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Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity in Its Use

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I. INTRODUCTION

The summary jury trial (SJT) is a beneficial federal court-annexed settlement device—but now is the time to strengthen its effectiveness and encourage uniformity in its use. This is the second article of a two-part series designed to first save, and then strengthen, this device.¹ Although the SJT was created more than fifteen years ago, uncertainties about basic issues and inconsistent use have negatively impacted its potential effectiveness. For it to achieve its laudatory goals—to save time and reduce cost—the litigated challenges must cease and a more uniform approach must be taken.

This is a critical time period in which to address these issues. The federal district courts are nearing the end of a congressionally imposed experimental period designed to find ways to reduce cost and delay in the litigation system.² This period began when Congress passed the Civil Justice Reform Act of 1990 (the “Civil Justice Reform Act” or “Act” or “CJRA”).³ Among other things, this Act required each federal judicial district to set up an Advisory Committee to develop a plan dealing with congestion and delay, including appropriate consideration of alternatives to adjudication.⁴ The SJT is an important device designed to achieve that goal

¹ See Ann E. Woodley, *Saving the Summary Jury Trial: A Proposal to Halt the Flow of Litigation and End the Uncertainties*, 1995 J. DISP. RESOL. 213 (the first article in this two-part series). Note that the first article of this two-part series has been cited in two recently published textbooks: JOHN S. MURRAY ET AL., *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 482 (2d ed. 1996) and JOHN S. MURRAY ET AL., *MEDIATION AND OTHER NON-BINDING ADR PROCESSES* 262 (1996).

² See Civil Justice Reform Act, 28 U.S.C. §§ 471–482 (Supp. IV 1992). The Civil Justice Reform Act of 1990 comprises Title I of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 101–105, 104 Stat. 5089-5098 (1990). See Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 835 (1994) (referring to the passage of the Civil Justice Reform Act of 1990).

³ See Civil Justice Reform Act.

⁴ See STEVEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 243 (2d ed. 1992); see generally Johnston, *supra* note 2. Johnston describes the background of the Act as follows:

The CJRA followed, in large part, from the work of a task force (“Brookings task force”) convened by the Brookings Institution and the Foundation for Change at the

request of Senator Joseph Biden. In 1988, Senator Biden prompted the Brookings task force to "develop a set of recommendations to alleviate the problems of excessive cost and delay" in civil litigation. The membership of the task force was selected to provide a broad spectrum of authorities representing the competing interests in the civil justice system. . . .

After discussing and debating reform proposals over a nine month period, the Brookings task force produced a lengthy set of recommendations for reducing costs and delays in federal civil litigation. The recommendations addressed three broad aspects of federal civil litigation: procedure, judicial resources, and the activities of attorneys and clients that affect cost and delay. The majority of the recommendations concerned changes in procedure, [i.e.,] steps that courts and judges could take to reduce cost and delay in civil litigation. Through its recommendations for procedural reform, the Brookings task force hoped to provide participants in the civil justice system with the "proper incentives" to minimize cost and delay.

Less than six months after the Brookings task force issued its report, Senator Biden introduced his initial version of the CJRA in the Senate on January 25, 1990. Senator Biden's bill relied heavily on the procedural recommendations of the Brookings task force. Although both the House of Representatives and the Senate made amendments to the CJRA before adopting it, the CJRA never shifted its focus from the reduction of cost and delay in the federal courts.

The first recommendation of the Brookings task force called for a statute requiring each district court to develop and adopt a formal plan to reduce cost and delay in civil litigation. Similarly, at the heart of the CJRA lies the requirement that each district court implement a "civil justice expense and delay reduction plan" by December 1, 1993. The stated purpose of this requirement is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." Despite this broadly stated purpose, the Act concentrates on only two of the announced goals—the reduction of cost and delay.

Id. at 837-841 (footnotes omitted). In addition:

The most significant practical restriction on judicial discretion is the Act's requirement that advisory groups and courts contemplate adoption of the specific methods of litigation management and cost and delay reduction set forth in the CJRA. First, the Act requires consideration of six identified "principles and guidelines of litigation management and cost and delay reduction."

Id. at 843. One of these six principles includes court-authorized reference of cases to SJs. See Civil Justice Reform Act § 473(a)(6); see also Shelby R. Grubbs, *A Brief Survey of Court Annexed ADR: Where We Are & Where We Are Going*, TENN. B.J. 20, 23 (Jan./Feb. 1994). The author states that "without doubt, the greatest impetus to the development of ADR in the history of the federal system is the enactment of the Civil Justice Reform Act of 1990." *Id.*

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and is specifically mentioned in the Act.⁵

The Act also required the Judicial Conference to report to Congress by the end of 1995 its assessment of the results of the diverse experience of the district courts in their efforts.⁶ The Act itself expires on December 1, 1997, and will not bind district courts after that date.⁷ The time between the

⁵ See Civil Justice Reform Act § 473(a)(6). Section 473(a)(6) of the Act provides:

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in conjunction with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

...

(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial and summary jury trial.

Id.

⁶ See Johnston, *supra* note 2, at 847–848. Johnston comments:

As part of the pilot program study, the Judicial Conference must provide a report to Congress by the end of 1995. The report must include an assessment of the extent to which cost and delay have been reduced as a result of the program. In addition, the report must compare the experiences of the pilot districts with the experiences of ten “comparable” districts for which adoption of the Act’s principles of cost and delay reduction had been “discretionary.” Perhaps most importantly, the pilot program report also must contain a recommendation as to whether some or all of the district courts should be required to include in their Plans the Act’s principles of cost and delay reduction. If the Judicial Conference does not recommend an expansion of the pilot program’s requirements, the Conference must identify “alternative, more effective cost and delay reduction programs” for implementation.

Id. Senator Biden accurately described the practical effect of the pilot program in prompting the adoption of the Act’s principles of cost and delay reduction. In advocating passage of the CJRA to the Senate, Senator Biden stated:

Within a set number of years, then, this legislation insures that one of two things will occur. Either the six principles of litigation management and cost and delay reduction that Congress has specified in this legislation will be part of district court plans nationwide, or some other program, that has been shown to be demonstrably better, will be in place. One way or the other, the situation is bound to improve.

Id. (footnotes omitted).

⁷ See Johnston, *supra* note 2, at 835 n.10 (referring to Civil Justice Reform Act

receipt of the Judicial Conference report and the expiration of the Act provides a window of opportunity for uniform improvements to be made to the federal court system. Therefore, this is the time to make proposals to assure that one important device designed to achieve the goals addressed by the Act—the SJT—is preserved and enhanced.⁸

As indicated above, the subject of settlement has assumed a new importance as a result of the Civil Justice Reform Act.⁹ But quite aside from

§ 103(a)).

⁸ Johnson notes:

After adoption of a Plan, the CJRA requires repeated annual assessments by each district court, in conjunction with its advisory group. Moreover, these annual assessments must be conducted "with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court."

Johnston, *supra* note 2, at 843 (footnotes omitted). In addition:

The most significant practical restriction on judicial discretion is the Act's requirement that advisory groups and courts contemplate adoption of the specific methods of litigation management and cost and delay reduction set forth in the CJRA. First, the Act requires consideration of six identified "principles and guidelines of litigation management and cost and delay reduction."

Id. (footnotes omitted). One of these six principles includes court-authorized reference of cases to SJTs. See Civil Justice Reform Act § 473(a)(6).

⁹ See GOLDBERG ET AL., *supra* note 4; see also Johnston, *supra* note 2, at 835 (referring to the passage of the Civil Justice Reform Act of 1990). As Goldberg stated:

Until fairly recently it was generally assumed that the primary function of judges was to decide cases. It is only in the last decade or so that courts have viewed substantial involvement in facilitating settlement as a primary function of the judge and that the notion of "the managerial judge" has entered the judicial vocabulary.

GOLDBERG ET AL., *supra* note 4, at 243 (citing Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982)). Goldberg added "There are undoubtedly some judges who still cling to the traditional notion that the sole function of judges is to adjudicate. . . . But the burgeoning caseloads in many courts, particularly urban ones, have created increasing pressure for judges to process more expeditiously their swelling dockets." *Id.*

See also Dan Quayle, *Proposed Civil Justice Reform Legislation: Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 980 (1992). The former Vice-President stated:

America has become a litigious society. In 1989 nearly 18 million new civil cases were filed in the state and federal courts. This amounts to one lawsuit for every ten adults. In the federal courts alone, the number of lawsuits filed each year has almost tripled in the

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issues of congestion and delay, judges are increasingly becoming aware that using ADR techniques in certain cases will provide more satisfactory outcomes than are possible through litigation.¹⁰ Thus for many judges the question is no longer whether to encourage settlement but how best to do so.¹¹ The Senate Report for Public Law 101-650,¹² the Judicial Improvements Act of 1990 (which includes the Civil Justice Reform Act of 1990) notes that the last fifteen years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts.¹³

One settlement technique used with growing frequency in the federal courts is the summary jury trial.¹⁴ Briefly stated, in an SJT, both sides

last thirty years from approximately 90,000 in 1960 to more than 250,000 in 1990.

This dramatic growth in litigation carries with it very high costs for the U.S. economy. A recent article in *Forbes* estimates that individuals, businesses and governments spend more than \$80 billion a year on direct litigation costs and higher insurance premiums, and a total of up to \$300 billion indirectly, including the cost of efforts to avoid liability.

Id.

¹⁰ See GOLDBERG ET AL., *supra* note 4, at 243.

¹¹ See *id.*

¹² S. REP. NO. 101-416, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6831.

¹³ See *id.*

¹⁴ See Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 802 (1989) [hereinafter Lambros, *New Adversarial Model*] (estimating that at least one hundred federal and state judges had deployed the SJT in the resolution of approximately one thousand disputes).

The use of SJTs in state courts, where it is less prevalent, is not addressed herein. However, many of the same concerns and proposed solutions would apply in those systems as well. Some of the state courts that have tried this procedure include the Maricopa County (Arizona) Superior Court, the Cuyahoga County (Ohio) Court of Common Pleas and the Madison County (Ohio) Court of Common Pleas, Probate Division.

In the Madison County case, *Nibert v. BancOhio National Bank*, No. CA86-05-012, 1987 WL 10359 (Ohio Ct. App. Apr. 27, 1987), the lower court used an SJT in a will contest action. See *id.* at *2. The summary jury unanimously concluded that the August 8, 1979, instrument admitted to probate was not the last will and testament of Frank R. Nibert. See *id.* The appellate court stated:

Although the summary jury trial was designed to quickly and inexpensively resolve disputes, it failed to achieve that laudable goal here. For following an unsuccessful motion for summary judgment on the issue of Nibert's competency, the case came on for a second trial, this time to the bench. After four days of testimony, the court concluded the August 8, 1979 instrument executed by Nibert was his last will and testament.

Id. See also N.D. OHIO R. 7, CH. 6. The United States District Court for the Northern District

present a summary of their evidence to an actual jury. The jury deliberates and then renders an advisory verdict, which becomes the basis for settlement discussions between the parties.¹⁵ The SJT was created in 1980 by the Honorable Thomas D. Lambros of the United States District Court for the Northern District of Ohio.¹⁶ In September 1984, the Judicial Conference of the United States passed a resolution recognizing the usefulness of the SJT in resolving prolonged civil litigation.¹⁷ As of 1987, the SJT had been used by an estimated sixty-five judges around the country.¹⁸ And, as mentioned above, it was specifically mentioned in the Civil Justice Reform Act of 1990 as one of the tools federal courts now have at their disposal.¹⁹

The SJT's intended time and cost reductions have been realized on many occasions,²⁰ but during the more than fifteen years since its creation, a number of basic uncertainties and litigated issues have threatened its use and effectiveness. The basic, initial issues were discussed in the first article of this two-part series,²¹ and if the proposed solutions are adopted, they will most likely save this device from extinction. This Article addresses the other significant issues that also impact upon the use and effectiveness of the SJT that must be resolved.

These remaining issues that affect the willingness of courts and lawyers to use this device, as well as its likely success, fall into four categories. The first issue is the lack of uniformity in the applicable rules and the use of the

of Ohio also uses a device called a "summary bench trial" in which, a judge is the decision maker rather than a jury. *See id.* This variation is beyond the scope of this Article. The United States District Court for the Northern District of Oklahoma also uses a device called an "executive summary jury trial," which the court describes as a summary jury trial where chief executive officers of corporate parties participate as part of a three-judge trial panel. *See N.D. OKLA. R. 16.3(f)*. Again, this variation is beyond the scope of this article.

¹⁵ *See* THOMAS D. 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* 9-10 (Jan. 1984) [hereinafter LAMBROS, *REPORT TO THE JUDICIAL CONFERENCE*].

¹⁶ *See* Thomas D. Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 *VILL. L. REV.* 1363, 1373 (1983-1984).

¹⁷ 1984 *JUD. CONF. OF THE U.S. REP.*, at 88. The September 1984 resolution passed by the Judicial Conference of the United States reads as follows: "Resolved, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective way of promoting the fair and equitable settlement of potentially lengthy civil trials." *Id.*

¹⁸ *See* Paul Marcotte, *Summary Jury Trials Touted*, *A.B.A. J.*, Apr. 1987, at 27.

¹⁹ *See* Civil Justice Reform Act § 473(a)(6).

²⁰ *See* discussion *infra* Part II.B. (concerning the benefits of SJTs).

²¹ *See generally* Woodley, *supra* note 1.

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process. The second issue is the lack of necessary limitations, including the lack of limitations on the following: time and expense, the inequality of participation by the parties and other factors affecting the reliability of the SJT verdict. The third issue is the lack of guidance for the courts, including the lack of guidance in choosing appropriate cases for SJTs; uncertainty about the types of available sanctions and under what circumstances they should be imposed; uncertainty about whether SJT verdicts should ever be binding, and, if so, under what circumstances; uncertainty about whether the judge or magistrate who conducted the SJT should preside over the actual trial when the SJT does not result in settlement; and uncertainty about whether SJT jurors should be excluded from serving at subsequent trials. Finally, the fourth issue is the other barriers to the use and effectiveness of SJTs.

All of these issues, if left unresolved, will result in the SJT's failure to achieve the result intended by its creation: reduction of the time and cost involved in litigation by fostering settlement. Therefore, to enhance this settlement device and encourage uniform treatment of it, this Article analyzes these issues and proposes solutions in the form of a model local court rule.

As part of the justification for the proposed solutions, this Article offers a unique perspective on the SJT device.²² Input on the issues raised by the use of SJTs has been obtained from those persons who actually conduct them: federal district court judges and federal magistrates from across the country. Lengthy surveys were submitted to these federal district court judges and federal magistrates,²³ and the responses received contribute

²² See Molly M. McNamara, Note, *Summary Jury Trials: Is There Authority For Federal Judges to Impanel Summary Jurors?*, 27 VAL. U. L. REV. 461, 475 n.102 (1993) (noting that to date, no comprehensive study has been conducted on the procedure). For an explanation of the survey conducted for this article, see *infra* note 24. While the surveys submitted to federal judges across the country to support this Article may not qualify as a comprehensive study, they certainly offer more insight into the actual process than has been available thus far.

²³ See Ann E. Woodley, Compilation of Judicial Responses to Professor A. E. Woodley's Survey on Summary Jury Trials (Spring 1994) (unpublished compilation of survey responses on file with Professor Woodley) [hereinafter *Judicial Survey Responses*]. A 40-question survey was sent to all of the chief judges of the United States District Courts along with a cover letter asking them to pass copies of the survey on to all of their colleagues (including both district court judges and magistrates). A separate mailing of the survey was also made to all of the district court judges and magistrates in the United States District Court for the Northern District of Ohio, since the SJT's creator, Judge Lambros, is a judge in that district. Responses were received from fifty-seven district court judges and magistrates from twenty-five states, including Alabama, Alaska, Arkansas, Connecticut, Florida, Georgia,

significantly to the discussion below.²⁴

The proposed remedies stem, in part, from suggestions made by the surveyed judges and magistrates, in addition to ideas from other scholars.²⁵ These remedies are directed to those judicial decision makers who can implement them in the federal court system.²⁶ Hopefully enhancing the process and encourage uniform treatment of the SJT will lead to the result that was intended by its creation: the reduction of the time and cost involved in litigation by fostering settlement.²⁷

The discussion below is divided into four parts. Part II is a background section describing the SJT process and its intended benefits, as well as

Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Michigan, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Wisconsin and Wyoming. These responses were updated, where necessary, in the Spring of 1994. Note that this is the same compilation that is referred to in the first article in this series.

Twenty-one of the responding judges indicated that they have conducted SJTs, thirty-four indicated that they have not and one stated that Judge Lambros conducted an SJT for him. *See id.*, Question 1, at 1. Judges from the Middle District of Alabama, the Northern District of Alabama, the Southern District of Florida and the District of Hawaii who stated that they have not conducted any SJTs added that they were also speaking for *all* of their colleagues in those districts. *See id.*

The surveyed judges who have conducted SJTs have conducted anywhere between one and sixty of them. *See id.*, Question 7, at 10.

²⁴ A similar 28-question survey on this subject was sent to the head litigation partner at the 100 largest law firms in Cleveland, Ohio, and Akron, Ohio, that list litigation in their *Marindale-Hubbell* entry. Although fewer than ten lawyers responded to this survey, their views have been included where appropriate. These responses are contained in an unpublished compilation entitled, "Compilation of Attorneys' Responses to Professor A. E. Woodley's Survey on Summary Jury Trials." *See* Ann E. Woodley, *Compilation of Attorney Responses to Professor A. E. Woodley's Survey on Summary Jury Trials* (Spring 1994) (unpublished compilation of survey responses on file with Professor Woodley) [hereinafter *Attorney Survey Responses*]. Note that this is the same compilation that is referred to in the first article in this series. *See generally* Woodley, *supra* note 1.

²⁵ Note, however, that the scholars have offered, at best, piecemeal approaches to the problems of sustaining and enhancing the SJT. Although not entirely comprehensive, the most basic problems were addressed by this author in the first article in this series. *See generally* Woodley, *supra* note 1.

²⁶ Again, although this Article does not address specifically the use of SJTs in state courts, the same remedies may be appropriate in those systems.

²⁷ *See Johnston, supra* note 2, at 848. The legislative history of the Civil Justice Reform Act "indicates that Congress pursued judicial reform on its own through the CJRA because of a perception that the courts could not effectively use their powers under the Federal Rules of Civil Procedure to reduce cost and delay." *Id.* at 848 n.82.

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briefly identifying the issues impacting upon the use and effectiveness of the SJT discussed here. Part III describes these issues in detail and proposes solutions. Part IV contains the specific model uniform local rule embodying the solutions. Finally, Part V offers a brief conclusion.

II. BACKGROUND

By way of background, this Article will briefly describe the SJT process and its benefits, as well as the issues impacting upon the use and effectiveness of this beneficial device.²⁸

A. *The Summary Jury Trial Process*

As noted in the Senate Report to the Judicial Improvements Act of 1990, the SJT "was borne out of a need to develop a settlement alternative that preserved the involvement of a jury in the decision making process."²⁹ The Report added that an SJT recognizes that often the only bar to settlement of a case is a difference of opinion on how a jury will perceive evidence presented at trial.³⁰ However, it is clearly a settlement tool which neither limits nor expands the rights of the parties involved.³¹ An SJT is generally used after discovery is complete and no motions are pending.³² The process has been described as follows:

In a summary jury proceeding, attorneys present abbreviated arguments to jurors who render an informal verdict that guides the settlement of the case. Normally, six mock jurors are chosen after a brief voir dire conducted by the court. Following short opening statements, all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys. Live witnesses do not testify, and evidentiary objections are discouraged. Thus, some of the evidence disclosed to the mock jury might be inadmissible at a real trial.

²⁸ Note that this background section is based largely upon the background section in the first article of this two-part series. See Woodley, *supra* note 1, at 221-233.

²⁹ S. REP. No. 101-416.

³⁰ *See id.*

³¹ *See Jones-Hailey v. Corporation of TVA*, 660 F. Supp. 551, 553 (E.D. Tenn. 1987) (quoting Thomas D. Lambros, *The Summary Jury Trial*, 103 F.R.D. 461, 469 (1984)). The court held that TVA's participation in an SJT was not a constructive consent by TVA to a jury trial. *See id.* at 553.

³² *See LAMBROS, REPORT TO THE JUDICIAL CONFERENCE, supra* note 15, at 12.

Following counsels' presentations, the jury is given an abbreviated charge and then retires to deliberate. The jury then returns a 'verdict.' To emphasize the purely settlement function of the exercise, the mock jury is often asked to assess damages even if it finds no liability. Also, the court and jurors join the attorneys and parties after the 'verdict' is returned in an informal discussion of the strengths and weaknesses of each side's case.³³

Elements of the process omitted from the above description include: either a judge or a magistrate may preside at the SJT;³⁴ the SJT jury panel is drawn from the pool in the same manner as is a regular petit jury;³⁵ the jury is told that the case is being presented in an abbreviated form, but usually is unaware before it deliberates that its verdict is merely advisory;³⁶ and clients or officers of clients with authority to negotiate a settlement are normally required to attend the SJT.³⁷ Obviously, if settlement discussions fail, the case will be tried. The entire process usually lasts less than one

³³ *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904 (6th Cir. 1988) (citations omitted).

³⁴ See Thomas D. Lambros & Thomas H. Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 47 (1980). From this point forward in this Article, the term "judge" will refer to both United States District Court Judges and United States Magistrate Judges.

³⁵ See *id.* at 47.

³⁶ See McNamara, *supra* note 22, at 471-472. McNamara writes:

Commentators disagree about whether potential jurors should be told of the nonbinding nature of the SJT proceeding. According to Judge Lambros' model, the judge tells the potential jurors about "the nature of the summary trial" with an emphasis on "the difference between the summary trial and a trial on the merits." Most commonly, the jurors are not told about the non-[binding] nature of the SJT verdict until after they have already returned what they were led to believe would be a binding verdict. One commentator has expressed concern that telling the jurors of the non-[binding] nature of the SJT will lead jurors to decide the case less carefully and thus compromise public confidence in the legal system.

Id. (footnotes omitted). See Stephen W. Myers & Howard Armstrong, *Court Tests Summary Jury Trial: Two Judges Try the 'Cutting Edge' Venture*, MARICOPA LAW., June 1990, at 1. Some courts make SJT verdicts binding if all of the counsel consent in advance. See *id.* In addition, some courts are trying a hybrid of sorts. See *id.* In "high-low" binding verdict cases, the plaintiff agrees to have his award limited to a given high figure, if there is a plaintiff's verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict. See *id.* The parties really are asking the jury to determine the award amount between the high and low figures. See *id.*

³⁷ See LAMBROS, REPORT TO THE JUDICIAL CONFERENCE, *supra* note 15, at 13.

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day,³⁸ but can take up to several days.³⁹

The SJT is designed to facilitate settlement by providing what is hoped to be a reasonably accurate forecast of the outcome of the trial, and, in fact, the Sixth Circuit has referred to it as a highly reliable predictor of the likely trial outcome.⁴⁰

When the surveyed judges who have conducted SJTs were asked to describe the basic SJT procedure they have used, there were some variations in the structure of the presentation. For instance, one judge indicated that he has parties combine opening statements and closing arguments in their presentations and then gives plaintiffs limited rebuttal time; another judge has parties give opening statements, a summary of each case, closing arguments and then final arguments; and another judge has the parties address the jury twice: the first such address combining the opening statement and the presentation of evidence, and the second address being the closing argument.⁴¹

In addition, if the case turns on the credibility of the parties, at least one surveyed judge allows full direct and cross-examination of the parties and the showing of videotaped depositions during the SJT.⁴² Another surveyed judge noted that in proper cases it may be an appropriate device for testing the credibility of a few main witnesses.⁴³

The surveyed judges' responses also revealed some variations in the amount of time allotted for the attorneys' presentations.⁴⁴ The estimates provided by the judges varied from thirty minutes per attorney⁴⁵ to six to eight hours per side, with the most common time period being between an hour and one and one-half hours per side.⁴⁶

Other judges' responses varied in what they require prior to the start of the SJT. One requires a pre-SJT agreement on exhibits and statements of fact; one requires testimony and summaries to be agreed upon in advance;

³⁸ See S. REP. NO. 101-416, at 29 (quoting Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (Feb./Mar. 1986)).

³⁹ See Judicial Survey Responses, *supra* note 23, Question 10, at 13-14.

⁴⁰ See *Cincinnati Gas & Electric Co.*, 854 F.2d at 904.

⁴¹ See Judicial Survey Responses, *supra* note 23, Question 10, at 13-14.

⁴² See *id.*

⁴³ See *id.*, Question 3a, at 5.

⁴⁴ See *id.*, Question 10, at 13-14.

⁴⁵ See *id.*, Question 10, at 13. The judge who gives each attorney a total of thirty minutes for his or her presentation stated that he was willing to give this much time to each of the twelve attorneys involved in a particular SJT he conducted. See *id.*

⁴⁶ See *id.*, Question 10, at 13-14.

and one makes evidentiary rulings in advance.⁴⁷ Finally, two other variations in the procedure used are that at least one judge selects the same number of jurors as a "real" trial will have, and another tells the jury in advance that the SJT is only advisory.⁴⁸

Most of the procedures used by the surveyed judges are in writing.⁴⁹ More than half of these judges use the Lambros procedure, and most of the remaining ones appear in local court orders or rules.⁵⁰

B. *The Benefits of SJTs*

Despite the issues affecting its use and effectiveness, a number of intended benefits appear to be borne out when using an SJT.⁵¹ The responding judges had an overwhelmingly favorable view of SJTs.⁵² The

⁴⁷ *See id.*

⁴⁸ *See id.*, Question 10, at 13.

⁴⁹ *See id.*, Question 11, at 15. Twelve of the judges responding to this question said that their SJT procedures were in writing, and six of the judges said that they were not. *See id.*

⁵⁰ *See id.*, Question 11, at 15.

⁵¹ *See* McNamara, *supra* note 22, at 491. McNamara comments:

While there is a lack of express authority for using potential petit jurors as summary jurors, it is clear that the SJT process has enjoyed a great deal of success. Both judges and attorneys who have participated in SJT find it to be beneficial. Even attorneys who were initially skeptical of the procedure—and reluctant to use it—have found SJT to be successful and beneficial.

Id. (emphasis added) (footnotes omitted).

⁵² *See* Judicial Survey Responses, *supra* note 23, Question 3, at 4-6; Question 3a, at 4-5; Question 8, at 11; Question 9, at 12; Question 15, at 20; Question 21, at 27-28; Question 22, at 29-31; Question 29, at 44-45; and Question 40, at 69-70 (noting that "[t]he summary jury trial is in my view the finest advance in the federal trial system in the last decade."). *See also* Attorney Survey Responses, *supra* note 24, Question 1f, at 3; Question 1g, at 3; Question 5, at 7; and Question 27, at 20.

When judges who had conducted SJTs were asked if they have been generally satisfied, partly satisfied or dissatisfied with the process, most identified themselves as "generally satisfied," a few said that they were "extremely satisfied" or "greatly satisfied" and a few said they were "partly satisfied." *See* Judicial Survey Responses, *supra* note 23, Question 3, at 4. No judge identified himself as "dissatisfied." *See id.* One judge stated that he had insufficient experience to form an opinion (since he has only done one SJT), but he added that it does seem to pitch parties toward settlement. *See id.*

In response to the question as to whether SJTs should ever be used in federal courts, an overwhelming majority responded in the affirmative. *See id.*, Question 21, at 27-28. Twenty-five out of the thirty-two judges responding to this question answered "yes." *See id.* These

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Senate Report to the Judicial Improvements Act of 1990 noted that while the data is not yet complete, studies of various ADR programs have shown generally favorable results.⁵³ The public in general has a positive view of ADR mechanisms,⁵⁴ and courts and commentators have extolled the virtues of the SJT in particular.⁵⁵

As previously mentioned, the primary benefit of an SJT is the saving of the time and cost involved in a lengthy trial (and appeal) if the process results in the settlement of the case.⁵⁶ However, even if the case does not

judges also provided numerous reasons for their positive views, all of which are mentioned above. *See id.*

When the judges were asked whether they would conduct another SJT in the future, nearly all of them responded in the affirmative. *See id.*, Question 15, at 20. Nineteen of the twenty-one judges responding to this question answered "yes." *See id.*

Of course, there are detractors. For example, one surveyed attorney wrote that "while the SJT was innovative, it is also another example, at least in certain instances, of what ADR truly stands for—abdication of duty and responsibility." Attorney Survey Responses, *supra* note 24, Question 27, at 20. That attorney stated that it would "not be necessary if more time were spent by attorneys and judges managing, settling and trying their cases." *Id.*

⁵³ *See* S. REP. NO. 101-416, at 28. "Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested publics." (quoting from Fed. Cts. Study Comm., 101st Cong., 2d Sess. Report, 83). The Committee strongly agrees with this assessment." *Id.*

⁵⁴ *See* Grubbs, *supra* note 4, at 25. Grubbs states:

Although there is, as yet, little empirical data demonstrating that ADR does, in fact, result in a speedier, more expeditious and less expensive resolution of civil disputes, there is no question that the public, and particularly the business community, thinks it does. Under the auspices of the Center for Public Resources, more than 500 of the country's largest corporations have signed a pledge obligating them to explore ADR to resolve disputes with other signatories.

Id. (footnotes omitted). Grubbs adds that most recently the Center for Public Resources has sponsored a program to secure a pledge from leading law firms to designate lawyers who will be knowledgeable about ADR and "when appropriate" discuss such procedures with clients. *See id.* at 30 n.29 (citing Anthony E. Diresta, *Law Firms Adopt Policy Requiring Their Litigators to Explore ADR with Clients*, LITIG. NEWS, Feb. 1993, at 3).

⁵⁵ *See generally* McNamara, *supra* note 22.

⁵⁶ *See* Judicial Survey Responses, *supra* note 23, Question 3a, at 4-5. One judge commented that two SJTs taking one and one-half days each ended up saving a total of eight to nine weeks of estimated trial time. *See id.* at 4. Another judge commented that an SJT had saved about two months of complicated jury trial sessions. *See id.*, Question 15, at 20. *See also* McNamara, *supra* note 22, at 491-492 (commenting that the main reason expressed for success of SJT is that parties receive opinion of jury without time and expense of lengthy jury

settle and it goes on to trial, the SJT process itself yields other benefits.⁵⁷

1. *The Settlement of Cases*

Although statistics on the success of SJTs are somewhat sparse,⁵⁸ the available information indicates a fairly high chance of settlement. First, the creator of the process—Judge Lambros—reports extremely high success rates.⁵⁹ In fact, the Senate Report on the Judicial Improvements Act of 1990 quotes Judge Lambros as saying that a full jury trial after an SJT is “almost always unnecessary because the procedure fosters settlement of the dispute.”⁶⁰ Second, the surveyed judges who have conducted SJTs also

trial) (footnote omitted).

⁵⁷ See discussion *infra* Part II.B.2.

⁵⁸ See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49 (E.D. Ky. 1988). The court wrote:

It is true that to date we have only unscientific anecdotal evidence of the effectiveness of summary jury trials. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington[,] [Kentucky], but I intend to expend a considerable sum to go there as soon as I get the chance.

Id.

⁵⁹ See Lambros, *New Adversarial Model*, *supra* note 14, at 800. Judge Lambros reported:

Between 1983 and 1986, of 150 cases that were assigned by me to summary jury trial, 62 settled prior to the commencement of the procedure. Of 88 SJTs conducted, 82 ultimately resulted in settlements. Over 90% of the cases assigned to SJT settled. In addition to the savings generated to individual litigants by avoiding a protracted jury trial, the success rate of the SJT has had a significant effect on the use of the jury, and related costs. As I described in my Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System, the savings aspect of SJTs with respect to the costs of jury service are substantial.

Id. (footnotes omitted). Judge Lambros then described his calculation of the jury service savings and concluded:

My research indicated a savings associated with the processing of 60 summary jury trials of \$90,730.00, or roughly \$1,512.17 per case. This savings was based on not requiring jurors to serve the total average number of days for a full jury trial *plus* the reduced number of potential jurors initially required for *voir dire*.

Id. at 801 (footnotes omitted).

⁶⁰ S. REP. NO. 101-416, at 28 (quoting Thomas D. Lambros, *The Summary Jury Trial—*

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reported an impressively high ratio of settlements to SJTs.⁶¹ The settlement figures for two particular districts—the Western District of Oklahoma and the Western District of Michigan—are impressive as well.⁶² Finally, there are some reported individual examples of success.⁶³

An Alternative Method of Resolving Disputes, 69 JUDICATURE 286, 286 (1986)).

⁶¹ See Judicial Survey Responses, *supra* note 23, Question 8, at 11. According to those judges, the number of cases in which SJTs were used that settled after the SJT and before or during trial were as follows: 30 (of 33); 1 (of 1); 22 (of 27); 4 (of 5); 1 (of 2); 10 (of 10); 4 (of 4); 28 or 29 (of 30); all of them (of 10-15); 2 (of 2); 5 (of 6); 2 (of 2); 43 (of 53); 1 (of 1); 1 (of 1); and 0 (of 1). See *id.* See also Attorney Survey Responses, *supra* note 24, Question 1f, at 3. Although the pool of reporting judges is not statistically significant, it is quite likely that those judges who have conducted the most SJTs and have the highest interest in the process were the ones who responded. Of those cases in which the surveyed attorneys participated in SJTs, slightly more than half of them settled before or during the subsequent trial. See *id.* Again, however, this was an extremely small sample.

⁶² See DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK 40 (John H. Wilkinson, ed., Cum. Supp. 1992).

In the Western District of Oklahoma, 187 cases were referred to summary jury trial between early 1983 and December 1989. Of those, 70 settled before the summary jury trial was conducted. Of the remaining 117 cases, 79 settled prior to trial. For a more complete account of the summary jury trial program in the Western District of Oklahoma, see 8 ALTERNATIVES TO THE HIGH COST OF LITIGATION 83 (May 1990).

In federal court in the Western District of Michigan, almost 70 summary jury trials have been held since 1983. Of these cases, 75 percent settled before the summary jury trial; of the remainder, all but two settled before trial. 4 INSIDE LITIGATION 12 (Apr. 1990).

Id. See also S. REP. NO. 101-416, at 29. The Senate Report to the Judicial Improvements Act of 1990 confirms the above statistics from the Western District of Michigan and notes that Judge Ensen of that district stated that the mere scheduling of an SJT results in settlement before the scheduled summary jury trial date in 75% of the cases. See *id.* at 31-32.

⁶³ See, e.g., *Day v. NLO, Inc.*, 147 F.R.D. 148 (S.D. Ohio 1993), *vacated on other grounds*, *In re NLO, Inc.*, 5 F.3d 154 (6th Cir. 1995) (describing a successful SJT in an earlier case involving the same defendant and the same factual circumstances). The case involved the Feed Materials Production Center (FMPC), located in Fernald, Ohio, at which defendant National Lead of Ohio (NLO), was involved in certain aspects of developing and manufacturing nuclear weapons for our country's armed services. See *id.* at 150. The court explained:

In a previous case, the residents around the FMPC brought suit alleging that NLO had exposed them to radiation and other hazardous materials. *In re Fernald*, Case No. C-1-85-149 (S.D. Ohio) (J. Spiegel). The residents claimed that they suffered emotional distress, personal injury and property damage by virtue of being a neighbor of the

Although the fact of settlement alone is beneficial to the litigants and the court system, SJTs are often used in cases in which the trial time would be quite lengthy. Settlements based upon SJTs also often result in significant time and cost savings.⁶⁴

FMPC. The Defendants in that case steadfastly refused to discuss settlement. In light of the prospect of a lengthy and complex trial on the merits, this Court decided to hold a summary jury trial in an effort to promote settlement. The Defendants argued in that case that the proceeding should have been closed to the public. As will be discussed in more detail later in this Order, we disagreed with the Defendants' argument and opened the summary jury trial to the public. Following the summary jury trial, the two parties settled the *In re Fernald* case for \$78 million.

Id.

⁶⁴ See *supra* note 56. For a description of a case where a significant amount of money was saved, see DONOVAN LEISURE NEWTON & IRVINE ADR PRACTICE BOOK, *supra* note 62, at 39. Donovan et al. comment:

Texas Utilities Co. v. Santa Fe Industries, Inc., 627 F. Supp. 44 (D.N.M. 1985), involved an antitrust challenge to a long-term agreement whereby Texas Utilities Co. leased approximately 300 million tons of coal in New Mexico from Santa Fe Industries. The damage claim was \$250 million before trebling. The parties had spent approximately \$60 million on discovery since 1981, and it was estimated that trial and appellate costs would be in the neighborhood of \$200 million. Following a two-day summary jury trial, however, the case settled on the basis of a new long-term agreement for the lease of the same amount of coal on less restrictive terms.

Judge West (W.D. Okla.) handled the summary jury trial in the New Mexico federal court at the invitation of the Chief Judge of the New Mexico court. Judge West has conducted 117 summary jury trials in his district. For a more complete account of this summary jury trial, see 4 ALTERNATIVE DISPUTE RESOLUTION REPORT (BNA) 2 (Apr. 26, 1990).

Id. See also *McKay*, 120 F.R.D. at 49. The court wrote a section at the end of the opinion entitled "Some Personal Observations":

In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials. It is true that I cannot prove scientifically that the cases would not have settled anyway but my experience tells me they would not. I do know that but for my making summary jury trials mandatory in these cases, they would not have occurred. I know also that the attorney who objected to the first summary jury trial he was required to participate in is now the biggest local fan of the procedure. In the case at bar I am gambling a five-day summary jury trial against a six-week real trial. Six to one is pretty good odds.

Id. (citation omitted). The court added:

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There are several reasons why SJTs can be, and usually are, successful in stimulating such settlements. First, many judges consider them to be fairly reliable predictors of trial results (and this view has been communicated to lawyers practicing before them). Judge Lambros has clearly reached this conclusion and has explained it in terms of how juries reach decisions.⁶⁵ One of Lambros' explanations why SJT verdicts and the decision-making process of jurors are reliable is as follows:

The summary jury trial is an alternative that is intended for cases in which settlement cannot be achieved because the parties have differing perceptions of how the jury will evaluate the evidence. It brings the facts of a case to life, and it isolates the key issues involved therein . . . the litigants are able to make an informed assessment of the strengths and weaknesses of their respective positions.

Most jurors, however, reach their verdicts deductively; they immediately latch onto a few fundamental premises and fit the facts they perceive over the course of the trial to these premises. Most jurors strive to reach verdicts which do not conflict strongly with cognitions in place at the beginning of trial. Through careful inquiry into the cognitions of the members of the advisory jury, counsel can use the summary jury trial experience to predict a future reaction by a jury at the actual trial. . . . *All participants should recognize that another jury would probably return a similar verdict if the case were to go to trial.*⁶⁶

I also don't know if other cases moved "up the queue" or not. In fact, I used the time saved to work six days a week instead of seven for awhile, perhaps saving me from a heart attack. This, too, was a benefit to the system. (At least I think so, although you could probably find a few dissenters among the members of the local bar.)

Id. at 49 n.19.

⁶⁵ See Lambros, *New Adversarial Model*, *supra* note 14, at 799-800.

⁶⁶ *Id.* at 799-800 (footnotes omitted) (emphasis added); see also LAMBROS, REPORT TO JUDICIAL CONFERENCE, *supra* note 15, at 9-10. Judge Lambros explained the reliability of SJT verdicts in yet another way:

The SJT can be an effective predictive process for ascertaining probability of results. It is my perception that the sole bar to settlement in many cases is the uncertainty of how a jury might perceive liability and damages. Such uncertainty often arises, for example, in cases involving a "reasonableness" standard of liability, such as in negligence litigation. No amount of jurisprudential refinement of the standard of liability can aid the resolution of such cases. Parties' positions during settlement negotiations in cases of this type are based on an analysis of similar cases within the experience of counsel as to

The surveyed judges' responses support the reliability of SJT verdicts as well. When the surveyed judges were asked whether they thought an SJT was a reliable indicator of what the actual trial verdict would be, an overwhelming majority of the responding judges stated that it was generally reliable.⁶⁷ This conclusion was based on their own experience, that of Judge Lambros, or that of other judges they had heard about or statistics.⁶⁸ They indicated that the evidence is the same, the lawyers "have their best shot" and that the jury for the actual trial will be drawn from the same source and in the same manner as the SJT jury.⁶⁹ One judge simply referred to an SJT as a "yardstick to measure settlements."⁷⁰ However, there were a number of qualifications stated.⁷¹

When the surveyed judges who have conducted SJTs were asked whether, in those cases that were tried after the completion of an SJT, the trial verdict differed significantly from the SJT verdict. Most of the judges stated that they were consistent with or the same as the SJT verdicts.⁷²

juries' determinations of liability and findings of damages. Such comparison is usually of little value, however, as parties tend to aimlessly grope toward some notion of a likely damage award figure upon which to base their negotiating positions. The parties and the Court may become frustrated in cases, especially where neither party wants to fully try the case on the merits and the only roadblock to a meaningful settlement is the uncertainty of how a jury might perceive liability and damages. The half-day proceeding is designed to provide a 'no-risk' method by which the parties may obtain the perception of six jurors on the merits of their case without a large investment of time or money.

After preparation and presentation of the case at a SJT, the possibility of settlement becomes much more real to both sides. Unreasonable demands and offers are reevaluated, and mutually agreeable compromises are worked out in light of the jury's findings.

Id.

⁶⁷ See Judicial Survey Responses, *supra* note 23, Question 29, at 44-45 (twenty-one judges said yes, five said no and four others were unsure or did not have enough experience to reach a definitive conclusion).

⁶⁸ See *id.*

⁶⁹ See *id.*, Question 29, at 44.

⁷⁰ See *id.*, Question 3a, at 4.

⁷¹ See *id.*, Question 29, at 44-45. Some of the qualifications included: given sufficient time to adequately summarize "the parties" version of the case; active participation in good faith; on the caliber of the attorney; differences in demeanor of live witnesses before a regular jury. See *id.*

⁷² See *id.*, Question 9, at 12. One judge commented that in the three cases he forwarded on for full trial, the trial verdicts were for the defendants as they were in the SJTs. See *id.* One judge stated that of the ten cases tried, in one case the trial verdict and the SJT verdict were dissimilar, in three cases they were similar and in six cases they were identical. See *id.*

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Comments by judges in reported cases and in information they supply to attorneys supports the reliability of SJT verdicts too. For example, the Sixth Circuit has referred to the SJT as a highly reliable predictor of the likely trial outcome.⁷³ And in a case decided by Judge Lambros, *Caldwell v. Ohio Power Co.*,⁷⁴ he noted that the SJT verdict had been \$2.5 million for the plaintiff. However, the actual trial verdict was \$2.2 million for the plaintiff.⁷⁵ Judge Lambros referred to these verdicts as being "remarkably consistent" with each other.⁷⁶ In addition, one surveyed magistrate distributes an SJT information sheet to attorneys listing "accuracy of the result" as one of the advantages of the process and explaining his conclusion.⁷⁷

He added that all of the cases he has tried to a summary jury since January 29, 1987, have either settled or have resulted in trial verdicts which were very similar or identical to the SJT verdicts. *See id.* Three judges indicated that the verdicts for plaintiffs increased in the actual trials; for example, in one tort case the SJT verdict was \$1.5 million and the trial verdict was \$3.5 million. *See id.* One of these judges commented that the trial did result in an improved plaintiff's verdict, but he added: "I don't know the fee arrangement but I doubt plaintiff's attorney improved his lot by trying the case." *Id.*

⁷³ *See Cincinnati Gas & Electric Co.*, 854 F.2d at 904.

⁷⁴ 710 F. Supp. 194 (N.D. Ohio 1989).

⁷⁵ *See id.* at 196, 202.

⁷⁶ *See id.* at 202.

⁷⁷ In responding to Question 10 of the judicial survey (regarding the basic SJT procedure used), one responding magistrate (D. Neb.) attached a copy of the SJT information sheet he wrote to distribute to lawyers. On that sheet he lists "accuracy of the result" as one of the advantages of the process and includes the following explanation: "In those cases which have not settled following a summary jury trial, but have instead gone to a 'real' trial, the actual verdicts following days of testimony are remarkably similar to the verdicts of the summary juries." Judicial Survey Responses, *supra* note 23, Question 10, at 5-6 n.2. And in footnote two, page six of the information sheet, the magistrate wrote:

For example, an article in the *National Law Journal* (6-10-85) points out two cases as examples: (a) a Chicago anti-trust case: SJT—\$27 million; verdict (after a 7-week trial)—\$24 million; (b) Oklahoma Federal District court: SJT—\$219,000; verdict (after trial)—("within \$10,000"). Consistency in defense verdicts was noted as well. Other literature also appears to support this conclusion.

Id. at 6 n.2. Note too that the author of this Article has used SJTs in her Pretrial Advocacy class for the past seven years. In each class there are four SJTs in the same mock personal injury suit (with different "counsel" and different six-person juries for each), and four SJTs in the same mock breach of contract/landlord-tenant case (with different "counsel" and different six-person juries for each). Every year the SJT verdicts for each case are remarkably consistent with each other. Of course, this does not demonstrate a direct correlation with

In addition to reflecting probable trial verdicts, SJTs can stimulate settlements because the process often satisfies a psychological need of the parties and their counsel for an in-court confrontation. This is especially true because an SJT involves a real jury.⁷⁸ Judge Lambros has written that the SJT works, among other reasons, because the parties "derive the satisfaction of having their story heard."⁷⁹ One surveyed judge wrote that an SJT satisfies the psychological need of parties to ventilate pent-up emotions, and another stated that it appears to give parties their day in court.⁸⁰ And in the above-mentioned SJT information sheet distributed by a surveyed magistrate judge (from the District of Nebraska), "day in court" is listed as one of the advantages.⁸¹ This advantage is described as follows:

This technique gives the litigants an opportunity to air their grievances in a courtroom before a judge and a jury, and in a proceeding with all of the 'trappings' of a real trial save the actual presentation of testimony. As during a real trial, the parties must

actual trial verdicts.

⁷⁸ See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 50 (E.D. Ky. 1988). District Judge Bertelsman explained:

[T]he summary jury trial gives the parties a taste of the courtroom and satisfies their psychological need for a confrontation with each other. Any judge or attorney who has handled domestic or employment cases can tell you (unscientifically but reliably) that emotional issues play a large part in some cases. When emotions run high, whether between parties or attorneys, cases may not settle even when a cost-benefit analysis says they should. A summary jury trial can provide a therapeutic release of this emotion at the expenditure of three days of the court's time instead of three weeks. After the emotions have been released the parties are more likely rationally to do the cost-benefit analysis, and the case may then settle.

Id. See also *Myers & Armstrong*, *supra* note 36, at 16. Attorney Barry Fish of Lewis and Roca, a law firm in Phoenix, Arizona, and Superior Court Judges Daniel E. Nastro and Barry C. Schneider have stated that they think the SJT will leave the parties feeling better about their case and the judicial system than does mandatory arbitration. For example, the parties get to see and hear their case presented to a jury. *See id.* "One of the critical points here, whether it's small, medium or large, is that the litigant, the parties, I think, really do feel they've had their day in court before a jury of their peers," Fish said. *Id.* "I think it's important that it's a jury and not a judge, and I think that parties like to hear their counsel argue the very best their case can be and they're impressed by it." *Id.*

⁷⁹ Lambros, *New Adversarial Model*, *supra* note 14, at 799.

⁸⁰ See Judicial Survey Responses, *supra* note 23, Question 3a, at 4-5.

⁸¹ See Judicial Survey Responses, *supra* note 23, Question 10, at 5-6.

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confront, both rationally and emotionally, their opponent's case against them. The proceeding may raise their anxieties because their previous negotiating positions will likely either be confirmed or totally undermined by the verdict. The verdict is the considered judgment of six impartial citizens selected in the same fashion as a real jury. Unless the proceeding is somehow fatally flawed, there is little to justify speculation that repeating the drama for real will yield significantly different results. Thus, parties may be in a better frame of mind to settle the case after having subjected it to a summary proceeding.⁸²

SJTs can also lead to settlement because the perceptions of the case held by the parties and lawyers often are altered when they see how a real jury views it.⁸³ Judge Lambros has reported that SJTs work because the parties are generally more receptive to settlement after they observe juror reactions to conflicting evidence and sense the strengths and weaknesses of their respective cases.⁸⁴ One surveyed judge commented that SJTs should be used in federal courts because they provide economical resolution of cases and they are philosophically satisfying to the parties—primarily because of their faith in the fairness of the jury system.⁸⁵

SJTs also give the parties a chance to see the costs and emotional stress of an actual trial, as well as seeing the other side's case first hand.⁸⁶ One judge wrote that an SJT serves as a process of "reality therapy" for both attorneys and clients.⁸⁷

Finally, SJTs provide one more step in the litigation process that acts as

⁸² Judicial Survey Responses, *supra* note 23, Question 10, at 5.

⁸³ *See id.*, Question 3a, at 4. One judge specifically stated that he was able to get a couple of tough cases settled when the plaintiffs' presentation did not impress the jury as much as plaintiffs felt it would. *See id.*, Question 21, at 27.

⁸⁴ *See* Lambros, *New Adversarial Model*, *supra* note 14, at 799.

⁸⁵ *See* Judicial Survey Responses, *supra* note 23, Question 21, at 27.

⁸⁶ *See McKay*, 120 F.R.D. at 50. District Judge Bertelsman stated:

Summary jury trials also give the clients a chance realistically to appraise the cost and emotional stress of an actual trial and require them to sit and listen to the other side's case and see how a jury reacts to it. The summary jury trial may be the client's first opportunity to look at the other side of the case first-hand rather than through his or her attorney. The attorney is often not in a position to give the client an objective view of the merits. After all, he was hired as a gladiator not a diplomat.

Id. *See also* Judicial Survey Responses, *supra* note 23, Question 3a, at 4–5. One judge also noted that an SJT lets a party compare their counsel with opposing counsel. *See id.*

⁸⁷ *See* Judicial Survey Responses, *supra* note 23, Question 3a, at 5.

an incentive to settle so that trial can be avoided.⁸⁸ One judge stated that even the suggestion of an SJT has helped settle cases.⁸⁹

2. *Benefits of the Process Apart from Settlement*

Even if a case does not settle after SJT has been conducted it still yields certain benefits. First, the process forces the parties to prepare for trial and may make the actual trial more efficient.⁹⁰ The court in *Arabian American Oil Co. v. Scarfone*⁹¹ described this benefit as follows:

Even if the summary procedures do not culminate in settlement of the case, the value of the summary trial in crystalizing the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their roles and the trial procedure.⁹²

In addition, an SJT provides an opportunity for the lawyers and parties to learn what a real jury views as the strengths and weaknesses of their case, as well as perceived strategic errors.⁹³ The lawyers' discussions with SJT jurors after the SJT verdict is rendered can be extremely useful in this respect. Stated another way, the SJT offers counsel "a unique opportunity to 'practice'" the case.⁹⁴

⁸⁸ See Lambros, *New Adversarial Model*, *supra* note 14, at 799. Judge Lambros wrote:

The summary jury trial produces the same tensions present immediately prior to jury trial. The shadow of an approaching summary jury trial will intensify the parties' efforts toward settlement. Because clients and key figures with settlement authority are required to attend the summary jury trial, the procedure is particularly effective where the legal labyrinth begins to tax the patience of the litigants involved.

Id.

⁸⁹ See Judicial Survey Responses, *supra* note 23, Question 40, at 69.

⁹⁰ See *id.*, Question 3a, at 4-5.

⁹¹ 119 F.R.D. 448 (M.D. Fla. 1988).

⁹² *Id.* at 449.

⁹³ See Judicial Survey Responses, *supra* note 23, Question 3a, at 4-5; see also Attorney Survey Responses, *supra* note 24, Question 5, at 7 (documenting that one surveyed attorney wrote that he would participate in an SJT voluntarily in the future because it cannot hurt and may even lead to settlement or a good read of the trial strategy of opposing counsel).

⁹⁴ McNamara, *supra* note 22, at 492.

C. *Identification of Issues Impacting Upon the Use and Effectiveness of SJTs*

Despite the benefits of SJTs, clearly there are a number of issues to be addressed. The surveyed judges who responded negatively to the question as to whether SJTs should ever be used in federal courts expressed some general concerns about SJTs.⁹⁵ In responding to the question as to the reasons why they have been only partly satisfied with the SJT process, judges described some problems as well.⁹⁶

The problems mentioned by the surveyed judges and lawyers, as well as those raised by scholarly criticism and those litigated in the courts, appear to fall into two major categories: those basic issues that threaten the very existence of the SJT and those other existing or potential issues, which, if addressed, would greatly enhance the process.⁹⁷

Assuming that the first category of issues (including the authority for mandating SJTs and for summoning SJT jurors) can be resolved,⁹⁸ there are four types of issues in the second category that affect the willingness of courts and lawyers to use this device, as well as its likely success.

The first type of issue consists solely of the lack of uniformity in the applicable rules and the use of the process. Clearly, if a settlement device is to have widespread, effective use in federal court, it must be used in a similar way in courts across the country. That is not the situation today.

The second type of issue pertains to the lack of necessary limitations upon SJTs. First, there is the problem of a lack of uniform time and expense limitations. While some judges clearly are concerned about this aspect of the process, others are not. Preparation for an SJT can be burdensome and time-consuming (because SJT preparation often differs fundamentally from trial preparation), and where the case is not settled, an SJT adds an extra layer of expense. Second, no consistent limitations exist to prevent unequal participation by the parties, which often results in the failure of the process itself, as well as an unwarranted strategic benefit to one side. Third, there is a lack of limitations with respect to issues affecting the reliability of the SJT verdict, such as handling cases with significant credibility issues, the trial-readiness of the case, the restrictions on reference to evidence in the SJT and the jury selection process.

The third type of issue pertains to the lack of guidance for the courts.

⁹⁵ See Judicial Survey Responses, *supra* note 23, Question 21, at 28.

⁹⁶ See *id.*, Question 3b, at 5-6.

⁹⁷ See generally Woodley, *supra* note 1.

⁹⁸ See *id.*, at 296-298 (making specific legislative recommendations for settling these and other basic issues). See *infra* note 118 and accompanying text (proposed summary jury trial statute).

First, individual judges, as well as practicing attorneys, have little or no guidance in choosing appropriate cases for SJTs. This issue increases in importance once it becomes clear that judges can mandate participation in SJTs over the parties' objections.⁹⁹ Second, there is no guidance for judges with respect to sanctions in the SJT setting. Even if there is authority for awarding sanctions in this context,¹⁰⁰ uncertainty exists about the types of available sanctions and under what circumstances they should be imposed. Third, judges lack guidance about whether SJT verdicts should ever be binding, and, if so, under what circumstances. Fourth, judges are given no advice about whether the district court judge or the magistrate who conducted the SJT should preside over the actual trial when the SJT does not result in settlement. Judges have strong opinions both ways, and it would enhance the process if the potential pitfalls were identified and discretion provided to deal with them. Finally, there is uncertainty about whether SJT jurors should be excluded from serving at the subsequent actual trial, as well as whether they should be excluded from all future trials since the processes are so different. All of these issues (among others) were addressed in the survey sent to the federal district court judges and magistrates.¹⁰¹

The fourth type of issue consists of the remaining barriers to the use of the process. These barriers include the lack of education for lawyers and judges on the subject, the need for flexibility in the process and the lack of courtroom facilities to handle these procedures.

III. ISSUES IMPACTING UPON THE USE AND EFFECTIVENESS OF SJTs AND THE PROPOSED SOLUTIONS

A. *The Lack of Uniformity in the Applicable Rules and the Use of the Process*

One of the obvious issues raised with respect to SJTs is whether uniform standards or local rules should be created. The summary jury trial has been in existence for more than fifteen years, and yet lawyers and judges lack guidance as to many of the issues raised by its use. The potential for harmful or, at least, confusing variations exists, and the number of potential challenges to the SJT necessarily increases with the

⁹⁹ See *infra* note 118 (reproducing subsections (b) and (c) of the proposed summary jury trial statute).

¹⁰⁰ See *infra* note 118 (reproducing subsection (i) of the proposed summary jury trial statute authorizing the imposition of sanctions in the SJT setting).

¹⁰¹ See generally Judicial Survey Responses, *supra* note 23.

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range of differences in the procedure used. In *McKay v. Ashland Oil, Inc.*,¹⁰² District Judge Bertelsman suggested the following:

After a period of experimentation, according to the declared policy of the Judicial Conference, perhaps uniform rules can be formulated for the use of summary jury trials, if this seems desirable. Perhaps also, after a period of experimentation and improvement they will gain sufficient credibility that many attorneys will agree to be bound by the summary jury's verdict. This would effect substantial savings of time.¹⁰³

1. *How Judges Have Reacted*

When the surveyed judges were asked whether uniform rules should be created concerning the procedure for and limitations upon SJTs, a little less than half of those responding said "yes".¹⁰⁴ Of those responding in the affirmative, some of the judges thought the rules should appear in the Federal Rules of Civil Procedure (one judge specifically mentioned Rule 16), some thought they should appear in local court rules and some mentioned federal statutes.¹⁰⁵ Several of the judges suggested that the general guidelines, or general authorization and framework, should be in the Federal Rules of Civil Procedure, but the details should be spelled out in local rules.¹⁰⁶

When asked what those rules should contain, one judge suggested some basic provisions: (1) length of trial, (2) agreement on evidence, (3) use of exhibits, (4) not binding, (5) advise jurors at conclusion of trial of their advisory role and (6) permit questions to jurors after trial and solicit

¹⁰² 120 F.R.D. 43 (E.D. Ky. 1988).

¹⁰³ *See id.* at 50-51.

¹⁰⁴ *See* Judicial Responses, *supra* note 23, Question 39, at 67-68. Of the thirty-three judges responding to this question, fourteen said "yes" and nineteen said "no." *See id.* When the attorneys were asked this question, one attorney answered in the affirmative despite the fact that "Judge Lambros' procedures are very workable." Attorney Survey Responses, *supra* note 24, Question 25, at 18. Another lawyer stated that uniform rules are always preferable. *See id.*

¹⁰⁵ *See* Judicial Survey Responses, *supra* note 23, Question 39, at 68. Like the judges, the attorneys suggested that any such rules should appear in the Federal Rules of Civil Procedure or the local court rules. *See* Attorney Survey Responses, *supra* note 24, Question 25, at 18. One attorney wrote that rules similar to arbitration rules might be a good idea. *See id.*

¹⁰⁶ *See* Judicial Survey Responses, *supra* note 23, Question 39. One of these judges also mentioned the possibility of putting these details in standing court orders. *See id.*

comments from jurors.¹⁰⁷ Other judges added that the rules should include just the basics with amplification by local rules if needed, and that the district court judge should be given the authority to order an SJT as a step in the pretrial process.¹⁰⁸

Those judges who did *not* think that uniform rules should be created gave various reasons for this conclusion. One judge wrote that courts and counsel must be free to adapt the procedure in a manner flexible enough to meet the contingencies and nuances of a particular piece of litigation.¹⁰⁹ Other judges stated that experimentation and local variations are useful, creativity should be allowed and that judges should have the ability to fashion the SJT the same way they do settlement conferences.¹¹⁰ In addition, several judges said that the SJT is too new for uniform rules to be imposed and that this procedure should be allowed to evolve by trial and error into its most effective form.¹¹¹ Finally, one judge wrote: "Judicial administration is being swamped with rule overkill. We are dealing with people. At the trial level, justice is the way [I do] it, not a precise result."¹¹²

One surveyed attorney wrote that uniform rules should not be created because they are too inflexible and probably would not be followed anyway.¹¹³ Another attorney explained that if voluntary participants want an SJT they should be able to arrive at their own set of rules (within limits) based upon the mechanism already in place in the courtroom of the judge in question.¹¹⁴

2. *The Justification for Uniform Rules*

As stated in the first article of this series,¹¹⁵ there is clearly a need for uniformity as to the basic issues surrounding the SJT. This need for uniformity extends beyond the authority for SJTs, for summoning SJT

¹⁰⁷ *See id.* Another judge indicated that "one could write a book on that." *Id.*

¹⁰⁸ *See id.* Of course, this latter suggestion is addressed in the proposed summary jury trial statute. *See infra* note 118.

¹⁰⁹ *See id.*

¹¹⁰ *See id.* at 67. Note that one judge wrote that creating uniform rules for SJTs would be like imposing rules for settlement negotiations. *See id.*

¹¹¹ *See id.* One judge stated that he still wants some flexibility in the system for another five to ten years. *See id.* at 68.

¹¹² *Id.* at 67.

¹¹³ *See* Attorney Survey Responses, *supra* note 24, Question 25, at 18 (citing as an example the MANUAL FOR COMPLEX LITIGATION, THIRD).

¹¹⁴ *See id.*

¹¹⁵ *See generally* Woodley, *supra* note 1.

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jurors and other essential issues. One commentator has noted:

However, to provide the needed safeguards, the local rules must go farther than generally authorizing summary jury trials. The rules should provide specific protections such as limiting further discovery or the addition of witnesses following the summary jury trial, thereby preventing one side from unfairly using the summary jury trial as a discovery tool to the detriment of opposing parties.¹¹⁶

Similar to the justification for creating clear authority to conduct SJTs, it will save substantial time and money to have a model local court rule to deal with the past and future problems encountered in using SJTs. If SJTs are conducted in virtually identical ways in every federal court in the country, the number of potential challenges to the process are necessarily reduced. Such uniformity will also provide guidance to the judges presiding over the SJTs and to the lawyers who will participate in them.

While uniform rules obviously cannot cover every contingency, and some room for flexibility must exist, limiting future challenges to various aspects of the SJT procedure and establishing some certainty and regularity to the process are worthy goals.

Federal Rules of Civil Procedure Rule 16(c)(9) authorizes federal court judges to use special procedures to assist in resolving disputes when authorized by statute or local rule.¹¹⁷ The first article in this series proposed a federal statute to address the basic SJT issues,¹¹⁸ and the statute provides

¹¹⁶ Robert Y. Gwin, *Summary Jury Trial: An Explanation and Analysis*, KY BENCH AND B. (Winter 1987), at 16, 58.

¹¹⁷ FED. R. CIV. P. 16(c)(9) states: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule"

¹¹⁸ See generally Woodley, *supra* note 1. The Proposed Summary Jury Trial Statute is as follows:

(a) A "summary jury trial" (SJT) is a court-annexed process in which the parties' attorneys summarize their case to a six-person jury with a judge or magistrate judge presiding and then use the decision of the jury and information about the jurors' reaction to the legal and factual arguments as an aid to settlement negotiations. Unless the parties stipulate otherwise, the SJT verdict is non-binding.

(b) A judge or magistrate judge may order an SJT:

(1) with the agreement of all parties, either by written motion or their oral motion in court entered upon the record, or

(2) upon the judge or magistrate judge's determination that a SJT would be appropriate, even in the absence of the agreement of all the parties.

that the specific procedures for an SJT will be controlled by local court rule.¹¹⁹ Therefore, this Article proposes a model local court rule to address the issues raised below.¹²⁰

(c) In exercising his or her discretion under subsection (b)(2), the judge or magistrate judge shall give consideration to the costs of the procedure, the costs that may be saved by ordering the SJT, the potential for resolution of the case, and any reasons advanced by the parties as to why an SJT would not be in the best interests of justice.

(d) SJT jurors shall be drawn from the regular jury pool and entitled to the same rights and subject to the same responsibilities as other jurors summoned pursuant to The Jury Selection and Services Act of 1968, 28 U.S.C. §§ 1861-1878. Any restrictions on post-trial communications with jurors do not apply to SJT jurors.

(e) Unless all parties agree otherwise, SJTs will not be recorded or reported, will be treated as confidential settlement proceedings under Federal Rule of Evidence 408, and will be closed to the press and the public.

(f) In the event that no settlement is reached following the SJT, and the case is returned to the trial docket:

(1) No statement made or document produced as part of the SJT, not otherwise discoverable or obtainable, shall be subject to discovery.

(2) A judge or magistrate judge shall not admit at a subsequent trial, or any other legal proceeding, any evidence that there has been an SJT, the nature or amount of any SJT verdict, any statement made or document produced in the SJT, or any other matter concerning the conduct of the SJT, the discussions with the jurors or negotiations related to it, unless:

(i) The evidence would otherwise be admissible under the Federal Rules of Evidence; or

(ii) The parties have otherwise stipulated.

(g) A non-binding SJT verdict shall not be appealable.

(h) The specific procedures for an SJT will be controlled by local court rule.

(i) The sanctions available under Federal Rule of Civil Procedure 16(f) shall apply to any violation by parties or attorneys of this statute or any local court rule setting forth SJT procedures.

Id. at 297-298. Note that in the version of the statute in the first article, the word "judge" following the word "magistrate" in section (c) was inadvertently omitted.

¹¹⁹ See *id.* at § (h).

¹²⁰ See *infra* Part IV. Note, however, that subsection 27 of the proposed model local court rule does provide for some flexibility in the process where needed. That subsection states:

The Court may order, or, with Court approval, counsel may stipulate to, alterations in the provisions set forth in this rule or in the use of the summary jury trial process generally. For example, such orders or stipulations may include decisions to hold the summary jury trial at a location other than the Courthouse, or to hold it before a judicial

B. *Issues with Respect to the Lack of Necessary Limitations*

1. *The Lack of Time and Expense Limitations*

The issue raised in this section is: “Should time and expense controls be created for SJTs, and, if so, what should they consist of and how should such changes be accomplished?”

Obviously, if the SJT is successful—and the parties settle the case—a significant amount of time and expense is saved. Therefore, this issue focuses on potential limits on the actual process itself, as well as ways to reduce overall preparation costs if the process is not successful.¹²¹ This is designed to address the common attorney complaint that the unsuccessful SJT imposes an “additional layer of expense.”¹²²

One commentator wrote:

Another disadvantage to the summary jury trial arises from the cost of the process. Although far less expensive than a full trial, the summary jury trial constitutes a very labor-intensive device for the attorney, who must prepare and reduce the entire case to an hour’s oral presentation as well as brief legal issues and prepare jury instructions. The attorney time and attendant cost of this preparation make the process relatively expensive if the case fails to settle and proceeds to a full trial on the merits.

To assist the participants in recouping some of the expense associated with the summary procedure, the court must make every reasonable effort to schedule a full trial promptly if settlement does not occur. A quick trial allows the parties to retain at least some of the benefits counsel have obtained from their summary jury trial preparation and thereby reduces to some degree the financial loss to the clients.¹²³

officer other than the trial judge.

¹²¹ One judge wrote: “If it *won’t* save both [time and expense], why do it?” Judicial Survey Responses, *supra* note 23, Question 25, at 36. This judge is probably missing the point, however. The question related to controlling costs of an SJT, which, however great, would be significantly less than the costs of going to trial.

¹²² See Judicial Survey Responses, *supra* note 23, Question 13, at 17–18; Question 18, at 24. See also Attorney Survey Responses, *supra* note 24, Question 2b, at 5; Question 28, at 20.

¹²³ See Gwin, *supra* note 116, at 57–58. In fact, forcing the parties to prepare for an SJT may make the actual trial more efficient. See Judicial Survey Responses, *supra* note 23, Question 3a, at 4–5. The court in *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448

In response to a survey question as to whether time and expense controls should be created for SJTs,¹²⁴ about half of the responding judges said yes.¹²⁵ Of those judges who stated that no time and expense controls should be created,¹²⁶ several appeared to base their response on their conclusion that such controls were not necessary and several others on a distaste for further rules.¹²⁷ The remaining judges responding to this question said that they did not know or had no opinion.¹²⁸

a. *How Judges Have Reacted*

With respect to the first part of the issue—imposing time and cost controls on the SJT process itself—the judges had a number of suggestions. Although some of the judges stated that such controls should be imposed on an ad hoc basis,¹²⁹ others made specific suggestions. With respect to time controls, the judges suggested either limiting the time allotted per side (such as three hours or half a day) or limiting the total time allowed for the SJT process (such as one day, one and a half days or two days).¹³⁰ Judges

(M.D. Fla. 1988), described this benefit as follows:

Even if the summary procedures do not culminate in settlement of the case, the value of the summary trial in crystallizing the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their roles and the trial procedure.

Id. at 449. However, as noted above, to retain this benefit the actual trial must take place relatively quickly.

¹²⁴ The judicial survey question (#25) read: "Should time and expense controls be created for summary jury trials, and, if so, what should they consist of and how should such changes be accomplished?" Judicial Survey Responses, *supra* note 23, Question 25, at 35.

¹²⁵ Of twenty-nine respondents, fifteen said "yes." *See id.*

¹²⁶ Of twenty-eight judges, nine responded negatively to this question. *See* Judicial Survey Responses, *supra* note 23, Question 25, at 35-36.

¹²⁷ *See* Judicial Survey Responses, *supra* note 23, Question 25, at 35-36. One judge said that to establish more rules would only overburden or complicate the process, and another judge merely wanted to leave the process flexible and not make it too rigid. *See id.*

¹²⁸ Five out of twenty-eight judges gave some response other than "yes" or "no." *See id.* at 36.

¹²⁹ At least four judges thought such controls should be imposed on an ad hoc or case-by-case basis. *See id.* at 35.

¹³⁰ *See id.* at 35-36. One judge indicated that Judge Lambros feels that an SJT should take one day, but he has found that one and one-half days works well in complicated cases. *See id.* at 35. Another judge stated that sometimes a longer SJT is necessary in a relatively "complex" matter. *See id.*

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suggested limiting costs by limiting the number of jurors and the length of the SJT, as well as trying to avoid a duplication of costs already incurred or an unnecessary add-on to actual trial costs.¹³¹ In response to a question seeking general suggestions for improving the SJT process, one judge suggested removing the jury—except, perhaps, where the only issue is damages.¹³²

Limiting unnecessary expense if the SJT process fails appears to involve having a trial-ready case prior to the SJT and scheduling the actual trial to take place soon thereafter.¹³³ In response to an attorney's cost objections, at least one judge responded that it is only one day and the case should be trial-ready at that point, so there is not much added cost. He stated that he is just asking counsel to get ready for a trial and then spend a day doing an SJT.¹³⁴ Another judge suggested that the trial should be set thirty to sixty days after the SJT so the preparation for it is not in vain.¹³⁵

b. Limiting the Time and Expense Involved

Based upon the discussion above, there are at least two ways to limit the time and expense involved in the SJT process: (1) limit the length and cost of the procedure itself and (2) schedule the actual trial very soon thereafter (if the case does not settle) so that counsel can retain some of the benefits of the SJT preparation. The latter suggestion could easily be implemented through rules requiring that the case be trial-ready at the time of the SJT and that the actual trial take place within thirty to sixty days thereafter.

With respect to the first suggestion, the judges have suggested limiting either the time allotted per side or the overall length of the SJT, as well as

¹³¹ See *id.* at 35. One of the responding attorneys wrote that such controls can be created by the parties at the time they voluntarily enter into an agreement to conduct an SJT. See Attorney Survey Responses, *supra* note 24, Question 12, at 10.

¹³² See Judicial Survey Responses, *supra* note 23, Question 24, at 34. It was unclear whether this was intended as a suggestion for reducing the time or costs involved or whether there was some other reason for removing the jury. A summary bench trial is available in the United States District Court for the Northern District of Ohio. See N.D. OHIO R. 7, ch. 6.

¹³³ One judge stated that he has not conducted an SJT because attorneys will not agree to it. He feels that the attorneys' main resistance is that they are extremely busy and do not feel it would be worth the time and expense to get up to speed on the case as to all of its facts and intricacies and then find that the SJT did not settle the case. See Judicial Survey Responses, *supra* note 23, Question 18, at 24.

¹³⁴ See Judicial Survey Responses, *supra* note 23, Question 13, at 18.

¹³⁵ See *id.*

limiting the number of jurors.¹³⁶ Additional ways to reduce the time or cost involved in an SJT might include: discouraging objections during the process, encouraging the counsel to agree on the exhibits in advance, limiting the length of the voir dire process, limiting the length and complexity of the jury instructions and allowing the jurors to render a special verdict consisting of a statement of each juror's findings in the event that a consensus verdict is not possible within a reasonable time.

It also might help reduce the time involved in an SJT if the local rule contained a general limitation on continuances or other delays, as well as a specific statement that the rule will be construed to secure the just, speedy and inexpensive conclusion of the SJT.

Finally, although the connection is less direct, it would appear that mandating the presence at the SJT of the parties with authority to settle the case would lessen the time and expense involved in the entire settlement process.

The following subsections of the proposed model local court rule contain language addressing the issue of time and expense limitations: 2, 8, 9, 10, 11, 14, 15, 17, 19, 23, 27 and 29.¹³⁷

2. The Lack of Limitations on the Inequality of Participation by the Parties

Two of the issues raised in this context are: (1) whether and how one may avoid or remedy the situation in which one party actively participates in the SJT in good faith while the other party withholds evidence and essentially uses the process as a discovery device and (2) what can or should be done if a lawyer takes advantage of the less restrictive evidentiary and other procedural rules during an SJT. For example, should there be a possibility of a mistrial?

These issues have been discussed in court opinions and by legal commentators. One commentator has stated:

Yet another hazard associated with the summary jury trial lies in the risk that one side will participate fully and in good faith in the procedure while the other side holds back evidence and uses the procedure as a discovery device to the prejudice of the party participating in good faith. However, if the court enforces the fundamental tenets of the summary jury trial by requiring that the parties have completed discovery and have their cases trial ready prior to the summary jury trial, it can significantly reduce such

¹³⁶ See Judicial Survey Responses, *supra* note 23, Question 25, at 35-36.

¹³⁷ See *infra* Part IV (proposing a model local court rule).

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potential for unfairness. A court's failure to protect the participants in this respect could even create sufficient prejudice to constitute an abuse of discretion.¹³⁸

The commentator added:

However, to provide the needed safeguards, the local rules must go farther than generally authorizing summary jury trials. The rules should provide specific protections such as limiting further discovery or the addition of witnesses following the summary jury trial, thereby preventing one side from unfairly using the summary jury trial as a discovery tool to the detriment of opposing parties.¹³⁹

In *Hume v. M & C Management*,¹⁴⁰ Judge Battisti wrote:

In my own view, the Summary Jury Trial is an unenlightened step backwards. It is reminiscent of a prior legal era, dominated by procedural mechanisms which stifled the candid exposition of the merits. For instance, the non-binding nature of Summary Jury Trials presents great temptation to strategically withhold crucial evidence and argument¹⁴¹

The court in *Cincinnati Gas and Electric Co. v. General Electric Co.*¹⁴² also pointed out the potential problem that some of the evidence disclosed to the mock jury might be inadmissible at a real trial.¹⁴³ It based this conclusion on that fact that all evidence is presented in the form of a descriptive summary to the mock jury through the parties' attorneys, live witnesses do not testify and evidentiary objections are discouraged.¹⁴⁴

¹³⁸ See Gwin, *supra* note 116, at 58 n.31 (citing Judge Lambros' statement that while the court has broad discretion under Rule 16 of the Federal Rules of Civil Procedure, it cannot take actions which adversely prejudice a party's position or compel counsel to adopt one line of strategy as opposed to another, in *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, 486 (1984)).

¹³⁹ See *id.* at 58.

¹⁴⁰ 129 F.R.D. 506 (N.D. Ohio 1990).

¹⁴¹ *Id.* at 508 n.3. Judge Battisti, a colleague of Judge Lambros in the United States District Court for the Northern District of Ohio (prior to Battisti's death), was an outspoken critic of the summary jury trial. See Woodley, *supra* note 1, at 265-273 (discussing this case).

¹⁴² 854 F.2d 900, 904 (6th Cir. 1988).

¹⁴³ See *id.*

¹⁴⁴ See *id.* (citations omitted).

Stated more simply, being able to trust opposing counsel and the judge are important aspects of a lawyer's willingness to participate in an SJT, according to attorney Barry Fish, of Lewis and Roca in Phoenix, Arizona.¹⁴⁵ He stated:

I must emphasize that it is very important to get a feel for what happens if one side goes over the line—argues from something other than the record—makes up something, fibs about something. You must trust the judge to have the courage and intellect to see it and then do something about it.¹⁴⁶

In *Fraleley v. Lake Winnepesaukah, Inc.*,¹⁴⁷ the court described its proposed SJT procedures, some of which apparently are designed to address these issues:

In making their statements to the jury, counsel are limited to representations as to evidence that would be admissible at trial. While counsel are permitted to mingle representations of fact with legal argument, considerations of responsibility and restraint must be observed. Counsel may only present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents, or by a professional representation that counsel personally spoke with the witness and, is repeating what the witness stated. Statements, reports, and depositions may be read from, but not at undue length.

...

Objections are not encouraged. However, in the event counsel oversteps the bounds of propriety as to a material aspect of the case, an objection will be received and, if well-taken, the jury admonished.¹⁴⁸

In *Compressed Gas Corp., Inc. v. U.S. Steel Corp.*,¹⁴⁹ one of the issues raised on appeal was whether the trial court abused its discretion in allowing plaintiff to conduct additional discovery following the SJT.¹⁵⁰ The appellate court stated, without discussion, that it had carefully reviewed this

¹⁴⁵ See Myers & Armstrong, *supra* note 36, at 3.

¹⁴⁶ *Id.*

¹⁴⁷ 631 F. Supp. 160 (N.D. Ga. 1986).

¹⁴⁸ *Id.* at 164.

¹⁴⁹ 857 F.2d 346 (6th Cir. 1988).

¹⁵⁰ See *id.* at 348.

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claim (among others) and was unable to conclude that it constituted reversible error.¹⁵¹

The surveyed judges differed as to the seriousness of these problems. With respect to the issue of one side withholding evidence at the SJT,¹⁵² one judge wrote that this is one of the best reasons for not having SJTs,¹⁵³ and several others suggested not having them or not proceeding under that scenario.¹⁵⁴ Several other judges wrote that this was not a problem.¹⁵⁵ One of these judges stated that in conducting thirty SJTs, he only saw one attorney who was not prepared and this fact was painfully obvious to both his client and the jury. He concluded that litigating attorneys go into these exercises with the intent to prevail so that they can persuade the other party of the benefits of settling the case.¹⁵⁶ Finally, other surveyed judges seemed to think that it would make a difference if the lawyers had entered into the process voluntarily.¹⁵⁷

When asked what can or should be done if an attorney takes advantage of the less restrictive evidentiary and other procedural rules during an SJT,¹⁵⁸ a surveyed attorney wrote that the process is only as good as the integrity of the lawyers.¹⁵⁹ In both of the SJTs in which he participated, the plaintiffs' lawyers told the jury facts they knew could not get into

¹⁵¹ *See id.* at 353.

¹⁵² The judicial survey question (#27) read: "How can you avoid or remedy the situation in which one party actively participates in the summary jury trial in good faith while the other party withholds evidence and essentially uses the process as a discovery device?" Judicial Survey Responses, *supra* note 23, Question 27, at 39.

¹⁵³ *See id.*

¹⁵⁴ *See id.* at 39-41.

¹⁵⁵ *See id.*

¹⁵⁶ *See id.* at 40. Another said that he has not had this experience and he has conducted thirty-seven SJTs. *See id.*

¹⁵⁷ *See* Judicial Survey Responses, *supra* note 23, Question 27, at 39. One judge noted that if the parties are not agreeable and proceed into the matter in bad faith, then, of course, it would be an absolute waste of time. *See id.*

Another judge commented that it is a problem when one attorney does not prepare well because he does not want to do it. He is less likely to get a reliable SJT verdict and the attorney's appraisal of it will be skewed. He concluded that there is a need to have attorneys "buy into it" for it to be successful. *See id.* at 40.

¹⁵⁸ The attorney survey question (#2b) read: "What can or should be done if a lawyer takes advantage of the less restrictive evidentiary and other procedural rules during a summary jury trial?" Attorney Survey Responses, *supra* note 24, Question 2b, at 5. For example, should there be a possibility of a mistrial?

¹⁵⁹ *See id.*

evidence.¹⁶⁰ A couple of other lawyers stated that judges and magistrates really cannot control such situations.¹⁶¹ One of them went on to state that no one can really control a trial lawyer's strategy or be sure one of the participants is not sandbagging his opponent.¹⁶²

a. *How Judges Have Reacted*

When asked how to avoid or remedy the situation in which one party actively participates in the SJT in good faith while the other party withholds evidence and essentially uses the process as a discovery device,¹⁶³ the judges gave a variety of answers.

Several judges suggested sanctions,¹⁶⁴ including costs under Rule 16 of the Federal Rules of Civil Procedure for failure to participate in good faith¹⁶⁵ or having them pay the other party's expenses.¹⁶⁶ Nonmonetary suggestions included: avoid the situation by a requirement that all evidence to be used in the real trial must be summarized at the SJT,¹⁶⁷ require all essential evidence be presented at the SJT,¹⁶⁸ have the client there to see the attorney's performance,¹⁶⁹ make sure the discovery process is available so that each side can learn fully the other side's evidence so this subterfuge should not be needed,¹⁷⁰ hold the SJT after discovery is closed,¹⁷¹ anticipate this in advance and issue the type of order that should guard against this particular contingency¹⁷² and forewarn them and then exclude the evidence at trial.¹⁷³

¹⁶⁰ *See id.*

¹⁶¹ *See* Attorney Survey Responses, *supra* note 24, Question 14, at 11.

¹⁶² *See id.*

¹⁶³ *See* the exact language of this judicial survey question (#27), *supra* note 152.

¹⁶⁴ At least six judges indicated that sanctions of some sort should be used in this kind of situation. *See* Judicial Survey Responses, *supra* note 23, Question 27, at 39-41.

¹⁶⁵ *See id.* at 40.

¹⁶⁶ *See id.*

¹⁶⁷ *See* Judicial Survey Responses, *supra* note 22, Question 27, at 39.

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 40.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.* The surveyed lawyers, answering essentially the same question, provided similar suggestions. *See* Attorney Survey Responses, *supra* note 24, Question 14, at 11-12. One of the lawyers stated that this is one of the problems of an SJT. In the case where he was required to participate in one, the trial judge, in effect, accused both counsel of "trying a different case than was tried in the summary jury trial." *Id.* Although he would not support

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One judge commented that if a judicial officer finds the procedure to be unfair, the system should be flexible enough for him to make an adjustment during the SJT, or if he cannot salvage it, to abort the trial. For instance, he stated, if the plaintiff saves all of his real evidence for rebuttal rather than his initial presentation, a solution would be to allow the defendant a rebuttal (since the process is a search for truth).¹⁷⁴

Other judges thought that an agreement should be obtained from the parties on this specific issue (for example, conducting the SJT unless the parties agree to participate in good faith), or that the judge should discuss the issue with counsel prior to the SJT.¹⁷⁵ Yet another judge wrote that the court should discern a genuine desire on the part of the parties to settle before using an SJT. If the effort is sincere, each side will want to present their best evidence, he stated.¹⁷⁶

When the surveyed judges were asked what can or should be done if a lawyer takes advantage of the less restrictive evidentiary and other procedural rules,¹⁷⁷ again the responses varied. Several of the judges recommended the possibility of a mistrial, as suggested by the survey question itself.¹⁷⁸ Other judges specifically rejected the idea of a mistrial, one of them stating that it was too severe a sanction.¹⁷⁹

Several of the judges suggested sanctions of some kind,¹⁸⁰ including the following: making the lawyer pay the other party's expenses,¹⁸¹ awarding Rule 16 sanctions to the extent of the costs of the SJT process,¹⁸² referring

this, an obvious remedy to this problem is to impose sanctions on the offending party and its counsel. *See id.* at 11.

¹⁷⁴ *See* Judicial Survey Responses, *supra* note 23, Question 27, at 39.

¹⁷⁵ *See* Judicial Survey Responses, *supra* note 23, Question 27, at 39-40.

¹⁷⁶ *See id.* at 40.

¹⁷⁷ The judicial survey question (#28) read: "What can or should be done if a lawyer takes advantage of the less restrictive evidentiary and other procedural rules during a summary jury trial? (For example, should there be a possibility of a mistrial?)" Judicial Survey Responses, *supra* note 23, Question 28, at 92.

¹⁷⁸ Five judges suggested that a mistrial might be appropriate. *See* Judicial Survey Responses, *supra* note 22, Question 28, at 42-43.

Attorney Barry Fish, of Lewis and Roca in Phoenix, Arizona, stated that for an SJT to work with a binding high-low verdict, attorneys must have available the remedy of mistrial, and that the requirements for mistrial can be relaxed somewhat by the judge because the judge has only one day invested instead of several days or weeks. *See* Myers & Armstrong, *supra* note 36, at 3.

¹⁷⁹ *See* Judicial Survey Responses, *supra* note 23, Question 28, at 42-43.

¹⁸⁰ Six of the judges suggested that sanctions were an appropriate response. *See id.*

¹⁸¹ *See id.* at 43.

¹⁸² *See id.*

the violating attorney to the Bar grievance procedure, telling the party that their counsel is acting unprofessionally,¹⁸³ "straighten counsel out,"¹⁸⁴ "call counsel down" and advise the jury of the misconduct,¹⁸⁵ telling the jury of the violation during the instructions¹⁸⁶ and giving the violating attorney a verbal warning in front of the jury and then, if the conduct persists, using the court's inherent power to fine the offender.¹⁸⁷

One judge stated that "SJTs are self-policing, e.g.[,] the remedy for one party's overstepping is that the other party will push back from the negotiating table and cry 'foul'! [The] court should sanction if [the problem] is severe enough, give [a] special instruction or let [the] other side rebut the 'inadmissible' information."¹⁸⁸

One judge tells lawyers that an SJT is useful only to the extent that it accurately forecasts results of a full trial.¹⁸⁹ He added that there is no need to have an SJT if the parties are not genuinely attempting settlement; if they are, it would be counterproductive to engage in these practices.¹⁹⁰

Another judge wrote that he always conducts a pretrial conference before an SJT in which he espouses "the golden rule of SJTs."¹⁹¹ That is, do not attempt to take advantage of your opponent at an SJT, because you not only have to persuade the jury at an SJT, but your opponent as well. If your opponent feels that you did something at the SJT that you would not be able to get away with at trial, they will not lend much credence to any SJT verdict you might obtain. Rather than settle, they are more likely to dismiss the SJT verdict and take their chances at an actual trial. He finds that most attorneys employ this reasoning and many times simply do not raise any but their strongest and most appealing arguments at the SJT. After all, they do not have to make a record for appeal. If they can fairly win on one or two basic issues, the opposing party has to ask itself what basis it has for believing that an actual trial would result in any different verdict.¹⁹²

¹⁸³ See *id.* at 42.

¹⁸⁴ *Id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 43.

¹⁸⁷ See *id.* at 42. The SJT procedure used in the District of Connecticut, which was attached to this judge's response, also contains a paragraph which states: "11. During presentation of the summary jury trial, objections will be received if in the course of the presentation counsel goes beyond the limits of propriety in presenting statements as to evidence or argument thereon." *Id.* at attachment.

¹⁸⁸ Judicial Survey Responses, *supra* note 23, Question 28, at 43.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See Judicial Survey Responses, *supra* note 23, Question 28, at 42-43.

¹⁹² See *id.*

b. *Fostering Good Faith Participation by All Parties*

Based upon the suggestions of the judges, lawyers and commentators, there are a number of possible solutions: require discovery to be complete at the time the SJT is held; require the case to be trial-ready; make all evidentiary rulings prior to the SJT; prohibit any additional discovery after the SJT; disallow at the subsequent trial any evidence or witnesses not referred to in the SJT; require the parties to agree on the record to participate in good faith and not hold back evidence; allow for rebuttal or curative instructions if the opposing counsel acts inappropriately in making its presentation and impose costs under Rule 16 of the Federal Rules of Civil Procedure for failure to participate in good faith or have the offending party pay the other side's SJT costs.¹⁹³

The following subsections of the proposed model local court rule contain language addressing the issue of fostering good faith participation by all parties: 2, 3, 10, 11, 20, 21 and 22.¹⁹⁴

3. *The Lack of Limitations Affecting the Reliability of the SJT Verdict*

The issue raised in this context is the following:

Is a summary jury trial verdict a reliable indicator of what the actual trial verdict will be (e.g., since the case is so compressed, the momentum of the plaintiff is not stopped by objections or cross-examination, and an SJT jury does not perform the function of judging the credibility of the witnesses)? Could its reliability be improved?¹⁹⁵

As stated above, judges and commentators generally consider SJTs to be fairly reliable predictors of trial results.¹⁹⁶ Obviously, however, there are exceptions,¹⁹⁷ as well as situations in which the reliability of the process is

¹⁹³ See *supra* notes 164–166 and accompanying text.

¹⁹⁴ See the entire proposed model local court rule, *infra*, at Part IV.

¹⁹⁵ Judicial Survey, Question 13, *infra* at Appendix.

¹⁹⁶ See *supra* Part II.B.1.

¹⁹⁷ In *Nibert v. BancOhio National Bank*, No. CA86-05-012, 1987 WL 10359 (Ohio Ct. App. Apr. 27, 1987), the lower court held an SJT in a will contest action. The summary jury unanimously concluded that the August 8, 1979, instrument admitted to probate was not the last will and testament of Frank R. Nibert. The appellate court stated:

Although the summary jury trial was designed to quickly and inexpensively resolve disputes, it failed to achieve that laudable goal here. For following an unsuccessful

reduced.

One situation in which the reliability of the process may be at issue is when the credibility of one or more witnesses is critical to the resolution of the dispute. As one commentator stated:

A primary disadvantage of the process as an indicator of jury reaction lies in the inability of the jury to judge credibility. A fundamental function of the jury at trial lies in determining which witnesses to believe and which to discount. The summary jury has no opportunity to see any witnesses. It can judge only the lawyers' credibility.¹⁹⁸

Judge Lambros has specified that "a case should not be assigned to summary jury trial if . . . the credibility of a witness is a critical issue in the resolution of the dispute."¹⁹⁹ Even surveyed judges who thought that SJT verdicts were generally reliable still were concerned about the fact that the SJT jury is not afforded the opportunity of assessing witness demeanor and credibility.²⁰⁰ Some of them also noted that attorneys had objected to participating in SJTs on this basis.²⁰¹

motion for summary judgment on the issue of Nibert's competency, the case came on for a second trial, this time to the bench. After four days of testimony, the court concluded the August 8, 1979 instrument executed by Nibert was his last will and testament.

Id. at *2.

In addition, one surveyed judge who indicated that he thought SJTs were reliable predictors of trial results noted that there are exceptions. *See* Judicial Survey Responses, *supra* note 23, Question 29, at 45. The judge stated that in a discrimination case where a bus driver was accused of harassing women, the SJT jury awarded \$80,000 to the plaintiff, but the actual trial verdict was for the defense. *See id.*

¹⁹⁸ *See* Gwin, *supra* note 116, at 57. The author added that "[n]evertheless, as cited previously herein, experience with cases that have gone to trial after the summary jury procedure supports the reliability of the summary jury verdict as a predictor of a full trial verdict even absent the opportunity to judge credibility." *Id.*

¹⁹⁹ M. Daniel Jacobovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio* 3 (Federal Judicial Center 1982).

²⁰⁰ Judicial Survey Responses, *supra* note 23, Question 29, at 44-45. One judge indicated that in one of his SJTs the SJT jury admitted afterwards that they had no basis to choose one expert's evaluation of damages over the opposing expert's evaluation and therefore simply "split the difference." *See id.* at 44. The judge noted that this would not have happened in a "real" trial. *See id.*

²⁰¹ *See* Judicial Survey Responses, *supra* note 23, Question 13, at 18. One of the surveyed attorneys also complained that because, there are no witnesses in an SJT, the jury cannot evaluate the credibility of anyone except the lawyers. *See* Attorney Survey Responses,

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The surveyed judges who thought that SJTs were generally reliable predictors of trial results included a number of other qualifications.²⁰² For instance, one judge wrote that if the parties are given sufficient time to adequately summarize their version of the case, then an SJT is a fairly reliable indicator.²⁰³ Another said that if done correctly, it results in an accurate summary of evidence being presented to the jury.²⁰⁴ One judge said that a lot depends on the caliber of the attorneys; another said that it is reliable if the parties have all actively participated in good faith.²⁰⁵ Finally, one judge emphasized that his court used actual jurors, in an actual trial setting, with actual instructions and with the jurors believing that they were making the actual decision.²⁰⁶ After the SJT, the judge explained to the jurors that their decision had not been binding. The jurors generally indicated that they were glad they had not known this, because otherwise they might not have given the case as much serious thought as they did.²⁰⁷

One lawyer responded to the question about the reliability of SJT verdicts by stating that if lawyers *fairly* present evidence it is better than a guess but not as good as the real thing.²⁰⁸ Another wrote that it could be reliable if both sides make a conscious effort to fairly, accurately and completely present their cases as they would at a real trial, and if the makeup of the jury is similar to that which sits at the real trial. Otherwise, the results of the two could vary wildly.²⁰⁹

a. *How Judges Have Reacted*

In response to the objection to SJTs that credibility determinations require observation of witnesses and their testimony, at least one judge responded that changes in the process can correct any such problems. For instance, that judge suggested allowing each side a limited amount of time

supra note 24, Question 2b, at 5.

Another attorney stated that he did not think that he would participate in an SJT voluntarily in the future. He stated that it seemed to him that the presentation in an SJT was too limited. The jurors do not have the opportunity of seeing all of the witnesses. Many times the examination of a particular witness or witnesses can be the deciding factor in a full-scale jury trial. *See* Attorney Survey Responses, *supra* note 24, Question 5, at 7.

²⁰² *See* Judicial Survey Responses, *supra* note 23, Question 29, at 44–45.

²⁰³ *See id.* at 44.

²⁰⁴ *See id.*

²⁰⁵ *See id.* at 45.

²⁰⁶ *See* Judicial Survey Responses, *supra* note 23, Question 29, at 44.

²⁰⁷ *See id.*

²⁰⁸ *See* Attorney Survey Responses, *supra* note 24, Question 10, at 10.

²⁰⁹ *See id.*

in the SJT to have live testimony from witnesses who are engaged in a "swearing match."²¹⁰ Where the credibility of two opposing witnesses is the deciding factor, other judicial suggestions included: allowing each witness to be examined for ten minutes on direct and fifteen minutes on cross,²¹¹ showing deposition videotapes of witnesses²¹² and allowing the plaintiff or defendant to take the stand and to give a short narrative statement.²¹³

In response to a question about how the particular SJT procedure used could be improved, one judge stated that he uses the following variations and that they might warrant consideration by other judges: (1) allow testimony of one or two witnesses where the outcome rests on credibility; (2) use an SJT jury of the same size as the trial jury size; (3) select the SJT jury immediately after the selection of the trial jury and from the same panel; (4) allow peremptory challenges for both juries; and (5) after the SJT verdict, have counsel alternately interrogate the jury fore person by leading questions or questions answerable by a dollar amount—for about thirty to forty-five minutes.²¹⁴ Finally, another judge suggested that there should be a videotaped explanation of the process.²¹⁵

As stated above, at least some of the judges thought that the jurors should be convinced that this is a real trial (however abbreviated) and that their verdict would be binding.²¹⁶ The purpose of this practice is to make sure that the SJT jurors take the process seriously.

b. *Improving the Reliability of the SJT Verdict*

The main issue in this context is what to do if the credibility of a witness is a critical issue in the resolution of the dispute. Judge Lambros has

²¹⁰ See Judicial Survey Responses, *supra* note 23, Question 13, at 18. In addition, one responding attorney suggested that the SJT procedure might be improved if one key witness from each side was permitted to testify, rather than only having presentations by counsel. See Attorney Survey Responses, *supra* note 24, Question 1j, at 4.

²¹¹ See Judicial Survey Responses, *supra* note 23, Question 24, at 34.

²¹² See *id.* This judge made the same suggestion in response to a question asking how the particular procedure he uses could be improved. See Judicial Survey Responses, *supra* note 23, Question 12, at 16.

²¹³ See Judicial Survey Responses, *supra* note 23, Question 12, at 16. He added, however, that it is unusual that a witness' credibility is so overwhelming or underwhelming that it makes a difference in the verdict. See *id.* He stated that there are not too many times that lawyers say after an SJT that the jury seeing their witness will make the difference. See *id.*

²¹⁴ See *id.*

²¹⁵ See Judicial Survey Responses, *supra* note 23, Question 24, at 34.

²¹⁶ See Judicial Survey Responses, *supra* note 23, Question 29, at 44.

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suggested that an SJT should not be held in a case if the credibility of a witness is a critical issue. Other judges and lawyers have suggested that an SJT could still be held under these circumstances, with some minor variations; for example, allowing a witness to make a short narrative statement, permitting a limited direct examination (such as ten minutes) and cross-examination (such as fifteen minutes) of a critical witness or allowing portions of a videotaped deposition of a critical witness to be shown. It appears that if the credibility of a witness is critical and the judge thinks that it is still an appropriate case for an SJT, the judge should be able to allow such variations in her discretion.

In addition, some of the solutions discussed in the section on parties participating in good faith²¹⁷ would contribute to the reliability of an SJT verdict: requiring discovery to be complete at the time the SJT is held, requiring the case to be trial-ready, making all evidentiary rulings prior to the SJT, prohibiting any additional discovery after the SJT and disallowing at the subsequent trial any evidence or witnesses not referred to in the SJT.

It also might improve the reliability of the process if the SJT jury and the trial jury are selected from the same jury panel, and the SJT jury thinks that it is a real trial and that their verdict is binding (so they will take the process seriously). In addition, if the jurors are allowed to ask some brief questions of the court or counsel (more of a necessity in an abbreviated process), their comprehension level will rise and more likely mimic that of a jury hearing an actual trial.

The following subsections of the proposed model local court rule contain language addressing the issue of improving the reliability of the SJT verdict: 2, 11, 12, 13, 16, 18, 21, 22 and 25.²¹⁸

C. *Issues with Respect to the Lack of Guidance for the Courts*

1. *The Lack of Guidance in Choosing Appropriate Cases*

Although SJTs have been used in virtually every type of case, there exists no official guidance for judges in choosing appropriate cases for SJTs. So the issue in this context is in what types of cases, or under what kinds of circumstances, are SJTs more or less appropriate?

According to the surveyed judges, the types of cases in which SJTs have been most frequently used are negligence or general tort actions, product liability cases, civil rights actions and contract disputes.²¹⁹ The judges have also used SJTs in the following types of cases: multi-party,

²¹⁷ See *supra* Part III.B.2.b.

²¹⁸ See the entire proposed model local court Rule, *infra*, at Part IV.

²¹⁹ See Judicial Survey Responses, *supra* note 23, Question 2, at 2.

commercial savings and loan failures, suits on notes and other financial transactions, commercial and business controversies, patent infringements (non jury), FELA cases, sex discrimination, corporate stock fights, environmental torts, business torts, professional malpractice (e.g., accounting), convoluted property damage cases with a save harmless agreement in the background, insurance and security fraud (ten to twelve victims), personal injury (burn victim), dealership termination, business disputes, securities fraud and a complicated subrogation case involving several millions of dollars (but only on the single issue of causation).²²⁰ One judge indicated (in his updated survey dated April of 1994) that he also had two SJTs scheduled, one in a business fraud case and one in a coal mine injury case.²²¹ The judge who indicated that he had used SJTs in commercial or business controversies said that he used them in those cases because they were complex, involved "big time money," would involve long trials and would give executives and defendants insight on liability.²²²

Some of the few reported cases involving SJTs have included the viewpoint of the trial judge on when an SJT should be used. For example, in *McKay v. Ashland Oil, Inc.*, District Judge Bertelsman observed that SJTs are not a panacea and they should not be used in a large volume of typical cases.²²³ However, he believes that the SJT is a useful device to settle a complex case with one or two key issues, where the problem with settlement is that the parties differ in their views of how the jury will react to the key issues.²²⁴

In *Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc.*,²²⁵ the magistrate reviewed the existing authorities on the issue of mandating participation in SJTs and stated: "As in this matter, each of these cases involved complex issues, parties who were poles apart in terms of settlement and cases which promised to consume a good deal of trial time."²²⁶

In *Cincinnati Gas and Electric Co. v. General Electric Co.*,²²⁷ the court stated that "[t]he summary jury trial can play a particularly useful role in facilitating the settlement of complex cases and is typically employed in cases that either will consume significant judicial resources if they proceed

²²⁰ See Judicial Survey Responses, *supra* note 23, Question 2, at 2-3.

²²¹ See *id.* at 3.

²²² See *id.* at 2.

²²³ See *McKay v. Ashland Oil, Inc.*, 120 F.R.D. 43, 49-50 (E.D. Ky. 1988).

²²⁴ See *id.*

²²⁵ 123 F.R.D. 603 (D. Minn. 1988).

²²⁶ *Id.* at 605.

²²⁷ 854 F.2d 900 (6th Cir. 1988).

to trial, or that are not amenable to settlement through other techniques."²²⁸

One commentator indicated that flexibility is the key factor for selecting cases for SJT²²⁹ and described three different approaches for making that decision.²³⁰ The first (Judge Lambros' approach) is that an SJT is suitable for any case in which a jury trial has been requested, discovery has been completed and all other pretrial procedures have been exhausted.²³¹ The second approach, suggested by another commentator, is that there is no pattern of cases best suited for an SJT, but an SJT is used whenever the judge believes a jury's verdict would prompt resolution.²³² Finally, the approach taken by Judge Enslin of the United States District Court for the Western District of Michigan, involves the use of three criteria for selecting cases: (1) similar competence of attorneys for both sides, (2) genuine dispute as to the monetary value of the case and (3) a day in court might be cathartic for the parties.²³³

a. *How Judges Have Reacted*

As one surveyed judge stated, choosing which cases are suitable for SJTs is an art, not a science.²³⁴ However, the judges provided a great deal of useful information in response to the survey questions addressing this issue.

When specifically asked in what types of cases, or under what kinds of circumstances, SJTs are appropriate,²³⁵ the answers were quite varied.²³⁶ A couple of judges stated that they have used SJTs in all types of civil cases or "across the board."²³⁷ The remaining judges based their answers on the length of the expected jury trial, on the substantive type of case and on the nature of the issues or the parties or the likelihood of settlement.²³⁸ For

²²⁸ *Id.* at 904.

²²⁹ See McNamara, *supra* note 22, at 461.

²³⁰ See *id.* at 461 n.24.

²³¹ See *id.* (citing Jacobovitch & Moore, *supra* note 199, at 3).

²³² See *id.* (citation omitted).

²³³ See *id.* (citing Clifford J. Zatz, *Toxic Tort Case Unlikely to Have Settled Without Summary Jury Trial, Lawyer Says*, in ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PERSPECTIVES 107, 108 (Martha A. Matthews ed., 1990)).

²³⁴ See Judicial Survey Responses, *supra* note 23, Question 22, at 30.

²³⁵ The judicial survey question (#22) read: "In what types of cases, or under what kinds of circumstances, are summary jury trials appropriate? Why?" Judicial Survey, Question 22, *infra* at Appendix.

²³⁶ See *id.* Judicial Survey Response, *supra* note 23, Question 22, at 30.

²³⁷ See Judicial Survey Responses, *supra* note 23, Question 2, at 2-3.

²³⁸ See Judicial Survey Responses, *supra* note 23, Question 22, at 29-30.

instance, the answers referring to the length of the expected jury trial included: protracted corporate litigation (where settlement is likely to avoid the expense of a full scale jury trial); lengthy cases; cases that are not too complex, but are projected for long jury trial; if the trial would last more than two weeks;²³⁹ cases expected to be exceptionally long and totally incapable of being settled according to the attorneys; any civil litigation, especially if the trial is expected to be lengthy and costly; cases in which the trial will be five days or more (along with some other factors);²⁴⁰ cases that would require a "lengthy trial";²⁴¹ cases in which the trial will last longer than ten days;²⁴² and cases that are complex and would last a long time.²⁴³

²³⁹ At least three judges used this as the benchmark for SJT use. *See id.*

²⁴⁰ Such factors were that it was a simple fact case, the parties' views on liability or damages were disparate and no more than three parties were involved. *See id.* at 29.

²⁴¹ This is modified by the following phrase: "where [the] parties' views are so divergent that settlement efforts solely by negotiation or settlement conference [are] highly unlikely to be successful." *Id.* at 30.

²⁴² In addition, this judge suggested that SJTs should be used where the parties' offers for settlement are unrealistic and they will not consider changing their positions even on the advice of counsel. *See id.*

²⁴³ *See id.* at 29-31. Maricopa County (Arizona) Superior Court Judge Barry C. Schneider has stated that the case does not have to be a big one to benefit from a summary jury trial. In fact, he thinks the savings may be proportionally higher in a smaller case. *See Myers & Armstrong, supra* note 36, at 3, 16. Judge Schieider stated:

One of the criticisms we hear very often about our system of litigation is how expensive it is. Part of that expense is bringing in expert witnesses [and] the attorney who is trying that case on a contingency has to front those costs even if it's a two-day trial or a three-day trial. By summarizing this expert's testimony to the jury you save that substantial expense. A \$2,000 savings in a \$15,000 case is potentially a greater percentage of a saving than maybe \$100,000 in a seven-figure case.

Id. at 16. Attorney Barry Fish, of Lewis and Roca in Phoenix, Arizona, described the following bad faith case as an example of a case that was appropriate for an SJT. *See id.* at 1. Mr. Fish described the case as follows:

One, it was a situation where there was not a lot of disagreement as to what happened, but, more, disagreement as to the inferences a jury might draw from what happened. It was those inferences that would make the case a defense verdict, or, perhaps, a seven-figure punitive damage case.

Id. at 3. He continued:

There was the risk to both sides of disruption of everyone's life for a month, and I don't exclude from that the disruption of the lives of the attorneys. We had an out-of-state

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The substantive types of cases judges mentioned as being appropriate for SJTs included: corporate or commercial litigation (and any business case that is complex, lengthy and involving a large monetary amount), antitrust (non governmental), personal injury, product liability, general diversity, malpractice, Title VII and civil rights.²⁴⁴

In response to the question as to whether SJTs should ever be used in federal courts,²⁴⁵ several judges responding in the affirmative qualified their answers. One judge thought SJTs might be useful in some extremely complex cases.²⁴⁶ Another thought SJTs were a good tool for use in protracted litigation.²⁴⁷ Another said they should be used only in cases anticipated to be very long and totally incapable of being settled according to the attorneys.²⁴⁸ Another judge said SJTs should be used if they save time, if the facts are agreed upon, if the evidence is agreed upon and if the benefit of a dress rehearsal is warranted.²⁴⁹ Another judge thought SJTs should be used if there is a series of similar cases and the parties are

defendant, all of our witnesses would have to be flown in [and] an important person in the business would have to be there for a long period. From the plaintiff's side, they were not well-to-do people and would suffer from being away from their jobs and routine lives for four weeks.

Id. Trusting the opposing counsel also made the experiment appealing to Fish. *See id.* He added:

I think another factor for the plaintiff in our particular case was that he was in a situation, because of a number of out-of-state depositions, where he had a lot of dry evidence, a lot of documents . . . and he didn't have what I would call a sexy plaintiff's case on its face. I think he saw himself faced with days of reading deposition transcripts in order to put into record certain things he had to put into the record.

Id. Fish also said that he saved his client, the defendant, a lot of money. He stated: "The fees and costs, given the expert witnesses and the cost of putting people up locally in hotels and the whole thing . . . we calculated roughly that the cost, win or lose, going into that trial would have been between \$100,000 and \$150,000." *Id.*

²⁴⁴ *See* Judicial Survey Responses, *supra* note 23, Question 22, at 29-31. In the Attorney Survey Responses, one lawyer stated that he had participated in an SJT in a patent case and an SJT in a copyright case. *See* Attorney Survey Responses, *supra* note 24, Question 1c, at 2.

²⁴⁵ The judicial survey question (#21) read: "Should summary jury trials ever be used in federal courts? Why or why not?" Judicial Survey, Question 21, *infra* Appendix.

²⁴⁶ *See id.* Judicial Survey Responses, *supra* note 23, Question 21, at 27.

²⁴⁷ *See id.* at 28.

²⁴⁸ *See id.* at 27.

²⁴⁹ *See id.*

interested in doing them.²⁵⁰

One judge wrote (in response to the last, open-ended survey question) that based on his experience, he plans to use SJTs in the future in protracted commercial matters involving multiple parties after settlement attempts through a magistrate or special master have not been successful.²⁵¹ Another judge stated that he would seriously consider compelling participation in an SJT in the circumstances of a lengthy trial, with relatively simple facts and parties whose settlement postures are quite disparate.²⁵²

In responding to the question about whether the judges would conduct another SJT in the future and, if so, why,²⁵³ some of the comments they made were as follows: it is effective and worthwhile if the case is not too complex and is projected for a lengthy trial; it may help resolve a case that the parties say cannot be resolved; if the case would take longer than two weeks to try (and the parties consent); if the case fits into its unique characteristics;²⁵⁴ if the case is going to take longer than two weeks to try, involves corporations and is resistant to ordinary settlement techniques and if the parties desired.²⁵⁵

Finally, other suggestions from the surveyed judges included: almost any case except those in which there is a one-on-one credibility main issue, any case except those involving the United States, cases in which there is a wide disagreement as to the value of the case, cases in which damages will be the overriding issue, cases in which parties need insight, cases in which the issues are *factual*, rather than legal—since you want to see what a jury would do, simple fact cases involving no more than three parties when the parties' views on liability or damages are disparate and the trial is expected to last more than five days, convoluted fact situations where the parties will not settle and the facts or evidence are agreed upon, cases in which the *parties'* offers for settlement are unrealistic and they will not consider changing positions even on the advice of counsel (and the trial will last longer than ten days), a series of similar cases and the parties are interested, to avoid lengthy trials, to help all sides become realistic about their case, any case except extremely complex cases, in which credibility is not the core issue or the case is not so complex as to require extensive proof to "see the whole picture," complicated if the case and all lawyers request it, if the

²⁵⁰ See *id.*

²⁵¹ See Judicial Survey Responses, *supra* note 23, Question 40, at 69.

²⁵² See Judicial Survey Responses, *supra* note 23, Question 14, at 19.

²⁵³ The judicial survey question (#15) read: "Would you conduct another summary jury trial in the future? Why or why not?" Judicial Survey, Question 15, *infra* Appendix.

²⁵⁴ This judge did not describe what such unique characteristics would be, however. See Judicial Survey Responses, *supra* note 23, Question 15, at 20.

²⁵⁵ See *id.*

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case involves two corporations and is a case resistant to ordinary settlement techniques (and the trial will take longer than two weeks), if the case is complex and would last a long time, if the case is complicated case and focuses on a discrete issue that might well break the logjam existing insofar as settlement efforts are concerned by focusing the attorneys' and clients' attention on what could happen at a jury trial, cases "where you can say here are the facts—now you draw the inferences," cases in which one or both of the parties (from the court's perception) "needs a boot in the reality" and might get a bit of a jolt from an SJT (although the SJT should not be limited to such situations) and circumstances in which one side or the other is unreasonably obstinate or unaware of the value of her case.²⁵⁶

When the surveyed judges were specifically asked in what types of cases, or under what kinds of circumstances, are SJTs *not* appropriate,²⁵⁷ again the answers were quite varied. Some judges based their answers on the length of the expected jury trial, others on the substantive type of case and still others on the nature of the issues or the parties or the likelihood of settlement.²⁵⁸

For instance, the answers referring to the length of the expected jury trial included: if the jury trial will be short (less than one week) and the case will be tried to a regular jury, "short" cases (since it will be a waste of time if you can actually try it all in a couple of days), "brief" trials, those not expected to be exceptionally long and capable of being settled according to the attorneys, where trial will not last more than ten days and two- to three-day trials involving simple issues.²⁵⁹

The substantive types of cases judges mentioned as being inappropriate for SJTs included: civil rights (remedies are unique—not damages), prisoner (no factual disputes generally, and they rarely settle), criminal, pro se, most personal injury, patent, antitrust, employment and cases involving the United States.²⁶⁰

Finally, other cases or circumstances the surveyed judges suggested as being inappropriate for SJTs included: where there is a one-on-one

²⁵⁶ See Judicial Survey Responses, *supra* note 23, Question 22, at 29–31.

²⁵⁷ The judicial survey question (#23) read: "In what types of cases, or under what kinds of circumstances, are summary jury trials not appropriate?" Judicial Survey. Question 23, *infra* Appendix.

²⁵⁸ See Judicial Survey Responses, *supra* note 23, Question 22, at 32–33.

²⁵⁹ See *id.* Note, however, that one judge wrote that SJTs would be inappropriate in cases scheduled for *more* than four jury days. See *id.* at 32. It is unclear whether this was an error or whether the judge thought that such cases would be too complex for the use of the SJT mechanism.

²⁶⁰ See *id.* at 32–33.

credibility issue,²⁶¹ if the parties are so entrenched that nothing will persuade them to change—they stand on principle or are stubborn,²⁶² highly technical or extremely complex cases,²⁶³ cases with mainly legal issues, cases with complex facts or difficult legal issues, cases in which legal issues are novel or which cannot be ruled upon without a very thorough presentation during the course of the trial, run-of-the-mill cases (since rarely will lawyers agree that a summary verdict is binding), multi-party cases, cases that the settlement judge thinks can be settled without jurors,²⁶⁴ where one party objects and when the parties cannot afford it.²⁶⁵

When asked what types of objections parties have made to participating in SJTs,²⁶⁶ the surveyed judges stated that, among other things, there have been objections on the grounds that the facts were too complex (for example, where expert witnesses are required to explain the event giving rise to liability, as opposed to the resulting damages), and that the law was too complex.²⁶⁷ A judge also stated that parties have objected to having SJTs on very complex matters and that some states, particularly the Commonwealth of Pennsylvania, have refused to consider an SJT verdict.²⁶⁸

One surveyed attorney wrote that SJTs are not appropriate in the simpler cases because discovery and trial are relatively inexpensive.²⁶⁹ He added that they are also not appropriate where settlement is simply not possible, although many judges believe that no such case exists.²⁷⁰ Another surveyed attorney wrote that SJTs in general, particularly the one he was required to do, are usually nothing more than a TAG (his acronym for “trial

²⁶¹ This was mentioned by at least three judges. *See id.* For further discussion of this topic, *see supra* Part III.B.3.

²⁶² This was mentioned by four of the judges. *See id.*

²⁶³ Note, however, that a judge who gave this answer went on to say that in one complex case where the SJT verdict was \$10 million, the case ended up being settled during trial for \$2 million. Defense counsel told the judge that the SJT verdict had a great effect on corporate counsel at the home office of the defendant manufacturer and was highly instrumental in effecting a settlement. *See id.* at 33.

²⁶⁴ One judge noted that sometimes a settlement conference with the parties is just as effective as an SJT at much less cost. *See id.* at 32.

²⁶⁵ *See id.* at 32–33.

²⁶⁶ The judicial survey question (#13) read: “What types of objections have parties made to participation in summary jury trials?” Judicial Survey, Question 13, *infra* at Appendix.

²⁶⁷ *See* Judicial Survey Responses, *supra* note 23, Question 13, at 17.

²⁶⁸ *See id.* at 17–18.

²⁶⁹ *See* Attorney Survey Responses, *supra* note 24, Question 9, at 9.

²⁷⁰ *See id.*

avoidance games,” which he stated that some judges and lawyers play).²⁷¹ But in response to a later question, this attorney wrote that TAGs have a place, particularly in certain types of complex litigation before substantial amounts of money are spent on discovery and trial preparation for what will be a lengthy trial.²⁷²

Finally, another attorney wrote that he would participate in an SJT voluntarily only in cases where the defendant has admitted liability and one is struggling with the value of the plaintiff's case.²⁷³

b. Providing Guidance for Choosing Cases

Given the responses of the surveyed judges and attorneys, it does not appear that there are any substantive types of cases that are particularly appropriate or inappropriate for SJTs.

There are certainly conflicting views about what other factors should be considered when deciding whether to hold an SJT. However, it does appear that there is some consensus that an SJT might be warranted if one or more of the following factors are present: the trial is expected to take at least a week, the trial will consume significant resources, the case is relatively complex (but not so complex that it could not be summarized in an understandable way), there is a genuine dispute as to the monetary value of the case, the parties have significantly different views as to how the jury will react to the key issues in the case, the parties' settlement offers are extremely far apart or one or both of them appear to be unrealistic, the case is not amenable to settlement through other techniques or a summary jury's verdict might prompt resolution. In addition, the court could consider whether variations in the procedure might make it useful even where the credibility of witnesses appears to be a critical issue.

Subsection 1 of the proposed model local court rule contains language addressing the issue of providing guidance for choosing cases.²⁷⁴

2. Uncertainty About the Types of Available Sanctions and Under What Circumstances They Should Be Imposed

Two of the issues raised in this context are whether a litigant should be sanctioned if he settles during a trial for the same amount as the SJT verdict, and whether a litigant should be sanctioned if he does not settle a case based upon an SJT verdict and then obtains a very similar or even less

²⁷¹ See Attorney Survey Responses, *supra* note 24, Question 3b, at 6.

²⁷² See Attorney Survey Responses, *supra*, note 24, Question 5, at 7.

²⁷³ See *id.*

²⁷⁴ See *infra* Part IV.

advantageous result at trial.²⁷⁵

There do not appear to be any cases dealing with these issues in an SJT context, but the Second Circuit Court of Appeals has decided a similar issue. *Kothe v. Smith*²⁷⁶ concerned the issue of imposing sanctions for settling after the first day of trial for the same amount suggested by the judge at a previous pretrial conference. In that case, the trial court judge held a pretrial conference three weeks prior to trial, during which he directed counsel for the parties to conduct settlement negotiations. The judge apparently recommended that the case be settled for between \$20,000 and \$30,000 and warned the parties that, if they settled for a comparable figure after trial had begun, he would impose sanctions against the dilatory party.²⁷⁷ The case settled for \$20,000 after one day of trial, and the court entered a judgment directing the defendant to pay \$1,000 to the plaintiff's attorney, \$1,000 to the plaintiff's medical witness and \$480 to the clerk of the court as a sanction.²⁷⁸

The Second Circuit vacated the judgment, holding that under the circumstances of this case, the district court's imposition of a penalty against the defendant was an abuse of the sanction power given it by Rule 16(f) of the Federal Rules of Civil Procedure.²⁷⁹ The court stated that although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlements through coercion.²⁸⁰ The court quoted the following language from *Wolff v. Laverne, Inc.*:²⁸¹

We view with disfavor all pressure tactics whether directly or obliquely, to coerce settlement by litigants and their counsel. Failure to concur in what the Justice presiding may consider an adequate settlement should not result in an imposition upon a litigant or his counsel, who reject it, of any retributive sanctions not specifically

²⁷⁵ Judicial Survey Question #32 read: "Should a litigant be sanctioned if he or she settles during a trial—for the same amount as the summary jury trial verdict? Why or why not?" Judicial Survey Question 32, *infra* at Appendix. Judicial Survey Question #33 read: "Should a litigant be sanctioned if he or she does not settle a case based upon a summary jury trial verdict and then obtains a very similar or even less advantageous result at trial? Why or why not?" Judicial Survey, Question 33, *infra* at Appendix.

²⁷⁶ 771 F.2d 667 (2d Cir. 1985).

²⁷⁷ *See id.* at 668-669.

²⁷⁸ *See id.*

²⁷⁹ *See id.* (citing FED. R. CIV. P. 16(f)).

²⁸⁰ *See id.* at 669 (citations omitted).

²⁸¹ 233 N.Y.S.2d 555 (N.Y. App. Div. 1962) (cited with approval in *Del Rio v. Northern Blower Co.*, 574 F.2d 23, 26 (1st Cir. 1978)).

authorized by law.²⁸²

The court continued by stating that, in short, pressure tactics to coerce settlement simply are not permissible.²⁸³ It added that Rule 16 was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise.²⁸⁴ Although Rule 16(c)(7), added in the 1983 amendments to the Rule, was designed to encourage pretrial settlement discussions, it was not its purpose to “impose settlement negotiations on unwilling litigants.”²⁸⁵ The court stated that it particularly was concerned that only one of the litigants was sanctioned here since settlement negotiations are a two-way street. Although the plaintiff had informed the trial court judge prior to trial that it would accept \$20,000, it never made a demand upon the defendant of less than \$50,000.²⁸⁶ The court added that the defendant’s attorney should not be condemned for changing his evaluation of the case after listening to the plaintiff’s testimony during the first day of trial.²⁸⁷

a. *How Judges Have Reacted*

Although the overwhelming majority of the surveyed judges answered “no” to both of the above-mentioned sanctions questions,²⁸⁸ there were a

²⁸² *Kothe*, 771 F.2d at 669.

²⁸³ *See id.* (citations omitted).

²⁸⁴ *See id.* (citations omitted).

²⁸⁵ *See id.* (quoting Advisory Committee Note, 97 F.R.D. 205, 210 (1983)).

²⁸⁶ *See id.* at 669–670.

²⁸⁷ *See id.* at 670.

²⁸⁸ In response to judicial survey question 32, see *supra* note 275, twenty-three judges said “no,” six judges said “yes” and two judges did not give definitive answers. *See* Judicial Survey Responses, *supra* note 23, Question 32, at 52–53. In response to judicial survey question 33, see *supra* note 271, twenty-seven judges said “no,” three said “yes” and one did not give a definitive answer. *See* Judicial Survey Responses, *supra* note 23, Question 33, at 54–55. With respect to the first issue, the judges wrote that settlements should never be discouraged, sanctioned or punished—and that they should be favored at all stages of the proceeding. *See* Judicial Survey Responses, *supra* note 23, Question 32, at 52–53. In explaining why litigants should not be punished for the timing of their settlements, judges pointed out that too many variables can affect the decision to settle, often the chemistry is not ripe until the trial is underway, and the time for a party to settle is not always “right” prior to trial. *See id.* Judges responding negatively to the first question also stated that such a sanction would be an improper deterrent to the exercise of the right to trial. *See id.* Still other judges responding negatively were concerned that this would discourage the use of SJTs and undermine their value and effect, that such a settlement merely proves the validity of the SJT

number of judges who thought that sanctions might be warranted under these circumstances.

Those judges who did think sanctions would be warranted if the parties settled during the actual trial—for the same amount as the SJT verdict—stated: this puts “teeth” into the procedure,²⁸⁹ the litigant has inconvenienced the court and the other side,²⁹⁰ to do so would encourage prompt settlement,²⁹¹ it would be appropriate to tax jury costs (but reluctant to impose other sanctions),²⁹² they could be imposed if there is a late settlement (where one party made a dramatic change in offer or counteroffer)—but the SJT verdict should not control,²⁹³ and they could be imposed unless there have been substantial differences between the parties.²⁹⁴

Those judges indicating that sanctions might be warranted if a party does not settle a case based upon an SJT verdict and then obtains a very similar or even less advantageous result at trial stated that they must be done by the rules,²⁹⁵ that they would put “teeth” into the procedure²⁹⁶ and that to do so would encourage prompt settlement.²⁹⁷

The judges who did not answer the sanctions questions definitively stated that every case will have to be judged individually,²⁹⁸ and that it would depend on the circumstances of the particular case.²⁹⁹

One surveyed attorney wrote that such sanctions should only be imposed as already provided in Rule 68 of the Federal Rules of Civil

and that that is the purpose of the SJT proceeding. *See id.* Judges responding negatively to the second question also pointed out that juries differ, a party has a right to due process and that there should be no compulsion to settle a case based upon an SJT verdict that was arrived at without the full procedural protections of an actual trial. *See* Judicial Survey Responses, *supra* note 23, Question 33, at 54–55. One judge wrote that sanctions under such circumstances “would throw cold water on the use of the process.” Judicial Survey Responses, *supra* note 23, Question 33, at 54.

²⁸⁹ *See* Judicial Survey Responses, *supra* note 23, Question 32, at 52.

²⁹⁰ *See id.*

²⁹¹ *See id.* He noted, however, that the Sixth Circuit has not allowed him to do so. *See id.*

²⁹² *See id.*

²⁹³ *See id.*

²⁹⁴ *See id.*

²⁹⁵ *See* Judicial Survey Responses, *supra* note 23, Question 33, at 54.

²⁹⁶ *See id.*

²⁹⁷ *See id.* This judge added, however, that the Sixth Circuit has not allowed him to do so. *See id.*

²⁹⁸ *See* Judicial Survey Responses, *supra* note 23, Question 32, at 53.

²⁹⁹ *See id.*; *see also* Judicial Survey Responses, *supra* note 23, Question 33, at 55.

Procedure.³⁰⁰ Another attorney responded “probably yes”—assuming the SJT vehicle is valid, although noting that things can change substantially between the SJT verdict and the actual jury trial verdict. He added that he could envision situations where a party could be justified in settling for the same amount during trial that it could have settled for after the SJT.³⁰¹

A few of the judges who answered “no” to the question of whether a litigant should be sanctioned if she settles during a trial (for the same amount as the SJT verdict) indicated that there might be exceptions. For instance, they wrote that sanctions might be imposed if the judge investigates the circumstances in detail before imposing them,³⁰² if a formal offer of judgment was filed,³⁰³ if they are composed solely of juror costs³⁰⁴ and if they are warranted but not as a common practice.³⁰⁵

One of the judges who responded negatively to the question of whether sanctions should apply when the litigant obtains a very similar or worse result at trial (after failing to settle based upon the SJT verdict) said that while he would not sanction the litigant under these circumstances, he would not give the litigant her costs.³⁰⁶ Another judge said that Rule 68 is the remedy in this situation,³⁰⁷ and yet another judge said sanctions should not be awarded unless the judge investigates the circumstances in detail prior to imposing them.³⁰⁸

Finally, two of the surveyed attorneys responded negatively to these sanctions questions on the basis that the Rule 68 offer of judgment rules are adequate to handle this situation.³⁰⁹

b. Clarifying the Types of Available Sanctions and the Circumstances Under Which They Should Be Imposed

As stated above, the primary issues in this section are: (1) should a litigant be sanctioned if he settles during a trial for the same amount as the SJT verdict, and (2) should a litigant be sanctioned if he or she does not settle a case based upon an SJT verdict and then obtains a very similar or even less advantageous result at trial.

³⁰⁰ See Attorney Survey Responses, *supra* note 24, Question 17, at 14.

³⁰¹ See *id.*

³⁰² See Judicial Survey Responses, *supra* note 23, Question 32, at 52.

³⁰³ See *id.*

³⁰⁴ See *id.*

³⁰⁵ See *id.* at 53.

³⁰⁶ See Judicial Survey Responses, *supra* note 23, Question 33, at 54.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See Attorney Survey Responses, *supra* note 24, Question 18, at 14.

Although there was an overwhelmingly negative response from the surveyed judges to these particular questions (and a negative response by the Second Circuit in a similar situation), the need for some types of available sanctions was demonstrated in the section above encouraging good-faith participation by the parties.³¹⁰

In addition, in the second type of situation, there appears to be some consensus with respect to using a Rule 68-type approach. Perhaps the judge, in his discretion, could inform the parties in advance that he will view any SJT verdict for plaintiff as a Rule 68 offer of judgment from defendant, if defendant agrees to settle for that amount. Then, if plaintiff rejects that offer, takes the case to trial and recovers less than the amount of the SJT verdict, the provisions of Rule 68 could apply (with respect to trial costs).

Subsections 20 and 26 of the proposed model local court rule contain language addressing the issue of clarifying the types of available sanctions and the circumstances under which they should be imposed.³¹¹

3. *Uncertainty About Whether SJT Verdicts Should Ever Be Binding, and, if so, Under What Circumstances*

Some of the issues raised in this context are: (1) whether SJT verdicts should ever be binding, and if so, under what circumstances, and (2) whether "high-low" binding verdicts should be used in SJTs?

The SJT was clearly designed to be a nonbinding settlement process. In the Senate Report to the Judicial Improvements Act of 1990, this process is described as "generally nonbinding" and "thus does not impair the constitutional right of any party to proceed to a full-blown jury trial."³¹²

However, there may be situations when the SJT verdict should be binding, or should bind the parties within certain parameters. For example, some local district court rules allow SJT verdicts to be binding if the parties so stipulate.³¹³ Another possibility being tried in some courts is the "high-

³¹⁰ *But see supra* Part III.B.2.b.

³¹¹ *See* the entire proposed model local court rule *infra* Part IV.

³¹² *See* S. REP. No. 101-416, at 6831. The report added that "Judge Lambros reports, however, that a full jury trial is 'almost always unnecessary because the procedure fosters settlement of the dispute.'" *Id.* at 25-26 (quoting Thomas D. Lambros, *The Summary Jury Trial—An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (Feb./Mar. 1986)).

³¹³ *See, e.g.*, D. MONT. STANDING ORDER NO. 6A (Summary Jury Trial); D. CONN. R.P. FOR SUMM. JURY TRIAL P. 15. An interesting idea for a hybrid process involving SJTs is to have a stipulation that the jury will not disclose its verdict or that the verdict will be sealed for a fixed period of time while the parties attempt to settle the case, and that the verdict will be a final, binding verdict if it is disclosed to the parties.

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low” binding verdict.³¹⁴ A “high-low” binding verdict in this context is where the plaintiff agrees to have his award limited to a given high figure, if there is a plaintiff’s verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict. The parties really are asking the jury to determine the amount of award between the high and low figures.³¹⁵

a. How Judges Have Reacted

When asked whether an SJT verdict should ever be binding,³¹⁶ a little fewer than half of the responding judges said “yes.”³¹⁷ However, all of these judges indicated that it should be binding only if the parties agree that it will have that effect.³¹⁸ Some of the judges emphasized that the parties should agree beforehand,³¹⁹ and another judge stated that both the attorneys and the parties themselves should personally agree and only after being fully apprised of the consequences.³²⁰ One judge said that an SJT verdict should be binding only on stipulation and if no party or attorney violates the letter or spirit of the SJT process.³²¹ Finally, a judge pointed out that subsection 15 of the District of Connecticut Rules of Procedure for SJTs provides that counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by

³¹⁴ See Myers & Armstrong, *supra* note 36, at 1 (describing the use of this variation in the Maricopa County (Arizona) Superior Court).

³¹⁵ See *id.* Attorney Barry Fish of Lewis and Roca in Phoenix, Arizona, thinks that for an SJT to work with a binding, high-low verdict, attorneys must have available the remedy of mistrial and that the requirements for mistrial can be relaxed somewhat by the judge, because the judge has only one day invested instead of several days or weeks. See *id.* at 3.

³¹⁶ The judicial survey question (#30(A) (B)) read: “30. Should summary jury trial verdicts ever be binding? A. If so, under what circumstances? B. If not, why not?” Judicial Survey Question 30, *infra* Appendix.

³¹⁷ Fifteen judges said “yes;” seventeen said “no.” See Judicial Survey Responses, *supra* note 23, Question 30, at 46.

³¹⁸ See *id.* One judge stated that if counsel and litigants agree, then the SJT is just a form of an accelerated hearing before a group arbitrator. See *id.*

One judge who thought that SJT verdicts should not ever be binding suggested that it could be malpractice not to opt for a full trial. See *id.*

All of the lawyers who answered this question in the affirmative thought an SJT verdict should be binding only if the parties agree. See Attorney Survey Responses, *supra* note 24, Question 16a, at 12.

³¹⁹ See Judicial Survey Responses, *supra* note 23, Question 30a, at 46.

³²⁰ See *id.*

³²¹ See *id.*

the court, or may stipulate to any other use of the verdict that will aid in the resolution of the case.³²²

With respect to the second issue, whether "high-low" binding verdicts should be used in SJTs, the judges' responses were mixed. When the judges were asked whether they thought "high-low" binding verdicts are a good idea,³²³ a few of them said "no" and the remaining respondents were almost evenly split between those answering in the affirmative and those who did not have an opinion on the subject.³²⁴

Of those saying that "high-low" binding verdicts are a good idea, a number of them added the caveat: if the parties agree.³²⁵ One of these

³²² See Judicial Survey Responses, *supra* note 23, Question 30a, at 46 (referring to the District of Connecticut Rules of Procedure for SJTs, which was attached to the judge's response).

The judges who thought that SJT verdicts should not ever be binding appeared to be assuming that a binding verdict would be forced upon the parties. See Judicial Survey Responses, *supra* note 23, Question 30b, at 46-47. For instance, one judge stated that an SJT is only a settlement tool, and that since he has not been able to convince attorneys to participate in a nonbinding SJT, he is certain he could not convince anyone to participate in a *binding* SJT. See *id.* at 46. In addition, a number of judges stated that it would be a denial of the parties' right to jury trial, or a due process or other constitutional violation. See *id.* at 46-47.

Those lawyers answering in the negative gave various explanations for their position. See Attorney Survey Responses, *supra* note 24, Question 16b, at 13. For instance, one lawyer wrote that no lawyer should be compelled to accept less than the law allows for his client. See *id.* Another lawyer wrote that an SJT verdict should not be binding because the presentation in an SJT is too limited. The jurors do not have the opportunity of seeing all of the witnesses, and many times the examination of a particular witness or witnesses can be the deciding factor in a full-scale jury trial. See *id.* Other lawyers were concerned about a binding verdict in a process that does not involve the full and complete presentation of evidence, where the rules of evidence are not observed, where credibility cannot be weighed and where the quality of the lawyer makes more of a difference. See *id.*

³²³ The judicial survey question (#30c) read:

Do you think 'high-low' binding verdicts are a good idea? Why or why not? [A 'high-low' binding verdict in this context is where a plaintiff agrees to have his award limited to a given high figure, if there is a plaintiff's verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict.]

See Judicial Survey, Question 30(c), *infra* Appendix.

³²⁴ See Judicial Survey Responses, *supra* note 23, Question 30c, at 48-49. Of the twenty-five judges responding to this question, ten said "yes," four said "no," and eleven had some other response (primarily no opinion). See *id.*

³²⁵ See *id.* at 48. One judge indicated that he had used a "high-low" verdict in one SJT

judges stated that it is imperative that the parties themselves fully consent to this procedure and not feel any pressures or time constraints.³²⁶ Others stated that it makes settlement more realistic, that it seems fair and that it guarantees that the case will be disposed of, with each side protected.³²⁷ However, several judges stated that they thought it would be difficult to get attorneys to agree to the use of a “high-low” verdict,³²⁸ and one commented that he might agree to it if he was a defense lawyer with a bad case.³²⁹

Of those judges who thought that “high-low” binding verdicts in SJTs are not a good idea, one judge said that there would be nothing gained by that type of restriction,³³⁰ one said that they are not good indicators of real results³³¹ and another judge stated that he was not supportive of compulsory binding verdicts where the parties were forced into the procedure.³³²

One surveyed attorney wrote that while he does not subscribe to a binding “high-low” verdict, the concept does have some usefulness because it provides parameters of exposure for each side.³³³ Thus, he stated, it adds an element of certainty to an uncertain process.³³⁴ In his experience, both clients and trial lawyers feel more comfortable about any aspect of litigation when certainty is added.³³⁵

Another attorney thought that “high-low” binding verdicts in SJTs were a good idea since the more agreements or stipulations between the parties, the more likely that resolution will occur.³³⁶

b. *Clarifying Under What Circumstances SJT Verdicts Should Be Binding*

It appears clear that an SJT verdict should only be binding if counsel stipulate to that effect in advance. As an alternative, counsel could agree in advance to a “high-low” binding SJT verdict. To preserve fairness, however, it appears that a party should be allowed to unilaterally opt out of

by agreement of counsel at his suggestion. *See id.*

³²⁶ *See id.* He added that he also has seen parties agree to do this in the actual trial of the case, in lieu of an appeal, although he did not try that case. *See id.*

³²⁷ *See id.*

³²⁸ *See* Judicial Survey Responses, *supra* note 23, Question 30c, at 48–49.

³²⁹ *See id.* at 49.

³³⁰ *See* Judicial Survey Responses, *supra* note 23, Question 30c, at 48.

³³¹ *See id.*

³³² *See id.*

³³³ *See* Attorney Survey Responses, *supra* note 24, Question 16c, at 13.

³³⁴ *See id.*

³³⁵ *See id.*

³³⁶ *See id.*

either such stipulation, if its counsel can convince the court that opposing counsel violated the letter or spirit of the SJT process or that some other reason exists that would make such a stipulation inequitable. Finally, counsel should also be allowed to stipulate, at any time, as to any other use of the SJT verdict that might aid in the resolution of the pending case.

Subsections 4, 5, 6 and 7 of the proposed model local court rule contain language addressing the issue of clarifying under what circumstances SJT verdicts should be binding.³³⁷

4. *Uncertainty About Whether the Judicial Officer Who Conducted the SJT Should Preside over the Actual Trial When the SJT Does Not Result in Settlement*

The issue raised in this context is whether the judge or magistrate judge who conducts the SJT should preside over the actual trial.³³⁸

a. *How Judges Have Reacted*

When asked whether the judge or magistrate judge who conducts the SJT should preside over the actual trial as well, almost twice as many of the responding judges said "yes" as said "no."³³⁹ There were several different reasons given as to why the same judicial officer should preside over both proceedings. Some judges stated that there was no reason not to have the same person conduct both or that it makes no difference.³⁴⁰ In fact, one judge who gave this type of answer stated that nothing that he has learned in the thirty-seven SJTs he has had would have influenced him in any way in the actual trials.³⁴¹

Other judges said the same judicial officer should preside over both the SJT and the actual trial since familiarity was important.³⁴² Several of these judges commented that the SJT gives the judge a good overview of the case and he can continue the settlement initiative throughout the actual trial.³⁴³ Another of these judges said that the judge will be better acquainted with

³³⁷ See the entire proposed model local court rule *infra* Part IV.

³³⁸ The judicial survey question (#26) read: "Should the judge or magistrate [judge] who conducts the summary jury trial preside over the actual trial as well? Why or why not?" See Judicial Survey, Question 26, *infra* Appendix.

³³⁹ Twenty-two judges responded yes to this question; twelve judges responded no. See Judicial Survey Responses, *supra* note 23, Question 26, at 37-38.

³⁴⁰ See *id.*

³⁴¹ See *id.* at 37.

³⁴² See *id.*

³⁴³ See *id.*

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the case and any problems that might arise in the actual trial.³⁴⁴ One of the judges commented that the more informed the hearing judges are, the better.³⁴⁵ One judge wrote that it is more efficient because the judge or magistrate is more familiar with the record³⁴⁶ and another wrote that to do otherwise would be impractical.³⁴⁷

Other judges responded affirmatively to this question on the basis that it is the jury, not the judge, that determines the outcome of both the SJT and the actual trial, and that this would make the SJT more credible since the rulings will be closer to what the lawyers can expect at the actual trial.³⁴⁸

Finally, several judges said that the same judicial officer should preside over both proceedings unless the parties object, the judge becomes partial or the judicial officer finds one of the classic reasons for refusal.³⁴⁹

The comments of the judges who thought that the same judicial officer should not preside over both proceedings varied somewhat. One group of judges was concerned about the fact that the judge or magistrate judge would have already participated in settlement discussions (following the SJT) and heard *ex parte* information.³⁵⁰ For example, one magistrate judge explained it this way: "Summary jury trial is a settlement vehicle. The judge who presides over it must be free to assist parties to settle by *ex parte* conferences, pointing out their weaknesses, etc. This is inappropriate for trial judges. Also, parties will be less frank to a trial judge."³⁵¹

³⁴⁴ *See id.*

³⁴⁵ *See id.* at 38.

³⁴⁶ *See id.* at 37.

³⁴⁷ *See id.* at 38.

³⁴⁸ *See id.* at 37.

³⁴⁹ *See id.* The nature and range of the comments of the attorneys responding to the question whether the judge or magistrate judge who conducts the SJT should preside over the actual trial as well were quite similar to those of the responding judges. *See* Attorney Survey Responses, *supra* note 24, Question 13, at 11. For instance, some of those who thought the same judicial officer should preside over both based their conclusion on the fact that it really should not matter. *See id.* One lawyer wrote that he saw no reason why not, so long as a different jury is used in the actual trial. *See id.* At least two other lawyers responded in the affirmative on the basis that the judicial officer would have more familiarity with the issues if she presided over both. *See id.* Another lawyer stated that the advantage of using the same judge is experience with the case and the issues. *See id.* Another lawyer responded affirmatively on the grounds that the jury decides the case—not the judge. *See id.* Finally, another lawyer responded affirmatively on the grounds that it would certainly make it more likely that the results would be comparable. *See id.*

³⁵⁰ *See* Attorney Survey Responses, *supra* note 23, Question 26, at 38.

³⁵¹ *Id.*

Most of the remaining judges who responded negatively were concerned about the appearance of bias or the prejudging of the case.³⁵² For instance, one of these judges wrote that no litigant will accept the claim that after an SJT a judge remains without bias. He added, "Remember, 'justice' is largely a matter of the litigants' perception."³⁵³ Another judge stated although he does not believe that conducting an SJT would preclude a judge from conducting the actual trial, for the sake of appearance it might be advantageous to have it conducted by a different judicial officer.³⁵⁴

Other reasons given by judges for why the same judicial officer should not preside over both proceedings were: if a different officer conducted the actual trial, the parties would be under no illusions that any procedural rulings at the SJT would be the same as those made in the actual trial;³⁵⁵ significant evidentiary rulings or rulings on legal issues should not be made by trial judges in this context;³⁵⁶ and that if a magistrate conducts the SJT, this is a further savings of time for the Article III judge.³⁵⁷

One of the surveyed attorneys suggested that the judge should step aside if a jury is waived after an SJT.³⁵⁸

b. Allowing Discretion in Determining Which Judicial Officer Should Preside over the Actual Trial When an SJT Does Not Result in Settlement

At this point there appears to be no consensus among the surveyed judges and lawyers on the issue of whether the same judicial official should preside over the SJT and the subsequent actual trial. This issue should be decided by the trial judge on a case-by-case basis to deal with situations of perceived bias, where a jury has been waived or where counsel jointly object. Therefore, the proposed rule addressing this issue merely provides this as an example of a discretionary decision by the judge in this context.

³⁵² See *id.*

³⁵³ *Id.*

³⁵⁴ See *id.*

³⁵⁵ See *id.* Why this should be considered a benefit is unclear.

³⁵⁶ See *id.* at 38. This judge added, however, that there would be no problem if the dispute is exclusively factual and there are no unusual evidentiary rulings. See *id.*

³⁵⁷ See *id.* One magistrate judge noted that if he gets an SJT on reference, he does not try it, usually the judge does. See *id.*

Surveyed lawyers responding negatively on this issue stated that neutrality could be compromised in the second proceeding and that the judicial officer will almost certainly be prejudiced by the conduct of the attorneys during, as the result of, the SJT. See Attorney Survey Responses, *supra* note 24, Question 13, at 11.

³⁵⁸ See Attorney Survey Responses, *supra* note 24, Question 13, at 11.

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Subsection 27 of the proposed model local court rule contains language allowing discretion in determining which judicial officer should preside over the actual trial when an SJT does not result in settlement.³⁵⁹

5. *Uncertainty About Whether SJT Jurors Should Be Excluded From Serving at Subsequent Trials*

The issue raised in this context is whether citizens who serve as jurors for SJTs should be excluded from serving at the subsequent actual trials (and/or any, even unrelated, subsequent actual trials).³⁶⁰

a. *How Judges Have Reacted*

When the judges were asked whether citizens who serve as jurors for SJTs should be excluded from serving at the subsequent actual trials (and/or any, even unrelated, subsequent actual trials), again the answers varied.³⁶¹ An overwhelming majority answered “yes” to at least part of this question.³⁶² At least half of those judges answering yes clearly stated that the SJT jurors should not serve at the subsequent actual trial of the same case.³⁶³ One of these judges pointed out that their court’s process of drawing both juries simultaneously prevents SJT jurors from serving on the trial jury.³⁶⁴ Other judges in this category explained that the jurors will have an opinion as to the merits, having seen evidence and heard the facts described.³⁶⁵ Jurors should hear live witnesses with a fresh and untainted point of view,³⁶⁶ the procedure at an SJT is much different from a plenary

³⁵⁹ See *infra* Part IV, at subsection 27. See also subsections 2, 3, 11, 12, 21 and 22 of the proposed model local court rule. These rules are intended to contribute to the reliability of the SJT verdict, thus making the identity of the presiding judicial officer less important.

³⁶⁰ The judicial survey question (#37) read: “Should citizens who serve as jurors for summary jury trials be excluded from serving at the subsequent actual trials (and/or any, even unrelated, subsequent actual trials)? Why or why not?” Judicial Survey, Question 22, *infra* Appendix.

³⁶¹ See Judicial Survey Responses, *supra* note 23, Question 37, at 63–64.

³⁶² Twenty-two of the responding judges said “yes”; five said “no” and four had some other type of response. See *id.*

³⁶³ See Judicial Survey Responses, *supra* note 23, Question 37, at 63. One judge merely commented that jurors who served on their SJT juries were not subsequently called for jury duty in any other jury trials. See *id.* at 64.

³⁶⁴ See *id.*

³⁶⁵ See *id.*

³⁶⁶ See *id.*

trial and confusion will be reduced³⁶⁷ and they may be prejudiced.³⁶⁸ Some of these judges did think, however, that the jurors could serve at unrelated, subsequent actual trials.³⁶⁹

Other judges responding in the affirmative indicated that perhaps the SJT jurors should not serve in even unrelated, subsequent actual trials because the procedures are different and a regular trial may be confusing.³⁷⁰ They might think it was an SJT and infect the other jurors;³⁷¹ it might be hard to shift gears³⁷² and they might have a distorted idea of the process.³⁷³ One judge, who did not specifically answer “yes” or “no,” commented: “This is a complicated question. How can you convince a juror who you have just fooled that it’s now the genuine thing?”³⁷⁴

The few judges responding negatively to this question indicated that they saw no reason to exclude the jurors from service, or that the jurors could be told the difference between an SJT and a real trial.³⁷⁵

A couple of the judges who did not specifically answer “yes” or “no” to this question said that serving as a juror in an SJT should be the same as serving at a regular trial in determining when a juror may be excused from further service.³⁷⁶

Several attorneys said that jurors need not be excluded from serving at unrelated, subsequent actual trials.³⁷⁷

³⁶⁷ See *id.*

³⁶⁸ See *id.* When the surveyed attorneys were asked this question, they gave similar responses. See Attorney Survey Responses, *supra* note 24, Question 24, at 17. They gave the following reasons for excluding jurors from serving at the subsequent actual trial: to prevent any prejudice carryover, fear of a “conditioned jury” and the jurors’ minds may be made up before the full scale jury trial even begins. See *id.*

³⁶⁹ See Judicial Survey Responses, *supra* note 23, Question 37, at 64.

³⁷⁰ See *id.*

³⁷¹ See *id.*

³⁷² See *id.*

³⁷³ See *id.*

³⁷⁴ See *id.* at 64. One surveyed attorney seemed to indicate that SJT jurors should not serve at any, even unrelated, subsequent real trials. He stated that jurors who participate in an SJT know their verdicts are not binding and they tend to focus more on the process than the evidence. Once so educated they would be hard to retrain, he added. See Attorney Survey Responses, *supra* note 24, Question 24, at 17.

³⁷⁵ See Judicial Survey Responses, *supra* note 23, Question 37, at 64.

³⁷⁶ See *id.*

³⁷⁷ See Attorney Survey Responses, *supra* note 24, Question 24, at 17.

b. *Clarifying the Limits of Post-SJT Jury Service of
SJT Jurors*

For the reasons stated above, it is clear that SJT jurors should not go on to serve as jurors in the actual trial of the same case if the post-SJT settlement discussions fail.

However, the issue of whether SJT jurors should serve in unrelated, subsequent actual trials is less clear, and because this issue does not appear to be a significant problem, it is not addressed by the proposed rule.³⁷⁸ However, at some point it might be worthwhile to consider prohibiting future jury service by SJT jurors—at least for a specified period of time—so that these persons will not confuse the SJT process with the real trial process.

Subsection 24 of the proposed model local court rule contains language addressing the issue of clarifying the limits of post-SJT jury service of SJT jurors.³⁷⁹

³⁷⁸ *But see* Hume v. M & C Management, 129 F.R.D. 506 (N.D. Ohio 1990). In that case, Judge Battisti noted that not only is the summoning of jurors for summary jury duty unauthorized by the legislature, but also the use of jurors as summary jurors could compromise the integrity of the jury system. *See id.* at 508 n.4. He pointed out that because serving as jurors in what turn out to be “fake” cases may affect their judgments at a full trial, a number of judges are excusing summary jury jurors from sitting as jurors in “real” cases later on. While excusing them may solve that problem, it creates another—the interruption of the randomness of jury selection. *See id.* In addition, Judge Battisti noted that the SJT experiment ignores the special considerations which should be present when experimenting with human beings as a “means to the end of obtaining information.” *See id.* (citing EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW 41 (Federal Judicial Center 1981)). He quoted the report as stating that “[a]ny research or experiment that involves human subjects uses those subjects as instruments of the research, as means to the end of obtaining information” and that “[u]sing persons as means conflicts with the principle of respect for persons . . . when the individual subjects do not consent.” *Id.* The judge also pointed out:

It is the institutionalization by the federal courts of the use of summary juries which is objectionable in law. If judges wish to promote the use of voluntary privately paid fact-finders, such as the ‘jurors’ used in mini-trials, they run no risk of misusing the jury system established by law.

Id. at 510 n.15.

³⁷⁹ *See* the entire proposed model local court rule, *infra*, at Part IV. Subsection 24 of the proposed model local court rule states: “The summary jury trial jurors may not serve as jurors in the subsequent actual trial of the same case.”

D. Other Barriers to Use and Effectiveness

The issues raised in this context are: (1) whether other problems or concerns about summary jury trials exist, (2) how they should be addressed and (3) whether other adjustments should be made to ensure that a litigant's right to jury trial is not threatened.

The concerns raised by the surveyed judges that do not duplicate these issues fall into three general categories: a need for education for both lawyers and judges about the SJT process a need for flexibility in the process and a need for additional facilities in which to conduct the SJTs.

1. How Judges Have Reacted

First, a lack of education about SJTs appears to be a problem which affects judges' willingness to use them and lawyers' willingness to participate in them. The surveyed judges have stated that lawyers have been slow to agree to SJTs,³⁸⁰ lawyers have objected because they did not understand them³⁸¹ and that lawyers still need to be educated about SJTs.³⁸² One judge stated that the only problem is getting lawyers to understand how the SJT works.³⁸³ Another wrote that this process has assisted in settlement, but lawyers still are somewhat fearful of what they are getting into.³⁸⁴ A surveyed attorney wrote that he would like more information on SJTs from judges (as opposed to law professors or other litigators who have participated in them) and that he would like to receive the information in the form of continuing legal education programs, presentations at bar or committee meetings, articles and standing court orders (all of these having been listed in the question itself).³⁸⁵

There appears to be some need for education on this process for some judges as well. One of the judges indicated that he will attempt to educate himself to determine the efficacy of SJTs.³⁸⁶ He noted that if other judges find their SJT experiences to be good to excellent, he will try to pick out a

³⁸⁰ See Judicial Survey Responses, *supra* note 23, Question 3b, at 5-6.

³⁸¹ See Judicial Survey Responses, *supra* note 23, Question 13, at 17-18. See also Judicial Survey Responses, *supra* note 23, Question 16, at 21-22 (why judges have not conducted SJTs); Judicial Survey Responses, *supra* note 23, Question 18, at 24 (the remaining stumbling blocks for those judges who have seriously considered conducting SJTs but have not done so).

³⁸² See Judicial Survey Responses, *supra* note 23, Question 40, at 69.

³⁸³ See Judicial Survey Responses, *supra* note 23, Question 3b, at 6.

³⁸⁴ See Judicial Survey Responses, *supra* note 23, Question 40, at 69.

³⁸⁵ See Attorney Survey Responses, *supra* note 24, Question 26, at 19.

³⁸⁶ See Judicial Survey Responses, *supra* note 23, Question 40, at 69.

few cases to try in this abbreviated manner.³⁸⁷ Another judge, when asked why he had not conducted an SJT, responded that he had no opportunity and no knowledge of the procedure.³⁸⁸ Finally, a number of judges stated that they are not convinced of the benefits of conducting SJTs and do not feel the need to use them or to assign them to a magistrate judge.³⁸⁹

Second, some of the judges are concerned about making the process more flexible to accommodate unique circumstances.³⁹⁰

Finally, a number of judges have mentioned that a shortage of courtrooms for conducting SJTs has been a problem.³⁹¹

2. *Eliminating Other Barriers to Use and Effectiveness*

First, lack of education about SJTs does appear to be a stumbling block to their use. Both judges and attorneys need additional education about this useful device. Therefore, it seems beneficial to suggest in the proposed rule itself that judges and lawyers attend CLE seminars about this process.

Second, it appears that to allow for flexibility in unique circumstances, there should be a general, catch-all provision that allows the court or the parties (by stipulation) to make changes in the SJT procedure. But to maintain the integrity of the process, it appears that court approval of stipulations by the parties should be required.

Finally, a number of the surveyed judges indicated that lack of courtroom space seemed to be a problem. Although the best solution to this problem is unclear, at the very least the location of the SJT could be an aspect of the procedure that could be altered by stipulation or court order.

Subsections 27 and 28 of the proposed model local court rule contain language addressing the remaining barriers to use and effectiveness.³⁹²

³⁸⁷ *See id.*

³⁸⁸ *See* Judicial Survey Responses, *supra* note 23, Question 16, at 21-22.

³⁸⁹ *See* Judicial Survey Responses, *supra* note 23, Question 19, at 25; Judicial Survey Responses, *supra* note 23, Question 13, at 18; Judicial Survey Responses, *supra* note 23, Question 16, at 21-22; Judicial Survey Responses, *supra* note 23, Question 18, at 24; Judicial Survey Responses, *supra* note 23, Question 20, at 26.

³⁹⁰ *See* Judicial Survey Responses, *supra* note 23, Question 12, at 16.

³⁹¹ *See* Judicial Survey Responses, *supra* note 23, Question 18, at 24; Judicial Survey Responses, *supra* note 23, Question 16, at 21.

³⁹² *See infra* Part IV, at subsections 27 and 28.

IV. PROPOSED MODEL LOCAL COURT RULE AND LOCAL COURT ORDER INCORPORATING THE SOLUTIONS

As stated above, while uniform rules obviously cannot cover every contingency, and some room for flexibility must exist, establishing some certainty and regularity to the process and limiting future challenges to various aspects of the SJT procedure are worthy goals. Therefore, below is a proposed model local court rule addressing the issues raised in this Article.

MODEL LOCAL COURT RULE

LOCAL COURT RULE ____
(Summary Jury Trial Procedure)

1. When deciding whether to order a summary jury trial in a case, the Court should take the parties' objections, if any, into account. The Court also should consider the following factors, one or more of which may indicate that a summary jury trial would be appropriate:

- (a) the parties have significantly different views as to how the jury will react to the key issues in the case;
- (b) there is a genuine dispute between the parties as to the monetary value of the case;
- (c) the parties' settlement offers are extremely far apart, or one or both such offers appears to be unrealistic;
- (d) the trial will consume significant resources (e.g., high expert costs, take longer than a week to try, etc.);
- (e) the case is relatively complex (but not so complex that it could not be summarized in an understandable way);
- (f) the use of one of the procedural variations listed in subsection 13, below, will compensate for the fact that the credibility of one or more of the parties or witnesses appears to be critical to the resolution of the case;
- (g) the case does not appear to be amenable to settlement through other techniques; and/or
- (h) a summary jury's verdict might prompt resolution of the case.

2. Discovery must be complete and the case must be ready for trial prior to the commencement of the summary jury trial.

3. If the Court deems it necessary, it may require counsel for the parties to enter into a written agreement to participate in the summary jury trial process in good faith and to refrain from holding back evidence they intend to use at trial. A copy of such agreement must be filed with the Court prior to the commencement of the summary jury trial.

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4. The summary jury trial jury's verdict will be non-binding and used as the basis for settlement discussions between the parties.

5. However, notwithstanding subsection 4, above, counsel may stipulate among themselves, in advance of the summary jury trial, either:

(a) 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

(b) that a consensus verdict by the jury will be treated as a "high-low" binding verdict (where plaintiff agrees to have its award limited to a given high figure if there is a plaintiff's verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict).

6. If counsel enter into either type of stipulation listed in subsection 5, above, any party may unilaterally opt out of such stipulation after the summary jury trial verdict is rendered, if counsel for that party convinces the Court that opposing counsel violated the letter or spirit of the summary jury trial process or that some other reason exists that would make enforcement of the stipulation inequitable.

7. Counsel may also stipulate, at any time, as to any other use of the summary jury trial verdict that will aid in the resolution of the pending case.

8. The summary jury trial shall be conducted before a six-member jury selected from the regular jury panel. The Court shall conduct a brief voir dire of the panel, and each party may exercise two challenges. No alternative jurors will be impaneled. 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.

9. The Court shall adjust the time for commencement of the summary jury trial, the length of presentations by counsel, and the length of deliberations by the jury, so that the proceeding can be completed in no more than one day. At the Court's discretion, this may be extended to not more than a total of two days if the complexity of the case so warrants. In allocating the respective time periods, the Court may take the attorneys' suggestions into account.

10. The parties as well as their counsel must be present during the summary jury trial. When a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of the party or insurance company, with full authority to settle, must attend. Because the primary purpose of the summary jury trial is to encourage settlement of the lawsuit, it is essential that each party be represented at trial by an individual with full settlement authority and a thorough knowledge of the case. This individual must be present throughout the entire summary trial. This requirement can be

waived only by order of the Court for good cause shown.

11. All evidence during the summary jury trial shall be presented through the attorneys for the parties. *Only evidence that would be admissible at trial upon the merits may be presented.* If the counsel cannot agree on the admissibility of exhibits in advance of the summary jury trial, the Court shall decide any such admissibility issues prior to its commencement. These admissibility rulings shall pertain to the subsequent actual trial as well.

12. During the summary jury trial, the attorneys may summarize and comment on the evidence, but counsel may only make factual representations supportable by reference to discovery materials, including depositions, stipulations, interrogatory answers, 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 a sworn affidavit of counsel that although an affidavit of the witness is not available and cannot be obtained by the exercise of reasonable diligence, the witness would be called at trial and counsel has been told the substance of the witness' proposed testimony by that witness.

13. Notwithstanding subsections 11 and 12, above, in a case in which the Court views the issue of the credibility of one or more witnesses to be critical to the resolution of the case, the Court, in its discretion, may allow any of the following variations to the summary jury trial procedure:

- (a) a short, narrative statement by one or more live witnesses;
- (b) a limited direct examination (e.g., 10 minutes) and cross-examination (e.g., 15 minutes) of one or more live witnesses; and/or
- (c) the showing of limited excerpts of a videotaped deposition.

14. Objections by counsel during the summary jury trial are discouraged, but will be allowed if opposing counsel clearly violates the rules regarding the presentation of evidence.

15. Prior to the commencement of the summary jury trial, counsel for each party shall present to the Court a summary of the law applicable to the case (in the form of jury instructions) not exceeding two pages in length. This summary of the applicable law should be in a form easily understood by the jury if and when the Court chooses to read it to them. Authorities may be indicated by footnote and written out on a third sheet of paper. Counsel are encouraged to agree on the summary before the summary jury trial, in which case only one two-page summary need be provided to the Court. Following the presentations by counsel at the summary jury trial, the Court shall read to the jury a brief summary of the law applicable to the case based upon the summary(ies) provided by the attorneys or the Court's own altered or substituted version.

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16. After the Court has summarized the law applicable to the case, the Court, in its discretion, may allow the jurors to ask the Court or counsel questions about the presentations or the instructions.

17. Jurors will be instructed to deliberate and return a consensus (unanimous) verdict. If it is not possible for the jurors to reach a consensus verdict within a reasonable amount of time, the Court may allow them to return a special verdict consisting of a statement of each juror's findings on the merits and an award of damages.

18. The jurors shall not be told prior to the completion of the summary jury trial that it is not an actual trial nor that their verdict is non-binding.

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

20. *Sanctions.* If counsel for a party is substantially unprepared to participate in the summary jury trial, fails to participate in the summary jury trial in good faith, or fails to comply with any of the subsections of this rule, the Court, upon motion or the Court's own initiative, may make such orders as are just, including, but not limited to:

(a) an order allowing the opposing side extra time for rebuttal or the introduction of additional exhibits;

(b) an order that a curative instruction will be read to the jury;

(c) any of the orders provided in F.R.C.P. 37(b)(2)(A), (B), (C), or (D);

(d) an order requiring the party or the attorney representing the party or both to pay the reasonable expenses incurred by the opposing side as a direct result of such misconduct;

(e) an order requiring the party or the attorney to pay a penalty into the court;

(f) an order requiring the attorney to attend a seminar on summary jury trials.

21. No additional discovery will be allowed after the conclusion of the summary jury trial.

22. Any evidence or witnesses not referred to in the summary jury trial will not be allowed to be used at the subsequent actual trial.

23. A trial on the merits will take place within thirty to sixty days after the summary jury trial if the case is not resolved through that process.

24. The summary jury trial jurors may not serve as jurors in the subsequent actual trial of the same case.

25. However, if at all possible, the jurors for the subsequent actual trial should be selected from the same jury panel from which the summary jury trial jurors were selected.

26. The Court, in its discretion, may inform the parties in advance of the summary jury trial that it will view any summary jury trial verdict for plaintiff as a F.R.C.P. 68 offer of judgment in that amount from defendant,

if defendant agrees to settle the case for that amount. If plaintiff then refuses to settle the case for that amount, takes the case to trial, and recovers less than the amount of the summary jury trial verdict, the provisions of F.R.C.P. 68 will apply (with respect to the costs of trial).

27. The Court may order, or, with Court approval, counsel may stipulate to, alterations in the provisions set forth in this rule or in the use of the summary jury trial process generally. For example, such orders or stipulations may include decisions to hold the summary jury trial at a location other than the Courthouse, or to hold it before a judicial officer other than the trial judge.

28. Judges and attorneys are encouraged to attend continuing legal education seminars on the summary jury trial process.

29. This rule shall be construed to secure the just, speedy and inexpensive conclusion of the summary jury trial process.³⁹³

³⁹³ NOTES RE: MODEL LOCAL COURT RULE:

Subsection 3: Note that one responding judge stated that he always conducts a pretrial conference before an SJT in which he espouses "the golden rule of SJTs." That is, do not attempt to take advantage of your opponent at an SJT, because you not only have to persuade the jury at an SJT, but your opponent as well. If your opponent feels that you did something at the SJT that you would not be able to get away with at trial, they will not lend much credence to any SJT verdict you might obtain. Rather than settle, they are more likely to dismiss the SJT verdict and take their chances at an actual trial. He finds that most attorneys employ this reasoning and many times simply do not raise any but their strongest and most appealing arguments at the SJT. After all, they do not have to make a record for appeal. If they can fairly win on one or two basic issues, the opposing party has to ask itself what basis it has for believing that an actual trial would result in any different verdict. *See* Judicial Survey Responses, *supra* note 23, Question 28, at 42-43.

Subsection 5: *See* Standing Order No. 6A (Summary Trial) (#10), United States District Court for the District of Montana (as altered).

Subsection 7: *See* Standing Order No. 6A (Summary Trial) (#10), United States District Court for the District of Montana.

Subsection 8: *See* Proposed Amendment of Administrative Order 1988-2—Summary Jury Trial, Michigan Supreme Court Orders, #3C; Standing Order No. CDIL 87-7 (#7) (Order on Summary Jury Trial Procedure), United States District Court for the Central District of Illinois.

Subsection 9: *See* Proposed Amendment of Administrative Order 1988-2—Summary Jury Trial, Michigan Supreme Court Orders, #3(A) (as altered).

Subsection 10: *See* Standing Order No. CDIL 87-7 (#2) (Order on Summary Jury Trial Procedure), United States District Court for the Central District of Illinois; Standing Order No. 6A (#2) (Summary Trial), United States District Court for the District of Montana; Local Rule 7:5.3 (d), United States District Court for the Northern District of Ohio.

Subsection 12: *See* D. CONN. R.P. FOR SUMM. JURY TRIAL PROC. 8; Proposed

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V. CONCLUSION

The SJT is a beneficial settlement device that can be strengthened through the adoption of the model local court rule proposed above. This rule addresses all of the remaining major issues that have arisen with respect to this device and also allows for alterations in the rule to accommodate special circumstances.

As we near the end of the Congressionally-directed experimental period in the recent life of the federal district courts, it is time to add some certainty and uniformity to one of the most promising settlement procedures of the future.

Amendment of Administrative Order 1988-2—Summary Jury Trial (#3(D)). Michigan Supreme Court Orders; Local Rule 602 (e), United States District Court for the Middle District of Tennessee.

Subsection 14: See M.D. TENN. LOC. R. 602 (f) (Summary Jury Trials) (as altered).

Subsection 15: See C.D. ILL. STANDING ORDER NO. CDIL 87-7 (#11) (as altered); Proposed Amendment of Administrative Order 1988-2—Summary Jury Trial (#G), Michigan Supreme Court Orders (as altered).

Subsection 17: See C.D. ILL. STANDING ORDER NO. CDIL 87-7 (#8) (Order on Summary Jury Trial Procedure) (as altered).

Subsection 19: See C.D. ILL. STANDING ORDER NO. CDIL 87-7 (#13) (Order on Summary Jury Trial Procedure).

Subsection 20: This language is drawn, in part, from FED. R. CIV. P. 11 and FED. R. CIV. P. 16(f).

Subsection 23: This is based in part on #3 of the Rules of Procedure for Summary Jury Trial Pretrial Procedure, Magistrate Judge F. Owen Eagan, United States District Court for the District of Connecticut.

Subsection 29: See C.D. ILL. STANDING ORDER NO. CDIL 87-7 (#14) (Order on Summary Jury Trial Procedure) (as altered).

APPENDIX

[List of Questions in Professor A. E. Woodley's Judicial Survey on Summary Jury Trials]

- QUESTION 1: Have you ever conducted a summary jury trial?
- QUESTION 2: In what types of cases have you conducted summary jury trials? Why?
- QUESTION 3: Have you been generally satisfied, partly satisfied or dissatisfied with the process?
- a. If you have been generally or (at least) partly satisfied with the process, why? What are its virtues?
 - b. If you have been (only) partly satisfied or dissatisfied with the process, why? What are its problems?
- QUESTION 4: Under what authority have you conducted a summary jury trials?
- QUESTION 5: When did you conduct your first summary jury trial?
- QUESTION 6: Approximately how many summary jury trials have you conducted per year?
- QUESTION 7: What is the total number of summary jury trials you have conducted?
- QUESTION 8: How many of the cases in which summary jury trials were used settled after the summary jury trial and before or during trial?
- QUESTION 9: In the cases that went on to trial after a summary jury trial, did the trial verdicts differ significantly from the summary jury trial verdicts? (Explain.)
- QUESTION 10: Describe the basic summary jury trial procedure you have used.
- QUESTION 11: Is this procedure in writing? If so, where?
- QUESTION 12: How could this particular procedure be improved?

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- QUESTION 13:** What types of objections have parties made to participation in summary jury trials?
- Which of these types of objections did you consider valid? Why?
 - Which of these types of objections did you consider valid? Why?
- QUESTION 14:** Have you ever ordered a summary jury trial over the parties' objections?
- If so, why and under what authority?
 - If not, why not?
- QUESTION 15:** Would you conduct another summary jury trial in the future? Why or why not?
- QUESTION 16:** If you have not conducted a summary jury trial, why not?
- QUESTION 17:** If you have not conducted a summary jury trial, have you given serious consideration to doing so?
(If not, skip to question #19.)
- QUESTION 18:** What appear to be the remaining stumbling blocks?
(Skip to question #20.)
- QUESTION 19:** If you have not given serious consideration to conducting a summary jury trial, why not?
- QUESTION 20:** If you are a judge and have not personally conducted a summary jury trial, have you assigned one or more to a magistrate judge? Why or why not?
- QUESTION 21:** Should summary jury trials ever be used in federal courts? Why or why not?
(If not, skip to question #40.)
- QUESTION 22:** In what types of cases, or under what kinds of circumstances, are summary jury trials appropriate?
- QUESTION 23:** In what types of cases, or under what kinds of circumstances, are summary jury trials not appropriate? Why?

- QUESTION 24: What general suggestions do you have for improving the summary jury trial process?
- QUESTION 25: Should time and expense controls be created for summary jury trials, and, if so, what should they consist of and how should such changes be accomplished?
- QUESTION 26: Should the judge or magistrate who conducts the summary jury trial preside over the actual trial as well? Why or why not?
- QUESTION 27: How can you avoid or remedy the situation in which one party actively participates in the summary jury trial in good faith while the other party withholds evidence and essentially uses the process as a discovery device?
- QUESTION 28: What can or should be done if a lawyer takes advantage of the less restrictive evidentiary and other procedural rules? (For example, should there be a possibility of a mistrial?)
- QUESTION 29: Do you think a summary jury trial verdict is a reliable indicator of what the actual trial verdict will be? Why or why not?
- QUESTION 30: Should summary jury trial verdicts ever be binding?
- a. If so, under what circumstances?
 - b. If not, why not?
 - c. Do you think “high-low” binding verdicts are a good idea? Why or why not? [A “high-low” binding verdict in this context is where a plaintiff agrees to have his award limited to a given high figure, if there is a plaintiff’s verdict, in return for a defense promise that it will pay a given low figure, even if there is a defense verdict.]
- QUESTION 31: Should information, strategies, and evidence revealed in the summary jury trial (as well as the outcome thereof) be admissible in the actual trial? Why or why not?
- QUESTION 32: Should a litigant be sanctioned if he or she settles during a trial—for the same amount as the summary jury trial verdict? Why or why not?

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- QUESTION 33:** Should a litigant be sanctioned if he or she does not settle a case based upon a summary jury trial verdict and then obtains a very similar or even less advantageous result at trial? Why or why not?
- QUESTION 34:** When the parties refuse to settle after a summary jury trial and the case is tried, should either party be able to rely upon the summary jury trial verdict as the basis for a motion for judgment notwithstanding the verdict, or a motion for a new trial on the ground that the verdict was against the weight of the evidence, or a motion for a remittitur of the damages awarded, or a response to any such motion? Why or why not?
- QUESTION 35:** Does the authority for summary jury trials need to be created or clarified?
- If so, what language should be used?
 - If so, where should such language appear (i.e., Federal Rules of Civil Procedure, local court rules or standing orders, or federal statutes)? Why?
 - If so, should such authority also provide that federal judges and magistrate judges may compel parties to participate in a summary jury trial? Why or why not?
- QUESTION 36:** Can citizens be compelled to serve as jurors for summary jury trials? If so, under what authority?
- QUESTION 37:** Should citizens who serve as jurors for summary jury trials be excluded from serving at the subsequent actual trials (and/or any, even unrelated, subsequent actual trials)? Why or why not?
- QUESTION 38:** Does your district have a local rule and/or a standing order concerning summary jury trials? If so, what is the number of that rule or order?
- QUESTION 39:** Should uniform rules be created concerning the procedure for, and limitations upon, summary jury trials?
- If not, why not?
(Skip to question #40.).
 - If so, where should those rules appear (i.e., in the Federal Rules of Civil Procedure, local court rules or standing orders, or federal statutes)? Why?

- c. If so, what basic provisions should those rules contain?

QUESTION 40: What other comments or concerns do you have about summary jury trials?