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The Mandatory Summary Jury Trial in Federal Court: Foundationally Flawed

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I. INTRODUCTION

The rising federal civil caseload continues to create unbridled problems of expense and delay. Whether due to the sheer volume of cases or the increased complexity of litigation, the judicial system seems unable to adapt and respond. The courts' decreasing ability to effectively resolve its crises has led to much discourse, suggesting the necessity for change and improvement of the system,[1] some of which have been implemented.[2] Nevertheless, these changes have failed to improve the administration and execution of civil justice in any significant way.[3]

These problems raise important questions about managing the expanding dockets without sacrificing fairness to litigants in each case and to the public at large.[4] Alternative dispute resolution (ADR) is a

1. Over 10 years ago, the Department of Justice prepared a document addressing this issue. *See* Report of the Department of Justice Commission on the Revision of the Federal Justice System, *The Needs of the Federal Courts* (Jan. 1977) [hereinafter Rosenberg Report]. The concerns raised and suggestions offered in this report remain relevant today.

2. For example, federal magistrates have assumed more responsibility over federal caseload, assisting district court judges in a variety of tasks, and presiding over civil cases if parties consent. *See* Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968) (codified as amended in scattered sections of 18 U.S.C. §§ 202, 3006A, 3041, 3045, 3060, 3102, 3116, 3184, 3191, 3195, 3401-02, 3771 (1982 & Supp. IV 1986); 28 U.S.C. §§ 631-639 (1982 & Supp. IV 1986)). Additionally, the Federal Rules of Civil Procedure have been amended twice, in 1980 and 1983, to better facilitate judicial management of the crushing caseloads.

3. *See* Administrative Office of the United States Courts, *1987 Annual Report of the Director* (1987); Administrative Office of the United States Courts Statistical Analysis & Reports Division, *Federal Judicial Workload Statistics* (Mar. 1987). Moreover, the administrative problems on the civil side of the federal docket are certain to worsen when the impact of the Sentencing Guidelines is recognized. *See* 18 U.S.C. §§ 3551-86 (1982 & Supp. 1986) (codification of sentencing guidelines).

4. Former Chief Justice Burger recognized the need for the judicial system to implement alternatives:

> Experimentation with new methods in the judicial system is imperative given growing caseloads, delays, and increasing costs. Federal and state judges throughout the country are trying new approaches to discovery, settlement negotiations, trial and alternatives to trial that deserve commendation and support . . . . Legal educators and scholars can provide a valuable service by studying new approaches and reporting successful innovations that can serve

mechanism to which lawyers, litigants, and courts are turning with increasing frequency to save time and money normally required by traditional civil litigation.[5] With broad support throughout the country, ADR may be the most expedient and viable approach to solving the federal court crisis.[6] Proponents of ADR maintain that a quick and fair result will be obtained in individual cases, thereby benefiting the system as a whole.[7]

Many district court judges utilize ADR techniques to expedite their congested dockets. Indeed, many have experimented effectively with different methods, including, for example, the summary jury trial.[8] Furthermore, various district courts have adopted local rules authorizing experimentation with summary jury trials.[9] The use of ADR devices raises the question of the extent to which federal courts, in the pursuit of settlements, may impose such mechanisms upon litigants.[10]

The summary jury trial, a popular yet controversial ADR option, is an abbreviated trial at which a jury renders a non-binding verdict. The procedure is designed to improve the accuracy of the litigants' expectations about trial outcomes at a lower cost than proceeding through traditional forms of litigation. Proponents of the summary jury trial assert that the device makes settlement substantially more likely and averts full trials in over ninety percent of the cases.[11] However, several commentators have criticized the procedure by em-

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as models for other jurisdictions, and on experiments that do not survive the scrutiny of careful testing.

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5. Other options to alleviate the congested dockets include further amending the Federal Rules of Civil Procedure and curtailing or limiting district court jurisdiction over certain types of actions, such as diversity cases. *See* Rosenberg Report, *supra* note 1.

6. Much has been written extolling the virtues of ADR. Many authors have asserted that ADR should play a major role in improving the catastrophic problems faced by today's federal district courts. *See, e.g.*, J. MARKS, E. JOHNSON & P. STANTON, DISPUTE RESOLUTION IN AMERICA: PROCESS IN EVOLUTION 34-38 (1984); Cook, *A Quest for Justice: Effective and Efficient ADR Processes*, 1983 DET. C.L. REV. 1129.

7. *See* Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

8. *See* Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984) [hereinafter Lambros]; Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363 [hereinafter *Judge's Role*]; Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Lieberman & Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. CHI. L. REV. 424 (1986); Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829 (1986).

9. *See, e.g.*, W.D. MICH. CIV. R. 44 (West 1986); N.D. OHIO LOCAL R. 17.02 (Anderson 1988); W.D. OKLA. R. 17(I) (West 1988).

10. *See* Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Posner, *The Summary Jury Trial & Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI L. REV. 366 (1986); Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

11. Lambros, *supra* note 8, at 472; *see* Marcotte, *Summary Jury Trials Touted*, 73

phasizing the need to preserve traditional forms of adversarial litigation, and noting that the added procedural layer increases costs and potentially prejudices the parties.[12] One writer has doubted the proclaimed efficiency of the summary jury trial.[13] Finally, some federal court rulings have questioned the foundational basis for requiring parties to participate in the mandatory summary jury trial, even though its results are non-binding.[14] This criticism is troubling because it questions the legality of the process. Because of the intractable problems facing federal courts and the proclaimed successes of the summary jury trial, inquiry into the court's authority to order such a process is crucial. Only with the proper authority can federal district courts experiment and systematically employ new methods to effectively alleviate the increasing burden on the federal court system.

This comment examines whether mandatory summary jury trials are congressionally authorized or whether federal courts are exercising powers beyond their statutory mandate when they require litigants to participate in such procedures. Part II explains the summary jury trial process. Part III discusses the constitutionality of summary jury trials and analyzes the various rules and theories upon which courts and commentators rely to sustain the basis for this type of program. Part IV concludes that despite the high praise and desperate demand for the innovative summary jury trial, federal district courts may lack the necessary foundation to order such trials absent statutory authorization by Congress[15] or favorable United States Supreme Court resolution.

A.B.A. J., Apr. 1, 1987, at 27; *see also* Angiolillo & Tell, *From Jury Selection to Verdict—In Hours*, BUS. WK., Sept. 7, 1987, at 48.

12. Delgado, Dunn, Brown, Lee & Huppert, *Fairness & Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WISC. L. REV. 1359 (1985).

13. No empirical study has substantiated its efficiency or compared its results to other settlement techniques. Posner, *supra* note 10, at 382. Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit has suggested that a cursory review of the disposition statistics advances the opposite conclusion: The device does not increase judicial efficiency. *Id.* at 381-83. Furthermore, it is often difficult to decipher what factor advanced the settlement. The cases settled during or after the summary jury trial may well have settled without the use of the technique.

14. *See infra* Part III.

15. Legislation has been proposed in Congress that would allow district courts to convene mandatory summary jury trials. *See* H.R. 473, 100th Cong., 1st Sess., 133 CONG. REC. H157 (daily ed. Jan. 7, 1987) (Alternative Dispute Resolution Promotion Act of 1987); S. 2038, 99th Cong., 2d Sess., 132 CONG. REC. S848 (daily ed. Feb. 3, 1986) (Alternative Dispute Resolution Promotion Act of 1986).

II. THE SUMMARY JURY TRIAL PROCESS

The pretrial settlement of a case provides a cost savings to the parties, the judicial system, and the public at large. One aspect of this savings is the elimination of selecting a jury. Some cases, however, are not amenable to settlement through the common methods of dispute resolution for a variety of reasons. Often, litigants refuse to compromise without first having their "day in court"—an opportunity to tell their version of the story.[16] Before hearing both sides of the case presented to an objective panel of factfinders, lawyers and their clients may not recognize the weaknesses of their case and accordingly will make unreasonable demands in settlement negotiations.[17] Even parties aware of the flaws in their case may believe they still can "win" or at least fare better by appealing to a jury.[18] This barrier to settlement often leads to protracted litigation and expense.

The summary jury trial[19] presents a solution which seeks to break down this barrier and avoid long trials which clog the dockets and drain federal resources.[20] Alternatively, the summary jury trial can help streamline the subsequent jury trial by limiting the issues to be litigated.[21] The summary jury trial is inherently different from other ADR devices. This distinction manifests itself through use of the traditional concept of trial by jury. It is the verdict by a jury of one's peers which allows the parties to believe that their case has been heard and an impartial decision reached.[22] Summary jury trials appeal to the emotional sense of justice, consistent with the American justice system's concepts of ventilation and confrontation in a struc-

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16. Lambros, *supra* note 8, at 468; *Judge's Role*, *supra* note 8, at 1374.

17. *See* Lambros, *supra* note 8, at 468. This author responds, however, that it is easy to ascertain the defects in one's position without the help of adversaries.

18. Lambros, *supra* note 8, at 468; *Judge's Role*, *supra* note 8, at 1374.

19. This device was introduced in March 1980 by federal district Judge Thomas Lambros in the Northern District of Ohio. Posner, *supra* note 10, at 368, 377 & n.21; *see Judge's Role*, *supra* note 8, at 1373. For examples of the summary jury trial in action, see Federal Reserve Bank v. Carey Canada, Inc., Civ. No. 3-86-185 (D. Minn. Nov. 17, 1988) (1988 WESTLAW 135862, ALLFEDS library); Negin v. City of Mentor, 601 F. Supp. 1502, 1505 (N.D. Ohio 1985); Rocco Wine Distribs., Inc. v. Pleasant Valley Wine Co., 596 F. Supp. 617, 620-621 (N.D. Ohio 1984).

20. However, some commentators have argued that settlement is achieved when parties are unsure of 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 the possession of one's opponents. . . . [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) (emphasis in original). Thus, the summary jury trial may encourage parties to solidify their positions.

21. Lambros, *supra* note 8, at 468.

22. *Id.*; *Judge's Role*, *supra* note 8, at 1374.

tured adversarial system. No other alternative dispute mechanism uses this basic foundation of our present judicial system.

The summary jury trial is simply an abbreviated trial without the presentation of testimony. It consists of a brief voir dire by the court to select a six-person panel of jurors, a preliminary instruction on the law, and opening statements by counsel. Counsel then have roughly one hour each to present the evidence, factually summarizing the anticipated testimony of potential witnesses and offering exhibits that would be admissible in a subsequent trial. After counsel make their closing arguments, the court instructs the jury on the law and the jury renders its advisory verdict.[23] The jury may return a consensus or, if unable to agree, individual verdicts.[24]

The summary jury trial is a flexible device that helps considerably in the pre-trial settlement of trial-bound cases.[25] The process is not confined to any particular type of action.[26] However, the summary jury trial is not always appropriate. The court has the discretion to determine whether the procedure is suitable. For example, courts typically convene summary jury trials where there has been a jury demand in a protracted case which relies heavily upon circumstantial evidence as opposed to those cases where the credibility of witnesses is paramount.[27]

The summary jury trial can be an effective predictive process for

23. Spiegel, *supra* note 8, at 829. Some lawyers protest the partiality and overstating of evidence in the presentations by counsel, despite even the most earnest efforts to be factual. *Id.* at 835-36.

24. Lambros, *supra* note 8, at 471.

25. Over 65 different federal district courts have utilized the summary jury trial device. Marcotte, *supra* note 11, at 27. Federal districts that presently employ the summary jury trial mechanism include: Southern District of Florida, Southern District of Illinois, District of Massachusetts, Eastern District of Michigan, Western District of Michigan, District of Montana, Northern District of Ohio, Southern District of Ohio, Western District of Oklahoma, Eastern District of Pennsylvania, and Middle District of Pennsylvania. *Id.*

26. The summary jury trial has been successfully used in the following types of actions: negligence, products liability, toxic tort, personal injury, contract, discrimination, admiralty and antitrust. Lambros, *supra* note 8, at 472.

27. Spiegel, *supra* note 8, at 835. Some lawyers maintain, however, that they *always* depend on a jury's response to the credibility and demeanor of witnesses. The complexity of a case may be a factor weighing against employing the summary jury trial. Additionally, situations may arise where parties will want to avoid the summary jury trial in order to prevent their opponents from previewing their case. When settlement is at an impasse or there is an appearance of bad faith, a party may conclude that the summary jury trial offers no benefit worth exposing its strategy. *See* Maatman, *The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County*, 21 J. MARSHALL L. REV. 455, 484 (1988).

determining the ultimate outcome of a case.[28] The uncertainty of a jury's verdict—often the sole bar to settlement—is therefore reduced. The role of the summary jury has been likened to that of a weather forecaster.[29] While there is a recognized margin of error in both weather and future jury predictions, the goal of the court is to reduce the margin of error in the latter. This paves the way for a more realistic possibility of settlement.[30] The proceeding, which usually lasts from one half day to two days,[31] is designed to provide a "no risk method by which parties can get the perception of jurors on the merits of their case without a large investment of time or money."[32] Where the summary jury trial does not culminate in settlement, the value of the process is not diminished. The summary jury trial crystallizes the issues and ensures full preparation by the parties.

The proceeding is purely advisory unless the parties agree to be bound by a consensus verdict, in no way affecting the parties' right to a full trial on the merits.[33] The process is merely a predictive tool that gives parties a reliable basis for building an acceptable settlement. The summary jury trial permits counsel "to achieve a just result for their clients at minimum expense."[34]

III. LEGALITY OF THE MANDATORY SUMMARY JURY TRIAL

There are two factors in determining the legality of court-ordered summary jury trials.[35] First, there is the question of its constitutionality. Second, there is the question of the federal court's authority to employ it. Only if the process satisfies both considerations can the federal courts continue to require the use of summary jury trials.

A. Constitutionality of the Mandatory Summary Jury Trial

The United States Constitution gives civil litigants in federal court the right to be heard by a federal judge.[36] Typically, the summary jury trial is conducted by a district court judge, thus satisfying this

28. For a discussion concerning the reliability of summary jury verdicts and its role in furthering settlement, see Jacoubovitch & Moore, *Summary Jury Trials in the Northern District in Ohio*, in FEDERAL JUDICIAL CENTER 9-33 (May 1982).

29. *Judge's Role*, *supra* note 8, at 1371.

30. Lambros, *supra* note 8, at 468.

31. *Id.* at 469; Spiegel, *supra* note 8, at 830.

32. Lambros, *supra* note 8, at 469.

33. *Id.*; Lambros & Shunk, *supra* note 8, at 46.

34. Lambros, *supra* note 8, at 469; Lambros & Shunk, *supra* note 8, at 46.

35. The consensual summary jury trial has not been challenged. Although courts have intimated that the Federal Rules of Civil Procedure permit the court to conduct the summary jury trial with the consent of the parties, its legality has not been fully explored. *See* Maatman, *supra* note 27, at 477. The voluntary practice is therefore outside the scope of this discussion.

36. Article III, section 1 provides in pertinent part: "The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall,

constitutional entitlement. Often, however, a federal magistrate presides over the summary jury trial upon assignment by the district court.[37] This creates no violation of the right because the resulting jury verdict is non-binding. The parties, therefore, have the opportunity to a *de novo* trial on the merits before a federal judge.[38]

The United States Constitution affords civil litigants the right of trial by jury[39] in which parties are not "deprived of . . . property, without due process of law."[40] Because the parties are entitled to a jury in the *de novo* trial, the summary jury trial does not infringe upon this seventh amendment right. However, the fifth amendment raises some concern. The summary jury trial requires parties to show, in advance, their trial strategy. This may hinder the performance of counsel at the trial on the merits and thereby affect the outcome. To the extent that the exposed strategy at the summary jury trial interferes with the delicate balance created by the Federal Rules of Civil Procedure,[41] due process rights may be in jeopardy.[42] Nonetheless, absent proof that the revealed strategy influenced the subsequent verdict, the otherwise unaffected *de novo* trial satisfies due process requirements.[43]

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at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1.

37. Lambros, *supra* note 8, at 470.

38. This is a horizontal process from summary jury trial to trial on the merits, and is not to be seen as appellate review. Because the verdict is not admissable at the full trial, it is certainly less intrusive than other procedures by which a determination on a non-dispositive matter may be accorded great weight by the subsequent trier of fact. *See* United States v. Raddatz, 447 U.S. 667 (1980) (due process to determine credibility requires only a *de novo* determination, not a full hearing).

39. The seventh amendment provides in pertinent part: "In suits at common law, . . . the right of trial by jury shall be preserved . . . ." U.S. CONST. amend. VII.

40. U.S. CONST. amend. V.

41. The Rules Enabling Act, 28 U.S.C. § 2072 (1982 & Supp. 1988), reflects the joint responsibility of the legislative and judicial branches of the federal government in balancing the competing concerns of effective judicial management and protection of individual rights. *See* Hanna v. Plumer, 380 U.S. 460 (1965).

42. Judge Arthur Spiegel of the United States District Court for the Southern District of Ohio, Seventh Circuit, argues that the likelihood of such a deprivation is remote because no surprises, blindsiding or ambushing methods are tolerated in federal courts. *See* Spiegel, *supra* note 8, at 835. However, this contention is not responsive to the disclosure of trial strategy which undermines the concept underlying the American system of justice that allows a party to present his case as he deems best. *See* Maatman, *supra* note 27, at 471.

43. Attorneys complain about the extra work and expense for their clients due to the added layer of litigation. If a summary jury succeeds, it certainly cuts down on the time and money otherwise spent continuing the litigation. If settlement does not result, the work of counsel and the court has not been wasted; the trial on the merits will be streamlined and scheduled shortly thereafter. *See* Spiegel, *supra* note 8, at 835.

B. *Authority for the Mandatory Summary Jury Trial*

Since its inception, the mandatory summary jury trial mechanism has been challenged by at least one court which questioned federal court authority to coerce participation.[44] Federal courts have limited jurisdiction, and their power is not self-executing; it must be authorized by Congress.[45] Congress has delegated authority to these courts through the Federal Rules of Civil Procedure (federal rules).[46] Therefore, when determining whether or not a procedure is within the scope of its judicial power, courts must look to the federal rules. Is the court-ordered summary jury trial within the parameters of the judicial power established by the federal rules?

District courts have the inherent power to manage and control their dockets.[47] Congress has empowered lower federal courts to issue supplementary rules of procedure to conduct their business.[48] These powers must be exercised in a manner harmonious with the federal rules.[49] To the extent that the mandatory summary jury trial contravenes the balance instituted by the federal rules, the authority by the federal courts to apply this procedure may be unavailable.

Courts have both relied upon and rejected the federal rules as the statutory foundation for the mandatory summary jury trial.[50] Be-

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Furthermore, many court practices and procedures require time and expense to which counsel have no redress.

44. Strandel v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987). One probable reason for the lack of challenges in this area is the difficulty in appealing discovery orders. Attempts to file a mandamus action or interlocutory appeal are usually unsuccessful in the context of discovery orders. *See* Maatman, *supra* note 27, at 469 n.58. A party may challenge a discovery order by way of criminal contempt; the party could simply violate the order and appeal from the contempt judgment. The attendant risk of punishment if the challenged order is upheld on appeal renders this route of limited usefulness. *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). When plaintiffs' counsel in *Strandell* refused to comply with the court's order to participate in the summary jury trial, he was held in criminal contempt. *See* Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988).

45. *See* Sheldon v. Sill, 49 U.S. (8 How.) 441, 446-49 (1850).

46. *See generally* FED. R. CIV. P. (1982 & Supp. IV 1986). The federal rules are the result of a careful process designed to integrate "both . . . the need for expedition of cases and the protection of individual rights." S. REP. NO. 1744, 85th Cong., 2d Sess. 2, *reprinted in* 1958 U.S. CODE CONG. & AMIN. NEWS 3023, 3026.

47. *See* Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962).

48. 28 U.S.C. § 2071 (1982).

49. *See* Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44 (E.D. Ky. 1988). Rule 83 states that a district court may "make and amend rules governing its practice *not inconsistent with [the federal] rules.*" FED. R. CIV. P. 83 (emphasis added).

50. The conflict is expressed by a split among the federal circuits. *Compare Strandell*, 838 F. 2d at 888 (federal district court may not require litigants to participate in non-binding summary jury trials) *with McKay*, 120 F.R.D. at 49 (court may order summary jury trial as a permissible settlement device) *and* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (court may require parties to participate in summary jury trial proceedings) *and* Cincinnati Gas & Elec. Co. v. General Elec. Co.,

cause the federal rules do not detail specific authorized practices, the conflict centers on the congressional intent behind the federal rules.[51]

Rule 1 of the federal rules provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[52] This rule does not stand alone but serves as a backdrop for interpretation of the subsequent rules.

Rule 16 governs the court's pretrial power to manage and control its docket. Rule 16(a), concerning pretrial activities, provides:

> In any action, the Court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action; . . . (4) improving the quality of the trial through more thorough preparation; and, (5) facilitating the settlement of the case.[53]

Rule 16's provisions do not grant courts the power to employ mandatory summary jury trials.[54] The plain language of Rule 16(a) allows the court, at its discretion, to direct appearances for pretrial "conferences." A summary jury trial is *not* a conference. It is a procedure far more intrusive than a conference.[55]

Rule 16(c), concerning subjects to be discussed at pretrial conferences, provides:

> 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 *extra*judicial procedures to resolve the dispute; . . . (10) the need for adopting special

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117 F.R.D. 597 (S.D. Ohio 1987) (district court has power to order summary jury trial to which first amendment right of access to judicial proceedings does not attach).

51. Congressional intent need not always be expressed. Court have filled the unanticipated gaps in the statutory scheme. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Notably, the Supreme Court interpretations of a statute, with respect to its ambiguity or its silence, are numerous. The test varies with the Court's attitude toward judicial activism. *Compare* Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33 (1916) (implying a private right of action under the Federal Safety Appliance Act of 1910) *with* Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) (no implied private right of action under the Securities and Exchange Act of 1934). With the shift since 1976 toward strict interpretation, the ultimate decision of the Court may well reflect a restrictive view of what power 28 U.S.C. § 2071 confers to federal district courts.

52. FED. R. CIV. P. 1.

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

54. *See Strandell*, 838 F.2d at 887 (parameters of rule 16 do not permit courts to compel parties to participate in summary jury trial); *but see* Federal Reserve Bank v. Carey Canada, Inc., Civ. No. 3-86-185 (D. Minn. Nov. 17, 1988) (1988 WESTLAW 135862, ALLFEDS Library) (district court has inherent power under rules 1 and 16 to compel participation in summary jury trial); *McKay*, 120 F.R.D. at 48-49; *Arabian Am. Oil Co.*, 119 F.R.D. at 448 (rule 16 furnishes authorization for courts to compel summary jury trial).

55. *But see Arabian Am. Oil Co.*, 119 F.R.D. at 448 ("Rule 16 calls these procedures conferences, but what is in a name.").

> procedures for managing potential difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and (11) such other matters as may aid in the disposition of the action.[56]

The drafters of rule 16 certainly intended to provide "a neutral forum" for discussing the possibility of settlement.[57] Rule 16(c) states that "participants at any conference under this rule may consider and take action with respect to . . . (7) the use of extrajudicial procedures . . . [and] (10) the need for adopting special procedures." The summary jury trial is "hardly an extrajudicial procedure."[58] The procedure is conducted inside the courtroom in a federal courthouse, before an article III judge, with jurors chosen from the court's ordinary pool who are paid with congressionally allocated funds.[59] Although the summary jury trial falls within the meaning of "special procedure," this subsection and the advisory committee's notes merely contemplate the discussion, not the implementation, at the pretrial conference of employing experimental devices.[60] After all, the title of the subsection is "subjects to be discussed" at the pretrial conference. Therefore, at the mandatory pretrial conference, the parties may discuss and agree to use the summary jury trial device.

Rule 16 was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation.[61] The advisory committee's note makes it clear that it was "not the purpose of Rule 16[(c)] to impose settlement negotiations on unwilling litigants."[62] Furthermore, the note states that "[t]he rule does not make settlement conferences mandatory because they would be a waste of time in many cases."[63]

Although settlement is desirable, the court may not pursue it at all costs. As the Second Circuit, commenting on the 1983 version of rule 16, noted: "Rule 16 . . . was not designed as a means for clubbing the

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56. FED. R. CIV. P. 16(c) (emphasis added).

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

58. *See* Maatman, *supra* note 27, at 478; Posner, *supra* note 10, at 385-86.

59. *See* Maatman, *supra* note 27, at 478.

60. *See* Posner, *supra* note 10, at 385; *but see* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 47-48 (E.D. Ky. 1988); Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill. 1987) *rev'd*, 838 F.2d 884 (7th Cir. 1988); Lambros, *supra* note 8, at 469-70.

61. *Strandell*, 838 F.2d at 887.

62. FED. R. CIV. P. 16 advisory committee's note. *See* 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1525 (Supp. 1988) ("[T]his new subdivision does not force unwilling parties into settlement negotiations."). The argument that distinguishes between forcing settlement and forcing settlement negotiations is not tenable in circumventing the explicit language in the advisory committee's note. *See Strandell*, 115 F.R.D. at 336 (language in comments does not preclude court ordering process to enhance possibility of fruitful negotiations); G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1415, 1424 (7th Cir. 1988) (Flaum, J., dissenting).

63. FED. R. CIV. P. 16 advisory committee's note. *See* Flanders, *Case Management & Court Management in the United States District Courts*, in FEDERAL JUDICIAL CENTER 37-39 (Sept. 1977).

parties—or one of them—into an involuntary compromise."[64] The rule 16 pretrial conference was intended to be "informational and factual" rather than coercive.[65]

While the drafters intended to facilitate settlement by permitting the trial judge to "explor[e] the use of procedures other than litigation to resolve the dispute," including "urging the litigants to employ adjudicatory techniques," clearly they did not intend to mandate participation by the parties.[66] The drafters' commentary with respect to the other parts of the rule substantially reinforces this noncoercive interpretation of rule 16. The last sentence of rule 16(c), added in 1983, reads: "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."[67] The drafters' note describes the amendment: "The reference to 'authority' is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to be unreasonable."[68] This subsection was designed solely to ensure proper pretrial conference preparation so that the conference is more than ceremonial.

Federal rule 83 provides: "In all cases not provided for by rule, the district judges and magistrates may regulate their practices in any manner *not inconsistent with* [the federal rules or any local rules]."[69] Because the mandatory summary jury trial is inconsistent with rule

64. Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (failure of physician to offer to settle claim for $20,000, as urged by federal district court during pretrial conference, did not warrant imposition of sanctions after claim was settled for $20,000 after one day of trial). *Cf. G. Heileman Brewing Co.*, 848 F.2d at 1420 (court cannot force person to attend pretrial conference if he is a represented party). Other circuit court decisions issued prior to the 1983 version of rule 16 substantiate this noncoercive view. *See* Indentiseal Corp. v. Positive Identification Sys., Inc., 560 F.2d 298 (7th Cir. 1977) (district court lacked power to order a party to undertake further discovery because rule 16 was noncoercive); J. F. Edward Const. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (district court could not use rule 16 to compel parties to stipulate to that which they could not voluntarily agree). Although these cases antedate the amendments to rule 16, nothing in the amended rule or in the advisory committee's notes suggests that the changes were intended to make the rule coercive.

65. *J. F. Edwards Constr. Co.*, 542 F.2d at 1323 (quoting Clark, *To an Understanding Use of Pretrial*, 29 F.R.D. 454, 456 (1961)).

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

67. FED. R. CIV. P. 16(c).

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

69. FED. R. CIV. P. 83 (emphasis added).

16,[70] rule 83 offers no basis to sustain the practice.[71] Rule 83 further provides that each district court may "make and amend rules governing its practice *not inconsistent with* [the federal rules]."[72] District courts have implemented local rules which allow them to employ the summary jury trial procedure.[73] Because the mandatory summary jury trial *is* inconsistent with rule 16, relying on a local district court rule as a basis for the mandatory summary jury trial is equally as inappropriate as relying on rule 83.

Federal rule 39(c) permits the district court, "[i]n all actions not triable of right by a jury," to "try any issue with an advisory jury."[74] Note, however, that the summary trial jury is not a traditional advisory jury in that it does not advise the judge how to decide a case,[75] but rather provides an inducement to settle. Therefore, summary jury trials fall outside the parameters of rule 39(c).[76] Furthermore, the rule excludes the summary jury trial because it is used in actions triable of right by a jury.[77]

Additionally, the mandatory summary jury trial as a pretrial settlement device seriously affects the well established rules concerning

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70. *See* text accompanying notes 50-68.

71. Several sources cite rule 83 as a foundation for court-ordered summary jury trial, in that the procedure is not inconsistent with the federal rules and particularly Rule 16. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988); Lambros, *supra* note 8, at 470. By independently relying on rule 83 as a statutory basis for authorizing mandatory summary jury trials, these sources bootstrap their argument. The premise that this argument depends on (*i.e.*, that it is not inconsistent) is false, and therefore destroys the rule 83 authority. *Cf.* G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F.2d 1418, 1421 (7th Cir. 1988) (district court order to defendant to send representative other than its attorney to court-ordered settlement conference was inconsistent with federal rules because rule 16 does not authorize court to order represented parties to appear); J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976) (standing order that arguably mandated counsel to stipulate facts was inconsistent with federal rules because no federal rule authorized court to order counsel to stipulate facts).

72. FED. R. CIV. P. 83 (emphasis added).

73. For example, rule 23 of the Eastern & Western Districts of Kentucky reads: "A judge may, in his discretion, set any civil case for summary jury trial or other alternate method of dispute resolution." Such rules, on their face, do not exceed the authority given by Congress because they do not include language of compulsion. Some rules, however, have been construed, based on the original intent of the drafters, to include mandatory summary jury trials. *See McKay*, 120 F.R.D. at 44 n.3. Because this constuction of the local rule *is* inconsistent with rule 16, the local rule is invalid. *Id.*

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

75. As the advisory committee's note explains, rule 39(c) codifies the traditional practice in equity, maritime law, and other nonjury fields whereby the judge could choose to convene a jury to advise him on questions of fact. *See, e.g.*, Kohn v. McNulta, 147 U.S. 238, 240 (1893); Cities Serv. Co. v. Ocean Drilling & Exploration Co., 758 F.2d 1063, 1071-72 (5th Cir. 1985); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICES & PROCEDURE § 2335 (1971).

76. *See* Posner, *supra* note 10, at 385.

77. *Id.*

discovery and work product privilege.[78] These rules reflect a carefully created balance between the competing concerns for pretrial disclosure and party confidentiality.[79] The compelled summary jury trial could easily tip the balance by requiring disclosure of information obtainable, if at all, through the mandated discovery process. It is, therefore, unreasonable to assume that "the Supreme Court and Congress would undertake, in such an oblique fashion, such a radical alteration of the considered judgments contained in Rule 26 and the case law."[80]

The 1984 Judicial Conference formally endorsed "the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases."[81] The phrase "experimental use" replaced language limiting the endorsement to those summary jury trials held "only with the voluntary consent of the parties."[82] "Experimental use" incorporates voluntariness, as emphasized by the conference's failure to use the word "mandatory."

There can be no dispute that a congested docket places greater stress on a court's ability to fulfill its responsibilities. Nor can it be denied that the exigencies of modern caseloads demand novel and imaginative alternatives. Nonetheless, "a crowded docket does not permit a court to avoid the adjudication of cases properly within its congressionally-mandated jurisdiction."[83] Even the best of policy objectives may not give district courts cause to expand the federal rules. As stated by the Seventh Circuit, "Innovative experiments may be admirable, and considering the heavy case loads in the dis-

78. *See* Hickman v. Taylor, 329 U.S. 495 (1947); Strandell v. Jackson County, 838 F.2d 888 (7th Cir. 1987); FED. R. CIV. P. 26-37.

79. *Strandell*, 838 F.2d at 888.

80. *Strandell*, 838 F.2d at 888. Advocates of the mandatory summary jury trial assert that this concern is misplaced. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 45, 48 (E.D. Ky. 1988) ("If . . . the summary jury trial prevents a litigant from saving some juicy tidbit as a surprise for the trial a la Perry Mason, the pretrial orders . . . are supposed to do the same thing. The trial by ambush has long been abolished from the federal system."). *Id.*

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

82. *See* Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill. 1987), *rev'd*, 838 F.2d 884 (7th Cir. 1988). The allegation that the deletion of the consensual language authorizes the mandatory summary jury trial fails to account for other changes made to the initial draft. *McKay*, 120 F.R.D. at 48. Furthermore, the Judicial Conference is not the Congress and is in no better position to analyze rule 16 than are the individual district courts themselves.

83. *Strandell*, 838 F.2d at 888; *see* Thermtron Prods. Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

trict courts, understandable, but experiments must stay within the limitations of the statute."[84]

IV. CONCLUSION

Not all judicial power need be expressly delegated by Congress. Lack of clear authority, however, is reason for hesitation in sensitive areas. The fact that Congress appropriates money for jurors without indicating how jurors are to be used does not empower federal judges to summon jurors to serve as mediators.[85] Despite valid policy objectives in alleviating the crisis of growing dockets, federal courts presently lack the authority to convene summary jury trials without the consent of the parties involved.[86] Only adoption of legislation[87] or favorable Supreme Court determination can empower the courts to compel participation in summary jury trials. Supreme Court attention to this controversy may resolve the problem before legislation is adopted, but through legislation, Congress has the final word to effectuate its intent. Until then, despite the proclaimed benefits of the process, federal courts should not order the summary jury trial against the will of the parties.

NINA JILL SPIEGEL*

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84. Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978).

85. *See* Jury Selection & Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 54 (codified as amended at scattered sections of 28 U.S.C. §§ 1821, 1862-69, 1871 (1982 & Supp. IV 1986)).

86. The contention is that, even where participation is compelled, the process is nonetheless consensual because the verdict is non-binding. Lieberman & Henry, *supra* note 8, at 436-37 n.53. This defies common sense, and is without merit.

87. *See supra* note 15.

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