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THE SUMMARY JURY TRIAL

THOMAS D. LAMBROS*
THOMAS H. SHUNK**

I. INTRODUCTION

THE SUMMARY JURY TRIAL IS A HALF-DAY PROCEEDING in which attorneys for opposing parties are each given one hour to summarize their cases before a six-member jury. Basically, introduction of evidence is limited, and witnesses are excluded from the proceeding. After the evidence has been presented and the judge provides a short explanation of the law, the jury retires and either presents a consensus verdict or, if no consensus can be reached, reveals anonymous individual juror views. The jury's verdict is purely advisory, unless the parties agree to be bound by the verdict. The main purpose of the procedure is to provide parties with an insight into the way a trial jury would view the case without the expenditure of time and money required for a full trial.

The American judicial system must necessarily rely on a steady flow of dispositions of cases by settlement lest it collapse because of a demand for trials beyond the ability of the courts to try cases. Settlements are achieved through a variety of procedures and techniques, yet many cases result in trials because of the uncertainty about prospective juror perceptions that pervades settlement discussions. Summary trial helps to eliminate this element of uncertainty and, at the same time, provides an additional basis for settlement of cases otherwise committed to trial. This is not to suggest that trial is to be avoided at all costs, but trial should result only in those cases incapable of alternative solutions. The summary jury trial provides one viable alternative.[1]

II. THE PROBLEM

In the Northern District of Ohio, federal judges are faced with a steadily increasing workload that is the natural result of an increasing number of actions filed each year.[2] The experience in other districts is,

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[1] The first summary jury trial was held on March 5, 1980 in the courtroom of Federal District Judge Thomas D. Lambros, who originated the procedure.

[2] In the Northern District of Ohio there were 1,973 civil cases pending as of January 1, 1975; on January 1, 1980, there were 3,218 civil cases pending. Personal injury cases increased from 329 to 439 during that period. [Statistics prepared by the Clerk's Office in Cleveland, Ohio, for the Northern District of Ohio, Eastern Division, at the request of the writers]. Civil filings per judgeship in-

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of course, similar.[3] The result of this increase in work for federal judges is longer delays in case processing,[4] and a resultant feeling of frustration on the part of judges, advocates and parties alike.

There have been many positive responses to the problem of delay: the use of magistrates,[5] the pretrial hearing to streamline the trial,[6] the creation of new judgeships,[7] the implementation of liberal discovery techniques[8] and the use of videotape in the courtroom.[9] Unfortunately, there have also been suggestions of techniques which may prove to be ultimately destructive: the elimination of diversity jurisdiction,[10] the elimination or severe emasculation of the jury system[11] and the creation of a cadre of "federal technicians" similar to the English system.[12] Each of these latter techniques destroys a valuable component of our judicial system.

Freedom has never been easily maintained; it must be sought after with diligence. It is easy to give over one's freedom to the dictates of

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creased from 267 to 385 in the 1975-1978 period. The total pending caseload increased from 295 to 416 per judgeship during that same time. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, MANAGEMENT STATISTICS FOR UNITED STATES COURTS 73 (1979) [hereinafter cited as MANAGEMENT STATISTICS].

[3] Total district court filings for the federal system increased from 96,910 in 1972 to 144,212 in 1978. The pending caseload increased from 102,344 to 173,827 during that time. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS 4 (1978).

[4] The number (and percentage) of civil cases over three years old in the Northern District of Ohio has increased from 115 (5.9%) in 1975 to 310 (9.8%) in 1979. MANAGEMENT STATISTICS, *supra* note 2, at 73.

[5] *See* 28 U.S.C. §§ 631-639 (1976); N.D. OHIO R. 19.

[6] FED. R. CIV. P. 16.

[7] *See* 28 U.S.C. § 133 (1976).

[8] FED. R. CIV. P. 26-37.

[9] Chapter 14 of the Local Rules for the Northern District of Ohio deals with videotape procedures. It provides that "[i]n any civil case any testimony may, in the discretion of the presiding judge, be presented on videotape recording." N.D. OHIO R. 14.

[10] 28 U.S.C. § 1332 (1976). The bills now pending before Congress that would abolish diversity jurisdiction were discussed, along with a number of other similar docket efficiency measures, at the Federal Bar Association's 1979 Annual Meeting in San Antonio, Texas, held September 25-28, 1979. An excellent summary of the proposals and discussions can be found in 48 U.S.L.W. 2248 (Oct. 9, 1979).

[11] For example, Chief Justice Burger's remarks in an address to the Conference of State Chief Justices, delivered August 7, 1979, suggested that "innovative" lawyers waive juries in complex cases. 48 U.S.L.W. 2118 (Aug. 14, 1979).

[12] *See, e.g.*, 48 U.S.L.W. 2235 (Oct. 2, 1979) (committee report adopted by the U.S. Judicial Conference recommends examinations for federal practice, minimum trial experience standards, peer review and continuing legal education requirements). The Devitt Report on federal practice standards was given close review at the Federal Bar Association's 1979 Annual Meeting, held September 25-28 in San Antonio, Texas. *See also* 48 U.S.L.W. 2248 (Oct. 9, 1979).

another and thereby simplify and streamline; when this is done in the name of "efficiency," the resignation seems almost desirable.[13] However, the techniques listed above that eliminate an important part of the judicial process for efficiency's sake do not really deal with the fundamental problem of increased litigation. It is the hope of the summary jury trial project that it will provide a way to promote efficient docket management *and* to utilize the jury system in so doing. Rather than eliminating or severely restricting the participation of the general public in the judicial process, the summary jury trial, if successful, will allow the lay public to participate in the efficient disposition of the court's business and still provide a means by which the federal courts can feasibly accommodate cases before them on the basis of diversity of citizenship.[14]

It is the hypothesis of this article, and of the summary jury trial program, that there is a large class of cases where the only bar to settlement among parties is the uncertainty of the perception of liability and damages held by the members of a lay jury. These cases involve issues similar to "the reasonable man" standard in negligence litigation, where no amount of jurisprudential refinement and clarification of the law can aid in resolution of the case. In these cases, settlement negotiations often involve an analysis of similar jury trials within the experience of counsel and the trial judge as to the findings of liability and damages. In this way, parties grope toward some notion of a likely award figure upon which to begin their negotiations.[15]

More often than not this comparison of past trial experience is futile, for even an agreement on the facts and a summary judgment on the liability issue results only in a slightly shorter trial on the issue of damages. Courts have for some time felt frustration over the need for trial in cases where neither side wishes litigation and would be willing to consider reasonable settlement if only some sense of the lay perception of the case could be attained.[16] In this regard, counsel's legal train-

[13] Consider the Chief Justice's characterization of attorneys who waive juries in complex cases as "innovative." *See* note 11 *supra*.

[14] If each judge were able to eliminate ten jury trials from his docket each year, 4,000 jury trials per year could be avoided. If each trial required an average of three days to complete, 12,000 trial days would be eliminated, and thus 72,000 juror days. Compare this with the 12,000 juror days required for the half-day summary jury trials required to eliminate those cases from the docket. This rather fanciful calculation merely illustrates the powerful incremental effect of the procedure considered only as one more tool in the trial judge's pretrial powers.

[15] This can often result in a settlement reflecting nothing more than the relative competence of opposing attorneys at settlement negotiations. The summary jury trial advisory verdict would tend to bring settlement more in line with realistic assessments of expected trial outcome.

[16] In fact, the idea for the summary jury trial came from recent experiences in two personal injury cases. In both instances, defense had offered a settlement that the court recommended to plaintiff as very reasonable; plaintiff refused the offer, went to trial, and received a verdict substantially lower than the offered settlement.

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ing is a disadvantage because knowledge of the law precludes an ability to see a case as would a lay jury.

Present pretrial techniques are inadequate to deal with this problem. The pretrial is an enormously beneficial asset to the trial judge, but since its inception it has been looked upon primarily as a means of streamlining the eventual trial. Thoughts of eliminating the need for trial always have been secondary.[17] In instances where recovery hinges primarily on juror perception of liability and damages, the summary jury trial is actually more suitable.

The technique has been used thus far only in instances where it is clear to the court that no possibility of settlement by the usual means is present.[18] In this type of case, the summary jury trial will provide counsel with the perception of a lay jury regarding liability and damages without affecting the right of the parties to a full trial on the merits and without a large investment of time or money. Thus, the summary trial provides a "no-risk" method by which counsel may obtain the opinion of six jurors on the merits of their case in the course of a half-day proceeding, so as to give the parties a reliable basis upon which to build a just and acceptable settlement.

III. DETAILS OF THE TECHNIQUE

After being notified that a case has been scheduled by the judge for summary jury trial,[19] counsel are provided with the following brief description of the procedure:

> This proceeding *in no way affects* parties' right to a full trial *de novo* on the merits; if one or both parties feel the result of the jurors' deliberation is grossly inequitable, the entire matter can be forgotten. Intelligent counsel, however, will readily recognize the value of the proceeding as a predictive tool, and will utilize it to obtain just results for their client at minimum expense.
>
> Counsel will appear, with parties, in court. The presence of a court reporter is optional. A jury venire of 10 members will be presented for consideration, and counsel will be provided with a short character profile of each juror, stating:

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[17] A feeling for the perceptions of the pretrial procedure held by the legal community in the early stages of its implementation can be found in the Report of the Committee on Pretrial Procedure to the Judicial Conference for the District of Columbia, *reprinted in* 4 F.R.D. 35 (1944). The Report clearly takes the "streamlining for trial" attitude toward pretrial hearings.

[18] Generally, the case must be ready for trial with discovery substantially complete and with a record of repeated failures to settle at past pretrial conferences before it is considered for summary jury trial.

[18] The form order that is sent to counsel sets a date, court and presiding judge, and also requests that plaintiff write the court one week before summary trial to give the latest status of settlement negotiations.

1. juror's name, occupation and place of employment,
2. juror's marital status,
3. juror's spouse's name, occupation and place of employment,
4. names and ages of juror's children,
5. previous knowledge of the juror of any parties, counsel or the nature of the case,
6. adverse attitudes of the juror (if any) to the nature of the action.

Each counsel shall be given two challenges, to arrive at a final array of six jurors.[20]

Summary trial shall be presided over by a judge or magistrate of this district. Each party will be given one hour to present, exclusively through counsel, its view of the circumstances of the action (this time allotment may be reduced in multiple-party situations). The presiding judge will then deliver to the jury a brief statement of the applicable law and the jury will retire. The jury will be given a choice of returning a consensus verdict or a special report anonymously listing the view of each juror as to liability and damages. Juries will be encouraged to return a consensus verdict. The consensus or special report will have no effect other than to suggest the basis for an equitable settlement to the parties.

Because of the nonbinding nature of the proceedings, evidentiary and procedural rules are few and flexible, and it is intended that objections and procedural maneuvering will be kept to a minimum. Counsel are free to adduce exhibits for the jury and may themselves describe the testimony of witnesses, but only counsel may speak to the jury and no more than short passages of depositions may be read aloud. The primary evidentiary rule is one of relevance to the proceedings.[21]

The jury panel is drawn from the pool in the same manner as is a regular petit jury.[22] A bailiff, court clerk or law clerk then takes the panel into the jury room and briefly outlines the nature of the summary trial, emphasizing the difference between the summary trial and a trial on the merits. In addition, the jurors are informed of the nature of the

[20] The judge conducts a short *voir dire* in the "show of hands" style on basic prejudices toward the specifics of the case. This *voir dire* rarely lasts longer than fifteen minutes.

[21] T. Lambros, Handbook and Rules of the Court for Summary Trial Proceedings (amended April 1, 1980) (emphasis in original) [hereinafter cited as Summary Trial Rules]. This handbook was developed by Judge Lambros and is sent with the Order of Summary to each participating attorney.

[22] Since some of the federal judges in the Northern District of Ohio question whether the procedure will "taint" summary jurors for regular jury duty, the jurors are currently being kept on separate duty tracks.

action and of the names of the parties and their attorneys. Jurors are then asked to fill out a brief Juror Profile Form.[23]

The clerk makes copies of the profile forms for distribution to the judge and counsel. Counsel are then given a few moments to analyze the forms before the judge asks several basic questions of the jury members. The most effective method for this abbreviated *voir dire* is a simple "show of hands" to questions in the vein of "have any of you ever been in an auto accident or had a close member of the family in an accident?" Jurors signaling an affirmative response are then questioned more closely as to possible bias. The procedure has never taken more than fifteen minutes.

The summary jury trial then proceeds to the argument stage. At the close of the arguments, the judge must briefly explain the relevant points of the law to the jury and provide the jury directions for filling out the verdict sheet. The verdict sheet in single-plaintiff/single-defendant cases involving one claim of liability is a simple form.[24] The purpose of the verdict sheet is to suggest that the jury ought to try to arrive at a consensus finding on liability and, if applicable, damages, but also provides a means for each juror to state his own findings should agreement be impossible. In more complex situations, the verdict sheets must be modified. Through the questioning of several panels, it has been found that the most effective method of presenting compound issues to the jury is by using several verdict sheets, each with a separate issue such as: "defendant A's liability on count one." No juror has suggested that the forms were confusing, nor have the forms ever been filled out inconsistently.[25]

Once the verdict of the jury has been announced, another short conference is necessary to discuss the verdict and to establish a time-table for settlement negotiations. The experience so far suggests that it is not reasonable to expect parties to settle on the day of the summary trial proceeding. This may be the product of bruised egos on the part of the party against whom the jury has found, but is nevertheless a uniform result. At least two weeks should be allowed for parties and their counsel to consider the results.[26] It must be remembered that the purpose of the summary trial is to provide a predictive tool to be used in the settlement negotiations; it is not a technique to obviate the need for old-fashioned settlement talks.

The summary jury trial proceeding was designed to be a half-day affair. A jury brought to the jury room at 8:30 a.m. can be briefed in ten

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[23] The Juror Profile Form has been reproduced as Appendix I.

[24] The verdict sheet has been reproduced as Appendix II.

[25] Jurors have often remarked that the step-by-step advisory verdict sheet makes consideration of the issues easier because it focuses the jury's attention on one particular area at a time.

[26] In the experience of Judge Lambros' court, this has been roughly the settlement time factor for successful summary jury trials.

minutes on the relevant aspects of the case. The attorneys can have copies of the completed Juror Profile Forms in their hands by 9:00 a.m. and the venire can be arrived at by 9:15 a.m. Given a full hour presentation on each side (several attorneys have successfully presented their cases in 20 minutes), the jury charge would begin at about 11:15 a.m. and the jury could retire at 11:30 a.m. On this time schedule, a verdict by 12:30 p.m. would not be unusual. A second summary jury trial could then be scheduled for the afternoon. So far there have been few difficulties in keeping within the general parameters of these time limits.

IV. ANALYSIS OF THE RULES

Most of the rules of procedure[27] for the summary jury trial are self-explanatory and their intent is clear. The following is a collection of remarks on the more important or troublesome aspects of the rules.

A. *What are the limits of the attorney's presentation?*

Attorneys faced with this procedure for the first time often ask what is expected of them in the way of presentation. Specifically, to what facts may they refer in their argument? Rule 2[28] provides a rather lengthy answer to the question of the content of the presentation. The style, however, is left up to the attorneys and the discretion of the court. Rule 2 as originally formulated merely required that all evidence be presented through the attorneys. No limitation was placed upon the evidence. It quickly became clear that an attorney could easily abuse this freedom by referring to facts that he had invented for the sake of effectiveness of presentation. There were also problems relating to portions of depositions to which objections had been made. For example, might an attorney refer to the objectionable material when a trial jury would not have had such access?

The solution, as can be seen in the amended version of Rule 2, was to require that any fact alluded to by an attorney must have a basis in a "product of discovery," or in a written and signed affidavit.[29] "Product of discovery" has been interpreted to mean "admissible product of discovery," thus requiring that the court make at least a preliminary ruling on parts of depositions to which objection has been taken and which will be used as part of the summary trial presentation. The affidavit exception to the "products of discovery" rule was created to accommodate attorneys who do not wish to take the depositions of those they know will be witnesses at trial in their case in chief. To save those attorneys the expense of deposing their own witness, they may simply offer a

[27] The Rules of Procedure adopted for the summary jury trial have been reproduced as Appendix III.

[28] Summary Trial Rules, R.2, *supra* note 21. *See* Appendix III.

[29] *See* Appendix III.

signed and sworn affidavit of the witness describing the relevant proposed testimony. In the unlikely event that there is a recalcitrant witness who does not wish to sign such an affidavit, or if for some other reason the affidavit simply cannot be obtained, the attorney may offer his own signed and sworn proffer of the expected testimony of the witness. This would provide the sanctions of perjury in the case of an attorney who had not taken the time to verify the facts of his case.

The question of style of presentation is much more difficult. The Rules do not specifically speak to style and there has been a wide range of techniques employed by attorneys in the procedure thus far. Some attorneys feel that reading from the depositions of the major witnesses provide a more substantial tone for their case; others prefer merely to describe the proposed witness' testimony so as to provide a smoother flowing presentation. Whenever tangible evidence is necessary to a fair consideration of the case, it may be presented to the jurors and taken into the jury room. A number of attorneys have found the use of photographs of injuries, vehicles and locations, in addition to diagrams of the action involved, to be useful. Perhaps the greatest value of this proceeding to the attorney is that he is given a chance to experiment with courtroom demeanor and to receive the reactions of a jury without a binding effect on his clients. Then, even if the case does not settle based on the verdict of the summary jurors, counsel will have insight into the most effective method of presentation of his case.[30] Further, the summary trial can indicate to the attorney the weak spots in his case by providing the attorney with an opportunity to review his case and prepare it as if at trial. Thus, a good lawyer in the summary proceeding becomes a better advocate at the trial on the merits, should such a trial become necessary.

B. *How will the jury be charged?*

An observer of trials is made painfully aware at the close of final argument that a good deal of "boilerplate" goes into the average charge to the jury. Much of this "boilerplate" has to do with questions concerning the demeanor of the witnesses and other matters that have no relevance to a proceeding involving only attorney presentations. Rule 7[31] provides that the charge will be brief, and it is important that this rule be followed closely. A juror who is asked to absorb the entire factual situation of an action in one morning will break under the strain of the law's "seamless web" if he is subjected to an overly detailed charge. By discussing the law with counsel for a few minutes before the proceeding,

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[30] This can be an important factor, as can be seen from the large sums of money litigators are now willing to pay for jury trial simulation by communications experts. *See* Starr, *Communication and the Trial Lawyer*, 3 IOWA TRIAL LAW. 9 (1978).

[31] Summary Trial Rules, R.7, *supra* note 21. *See* Appendix III.

the judge can determine which aspects of the charge are crucial to the jury's decision and which may be omitted. Obviously, a short charge will often not completely state the applicable law or may not contain all the fine ramifications, but if the purpose of the proceeding is to give attorneys an insight into the perception of their case by a lay jury, a perfectly detailed charge is unnecessary. The thought that must go into the decision on how to simplify the charge will undoubtedly sharpen the understanding of the applicable law for both counsel and judge. Interestingly, there have been few disputes or complaints in the proceedings thus far in reference to the charge finally given.

C. *Are objections in the courtroom appropriate?*

This is a largely untested question because there has been little occasion for objection. Attorneys, realizing that each will get his opportunity to speak to the jury, feel little need to interrupt the flow of their adversary's presentation. The objections that are made have all concerned Rule 2 challenges to the veracity of the substance of opposing counsel's remarks. These objections can often be anticipated by a prior examination by the judge of the objections made to deposition testimony and motions *in limine*. If counsel are apprised of the ruling of the court on these motions prior to summary trial, there will be little cause for objection during the proceeding. Other challenges can usually be handled with little trouble at side bar by merely requiring the attorney making the presentation to refer to the discovery product or affidavit that contains the basis for the assertion made in the presentation. Rule 9 incorporates the language of Rule 403 of the Federal Rules of Evidence[32] and is the basis on which a presentation that oversteps the bounds of propriety may be controlled.

V. BASIS OF THE PROCEDURE

Although the summary jury trial procedure is new, it is squarely grounded in the Federal Rules of Civil Procedure, both technically and in spirit. Remembering that the Rules are to be construed "to secure the just, speedy, and inexpensive determination of every action,"[33] the procedure is clearly within a judge's pretrial powers under Rule 16 of the Federal Rules of Civil Procedure, and the court's inherent power to control its docket.[34]

Pretrial procedures were born in Detroit in 1932, at a time when the state circuit court was far behind in its docket. Without enabling legislation and on its own initiative, that court set up a mandatory pretrial procedure system. When it became obvious that the pretrial concept

[32] *Compare* Summary Trial Rules, R.9 *with* FED. R. EVID. 403.

[33] FED. R. CIV. P. 1.

[34] *Id.* R. 16(6).

was effective in speeding and streamlining cases, the movement spread to Cleveland, Boston and other areas, and was eventually incorporated into the Federal Rules.[35]

The pretrial procedure, as embodied in Rule 16 of the Federal Rules of Civil Procedure, remains an open-ended tool for processing of cases and gives the court wide discretion. As the Seventh Circuit explained in *O'Malley v. Chrysler Corp.*,[36]

> The Federal Rules of Civil Procedure, Rules 34-36, 28 U.S.C.A. following section 723c, provide not only for discovery but for pretrial conference (Rule 16). Under these rules we think the court has the wide discretion and power to advance the cause and simplify the procedure before the cause is presented to the jury. The District Court had the power to issue such orders as in the exercise of its sound discretion would advance and simplify the cause before trial. . . . [T]he order made in the instant case was such an order. It was only a step in the orderly procedure of the case. The District Court was exercising its pretrial powers. It would, in our opinion, have had the *power* to make the order it made irrespective of the Federal Rules of Civil Procedure.[37]

O'Malley has been confirmed repeatedly by other courts.[38] The only real limitation placed on the court's power under Rule 16 appears to be when the court's action would adversely prejudice a party's position or would compel counsel to adopt one line of trial strategy over another.[39] Neither of these two latter considerations is present in the summary trial procedure.

Further, the idea behind the summary jury trial is similar to Rule 39(c) of the Federal Rules of Civil Procedure—the advisory jury.[40] Admittedly, that rule provides for an advisory jury only in cases not triable as of right by jury. The clear purpose behind the rule, however, 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. In the summary trial, the court is similarly calling upon jurors to provide their peculiar expertise in a situation where that expertise is vital but not provided for by the present civil procedure practice.

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[35] *See, e.g.*, Laws, *Pretrial Procedure in the District of Columbia*, 25 A.B.A.J. 855 (1939); Comment, *Pre-Trial Hearings and the Assignment of Cases*, 33 ILL. L. REV. 96 (1939).

[36] 160 F.2d 35 (7th Cir. 1947).

[37] *Id.* at 36 (emphasis in original).

[38] *See, e.g.*, Tracor, Inc. v. Premco Instruments, Inc., 395 F.2d 849 (5th Cir. 1968); Buffington v. Wood, 351 F.2d 292 (3d Cir. 1965).

[39] *See* Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977).

[40] *See* FED. R. CIV. P. 39(c).

VI. THE EXPERIENCE SO FAR

For the first seven months during which the procedure was utilized, thirty-two cases were set for summary jury trial, with eight more docketed for the near future. Of these thirty-two, eight were settled before the proceeding, apparently based on the sharpened perception of counsel generated by the requirement of preparation for summary jury trial. Eighteen of the cases were settled after the summary jury verdict, and settlement negotiations are still pending in two of the more recent cases. Of the remainder, two cases are set for trial, one proceeded to trial but was settled during the presentation of plaintiff's case, and only one has gone through the full trial to a final jury verdict. Given this relatively small number of cases, it is difficult to draw any generalizations about the results of the summary jury trial at this time.

The primary objection to be made to the summary jury trial procedure is that similar results could be achieved by merely setting the case down for a definite trial date. This objection ignores the basis upon which cases were initially selected for the summary jury trial proceeding—they were ready to go to trial and it was apparent that counsel had reached an impasse on settlement. While it is obvious that the eight cases that settled before the summary jury trial would also have settled if set for a full trial, the remainder of the cases that were terminated can be considered successes for the new procedure.

At the first summary jury trial, counsel went on record to express doubts about the usefulness of the procedure. No other objections have ever been made formally, but it is worthwhile to consider counsel's arguments made on the eve of the first proceeding. Summarized, the objections were these: 1) the procedure ought to be strictly on the agreement of all parties. 2) There is no opportunity for the jurors to test the veracity of counsel's presentation of the witnesses. 3) There is no opportunity for impeaching witnesses. 4) There is no opportunity to have witness or client input to prepare an effective rebuttal to evidence or cross-examination. 5) The attorney must reveal his game-plan for trial.

These objections are interesting primarily because they reflect the misconception that to be effective the summary jury trial has to be as similar to a trial on the merits as possible. It would be impossible to simulate fully an evidentiary trial in the course of a half-day proceeding. That is why some aspects of the evidentiary trial were purposely altered to provide a more speedy proceeding. Further, if counsel wishes, he can "factor in" his perception of the effect that the difference between the summary procedure and an evidentiary proceeding would have on the final outcome of the case. The summary verdict is useful as a basis upon which settlement talks can begin. Counsel can simply take the verdict and modify it based upon their own correction factors. The fifth objection listed above was strenuously presented in the first proceeding. The court's response at that time was that the spirit of the new

Federal Rules of Civil Procedure militates against the "sporting theory" of litigation. Beyond that, an attorney who did not want to make his "trump card" available to the opposition before trial, could merely withhold that piece of evidence from the summary proceeding and calculate the effect it would have on the verdict in the evidentiary trial. Since the summary proceeding has no binding effect, parties would not be prejudiced. The first objection can similarly be answered by noting that parties may ignore the advisory opinion. However, it would be in their best interests to give the "trial run" some weight in their decisions about settlement and the possible outcome of a full evidentiary hearing.

VII. CONCLUSIONS

The results of the first thirty-two cases can be attacked on many theoretical grounds: not enough cases have been processed to give an adequate reflection of the technique's success; there has been no evaluation of the procedure by comparing the effect of processing similar cases on two separate tracks, one utilizing the summary jury trial procedure, the other relying on usual pretrial techniques; there is no way to determine whether settlement reached through summary trial is more "just" than settlement achieved through other means. All of these objections are arguably valid. The procedure is still new and needs a great deal more testing before it can be pronounced a successful pretrial innovation. However the new procedure has had an auspicious beginning and should be given the strenuous further testing needed to prove its effectiveness.

APPENDIX I

JUROR PROFILE FORM

TO THE JUROR

You have been selected to take part in a new experiment being conducted by Judge Lambros called a "summary trial." The Judge's clerk will explain the details of the procedure to you before trial, but, briefly, it is a summarized presentation of a case upon which you will be expected to decide the issues within one day. Your verdict will be an advisory opinion to aid in the resolution of the case.

To assist the Court in empaneling a summary jury, you are requested to answer the following questions. Your responses to these questions and such additional questions which may be asked of you by the Court will be helpful in the selection of an impartial summary jury.

At the conclusion of the proceedings, your comments and suggestions will be solicited.

QUESTIONS: (Please Print)

1. Name. _____

_____

2. Occupation and place of employment. (If retired, add your former occupation and place of employment.)

_____

_____

3. Are you married or single?

_____

4. Your spouse's name?_____

_____

5. Spouse's occupation and place of employment. (If retired, add the former occupation and place of employment.)

_____

_____

6. Your children's name and ages?

_____

_____

7. Do you know any of the parties or their counsel? If so, specifically state who. _____

_____

_____

_____

8. Are you in any way personally connected with the facts of this case or do you have personal knowledge of this case? If so, state how.

_____

_____

_____

9. Is there anything you can think of that would bias your opinion so that you would be unable to give a fair and just consideration to the merits of this case? If so, state what.

_____

_____

_____

_____

Your Signature

APPENDIX II

JURORS' ADVISORY OPINION

Case No. _____

WE, THE JURY, HAVE REACHED THE FOLLOWING CONSENSUS:

We, the Jury, find defendant

_____ not liable.

_____ liable, in the amount of _____.

_____ liable, but not able to reach a unanimous decision as to the amount.

We, the Jury, being unable to reach a unanimous decision, submit our anonymous, individual findings as follows:

1. _____ not liable.
   _____ liable, in the amount of _____.
2. _____ not liable.
   _____ liable, in the amount of _____.
3. _____ not liable.
   _____ liable, in the amount of _____.
4. _____ not liable.
   _____ liable, in the amount of _____.
5. _____ not liable.
   _____ liable, in the amount of _____.
6. _____ not liable.
   _____ liable, in the amount of _____.

_____
Foreperson

APPENDIX III

RULES OF PROCEDURE FOR SUMMARY TRIAL PRE-TRIAL PROCEDURE
(As Amended 4/1/80)

Summary Trial is a new pre-trial procedure to be used from time to time in cases assigned to my docket. Although new to the American judicial process, this procedural undertaking has as its foundation Rule 1 of the Federal Rules, ". . . to secure the just, speedy and inexpensive determination of every action."

Therefore, pursuant to Rule 16 of the Federal Rules of Civil Procedure and the inherent power of the Court to control the docket, the following rules are adopted for the orderly presentation of Summary Trials:

1. When there are only two parties to a proceeding, each party is granted one hour to present its case to the jurors. When there are more than two parties, the Court shall establish a scheme of time allotment such that total presentation by counsel shall not exceed 2 1/2 hours.

2. All evidence shall be presented through the attorneys for the parties. The attorneys may summarize and comment on the evidence and may summarize or quote directly from depositions, interrogatories, requests for admissions, documentary evidence and sworn statements of potential witnesses. However, no witness' testimony may be referred to unless the reference is based upon one of the products of the various discovery procedures, or upon a written, sworn statement of the witness, or upon sworn affidavit of counsel that the witness would be called at trial and will not sign an affidavit, and that counsel has been told the substance of the witness' proposed testimony by the witness.

3. Each counsel may exercise a maximum of two challenges to the 10-member jury venire to arrive at a jury of six members. There will be no other exclusions of jurors. There will be no alternate jurors. Counsel will be assisted in the exercise of challenges by a brief voir dire examination to be conducted by the Court and the juror profile forms.

4. Jurors will be instructed to return either a consensus verdict, or a special verdict consisting of an anonymous statement of each juror's findings on the merits and award of damages. Jurors will be asked to return a consensus verdict if possible.

5. Counsel may request that the proceedings be recorded by a court reporter.

6. Counsel may stipulate among themselves that a consensus verdict by the jury will be a final determination on the merits of the case and judgment may be entered thereon by the Court, or may stipulate to any other use of the verdict that will aid in the resolution of the pending case.

7. After presentations by counsel, the Court will briefly outline the nature of the law to the jury.

8. The proceedings may not be continued or delayed other than for short recesses in the discretion of the Court.

9. All evidence presented or described by counsel shall be admissible so long as it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, except that counsel may not introduce evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay or waste of time.

10. Counsel may stipulate as to all facts in agreement prior to the proceeding and the stipulation will be read by the Court.

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

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 4/1/80