

Summary Jury Trials Belong in Every Lawyer's Settlement Toolkit

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Since its inception thirty-three years ago, the summary jury trial has been heralded as an effective mechanism for predicting jury verdicts and promoting settlement without the expenditure of time and money required for a traditional jury trial. In "response to burgeoning court dockets," Judge Thomas D. Lambros of the United States District Court for the Northern District of Ohio created summary jury trials, which are non-binding, abbreviated jury trials. See Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6, 7 (1993). The purpose of the summary jury trial is not to force settlement, but rather to provide a procedure intended to clarify issues and enlighten the parties on how a jury may view the facts and law of the case. *Id.*

Following Judge Lambros' lead, Ohio state and federal courts have adopted rules that provide for summary jury trials as one method of alternative dispute resolution. See 1993

Official Comment, Ohio Civ.R. 16; N.D. Ohio Local Rule 16.7; S.D. Ohio Civ. R. 16.3. Notwithstanding the fact that summary jury trials have been in existence for more than thirty years, litigants and their counsel sometimes overlook the usefulness of summary jury trials as a tool for settlement.

What Is the Procedure for Summary Jury Trials?

1. The decision to pursue a summary jury trial usually takes place during the pretrial conference. Thereafter, the judge requests that the parties brief the legal issues and submit proposed jury instructions. See Charles F. Webber, Comment, *Mandatory Summary Jury Trial: Playing by the Rules?*, 56

U. CHI. L. REV. 1495, 1497 (1989).
2. The summary jury trial begins with a group of potential jurors obtained from the court's pool for an abbreviated *voir dire*. During the *voir dire*, both sides are permitted to make limited for-cause and peremptory challenges. At this juncture, some judges inform the jurors that their verdict is advisory, while other judges, "fearing some compromise in juror attentiveness and sense of responsibility," inform the jurors after they render their verdict. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 16.53 (Matthew Bender 3d Ed.); Webber at 1497.
3. After seating the jury which ordinarily has six jurors, each lawyer presents a summary of the case including opening and closing

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statements and summaries of witness testimony, but generally does not present live witness testimony. See Lambros at 7. Specifically, the lawyers present and discuss documents, summarize or read deposition transcripts, and offer demonstrative exhibits. The presentations "generally consume two or three hours per side," while the entire proceeding is usually "no more than a long day." MOORE at § 16.53(6)(b)(iii).

4. After the lawyers present their evidence, the judge or magistrate judge gives shortened jury instructions and the jury retires to deliberate. Thereafter, the jury renders its verdict. See Webber at 1497.
5. The parties and their counsel then have the opportunity to converse with the jurors and

ask how they responded to different lines of argument and various pieces of evidence. MOORE at § 16.53(6)(b)(iii).
6. Last, the judge invites the parties to participate in settlement negotiations. If the parties fail to reach a settlement, then the case is returned to the trial calendar. MOORE at § 16.53(6)(b)(iii).

What Are the Main Advantages of Summary Jury Trials?

Summary jury trials typically are beneficial to parties who have difficulty reaching a settlement because they have unrealistic assessments of their own cases or their opponent's case. The summary jury trial often reduces the gap between the parties' perceived probabilities of the outcome at trial by allowing them to observe the jurors' reactions to conflicting evidence and view, firsthand, the case's strengths and weaknesses. Richard A. Posner, *The Summary Jury Trial and Other*

Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. CHI. L. REV. 366, 371 (1986). Summary jury trials, thus, are designed to help the parties get closer to the "true odds" because the jurors' perceptions and observations are available to both parties. *Id.*

In addition, "[I]itigants are presumably more likely to accept the case valuations of summary jurors than those of their attorneys or qualified neutrals." Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 474-75 (2003). The jurors' valuations assist lawyers in identifying discrepancies within their arguments, such as missing links in evidence or factual inferences that the jury perceived as weak or nonexistent. MOORE at § 16.53(6)

(d). Summary jury trials, therefore, have a tendency to clarify legal and factual issues at an early procedural stage.

Further, summary jury trials create a similar type of tension to that present in traditional jury trials. According to Judge Lambros, this tension presents the following two advantages: (1) the summary jury trial acts as a dress rehearsal for the real jury trial; and (2) the anticipation of an approaching trial amplifies the parties' efforts toward reaching a settlement. Lambros at 7. Depending on the client, it may also satisfy a party's need to have his or her day in court. *Id.* at 11.

Perhaps most importantly, summary jury trials are cost and time effective. If the case settles, the parties forgo the hefty bill associated with trial preparation, witnesses, experts, and other trial-related expenses. Additionally, the proceeding usually lasts no more than one day because the case is presented in summary form. *Id.* at 8.

What Are the Main Disadvantages of Summary Jury Trials?

Some commentators have lodged various criticisms against summary jury trials. For example, the main function of a jury is to determine witness credibility, but summary

jury trials generally prohibit the use of live witness testimony. See Posner at 374. The jury, therefore, is assessing the credibility of the lawyers, and "[w]e do not need a jury of laymen to decide which of two lawyers is more credible." *Id.* There is also some concern that the practice of not informing jurors that their decisions are non-binding at the outset could be detrimental to the legal system because jurors are "learning that juries sometimes make decisions and at other times simply referee fake trials," and "as word spreads, the conscientiousness of jurors could decline[.]" Posner at 386-87. Other potential disadvantages of summary jury trials are that they can be more expensive than other forms of alternative dispute resolution, can occur late in the pretrial period after the parties have already incurred substantial expenses during discovery and motion practice, and can "expos[e] much of a party's trial strategy to opponents." MOORE at § 16.53(6)(e).

Conclusion

Even with these potential disadvantages, summary jury trials should have a place in every litigator's set of alternate dispute resolution tools. They permit attorneys to test trial strategies on jurors in advance of trial,

while also allowing clients to see firsthand how their case looks when presented to a neutral jury. For a minimal outlay of time and money, especially when compared to the expenses that would be incurred at a traditional trial, the summary jury trial truly can represent a win-win for all involved.



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