Blueprint for a Summary Jury Trial

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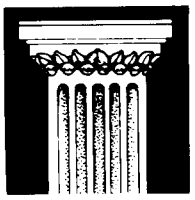
The Grand Rapids courtroom is hushed as the judge gives his final instructions to the jury. The six jurors have heard evidence in a complex employment discrimination case that the attorneys estimated would take four weeks to present. Yet this entire trial, including the jury's deliberation, will be completed in a single day.



The summary jury trial is rapidly attracting attention throughout the country as an effective settlement procedure. The experimental use of summary jury trials was endorsed by the Judicial Conference of the United States in 1984 as a means of promoting the fair and equitable settlement of potentially lengthy civil cases, and they have been used with considerable success in the United States District Court for the Western District of Michigan.[1] In the case mentioned above, the parties listened to the non-binding verdict of the jury, discussed the case among themselves, and settled it the same night.

Had the parties not settled the case, their right to a full-scale jury trial on the merits would not have been affected in any way.

The summary jury trial (SJT) is a non-binding jury trial without the presentation of live evidence. It is the creation of the Hon. Thoms D. Lambros, U.S. District Judge for the Northern District of Ohio,[2] and has been adopted by the judges of Michigan's Western District as one of three alternative means of dispute resolution now offered by the court. The others are mediation and mandatory arbitration, the latter being part of a federally funded pilot program underway in ten districts throughout the United States.

Although costing the court more than either mediation or arbitration, a SJT offers the parties the opportunity to actually try their case before a real jury. With a judge or magistrate presiding, and all the trappings of the court in place, this dress rehearsal becomes a real trial capable of resolving a lawsuit. Of the 28 SJTs conducted by our office during 1984 and 1985, eight of those settling did so the day the SJT was completed, and only three ultimately failed to settle prior to trial.

It is too early to forecast the ultimate role, if any, the SJT will play in court litigation. We have not detected, for example, any readily discernible pattern of cases best suited for a SJT. Our court has used the summary trial whenever there is some reason to believe that the guidance of a jury's verdict may prompt resolution, and the cases have been evenly distributed among personal injury and product liability claims, employment discrimination and civil rights violations, and contract and securities fraud cases.[3]

We know that approximately 90% of all federal cases eventually settle. Are the cases in which we have successfully used a summary trial ones which would have settled anyway? Would some other less expensive form of alternative dispute resolution have been equally successful in settling these cases? We cannot be sure. We feel, however, that when all the pretrial stages of a case have been completed without demonstrating any likelihood of settlement, and the case then continues through the entire SJT procedure before settling, this is some indication that the case was one of the 10% that could otherwise have been expected to go to trial.

We are also aware that in some of the cases that settled after a summary jury trial, it took another settlement conference with the judge, or the disposition of a pretrial motion, or other further proceeding before settlement was finally achieved.

With these caveats in mind, we can also commend the efficacy of the procedure. In virtually each instance in which it was used, the case would not have settled as it did but for the SJT.

The SJT is an experimental device and can be modified as circumstances dictate. The following is the "blueprint" upon which we have built our experience.

Pretrial Conference

The first step in the SJT process is a pretrial conference conducted by a federal magistrate, who will normally preside. The conference is scheduled in a referral order issued by the district judge assigned to the case.

The pretrial conference serves a variety of purposes. The SJT is frequently unfamiliar to attorneys. Since it is necessary to adhere to a strict schedule to ensure that the jurors will have ample time to complete their deliberations before the end of the day, it is important that the attorneys fully understand our procedure and that all foreseeable problems be ironed out ahead of time.

For example, objections during the SJT are strongly discouraged. The court and the attorneys must decide beforehand what evidence will be allowed, and must do so in such a way that both sides are confident that the SJT verdict will be a reliable one. Surprisingly,

most evidentiary disputes are resolved by the parties themselves.

We urge both sides to let their opponents "have their best shot" when deciding whether to allow evidence, on the premise that at an SJT an attorney is not only selling the jury on the merits of the case, but the other side as well. If the opponent does not feel that there has been a fair hearing, it is likely that the SJT verdict will be given little credence.

In those instances where a question of admissibility of a critical piece of evidence cannot be resolved, a party may address a motion in limine prior to the SJT to the judge assigned to the case.

Attorneys will also be asked to exchange exhibits before the SJT. An attorney may then simply present the exhibits during the SJT to the jurors without further need to "introduce" them into evidence. When an exhibit is a document, the attorney may give a copy to each juror.

Similarly, the attorneys frequently use the conference to streamline and narrow the issues that will be presented. Since there is no need to preserve a record for appeal, attorneys frequently choose to rely only on their strongest arguments to the exclusion of lesser issues.

The pretrial is also an opportunity to get the attorneys' attention — that is, to impress upon them the advantage of preparing well, rather than dismissing this novel procedure as merely an additional chore assigned by the judge. Again, we have been pleasantly surprised by the spirit with which the attorneys have attacked this exercise. Most have put in all the effort necessary to make an excellent presentation, often to the extent of preparing slides, charts, and notebooks. And, of course, such preparation is not wasted regardless of whether the case settles. On the rare occasion when an attorney has not prepared well, it has been painfully obvious to all present.

Finally, the very act of initiating the SJT process by scheduling a pretrial conference may precipitate settlement. Of the 43 cases referred to this office for a SJT, 13 settled prior to the pretrial conference. Another case was dismissed by the plaintiff after referral, but prior to the pretrial conference. One more case was dismissed by the plaintiff after the pretrial conference, but before the SJT. It is apparent these cases would have settled on the courthouse steps in any event, but the availability of the SJT procedure accelerated the process to everyone's benefit.

Parties

The most frequent question asked is whether the parties themselves must be present at the SJT. The answer is an adamant "Yes!" It is essential that the principals — those persons with ultimate settlement authority — have an opportunity to see and hear a presentation of their opponent's arguments as well as their own, and to personally gauge the impact of the case on the jury.

While the jurors are deliberating, the court will normally speak to the parties directly, and caution them that six disinterested strangers are about to decide their case, and should the case go to a full-scale trial *de novo,* six other such strangers would do the same thing. The proofs will take longer to present at the trial *de novo* but will sound essentially the same. Is there any reason, the parties are asked, to believe that the jurors at a second trial would return a substantially different verdict than the jurors at the SJT?

Other reasons also require the presence of the principals. The case may not assume a settlement posture until some type of hearing takes place. A litigant may simply need "his day in court" to vent grievances. If a plaintiff feels that there has been fraud or intentional harmed caused by the other party there may be an emotional need to seek vindication. This is sometimes true in employment discrimination cases where personal animosities have developed between the plaintiff and supervisors.

It can be a factor, as well, in situations where the parties have only met briefly. Such is often the situation where there is an allegation of false arrest or excessive force used during an arrest, or where an insurance company fails to pay a claim because of alleged wrongdoing by the policyholder. In all these circumstances, the SJT can act as the catharsis which will allow the settlement process to go forward. A full scale rerun of the hearing becomes unnecessary.

The case may also be one where a client's expectations are not realistic, and exposure to the uncertainty, time and expense of trial may cause re-evaluation of a position. We have had several employers truly shocked to discover that jurors would believe that actions taken against their employees were discriminatory. Suddenly, their exposure to damages was a very real possibility. And, of course, a verdict of no liability can quickly sober up a plaintiff's outlook.

The physical presence of the parties facilitates settlement negotiations after the SJT. Even if the parties do not personally talk to each other, offers and counteroffers can be quickly exchanged and answers obtained without interruption. We have never experienced a same-day settlement where the principals were absent.

The necessity of the parties' presence cannot be overemphasized. Our court has twice issued writs ►

of habeas corpus to obtain the presence of plaintiffs confined in institutions. In another instance, an entire city commission attended. After hearing the verdict, they convened a meeting on the spot and doubled their settlement offer into six figures. The case eventually settled within a few thousand dollars of this amount. In another case, the presence of a school board permitted late evening negotiations and a settlement the same night.

When parties contend they are too far away to conveniently appear, we cite the example of a Norwegian cruise ship line which was a defendant in a personal injury case. Any settlement had to be personally approved by one of the company's directors. At the court's direction, a director flew in from Europe to be present at the SJT. The case settled to everyone's satisfaction several hours after the verdict was returned.

Jurors

Once jurors are called for SJT duty, their names are not returned to the regular jury pool. However, those not actually selected for a particular SJT may be called for subsequent ones.

On the morning of trial, the entire jury panel for that day is placed in the jury box by random draw from the jury wheel. The first six jurors seated constitute the jury unless there is a challenge, in which case the seventh juror becomes the first replacement, the eighth juror the second replacement, and so forth. Each side is entitled to its usual three challenges, but the attorneys often relinquish one peremptory challenge apiece to shorten the process and reduce the number of jurors required.

Juror background questionnaires are available in the clerk's office three days prior to trial and are also given to the attorneys the morning of trial. Voir dire is conducted by the magistrate based on questions submitted by the parties ten days earlier. Attorneys may ask a reasonable number of supplemental questions to ensure their satisfaction with the jury.

After the six selected jurors are sworn and everyone else is excused from the courtroom, the court introduces the summary jury procedure.

The court explains that the procedure is experimental and is designed to significantly shorten the length of trial by allowing the attorneys to summarize the evidence, rather than call each witness to testify separately. The jurors are told that the attorneys have had the opportunity to conduct discovery, and substantially agree as to what the witnesses would say if they were called to testify. The court stresses, however, that the parties do not agree as to how the case ought to be decided or that they feel any less strongly about the case merely because they have agreed to the more compact format for its presentation. Savings in both time and money to the court, the parties, and the jurors themselves is emphasized.

One of the more difficult decisions we have made is in waiting until the verdict is returned to tell the jurors that the SJT is a non-binding procedure. Consequently, the jurors assume their verdict is final. (The verdict may, in fact, be binding if the parties agree to settle their case in this manner. Recently, the parties in one of our SJTs agreed beforehand to accept the SJT verdict as final with no right of appeal, but this was an exception.) While we have felt somewhat uncomfortable in not being totally candid with this experimental approach, both the attorneys and jurors have told us they approve of it.

It is crucial to the credibility of this procedure that the jurors come to grips with the hard and often emotional issues that a fact-finder must decide. In many cases, jurors have told us that it would have made no difference in their decision had they known the verdict was not final. Some have said they probably would not have worked as hard. In several tough cases, however, jurors have conceded it would have made a difference. A particularly graphic example involved an infant who had been crippled for life by scalding water. The defendant was a Fortune 500 company, well able to pay any damage award. Following the court's instruction on proximate cause, the jurors returned a verdict of no liability. The decision was clearly a painful one for many of the jurors who had seen the child in the courtroom, but they nevertheless felt bound by law to not award damages. Several of the jurors frankly admitted, however, that had they known the verdict was only advisory, they would have found liability in an effort to help the child by prodding the defendant into settling.

While selecting the members of a normal jury can be done relatively quickly, making them of a single mind on a given issue is not always accomplished so readily. A jury begins as a collection of individuals not familiar with each other, their surroundings or the proceedings. Great respect and onerous responsibility are thrust upon them, and through the successive stages of a trial they are molded into a singular entity capable of speaking with a common voice.

Given the purpose of the SJT, it is essential not to disturb the chemistry of this process more than necessary. By allowing the jurors to labor under the belief that it is their burden to ultimately decide the outcome of the case, we hope we are preserving the integrity of the jurors' decision-making process.

Having said this, it should be added that we are very careful to explain the procedure to the jurors when the verdict is returned. So far we have always found them in agreement with our method, once it has been explained. Finally, it is problematic how long we will be able to continue this option if the SJT becomes familiar to the public.

Presentation of the Case

Each side makes a single, one hour presentation to the jury, although the time limit is not inflexible where

multiple parties are involved. The plaintiff (who normally has the burden of proof) proceeds first and the defense follows. Plaintiff may reserve a short period for rebuttal, but if it is not true rebuttal the defense may be granted time in response.

Attorneys often feel that one hour is not enough time to present a case in its entirety. The economical use of our time is a necessity, however, if we are to comfortably complete the entire procedure, including the jury's deliberations, within a single day. There really are few cases, properly organized, that cannot be summarized in 60 minutes.

The presentations are in the nature of closing arguments with the attorneys free to blend evidence with argument. No court reporter is present and nothing said by the attorneys is binding on their clients at future proceedings. Any statement of fact to the jury, however, is at the same time a representation by the attorney to the court and opposing counsel that this evidence can be found in a deposition, admission, answer to interrogatory, affidavit or stipulation, or that the witness has personally told the attorney that this is what would be said if called to testify.

Within these parameters, the attorneys are free to structure their presentations as they choose, and several attorneys may divide up the presentation of one side of a case. Live testimony is not permitted since there is no opportunity for cross-examination, but the physical condition of a witness may be displayed to the jury. Physical evidence, including documents and demonstrative evidence, may be shown to the jury and sent into the jury-room. Projection equipment of all types is allowed. Excerpts from discovery materials may be read to highlight points. Frequently, deposition testimony is presented by one attorney asking the questions and a second attorney giving the deponent's answers. Depositions, interrogatories, etc., are not sent into the jury room during deliberations.

The single biggest drawback to the SJT is the lack of opportunity to judge the credibility of live witnesses. Unfortunately, this is a problem shared by most settlement techniques. ►

Instructions and Verdict

The court instructs the jury immediately after the attorneys have completed their presentations. We ask the attorneys to furnish the court with an agreed upon set of abbreviated, substantive instructions ten days before trial. Each instruction is typed on a separate sheet of paper with a citation of authority at the bottom. If the attorneys cannot agree upon a particular instruction, they may each offer their own alternative and the court decides. The court then adds its standardized set of preliminary instructions applicable to that case, edits for clarity, and gives each side a completed set of instructions the morning of trial.

We purposely retain a portion of the usual boilerplate in our instructions. It takes only a few minutes to give, and it eliminates potential problems which might arise from the jurors' lack of familiarity with the court system. On the other hand, we have stricken those instructions requiring jurors to make mathematical calculations of present value, inflation, etc. We also frequently provide a special verdict form which separates the various claims of liability and damages, in order to better assess the strengths and weaknesses of the different components of the lawsuit. We have not felt it necessary to furnish written instructions for the jurors in this abbreviated trial setting.

The verdict must be unanimous. If the jury cannot render a decision within a reasonable time, we are prepared to accept anonymous verdict forms from each juror. The jurors are not told this, however, and it has never been necessary to use this alternative.

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Once the jurors have rendered their verdict and the court has explained the entire procedure to them, they are invited to remain for a few moments to informally discuss the case with the attorneys and their clients. This is particularly valuable. Usually the jurors are asked what arguments were effective, and what evidence they tended to discount. Hypotheticals are sometimes posed to determine whether additional evidence might have made a difference in the verdict. This questioning often reveals much about the jury's decision-making process and allows each side a greater understanding of the case's further potential.

Post-trial Conference

The post-trial conference is an integral part of the SJT procedure. While the summary trial may position the parties for an immediate settlement or a substantial change in their negotiating position, these results do not occur automatically. Rather, they usually come from the court meeting with the attorneys, together and separately, and talking.

Settlement negotiations begin immediately after the jury leaves the courtroom. At this juncture, the chances for settlement are often as great as they can ever be, since everyone is present and the issues and the SJT verdict are fresh in everyone's mind. Having gone through the effort of what has, in effect, been a trial, parties are often inclined to want to "wrap-up" the case.

We have found that counsel usually welcomed the active participation by the court at this stage. Each side would make their settlement position known to the court without revealing it to the other side, and in so doing permit the judge to determine whether there was any point in engaging in further talks. By discussing the case with each of the attorneys, and sometimes the parties themselves, the court often was able to suggest options which moved the case closer to settlement. One-third of our settlements are achieved at this point, and in virtually all of the remaining cases substantial identifiable strides towards settlement occur.

Conclusion

The jury is still out on precisely what role the SJT should ultimately play. Clearly, it has resulted in the settlement of cases which otherwise would have gone to trial, but whether it can do so routinely and more effectively than other less costly forms of dispute resolution has not been determined. Further experimentation will undoubtedly suggest types of cases where an advisory jury verdict is the best route to a settlement.

We do know that the success of a SJT is dependent upon the presence of the parties themselves, preserving the integrity of the jury decision-making process, and satisfying all sides that they have received a fair hearing of the case. We hope our blueprint for a summary jury trial will aid others experimenting with this most intriguing method of alternative dispute resolution. ►

Footnotes

1. In 1985 the Federal Judicial Center produced a one-hour video tape entitled "Summary Jury Trials in the Western District of Michigan." The tape was narrated by the Honorable Richard A. Enslen of this district. Judge Enslen is recognized as one of the leaders in the use of the summary jury trial, and was the 1984 recipient of the Center for Public Resources Award for Excellence and Innovation in Dispute Resolution and Dispute Management.
2. Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1984), provides an extensive collection of background material on the summary jury trial.
3. This appears to be the experience elsewhere as well. A sampling of reported decisions in other jurisdictions in which summary jury trials have been utilized illustrates this point. *Hall v Ashland Oil Co.*, 625 F.Supp. 1515, (D. Conn. 1986) (exposure to benzene): *Stacey v Bangor Punta Corp.*, 107 F.R.D. 779 (D. Maine 1985) (defective revolver): *Negin v City of Mentor, Ohio*, 601 F.Supp. 1520 (N.D. Ohio 1985) (zoning dispute): *Rocco Wine Distributors v Pleasant Valley Wine*, 596 F.Supp. 617 (N.D. Ohio 1984) (violation of state liquor laws).

Other commentators have suggested that the SJT may be particularly effective in resolving employment discrimination and wrongful discharge litigation. *See, O'Meara & Massie, Alternative Dispute Resolution: Some Employment Law Applications*, 64 *Mich. Bar J.* 1040, 1044 (Oct. 1985).