Compelling Alternatives: The Authority of Federal Judges to Order Summary Jury Trial Participation

William E. Craco

Follow this and additional works at: https://ir.lawnet.fordham.edu/flr

Part of the Law Commons

Recommended Citation
Available at: https://ir.lawnet.fordham.edu/flr/vol57/iss3/7

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
COMPELLING ALTERNATIVES: THE AUTHORITY OF FEDERAL JUDGES TO ORDER SUMMARY JURY TRIAL PARTICIPATION

INTRODUCTION

The expanding use of alternative dispute resolution ("ADR") techniques is among the most striking of modern developments in the practice of law in the United States. In recent years, congestion in the dockets of federal courts has worsened because of increased civil filings and the introduction of newly created substantive rights. These trends

1. Alternative dispute resolution has been defined as:
   a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes which would otherwise likely be brought to the courts.


Commonly used ADR techniques include mediation, arbitration, summary jury trials and mini-trials. See Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States, Committee on the Operation of the Jury System, 103 F.R.D. 461, 465-67 (1984) In recent years, private dispute resolution services have been organized. See, Wiehl, Private Justice For a Fee: Profits and Problems, N.Y. Times, Feb. 17, 1989, at B5, col. 3. Certain types of conflicts are particularly good candidates for alternative dispute resolution, either because there are large numbers of such cases before the courts, or because the disputes are complex, requiring a great deal of court time. See Brunet, Questioning the Quality of Alternate Dispute Resolution, 62 Tul. L. Rev. 1, 2-3 (1987) (commentators recommend substituting ADR for conventional litigation in a variety of areas, including government contracts disputes, broker-customer relations, international trade, higher education, medical malpractice, and race relations).

2. During the 1970s, the number of cases filed in federal district courts more than doubled. See Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case From Filing to Disposition, 69 Calif. L. Rev. 770, 770 (1981). More recently, the Director of the Administrative Office of the United States Courts reported that on June 30, 1983, the number of civil cases pending before United States District Courts totaled 231,920. See Report of the Proceedings of the Judicial Conference of the United States 114 table 3 (1983). By June 30, 1987, the number of pending cases had grown to 243,159. See Reports of the Proceedings of the Judicial Conference of the United States 169 table C (1987). The number of cases involving protracted trials has also increased; the number of trials lasting more than thirty days tripled during the 1970s. See Peckham, supra, at 770.

have prompted recognition that promoting settlement is not only a legitimate use of judicial resources, but an increasingly necessary one. The efforts of the ADR movement to nudge litigants towards relatively efficient, inexpensive methods of resolving disputes or facilitating settlement have won praise and support from the judiciary, the academic community and legislators.

401 F.2d 47, 50 (7th Cir. 1968) (same); see also The Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986) (criminal defendant entitled to move for dismissal of indictment or information if not brought to trial within specified period); Lambros, The Future of Alternative Dispute Resolution, 14 Pepperdine L. Rev. 801, 802 (1987) (increase in litigation attributable to increased interaction between members of society as well as "social attitudes of our citizens"). But see McMillan & Siegal, Creating a Fast-Track Alternative Under the Federal Rules of Civil Procedure, 60 Notre Dame L. Rev. 431, 432-33 (1985) (suggesting delay and excessive cost of modern litigation due to discovery rule abuse, pretrial motions practice misuse, laissez-faire judicial management, insufficient pretrial management and resources). See generally Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1, 3 (1984) (increase in litigation due to "massive growth in the number of substantive rights recognized by American law, some unfortunate side effects of... our extremely permissive and forgiving procedural system, and the unique economics of the American legal system.").


The summary jury trial ("SJT") is one of the recent innovations in dispute resolution. The procedure, developed by Judge Thomas Lambros of the Northern District of Ohio in the early 1980s, uses an advisory jury and a flexible, but greatly condensed trial procedure in an effort to facilitate pretrial settlement.\(^9\)

Although much of the information concerning the value of the SJT is anecdotal,\(^10\) the procedure appears to be enjoying startling practical success.\(^11\) The SJT is now used in jurisdictions throughout the nation,\(^12\) and has been endorsed by the Judicial Conference of the United States.\(^13\)

arbitration for claims of less than $10,000 or $20,000, depending on location); Wash. Rev. Code. Ann. § 7.06.010 (Supp. 1989) (mandatory arbitration if provided for by local rule); see also Miller, *The Role of Legislation in Fostering ADR*, in *Removing the Barriers to the Use of Alternative Methods of Dispute Resolution* 21 (1984) (background and history of state and federal ADR legislation); Weller, Ruhnka & Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 Judges' J. 36 (Summer 1981) (examining city's effort to reduce congestion through program of mandatory arbitration).


The summary jury trial is sometimes confused with an entirely distinct procedure called a mini-trial. The mini-trial is a voluntary procedure in which the disputants present their differences to a neutral moderator of their choosing for resolution. See Lambros, supra note 1, at 467; see also Green, Marks & Olson, *Settling Large Case Litigation: An Alternative Approach*, 11 Loy. L.A. L. Rev. 493, 501-11 (1978) (detailing mini-trial procedure). The mini-trial is generally used to resolve or promote settlement of complex business disputes.

10. See, e.g., McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988) ("In my own experience summary jury trials have netted me a savings in time of about 60 days and I have only used the procedure five times. It settled two of these cases that were set for 30-day trials."); Spiegel, *Summary Jury Trials*, 54 U. Cin. L. Rev. 829, 834 (1986) (detailing successful results of Judge Spiegel's use of summary jury trials); Ranii, *New Spurs to Settlement: Summary Jury Trials Gain Favor*, Nat'l L.J., June 10, 1985, at 1, col. 6, 30, col. 3 (Hon. Lee West of the District of Oklahoma "estimates that all but four of the approximately 30 [summary jury trials] that he and his ... colleagues have conducted have resulted in settlement.").

11. In the Northern District of Ohio, over 90 percent of the cases selected for SJT between 1980 and 1984 settled before they reached trial on the merits. See Lambros, supra note 1, at 472. *But see* Posner, supra note 5, at 382 ("crude" study of SJT does not show increase in judicial efficiency in districts where the technique was used, but "does not show that the summary jury trial is a failure"). Judge Lambros has estimated that the use of SJTs in 49 cases saved his district more than $73,000. See Lambros, supra note 1, at 474.

12. See Lambros, supra note 1, at 474-76 (detailing spread of procedure); Ranii, supra note 10, at 30, col. 1 (same).

Despite the general enthusiasm regarding the summary jury trial, courts disagree as to whether unwilling litigants may be compelled to participate in the procedure.\textsuperscript{14} Under one view, the Federal Rules of Civil Procedure and the inherent powers of federal courts authorize the compulsion of summary jury trials.\textsuperscript{15} One circuit court of appeals disagrees, however, maintaining that mandatory SJTs are not authorized.\textsuperscript{16}

This Note argues that mandatory summary jury trials are within the authority vested in federal courts by statute and by inherent judicial power. Part I explains briefly the mechanics of the SJT, discusses how it seeks to encourage settlement, and touches upon the most frequently voiced criticisms of the procedure. Part II analyzes the possible sources of authority to compel SJTs in several provisions of the Federal Rules of Civil Procedure that give federal courts pretrial authority to compel parties to act. This part also discusses the inherent power of federal courts to manage and control their dockets, and examines whether that power might extend to compulsory SJTs. Part III examines the wisdom of forcing participation in the procedure, considering practical and public policy concerns raised by compulsion. This Note concludes that courts may compel summary jury trials, and that the use of that authority is a prerequisite to the continued expansion in the use of the device as a legitimate alternative to litigation.

I. BACKGROUND

A. Summary Jury Trial Procedure

Flexibility is one of the most distinctive characteristics of the summary jury trial,\textsuperscript{17} allowing the procedure to be tailored to the demands of a particular dispute.\textsuperscript{18} The accepted format, however, generally adheres


\textsuperscript{16} See Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1988).

\textsuperscript{17} See Gwin, supra note 9, at 17; Lambros, supra note 9, at 286; Lambros, supra note 1, at 468; infra note 41 and accompanying text.

\textsuperscript{18} For example, some particularly complex cases may need longer summary jury trials; a three day summary jury trial recently resulted in the settlement of a complicated toxic tort dispute. See Two Non-Binding Jury Verdicts Lead To $3.5 Million Toxic Tort Settlement, 1 Alt. Dispute Resolution Rep. (BNA) 339 (Dec. 23, 1987).
closely to the original formulation of Judge Lambros. SJTs are conducted only after all pending motions are resolved and after discovery is completed. In fact, a summary jury trial typically represents the parties' final effort at pretrial settlement, and occurs after other efforts at settlement have failed.

A magistrate or judge conducts the summary jury trial. Potential jurors are taken from the regular jury pool, and attorneys for each side are permitted a limited number of peremptory challenges. After the judge conducts a brief voir dire, the advisory jury is empaneled. The jurors are given brief descriptions of the case before the SJT begins, but they generally are not aware until the conclusion of the SJT that their verdict will not be binding upon the litigants.

Each side to the dispute is given one hour to set forth an abbreviated form of its case to the jury. To save time, testimony from sworn witnesses is usually excluded; the attorneys present all the evidence and summarize anticipated witness testimony. Formal objections are not encouraged.

Following the presentations by counsel, the judge gives an abbreviated charge on the law, and the jury retires to deliberate. Although the ju-

19. See Lambros, supra note 1, at 470-71; see also Lambros & Shunk, supra note 9, at 58 (sample of SJT rules).
20. See Lambros, supra note 1, at 470.
21. See id. at 463, 468; Lambros & Shunk, supra note 9, at 46 n.18; see, e.g., Rocco Wine Distribrs., Inc. v. Pleasant Valley Wine, 596 F. Supp. 617, 620-21 (N.D. Ohio 1984) (parties to have 30 days to attempt to settle, after which summary jury trial to be held); see also Lambros, supra note 9, at 286 ("The summary jury trial is intended primarily for cases that will not settle using more traditional methods.").
22. See Lambros, supra note 1, at 470. The SJT is unusual among ADR techniques because it depends on the direct and active guidance of a judge or magistrate. See Brunet, supra note 1, at 11-12. One district court judge permits a law clerk to preside over the SJT, while the judge sits as a silent juror. See Levin & Golash, supra note 1, at 38-39.
23. The number of jurors varies. CompareLambros, supra note 1, at 471 (Lambros' original conception of six-person advisory jury) with Gwin, supra note 9, at 16 ("the court typically calls ten jurors") and Levin & Golash, supra note 1, at 38 (Judge McNaught of the District of Massachusetts uses five jurors to assure a majority decision).
24. See Gwin, supra note 9, at 16.
25. See Lambros, supra note 1, at 471.
26. See Lambros & Shunk, supra note 9, at 48.
28. See Lambros & Shunk, supra note 9, at 47-48.
29. See Gwin, supra note 9, at 16; infra note 38 and accompanying text.
30. See Lambros, note 1, at 471. Although Judge Lambros envisioned a one-day procedure, some summary jury trials have lasted longer. See Enslen, supra note 27, at 1016 (three-day SJT scheduled); supra note 18.
31. See Lambros, supra note 1, at 471. But see Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1372 (D. Minn. 1985) (live testimony used); Levin & Golash, supra note 1, at 38 (same).
32. See Lambros, supra note 1, at 471.
33. See id.
34. See id.
rors are encouraged to return a consensus verdict, separate verdicts are permitted. After the verdict is delivered, the presiding judge frequently permits counsel to discuss with the jurors their perceptions of the strengths and weaknesses of each side's case. Soon after the verdict, the parties meet to reconsider settlement possibilities in light of the jury's decision.

The summary jury trial is strictly advisory; the participants may accept the verdict in whole or in part, or ignore it altogether. They remain free to insist upon a full binding trial on the merits regardless of the outcome of the SJT. Alternatively, a summary jury trial could be held on only some of the disputed issues in a case, while others are left for trial. After the SJT, the parties may wish to settle either the entire case based on the information obtained during the limited procedure, or only as to the issues covered in the SJT, and proceed to trial on issues omitted from the procedure.

B. Goals and Risks of the Summary Jury Trial

Summary jury trials seek to decrease court congestion by facilitating settlement, particularly of difficult or complex cases which threaten to consume inordinate amounts of court time. Judge Lambros conceived the procedure after realizing that many disputes could be settled with ease, and to the satisfaction of both sides, if the parties were made aware of the strength of their case relative to their opponent's. Lambros

35. See id.
36. See Gwin, supra note 9, at 17.
37. See Lambros, supra note 9, at 290; Lambros & Shunk, supra note 9, at 48.
38. See Lambros, supra note 1, at 469.
39. See infra note 41 and accompanying text. The parties might, for example, agree before the summary jury trial begins to accept the advisory jury's verdict as to liability, but not on the issue of damages.
41. Splitting the procedure has been used in other contexts. See Hittner, supra note 40, at 40 (court may bifurcate the trial, trying liability issue and, if liability is found, then trying damages; "[e]ither stage of the bifurcated trial may be appropriate for a summary jury trial").
42. See Lambros, supra note 1 at 468; Maatman, supra note 14, at 457-58; Posner, supra note 5, at 369.
44. See Lambros, supra note 9, at 286.
thought that

if only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury _would_ do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.45

In addition to the primary goal of promoting settlement, the procedure aims to make trial more efficient by clarifying at an early stage which issues are truly in dispute, and by forcing the participants to consider carefully the merits of the arguments on both sides of the dispute.46

Despite its promise and apparent success, the summary jury trial is not the perfect panacea.47 The procedure, whether voluntary or compelled, is not appropriate in every instance.48 Moreover, legitimate and thought-provoking criticism has been raised concerning the effect on the litigants of compulsory use of the summary jury trial. For example, some participants resent being forced to prepare for a summary jury trial, and then again for a full trial on the merits should settlement prove elusive.50

45. Lambros, _supra_ note 1, at 463 (emphasis in original).
46. _See_ Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. 1988) (WESTLAW Allfeds database). Moreover,

[the preparation of opening statements and closing arguments, lining up witnesses and documents, and generally getting prepared for the summary jury trial obviously help[s] the parties prepare for trial on the merits. From the court's point of view, our preparation of the charge in the summary jury trial and the preview of the evidence certainly [gives] us a leg up in preparing for trial on the merits.]

Spiegel, _supra_ note 10, at 835.
47. _See, e.g.,_ Maatman, _supra_ note 14, at 470-72 (inappropriateness of compelled summary jury trials); Posner, _supra_ note 5, at 373-74 (questioning effectiveness of summary jury trial); Spiegel, _supra_ note 10, at 835-36 (common objections to SJT include extra work and expense, timing of the procedure, and the result of differing verdicts at SJT and full trial).

48. SJTs, however, are especially useful in cases where litigants disagree on the appropriate amount of unliquidated damages, where reasonableness or ordinary care standards require evaluation in light of the facts of the dispute, or where one side misperceives the strength of his case. _See_ Lambros, _supra_ note 9, at 286; _see also_ Levin & Golash, _supra_ note 1, at 38 (attempt to use SJT in a particular antitrust case "a mistake"). Because they are unrecorded and have no precedential value, SJTs are inappropriate in cases that would set an important precedent or help clarify the law in a disputed area. Likewise, controversies that turn on the credibility of witness testimony are inappropriate subjects for SJTs. _See_ Spiegel, _supra_ note 10, at 835. _But see supra_ note 43 and accompanying text.

49. Courts considering the issue of compulsory summary jury trials have not questioned the constitutionality of the procedure. The absence of constitutional challenges may be explained by the non-binding nature of the procedure. _See_ Lambros, _supra_ note 1, at 469.


50. _See_ Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17,
Nevertheless, the preparation for summary jury trial would almost certainly help litigants prepare for a full trial of their dispute.\(^5\)

More troubling than complaints of double preparation, however, are questions concerning the compulsory summary jury trial's impact on discovery and work product rules.\(^2\) The plaintiffs in *Strandell v. Jackson County*,\(^5\) for example, argued that a compulsory summary jury trial would force them to tip their hand by revealing trial strategy or privileged testimony, and threaten work product protections, giving their opponents unfair advantages at trial.\(^5\) The work product objection raised in *Strandell*, however, does not pose a problem in a significant number of disputes.

Summary jury trials are not conducted until discovery has been completed,\(^5\) and thus participants enter the procedure already familiar with the facts of the case of their opponent. As a result, evidence presented at trial should not be a surprise.\(^5\) A competent attorney, through careful analysis of material obtained during discovery, should be able to form a general understanding of the trial strategy his opponent would use even before the SJT begins.\(^5\) In addition, as SJTs are measures of last resort held after the parties have discussed the case and their positions in the

---

\(^{1}\) See Spiegel, supra note 10, at 835.

\(^{2}\) See Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987). The work product and trial strategy problems arise only in the mandatory SJT context, because litigants who participate voluntarily are able to balance for themselves the interests of efficiency against those of confidentiality. See Maatman, supra note 14, at 479.

\(^{3}\) See Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987). In *Strandell*, an attorney representing a civil rights plaintiff was held in criminal contempt by a district court for failing to proceed as ordered with a summary jury trial. The district court based its authority to compel participation in part on Fed. R. Civ. P. 16(a) and (c). See Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill. 1987). The court also noted that “[t]he ability of a court to use its best judgment to move its crowded docket must be preserved, where it involves a non-binding yet highly successful procedure.” Id. at 336. The Court of Appeals for the Seventh Circuit reversed, and vacated the contempt judgment. See Strandell, 838 F.2d at 888.

\(^{4}\) See Strandell, 838 F.2d at 888 (discovery and work product rules “reflect . . . balance between the needs for pretrial disclosure and party confidentiality. Yet, a compelled summary jury trial could easily upset that balance by requiring disclosure of information obtainable, if at all, through the mandated discovery process.”); see also Maatman, supra note 14, at 472 (sharing Strandell court’s concerns about premature revelation); Spiegel, supra note 10, at 835 (“some lawyers have been concerned that the summary jury trial requires them to show, in advance, their trial strategy”).

\(^{5}\) See supra note 20 and accompanying text.


\(^{7}\) The plaintiff’s attorney in *Strandell* objected to the mandatory summary jury trial in part because he claimed that it would force him to reveal some testimony that the defense had failed to investigate during discovery. See Maatman, supra note 14, at 475.
course of previous settlement efforts, it is unlikely that trial will yield significant surprises. Furthermore, argument that a pretrial procedure will reveal surprises a litigant wishes to hold for trial goes against the purpose of pretrial practice, which is to minimize surprises at trial. "Trial by ambush" is no longer a legitimate trial tactic, in light of the emphasis in the Federal Rules of Civil Procedure on limiting surprises at trial.

The discretionary nature of mandating SJT participation allows for judicial consideration of the potential harms of the procedure. Judges may consider the possibility that a compulsory summary jury trial will cause unfair revelation of trial strategy when deciding whether the procedure is appropriate in a particular dispute. If the court determines that privileged material might be revealed, the procedure can be tailored to avoid that threat. If the judge determines that unfair prejudice cannot be eliminated by tailoring the SJT, the parties may proceed directly to trial.

Thus, the objections raised to mandatory SJTs, though significant, are not insurmountable. Judges contemplating use of a compulsory summary jury trial must consider very carefully whether the procedure is appropriate in light of the particular facts of the case, and do so in view of the procedure's impact on the litigants.

II. AUTHORITY FOR COMPULSORY SUMMARY JURY TRIALS

A. Federal Rules of Civil Procedure

Judge Lambros found authority for federal judges to conduct sum-

58. See supra note 21 and accompanying text.
61. See supra notes 55-58 and accompanying text.
62. Limiting the coverage of a compulsory summary jury trial has been proposed in other contexts. Judge David Hittner of the Southern District of Texas has suggested that compulsory summary jury trials be bifurcated when helpful, "that is, first try the liability issue and if liability is found, then try the damage issue. Either stage of the bifurcated trial may be appropriate for a summary jury trial." Hittner, supra note 40, at 40.
63. The decision whether or not to hold a summary jury trial, according to Judge Lambros, "rarely turns on the substantive legal aspects of a case, but rather depends upon the dynamics of the controversy." Lambros, supra note 9, at 286; see also Spiegel, supra note 10, at 835 ("I plan to schedule summary jury trials in those cases which will take over a week to try where there has been a jury demand, and where the case seems appropriate, such as in cases based on circumstantial evidence rather than those where credibility of the witnesses is paramount."); Comment, supra note 14, at 438 (judge must consider expense of procedure and pressure placed on participating attorneys).
mary jury trials rooted in several of the Federal Rules of Civil Procedure. The debate over whether the Rules provide authority to compel SJTs, however, has focused primarily on several provisions of Rule 16 of the Federal Rules of Civil Procedure.

Rule 16 empowers judges to order attorneys and pro se litigants to appear before the court at pretrial conferences, and authorizes harsh

64. Judge Lambros found authority to conduct SJTs in Rules 16 and 39(c), as well as in local rules enacted under Fed. R. Civ. P. 83. See Lambros, supra note 1, at 469-70.

65. Local rules concerning SJTs enacted under Fed. R. Civ. P. 83 have figured in decisions concerning the legitimacy of compulsory summary jury trials. See Federal Reserve Bank v. Carey-Canada, Inc., No 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44 (E.D. Ky. 1988); see also Lambros, supra note 1, at 469-70. The presence of a local rule, however, is not a major consideration in this analysis of mandatory SJTs for two reasons. First, this Note argues that courts have authority to compel participation regardless of the presence or absence of a local rule. Second, the presence of a local rule allowing compulsion would do nothing to address serious questions about the procedure like those raised by the court in Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987). See Comment, supra note 14, at 433-34.


Rule 16 provides in pertinent part:

(a) Pretrial Conferences; Objectives. 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;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation, and;
(5) facilitating the settlement of the case.

(b) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(10) the need for adopting special procedures for managing potentially 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.


67. Recent decisions have expanded pretrial authority to permit courts to compel represented parties to appear for settlement conferences. See G. Heileman Brewing Co. v. Jospeh Oat Corp., No. 86-3118, slip op. at 2 (7th Cir. March 27, 1989); Lockhart v. Patel, 115 F.R.D. 44, 46 (E.D. Ky. 1987).
sanctions against those who disobey such orders, or who fail to take part in pretrial procedure in good faith. The Rule was extensively amended during a general overhaul of the Federal Rules in 1983. The revisions in Rule 16 were designed not only to strengthen the powers of courts to control pretrial case management and scheduling, but also to reflect the increasingly active role in guiding pretrial procedure that many courts had assumed at the time of the 1983 changes. As a result of the revisions, encouraging settlement is now one of the express goals of pretrial procedures under Rule 16(a).

The authority granted to courts by the Federal Rules to secure effective and focused pretrial procedure was intended to be subject to broad interpretation. While Rule 16 plainly states that courts are empowered to direct counsel and unrepresented parties to appear for pretrial conferences, and even though it offers a list of suggested topics for consideration at such meetings, the Rule is silent concerning the form or procedure to be followed by parties at such a gathering. Absent an explicit definition of the form of a pretrial conference, Rule 1's construction requirement that the Federal Rules be "construed to secure the just, speedy, and inexpensive determination of every action" strongly suggests that the provisions of Rule 16 should not be read to limit such pretrial meetings to those which are traditionally defined as conferences. On the contrary, because the term is not defined, it should be broadly read.

The Advisory Committee's commentary confirms that the drafters of Rule 16 did not intend to limit judges to particular forms of pretrial proceedings. In fact, the Advisory Committee indicated in its commentary to the 1983 amendments that the Rule was intended to allow for a range of pretrial techniques under Rule 16. In commenting on Rule 16(c)(10)'s reference to pretrial discussion of "the need for adopting spe-

69. See Advisory Committee Notes, supra note 59, at 201-05.
72. See Advisory Committee Notes, supra note 59, at 207, 211. For example, the amendments recognized the fact that settlement had become a topic commonly discussed at Rule 16 conferences. See C. Wright, A. Miller & M. Kane, Federal Practice & Procedure, Civil § 1525, at 592 (1971 & Supp. 1986).
73. See Fed. R. Civ. P. 16(a)(5).
74. See infra notes 77-78 and accompanying text.
75. See Fed. R. Civ. P. 16(a).
76. See Fed. R. Civ. P. 16(c)(1)-(11).
77. Fed. R. Civ. P. 1; see also 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.").
78. See Advisory Committee Notes, supra note 59, at 211.
cial procedures for managing potentially difficult or protracted actions,” the Advisory Committee stated: “Clause 10 provides an explicit authorization for such procedures and encourages their use. No particular techniques have been described; the Committee felt that flexibility and experience are the keys to efficient management of complex cases.”

Rule 16 never specifically addressed the summary jury trial, but its text seems to give judges and litigants a free hand in the procedures they may use.

Some courts have taken the words of the Advisory Committee to heart, and have interpreted Rule 16 broadly. The Seventh Circuit Court of Appeals, however, held that Rule 16 does not authorize compulsory SJTs in *Strandell v. Jackson County.*

Much of *Strandell’s* analysis focused not on the text of the Rule, but on a single sentence of the Advisory Committee notes on Rule 16(c).

That sentence confirms that the purpose of 16(c) is to foster settlement, not to “impose settlement negotiations on unwilling litigants.”

The *Strandell* court seized on these words as support for the conclusion that compulsory SJTs were outside the scope of Rule 16. *Strandell’s* analysis, however, reflects a fundamental misunderstanding of the purpose of mandatory SJTs. Summary jury trials, whether voluntary or compelled, are not settlement negotiations.

Instead, the procedure is designed to foster settlement by ensuring that any settlement negotiations that actually take place are rendered as effective as possible by providing litigants with a realistic preview of

---

79. Id.

The Seventh Circuit’s tradition of narrowly interpreting Rule 16 is not limited to the summary jury trial context. *Compare* Identiseal Corp. v. Positive Identification Sys., Inc., 560 F.2d 298 (7th Cir. 1977) (Rule 16 pretrial authority of district court does not authorize compelling plaintiff to conduct additional discovery, under threat of dismissal of action) *and* J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir. 1976) (per curiam) (Rule 16 does not authorize compulsion of stipulation of facts) *with* G. Heileman Brewing Co. v. Joseph Oat Corp., No. 86-3118 (7th Cir. March 27, 1989) (district court may compel represented parties to attend pretrial settlement conferences) (WESTLAW, Allfeds database) *and* In re LaMarre, 494 F.2d 753 (6th Cir. 1974) (district court may compel attendance of insurer’s claim manager (treated as party to action) at pretrial settlement conference).

The Seventh Circuit’s recent reconsideration of its holding in the *Heileman* case may signal a shift in the court’s view of its Rule 16 authority. *See* G. Heileman Brewing Co. v. Joseph Oat Corp., No. 86-3118 (7th Cir. March 27, 1989) (WESTLAW, Allfeds database).

81. *See Strandell,* 838 F.2d at 887.
83. *See Strandell v. Jackson County,* 838 F.2d 884, 887 (7th Cir. 1987).
84. Judge Lambros indicated that parties could consider new positions on settlement that might have resulted from the summary jury trial at a meeting after the completion of the procedure. *See* Lambros, *supra* note 9, at 290; *supra* note 37 and accompanying text.
their chances of success at trial.85 The purpose of the procedure, far from being contrary to the goals of Rule 16(c), is precisely the same.86

Keeping the goals of Rule 16 in mind, as one court has stated, “[i]t is hard to imagine that the drafters of the 1983 Amendments actually intended to strengthen courts' ability to manage their caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation.”87 Reading SJTs into the Rules is consistent with the Rules' purpose88 of bolstering the ability of federal courts to manage increasingly congested dockets.89

B. Inherent Power of Federal Courts

Federal decisions over the years have recognized a set of nebulous powers vested in federal courts,90 distinct from those powers explicitly

85. Courts do not have the power to impose settlement on unwilling parties. See Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985). Therefore, the distinction between a compulsory summary jury trial and imposing settlement negotiations is critical. See Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill.) (Advisory Committee comments to Rule 16(e) “do not, however, mean this Court lacks the power to order the litigants to engage in a process which will enhance the possibility of fruitful negotiations.”) rev'd 838 F.2d 884 (7th Cir. 1987); Hittner, supra note 40, at 40 (“A summary jury trial is a forum for early case evaluation and development of realistic settlement negotiations.”) (quoting Texas Alternative Dispute Resolution Procedures Act, Tex. Civ. Prac. & Rem. Code Ann. § 154.026(a) (Vernon Supp. 1989).
86. See supra note 73 and accompanying text.
88. The SJT and Rule 16 have common goals: early settlement, compare supra note 9 and accompanying text (SJT) with Advisory Committee Notes, supra note 59, at 210 (Rule 16); clarification of disputed issues, compare supra note 46 and accompanying text with Advisory Committee Notes, supra note 59, at 209 (“The reference in Rule 16(c)(1) to 'formulation' is intended to clarify and confirm the court's power to identify the litigable issues.”).
89. See Advisory Committee Notes, supra note 59, at 207.
90. See, e.g., Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-67 (1980) (inherent power to assess attorneys' fees); Link v. Wabash R.R. Co., 370 U.S. 626, 629 (1962) (inherent power used to dismiss action because of inaction); Michaelson v. United States, 266 U.S. 42, 65 (1924) (inherent power to punish contempt); Ex Parte Peterson, 253 U.S. 300, 312 (1920) (appointment of auditors authorized by courts' "inherent power to provide themselves with appropriate instruments required for the performance of their duties"); Barnd v. City of Tacoma, 664 F.2d 1339, 1342 (9th Cir. 1982) (inherent power to sanction attorney conducting litigation in bad faith); Hyler v. Reynolds Metal Co., 434 F.2d 1064, 1065 (5th Cir. 1970) (inherent power to dismiss case for failure to prosecute), cert. denied, 403 U.S. 912 (1971); Provenza v. H & W Wrecking Co., 424 F.2d 629, 630 (5th Cir. 1970) (same); Torino v. Texaco, Inc., 378 F.2d 268, 270 (3d Cir. 1967) (same). The presence of inherent powers that act beyond the scope of Rule 16 authority has also been recognized. See J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323 (7th Cir. 1976).

State courts also exercise inherent powers. See, e.g., Smothers v. Lewis, 672 S.W.2d 62, 64 (Ky. 1984) (court's inherent power to take actions reasonably necessary to administer justice); Dibble v. State, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (S.C. Ct. App. 1983) (same). Some powers now explicitly granted to federal courts by Congress were originally categorized as inherent powers. See, e.g., Eash v. Riggins Trucking Inc., 757 F.2d
Numerous formulations of these inherent powers have been offered, and at the core of all these definitions is the concept of necessity; inherent powers are those powers that, though never specifically granted, courts exercise in order to perform essential functions. Inherent powers are, by their nature, flexible, and used largely on an ad hoc basis. Because the scope of the powers is not expressly limited, as is the judiciary's statutory authority, courts must exercise these powers with careful consideration of their effect on the rights of litigants. The Strandell court, for example, required that inherent powers be exercised in "due cognizance both of the need for expedition of cases and the protection of individual rights."

Two principal considerations govern the inquiry into the appropriate—
ness of a particular proposed application of inherent powers. First, courts should determine whether similar uses of inherent power have been upheld in the past, or whether the proposed action represents a new and possibly suspect expansion of those powers. 97 Second, the impact of the use of that power on the dispute and on the rights of the litigants must be addressed. 98 These considerations, applied to the compulsory SJT debate, reveal that the procedure is well within the existing scope of inherent powers, and that its use need not intrude prohibitively on the rights of parties to the dispute.

The consideration of the scope of past uses of inherent powers must be focused on the particular manifestation of the inherent powers 99 that permits federal courts to act as they deem necessary to control their own dockets and provide for efficient management of their caseloads. 100 This species of inherent power has been invoked as support for a variety of actions designed to promote judicial efficiency. For example, the inherent power of docket control has authorized the imposition of a broad range of sanctions against litigants who delay court proceedings or fail to vigorously prosecute their cases. 101 Court costs have been imposed in order to promote the goals of Rule 1, which calls for the "just, speedy, and inexpensive determination of every action." 102 Attorneys' fees have been imposed on lazy litigants based on inherent power justification. 103 In particularly egregious instances of delay, courts have been willing to dismiss the plaintiff's entire action. 104 All the sanctioning actions taken by federal courts invoking inherent power to control dockets punish litigants in a way which permanently affects them or their action, 105 and

97. See infra notes 99-108 and accompanying text.
98. See infra note 113-119 and accompanying text.
101. See Moulton v. Commissioner, 733 F.2d 734, 735 (10th Cir. 1984); Penthouse Int'l Ltd. v. Playboy Enters., Inc., 663 F.2d 371, 386 (2d Cir. 1981).
102. Fed. R. Civ. P. 1; see Moulton v. Commissioner, 733 F.2d 734, 735 (10th Cir. 1984) (affirming order imposing double costs and attorney's fees on litigant who had taken a frivolous appeal from a tax deficiency judgment).
103. See Barnd v. City of Tacoma, 664 F.2d 1339, 1342 (9th Cir. 1982); see also Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) (attorneys' fees as sanction for abusive litigation practice).
104. Even though dismissal of pending actions for failure to prosecute is now provided for under Fed. R. Civ. P. 41, some courts rely instead (or in addition) upon their inherent authority to control their docket when imposing this harsh sanction. See, e.g., Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962); Penthouse Int'l Ltd. v. Playboy Enters., Inc. 663 F.2d 371, 386 (2d Cir. 1981).
105. But see infra notes 110-12 and accompanying text.
that may decrease their chances of ultimate success.

Use of the power to control dockets has not been limited to sanctions; courts have also taken positive action to ensure that their business is not delayed. For example, in *Ex Parte Peterson*, the Supreme Court upheld the appointment of an auditor, without the consent of the parties to the dispute, to examine and report on the business records of the litigants. The appointment was justified as an exercise of the courts “inherent power to provide itself with this instrument for the administration of justice when deemed by it essential.”

The accepted uses of the inherent powers of federal courts, detailed above, strongly indicate that those powers require no further expansion to embrace compulsory summary jury trials. Mandatory summary jury trials, though clearly not appropriate as punitive measures, serve the same purpose as sanctions in helping to prevent pretrial delay. Sanctions reduce delay by deterring insubstantial participation, SJTs by reducing congestion through encouraging settlement. Moreover, because the participants in a summary jury trial invest a relatively small amount of time in the procedure, are in no way bound by its outcome, and suffer no impairment of the viability of their action, the mandatory summary jury trial is a far less intrusive use of the court's powers than previous uses of this species of inherent power.

The second consideration, determining the appropriateness of an exercise of inherent powers to compel SJTs, requires addressing the procedure's effects on the rights of litigants in a particular instance. As inherent power is currently used to authorize dismissal and other sanctions to promote judicial efficiency, it would defy logic to suggest that it would not authorize a brief, non-binding procedure with the same goal.

The Seventh Circuit in *Strandell*, however, found that inherent powers could not justify compulsory summary jury trials. The court based this conclusion on the premise that inherent powers had to be exercised “in a manner that is in harmony with the Federal Rules of Civil Procedure,” and that exercise of the powers as authority for compulsory

106. 253 U.S. 300 (1920).
107. See id. at 312.
108. Id.
109. Sanctions imposed through the use of the inherent powers of the courts seek not only to punish the particular individual involved, but also to promote efficient procedure in the long run by discouraging similar conduct in the future. See *Barnd v. City of Tacoma*, 664 F.2d 1339, 1342 (9th Cir. 1982).
110. See supra note 30 and accompanying text.
111. See supra notes 38-39 and accompanying text.
112. See supra notes 55-63 and accompanying text.
113. See supra note 61 and accompanying text.
114. See *Strandell v. Jackson County*, 838 F.2d 884, 886-87 (7th Cir. 1987). The *Strandell* court, however, did acknowledge courts' “substantial inherent power to control and to manage [their] docket[s].” Id. at 886.
115. Id.
SJT's would be contrary to Rule 16[116] and to the rules governing discovery and work product privilege.[117] As seen above, the compulsion of SJTs is within the scope of the term "conference" under the Rule 16.[118] Even if the Rule does not expressly authorize the procedure, it is certainly in harmony with Rule 16, when read in light of the mandate of Rule 1's call for efficiency. Furthermore, though they pose significant problems, work product concerns and the threat of premature revelation of trial strategy can be avoided by tailoring the procedure to avoid such problems.[119] In short, the complete prohibition of compulsory SJTs is an unnecessarily broad prophylactic measure.

III. POLICY: WHY COMPEL SUMMARY JURY TRIALS?

Although authority for the compulsory use of the summary jury trial procedure may be present, the wisdom of compelling the procedure merits separate attention. A number of policy considerations are served by permitting mandatory use of the procedure, indicating that judges should not hesitate to order participation in instances where they believe it would be helpful and appropriate.

The success of the SJT suggests the most obvious reason for compelling the procedure.[120] The SJT has been shown to be effective in advancing the judicial policy of reducing congestion on federal dockets.[121] Recognizing the power to compel the procedure in appropriate situations will lead to more frequent use, thereby promoting the well-defined goals of pretrial efficiency and reduction of cost. If, however, participants choose not to participate meaningfully in the procedure, it might be rendered a waste of time rather than a device for promoting judicial efficiency. Several factors, however, tend to minimize that danger. First, unwilling participants will risk incurring sanctions under Rule 16(f) for withholding good faith participation.[122] In addition, represented parties, though involved in the procedure against their will, would be unwilling to finance their attorney's less than zealous participation in the SJT, and would likely pressure counsel to make the time spent as meaningful as possible under the circumstances.[123]

Finally, the major obstacle to widespread use of SJTs are the suspicions of unwary practitioners, unaware of the benefits of the procedure.[124] By ordering SJTs in certain instances, judges not only improve

---

116. See id. at 887.
117. See id. at 888.
118. See supra notes 65-90 and accompanying text.
119. See supra notes 52-63 and accompanying text.
120. See supra note 12 and accompanying text.
121. See id.
123. An attorney has an ethical responsibility to represent his client zealously. See Model Code of Professional Responsibility Canon 7 (1979).
124. See Ranii, supra note 10, at 30, col. 3. A litigant is likely to feel a certain sense of emotional satisfaction after having some form of a "day in court." See Lambros, supra
the chances that the particular dispute will be resolved efficiently, but increase the number of practitioners who will feel comfortable with the procedure in the future.125

CONCLUSION

Careful analysis of the applicable provisions of the Federal Rules of Civil Procedure and of the Advisory Committee notes on those sections confirms that compulsory summary jury trials are within the authority of federal courts. Even without Federal Rules authority, compelling the procedure falls within the inherent power of federal courts to manage and control their dockets. In light of these sources of authority, and looking to the promise of the SJT to reduce congestion in the federal courts, judges should consider compelling litigants to participate in summary jury trials in appropriate instances.

William E. Craco

note 1, at 468. The SJT provides such satisfaction without the necessity of vindicating one side of the dispute at the expense of the other. Such emotional benefits are not limited to litigants. See Ranii, supra note 10, at 30, col. 2 (SJT emotionally satisfying for lawyers as well).

125. See Ranii, supra note 10, at 30, col. 3 (compelling use of SJTs in District of Oklahoma causes local bar to be “largely converted” to the procedure).