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

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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.[1] In recent years, congestion[2] in the dockets of federal courts has worsened because of increased civil filings and the introduction of newly created substantive rights.[3] These trends

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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.

Henry & Lieberman, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 425-26 (1986). *See generally* Center for Public Resources Legal Program, Containing Legal Costs: ADR Strategies for Corporations, Law Firms and Government (1988) (description of forms and application of ADR for business, law firms and government agencies); C. Harrington, Shadow Justice: The Ideology and Institutionalization of Alternatives to Court (1985) (critique of social impact of institutionalizing ADR techniques); *Essays on the Future of Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 771 (1987) (explaining perceived trends in future of ADR); Levin & Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. Fla. L. Rev. 29 (1985) (overview and analysis of various ADR applications in federal litigation).

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.

3. *See, e.g.*, Superintendent of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) (implied private cause of action under Rule 10b-5 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(b) (1982)); Jordon Bldg. Corp. v. Doyle, O'Connor & Co.,

have prompted recognition that promoting settlement is not only a legitimate use of judicial resources,[4] but an increasingly necessary one.[5] 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,[6] the academic community[7] and legislators.[8]

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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 Alterative 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.").

4. *See* F. Lacey, The Judge's Role in the Settlement of Civil Suits 25-26 (1977) ("A dispute resolved through settlement rather than trial, where both sides believe a fair result has been reached, furthers the ends of justice and good judicial administration."); Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 Vill. L. Rev. 1363 (particular suitability of judges to encourage settlement). *See generally*, W. Brazil, Settling Civil Suits: Litigators' Views About Appropriate Rules and Effective Techniques for Federal Judges (1985) (study of litigators concerning role of courts in settlement efforts); Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. Rev. 485, 490-93 (1985) (discussing history of settlement conferences, purpose of Fed. R. Civ. P. 16, and debate over whether attorneys or judges should initiate and control settlement efforts under the Rule).

5. Courts often express the need for early settlement of cases as a way to help realize the public policy objective of easing court congestion. *See* Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154, 1164 (5th Cir. 1985); ABKCO Music, Inc. v. Harrisongs Music Ltd., 722 F.2d 988, 997 (2d Cir. 1983); Anselmo v. Manufacturers Life Ins. Co., 595 F. Supp. 541, 551 (W.D. Mo. 1984), *aff'd*, 771 F.2d 417 (8th Cir. 1985). *But see* Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 388 (1986) (increasing amount of settlement may result in short term cost reduction, but "in the long run the litigation rate may rise").

6. *See* Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 94 (1976); Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 276 (1982); Nelson, *The Immediate Future of Alternative Dispute Resolution*, 14 Pepperdine L. Rev. 777, 780 (1987).

7. *See* Center for Public Resources, Containing Legal Costs; ADR Strategies for Corporations, Law Firms, and Government (1988). *But see* Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1076 (1984) (suggesting that settlement movement unfairly advantages parties with greater financial resources, and limits role of lawsuits to only resolution of individual disputes, rather than fulfilling broader societal purpose); Posner, *supra* note 5, at 366 (1986) (questioning effectiveness of some ADR methods, including summary jury trial).

8. Legislators in many states have made the use of alternative procedures mandatory in certain types of cases. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-133 (1982 & Supp. 1988) (authorizing court to direct that claims less than $50,000 be arbitrated); Cal. Civ. Proc. Code § 1141.11 (West 1982 & Supp. 1989) (local rule may provide for arbitration of claims of less than $50,000); 42 Pa. Cons. Stat. Ann. § 7361 (Purdon 1982) (compulsory

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]

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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).

Legislation to encourage the use of ADR techniques was introduced in two recent sessions of Congress. *See* H.R. 473, 100th Cong., 1st Sess., 133 Cong. Rec. 157 (1987) (Alternative Dispute Resolution Promotion Act of 1987) (requiring attorneys to inform litigants of possibility of resolving dispute through ADR, and to certify to court that they have done so); S. 2038, 99th Cong., 2d Sess., 132 Cong. Rec. 848 (1986) (Alternative Dispute Resolution Promotion Act of 1986) (same).

9. *See* Gwin, *The Summary Jury Trial: An Explanation and Analysis*, 52 Ky. Bench and Bar 16, 16 (Winter 1988); Lambros, *The Summary Jury Trial--An Alternative Method of Resolving Disputes*, 69 Judicature 286, 286 (Feb.- Mar. 1986); Lambros, *supra* note 1, at 467; Lambros & Shunk, *The Summary Jury Trial*, 29 Clev. St. L. Rev. 43, 43 (1980).

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).

13. *See* Report of the Proceedings of the Judicial Conference of the United States 88 (1984).

Despite the general enthusiasm regarding the summary jury trial, courts disagree as to whether unwilling litigants may be compelled to participate in the procedure.[14] Under one view, the Federal Rules of Civil Procedure and the inherent powers of federal courts authorize the compulsion of summary jury trials.[15] One circuit court of appeals disagrees, however, maintaining that mandatory SJTs are not authorized.[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,[17] allowing the procedure to be tailored to the demands of a particular dispute.[18] The accepted format, however, generally adheres

14. *Compare* Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1988) (district court lacks authority to compel participation) *with* Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 (D. Mass. 1988) (district court may compel participation in SJT) *and* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 44 (E.D. Ky. 1988) (same) *and* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988) (same) *and* Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database) (same). *See generally*, Maatman, *The Future of Summary Jury Trials in Federal Courts:* Strandell v. Jackson County, 21 J. Marshall L. Rev. 455 (1988); Comment, *Compelled Participation in Summary Jury Trials: A Tale of Two Cases*, 77 Ky. L.J. 421 (1988).

15. *See* Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48-49 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988); Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database).

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

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.

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.[19] SJTs are conducted only after all pending motions are resolved and after discovery is completed.[20] In fact, a summary jury trial typically represents the parties' final effort at pretrial settlement, and occurs after other efforts at settlement have failed.[21]

A magistrate or judge conducts the summary jury trial.[22] Potential jurors[23] are taken from the regular jury pool,[24] and attorneys for each side are permitted a limited number of peremptory challenges.[25] After the judge conducts a brief *voir dire*,[26] the advisory jury is empaneled.[27] The jurors are given brief descriptions of the case before the SJT begins,[28] but they generally are not aware until the conclusion of the SJT that their verdict will not be binding upon the litigants.[29]

Each side to the dispute is given one hour to set forth an abbreviated form of its case to the jury.[30] To save time, testimony from sworn witnesses is usually excluded;[31] the attorneys present all the evidence and summarize anticipated witness testimony.[32] Formal objections are not encouraged.[33]

Following the presentations by counsel, the judge gives an abbreviated charge on the law, and the jury retires to deliberate.[34] 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 Distribs., 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. *Compare*Lambros, *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.

27. SJT procedures sometimes involve more than one jury. *See, e.g.*, Enslen, *Alternative Dispute Resolution: Summary Jury Trial in a Toxic Tort Case*, Toxics L. Rep. (BNA) No. 37, at 1016 (Feb. 17, 1988).

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.[35] 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.[36] Soon after the verdict, the parties meet to reconsider settlement possibilities in light of the jury's decision.[37]

The summary jury trial is strictly advisory;[38] the participants may accept the verdict in whole or in part, or ignore it altogether.[39] They remain free to insist upon a full binding trial on the merits regardless of the outcome of the SJT.[40] Alternatively, a summary jury trial could be held on only some of the disputed issues in a case, while others are left for trial.[41] 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,[42] particularly of difficult or complex cases which threaten to consume inordinate amounts of court time.[43] 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.[44] 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.

40. *See* Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database); Hittner, *The Summary Jury Trial*, 51 Texas Bar J. 40, 40 (1988); Lambros, *supra* note 1, at 469; Posner, *supra* note 5, at 369.

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.

43. *See* Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 904 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 1171 (1989); Hittner, *supra* note 40, at 40; Ranii, *supra* note 10, at 30, col. 1.

Summary jury trials have been used in cases involving a broad range of substantive issues. *See, e.g.*, Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988) (breach of construction contract); Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987) (civil rights action under 28 U.S.C. § 1983); *see also* Fraley v. Lake Winnepesaukah, Inc., 631 F. Supp. 160 (N.D. Ga. 1986) (suggesting use of SJT in negligence suit); Zatz, *Toxic Tort Case Unlikely to Have Settled Without Summary Jury Trial, Lawyer Says*, 2 Alt. Dispute Resolution Rep. (BNA) 145 (April 14, 1988) (describing benefits of use of SJT in major toxic tort case).

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[49] 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]

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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,

> [t]he 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.

In broader terms, other forms of compulsory ADRs generally are not constitutionally infirm. *See* Kimbrough v. Holiday Inn, 478 F. Supp. 566, 569-71 (E.D. Penn. 1979); Hines v. Elkhart Gen. Hosp., 465 F. Supp. 421, 427 (N.D. Ind.), *aff'd*, 603 F.2d 646 (7th Cir. 1979); Davidson v. Sinai Hosp. of Baltimore, 462 F. Supp. 778, 781 (D. Md. 1978) *aff'd*, 617 F.2d 361 (4th Cir. 1980).

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.[51]

More troubling than complaints of double preparation, however, are questions concerning the compulsory summary jury trial's impact on discovery and work product rules.[52] The plaintiffs in *Strandell v. Jackson County*,[53] 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.[54] 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,[55] 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.[56] 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.[57] In addition, as SJTs are measures of last resort held after the parties have discussed the case and their positions in the

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1988) (WESTLAW, Allfeds database) ("The parties argue that the investment of attorney time and money would be wasted on the SJT proceeding. However, an investment of three days for the SJT when compared to a potential real jury trial lasting four-to-six courtroom weeks is reasonably proportionate."); *see also* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46 (E.D. Ky. 1988) (noting that summary jury trials may require extra preparation, but "so do pretrial orders, memoranda, conferences, marking of exhibits, etc.").

51. *See* Spiegel, *supra* note 10, at 835.

52. *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.

53. 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.

54. *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").

55. *See supra* note 20 and accompanying text.

56. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988); Shepard's Discovery Proceedings in Federal Practice § 1.1 (W. Windborne ed. 1983).

57. 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,[58] 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.[59] "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.[60]

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.[61] If the court determines that privileged material might be revealed, the procedure can be tailored to avoid that threat.[62] 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,[63] 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.

59. *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988); Clark, *Summary and Conclusion to an Understanding Use of Pre-trial*, 29 F.R.D. 454, 456 (1962); *see also Amendments to Fed. R. Civ. P. 16: Advisory Committee Note*, 97 F.R.D. 165, 205-06 [hereinafter *Advisory Committee Notes*] (purpose of pretrial conferences under Rule 16 is to eliminate surprise).

60. *See* C. Wright, The Law of Federal Courts § 81 (4th ed. 1983); *see, e.g.*, Erskine v. Consolidated Rail Corp., 814 F.2d 266, 272 (6th Cir. 1987); Woods v. International Harvester Co., 697 F.2d 635, 639 (5th Cir. 1983); Davis v. Marathon Oil Co., 528 F.2d 395, 404 (6th Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database).

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.[64] The debate over whether the Rules provide authority to compel SJTs, however, has focused primarily[65] on several provisions of Rule 16 of the Federal Rules of Civil Procedure.[66]

Rule 16 empowers judges to order attorneys and pro se litigants to appear before the court at pretrial conferences,[67] 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.

66. *See* Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987); Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 47-48 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 448 (M.D. Fla. 1988); Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database); Lambros, *supra* note 1, at 469; Maatman, *supra* note 14, at 461; Posner, *supra* note 5, at 385.

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.
>
> . . . .
>
> (c) 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.

Fed. R. Civ. P. 16.

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. Joesph 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.[68] The Rule was extensively amended during a general overhaul of the Federal Rules in 1983.[69] The revisions in Rule 16 were designed not only to strengthen[70] the powers of courts to control pretrial case management and scheduling,[71] but also to reflect the increasingly active role in guiding pretrial procedure that many courts had assumed at the time of the 1983 changes.[72] As a result of the revisions, encouraging settlement is now one of the express goals of pretrial procedures under Rule 16(a).[73]

The authority granted to courts by the Federal Rules to secure effective and focused pretrial procedure was intended to be subject to broad interpretation.[74] While Rule 16 plainly states that courts are empowered to direct counsel and unrepresented parties to appear for pretrial conferences,[75] and even though it offers a list of suggested topics for consideration at such meetings,[76] 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"[77] 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.[78] In commenting on Rule 16(c)(10)'s reference to pretrial discussion of "the need for adopting spe-

68. *See* Fed. R. Civ. P. 16(f).

69. *See Advisory Committee Notes, supra* note 59, at 201-05.

70. *See* Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database).

71. *See Advisory Committee Notes, supra* note 59, at 206, 207; *see also* Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database) (1983 amendments intended to strengthen court's ability to manage their caseloads).

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."[79] 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*.[80] 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).[81] That sentence confirms that the purpose of 16(c) is to foster settlement, not to "impose settlement negotiations on unwilling litigants."[82] The *Strandell* court seized on these words as support for the conclusion that compulsory SJTs were outside the scope of Rule 16.[83] *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.[84] 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.*

80. 838 F.2d 884, 887 (7th Cir. 1987). *Compare* Home Owners Funding Corp. of Am. v. Century Bank, 695 F. Supp. 1343, 1347 n.3 (D. Mass. 1988); McKay v. Ashland Oil Inc., 120 F.R.D. 43, 47-48 (E.D. Ky. 1988) *and* Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 448 (M.D. Fla. 1988) *and* Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database) *with* Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987).

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.

82. *Advisory Committee Notes*, *supra* note 59, at 210.

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' purpose[88] 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(c) "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.

87. Federal Reserve Bank v. Carey-Canada, Inc., No. 86-185 (D. Minn. Nov. 17, 1988) (WESTLAW, Allfeds database).

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

granted by statute.[91] Numerous formulations of these inherent powers have been offered,[92] 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.[93] Inherent powers are, by their nature, flexible, and used largely on an ad hoc basis.[94] 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.[95] 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.' "[96]

Two principal considerations govern the inquiry into the appropriate-

557, 562 n.8 (3d Cir. 1985) (contempt power "rooted principally in the inherent powers of the judiciary" now codified at 18 U.S.C. § 401 (1982)).

91. *Cf. Ex Parte* McCardle, 74 U.S. (7 Wall.) 506, 512-13 (1868) (appellate power of federal courts, though granted by Constitution, is limited by Congress).

92. *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (inherent powers are those " 'necessary to the exercise of all others.' ") (quoting United States v. Hudson, 2 U.S. 445, 447, 7 Cranch 32, 34 (1812)); J. Cratsley, Inherent Powers of the Courts 2 (1980) ("Inherent powers . . . consist of all powers reasonably required to enable a court to perform efficiently its judicial functions . . . and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exists . . . ."); 21 C.J.S. *Courts* § 31 (1940) ("The inherent powers of courts are derived from the laws to which courts owe their existence, and do not exist without express or implied grant.").

Eash v. Riggins Trucking Inc., 757 F.2d 557 (3d Cir. 1985), includes one of the few careful analyses of the inherent powers exercised by federal courts. The *Eash* court identified three types of inherent powers. *See id.* at 562-64. The first, irreducible inherent authority, was said to stem "from the fact that once Congress has created lower federal courts and demarcated their jurisdiction, the courts are vested with judicial powers pursuant to Article III." *Id.* at 562. The second use of the term deals with powers that federal courts invoke, by strict functional necessity, in order to exercise their other powers. *See id.* at 562-63. The Supreme Court has termed this type of inherent power "essential to the administration of justice" and " 'absolutely essential' for the functioning of the judiciary." *Id.* at 563 (quoting Michaelson v. United States, 266 U.S. 42, 65 (1924); Levine v. United States, 362 U.S. 610, 616 (1960)). The third type of inherent power discussed by the *Eash* court is sometimes said to be "rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion." *Eash*, 757 F.2d at 563 (citing ITT Community Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978)).

93. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) (quoting United States v. Hudson, 2 U.S. 445, 447, 7 Cranch 32, 34 (1812)). Other necessary functions of the courts said to be authorized by inherent powers include raising funds for operations, and hiring and compensating court personnel. *See* J. Cratsley, *supra* note 92, at 18.

94. *See* Eash v. Riggins Trucking Inc., 757 F.2d 557, 561-62 ("The notion of inherent power has been described as nebulous, and its bounds as 'shadowy'.") (quoting Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 485 (1958)).

95. *See* Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980) ("Because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion.").

96. Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987) (quoting S. Rep. No. 1744, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Admin. News 3023, 3026).

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.

99. *See* Strandell v. Jackson County, 838 F.2d 884, 886-87 (7th Cir. 1987); 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, 48 (E.D. Ky. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988); *see also* Cincinnati Gas & Elec. Co. v. General Elec. Co., 117 F.R.D. 597, 599 (S.D. Ohio 1987) (power to conduct summary jury trials comes from inherent powers of courts).

100. *See, e.g.*, Link v. Wabash R.R., 370 U.S. 626, 629-30 (1962); Eash v. Riggins Trucking Inc., 757 F.2d 557, 561 (3d Cir. 1985); J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1323 (7th Cir. 1976).

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*,[106] 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.[107] 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."[108]

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.[109] 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,[110] are in no way bound by its outcome,[111] and suffer no impairment of the viability of their action,[112] 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.[113] 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.[114] 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,"[115] 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.*

SJTs 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.*
122. *See* Fed. R. Civ. P. 16(f).
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.

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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).