attractive) associate read the witness testimony while he posed the questions.

III. Comparison of State and Federal SJT Cases

The federal court's accelerated docket program selected for SJT treatment old cases in which a lengthy trial was anticipated. The average federal SJT case in our sample was twenty-seven months old (calculated from date of filing) at the time it was assigned to SJT. In contrast, the average state SJT case in our sample was only ten months old when assigned to SJT.

The mandatory nature of the federal program resulted in the selection of a sample of SJT cases that reflected a fairly wide range of substantive case types. Moreover, the requirement of an estimated lengthy trial tended to select for SJT treatment complex cases involving multiple parties and multiple claims.

Table 1 shows the range of substantive case types in both the federal and state SJT case samples.

16. Questionnaire #11540-416. *See supra* note 12.
17. Questionnaire #13523-311. *See supra* note 12.

TABLE 1

SJT Substantive Case Types

	Assigned	Held
State Cases		
Auto Negligence	38	33
Other Tort	12	8
Contract	2	1
Legal Malpractice	1	1
TOTAL	53	43
Federal Cases		
Private Law		
Personal Injury	33	19
Contract	14	8
Products Liability - Tort	10	7
Products Liability - Contract	3	0
Products Liability - Auto	3	2
Property	1	1
Subtotal	64	37
Public Law		
Federal Question	16	5
Civil Rights	15	3
Securities	6	4
Antitrust	3	2
Subtotal	40	14
TOTAL	104	51

The large concentration of state SJT cases in the personal injury area indicates that the popularity of the SJT in the nineteenth circuit is largely limited to members of the personal injury bar.

An analysis of the statistical differences between the state and federal cases assigned to SJT and those in which the SJT was actually held suggests that mandatory SJT programs may experience greater case "fall out" than voluntary programs. Of the ten state cases that were assigned to SJT but in which the SJT was not held, one case (two percent of those assigned) settled prior to the SJT date while the parties decided to forego SJT treatment in the other nine cases (eighteen percent of those assigned), for a twenty-percent fall-out rate. The federal program, on the other hand, experienced a fifty-one percent fall-out rate, with twenty-five cases (24%) settling prior to SJT and the court deciding or

agreeing to forego SJT in twenty-eight cases (27%). The "public law" cases fell out at a higher rate (65%) than the "private law" cases (42%).

From a case management standpoint, the higher pre-SJT settlement rate in the mandatory federal program reinforces the opinion that the scheduling of a firm trial date (albeit a summary jury trial date) encourages the parties to enter into serious settlement discussions, thereby accelerating the decision to settle. On the other hand, the low pre-SJT settlement rate in state cases suggests that the voluntary decision to schedule an SJT is most likely preceded by a breakdown in serious settlement discussions.

IV. Comparison of State and Federal SJT Dispositions and Outcomes

The purpose of the summary jury trial is to "decimate" the "barriers to settlement."[18] Proponents argue that the common experience of obtaining the perception of six jurors on the merits of the case will encourage settlement.

A. *Case Disposition*

Table 2 shows the dispositions of the state and federal SJT cases. Although a number of state and federal cases were still pending[19] at the time of our study, the state program achieved higher settlement rates than the federal. However, both programs had cases that went on to full trial, with the state program experiencing a nine percent trial rate and the federal program a fourteen percent trial rate.

The survey asked lawyers to identify the relative influence of seven factors in reaching settlement. Three of these factors might be categorized as "case management influences":

- judicial involvement in settlement discussions;
- scheduling of the SJT;
- court imposed deadline following SJT.

Figure 1 displays the lawyer responses. In general, the case management factors played a greater role in settlement in the federal cases than in the state cases. What is perhaps most revealing is the fact that the federal program apparently placed much greater emphasis on the in-

18. Lambros, *supra* note 1, at 468.

19. The SJT had been held at least nine months prior to our data collection efforts in all state and federal "still pending" cases. Although settlement may still be likely in many of these cases, linking settlement to the SJT event after the passage of nine months time becomes tenuous at best.

TABLE 2

SJT Case Disposition

State Cases
(n = 43)

Settled	33 (77%)
Full Trial	4 (9%)
Still Pending	6 (14%)

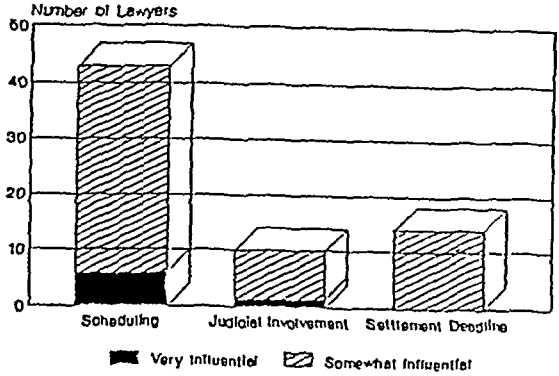
Federal Cases
(n = 51)

Settled	29 (59%)
Full Trial	7 (14%)
Still Pending	15 (29%)

FIGURE 1

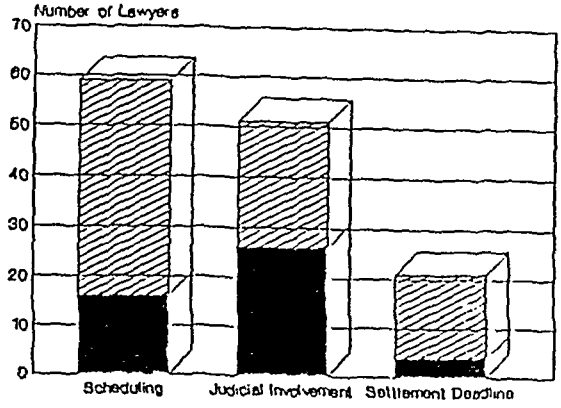
Case Management Influences

State Lawyers



(n=73)

Federal Lawyers



(n=103)

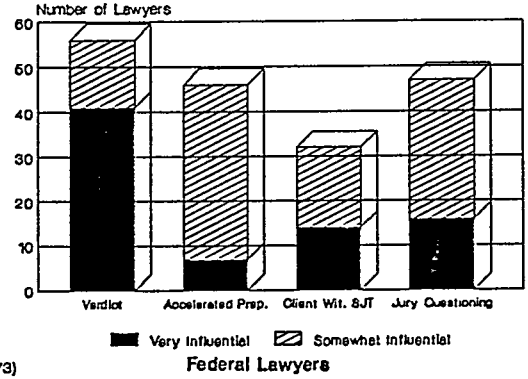
volvement of the judges and magistrates in settlement discussions than did the state program.

The remaining four factors we have categorized as "SJT process influences":

- summary jury trial verdict;
- forced to accelerate trial preparation for the SJT;
- client influenced by witnessing the SJT;
- questioning of jury following the SJT.

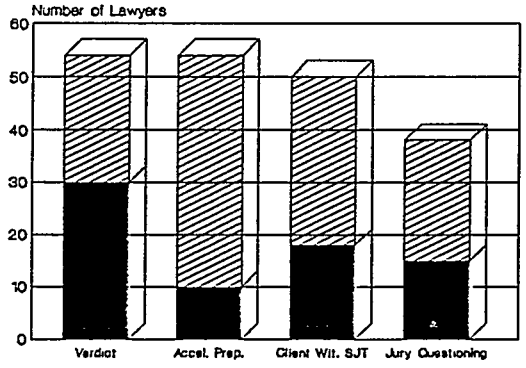
Figure 2 shows the relative influence of these four factors on settlement.

FIGURE 2
SJT PROCESS INFLUENCES
State Lawyers



(n=73)

Federal Lawyers



(n=106)

Although all four of these process factors apparently played a role in influencing settlement in both the state and federal courts, the verdict itself was clearly the most influential factor, particularly in the state court. Seventy-one percent of the state lawyers and fifty-one percent of the federal lawyers identified the verdict as a "very influential" factor.

B. *Case Outcomes*

Overall, prevailing party verdict differences were somewhat striking. Table 3 reveals that plaintiffs prevailed in the majority of both state and federal SJT cases. However, a considerably higher percentage of plaintiffs prevailed in the state SJT cases (86%) than in the federal (56%).

TABLE 3

SJT Verdicts

State Cases (n = 43)	
For Plaintiff	37 (86%)
For Defendant	6 (14%)
Federal Cases (n = 43)	
For Plaintiff	24 (56%)
For Defendant	19 (44%)

These differences are even more revealing when one considers that the average plaintiff's award in the federal SJT cases was twelve times that of the average state SJT award.[20] This brings into question the "no-risk" aspect of the SJT claimed by its proponents.[21] In cases where defendants have an offer on the table, plaintiffs might experience a considerable setback with a no-liability SJT award.[22] These data also suggest that liability, rather than the size of the damages award, was more frequently in question (and therefore a potential barrier to settlement) in the federal cases than in the state cases. Attorney responses to our questionnaire survey supported the notion that liability was more frequently at issue in the federal cases. We asked the attorneys to rank

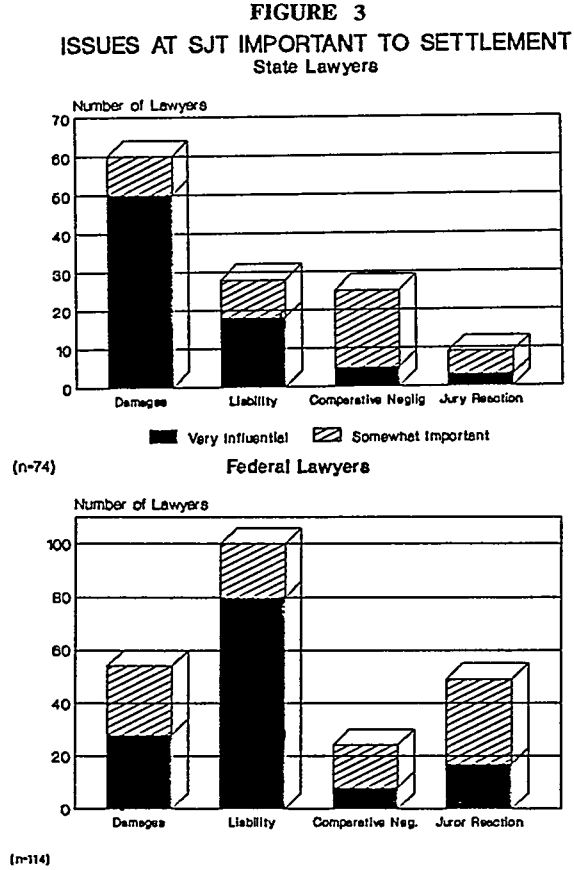
20. Plaintiffs' damages awards in the state SJT cases ranged from $5,000 to $150,000 with an average award of $43,767. In the federal SJT cases, plaintiffs' damages awards ranged from $10,000 to $4,500,000 with an average award of $539,211.

21. Lambros, *supra* note 1, at 469. In the ten federal cases and three state cases where the SJT jury returned a no liability verdict and information on SJT pre and post settlement offers were available, six federal cases and two state cases had settled at the time of this study. In all but one federal case, the parties eventually settled for an amount equal to, or slightly above, the defendant's pre-SJT settlement offer. In the one federal case, however, the defendant had offered $300,000 prior to the SJT. Following the SJT, the defendant's settlement offer had dropped to $25,000. The case ultimately settled for $60,000.

22. It is interesting to note that even Posner did not contemplate this problem. Posner, *supra* note 6, at 367.

order (from 1 = most important to 4 = least important) the issues at SJT that were important to the settlement of the case. The results are indicated in Figure 3. Not only were the federal lawyers (unlike the state lawyers) more interested in the liability issue than in the size of the damages award, but they also tended to be much more interested in juror reaction to the applicable law than the state lawyers.

FIGURE 3
ISSUES AT SJT IMPORTANT TO SETTLEMENT



C. *SJT Rationality*

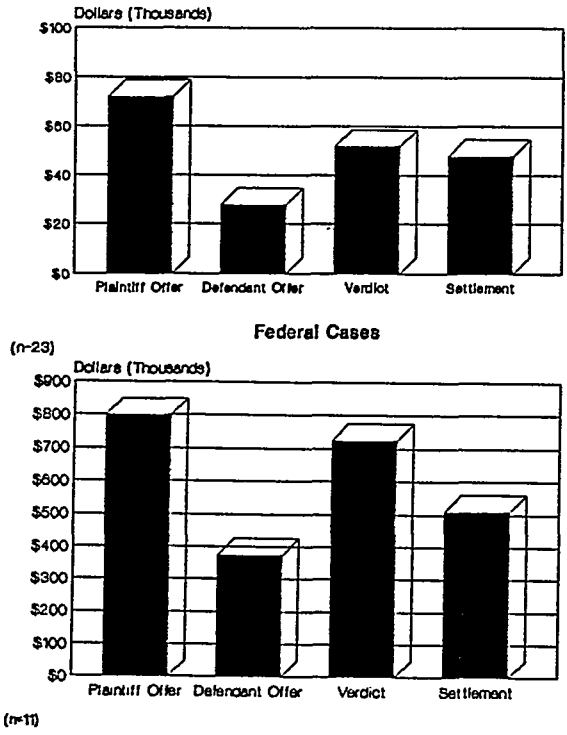
The attorneys' ranking of the SJT verdict as the single most important factor in bringing about case settlement suggests that the SJT conforms to "a model of rational litigant behavior."[23] Although generally critical of the SJT, Posner argues that the SJT verdict should reduce litigant

23. *Id.* Posner requires this criterion for evaluating a procedural reform.

uncertainty by reducing the difference between the parties' perceptions of likely trial outcomes. In practical terms, the SJT verdict has the potential for reducing uncertainty if it falls within the range of pre-SJT settlement offers where both parties have offers on the table prior to the SJT.

In our survey, we asked the attorneys to report pre-SJT settlement offers and post-SJT settlement amounts. Figure 4 displays the average pre-SJT settlement offers, SJT verdicts, and post-SJT settlement amounts for those state and federal cases in which these data were made available.[24] Although the average SJT verdict for both the state and federal cases fell within the range of the average pre-SJT settlement

FIGURE 4
Comparison of Pre-SJT Settlement Offers
SJT Verdict, and Settlement Amount



24. Although we assured the attorneys that their responses would be kept confidential in our cover letter to the questionnaire survey, a number of attorneys (particularly those

offers, the state verdict figure was considerably closer to the midpoint of this range and was a better predictor of the post-SJT settlement amount than the average federal verdict.

Interestingly, the average state post-SJT settlement amount fell midway between the average pre-SJT settlement offers. These gross figures are consistent with Raiffa's research findings that the best predictor of ultimate settlement is the midpoint between two settlement offers once these offers are on the table.[25] Moreover, the averages for the federal cases suggest that the SJT verdict was not a particularly good predictor of settlement and thus brings into question its value as a catalyst for settlement.

Not surprisingly, the state lawyers were more positive about the SJT as a predictor of trial outcome. We asked the lawyers whether they thought the amount awarded by the summary jury reflected the amount that would have been obtained if there had been a full trial. Table 4 shows their responses.

TABLE 4

SJT Verdict Reflect Trial Verdict?

State Lawyers (n = 66)	
SJT Verdict About Right	64%
SJT Verdict Too High	3%
SJT Verdict Too Low	33%
Federal Lawyers (n = 96)	
SJT Verdict About Right	53%
SJT Verdict Too High	19%
SJT Verdict Too Low	28%

A majority of both the state lawyers (64%) and the federal lawyers (53%) thought that the SJT verdict was "about right."

Finally, it must be noted that gross figures mask the fact that Posner's prediction that the SJT will reduce the gap between the parties' pre-SJT perceptions of likely trial outcomes may not always hold up. For

who participated in federal court SJTs) felt that they could not supply us with this information because of client confidentiality. Moreover, one of the federal magistrates declined to give us access to SJT verdict information in the SJT cases the magistrate presided over because the magistrate had told the parties prior to SJT that the SJT file would be sealed.

25. H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982).

example, in at least one of the federal cases in our sample in which the defendant had a sizable pre-SJT settlement offer on the table, the SJT resulted in a verdict of no liability. In isolated individual cases, therefore, even critics like Posner may be too optimistic concerning the efficacy of the SJT.

V. Comparison of State and Federal SJT Processes

Although SJTs in both the state and federal courts generally were patterned after the Lambros model insofar as limitations were placed on the *form* of case presentation (no live witnesses, objections handled at pre-trial, *et cetera*), the length of the SJT case varied considerably between state and federal SJTs. Because the federal cases were more likely to be factually or legally complex and to involve multiple parties, one might reasonably expect the federal SJTs to require longer jury selection, case presentation, and jury deliberations, and this was indeed the case. Even then, however, the differences in SJT times were striking.

The promotional literature characterizes the summary jury trial as a "half-day proceeding."[26] Although most of the state cases were faithful to this characterization, the federal cases were not. As indicated in Table 5, the state lawyers reported that eighty-six percent of the state SJTs took four hours or less to try from jury selection to verdict. Only eight percent of the federal cases were completed in that time. Indeed, most of the federal cases (59%) took more than an entire day (eight hours) to try, while only four percent of the state cases exceeded one day.

TABLE 5

SJT Time

State Cases (n = 42)	
4 Hours or Less	36 (86%)
5 - 8 Hours	4 (10%)
9 - 16 Hours	1 (2%)
More than 16 Hours	1 (2%)
Federal Cases (n = 36)	
4 Hours or Less	3 (8%)
5 - 8 Hours	12 (33%)
9 - 16 Hours	15 (42%)
More than 16 Hours	6 (17%)

26. Lambros, *supra* note 1, at 469.

Only one (2%) of the state cases took more than two days (sixteen hours), whereas six (17%) of the federal cases took this much time.

Even though the federal lawyers were allowed considerably more time for the SJT, they tended to be less satisfied than the state lawyers with the SJT procedure. We asked the attorneys whether the SJT procedure allowed them to present their case adequately. Table 6 presents their responses.

TABLE 6

SJT Procedure Adequate?

State Lawyers (n = 74)	
Yes	67 (91%)
No	7 (9%)
Federal Lawyers (n = 120)	
Yes	61 (51%)
No	59 (49%)

The state lawyers (91%) were overwhelmingly positive concerning the adequacy of the SJT procedure, while only half of the federal lawyers (51%) had a similar view.

Even though the federal SJTs took considerably longer and the federal lawyers were less positive about the SJT procedure, it could be argued that the SJT intervention was justified if a substantial number of settlements occurred in cases where the attorneys initially predicted a high likelihood of a protracted trial. We asked the lawyers whether their case would have gone to trial if there had not been a SJT. Table 7 reports the results. A healthy majority of both the state and federal lawyers believed their case would have been tried if there had not been an SJT. The federal lawyers who said that their case would have gone to trial estimated a median of seven and one-half days of trial time, while the state lawyers estimated a median of two and one-half days.

Even though a majority of the federal lawyers predicted a protracted trial in the absence of the SJT, this feeling apparently was not strong enough to offset a general attitude that the mandatory SJT resulted in increased costs to their clients. We asked the lawyers whether the use of the SJT resulted in their spending more or fewer billable hours on the case. Table 8 presents the results. More than three quarters of the state lawyers responded that they spent fewer billable hours, while only thirty percent of the federal lawyers felt this way.

TABLE 7

Likelihood of Trial if No SJT

State Lawyers
(n = 69)

Very Likely	72%
Likely	17%
Unlikely	9%
Very Unlikely	2%

Federal Lawyers
(n = 114)

Very Likely	67%
Likely	18%
Unlikely	13%
Very Unlikely	2%

TABLE 8

Billable Hours

State Lawyers
(n = 69)

More	16%
Same	6%
Fewer	78%

Federal Lawyers
(n = 117)

More	57%
Same	13%
Fewer	30%

Indeed, a majority of the federal lawyers (57%) felt that they spent *more* billable hours on the case, estimating a median of fifty-five additional hours.

How, then, could some federal lawyers have predicted that the SJT avoided trial on the one hand, but resulted in their spending more billable hours on the case on the other? One factor that helps to reconcile this apparent discrepancy is that the federal cases were closer to being trial-ready (probably because of their age) than the state cases at the time of the SJT. We asked the lawyers to estimate the percentage of

their discovery that was complete at the time of the SJT. Table 9 presents the results. Almost half (48%) of the federal lawyers estimated that their discovery was complete, while only twenty-two percent of the state lawyers made this claim.

TABLE 9

Discovery at Time of SJT

	State Lawyers (n = 74)
Less than 25%	5%
25 - 50%	20%
51 - 75%	26%
76 - 99%	27%
Complete	22%

	Federal Lawyers (n = 123)
Less than 25%	1%
25 - 50%	1%
51 - 75%	7%
76 - 99%	44%
Complete	48%

Moreover, ninety-two percent of the federal lawyers estimated that their discovery was more than seventy-five percent complete and only about half (49%) of the state lawyers made this estimate. Even then, ninety-nine percent of the state lawyers and ninety-seven percent of the federal lawyers deemed the discovery adequate for SJT purposes.

When one then considers the relative finality of a full jury trial as opposed to an SJT, the tendency of the federal lawyers to estimate that the SJT increased litigation costs is explainable. The SJT entails more post-event settlement negotiations and discussions with the client (billable hours) than does the full trial. This observation runs counter to a principal argument of SJT proponents that settlement resulting from an SJT will result in cost savings to the litigants.

Finally, we asked the lawyers whether their clients were satisfied with the SJT procedure. Table 10 presents the responses of the attorneys. The responses to this question were most revealing. An overwhelming majority (89%) of the state lawyers reported client satisfaction with the SJT procedure, while only a bare majority of the federal lawyers (51%) were able to make the same claim.

TABLE 10

Client Satisfied With SJT?

State Lawyers (n = 72)	
Yes	89%
No	11%
Federal Lawyers (n = 113)	
Yes	51%
No	49%

VI. CONCLUSION

Many attorneys who have participated in summary jury trials in Florida express views that would appear to be consistent with the claims of SJT proponents: Cases settled that would otherwise have gone to trial, attorneys and litigants were satisfied with the SJT process, and litigation costs were reduced. On the other hand, some attorneys express opposing views: The SJT experience actually made settlement more difficult, attorneys and litigants were dissatisfied with the SJT process, and litigation costs increased. The experiences of these latter attorneys run counter to Lambros' characterization of the SJT as a "no risk" proceeding.

Generally, favorable attitudes were more likely to be held by attorneys who participated in the voluntary SJT program in state court, while unfavorable attitudes were more likely to be found among participating attorneys in the mandatory SJT program in federal court. Higher percentages of state court attorneys reported that the SJT verdict reflected the likely verdict at full trial, believed that the SJT procedure allowed for adequate case presentation, felt that the SJT resulted in fewer billable hours, and stated that their clients were satisfied with the SJT. Moreover, the state court SJTs resulted in higher case settlement rates than the federal program and were more efficient insofar as they were more likely to conform to the Lambros model of an abbreviated half-day proceeding.

While it would be misleading to attribute the apparent shortcomings of the federal program solely to its mandatory character, these data, combined with observations made in personal interviews, would certainly question the wisdom of mandatory SJTs as a matter of sound judicial policy. It would appear that as the process is made less consensual, the

less likely it will be that the participants will work toward achieving its goals.

What must be kept in mind is the fact that the SJT is not a free-standing dispute resolution device. It is merely an adjunct to settlement negotiations between the parties. If a party has adopted a highly competitive, adversarial posture in settlement negotiations, the party is likely to bring that orientation to the SJT process. Such a party will be less likely to consent to the use of the SJT as a means of obtaining a realistic prediction of the outcome of a real jury trial. If required to participate in an SJT, the party will be more likely to attempt to view the SJT either as a bothersome inconvenience or an opportunity to gain a tactical advantage over an adversary. In both instances, the party's behavior at the SJT most likely will result in gamesmanship that dilutes the predictive value of the SJT.

If a party has adopted a cooperative, problem-solving approach to settlement negotiations,[27] on the other hand, the party will be more likely to consent to the SJT experience and view it as an opportunity to develop information that is critical to the solution of a common problem. That is, the party will thus be more willing to behave in a manner that enhances the predictive value of the SJT. Because its success thus largely depends on the orientations and attitudes of the participants, the SJT will be more likely to achieve its goals in a legal culture that consents to its use.

27. For an excellent discussion of the problem-solving approach to legal negotiations, see Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754 (1984).