

# The Summary Jury Trial—Ending The Guessing Game: An Objective Means Of Case Evaluation†

## *A Comment on Professor Woodley's Proposal*

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Seventeen years have passed since I pondered ways to address the most elusive task that faces a trial lawyer—predicting the outcome of a jury trial. Every time a case is prepared for litigation, a trial lawyer is faced with the imponderable task of attempting to predict the outcome of a jury trial. Clients desire to know what the outcome will be prior to trial and, thus, an attorney must venture a guess to determine whether to advise their clients to settle or to risk a trial. The evaluation process was too subjective. As professionals, we have been in need of something more objective for measuring outcomes. The frustration engendered by this speculation provided me with the opportunity to experience my own “Eureka Moment.” My Eureka Moment came when I first envisioned the concept of an abbreviated trial or a “summary jury trial” (also referred to as the “SJT”) as a means of predicting outcomes and providing clients an opportunity to be a part of the forecasting process, thus reducing the tensions with no alternative available for obtaining a more objective case evaluation. The summary jury trial was intended as a step towards achieving objectivity in case evaluation. The state of the SJT process is strong. Experience has demonstrated that it is a worthy and credible method of predicting probable jury verdicts in aid of achieving a fair settlement value.

In early 1980, the trial dockets of the federal courts became backlogged following Congress' enactment of the Speedy Trial Act.<sup>1</sup> Under the Speedy Trial Act, a criminal defendant is entitled to have his case brought to trial within a prescribed time period. Pursuant to the Act, a criminal indictment is subject to dismissal if trial on the indictment does not begin within the prescribed time period. Although the Act satisfied its goal of aiding criminal defendants to a quick trial, it also caused a backlog in the federal civil trial dockets because of the constitutional and statutory priority given to criminal cases.

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† Editor's note: Professor Woodley thanks Judge Lambros for his comments on her proposals, and she agrees with his proposed changes to her model rules.

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<sup>1</sup> 18 U.S.C. § 3161 (1994).

During this time period, in early 1980, I conducted two civil trials which led to my search for an additional alternative to the judicial system's traditional settlement methods. Prior to either of these two cases going to trial, I conducted settlement conferences in both cases. No settlement was reached in either case. Each of the cases proceeded to trial with both of the trials lasting approximately eleven days. Settlement offers were even exchanged during the course of the trials, although settlements were not reached in either case.

After the juries had reached their verdicts, I realized why the cases had not settled during the settlement conferences or even during the trials themselves. The cases had not settled because trial counsel had been unable to accurately predict or forecast the outcome of the jury. Here, the clients had placed complete reliance upon their lawyers and were expecting a favorable jury result. The respective clients had divergent expectations. They had no objective method of testing the reasonableness of their expectations. They were relying on their lawyers' best guess. As a result of their inability to predict the jury outcome, trial counsel had higher expectations for their cases than what was actually achieved in the final jury verdicts. I concluded that to aid settlement in certain cases, a device was needed to help counsel more accurately predict the outcome or value of their cases prior to trial. Accordingly, I developed the concept of using an abbreviated or summary jury trial as a device which would aid trial counsel in making this prediction prior to trial. The summary jury trial links our great heritage of the traditional jury trial with the modern methods of dispute resolution.

The strength of the summary jury trial is derived from the ability to use the SJT to predict or forecast a jury outcome which can then be used as an aid to settlement. It provides the trial participants with a virtual reality setting. The summary jury trial puts the lawyers together in the courtroom in front of their parties, in front of a jury and in front of a judge. The SJT thus provides the parties with an actual "day in court" without the risk of a binding verdict. It provides the parties with a valuable settlement-enhancing technique while still preserving the right of trial by jury if a settlement is not achieved. This trial preview provides an opportunity to observe the substantive part of the case and experience the venting of emotions which may otherwise block settlement. It serves to settle the sense of uneasiness associated with any trial by removing much of the uncertainty and mystery about the outcome. One of its primary goals is to end the "guessing game."

Studies have shown an extremely high correlation between a juror's initial impression of a case following counsel's opening statements and a

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juror's eventual vote on a case in the jury room.<sup>2</sup> Because a summary jury trial is an amalgamation of an opening statement, evidentiary summarization with exhibits, final arguments and jury instruction, it provides the jury with more information than a mere opening statement. Accordingly, a jury verdict in a SJT possesses a high degree of reliability.

I appreciate the opportunity provided to me by the *Ohio State Journal on Dispute Resolution* to comment on the preceding article on the summary jury trial authored by Professor Ann E. Woodley.<sup>3</sup> Professor Woodley presents her proposal to strengthen the summary jury trial. The insights provided by Professor Woodley in her article will be extremely valuable to our judicial system as the system standardizes its utilization of the summary jury trial as a settlement device. First, the article is valuable because Professor Woodley has completed the most comprehensive study of the summary jury trial to date. In her article, Professor Woodley has outlined the results of her survey which compiled the responses of an exhaustive survey of federal judges and lawyers regarding their views and experiences with the summary jury trial.<sup>4</sup> Indeed, Professor Woodley now has fortunately penetrated the deepest craters and depths of the SJT with her comprehensive chronicling of its emergence and evolution in our legal landscape. Her research has enlightened our understanding of the process and its expansion throughout the country.

Moreover, the article is valuable because Professor Woodley has identified certain SJT issues which can now be addressed.<sup>5</sup> Much has occurred in the past seventeen years since I developed the summary jury trial. Professor Woodley's article is valuable because of her critical analysis of the experiences of our judicial system in its utilization of the summary jury trial. Professor Woodley's identification and examination of these experiences will provide the system with more information to better utilize the summary jury trial.

Finally, Professor Woodley's article is valuable because she has proposed a Model Local Court Rule which will guide our judicial system in our utilization of the SJT as a settlement device.<sup>6</sup> Even though I normally would not support a strict utilitarian type rule, Professor Woodley's rule recognizes the flexibility which is required by this versatile and dynamic

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<sup>2</sup> See, e.g., Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 301, 301 (1981).

<sup>3</sup> See Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity in Its Use*, 12 OHIO ST. J. ON DISP. RESOL. 541 (1997).

<sup>4</sup> See *id.* at Part II.A.

<sup>5</sup> See *id.* at Part III.B.1.b-III.C.5.d.3.

<sup>6</sup> See *id.* at Part IV.

process. I support Professor Woodley's proposed rule precisely because the rule incorporates the needed flexibility. Now that our judicial system has had seventeen years of experience with the SJT, I agree with Professor Woodley that the time is right to strengthen and institutionalize the use of the summary jury trial as a settlement device in our judicial system.<sup>7</sup> In her proposed model rule, Professor Woodley has offered us a variety of choices for strengthening the summary jury process.

In her article, Professor Woodley has recognized that the key to the effectiveness of the SJT is the selective utilization of the SJT in appropriate cases.<sup>8</sup> Thus, in Section 1 of Professor Woodley's Model Local Court Rule, she states that a court may consider certain factors when determining whether a summary jury trial is appropriate.<sup>9</sup> I agree with Professor Woodley that the initial determination made by a court must be whether an individual case is appropriate for an SJT. This determination involves a wide array of considerations running from conserving expenditures of vast resources associated with a complex and protracted jury trial to psychological considerations in decreasing the stress level of a trial, regardless of its length or intensity.

The summary jury trial is simply one of several devices that a trial judge can utilize to facilitate the settlement of litigation. As the reader is no doubt aware, there are several types of alternative dispute resolution procedures which have been used effectively to resolve different types of disputes. The SJT was not intended to supplant or replace these other types of alternative dispute resolution procedures. A trial judge has several settlement devices or tools from which to choose. Just as an experienced journeyman would not use a hammer to tighten a loose bolt, certain settlement tools are not appropriate for certain cases. The individual judge must be selective in determining what type of settlement device should be employed in each case. Sometimes, more than one alternative is appropriate. If a mediation does not facilitate a settlement, perhaps a summary jury trial should follow the mediation.

Likewise, the SJT was not intended to supplant or replace the traditional jury trial. It was intended to provide settlement opportunities for cases that were trial-bound absent the intervention of another workable alternative. As our traditional jury trial is the crown jewel of our judicial system, we ought not overburden the process. Only truly justiciable issues should go to trial. As such, the jury trial must be carefully preserved for cases that need to be tried. Instead of burdening the traditional litigation

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<sup>7</sup> See *id.* at Part V.

<sup>8</sup> See *id.* at Part IV.

<sup>9</sup> See *id.*

process, the SJT is simply one of several alternatives that a trial judge may choose to reduce the burdens heavily laden on our American courtrooms.

Although I support the adoption of Professor Woodley's proposed rule in general, I have some minor concerns regarding some aspects of the proposed rule. For example, Section 8 of the proposed rule provides for a six-member jury for the summary jury proceeding.<sup>10</sup> However, I believe that it is important to capture the reality of each jurisdiction. Thus, I would suggest that this section provide: "Ordinarily the summary jury trial will be conducted before a six-member jury selected from the regular jury panel." This will allow the court and counsel to adapt the size of the jury as is necessary for each case. Indeed, in some heavily disputed cases, two summary juries have been impaneled in order to provide the parties with more feedback.

Additionally, Section 21 of the proposed rule provides that "[n]o additional discovery will be allowed after the conclusion of the summary jury trial."<sup>11</sup> I am concerned that such a provision is simply too absolute. In some cases, an SJT may reveal that certain flaws exist in a case or that deficiencies in discovery exist. In such a situation, an absolute rule preventing further discovery would frustrate our ultimate goal of achieving justice. Instead of using absolute language in this section, I would suggest the adoption of language which can be molded to fit each individual situation as needed. For example, Section 21 could read: "Ordinarily, no additional discovery will be allowed after the conclusion of a summary jury trial." Thus, a trial judge maintains the flexibility necessary to adapt the guidelines to each case.

Likewise, I have a similar concern with Section 22 of the proposed rule.<sup>12</sup> Section 22 provides that "[a]ny evidence or witnesses not referred to in the summary jury trial will not be allowed to be used at the subsequent actual trial."<sup>13</sup> Again, I would suggest modifying this rule to eliminate the absolute nature of prohibition. Perhaps, Section 22 could read: "Ordinarily, significant evidence not referred to in the summary jury trial will not be admissible at a subsequent trial." I suggest limiting this prohibition to significant evidence because only "significant" evidence will be referred to at the summary jury trial. By its very nature, a summary jury trial is an abbreviated trial and thus, counsel will only refer to significant evidence. Counsel will not refer to certain evidence which still may need to be introduced at trial because of the nature of the evidence, such as chain of custody evidence, foundation evidence or expert credentials. This modification allows a trial judge to determine if evidence should be

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<sup>10</sup> See *id.* at Part IV.

<sup>11</sup> *Id.* at Part IV.

<sup>12</sup> See *id.* at Part IV.

<sup>13</sup> *Id.*

admissible at a subsequent trial even if such evidence was not referred to during the summary jury process. Thus, the trial judge maintains the flexibility to adapt to each case.

The summary jury trial must be maintained as a versatile, dynamic process which may be molded to fit the needs of each case. For example, if the credibility of a witness is significant in a case, the SJT can be modified to allow for an abbreviated version of a direct and a cross examination of that witness. Although the flexibility of the SJT must be maintained, I support the adoption of Professor Woodley's proposed local rule. The proposed local rule provides the basic parameters of a SJT which are flexible enough to meet my concerns and which will aid both state and federal courts as they utilize the SJT as a settlement device.

I would suggest a minor modification with respect to Section 23 of Professor Woodley's proposed rule which provides that "[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."<sup>14</sup> Perhaps Section 23 could read: "Ordinarily, a summary jury trial will be scheduled thirty to sixty days prior to a scheduled trial date." I suggest this modification to avoid conflicts which might result from the realities of scheduling a court docket and the absolute language of the proposed rule—that a trial "will take place." Moreover, as a practical matter, courts often set a trial date first and then work backwards setting other dates at certain time periods before the trial date. Thus, a court could routinely set a summary jury trial for sixty days prior to the scheduled trial date. Such a modification takes into account the realities of each individual court schedule.

A model local court rule is necessary to achieve some minimum workable standards and guidelines for the summary jury trial. Such a rule should not be so restrictive as to dismantle the real purpose for its application. Such applications are intended to be aids to settlement as well as a procedure to produce a better quality binding trial if settlement is not achieved.

Although some criticism has been directed at the summary jury trial because the SJT allegedly adds an extra layer of expense to the litigation process, my experience has shown that the opposite is true. Rather than adding an extra layer of expense, a summary jury trial encourages trial counsel to make a timely analysis of the case and to focus on its strengths as well as its frailties. In preparing for a summary jury trial, trial counsel must crystallize and distill their best arguments and evidence for an abbreviated presentation to the jury. Such a focusing by its very nature is beneficial because counsel is focusing on the heart of the dispute rather than focusing on relatively insignificant issues such as minor discovery issues which may

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<sup>14</sup> *Id.*

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happen during the course of litigation. Thus, any extra preparation required for a summary jury trial is time that has been well spent when counsel are confronted with the actual trial.

For example, the prosecutors in the O.J. Simpson case could have benefited from practicing their case in the summary jury format prior to the actual trial.<sup>15</sup> If the prosecutors had distilled their case against O.J. Simpson down to a few hours of essential evidence and argument prior to the actual trial, the prosecutors' focus may have improved immensely. A summary proceeding, by its very nature, requires the participants to get to the heart of the case. Thus, any participation in a summary proceeding benefits counsel's focus on the essentials of the case rather than allowing counsel to get sidetracked on peripheral issues. In the O.J. Simpson case, the prosecution could have been improved through the development of such a "focus." For example, the prosecution might have recognized the strength of the white Bronco chase evidence, the disingenuousness of the glove-fitting experiment and the importance of the evidence relating to the Bruno Magli shoes. I use the Simpson case merely to stress a point and not to suggest the application of the SJT in a criminal case, with the exception of each side using it as a unilateral focus procedure. The point that I am seeking to stress is that, in civil cases where it is used either as a court-annexed settlement procedure or privately as a focus procedure, it is a low cost and otherwise efficient way of assessing strengths and weaknesses for either evaluation purposes or improving the final trial process. Indeed, it is interesting to note that the deliberations by the jury in the O.J. Simpson criminal case took less time than it would have taken to conduct a summary jury trial.

Although this critique has centered on the summary jury trial as a court-annexed alternative, it is also an option for private applications such as case evaluation, jury analysis and testing the effectiveness of trial strategies and techniques. It is because of its multiple applications that it has been referred to as a versatile, dynamic process. In conclusion, Professor Woodley's proposed rule provides a needed parameter for our discussion of the summary jury trial as a settlement device and thus, I strongly favor the adoption of the proposed rule. The adoption of any such rule must by its nature recognize and maintain the summary jury trial as a flexible and dynamic process which must be adapted or molded to fit each case as needed.

At this time, when resources, both public and private, are limited and costs and budgets are being cut, Professor Woodley has fortuitously provided visibility to a process that can serve as a cost-cutter and time-saver

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<sup>15</sup> For a complete account of the criminal trial of *California v. Simpson*, No. BA097211 (acquittal issued Oct. 3, 1995), and the strategies of both the prosecution and defense, see JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE VS. O.J. SIMPSON* (1996).

for private litigants confronted with expensive lawsuits, as well as the court when faced with the need to increase the settlement rate in a system that has come to rely on a steady flow of settlements. Professor Woodley has provided us with a timely opportunity to reflect on the various means available to us in enhancing the dimension and quality of modern due process.