# Incongruity In the Seventh Circuit: Do Federal Courts Have the Authority to Order Summary Jury Trials?

## I. INTRODUCTION

In the two decades preceding 1983, the number of civil cases filed in the federal district courts rose at an alarming rate.[1] To make pretrial conferences more responsive to this trend, the Supreme Court authorized an amendment to Rule 16 of the Federal Rules of Civil Procedure in 1983. Prior to the amendment, the pretrial conference comprised a single meeting held for the sole purpose of familiarizing the court and the parties with the issues so as to make the trial as efficient as possible.[2] In amending the Rule, the Advisory Committee redefined the objectives of pretrial conferences and the subjects for discussion to shift the focus toward a process of judicial management embracing the entire pretrial phase.[3] Rule 16 now provides that settlement

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1. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model For A New Era*, 50 U. PITT. L. REV. 789, 792 (1989).

2. Prior to the amendment, Rule 16 provided:

> In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider
> 1) The simplification of the issues;
> 2) The necessity or desirability of amendments to the pleadings;
> 3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
> 4) The limitation of the number of expert witnesses;
> 5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
> 6) Such other matters as may aid in the disposition of the action.
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> The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

FED. R. CIV. P. (1982).

3. Rule 16, as amended in 1983, provides in 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

should be an objective of the pretrial conference because it decreases costs and eases crowded dockets.[4] Moreover, Rule 16 now recognizes alternative dispute resolution (ADR) as a legitimate option to traditional litigation and encourages courts and litigants to discuss the merits of using ADR procedures.[5] Accordingly, the federal judiciary and litigants have begun to

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before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(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

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

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

(11) such other matters as may aid in the disposition of the case.

FED. R. CIV. P. 16(a), (c).

4. Rule 16 specifically provides that one of the objectives of the pretrial conference should be to "facilitat[e] the settlement of the case." FED. R. CIV. P. 16(a)(5). The advisory committee suggests that settlement should be facilitated as early as possible because it "obviously eases crowded court dockets and results in savings to the litigants and the judicial system." FED. R. CIV. P. 16(a) advisory committee's note.

5. Rule 16, as amended, provides that one of the subjects that may be discussed at pretrial conferences is ". . . the use of extrajudicial proceedings to resolve the dispute." FED. R. CIV. P. 16(c)(7). Two commentators assert that Rule 16(c)(7) will be "a powerful stimulant to increased use of ADR in the federal courts." Moreover, they believe that Rule 16(c)(7), in general, "reflects the acceptance alternatives have already gained and is evidence of the change in the judicial attitude toward ADR." Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29 (1985).

use a variety of ADR techniques,[6] including the summary jury trial (SJT), to facilitate settlement during the pretrial period. In a SJT, the litigants summarize their cases before an advisory jury and receive a nonbinding verdict as to liability and damages.[7] The advisory jury's verdict is frequently sufficient to motivate the parties to settle.[8]

An issue both the judiciary and commentators are currently debating is whether federal courts have the authority to require litigants to participate in nonbinding SJTs in order to promote settlement.[9] The judiciary is split on this issue. The Seventh Circuit, the first court to address this issue, held in *Strandell v. Jackson County, Ill.*, that district courts cannot require litigants to participate in SJTs.[10] District courts in a variety of other circuits, however, have held unanimously to the contrary.[11] Moreover, less than two years after *Strandell*, the Seventh Circuit rendered a decision that casts further doubt on the soundness of *Strandell*. In that case, *G. Heileman*

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6. Some of the commonly used methods of alternative dispute resolution include mediation, arbitration, summary jury trials and minitrials. For a more detailed analysis of these, and other methods of ADR, *see* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 465-67 (1984); Levin & Golash, *supra* note 5, at 29.

7. Lambros, *supra* note 6, at 468-69.

8. *See infra* notes 100-108 and accompanying text.

9. Several federal cases address this specific issue. (*see, e.g., infra*, notes 10 and 11 and accompanying text.) Moreover, the recent flood of law review articles and notes illustrates the interest this issue has raised among commentators and distinguished members of the judiciary. *See, e.g.*, Keeton, *The Function of Local Rules and the Tension With Uniformity*, 50 U. PITT. L. REV. 853 (1989); Lambros, *supra* note 1; Maatman, *The Future of Summary Jury Trial in Federal Courts*: Strandell v. Jackson County, 21 J. MARSHALL L. REV. 455 (1988); McKay, *Rule 16 and Alternative Dispute Resolution*, 63 NOTRE DAME L. REV. 818 (1988); Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Richey, *Rule 16: A Survey and Some Considerations for the Bench and Bar*, 126 F.R.D. 599 (1989); Webber, *Mandatory Summary Jury Trial: Playing by the Rules?* 56 U. CHI. L. REV. 1495 (1989); Note, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 KY. L.J. 421 (1989); Note, *Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation*, 57 FORDHAM L. REV. 483 (1988); Note, *Mandatory Mediation and Summary Jury Trial: Guidelines for Ensuring Fair and Effective Processes*, 103 HARV. L. REV. 1086 (1990); and Note, *Thwarting Judicial Power to Order Summary Jury Trials in Federal District Court*: Strandell v. Jackson County, 40 CASE W. RES. 491 (1989-90).

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

11. Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc. 120 F.R.D. 43 (E.D. Ky. 1988); Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988).

*Brewing Co., Inc. v. Joseph Oat Corp.*, the court held that federal courts may compel litigants to attend settlement conferences.[12]

This Note considers whether federal courts have either the statutory or inherent authority to compel parties to attend nonbinding SJTs. Part II describes the SJT -- its purpose, procedure, and statutory and common law justification -- as perceived by its creator, Judge Thomas Lambros. Part III delineates the statutory, judicial, and common law authority relied on by both the Seventh Circuit and the other district courts in support of their respective positions. Part IV juxtaposes the seemingly irreconcilable rationales underlying the Seventh Circuit's *Strandell* and *Heileman* decisions. Finally, Part V concludes that because SJTs and settlement conferences are so similar in purpose and effect, *Heilman*, the more persuasive decision, will significantly influence courts which are asked to determine if district courts possess the authority to compel litigants to participate in SJTs.

## II. The Summary Jury Trial

### A. *The Purpose and Proceeding*

In 1980, Federal District Court Judge Thomas D. Lambros of the Northern District of Ohio hypothesized that a large number of cases fail to settle merely because the parties are uncertain of potential jurors' perceptions as to liability and damages.[13] With this in mind, he designed the SJT, a half-day proceeding that provides counsel with lay jurors' perceptions regarding liability and damages. The SJT does not, however, affect the rights of the parties to a trial on the merits.[14]

Judge Lambros has refined the SJT proceeding to best serve its intended purposes, and his model has been largely adopted by courts utilizing SJTs.[15] Counsel and parties appear before a judge or a magistrate to present cases substantially ready for trial.[16] A jury venire of ten members is assembled for consideration. Based on a character profile of each juror and a brief voir dire

12. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc).

13. Lambros & Shunk, *The Summary Jury Trial*, 29 Clev. St. L. Rev. 43, 45 (1980).

14. *Id.* at 46.

15. For a detailed description of the SJT process, *see id.* at 46-49; Lambros, *supra* note 6, at 470-71.

16. Discovery must be complete and there must be no motions pending. Lambros & Shunk, *supra* note 13, at 46.

by the court,[17] each party is allowed two peremptory challenges to the venire. A jury of six then hears the case.

Unless the parties agree otherwise, the jury's verdict is purely advisory. The jury usually hears the case without this knowledge, however, thus encouraging decision-making that more accurately reflects that of a true jury.[18] Typically, each party is given one hour to present its case.[19] Counsel may present summaries of anticipated witness testimony and exhibits only if they would be admissible at trial; otherwise, evidentiary and procedural rules rarely impede the proceedings.

After the presentation of the evidence, the jury is given an abbreviated charge. It is hoped that the jury will return a unanimous verdict following deliberation. If the jurors are unable to reach a consensus, however, each member is asked to return a verdict that describes his perception of liability and damages. Because the SJT is intended to be a learning process for the litigants, the attorneys also may question the jurors concerning their verdict. After the verdict is returned and the jurors are questioned, the litigants can make a more informed assessment of the strengths and weaknesses of their respective positions. This frequently results in settlement; however, if the parties are unable to settle following the SJT, their rights to a full trial on the merits are not affected.[20]

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17. Each juror fills out a questionnaire that asks for basic information including: occupation, place of employment, marital status and previous knowledge of any parties, any counsel, or the nature of the claim. These questionnaires are then made available to counsel and the court, thus relieving counsel of the task of having to obtain the information from each potential juror on voir dire. *Id.* at 46-47. Any prejudices toward the specifics of the case are ascertained in an abbreviated "show-of-hands" voir dire conducted by the judge. *Id.* at 47 n.20.

18. *Cf.* Posner, *supra* note 9, at 386-87. Judge Posner notes that some juries are told, prior to the SJT, that their verdict will be advisory. He argues that such knowledge is likely to decrease the verdict's informational value. Moreover, he points out that some juries are never told their verdicts are advisory. Because Judge Posner attributes the success of the jury system to the sense of responsibility that jurors feel when exercising governmental power, he fears that discovery of the deceit that occurs in SJTs will impede the success of the jury system by causing jurors to take the responsibility lightly.

19. The time for presentation can be varied according to the needs of the case. In Stites v. Sundstrand Heat Transfer, Inc., 660 F. Supp. 1516 (W.D. Mich. 1987), each party was given six hours to present its case. In Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987) a proposed SJT was scheduled for seven days but lasted for two weeks. Maatman, *supra* note 9, at 464-65.

20. Lambros, *supra* note 6 at 469.

B. *The Justification*

Judge Lambros argues that the SJT procedure is a valid method of ADR pursuant to the Federal Rules of Civil Procedure and the court's inherent power to manage and control its docket.[21] Initially, he contends that the authority for the SJT is grounded in the spirit of the Federal Rules, as set forth in Rule 1. That Rule provides that the Rules are to be liberally construed "to secure the just, speedy, and inexpensive determination of every action."[22] Lambros suggests that each of these objectives is contemplated by the SJT proceeding, and in fact, influenced its creation and development.[23]

Moreover, Judge Lambros argues that SJTs fall within the parameters of acceptable pretrial activity under Rule 16. Rule 16(a) describes possible objectives of the pretrial conference, including expediting disposition of the action and facilitating settlement of the case.[24] Furthermore, Rule 16(c) describes subjects that may be discussed at pretrial conferences such as the possibility of settlement, the use of extrajudicial procedures to resolve the dispute, and "such other matters as may aid in the disposition of the action."[25]

Judge Lambros believes the SJT is also consistent with Rule 39. Rule 39(c) provides for an advisory jury in cases not triable to a jury as a matter of right.[26] Judge Lambros argues that the purpose behind the Rule, like the

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21. For a detailed analysis of the authority on which Judge Lambros relies to justify the SJT as a valid method of ADR, *see* Lambros, *supra* note 6, at 469-70; Lambros & Shunk, *supra* note 13, at 51-52.

22. FED. R. CIV. P. 1.

23. Lambros states that the SJT "was born, as a method of reducing the stresses and burdens on the judicial system while safeguarding the time-tested adversarial process of trial by jury." Lambros, *supra* note 1, at 798. Moreover, he argues that by generating settlement early in the litigation process, the SJT conserves legal resources in two ways: (1) costs to litigants are reduced because the entire litigation process is abbreviated, and (2) costs to the judicial system are reduced because juror costs decrease significantly. Lambros estimates that approximately $1,500 is saved on juror costs each time the SJT is used. The savings are based on the reduced number of potential jurors initially required for voir dire and the limited amount of time that the jurors serve. *Id.* at 800-01.

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

25. FED. R. CIV. P. 16(c)(7), (11).

26. The Rule provides that:

> 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

SJT, is "to give the court and the parties the opportunity to utilize a jury's particular expertise and perceptions when a case demands those special abilities."[27]

Furthermore, Judge Lambros relies on Rule 83 to support his position. That Rule provides, in pertinent part, that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules.[28] The SJT is specifically provided for by local rule in the Northern District of Ohio and in many other districts.[29]

Finally, Judge Lambros argues that the SJT is within the court's inherent power to manage and control its docket. He asserts that although district courts have the discretion and power to "advance and simplify the case before trial" pursuant to the Federal Rules, the district courts possess this power irrespective of those provisions.[30] This proposition has received widespread judicial acceptance.[31]

Judge Lambros' interpretation of the Federal Rules and the court's inherent power in support of litigants' *voluntary* participation in SJTs has apparently received widespread acceptance. In 1989 Judge Lambros estimated that approximately one hundred federal and state judges have used SJTs to resolve disputes.[32] Also, the Federal Judicial Conference of the United States

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effect as if trial by jury had been a matter of right.

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

27. Lambros & Shunk, *supra* note 13, at 52. *Cf.* Posner, *supra* note 9, at 385. Posner argues that the jury in a SJT proceeding is not an advisory jury in the sense intended by Rule 39(c), and is, therefore, outside the scope of the Rule. His primary concern is that the SJT is not used to "advise the judge how to decide the case, but is used to push the parties to settle." *Id.*

28. FED. R. CIV. P. 83.

29. In the Northern District of Ohio, the SJT has been specifically provided for by Local Civil Rule 17.02. In McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988), the court identified a local rule as the only authority required by the judiciary to compel participation in SJTs. (For an in-depth analysis of the impact of the local rule on the *McKay* decision, *see* Note, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 KY. L.J. 421 (1988-89)). Moreover, in Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603, 606 (D. Minn. 1988), the court relied on Federal Rules 1 and 16, as well as a local rule, in holding that district courts have the power to order mandatory SJTs.

30. Lambros & Shunk, *supra* note 13, at 52, citing O'Malley v. Chrysler Corp., 160 F.2d 35 (7th Cir. 1947).

31. Buffington v. Wood, 351 F.2d 292 (3d Cir. 1965); Tracor, Inc. v. Premco Instruments, Inc., 395 F.2d 849 (5th Cir. 1968).

32. Lambros, *supra* note 1, at 802.

endorsed the SJT as "an effective means of promoting fair and equitable settlement of potentially lengthy civil jury cases."[33] Finally, the Seventh Circuit emphasized in *Strandell* that "it was not asked to determine the manner in which SJTs may be used with the consent of the parties."[34] From this statement, and the context of the case generally, one can infer that even the Seventh Circuit considers consensual SJTs to be statutorily authorized.

## III. MANDATORY SJTs AND THE COURTS

This Note addresses the question that is being debated by courts and commentators: Do federal courts have the authority to compel litigants to participate in SJTs? Judge Lambros, not surprisingly, asserts that courts do have such authority.[35] The *Strandell* court flatly rejected this proposition. Each of the other courts that has addressed this issue, however, has expressly adopted Judge Lambros' analysis. Moreover, in *Heileman*, the Seventh Circuit seemingly contradicted its prior decision in *Strandell* by holding that district courts may order litigants to participate in pretrial settlement conferences.

### A. *Strandell*

Whether district courts have the authority to compel litigants to participate in SJTs was first addressed in *Strandell v. Jackson County, Ill. Strandell*, a civil rights action, arose from the suicide of an individual detained in a county jail.[36] The trial was anticipated to take five to six weeks, and the parties were poles apart in terms of settlement; therefore, the district court ordered the parties to engage in a nonbinding SJT.[37] Plaintiffs' counsel

33. THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE PROCEEDINGS 88 (Sept. 1984).

34. 838 F.2d 884, 886 (7th Cir. 1987).

35. Lambros, *supra* note 1, at 802. Judge Lambros argues that the broad pretrial management provisions of Rules 1 and 16 "suggest that it is within the judge's authority to require the use of alternative procedures to aid in case resolution." *Id.* at 802.

36. Strandell v. Jackson County, Ill., 648 F. Supp. 126 (S.D. Ill. 1986), *vacated*, 838 F.2d 884 (7th Cir. 1987).

37. Strandell v. Jackson County, Ill., 115 F.R.D. 333, 334 (S.D. Ill. 1987).

objected to the order, however, contending the district court was powerless to order a SJT.[38]

Nevertheless, the district court overruled the plaintiffs' objection. Quoting Judge Lambros, it held that the authority to order a SJT was grounded in Rules 1 and 16.[39] In the alternative, the court noted that, absent any express statutory prohibition, it had the inherent power to "determine the best procedure to follow to secure a speedy and just resolution of a lawsuit."[40] Finally, the district court relied upon a resolution adopted by the 1984 Judiciary Conference which endorsed the use of SJTs. The original draft of the resolution provided, in part: "Resolved, the Judiciary Conference endorses the use of SJT, *only with the voluntary consent of the parties*, as a potentially effective means of promoting the fair and equitable settlement of lengthy civil jury cases."[41]

The final draft, however, omitted the language regarding voluntary consent.[42] The court construed this deletion as indicative of the Judicial Conference's intent to authorize mandatory SJTs under the Federal Rules.

On appeal, the Seventh Circuit reversed the district court, agreeing with plaintiffs' counsel that the Federal Rules could not be construed to authorize a mandatory SJT.[43] Scrutinizing the language of Rule 16, its accompanying advisory committee notes, and case law, the court concluded the Rule was not intended to be coercive. First, the court cited the advisory committee note to

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38. In *Strandell*, plaintiffs' also objected on the grounds that they would be unfairly prejudiced by having to reveal their trial strategy and 21 witness statements already held privileged by the court. (For an insightful description of the objections, *see* Maatman, *supra* note 9, at 468-69.) The court justifiably overruled these objections. As the court noted, discovery should leave little surprise to the litigants. However, litigants cannot be compelled to reveal privileged information at a SJT; it is their prerogative to withhold such information from the jury. If the information withheld is so crucial as to be determinative of the outcome of the case, however, it is arguable the SJT will not serve its intended purpose -- allowing the litigants to test the strength of their case from a jury's point of view. *Strandell* arguably was not a case well-suited for the SJT because 21 witness statements would have been withheld, and thus, the jury's verdict would have been of limited usefulness to the litigants. Thus, district courts must exercise the utmost discretion in assigning cases for mandatory SJTs.

39. *Strandell*, 115 F.R.D. 333, 335 (S.D. Ill. 1986), citing Lambros, *supra* note 6, at 469.

40. *Stradell*, 115 F.R.D. 333, 336 (S.D. Ill. 1986).

41. THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM REPORT, Agenda G-13 at 4, (Sept. 1984) (emphasis added).

42. The final draft of the resolution stated: "RESOLVED, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases." THE JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT PROCEEDINGS 88 (Sept. 1984).

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

Rule 16(c)(7), which denotes, in part, that the purpose of Rule 16(c)(7) is not "to impose settlement negotiations on unwilling litigants."[44] Second, the court pointed to the advisory committee note to the last sentence of Rule 16(c) which provides that a judge cannot compel attorneys to enter into stipulations or to make admissions.[45] Finally, the court cited two cases decided prior to Rule 16's amendment which held that the Rule could not be used to compel parties to stipulate facts[46] or to undertake further discovery.[47] From the above, the court concluded: "We do not believe that these provisions can be read as authorizing a *mandatory* SJT."[48]

The Seventh Circuit conceded that district courts have the inherent power to manage and control their dockets but stressed the limits upon that power by virtue of the Federal Rules. Where the Federal Rules delineate "the appropriate balance between the needs for judicial efficiency and the rights of the individual litigants, innovation by the individual judicial officer must conform to that balance."[49] Accordingly, having already decided that Rule 16 prohibited the use of mandatory SJTs, the court concluded that a district court would be going beyond the scope of its inherent power to manage and control its docket if it compelled participation in a SJT.[50]

### B. The Rejection of *Strandell* in the District Courts

Since *Strandell*, every court that has addressed the issue has held that district courts have the authority to compel parties to attend SJTs.[51] In *Arabian American Oil Co. v. Scarfone*, a Florida district court found the *Strandell* decision neither persuasive nor binding,[52] asserting that the "obvious

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44. *Id.* at 887, citing FED. R. CIV. P. 16(c)(7) advisory committee's note.

45. *Id.* The advisory committee's note provides, in pertinent part, that "[t]he reference to 'authority' is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions . . . ." FED. R. CIV. P. 16(c) advisory committee note.

46. *Strandell*, 838 F.2d 884, 887-88, (7th Cir. 1987), citing J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976).

47. *Strandell*, 838 F.2d 884, 887 (7th Cir. 1987), citing Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298 (7th Cir. 1977).

48. *Strandell*, 838 F.2d 884, 887 (7th Cir. 1987).

49. *Id.* at 886-87.

50. *Id.* at 888.

51. *See infra* notes 52-58 and accompanying text.

52. Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition.[53] Thus, the court concluded that district courts have the authority to order mandatory SJTs.

In *McKay v. Ashland Oil, Inc.*, a Kentucky district court identified the requisite authority in a local rule that permitted district courts to require attendance at SJTs.[54] Moreover, noting that compelled attendance at SJTs is "all but expressly authorized" by Rule 16, and "[c]ertainly . . . not in conflict" with it,[55] the court concluded that "mandatory SJTs would seem to be within the inherent power of the court."[56] In *Home Owners Funding Corp. of America v. Century Bank*, a Massachusetts district court, citing *Arabian American Oil Co.* and *McKay*, determined that district courts have the power to order SJTs pursuant to Rule 16.[57] Finally, in *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*, a Minnesota district court gave a comparable construction to Rule 16 and drew further support from Rules 1, 39, and 83, as well as the court's inherent power and a local rule.[58]

### C. *Heileman*

Perhaps the decision that has most weakened the Seventh Circuit's holding in *Strandell*, however, is the Seventh Circuit's own decision in *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*[59] The issue presented in *Heileman* was whether a district court could compel each party to send the attorney of record, as well as a party representative with full settlement authority, to a pretrial settlement conference.[60]

Upon initial consideration, a panel of the Seventh Circuit approached the issue in the same manner the court had analyzed the issue presented in *Strandell* -- it first ascertained whether compelled attendance was provided for by Rule 16. The panel immediately acknowledged that Rule 16 expressly

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53. *Id.* at 448.

54. 120 F.R.D. 43 (E.D. Ky. 1988).

55. *Id.* at 48.

56. *Id.*, citing Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985).

57. 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988).

58. 123 F.R.D. 603, 606-07 (D. Minn. 1988).

59. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc).

60. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 848 F.2d 1415, 1418 (7th Cir. 1988), *vacated en banc*, 871 F.2d 648 (7th Cir. 1989).

authorizes district courts to conduct settlement conferences.[61] Nevertheless, as in *Strandell*, the panel concluded that nothing in Rule 16 could be construed to authorize district courts to order represented parties to attend settlement conferences. In fact, the plain language of Rule 16 led the panel to the opposite conclusion. Rule 16(a) expressly authorizes district courts to order both attorneys of record and pro se litigants to appear for a pretrial conference.[62] The Rule does not, however, expressly authorize district courts to order represented parties themselves to appear. The court viewed this as a significant omission because Rule 16 clearly distinguishes between represented and unrepresented parties in several subsections.[63] Therefore, the panel concluded, by negative implication, that Rule 16 does not authorize compelled attendance of represented parties at settlement conferences.[64]

The panel also examined whether district courts have the inherent authority to compel represented parties to attend settlement conferences. It recognized the substantial inherent powers vested in the district courts but emphasized that such powers had to be exercised "in harmony with the Federal Rules . . . ."[65] Applying this standard, the panel concluded that because the plain language of Rule 16 prohibits district courts from compelling settlement conferences, district courts similarly lack the inherent power to take such actions.

On rehearing en banc, the Seventh Circuit reversed the panel's decision.[66] The court conceded that Rule 16 does not provide district courts with the express authority to order represented parties to attend settlement

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61. Rule 16(a) provides in pertinent part: "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 . . . facilitating the *settlement* of the case." FED. R. CIV. P. 16(a)(5) (emphasis added).

62. The Rule expressly provides courts with the authority to direct "the *attorneys for the parties and any unrepresented parties* to appear before it" for a settlement conference. FED. R. CIV. P. 16(a)(5) (emphasis added).

63. Rule 16(b) requires district courts to enter scheduling orders after consulting "the attorneys for the parties and any unrepresented parties . . . ." Rule 16(d) requires that "one of the attorneys who will conduct the trial for each of the parties and . . . any unrepresented parties" must attend the final pretrial conference. FED. R. CIV. P. 16(b), (d).

64. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 848 F.2d 1415, 1420 (7th Cir. 1988), *vacated en banc*, 871 F.2d 648 (7th Cir. 1989).

65. *Id.* at 1419 (quoting Strandell v. Jackson County, Ill., 838 F.2d 884, 886 (7th Cir. 1987)).

66. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc).

conferences.[67] The court noted, however, that the Federal Rules are not the exclusive authority for actions taken by district courts.[68] Specifically, a district court's ability to take action in a procedural context may be grounded in inherent power, "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."[69]

The en banc court recognized that a district court must exercise its inherent authority "in a manner that is in harmony with the Federal Rules . . . ."[70] but the court asserted that the mere absence of express statutory authority does not give rise to a negative implication of prohibition.[71] As applied to the facts of the case, the court held that compelling represented parties to attend settlement conferences is consistent with Rule 16. The court asserted that because Rule 1 requires that the Federal Rules to be liberally construed, the panel's strict construction of Rule 16 was improper.[72] Moreover, the court found that Rule 16 was amended "to urge judges to make wider use of their powers and to manage actively their dockets from an early stage."[73] Thus, the Seventh Circuit concluded that compelling represented parties to attend settlement conferences constitutes a proper use of the district court's inherent authority.[74]

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67. *Id.* at 651.

68. *Id.* (citing HMG Property Investors, Inc. v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 915 (1st Cir. 1988) and Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 11 (1st Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986)).

69. *Id.* (quoting Link v. Wabash R.R., 370 U.S. 626, 630-31 (1962)).

70. *Id.* at 652 (quoting Strandell v. Jackson County, Ill., 838 F.2d 884, 886 (7th Cir. 1987)).

71. *Id.* (citing Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962)). The Seventh Circuit read the *Strandell* test to proscribe inherent authority only "where the rules directly mandate a specific procedure *to the exclusion of others* . . . ." (quoting Landau v. Cleary, Ltd. v. Hribar Trucking, Inc., 867 F.2d 996, 1002 (7th Cir. 1989)).

72. *Id.* at 652.

73. *Id.* In drawing this conclusion, the Seventh Circuit was influenced by a Tenth Circuit decision, in which that court held that "the spirit and purpose of the amendments to Rule 16 have always been within the inherent powers of the courts to manage their affairs as an independent constitutional branch of government." *In re Baker*, 744 F.2d 1438, 1441 (10th Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1014 (1985).

74. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 652-53 (7th Cir. 1989) (en banc).

## IV. A Critical Analysis of *Strandell* and *Heileman*

The Seventh Circuit never convincingly articulated the reason for its seemingly contradictory results in *Strandell* and *Heileman*. Each case involved a different type of pretrial proceeding; one case involved SJTs, the other case settlement conferences, yet, the court never suggested, however, that this difference established the foundation for its inconsistent holdings. Both cases were decided following an analysis of Rule 1, Rule 16, and the court's inherent power to manage and control its docket. In *Strandell*,[75] the court held that Rule 16 was not intended to be coercive, citing several statements in the Rule and its advisory committee notes. Thus, the court concluded that district courts also do not have the inherent power to order litigants to SJTs. In *Heileman*,[76] the court seemingly ignored *Strandell*'s concern with coerciveness, concluding that district courts can compel represented parties to attend settlement conferences pursuant to the inherent power they possess to manage and control their dockets.

### A. *The Type of Proceeding*

The Seventh Circuit never suggested, nor should it have, that the contradictory outcomes in *Strandell* and *Heileman* resulted from differences in the types of proceedings at issue. Both Rule 16 and its accompanying advisory committee notes encourage federal courts and litigants to use settlement conferences and extrajudicial procedures, such as SJTs.[77] The advisory committee notes suggest that the use of both proceedings will further the purposes of the 1983 amendment to Rule 16. Indeed, both settlement conferences and SJTs encourage, and frequently result in, settlement. Thus, the procedural differences in these proceedings do not justify the inconsistent results reached by the Seventh Circuit.

Rule 16(c)(7) expressly provides that participants at any pretrial conference may consider and take action with respect to the possibility of settlement.[78] The advisory committee intended this provision to relate to the use of settlement conferences and asserted that "settlement conference[s] [are]

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75. *See supra* notes 43-48 and accompanying text.

76. *See supra* notes 66-74 and accompanying text.

77. *See infra* notes 78-82 and accompanying text.

78. Rule 16(c)(7) provides, in part, that "[t]he participants at any conference under this rule may consider and take action with respect to the possibility of settlement . . . ." Fed. R. Civ. P. 16(c)(7).

appropriate at any time."[79] The advisory committee encouraged the use of settlement conferences because settlement "eases crowded court dockets and results in savings to the litigants and the judicial system . . ."[80] -- obvious goals of the 1983 amendment to Rule 16.

Rule 16(c)(7) also provides that participants at a pretrial conference may consider and take action with respect to the use of extrajudicial procedures.[81] Pursuant to this provision, the advisory committee intended that judges explore the use of procedures "other than litigation to resolve disputes," including adjudicatory techniques which occur "outside the courtroom."[82] At least one commentator has interpreted this language to exclude SJTs from available ADR procedures because the participation of judges and jury members precludes SJTs from being "an adjudicatory technique which occurs outside of the courthouse."[83]

This interpretation is fallible, however, because the advisory committee enumerates "adjudicatory techniques which occur outside the courthouse" as only one available alternative. Nothing in the language can be interpreted to preclude judges and litigants from further exploring the use of adjudicatory techniques, such as SJTs, which occur within the courthouse. ADR procedures -- whether they occur within or outside the courthouse -- are encouraged because they often lead to settlement, thus furthering the objectives of the 1983 amendment.

Both settlement conferences and SJTs clearly further the objectives of the 1983 amendment to Rule 16. They are implemented to get the parties together for the purpose of increasing the possibility of pretrial settlement. In some situations, this may require only a meeting between the parties in which the judge acts as an intermediary. Under other circumstances, however, more may be necessary -- as where the parties refuse to settle because they are uncertain of potential jurors' perceptions as to liability and damages. Although the procedural aspects of the proceedings are different,

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79. FED. R. CIV. P. 16(c) advisory committee's note.

80. FED. R. CIV. P. 16(c) advisory committee's note.

81. Rule 16(c)(7) provides, in part, that "[t]he participants at any conference under this rule may consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute." FED. R. CIV. P. 16(c)(7).

82. FED. R. CIV. P. 16(c)(7) advisory committee's notes.

83. Maatman contends, with respect to the advisory committee notes that the proffered legality of SJTs remains questionable. He purports that the "summary jury trial is hardly an extrajudicial proceeding. Indeed, a summary jury trial is conducted inside the courtroom of a federal courthouse, before an Article III judge, and with jurors selected from the court's master jury wheel who are paid from congressionally apportioned funds." Maatman, *supra* note 9, at 478.

their purposes and effects are identical; thus, the inconsistent holdings in *Strandell* and *Heileman* cannot be attributed to the differences in the type of the proceeding involved.

### B. *The Federal Rules of Civil Procedure and the Court's Inherent Power to Manage and Control Its Docket*

Although the issues presented in *Strandell* and *Heileman* were fundamentally indistinguishable -- whether district courts can compel litigants to attend and participate in pretrial proceedings provided for by Rule 16 -- the Seventh Circuit's construction of Rule 16 in each case provided inconsistent conclusions. In *Strandell*, the court concluded that Rule 16 was not intended to be coercive, and therefore, it held that district courts do not have the authority to compel parties to attend SJTs.[84] In *Heileman*, and in all other cases which have addressed the mandatory SJT issue, however, the courts construed the language of Rule 16(a) broadly to conclude that district courts do have the authority to order litigants to attend pretrial proceedings.[85] The interpretations of the latter courts are more persuasive, however, because they best reflect the mandates of Rule 1, further the purposes of the amendment to Rule 16, and acknowledge the inherent power which district courts possess to manage and control their dockets.

The *Strandell* court, focusing on language in Rule 16, its accompanying advisory committee notes, and pre-1983 caselaw, concluded that Rule 16 was not intended to be coercive.[86] This conclusion is not persuasive. To "encourage forceful judicial management,"[87] Rule 16 was amended to provide district courts with the authority to sanction "disobedient or recalcitrant parties," their attorneys, or both in several situations.[88] For example, sanctions may be imposed on a litigant if his attorney (1) fails to obey a pretrial order, (2) fails to appear at a pretrial conference, (3) is substantially unprepared to participate in the conference, or (4) fails to

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

85. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc. 120 F.R.D. 43 (E.D. Ky. 1988); Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988).

86. *See supra* notes 43-48 and accompanying text.

87. The advisory committee provided that the "explicit reference to sanctions [in Rule 16(f)] reinforces the rule's intention to encourage forceful judicial management." FED. R. CIV. P. 16(f) advisory committee's notes.

88. *Id.*

participate in good faith. Also, in appropriate situations, the litigant's own behavior can warrant the imposition of sanctions.[89] Thus, Rule 16 was clearly intended to be coercive.

In determining specifically whom may be compelled to attend a conference for the purpose of discussing settlement, the courts have construed the language of Rule 16(a). Rule 16(a) provides, in pertinent part: "In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case."[90] The *Heileman* panel narrowly construed this language to authorize the compulsory attendance of only attorneys of record and unrepresented litigants at settlement conferences.[91] This interpretation is somewhat persuasive because Rule 16 distinguishes between represented parties and unrepresented parties in several sections.[92] If the drafters had intended to provide the courts with the authority to order represented parties to settlement conferences, it is arguable that they would have so stated in Rule 16(a). The absence of express authority, however, does not give rise to a negative implication of prohibition.[93] And, Rule 16 does not expressly prohibit compelled attendance of represented litigants.

The en banc *Heileman* court held the panel's interpretation of Rule 16(a) to be improper because it did not provide for a liberal construction of the Rule, as required by Rule 1.[94] Rule 1 provides that the Federal Rules are to be liberally construed to secure the just, speedy, and inexpensive

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89. FED. R. CIV. P. 16(f).

90. FED. R. CIV. P. 16(a).

91. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 848 F.2d 1415, 1420 (7th Cir. 1988), *vacated en banc*, 871 F.2d 648 (7th Cir. 1989). The Seventh Circuit traditionally interpreted Rule 16 narrowly. *See* Identiseal Corp. v. Positive Identification Sys., Inc., 560 F.2d 298 (7th Cir. 1977) (Rule 16 pretrial authority of district court does not authorize compelling plaintiff to conduct additional discovery, under threat of dismissal of action) and J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (per curiam) (Rule 16 does not authorize compulsion of stipulation of facts).

92. *See supra* note 63.

93. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (citing Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962). *See also* Rule 83 which provides, in part that "[I]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." FED. R. CIV. P. 83.

94. G. Heileman Brewing Co., Inc., 871 F.2d 648, 652 (7th Cir. 1989) (en banc).

determination of every action.[95] The en banc court's holding, however, reflects a fundamental misunderstanding of Rule 1. Rule 1 does not prescribe that the Federal Rules be liberally construed; it prescribes that the Rules be construed to secure the "just, speedy, and inexpensive determination of every action."[96] Thus, the panel's interpretation cannot be found to be improper on the ground that it strictly construed the Rule.

The panel's interpretation of Rule 16(a) can be found to be improper, however, on the ground that it does not facilitate the just, speedy, and inexpensive determination of every action. As the use of SJTs has shown, litigants are more likely to settle when they become aware of the strengths and weaknesses of their cases.[97] Settlement during the pretrial period obviously eases crowded court dockets and results in savings of time and money for the litigants and the judicial system.[98] Thus, Rule 16 should be construed to enable district courts to compel represented parties -- those who possess settlement authority -- to attend settlement conferences because the "just, speedy, and inexpensive" language of Rule 1 lends support to this construction.

To construe Rule 16 to authorize compulsory settlement conferences is also consistent with the primary purpose for the amendment to Rule 16. Prior to the 1983 amendment, studies had empirically proven that when a district court intervenes at an early stage to assume control over a case, the case is resolved (by settlement or trial) more efficiently, and with less cost and delay, than when the parties are left to their own devices.[99] The drafters thus amended Rule 16 to provide district courts with greater authority to manage cases during the pretrial period.[100] To find that district courts have the authority to compel litigants to attend pretrial proceedings is consistent with this purpose, particularly because pretrial conferences do not bind litigants, do not deprive litigants of their right to a trial, and only serve to increase the possibility of settlement.

Finally, to enable district courts to compel represented parties to attend settlement proceedings is also consistent with the inherent power which courts

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95. FED. R. CIV. P. 1.

96. Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring).

97. Between 1983 and 1986, for example, 82 of the 88 SJTs conducted in the Northern District of Ohio resulted in settlements. Lambros, *supra* note 1, at 800. During this time period, 150 cases were assigned by Judge Lambros to SJTs. Sixty-two settled prior to the SJT itself, and 82 settled as a result of the SJT. Thus, over 90% of the cases assigned to SJTs settled. *Id.*

98. FED. R. CIV. P. 16(c) advisory committee's note.

99. FED. R. CIV. P. 16 advisory committee's note.

100. FED. R. CIV. P. 16(a) advisory committee's note.

possess to manage and control their dockets. Federal case law and statutes recognize that district courts possess powers other than those specifically provided for by the Constitution and statutes.[101] These inherent powers, though never specifically granted, enable courts to perform essential functions.[102] For example, district courts are said to possess the inherent power to control their dockets and manage their caseloads so as to dispose of cases expeditiously.[103] To require represented parties to attend settlement proceedings when the district court determines that such would dispose of the case more expeditiously would seem to be within the court's inherent power.

It is well established that "[e]ven a sensible and efficient use of supervisory power . . . is invalid if it conflicts with constitutional or statutory provisions."[104] The use of inherent power to compel parties to attend settlement conferences is not, however, inconsistent with any constitutional or statutory provision. Prior analysis has illustrated that the use of inherent powers to compel parties to attend settlement conferences frequently has the effect of furthering the objectives of both Rules 1 and 16.[105] Moreover, Rule 16 was amended in 1983 to provide district courts with sanctioning power so as "to obviate dependence upon . . . the court's inherent power to regulate litigation."[106] Thus, the use of inherent power to compel attendance at pretrial proceedings is codified in Rule 16(f). This provision has been construed to provide district courts with authority to impose sanctions on

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101. *See, e.g.*, Bank of Nova Scotia v. United States, 108 S.Ct. 2369, 2373 (1988) (quoting United States v. Hasting, 461 U.S. 499, 505 (1983) which states: "In the exercise of its supervisory authority, a federal court 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'" *See also* FED. R. CIV. P. 83. That rule provides: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."

102. Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

103. *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962) (dismissal of pending action for failure to appear at a pretrial conference); Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (attorneys' fees as sanction for abusive litigation practice); and Moulton v. Commissioner, 733 F.2d 734, 735 (10th Cir. 1984) (double costs and attorneys' fees imposed on litigant who had taken a frivolous appeal from a tax deficiency judgment).

104. *Bank of Nova Scotia*, 108 S.Ct. 2369, 2373 (quoting Thomas v. Arn, 474 U.S. 140, 148 (1985)).

105. *See supra* notes 97-100 and accompanying text.

106. FED. R. CIV. P. 16(f) advisory committee's note.

litigants for failure of an insurance representative,[107] an attorney,[108] or a represented party[109] to appear at a settlement conference.

## V. Conclusion

The question of whether district courts possess the authority to compel litigants to attend SJTs is one, like many others, that will not be universally resolved absent a decision by the Supreme Court, or clarification in the Federal Rules or its accompanying advisory committee notes. With the exception of the Seventh Circuit's decision in *Strandell*, however, existing caselaw overwhelmingly suggests that district courts do possess such authority. Several district courts have held that district courts possess the authority to compel parties to attend SJTs; and, in *Heileman*, the Seventh Circuit held that district courts possess the authority to compel parties to attend settlement conferences.

The Seventh Circuit never convincingly justified the incongruous results of *Strandell* and *Heileman*. The contradictory results cannot be explained by the fact that each case involved a different type of pretrial proceeding; both the SJT and the settlement conference are identical in purpose and effect. Moreover, the contradictory results cannot be explained by the status of Rule 16 with regard to coercion when *Strandell* and *Heileman* were decided; both cases were decided after the 1983 amendment. Arguably, no justification exists other than that the Seventh Circuit's perception of the intent of Rule 16 changed. Nevertheless, the result reached in *Heileman* is the more persuasive decision, and should guide courts considering the validity of SJT's because it gives effect to the intent of the amended Rule 16, reflects the mandates of Rule 1, and acknowledges the power that district courts possess to manage and control their dockets.

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107. Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987).

108. Ayers v. City of Richmond, 895 F.2d 1267 (9th Cir. 1990).

109. G. Heileman Brewing Co., Inc. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc).

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