
Gerald L. Maatman Jr.
ARTICLES

THE FUTURE OF SUMMARY JURY TRIALS IN FEDERAL COURTS: STRANDELL v. JACKSON COUNTY

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INTRODUCTION

Alternative Dispute Resolution (ADR) is a mechanism to which lawyers and litigants are turning with increasing frequency to save time and money attendant traditional civil litigation in federal courts. The search for litigation alternatives stems from dissatisfaction with congested court dockets, long delays, and the high cost of litigating. The ADR movement enjoys broad support. Indeed, the subject has its own specialized journals and an ABA Standing Committee. Law schools and legal casebooks are now endeavoring to

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1. J. MARKS, E. JOHNSON & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION 7, 26-38 (1984). ADR, however, is not without detractors. PropONENTS of the Critical Legal Studies movement object to ADR as favoring the state, the wealthy, and capital. See Abel, Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice, 9 Int'l J. Soc. & Law 245 (1981). Other commentators have argued that ADR fosters racial and ethical prejudice, on the premise that people who hold prejudicial attitudes are more apt to act on those attitudes in informal settings. See Delgado, Fairness and Formality: Minimizing The Risk of Prejudice in Alternative Dispute Resolution, 1985 Wisc. L. Rev. 1359. Another criticism is that as the ADR process is not restrained by the equality parties enjoy in formal legal proceedings, ADR works to the detriment of the disadvantaged to the extent that they benefit most from the public policies underlying formal legal processes. See Fiss, Against Settlement, 93 YALE L.J. 1073, 1076-80 (1984).

2. Alternatives to the High Cost of Litigation is a monthly publication available from the Center for Public Resources, and covers the latest developments in ADR, dispute prevention, and judicial ADR. The Alternative Dispute Resolution Report, published monthly by the Bureau of National Affairs, reports on public and private ADR. The ABA's House of Delegates conferred standing-committee status on
train lawyers in alternative dispute resolution techniques.\(^4\) ADR is also big business. Private entrepreneurial ADR firms are nationwide in scope, prompting concerns of a "brain drain" from public courts as judges retire to earn higher pay at private dispute resolution companies.\(^4\)

The Federal Rules of Civil Procedure also recognize ADR as a legitimate option to traditional civil litigation. Rule 16(c)(7) provides that "the participants at any pre-trial conference . . . may consider and take action with respect to . . . the use of extrajudicial procedures to resolve the dispute."\(^5\) Many federal judges enthusiastically embrace alternative methods of dispute resolution; others counsel caution.\(^6\) The result is a wide divergence in federal pre-trial practice. Settlement may be fostered by traditional judicial approaches of tight docket control, rigid litigation timetables, or the court's active participation in pre-trial settlement negotiations.\(^7\) In contrast, some federal judges are increasingly viewing ADR options under Rule 16 as a method to clear their dockets and dispose of a large percentage of cases without a trial on the merits.\(^8\) Utilization

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3. See S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION (1985); L. KA-
nowitz, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION (1986); Sanders, Alternative Dispute Resolution in the Law School Curriculum: Opportunities and Obstacles, 34 J. LEGAL EDUC. 229 (1984).

4. Oliver, Rent-a-Judge: A Shortcut Through the Legal Muck, L.A. Times, Feb. 18, 1988, § I, at 1, col. 1 (retired judges hired by litigants to settle civil disputes through arbitration, mediation, conciliation, or mini-trials earning $250 to $300 per hour). The American Bar Association's Commission on Court Costs and Delay estimated in 1985 that nearly 400 private companies are marketing private judges for civil disputes. Id. One of the first companies to enter the market was EnDispute, Inc., which now has offices nationwide. See Koenig, More Firms Turn to Private Courts To Avoid Long, Costly Legal Fights, Wall St. J., Jan. 4, 1984, at 1, col. 1.

5. FED. R. CIV. P. 16(c)(7).


8. Lambros, The Summary Jury Trial, 13 LIT. MAG. 52 (1986); Lambros, The Summary Jury Trial—An Alternative Method of Resolving Disputes, 69 JUDICATURE 286 (1986). In fact, since 1980, Judge Lambros has not had a civil jury trial in his courtroom, and has tried only criminal cases and non-jury cases, a result he has attributed to the summary jury trial. See Developments in Alternative Dispute Resolution, 115 F.R.D. 349, 369 (1986); see also Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill. 1987) (without the availability of mandatory summary jury trials, a court cannot clear its docket).
of ADR mechanisms raises the additional question of the extent to which federal courts may impose such devices upon litigants in the name of settlement.

One such popular yet controversial ADR option is the Summary Jury Trial (SJT), the brainchild of Judge Thomas Lambros of the United States District Court for the Northern District of Ohio. Although Judge Lambros originated the concept only eight years ago, the use of the device has grown dramatically. Summary jury trials have been held in an estimated sixty-five different federal district courts. In 1984, the Federal Judicial Conference of the United States endorsed the SJT device as an “effective means of promoting fair and equitable settlement of potentially lengthy civil jury cases.” Judges describe themselves as being fascinated by the concept, law schools teach courses to their students on how to conduct a summary jury trial, and lawyers and litigants increasingly face the prospects of participating in the procedure. As a consequence, the summary jury trial has become an important component of pretrial practice in many federal courts.

What is a summary jury trial? In essence, it is an ADR mechanism that retains the traditional jury system, albeit in a nontraditional manner. The summary jury trial is designed to facilitate set-

10. Marcotte, Summary Jury Trials Touted, A.B.A. J., April 1, 1987, at 27; see also Angiolillo & Tell, From Jury Selection to Verdict—In Hours, Bus. WK., Sept. 7, 1987, at 48. Judge Lambros himself has set over 150 cases for summary jury trial. Id. Judge Lambros has also conducted summary jury trial proceedings in other federal districts at the request of other judges. See Rani, New Spurs to Settlement: Summary Jury Trials Gain Favor, Nat’l J., June 10, 1985, at 1, col. 4. The first summary trial in the Northern District of Illinois was conducted by Judge Lambros in February of 1985, in an antitrust case; the plaintiff won a verdict of $27 million in the summary jury trial. Id. Many state court systems have also embraced the concept. Most recently, summary jury trials have also been introduced in North Carolina state courts in a pilot program based on the model developed in federal courts. See 1 ALTERNATIVE DISPUTE RESOLUTION REP. 181-83 (1987).
11. Report of the Committee on the Operation of the Jury System, Proceedings of the Judicial Conference of the United States, at 88 (Sept. 17, 1984). The original draft of the resolution endorsed the use of the summary jury trial "only with the voluntary consent of the parties." SUMMARY REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM 2 (Sept. 1984). The committee reported that “[a]lthough Judge Lambros is willing to require litigants to go through the procedure, it is your committee’s view that it is necessary, both as a matter of law and equity, that summary jury trials be conducted only with the parties’ consent.” Id. at 3. Without explanation, the final draft of the resolution omitted the language regarding voluntary consent.
12. See Posner, supra note 6, at 366. In Chief Justice Burger’s 1984 Report to the Judiciary, he noted that “summary jury trials are becoming increasingly useful as judges across the country adapt these approaches to achieve their goals . . . . These judicial pioneers should be commended for their innovative programs. We need more of them in the future.” BURGER, 1984 YEAR-END REPORT ON THE JUDICIARY 15-16.
13. See GOLDBERG, supra note 3, at 282.
tlement by providing what is hoped to be a reasonably accurate forecast of trial outcomes. The procedure consists of counsel's presentations to an advisory jury of the expected evidence in each party's case. The jury is then given an abbreviated charge, and asked to render a verdict as to liability and damages. The summary jury trial lasts up to one day and its apparent evidentiary and procedural rules are few and flexible. The verdict of the jury is intended to give the parties a preview of the likely result of a full trial. Since the jury's determination is advisory only and nonbinding unless the parties agree otherwise, the litigants can obtain the opinions of a jury and preserve their seventh amendment rights to a jury trial without the expense and time concomitant to a full trial.

The goal of the summary jury trial is to refine the settlement calculus of the parties. The procedure is designed to improve the accuracy of a litigant's expectation about trial outcomes at a lower cost than continuing to litigate. Proponents of the summary jury trial claim that the procedure makes settlement significantly more likely, and avoids full trials in over ninety percent of cases. However, no empirical study has substantiated the results of SJT utilization or compared its proclaimed efficiency to other settlement devices.

As conceived by Judge Lambros, the summary jury trial is not confined to any particular type of civil case. Proponents have found it particularly effective in negligence actions, but the procedure has been used successfully to resolve contract, defamation, securities, toxic tort, employment discrimination, and even class-action asbestos and antitrust lawsuits. Yet, even Judge Lambros concedes that


15. See Posner, supra note 6, at 382. Judge Richard Posner of the Seventh Circuit has suggested that a cursory review of case disposition statistics leads to the conclusion that the summary jury trial does not increase judicial efficiency. Id. As Judge Posner points out, "The judicial time taken up in summary jury trials might be spent equally well or even better on some other method of encouraging settlements especially when one considers how lavish the summary jury trial is with the judge's time: he spends a whole day trying to settle one case." Id.

16. See Lambros, supra note 14, at 472-77; see also Provine, supra note 14, at 69 (summary jury trial applied to consolidated asbestos case involving over 100 plaintiffs); Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1372 (D. Minn. 1985) (seven day summary jury trial in antitrust class action). Judge Lambros has suggested that certain cases are not amenable to summary jury trial. He believes a case should not be assigned to summary jury trial if the case is likely to set precedent (rather than simply require the application of existing law), a government office or agency is a
the summary jury trial is not a panacea in every case where settlement is not achieved in a pre-trial conference.\textsuperscript{17} Most federal courts implement summary jury trial procedures by local rules which vest district judges with discretion to decide when and in what cases to schedule a summary jury trial.\textsuperscript{18} Summary jury trial proceedings have been convened, however, without reference to a local rule, but simply upon general orders stemming from pre-trials.\textsuperscript{19}

The authority of federal courts to order summary jury trials had been assumed and never questioned or considered until the Seventh Circuit’s recent decision in \textit{Strandell v. Jackson County}.\textsuperscript{20} The Seventh Circuit held in \textit{Strandell} that the Federal Rules of Civil Procedure do not authorize a district court to order a litigant to participate in a summary jury trial. In construing the powers accorded district judges under the federal rules, the court in \textit{Strandell} determined that “while the pretrial conference of Rule 16 was intended to foster settlement through the use of extrajudicial procedures, it was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation.”\textsuperscript{21} Indeed, the decision implies

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\textsuperscript{17} See Lambros, \textit{supra} note 6, at 1376.

\textsuperscript{18} Rule 83 of the Federal Rules of Civil Procedure authorizes local rules that are not inconsistent with the federal rules. In the Northern District of Ohio, Local Rule 17.02 provides that “[t]he Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative methods of dispute resolution, as he or she may choose.” N.D. O\textit{H}IO \textit{L}oc. R. 17.02. Other jurisdictions also have local rules setting procedures for summary jury trials. For example, in the Central District of Illinois, Standing Order 7 governs any summary jury trial. The order is extensive. It provides that the procedure is not to last in excess of five hours, no witnesses are allowed, and the court may order the summary jury trial \textit{su sponte}. See \textit{C.D. ILL., STANDING ORDER 7}, ¶¶ 1, 3, 15. To the extent the Seventh Circuit held in \textit{Strandell} that a mandatory summary jury trial is not authorized by the Federal Rules of Civil Procedure, any local rules providing for such procedures are invalid. See \textit{Farmer v. Arabian American Oil Co.}, 285 F.2d 720, 722 (2d Cir. 1960) (Rule 83 provides limited power as local rules are allowed only to the extent not inconsistent with the federal rules).

\textsuperscript{19} See \textit{infra} note 58. Some courts have suggested in written opinions that the parties consider summary jury trial procedures. See, \textit{e.g.}, \textit{King v. E.F. Hutton & Co.}, 117 F.R.D. 2, 11 n.14 (D.D.C. 1987). It is apparent that some courts will not employ the procedures absent the consent of the parties. See \textit{Ranii, supra} note 10, at 1, 30.

\textsuperscript{20} 838 F.2d 884 (7th Cir. 1988).

\textsuperscript{21} Id. at 887.
that any other interpretation of Rule 16 would have signaled that a quiet revolution had occurred in federal pre-trial practice. The Seventh Circuit asserted that a mandatory summary jury trial would be possible only upon radical surgery of the Federal Rules of Civil Procedure. 

Strandell thus represents a refusal to endorse the summary jury trial as conceived and implemented by Judge Lambros.

This article examines the summary jury trial and its legality under federal law. Because the Seventh Circuit did not address the question of the manner in which a summary jury trial may be used with the consent of the parties, part I of this article discusses summary jury trial procedures, both in general and in the context of a recent complex toxic tort case resolved after a summary jury trial. Next, part II analyzes the Strandell decision. Particular attention is focused upon the inherent power of federal courts to control and manage their dockets, and the balance to be struck between the rights of individual litigants and judicial innovation with ADR mechanisms. Finally, part III of this article examines the future of the summary jury trial. The legal basis of consensual summary jury trials is analyzed, and the benefits and potential adverse consequences of participation in a summary jury trial are discussed from the practitioner's viewpoint.

I. SUMMARY JURY TRIAL PROCEDURES

A. The Summary Jury Trial In Theory

Judge Lambros developed the summary jury trial as a result of his perception that there is a certain class of cases in which the only bar to settlement is the difference in opinion among the parties as to how a jury will react to the evidence adduced at trial. The summary jury trial is an attempt to narrow the gap between the parties' opinions as to potential trial outcomes.

In devising the procedure, Judge Lambros relied upon Rules 1, 16, and 39 of the Federal Rules of Civil Procedure, as well as the inherent power of a court to manage its docket. Rule 1's mandate is that federal judges apply the federal rules to secure the just, speedy, and inexpensive determination of every case. The summary jury trial is an obvious effort to resolve disputes with a savings of time and expense. The result is just if it is assumed the summary jury trial replicates a full trial, and the parties behave rationally and

22. Id. at 888.
23. See Lambros & Shunk, supra note 9, at 44-45.
24. See Lambros, supra note 14, at 469-70, 484-86.
25. FED. R. Civ. P. 1. See Real v. Hogan, 828 F.2d 58, 63 (1st Cir. 1987) ("the Federal Rules must be construed to secure not only the 'just' but the 'speedy' determination of every action").
Future of Summary Jury Trials

settle their differences based upon a preview of the likely outcome at trial. Furthermore, Rule 39(c), it is argued, authorizes federal judges to convene an advisory jury in any case not triable of right by a jury. The rule codifies long-standing equity and maritime practice where a judge could convene a jury to advise the court on questions of fact. The summary jury trial is analogous to an advisory jury under Rule 39(c), it is argued, to the extent the parties utilize the jury's perceptions of the facts in helping the court resolve the dispute.

The linchpin underlying the legality of the summary jury trial, however, is Rule 16. The declared purpose of the rule is to facilitate settlement. Rule 16(c)(7) provides that the “participants at any pre-trial conference . . . may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.” ADR mechanisms are therefore appropriate, and a distinct option under Rule 16(c)(7).

The inherent power of a federal judge to manage and control his or her docket is the final basis for the summary jury trial. The summary jury trial, in part, can be seen as a response to the myriad of problems caused by ever-expanding court dockets. Judicial innovation in developing alternative methods of dispute resolution is one method to aid the court's efficient disposition of its business. The conclusion of Judge Lambros is that as federal judges have sufficient power and resources to manage their dockets, a federal court therefore has inherent authority to convene a summary jury trial.

Judge Lambros has analogized a federal judge's role in a summary jury trial to that of a weather forecaster. The role of the court in fostering settlement is to predict for the disputants how a jury will decide the pending action; while there is a recognized margin of error in predicting the weather, let alone a jury verdict, the
Assuming a case does not settle at a pre-trial conference,31 a summary jury trial is set. Discovery should be completed. The parties may be guided by local rules setting forth summary jury trial procedures, or given materials by the court explaining the summary jury trial process.32 Preparation for the proceeding is not inconsequential. To the extent counsel must present their version of the evidence in a summary jury trial, the parties must organize and prepare their cases for presentation to the jury. The parties or their principals are required to be present at the entire summary jury trial. Counsel are required to submit trial briefs. Abbreviated jury instructions are also submitted, consisting of instructions on the issues, burden of proof, and damages.

On the day of the summary jury trial, a jury venire is called and six jurors are chosen. The parties have two peremptory challenges. The jurors are informed only that the parties have decided to streamline the case and to dispense with usual court procedures. Typically, the process of voir dire, jury selection, and the court’s preliminary remarks are completed in fifteen minutes.33

The actual “trial” consists solely of counsel’s presentations. Procedural rules are few, and the form of the proceeding is flexible. Counsel may employ argument with summarization of evidence34

31. A pre-trial conference is not automatic in theory. See Fed. R. Civ. P. 16. A district court has discretion to set cases for pre-trial conferences. Most courts set pre-trials with scheduling orders under Rule 16(a) at the inception of the lawsuit. A district court has authority to compel parties and their principals to attend. See, e.g., Lockhart v. Patel, 115 F.R.D. 44, 46 (E.D. Ky. 1987). The pre-trial conference is a forum for discussion; the court cannot force a settlement on terms deemed objectionable to a litigant. See Huertas v. East River Housing Corp., 813 F.2d 580 (2d Cir. 1987). A court-compelled settlement raises due process concerns. In re LaMarre, 494 F.2d 753, 756 (6th Cir. 1974) (“it is, of course, clear that on due process grounds, no judge can compel a settlement prior to trial terms which one or both parties find completely unacceptable”). The Second Circuit recently held that a litigant cannot be sanctioned for the failure to settle before trial at a figure a trial court determined to be reasonable at a pre-trial conference, even when the eventual settlement was for the very figure the trial court had proposed. Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985). The Second Circuit reasoned that although the law favors the voluntary settlement of civil suits, “Rule 16 . . . was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise.” Id. at 669.

32. See Lambros, supra note 14, at 461-88.

33. See Lambros, supra note 6, at 1377. While the usual summary jury trial involves six jurors, some federal judges have convened summary jury trials with only three jurors. See Provine, supra note 14, at 73 n.184.

34. Regarding summarization of evidence, commentators note:

In making statements to the jury, counsel are limited to presenting representations as to evidence which would be admissible at trial. While counsel are permitted to mingle representations of fact with argument, considerations of
and are free to present exhibits to the jury. Objections by counsel are disfavored and not provided for in summary jury trial procedures; tactical maneuvering is to be kept to a minimum. Time limits are imposed on each side, with the attorneys normally given an hour to present their cases. The hour of the plaintiff may be portioned to allow for a short rebuttal. Though testimony of witnesses is not characteristic of the prototype summary jury trial, a court may allow it if the parties agree to present limited live testimony in abbreviated form.

At the conclusion of the counsel’s presentations, the court delivers the jury instructions. The jury has not been informed that its role is advisory in nature. On the other hand, if the parties have agreed to be bound by the verdict, the jury will be so informed. It is not uncommon for the court to submit special interrogatories to the jury. The jurors are sometimes given a time limit on deliberations. Alternatively, the court may re-instruct the jury after one to two hours to return a consensus verdict, individual verdicts, or simply each juror’s perception of liability and damages.

Since the summary jury trial is intended as a learning process for the litigants, attorneys are given the opportunity to question the jurors after a verdict is rendered. By this process, the parties will gain a better appreciation of the jury’s reaction to the evidence at issue. It is hoped that the verdict of the summary jury trial will 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.


35. Id. However, should counsel overstep the bounds of propriety as to a material aspect of the case, the procedure as envisioned by Judge Lambros would allow for an objection to be received, and for the jury to be admonished. Id.

36. Id. In the District of Massachusetts, Judge McNaught has employed the summary jury trial in a novel respect, insofar as the judge’s law clerk presides over the trial. Judge McNaught uses five jurors for a summary jury trial, while the judge himself sits as the sixth (and silent) juror. See Levin & Golash, Alternative Dispute Resolution in Federal District Courts, 37 U. FLA. L. REV. 29, 38-39 (1985). Judge McNaught has held in excess of 50 summary jury trials. See Ranii, supra note 10, at 30.

37. Several views have emerged regarding the desirability of unanimous verdicts. See PROVINE, supra note 14, at 74. Judge Lambros does not require or stress unanimity, though he instructs the jury to attempt to reach a consensus. Id. Judge Lambros has estimated that split verdicts have occurred in about 10% of the summary jury trial proceedings he has conducted. See Ranii, supra note 10, at 30. This encourages settlement, according to Judge Lambros, because in “a split verdict . . . both sides can see the risk” of going to trial. Id. Judge Enslin, on the other hand, requires unanimity on the question of liability, which is separated from the issue of damages. In addition, Judge Enslin asks for votes from all present at the summary jury trial, including the bailiff, the judge’s law clerk, and the court reporter. See PROVINE, supra note 14, at 74.
prompt settlement discussions; this is the rationale for requiring the parties to be present. Judge Lambros claims that over ninety percent of the cases he has set for summary jury trial have settled; other judges utilizing the procedure have claimed a similar success rate.  

B. The Summary Jury Trial In Operation and Practice

The flexibility inherent in the summary jury trial is manifest in the disparities characterizing summary jury trial proceedings held in different federal courthouses or in different types of cases resolved by summary jury trial proceedings in the same courtroom. Some summary jury trials last in excess of one day or incorporate live testimony to a greater degree than that originally envisioned by Judge Lambros. A case study of the flexibility of the summary jury trial is illustrated by its recent use in Stites v. Sundstrand Heat Transfer, Inc., a large toxic tort case pending before Judge Enslin of the United States District Court for the Western District of Michigan.

The Stites case involved claims by twenty-nine plaintiffs alleging neurological damage and physical injury due to exposure to trichloroethylene, a toxic chemical that leaked from defendant’s plant. It was one of the nation’s major groundwater pollution cases. The litigation centered around multiple experts expressing competing medical and toxicological opinions. The defendants had retained over sixty experts, while the plaintiffs had employed twenty. Negotiations during pre-trial conferences had shown the parties to be millions of dollars apart in their evaluation of the settlement value of the case. The defendants had spent three million

38. See Lambros, supra note 6, at 1377. No empirical study has assessed the efficiency of the summary jury trial, or compared it to other settlement techniques. See Posner, supra note 6, at 381-83. However, in the Western District of Oklahoma, the combined use of the special settlement conferences and the summary jury trial is claimed to have increased settlement rates from 84% to 96%. See THE SUMMARY JURY TRIAL, THE JUDICIAL CONFERENCE OF THE SIXTH CIRCUIT OF THE UNITED STATES 2-5 (May 16, 1985) (speech of Hon. Lee West).


40. No. K84-299 (W.D. Mich.). Judge Enslin is also a leading proponent of the summary jury trial. He has utilized the procedure on over fifty occasions. See Angiolillo & Tell, supra note 10, at 48.

41. See Zatz, supra note 16, at 930. The case arose in 1983 when trichloroethylene and related organic solvents were discovered in several residential wells near the defendant’s facility in Dowagiac, Michigan. The plaintiffs claimed that they had sustained chronic systemic chemical poisoning, with resulting personal injury to virtually every organ in their human bodies. Id. Plaintiffs also alleged that they had suffered an increased risk of cancer due to chemical exposure and suppression of their immune systems. Id.
dollars on discovery costs and attorney's fees, the plaintiffs one million dollars, with the prospect of both sides spending more as the case proceeded toward trial.42 In these circumstances, both parties requested a summary jury trial.

Judge Enslin instituted several modifications to the summary jury trial format in Stites. Because the case was simply too broad in scope and too complex to be realistically presented in one day, the court expanded the summary jury trial to three days. Each party had a six hour time limit on their respective presentations. The parties were also permitted to present expert testimony in the form of video monologues, because the jury would be asked to assess the qualifications and credibility of dozens of experts and to resolve a myriad of scientific and medical controversies. Moreover, the court removed the issue of liability from the case. Instead, the parties were given one-half hour each to present background information about the origins of the groundwater contamination, the defendant’s storage and disposal practices, and the state of the art prevailing at the time of the contamination. As a focus on damages, the court and parties selected one family consisting of four plaintiffs as a representative group that would present virtually every medical condition at issue in the lawsuit. Finally, Judge Enslin decided to utilize a second jury, both to produce a range of values within which the parties might ultimately settle, and to avoid an attempt by either party to dismiss the advisory verdict as a fluke.43

With discovery and motions complete, the parties had approximately six weeks to prepare for the summary jury trial. Defense counsel later revealed that the majority of their preparation consisted of preparing video monologues of expert testimony. Because the parties did not exchange videotapes of their experts until one week prior to trial and as cross-examination plays no part in a summary jury trial, the attorneys had to anticipate the testimony of adversarial experts, tape potentially responsive testimony in advance, and build impeachment theories into their presentations. Defense counsel revealed that they selected appropriate pieces from nearly 120 hours of videotape for inclusion in their ultimate three hour tape presentation.44

After selection of twelve jurors, the summary jury trial opened in the Stites case with each side allowed to make a thirty minute “background” presentation that replaced any discussion of liability testimony. Plaintiffs’ “background” presentation consisted of a

42. See 6 ALTERNATIVES 19-20 (Feb. 1988).
43. See Zatz, supra note 16, at 930. The parties did not agree that the verdicts would be binding. Id. Judge Lambros has also utilized multiple jury panels in an asbestos summary jury trial. See PROVINE, supra note 14, at 70 n.174.
videotape complete with a narrator, shots of neighborhood children at play, and an interview with the representative plaintiff family in their home. Plaintiffs stressed that trichloroethylene is a poison, which the defendant had dumped and buried despite knowledge of its hazards. Defendants' "background" presentation consisted of an oral presentation by counsel to the effect that engineering and environmental experts had found that defendant's storage facilities were state of the art, leakage was small and accidental, and the surrounding ecosystem was healthy.⁴⁵

The next phase of the summary jury trial involved medical claims. Intertwining their four and one-half hour presentation with argument and videotapes of their experts, plaintiffs' medical case posited claims that the chemical exposure had caused neurological injury, immune dysfunction, and increased risk of cancer. In essence, plaintiffs had one full day of argument, uninterrupted by objection or cross-examination, before the defendant could respond. Plaintiffs requested $2.5 to 3 million in damages for past injuries, and $10,000 annually for each of the four plaintiffs for future injuries. Defendants' presentation consumed the second and part of the third day of the summary jury trial. Defendant's presentation centered upon videotape testimony of a multi-disciplinary team of physicians, toxicologists, and carcinogenists. Defendant argued that none of the medical conditions of the plaintiffs could be linked causally to chemical exposures and that exposures even at thousands of times the levels to which the plaintiffs had been exposed could not produce neurological damage. Thereafter, plaintiffs were given one hour to present rebuttal arguments.⁴⁶

Judge Enslin divided the jurors into two groups, and directed the juries to reach a verdict in three hours. The court informed the juries that the parties had insisted on two separate jury verdicts, and that a procedure had been developed for dealing with any varying verdicts. The first jury returned a $2.8 million verdict for plaintiffs in less than the allotted time. After requesting additional time to deliberate, the second jury returned a defense verdict. The court then requested the second jury to deliberate further and decide upon a damage figure that assumed they had found in favor of plaintiffs; the second jury returned with a total figure of $300,000. Counsel were then allowed to question the jurors. Some jurors complained that they were unable to keep track of the testimony and weigh competing concerns about the toxicity of trichloroethylene.

⁴⁵. Id. at 931. Unlike most summary jury trials (and indeed actual trials in federal courts), Judge Enslin allowed extensive voir dire lasting four hours. See 6 ALTERNATIVES 20 (Feb. 1988); see also Enslin, Alternative Dispute Resolution: Summary Jury Trial In A Toxic Tort Case, 2 TOXICS L. RPTR. 1015, 1016 (1988).
⁴⁶. See Zatz, supra note 16, at 932.
Indeed, some of the jurors commented that the editing of the testimony on the videotapes left them suspicious as to whether they heard everything the witnesses had to say.

The parties proceeded immediately into marathon settlement negotiations, which resulted the next day in a $3.5 million settlement of all twenty-nine claims, with the plaintiffs retaining the right to determine distribution. Judge Enslin and the attorneys proclaimed the summary jury trial a success. The proceeding demonstrated to both sides that they might win the case at a full trial on the merits, yet also risk a defeat as shown by the inconsistency of the verdicts in the summary jury trial. The case was settled in lieu of what the attorneys and court had estimated would have been a nine to fourteen month trial costing in excess of several million dollars.

II. Strandell v. Jackson County: The Legality of Mandatory Summary Jury Trials

Local rules in the courtrooms of Judges Lambros and Enslin authorize orders directing litigants to participate in a summary jury trial; other federal courts compel participation in mandatory summary jury trial proceedings by local rule or pursuant to orders entered in Rule 16 pre-trials. This practice remained unchallenged

47. Id. at 931-32. Following the summary jury trial, an extensive survey and questionnaire was administered to the jurors by Professor Marie Provine of Syracuse University. The results of the study are summarized in Judge Enslin's report of the Stites summary jury trial. See Enslin, Summary Jury Trials Can Help Settlement in Toxic Tort Cases, 2 ALTERNATE DISPUTE RESOLUTION REP. 46 (1988); Enslin, supra note 45, at 1017-18.

48. See Enslin, supra note 47, at 48. Defense counsel believed that the case would not have settled without the summary jury trial. See Zatz, supra note 16, at 935. Defendants estimate trial costs would have approximated $3 million, while plaintiffs conceded they would have expended nearly $500,000 to prepare for trial. See Enslin, supra note 47, at 48. Judge Enslin believed the summary jury trial "saved enormous resources," and has indicated his intention to use the device with other toxic tort cases. See Enslin, note 45, at 1017.

49. Some federal courts direct participation of litigants based upon local rules. See, e.g., C.D. ILL. STANDING ORDER 7, ¶ 15; W.D. Mich. Loc. R. 44(a),(b); D. MONT. STANDING ORDER 6A; N.D. Ohio Loc. R. 17.02; W.D. Okla. Loc. R. 17 (I). Other federal courts have ordered SJT proceedings without reference to a local rule. See, e.g., Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987). Parties subject to coerced participation in a summary jury trial in jurisdictions without local rules authorizing summary jury trials are apt to perceive that judges "make up the rules as they go along" to mandate such a settlement procedure. However, a study of settlement strategies in federal courts has concluded:

The decision on the part of many judges to forego a detailed presentation of the summary jury option in either court rules or standing orders should not, however, be taken to mean that procedures are typically developed on an ad hoc or case-by-case basis. The judges and magistrates who have spoken out on the process have developed their own standard procedures for summary jury trial, which they follow in all, or nearly all, cases.
for seven years until plaintiffs' counsel in *Strandell v. Jackson County* questioned the authority of federal courts to coerce participation in mandatory summary jury trials.

### A. Background to Strandell

To describe the case briefly, in March 1985, the plaintiffs in *Strandell* filed their action under 42 U.S.C. section 1983 in the United States District Court for the Southern District of Illinois. Plaintiffs alleged that the defendant law enforcement officials and their county employer had violated the constitutional rights of the plaintiffs' decedent because of the purported unconstitutional arrest, strip search, beating, and death of the plaintiffs' decedent while in the custodial care of the defendants at their county jail. Plaintiffs successfully opposed and defeated defendants' successive motions to dismiss and for summary judgment. In addition to serving and obtaining extensive written discovery, plaintiffs' counsel deposed the six party defendants, thirteen witnesses and the defendants' two experts; defense counsel, in contrast, deposed no witnesses. Plaintiffs' counsel also secured statements from twenty-one witnesses. Defense counsel filed a motion to compel production of these witness statements, which the court denied for reasons of privilege. As the litigation progressed, plaintiffs made a settlement demand for the insurance policy limits of defendants, and defendants made no counter-offer; in addition, the defendants' insurance carriers filed their own declaratory judgment action seeking to escape defense and indemnity responsibility under their policies.

At an initial pre-trial conference, when faced with these positions on settlement, the court suggested the possibility of resolving the case with a summary jury trial. The court directed the parties to the procedures established by Judge Lambros because no local rule

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**Provine, supra note 14, at 72.**


51. The *Strandell* case has generated multiple opinions. The ruling denying defendants' first motion to dismiss is reported at 634 F. Supp. 824 (S.D. Ill. 1986). The opinion denying defendants' second motion to dismiss and for summary judgment is reported at 648 F. Supp. 126 (S.D. Ill. 1986). The ruling denying defendants' motion to compel production of witness statements is reported at 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1986). The opinion holding plaintiffs' counsel in criminal contempt is reported at 115 F.R.D. 333 (S.D. Ill. 1987).


53. 7 Fed. R. Serv. 3d 715 (S.D. Ill. 1986).

54. See Plaintiffs' Status Report at 6, Strandell v. Jackson County, No. 85-4159 (S.D. Ill. Aug. 28, 1986). The declaratory judgment action was filed in state court and ultimately removed to federal court. See Imperial Casualty & Indemnity Co. v. USF&G, et al., No. 86-4137 (S.D. Ill.).
existed to establish a summary jury trial or to outline procedures for its utilization. Plaintiffs expressed no interest in a summary jury trial, and instead filed a motion to advance the case for trial, which the court granted. The parties finished discovery of experts, and filed a joint pre-trial order.

At the final pre-trial conference on the eve of trial, the court again raised the possibility of resolving the dispute through a summary jury trial. Plaintiffs' counsel declined this suggestion a second time, and answered ready for an immediate trial. At this juncture, the court ordered the participation of the parties in a mandatory summary jury trial. Plaintiffs' counsel objected to the order on the grounds that federal judges have no authority under the Federal Rules of Civil Procedure to convene a mandatory summary jury trial, and because plaintiffs would be unfairly prejudiced during the procedure by having to reveal their trial strategy as well as the multitude of witness statements already held privileged by the court in its earlier denial of defendants' motion to compel. The court overruled these objections, and ordered the parties to select a jury for the summary jury trial. When plaintiffs' counsel declined to do so, the court held plaintiffs' counsel in criminal contempt.

B. The Seventh Circuit's Decision

On appeal, United States Court of Appeals for the Seventh Circuit reversed summarily at oral argument, and issued its full opinion four months later. The Seventh Circuit premised its ruling with a recognition that while courts have substantial inherent power to manage their dockets, judicial experiments such as the summary

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55. The procedures prepared by Judge Lambros are readily available. See Lambros, supra note 14, at 482-88.
57. See Plaintiffs' Motion Objecting To Mandatory SJT at ¶¶ 1-5, Strandell v. Jackson County, No. 85-4159 (S.D. Ill. Mar. 31, 1987).
58. Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill. 1987). Perhaps one reason for the lack of any legal challenge to orders mandating a summary jury trial is the difficulty in appealing discovery orders. A party might attempt to file a mandamus action or interlocutory appeal, but such attempts are usually unsuccessful in the context of discovery orders. A litigant may challenge a discovery order by way of criminal contempt. If the underlying order is invalidated, the criminal contempt judgment will be vacated; however, the party must be willing to pay the price of being punished if the validity of the order he has disobeyed is upheld. See Marrese v. American Academy of Orthopedic Surgeons, 726 F.2d 1150, 1157 (7th Cir. 1984), rev'd on other grounds, 470 U.S. 373 (1985). For this reason, review of a discovery order by way of criminal contempt has been described as a "crude but serviceable method" of securing appellate jurisdiction. Id.
59. Strandell v. Jackson County, 830 F.2d 195 (7th Cir. 1987).
60. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988).
jury trial must conform to the Federal Rules of Civil Procedure.62 The court pointed out that the Federal Rules of Civil Procedure are the product of a careful process of study designed to reflect a balance of the competing concerns for judicial efficiency and for the rights of individual litigants.63 Therefore, any judicial innovation must conform to that balance, as embodied in the Federal Rules of Civil Procedure.64

The heart of the Strandell decision is its interpretation of Rule 16.65 The Seventh Circuit reasoned that Rule 16 was not intended to be coercive.66 Therefore, the court stated that a mandatory summary jury trial is inconsistent with the Federal Rules of Civil Procedure.67 According to the court, while pre-trial practice under Rule 16 is in-

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62. Strandell, 838 F.2d at 888. The Seventh Circuit stated that the district court noted a "crushing caseload" in the Southern District of Illinois in explaining its decision to compel the use of a summary jury trial, also suggesting that compliance with the Speedy Trial Act required resort to such a device. Id. While the Seventh Circuit acknowledged that crowded dockets place great stress on a judge's capacity to fulfill his responsibilities, the court stressed that a crowded docket does not permit a court to avoid adjudication of cases properly within its congressionally mandated jurisdiction. Id.; see also Thermtron Prods., Inc. v. Hermandorfer, 423 U.S. 336, 340 (1976) (a district court may not ignore the limitations on its power for convenience or "because . . . [it] considers itself too busy to try [a case]").

63. Id. at 886 (citing the Rules Enabling Act, 28 U.S.C. § 2072). According to the Seventh Circuit in Strandell, the process set forth in the Rules Enabling Act reflects the joint responsibility of the legislative and judicial branches of government in striking the balance between the need for the expedition of cases and for the protection of individual rights. Id.

64. Id. at 886-87. The question of judicial power to impose requirements designed to settle litigation had received only limited scrutiny prior to Strandell. In 1979, a district court determined that its local rule proving for mandatory arbitration was a proper exercise of the court's power to manage its docket and promote efficient use of judicial resources. Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979). In 1985, the Sixth Circuit upheld a local rule providing for referral of diversity cases to mediation. Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985). The court rejected challenges that the local rule violated the seventh amendment and various federal rules since "the mediation panel merely issues a settlement evaluation that has no force unless accepted by the parties." Id. at 269. Finally, a district court has more recently sustained the validity of a local court rule authorizing referral of cases to mediation and the imposition of attorneys' fees upon the losing party for failure to better the mediation award at a full trial on the merits. Tiedel v. Beech Aircraft Corp., 118 F.R.D. 54 (W.D. Mich. 1987).

65. The district court in Strandell relied on Rule 16(c), subsections (7) and (11) for authority to compel a summary jury trial. Those subsections provide:

   The participants at any conference under this rule may consider and take action with respect to . . .
   (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute; . . .
   (11) such other matters as may aid in the disposition of the action.

66. Strandell, 838 F.2d at 888. Judge Lambros has written, in a related context, that "the judicial process is not . . . coercive [and] . . . courts do not nullify the free will of litigants." Lambros, supra note 6, at 1367.

67. Strandell, 838 F.2d at 888.
tended to foster settlement, its purpose was never to achieve that result by allowing a federal court to require an unwilling litigant to be "sidetracked from the normal course of litigation.""\textsuperscript{66}

In construing Rule 16, the Seventh Circuit looked both to the plain language of the rule and its advisory committee note. The rule, at subsection (c), simply refers to the possible use of extrajudicial or alternative dispute resolution devices as a potential means to achieve settlement.\textsuperscript{69} The rule does not require a litigant to do so at the behest of the district court. To the extent a federal judge interferes with a party's determination of settlement techniques, a court exceeds the scope of its case management powers under Rule 16. A court-ordered summary jury trial thus would be contrary to the concept underlying the American system of jurisprudence that purports to allow a party to present its case as it deems to be in its best interests. The Seventh Circuit also observed that the drafters' commentary on the rule makes plain that a district court's pre-trial power does not include "clubbing the parties" into "an involuntary compromise."\textsuperscript{70}

In so construing Rule 16, the Seventh Circuit made clear that a district court's authority to impose settlement devices under the rule is a narrowly circumscribed area of power. While courts have a legitimate interest in clearing up congested trial calendars, the need

\textsuperscript{66} Id.

\textsuperscript{69} See supra note 65.

\textsuperscript{70} Strandell, 838 F.2d at 887 (quoting Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985)). The Seventh Circuit also stated that the drafters' commentary with respect to other parts of Rule 16 further reinforced the court's interpretation of Rule 16 as noncoercive with respect to settlement procedures. Id. at 887. The court cited to the drafters' comments to the last sentence of Rule 16(c), added in 1983. Id. This sentence provides: "At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed." Id. (quoting FED. R. CIV. P. 16(c)). The Seventh Circuit observed that the drafters' comments made plain that reference to "authority" was not intended to insist upon the ability to settle the litigation. Id. The comments further made clear that the rule should not be construed to permit a judge to compel attorneys to enter into stipulations or to make admissions considered to be unreasonable. Id. (citing FED. R. CIV. P. 16 advisory committee's notes). The Seventh Circuit also cited J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976), and Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298 (7th Cir. 1977), to further bolster its interpretation of Rule 16 as noncoercive. Id. at 887-88. In J.F. Edwards Const., the Seventh Circuit had held that a district court could not use Rule 16 to compel parties to stipulate facts to which they could not voluntarily agree. In Identiseal Corp., the Seventh Circuit found Rule 16 was noncoercive, holding that district courts lacked power to order a party to undertake further discovery. While J.F. Edwards Const. and Identiseal antedate the amendments to Rule 16, the Seventh Circuit in Strandell pointed out that "nothing in the amended rule or in the Advisory Committee Notes suggests that the amendments were intended to make the rule coercive." Id.; see also Salahaddin v. Harris, 782 F.2d 1127, 1133 (2d Cir. 1986) (the 1983 amendments to Rule 16 "did not [set] loose a strange and capricious new beast").
for convenience and expedience cannot exceed statutory and inherent limitations. Indeed, legal and prudential constraints on judicial power underlie the Seventh Circuit’s reading of Rule 16 as non-coercive in nature.

To that end, the pre-trial conference under Rule 16 was intended to be “informational and factual” rather than coercive.\(^{71}\) Compelling obedience to court orders with respect to the pre-trial process is limited to situations involving, for example, a party’s failure to prosecute its case, prepare a pre-trial order, or appear at a pre-trial conference.\(^{72}\) Rule 16 cannot be invoked as authority to impose a summary jury trial in the guise of settlement negotiations. At most, the court can only require the parties to consider settlement by discussion—or possible participation in a summary jury trial—as a means of disposition of the case. Therefore, the purpose of Rule 16 is to achieve voluntary agreement for expediting trial.\(^{73}\)

The second basis of the Seventh Circuit’s decision rested on the notion that a mandatory summary jury trial would seriously affect the core concepts of disclosure in pre-trial discovery and the delicate framework of the work-product privilege.\(^{74}\) The Seventh Circuit stated that the rules concerning discovery and work-product privilege reflect a “carefully crafted balance between the needs for pre-trial disclosure and party confidentiality.”\(^{75}\) The court opined that a mandatory summary jury trial could upset that balance, for a party should not be required to undergo a summary jury trial if it would force the litigant to divulge privileged information prior to a full trial on the merits.\(^{76}\) Such information, if obtainable at all by an adversary, should be obtained through the normal discovery process and not as a result of a summary jury trial.\(^{77}\)

Indeed, the Seventh Circuit indicated that any other interpreta-

\(^{71}\) See J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323 (7th Cir. 1976).

\(^{72}\) Id. at 1323-25.

\(^{73}\) This premise is well founded in the Seventh Circuit. For example, under Rule 16, the Seventh Circuit has determined that a district court does not have the power to compel a litigant to stipulate to facts. See J.F. Edwards Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976). A district court also has no authority to require a party to initiate discovery that counsel believes would not serve the interests of their clients. See Identiseal Corp. of Wisconsin v. Positive Identification Sys., 560 F.2d 298, 301 (7th Cir. 1977). In addition, the Seventh Circuit has found that Rule 16 does not permit a district court to force a party to consent to a referral of the trial of their case to a magistrate. See Adams v. Hecker, 794 F.2d 303, 307 (7th Cir. 1986); Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1041 (7th Cir. 1984).

\(^{74}\) Strandell, 838 F.2d at 888 (citing Fed. R. Civ. P. 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947)).

\(^{75}\) Id.

\(^{76}\) Id.

\(^{77}\) Id.
tion of Rule 16 with regard to pre-trial settlement practice would constitute a "radical alteration of the considered judgments contained in Rule 26 and the case law." For this reason, the Strandell court justified its holding that Rule 16 could not be used coercively by observing that the rule-making process of the Supreme Court and Congress, in providing for trial practice procedures, could hardly have undertaken such a radical alteration of either discovery concepts or the framework for the work-product privilege. The Seventh Circuit reasoned that if such radical surgery of the federal rules is to be undertaken, Congress and the Supreme Court would have to amend the Federal Rules of Civil Procedure to explicitly provide for mandatory summary jury trials. Hence, the Seventh Circuit concluded that Rule 16 does not permit district courts to compel parties to participate in summary jury trials.

Underlying the second basis of the Seventh Circuit’s decision lies the notion that the substantive rights of individual litigants should not be sacrificed in the guise of regulating procedure. This concept is embodied in section 2072 of the Rules Enabling Act. In enacting section 2072, Congress delegated authority to the Supreme Court to prescribe rules of procedure for federal courts. This delegation rests upon the necessity for uniformity on procedural matters in federal courts. However, the Rules Enabling Act also mandates the preservation of the substantive rights of litigants. To this end,

78. Id.
79. Id. (citing the Rules Enabling Act, 28 U.S.C. § 2072 (1982)). The Rules Enabling Act provides in pertinent part:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers. Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

80. Strandell, 838 F.2d at 884.
81. Id. A local rule providing for a mandatory summary jury trial would be invalid in light of the Seventh Circuit’s ruling. It is of no legal significance that local district court rules, in accordance with Rule 83, have been furnished to the Judicial Council of the relevant circuit and the Administrative Office of the United States Courts. This is because district courts act in an administrative rule-making capacity when promulgating local rules and not in the same manner as when courts decide questions of law. See Mississippi Publishing Co. v. Murphree, 326 U.S. 438, 444 (1946) ("the fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency").

82. See supra note 79.
83. Id.
the Rules Enabling Act contains a limitation prohibiting rules that "abridge, enlarge or modify substantive rights." 85

The distinction between substance and procedure is often unclear. Rules that may be classified as procedural may also bear directly on the substantive rights of litigants. 86 Therefore, while the Rules Enabling Act delegates power to the Supreme Court to govern practice and procedure, this power inevitably includes matters falling in the uncertain area between substance and procedure. 87 However, in prescribing rules in this uncertain area, the Supreme Court cannot avoid the congressional limit on affecting substantive rights. Thus, the Federal Rules of Civil Procedure intentionally reflect a balance between the often competing concerns of procedural matters, such as the need for judicial efficiency or for pre-trial disclosure, and substantive matters, such as the need for party confidentiality or the preservation of other individual litigant rights.

Once rules have been prescribed according to the process set forth in the Rules Enabling Act, Congress and the Supreme Court have acted to determine the appropriate balance between such competing concerns. After the appropriate balance has been prescribed, the rights of litigants cannot be altered or compromised in the guise of regulating procedure. To alter the core of any such rules, the appropriate process of the Rules Enabling Act must be followed.

*Strandell*, in this context, is a recognition that the rights of individual litigants are not to be subordinated to judicial authority to impose requirements to settle cases. The federal rules reflect a well-reasoned balance between the need for judicial efficiency and the rights of individual litigants that trial lawyers rely upon in preparing their cases. *Strandell* signifies that an exercise of a district court's power to promote judicial efficiency cannot sacrifice litigant rights or upset the balance embodied in the Federal Rules of Civil Procedure. Alterations of the federal rules are within the province of Congress and the Supreme Court, and not within the guise of a court's inherent power. 88 An innovation of the magnitude of the summary jury

85. *See supra* note 79.
86. *See supra* note 84.
87. *Id.*
88. *This notion is further underscored by the fact that legislation has been introduced in the last two sessions of Congress to amend the Federal Rules of Civil Procedure and Title 28 of the U.S. Code to grant authority to district courts to convene summary jury trials. See H.R. 473, 100th Cong., 1st Sess., 133 CONG. REC. H. 157 (1987) ("Alternative Dispute Resolution Promotion Act of 1987"); S. 2038, 99th Cong., 2d Sess., 132 CONG. REC. S. 848 (1986) ("Alternative Dispute Resolution Promotion Act of 1986"). The proposed legislation would require attorneys to advise their clients of ADR mechanisms, and to file notice with the court certifying that the attorney has complied. The proposed statutes also provide that if the parties consent to ADR mechanisms, the court may enter an order governing such proceedings. Available ADR mechanisms expressly include summary jury trial proceedings. *Id.*
trial cannot be undertaken by a single judge in derogation of the carefully designed procedure for judicial rule-making.

As the Seventh Circuit recognized in Strandell, a mandatory summary jury trial has the potential of disrupting the work-product privilege. Therefore, the Seventh Circuit's interpretation of the parameters of a district court's pre-trial authority was necessary in order to preserve the framework of Hickman v. Taylor. The necessity of such parameters can best be exemplified by the Strandell case itself.

In Strandell, an order compelling participation in the summary jury trial placed plaintiffs' counsel in a position of adopting one line of strategy different from that of a full trial on the merits. Plaintiffs' counsel would have had to confine their presentation to conclusory arguments of the defendants' alleged liability in order to avoid the risk of irreparable harm and injury to their case, which would be caused by revealing the privileged witness statements in the summary jury trial. Since defense counsel had failed to undertake any discovery with respect to witnesses, defense counsel therefore would become the recipient of the specifics of testimony in the summary jury trial that they had not bothered to investigate. Forcing adoption of different trial strategies undermines the goal of summary jury trials to promote settlement. In addition, the procedure in these circumstances merely results in unnecessary increased costs and delays. More interestingly, however, the potential for sham participation raises the question of whether a district court could order litigants to adopt a more meaningful strategy, with contempt of court or other sanctions as a consequence of the failure to do so.

90. It is familiar law that district courts may enter sanctions for violations of the federal rules. See, e.g., Link v. Wabash R.R., 370 U.S. 626 (1962) (dismissal with prejudice); Miranda v. Southern Pac. Transp. Co., 710 F.2d 516 (9th Cir. 1983) (monetary sanctions on attorneys for failure to comply with pre-trial conference requirements). In the context of pre-trials, Rule 16(f) authorizes district courts to impose sanctions "if a party or party's attorney fails to participate [in a pretrial conference] in good faith . . . ." FED. R. CIV. P. 16(f); see also American Bar Association Model Code of Professional Responsibility, Disciplinary Rule 7-102(A) ("a lawyer shall not . . . assert a position, conduct a defense, delay a trial, or take other action" when such tactics delay the inevitable outcome of the litigation). The question would become whether a court could impose sanctions for a party doing no more than going through the motions of a summary jury trial, well knowing that they will not settle the case. Absent a rule on summary jury trials covering imposition of sanctions, the court may well desire to impose sanctions for lack of good faith participation. Compare Tiedel v. Beech Aircraft Corp., 118 F.R.D. 54, 58 (W.D. Mich. 1987) (attorney's fees imposed upon party for its failure to better a mediation award at the time of trial where party rejected mediation award and elected to proceed to trial) and New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712, 715 (E.D. Pa. 1983) (defendant failed to participate in court-ordered arbitration program, and court notes that motion to strike defendant's request for a jury trial de novo would be appropriate), with Lyons v. Wickhorst, 42 Cal. 3d 911, 231 Cal. Rptr. 738, 727 P.2d 1019 (1986) (trial
In Strandell, a strategy more meaningful than sham participation would have necessitated the divulgence of privileged information and witness statements. Indeed, compelled participation in the summary jury trial would have resulted in a complete reversal of the district court's earlier ruling denying the defendant's motion to compel production of the privileged materials. In addition, court-ordered participation effectively compels counsel to adopt a particular strategy over one at trial that would better promote their client's interests.

Under such circumstances, mandatory application of an experimental device would effect a drastic altering of the core of Hickman v. Taylor. The district court's initial scheduling order in Strandell set only a discovery cutoff date, a pre-trial, and trial date. The possibility of a summary jury trial was not mentioned, nor did the local rules provide for a possible summary jury trial. The plaintiffs relied on the scheduling order in preparing their case, as well as on the specific rules laid down by the Federal Rules of Civil Procedure. The plaintiffs prepared their case and obtained a myriad of privileged witness statements. The order compelling a mandatory "summary jury trial" would destroy any semblance of protection accorded plaintiff's discovery and investigatory efforts.

Moreover, a non-consensual summary jury trial, in effect, converts pre-trial practice into another discovery mechanism, thereby allowing one litigant to make unfair use of his opponent's diligent preparation for trial. Pre-trial, in the guise of a summary jury trial, should not have the effect of forcing a party to divulge privileged information to an opponent after the close of discovery. Pre-trial is neither the time nor place for discovery of the specifics of expected testimony of a witness.

Indeed, preparation for trial traditionally rests in a party's own efforts aided by the tools of discovery. Hence, a mandatory summary jury trial necessarily destroys the basis upon which the work product doctrine rests, as it would be inconsistent with the doctrine's role of promoting the adversary system by safeguarding the fruits of
an attorney's trial preparation from their opponent. As the Seventh Circuit in Strandell recognized, fairness and equity dictate that experimental use of a mandatory, non-consensual summary jury trial is inappropriate where a litigant's privileged discovery materials may be subject to disclosure.

III. FUTURE OF SUMMARY JURY TRIALS

A. The Legality of Consensual Summary Jury Trials

The court in Strandell observed that the only issue before it concerned whether federal courts have the power to require a litigant to participate in a summary jury trial. The Seventh Circuit expressly noted that it was not required to decide the manner in which summary jury trials may be used with the consent of the parties. Moreover, the court left open the question of the legality of consensual summary jury trials altogether, although it intimated that the Federal Rules of Civil Procedure permit summary jury trial by consent.

In leaving the question of the legality of consensual summary jury trials unanswered, the Seventh Circuit did not pass upon the question of whether district courts have the authority to empanel citizens selected from the district's master jury wheel to sit for purposes of the summary jury trial. In trials in federal district court, jurors are selected pursuant to the procedures established by the Jury Selection and Service Act of 1968. This statute has no provision for the use of jurors to sit for purposes of summary jury trials or to act as mediators to render advice to litigants in the form of an advisory verdict.

95. Case law authority recognizes that a party is certainly entitled to make legitimate use of any tactical advantage gained on an opponent. See Hickman v. Taylor, 329 U.S. 495, 516 (1949) ("discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary"); Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 456 (7th Cir. 1987) ("Our legal system is adversarial, not inquisitorial, and parties are entitled to the strategic advantage of information to which the other side has not sought access"); United States v. AT&T, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (work product doctrine's role is to promote "the adversary system by safeguarding the fruits of an attorney's trial preparation from ... the opponent").

96. Strandell v. Jackson County, 838 F.2d 824, 886 (7th Cir. 1988).

97. Id. The court also noted that it was not expressing any view on the effectiveness of summary jury trials in settlement negotiations. Id.

98. The issue of whether federal courts have the authority to empanel jurors for a summary jury trial was raised by plaintiffs' counsel in his briefs in Strandell, but the Seventh Circuit did not address the issue. See Brief of Contemner-Appellant at 34-37, Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988).


100. Id; see also Posner, supra note 6, at 385-86. It has been observed that "the authority under which courts divert jurors from 'real' trials nevertheless remains problematic." Provine, supra note 14, at 72 n.180. Judge Lambros has avoided the
Proponents have suggested that a potential source of authority to empanel jurors for a voluntary summary jury trial stems from Rule 39(c) of the Federal Rules of Civil Procedure.\textsuperscript{101} Rule 39(c) codifies the practice of a court of equity summoning an advisory jury to assist it in deciding factual issues.\textsuperscript{102} Rule 39(c) empowers a court upon motion or its own initiative to convene an advisory jury in actions "not triable of right by a jury." Hence, Rule 39(c) authorizes a district court to call an advisory jury only in an equity case. The rule has no express grant of power for a district court to convene an advisory jury in a case on the law side of the docket. Therefore, Rule 39(c) provides no explicit support to convene a jury for purposes of a summary jury trial, even one by consent of the parties.

Although the court in Strandell intimated that the Federal Rules of Civil Procedure allow a consensual summary jury trial, the proffered legality\textsuperscript{103} of such a procedure remains questionable. The advisory committee notes to the 1983 amendments to Rule 16 state: "In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute. This includes urging the litigants to employ adjudicatory techniques outside the courthouse."\textsuperscript{104}

A summary jury trial is hardly an extrajudicial proceeding. Indeed, a summary jury trial is conducted inside the courtroom of a federal courthouse, before an Article III judge, and with jurors selected from the court's master jury wheel who are paid from congressionally apportioned funds. Moreover, nothing in Rule 16(c)(7) or in the advisory committee notes mentions, envisions, or authorizes the use of a summary jury trial. All that the subsection and advisory committee note appear to envision is the discussion of employing adjudicatory techniques outside the courthouse. Although express authorization from the federal rules is not always necessary, a lack of clear authority is cause for hesitation when experiments are to be undertaken.\textsuperscript{105}

\begin{itemize}
\item legal question and expense by utilizing in summary jury trial proceedings excess jurors not selected for jury duty in full trials. \textit{Id.}
\item \textsuperscript{101} \textit{FED. R. CIV. P. 39(c).}
\item \textsuperscript{102} See \textit{9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL} \S 2335 (1971 & Supp. 1987).
\item \textsuperscript{103} See supra notes 24-27, and accompanying text; see also Lambros, supra note 14, at 461-65.
\item \textsuperscript{104} See Amendments To The Federal Rules Of Civil Procedure, 97 F.R.D. 165, 211 (1983); see also Posner, supra note 6, at 366-75.
\item \textsuperscript{105} See Posner supra note 6; see also Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987) ("the ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the responsibility for doing so should make federal judges hesitate to create new forms of judicial proceedings in the teeth of existing rules"); Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978) ("innovative experiments may be admirable, and considering the heavy case loads in the district courts, understandable, but experiments must stay
Legislative proposals have been introduced in the last two sessions of Congress to amend the Federal Rules of Civil Procedure and Title 28 of the United States Code in order to grant authority to district courts to convene and order summary jury trial proceedings on a consensual basis. The fact that such legislation has been offered intimates that statutory authority under Rule 16 is lacking.

However, the absence of statutory authority does not mean that courts do not have inherent authority to convene consensual summary jury trials. The Seventh Circuit in Strandell held only that inherent authority is nonexistent in regards to ordering non-consensual participation. The opinion can be read narrowly to suggest that a court’s inherent authority is not so limited in the context of a consensual summary jury trial. Indeed, the key word and distinction may be consent. With consent present, both the balance between judicial efficiency and individual litigants’ rights and between pre-trial disclosure and party confidentiality are preserved. Parties are able to choose the strategy in their best interests and determine if the price of revealing the fruits of their discovery is worth their participation in a summary jury trial. When consent is present, such devices may prove to be useful in facilitating settlement.

Courts have neither defined the concept of inherent judicial power with precision nor developed a clear analysis for measuring its reach. The courts have invoked the doctrine of inherent judicial power to regulate the conduct of members of the bar and to provide sanctions upon those who abuse the judicial process. However, no appellate court has yet endorsed the view that a judge possesses inherent power to impose requirements designed to settle cases.

Only one federal court to date has discussed the issue of inherent authority to convene a consensual summary jury trial. In Cincinnati Gas & Electric Co. v. General Electric Co., a post-Strandell decision, the court stated in dicta that a consensual summary jury

within the limitations of the statute”). However, some courts more readily employ innovative procedural devices when both parties stipulate to their use. See, e.g., Mobil Oil Corp. v. Altech Corp., 117 F.R.D. 650 (C.D. Cal. 1987) (although there was no precedent on the issue, court determined a special master could preside over a jury trial pursuant to stipulation of the parties).

106. See supra note 88.


109. 117 F.R.D. 597, 599 (S.D. Ohio 1987). The court also suggested it had authority to order the procedure pursuant to Rule 16 (a)(5), (c)(7), and (e)(10).
trial may be convened as a “matter of the Court’s inherent power to manage its own cases.” This conclusion, however, was unnecessary to the question being decided, because no challenge was posited concerning the power to convene the summary jury trials. Rather, the court examined whether newspapers could intervene in the action for the limited purpose of challenging the closure of the summary jury trials to the press, and whether the first amendment right of access to judicial proceedings extends to summary jury trials. The court resolved this equally novel issue by determining that courts may restrict public access to summary jury trials.

The ambiguity and inexactitude of the limits on inherent judicial power has not prevented courts from convening consensual summary jury trials. The practice is now the norm in many courtrooms, notwithstanding the notion that inherent powers should be exercised with restraint and caution. In light of the fact that a legal challenge to a consensual summary jury trial is most unlikely, legal authority will remain sparse on the issue of inherent power to convene summary jury trials. Therefore, absent legislative direction, federal courts will continue to convene consensual summary judgment trials based on the notion of inherent authority.

B. The Pros and Cons of Consensual Summary Jury Trials

While it is clear from Strandell that compelled participation in summary jury trials is not permitted at least in the Seventh Circuit, the consensual summary jury trial, though legally questionable, appears to be permitted; proponents will argue that Strandell does not preclude voluntary summary jury trials. Indeed, it is the norm in most federal courts. Therefore, the summary jury trial device will

110. Id. at 599; see also supra note 28. Judge Spiegal, the author of the opinion, is also a proponent of the summary jury trial. See Spiegal, Summary Jury Trials, 54 U. Cin. L. Rev. 829 (1986).

111. The court decided that the press and public have no first amendment right to attend a summary jury trial because it is a pretrial proceeding and settlement technique. Guided by the recent decision in Press-Enterprise v. Superior Court of Cal., 106 S. Ct. 2735 (1986), the court applied a two-part criteria in determining whether the right of access attached to the summary jury trial: whether there had been a “tradition of access” to such proceedings, and whether such access plays a significant role in the functioning of the process. The court opined that neither criteria had been satisfied. There was no historical right of access, because the summary jury trial is less than a decade old; moreover, settlement negotiations traditionally have been closed proceedings. Id. at 599. The court also concluded that a summary jury trial, as a settlement device, has no effect on the merits should the case go to trial, and therefore public access is not critical to ensure that the proceedings be conducted fairly. Id. at 600. Although the parties settled their case following the summary jury trial, see 6 ALTERNATIVES 1 (Feb. 1988), the newspapers have taken an appeal of the closure order. Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597 (S.D. Ohio 1987), appeal filed, Nos. 87-3950 and 87-4045 (6th Cir. Oct. 13, 1987 & Nov. 23, 1987).
continue to represent a viable alternative to trial and a possible topic of discussion at every pre-trial conference convened in federal courts. Litigators in federal court will undoubtedly and increasingly confront the question of whether they ought to counsel a client to consent to participation in a summary jury trial. Various pros and cons must be considered in deciding that question.

The most obvious benefit of a summary jury trial is the potential avoidance of litigation costs that usually accompany a full trial on the merits. The length of the procedure is designed to be much shorter in nature, thereby generally limiting the extent of the evidence counsel may present. Thus, in theory, a summary jury trial should be a fraction of the cost of a full trial.

However, theoretical designs do not always reflect practical realities. A summary jury trial has its own hidden costs. The very nature of a summary jury trial calls for strategy far different than litigators may employ at a full trial on the merits. Therefore, preparation for a summary jury trial differs fundamentally from trial preparation. For a newcomer to the device, the preparation may indeed prove to be burdensome and time-consuming.

The counsel that participated in Stites, a large scale toxic tort case, estimated that resolution of the case through a summary jury trial saved an estimated three million dollars in trial costs and further discovery, and avoided roughly anywhere from nine to fourteen months that it would have taken to conduct the trial. However, counsel that participated in Stites also indicated that preparation for the summary jury trial was as rigorous as preparation for any other trial because discovery had to be just as thorough, and counsel's familiarity with expected testimony was even more important.

Indeed, in Stites, presentation of witness testimony by videotape required seven-day work weeks for counsel and legal assistants. The plaintiffs' expert testimony had to be anticipated and responded to for impeachment purposes all within the defendant's presentation of their case. Counsel in Stites even had to engage in learning about film production in order to produce an understandable presentation for the jury in the summary jury trial. After the videotapes of the opposing parties were exchanged, the process repeated itself, once again requiring enormous time and effort to complete the final product. In any complex case centering upon competing and multiple expert opinions, counsel can expect a similar

112. See supra notes 40-48 and accompanying text.
113. See Enslin, supra note 47, at 48.
115. Id.
investment of time and expenditure of money.

As the Stites case indicates, the severe time limits in presenting a party's evidence in a summary jury trial, and the uniqueness of the proceeding may well necessitate a considerable amount of time to prepare an understandable case. Therefore, the amount of attorney fees that may end up attributable to preparation for participation in a summary jury trial are by no means insubstantial. Indeed, the parties may incur costs comparable to preparation for a full trial, even in circumstances where settlement is achieved. In circumstances where the proceeding serves no utility as a settlement device, or the parties have reached an impasse regarding settlement, the expenses and costs incurred may be unnecessary or doubly exorbitant.

Regardless of whether a case ultimately settles through a summary jury trial, counsel considering participation should weigh the device's role in bringing parties together. Often a major stumbling block to settlement will be a party's unyielding attitude in terms of potential liability and exposure. In theory, the advisory verdict in a summary jury trial provides a barometer or prediction of a potential jury's reaction to the evidence in each party's case. Its utility as a settlement device stems from the confidence parties have that the verdict will be duplicated at trial. With this confidence, a defendant's attention to potential exposure is heightened while a plaintiff's demands become more realistic in terms of the dollar values of the claims at issue. In addition, both the parties are given an emotional release in the sense that they feel they have had their day in court, while at the same time reinforcing the realities of the case.

One must remember, however, that the summary jury trial's utility as a settlement device depends upon the reliability of the jury verdict. Not all cases are amenable to resolution through a summary jury trial proceeding. For an advisory verdict to be reliable, the jury in such a proceeding should be able to view and evaluate the evidence as a jury would in a full trial, only in a much more

116. The summary jury trial before Judge Enslin in the Stites case, discussed supra notes 40-48, 106-109 and accompanying text, was conducted before a panel of twelve jurors, later reduced to ten, and then divided into two panels of five for deliberation. Each panel returned a different verdict, one for the defendant and one for the plaintiff. Counsel in Stites questioned the jurors, and discovered that both panels expressed overall confusion of the mass of evidence presented in such a short time. Counsel in Stites also noted that the panel ultimately for the plaintiff approached the evidence from an emotional perspective, whereas the panel that found for the defendant examined the evidence from a more logical perspective. The differing verdicts in Stites cast doubt on the summary jury trial's ability to accurately predict a verdict at a full trial on the merits. However, in Stites, the inconsistency of the verdicts seemed to have actually promoted the settlement. For further discussion concerning the reliability of a summary jury trial verdict and its overall role to facilitate settlement, see Jacobovitch & Moore, supra note 16, at 9-33; Ranii, supra note 10, at 30.
abbreviated form. Therefore, in cases where determinations as to
truthfulness and credibility are of paramount importance, the ab-
sence of the jury's observation of parties, witnesses, or expert wit-
nesses and the opportunity for cross-examination prevents the jury
from accurately performing that very important function. At the
summary jury trial, counsel presents the context of such testimony,
thus preventing the jury from being able to reach an accurate and
just assessment of credibility. In such cases, the advisory verdict
may be a poor predictor of the outcome of a full trial, and hence its
utility as a settlement device may be dubious.

For similar reasons, very complex cases may not be amenable to
a summary jury trial. Because the procedure is very abbreviated,
presentations by counsel must be compressed into a few hours. With
such time limits, not all of the arguments and evidence will be ade-
quately presented. The price of a quick and efficient summary jury
trial may result in the incomplete development of pertinent facts.
On the other hand, counsel may also run the risk that the complex-
ity of the case will result in a massive overload of information to the
jurors. Mass amounts of compressed information can mislead and
confuse the jury. In addition, defense counsel must recognize that
the summary jury trial's procedure will often place plaintiffs at an
advantage because momentum is not interrupted, as it is in a real
trial, by cross-examination and objections. Consequently, the ad-
visory verdict may prove to be of no more insight into potential lia-
bility and exposure than what counsel had anticipated before the
proceeding.

The fact that not all cases may be amenable to summary jury
trial resolution, however, should not automatically preclude counsel
from considering participation in the proceeding. The summary jury
trial offers the fringe benefit of obtaining a preview into an oppo-
nent's case, and an opportunity to have lay jurors analyze the issues.
Such insights can prove invaluable if the case goes on to trial. More-
over, counsel on both sides will have a better idea of what to expect

117. See Zatz, supra note 16, at 932-33. Jurors in the summary jury trial in
Stites commented that the substitution of live witnesses with videotape presentations
left the jurors suspicious of the entire process. Many wondered if the editing of tapes
had prevented them from hearing what all the witnesses had to say, thereby affecting
credibility determinations. Id; see also JACOBOVITICH & MOORE, supra note 16, at 22.
In a study of the SJT in the Northern District of Ohio, juror questionnaires revealed
that jurors felt that the SJT left too much to the juror's imagination, whereas a regu-
lar trial would have provided them with a clearer picture through actual observation
of witnesses. Some jurors also commented that the absence of witnesses and cross-
examination left determinations of credibility upon the lawyers. Id. at 22-23.
118. See Zatz, supra note 16, at 933-34.
119. Id. at 934. In a lengthy summary jury trial such as Stites, plaintiffs will
have several hours of what is in essence tantamount to a closing argument uninter-
rupted by cross-examination or objection. Id.
in terms of the evidence, and of their adversary's performance by way of strategy at the subsequent full trial on the merits.

Situations will inevitably arise where parties will want to avoid a summary jury trial in order to prevent their opponent any preview into their case. As illustrated by the *Strandell* case, a summary jury trial may harm a client's interests. For a summary jury trial to be effective as a settlement device, reliability in the verdict is crucial. To procure such reliability, presentation should be vehement and designed to "win" the verdict. Therefore, participation in a summary jury trial will require disclosure of important information, even perhaps disclosure of information which an opponent may otherwise have had no idea or to which they had no access. In *Strandell*, the plaintiffs procured a myriad of witness statements and other confidential work-product information that was privileged. With discovery closed, the defendants taking no depositions of witnesses, and the district court's denial of the motion to compel production of the multiple witness statements, the plaintiffs obtained a distinct tactical advantage over the defendants. With settlement at an impasse, a summary jury trial offered no benefit to the plaintiffs that would be worth sacrificing their tactical advantage. Indeed, a summary jury trial would only benefit defense counsel by allowing them to witness a rehearsal of the plaintiffs' trial strategy and learn what defendants had failed to discover when left to their own devices during discovery.\(^\text{120}\)

Such circumstances bring into light the potential danger that a summary jury trial, even in cases where the interests of a party are not at risk of harm, may be used purely by ill-prepared counsel as a manipulative means of gaining tactical advantage at trial.\(^\text{121}\) This is because a summary jury trial has the obvious benefit of offering a preview into the opponent's case and an opportunity to hear lay jurors analyze it. Parties not truly interested in settling, knowing this benefit of a summary jury trial, may implore its use from such pure tactical considerations rather than as means of pursuing resolution of the case. It is not difficult to conceive that in such circumstances counsel would be compelled to adopt one line of trial strategy over

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120. See *supra* notes 50-58 and accompanying text. Some commentators have argued that settlement is achieved when parties are uncertain as to the evidence or theories possessed by their adversaries. "[T]he most important factor in the making of settlements is the fear of unknown evidence in possession of one's opponent . . . [T]he mutual fear of unknown factors creates a greater desire to settle than is present if each party already knows exactly what the other side's evidence will be and has had an opportunity to prepare his case accordingly." Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480, 489-90 (1967).

121. See *supra* notes 90-93 and accompanying text. On the other hand, Judges Lambros and Enslin have reported that the SJT procedure does not work well when the lawyers "are inexperienced or unprepared . . . ." See Provine, *supra* note 14, at 70.
another for purposes of a summary jury trial as opposed to strategy to be utilized during a full trial on the merits.

In addition to the concerns expressed thus far, the overall nature of the summary jury trial poses potential problems regarding the role of the judge and of the advisory jury. Often the judge that will be presiding over the summary jury trial will also preside over the real trial if one becomes necessary. Counsel in the Stites case expressed the general concern that fundamental unfairness could result from bias a judge might develop about the merits of the case during a summary jury trial. However, judges often develop opinions concerning the merits at several proceedings of a case, and judges are charged, as a theoretical matter, to impartially conduct the case. Nonetheless, this does present a factor to consider in counseling clients on whether or not to consent to a summary jury trial.

Another factor to consider is what and when the jury in a summary jury trial will be told regarding its role. Judges have expressed the concern that the reliability of the verdict may be affected by telling the jury at the outset of the proceeding that their decision will not be binding. The jury might become apt to take the procedure less seriously, thereby rendering nugatory the very basis of a summary jury trial. Considering this consequence of impairing the reliability of the advisory verdict, most summary jury trial jurors will be told of their role, if at all, at the end of the procedure. In-

122. See Zatz, supra note 16, at 934. Summary jury trials have been conducted also by magistrates. See Jacobovitch & Moore, supra note 16, at 5; Ranii, supra note 10, at 1, 30; see also Provine, supra note 14, at 85. One judge assigned a summary jury trial to a magistrate expressly due to concerns of impartiality. See 5 Alternatives 1, 14 (Jan. 1987). The case, pending in the Eastern District of North Carolina, concerned antitrust allegations of predatory pricing, tying arrangements, and price discrimination. Judge Fox had a magistrate preside over the summary jury trial because of the court's concern that it maintain an ability to view the evidence freshly in the event the case failed to settle and went on to a full trial on the merits. Id. at 14.

123. See Zatz, supra note 16, at 934. Commentators have also noted that judicial participation in alternative dispute resolution mechanisms has the potential to prejudice a litigant to the extent a judge's perception of the case gained during the ADR proceeding may influence the court's ruling after a full trial. See Oesterle, Trial Judges In Settlement Discussions: Mediators Or Hagglers, 9 Cornell L. Forum 7, 10 (1982).

124. See Posner, supra note 6, at 386. But see 6 Alternatives 19 (Feb. 1988), which reviews the summary jury trial in the Stites case, discussed supra notes 40-48 and accompanying text. In the Stites case, the jurors were administered a questionnaire asking the jurors to respond to how they felt regarding not being told of the non-binding nature of the verdict. Id. at 20. The jurors unanimously responded that they felt it was appropriate not to have been told. Id. Indeed, in a related question, only one juror responded that he might have decided the case differently had he known the verdict would be non-binding. Id.

125. Id. One judge has followed the practice of advising the jury that their verdict will be non-binding prior to the start of the summary jury trial. See 6 Alternatives 22 (Feb. 1988). The attorneys involved in this case believed that these remarks did not deter the jury from following the SJT closely. Id.
indeed, current guidelines for summary jury trial procedures, as established by Judge Lambros, do not provide for telling the jurors in advance of the nonbinding nature of their decisions, thereby preserving, in theory, the reliability of the advisory verdict. 126

Judges have also expressed the more general concern that the advisory nature of the summary jury trials could undermine the overall jury system. 127 It is argued that the very act of rendering a binding verdict is an exercise of governmental power by jurors, and thus provides jurors with the incentive to responsibly exercise their role. Indeed, at present, some courts have created separate jury pools, with those jurors who have sat on a summary jury trials being disqualified from regular jury service. 128 Therefore, the potential is real that when jurors discover they have been misled regarding the nature of their verdict, the incentive to perform well will be lost and could result in a decline in juror conscientiousness, and in the utility of the summary jury trial procedure itself. 129

IV. CONCLUSION

In sum, while the summary jury trial is not an all-purpose panacea to reduce the congestion of federal district court dockets, its proponents argue that a near decade worth of experience with the procedure suggests that its discriminate use can assist counsel to procure justice for their clients in an expeditious and cost-efficient manner. However, its utility as a settlement device depends substantially upon the motives of the counsel and parties who participate. Parties who endeavor seriously to resolve the case with a favorable settlement should engage in the procedure with the goal of convincing their opponent of the superiority of their case or that continued litigation might not prove to be cost-effective. Impromptu of the device by ill-prepared counsel motivated by a desire to gain a strategical advantage at the subsequent full trial on the merits will only reduce the reliability of the advisory verdict and destroy the procedure's perceived theoretical efficacy to promote settlement.

Also fundamental to the summary jury trial's utility as a settlement device is that its use be discriminately applied to cases amenable to such resolution. The Seventh Circuit's decision in Strandell underscores the notion that the summary jury trial is not the answer in every case, especially when pre-trial settlement negotiations reach

126. See Lambros, supra note 8.
127. See Posner, supra note 6, at 386-87.
128. Id. Judge Becker of the Third Circuit also has criticized SJT procedure for taking jurors from the "regular venue to participate in what is essentially a mock trial . . . ."
129. See Posner, supra note 6, at 386-87.
an impasse. Cases may not be amenable to resolution in a summary jury trial due either to the complexity of the case or to the import of credibility determinations. In other cases, a summary jury trial could work to undermine the interests of a client.

While Strandell provides that a party cannot be compelled to participate in a summary jury trial, the Seventh Circuit has left open its utilization on a voluntary basis. Questions persist, however, as to the legality of a consensual summary jury trial, thereby raising the necessity for amendatory legislation to Title 28 or the Federal Rules of Civil Procedure. With the increasing use of the summary jury trial, counsel can ill afford to volunteer the participation of their client in the procedure without considering the potential benefits and adverse consequences to the interests of their client.