

GENERAL ORDER NO. 119

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND
1990 SEP 11 PM 4:17

JUROR UTILIZATION)
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)

The following actions, have been approved at the September 11, 1990 judges' meeting by the nine (9) judges attending said meeting, and being more than a majority of the judges of this Court:

1. Length of Time a Prospective Juror Should be on Call

Prospective jurors shall be subject to service for a period no longer than sixty (60) days, absent exceptional circumstances.

2. Length of Jury Service

If a juror is impaneled in a civil case, criminal case, or for a summary jury trial, that juror shall be excused from further jury service. This shall apply whether the case is settled, dismissed for any reason, or actually tried to a conclusion.

3. Number of Calls

If a juror is called for service five (5) times but is never impaneled to serve as a juror, that juror shall be excused from further jury service after the fifth call.

4. Number of Jurors in Panel

Unless otherwise directed, a panel in a criminal case shall be limited to thirty-five (35) panelists, and a panel in a civil case shall be limited to eighteen (18) panelists.

5. Summary Jury Trials Jurors

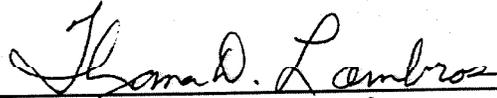
In order to increase the efficiency of juror utilization whenever practicable, panelists for summary jury trials shall be panelists who are not used, and/or are left over, after the impaneling of jurors in civil or criminal cases.

6. Qualified Jury Wheel

The Clerk of Court shall maintain one (1) separate qualified jury wheel for each of the four (4) places of holding court, to wit: Cleveland, Toledo, Akron, and Youngstown.

IT IS SO ORDERED,

FOR THE COURT



Thomas D. Lambros
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF
AMENDMENT TO
LOCAL CIVIL RULE 17

:
:
:

GENERAL ORDER

No. 62

Local Civil Rule 17 is hereby amended to read as follows:

CHAPTER SEVENTEEN
PRETRIAL PROCEDURE

FILED
1983 JAN 12 AM 8:42
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO

Rule 17.01 Pretrial Conferences

...

Rule 17.02 Alternative Methods of Dispute Resolution

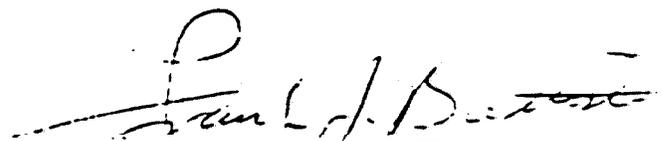
The Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative method of dispute resolution, as he or she may choose.

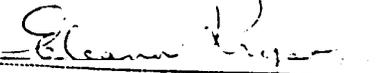
The foregoing amendment will take effect at the opening of business on January 12, 1983.

IT IS SO ORDERED.

FOR THE COURT

I hereby certify that this instrument is a true and correct copy of the original on file in my office.
Attest: James S. Gallas, Clerk
U. S. District Court
Northern District of Ohio


Frank J. Battisti
Chief Judge

By: 
Deputy Clerk

MAR 25 1985

REPORTS OF THE PROCEEDINGS

OF THE

JUDICIAL CONFERENCE

OF THE

UNITED STATES

HELD IN

WASHINGTON, D.C.

March 8 and 9, 1984

and

September 19 and 20, 1984

ANNUAL REPORT

OF THE

DIRECTOR OF THE ADMINISTRATIVE OFFICE

OF THE

UNITED STATES COURTS

1984

addition, it would bring about other needed improvements relating to effective implementation and operation, and thus more nearly ensure the fundamental purpose of the Criminal Justice Act. Accordingly, the Judicial Conference does not support the amendment to the Criminal Justice Act included in H.R. 5757 and again endorses the enactment of H.R. 4307 or S. 2420.

COMMITTEE ON THE OPERATION OF THE JURY SYSTEM

Judge T. Emmet Clarie, Chairman of the Committee on the Operation of the Jury System, presented the report of the Committee.

SUMMARY JURY TRIALS

Judge Clarie informed the Conference that the Committee had completed its analysis of the summary jury trial and had concluded that it is a useful complement to other judicial techniques aimed at promoting the settlement of difficult cases. Although Judge Clarie emphasized that it is not suitable for all cases, it is a valuable tool in many situations. The Conference thereupon adopted the following resolution:

Resolved, that the Judicial Conference endorses the experimental use of summary jury trials as a potentially effective means of promoting the fair and equitable settlement of potentially lengthy civil jury cases.

JUROR UTILIZATION

At its session in March, 1984 (Conf. Rept., p. 34) the Conference established a national goal of limiting the percentage of jurors not selected, serving or challenged on voir dire or orientation day to 30 percent. Judge Clarie informed the Conference that many district courts had made significant progress toward attaining this goal and suggested a formula to be used in calling jurors for civil and criminal trials. It was the view of the Conference that a strict formula would not be advisable. The Conference, however, commended the district

JUDICIAL CONFERENCE OF THE UNITED STATES

AGENDA

September 19-20, 1984

10:00 a.m., Supreme Court Building

- A. Opening comments of the Chief Justice
- B. Introduction of new members of the Judicial Conference
- C. Introduction of invitees
- D. Annual Report of the Director, Administrative Office of the U.S. Courts, 1984
- E. Report of the Director, Federal Judicial Center
 1. Election of Member, Board of the Federal Judicial Center, pursuant to 28 USC 621, to fill the unexpired term of Bankruptcy Judge John J. Galgay, deceased
- F. Report of the Chairman, Judicial Panel on Multi-District Litigation
- G. Reports of Committees:
 1. Committee on the Judicial Branch Circuit Judge Frank M. Coffin, Chairman
 2. Committee on Court Administration Senior District Judge Elmo B. Hunter, Chairman
 3. Committee on the Budget Chief Circuit Judge Charles Clark, Chairman
 4. Committee on Judicial Ethics Circuit Judge Edward A. Tamm, Chairman
 5. Advisory Committee on Codes of Conduct Chief Judge Howard T. Markey, Chairman
 6. Committee on Intercircuit Assignments District Judge Thomas A. Flannery, Chairman
 7. Committee on Rules of Practice and Procedure Senior District Judge Edward T. Gignoux, Chairman

SUMMARY

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON
THE OPERATION OF THE JURY SYSTEM

The Committee on the Operation of the Jury System recommends that the Judicial Conference take the following actions:

1. Approve the report of the subcommittee on summary jury trials, and adopt a resolution endorsing the use of summary jury trials, only with the consent of the parties, as a potentially effective means of promoting the settlement of lengthy civil jury cases (p. 2)
2. Recommend that district courts, in routine cases, call in panels of no more than 18 prospective jurors for a six-person civil trial and 36 prospective jurors for a criminal trial (p. 4)

The remainder of the report is informational only.

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON
THE OPERATION OF THE JURY SYSTEM

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

INTRODUCTION

The Committee on the Operation of the Jury System respectfully submits the following report to the Conference.

Your committee met at Newport, Rhode Island on July 16 and 17, 1984. All members of the committee were present, with the exception of Judge Clifford Scott Green, who was unable to attend and who was excused.

Upon the committee's invitation, United States Magistrate F. Owen Eagan of the District of Connecticut appeared to relate his experiences with summary jury trials, and Thomas M. Hickey, Director of Judicial Information Systems and Jury Administrator in the state courts of Connecticut, addressed the committee regarding supplementation of voter lists as the source for juror names. Attending from the Administrative Office of the United States Courts were Norbert A. Halloran, Special Assistant for Jury Systems and Speedy Trial Matters, and Robert K. Loesche, Assistant General Counsel.

ITEM ONE

Summary Jury Trials

After a substantial period of study, your committee has completed its analysis of the summary jury trial, and recommends that the Judicial Conference endorse this procedure for use by district courts as an optional device.

As indicated in our last two reports, your committee has investigated the summary jury trial technique from a variety of perspectives. We have reviewed the literature, we have heard a lengthy presentation from its originator, Judge Thomas T. Lambros of the Northern District of Ohio, and we have independently conducted experiments with the procedure. At the direction of the committee's chairman, Magistrate F. Owen Eagan of the District of Connecticut earlier this year conducted seven summary jury trials in a variety of civil actions. His report at our most recent meeting supports many of the findings of the five-member subcommittee which studied this subject in detail a year ago. The subcommittee's report is attached hereto as Exhibit A.

In particular, Magistrate Eagan confirms our view that the summary jury trial is a useful compliment to other judicial techniques aimed at promoting the settlement of difficult cases. It is not, we emphasize, a panacea for all cases, but it is a valuable tool in many situations. Cases in which clients, rather than the attorneys, are resistant to settlement are the most well-suited to the procedure, in that

it exposes clients (whose attendance is required, unless they are excused for good cause) to the kind of zealous attack on their positions which will come at trial. Receiving the independent judgment of six unbiased citizens tends to dispel any false notions that clients may have regarding the invulnerability of their position, and it appears further to satisfy a psychological need for trial "combat" which may otherwise interfere with settlement.

Magistrate Egan agrees with us that long cases rather than short cases, i.e., those that would normally require a week or more to try, are the best ones to present to a summary jury, because the savings that will accrue to both parties and the court from a settlement are the greatest. As to the types of cases presented, we find that there are few reasons for restriction. Subject matters as diverse as antitrust, contract, land condemnation, torts, and even patents can and have been successfully presented to summary juries. Presentation of cases which turn on credibility or of prisoner petitions, however, is not recommended.

Finally, Magistrate Egan and your committee believe strongly that use of summary jury trials must be voluntary. Although Judge Lambros is willing to require litigants to go through the procedure, it is your committee's view that it is necessary, both as a matter of law and equity, that summary jury trials be conducted only with the parties' consent.

In light of the many benefits which can result from the use of the procedure, but recognizing its limitations, we seek Conference endorsement of the summary jury trial. It is our hope that Conference support will spur district judges to experiment with the process and to learn for themselves how it can assist in the resolution of many types of civil litigation. Your committee, with one dissent, requests the Conference to approve the attached subcommittee report and to adopt the following resolution:

RESOLVED, the Judicial Conference endorses the use of summary jury trials, only with the voluntary consent of the parties, as a potentially effective means of promoting the fair and equitable settlement of lengthy civil jury cases. With proper authorization by local rule, summary jury trials are recommended to district courts for consideration as an optional device.

Assuming this resolution is adopted, we also request approval to send notice of this resolution, together with a brief two-page description of the procedure, attached as Exhibit B, to all district judges.

ITEM II

Standard-Sized Panels for Jury Selection in Civil and Criminal Cases

At its last meeting, the Judicial Conference adopted your committee's recommendation to establish a national goal of limiting the percentage of jurors not selected, serving or

REPORT OF THE SUBCOMMITTEE ON
SUMMARY JURY TRIALS AND OTHER ALTERNATIVE DISPUTE RESOLUTION
TECHNIQUES

TO THE COMMITTEE ON THE OPERATION OF THE JURY SYSTEM:

At the Committee's meeting in July, 1983, Judge Thomas Lambros of the Northern District of Ohio made a lengthy presentation on the summary jury trial procedure he originated approximately three years ago. His remarks were cogent and well-received, but it was clear that many Committee members harbored reservations about endorsing the technique on a nation-wide basis.

This subcommittee was created to evaluate Judge Lambros' innovation together with other appropriate alternative dispute resolution techniques, and to make recommendations for action by this Committee and the Judicial Conference. Pursuant to this mandate, the subcommittee reappraised summary jury trials, compiled and reviewed an extensive collection of materials on other dispute resolution innovations, and discussed its findings at a meeting in Washington, D. C.

Our work leads to two conclusions. First, in light of the enormous variety of alternative procedures available for study and the Jury Committee's relatively narrow focus, we feel that formal action is appropriate only with regard to summary jury trials. Second, the subcommittee finds the summary jury trial to be a valuable and worthwhile innovation, and we suggest that the Judicial Conference recommend the procedure to all district courts for serious consideration as an optional device.

Alternative Dispute Resolution Techniques. The subcommittee's first task was defining the scope of its work. Using the extensive judicial administration collection of the Federal Judicial Center library, we attempted to identify a small number of dispute resolution procedures that could be meaningfully studied in conjunction with summary jury trials.

Two bibliographies were prepared on the broad subjects of "arbitration and award" and "alternatives to court proceedings." The latter proved to be the most informative, but even this one listing contained 70 entries, each of which in turn referred to numerous other works. Given its limited resources, the subcommittee concentrated on a few particular entries from this bibliography: a Federal Judicial Center report on the mediation program in the Eastern District of

Michigan; the Center's evaluation of court-annexed arbitration in three district courts; a description of a California "mini-trial" of a complex patent case; a Rand Corporation analysis of court-administered arbitration in consumer disputes; a National Center for State Courts survey on alternatives to civil litigation; a paper on the role of mediation in resolving prisoner disputes prepared by the Law and Society Association; a second study of court-annexed arbitration by A. Leo Levin, Director of the Federal Judicial Center; and several articles and speeches on the role of the judge in the settlement process.

What these materials made abundantly clear is that the number of alternative procedures is enormous and the volume of accompanying literature virtually infinite. Indeed, there is even a new journal entitled Alternatives to the High Cost of Litigation. The subcommittee recognizes that most of the procedures discussed in the literature have merit, and likely could prove beneficial to the administration of justice in the federal courts. But the sheer quantity of material and the complexity of the issues gives us pause. Prior to any one technique being endorsed or adopted, it should be subject to close attention and study. Neither this subcommittee nor the full Committee can devote the time or resources necessary to make an in-depth analysis of all the innovations that might be worthy of consideration by the federal judiciary.

The best report we could prepare would be frustratingly brief, and, in light of the volume of work already published, would likely be duplicative, if not superficial.

Furthermore, the "mandate" of the Committee suggests that we concentrate our attention on matters that have specific relevance to the operation of the jury system. In this regard, it should be noted that the subcommittee on judicial improvements (of the Judicial Conference Committee on Court Administration) is monitoring court-annexed arbitration in the Eastern District of Pennsylvania and the Northern District of California, and would, in the normal course of events, have "jurisdiction" over the federal courts' use of other alternative dispute resolution procedures such as mediation.

Accordingly, your subcommittee concludes that review of procedures other than summary jury trials would be substantively overtaxing and, given the limited mission of the parent Committee, "politically" inappropriate. We feel it is far preferable to confine our attention to summary jury trials. This decision is not meant to disparage other resolution techniques or to discourage further innovation. Rather, the aim is to limit this Committee's work to an area in which it can reasonably apply its expertise and in which it can make a meaningful contribution.

Summary Jury Trials. In turning our attention to summary jury trials, the subcommittee first reevaluated the procedure described by Judge Lambros. As borne out by his firsthand experience and as verified by the Federal Judicial Center study, "Summary Jury Trials in the Northern District of Ohio" (Federal Judicial Center 1982), the subcommittee finds that the summary jury trial is an efficacious means of producing settlements. The summary presentation does a good job, we feel, of informing the litigants--and the presence of the clients at summary trials is crucial for this reason--of the "true" value of their case. While we cannot determine whether summary jury trials produce settlements in cases that would not otherwise be settled, we nonetheless believe that the procedure makes a positive contribution simply in spurring such resolutions with a minimum allocation of court resources.

Thus, we endorse summary jury trials in principle. But we do have several concerns about the procedure which require us to qualify our support somewhat.

Compulsory Participation. Reflective of summary jury trials' success in terminating litigation, it must be realized that they do, in reality, replace conventional trials. The right to a traditional jury is not legally precluded, of course, but as a practical matter the very purpose of the

procedure is to eliminate the need for conventional trial presentations. Thus, summary jury trials tend to repudiate the constitutional right to jury trial. We therefore feel that use of this technique should to the maximum extent possible be voluntary, contrary to Judge Lambros' current practice. Although Judge Lambros reported that he has been faced with no legal challenges to a mandatory referral to a summary jury trial, we nonetheless consider it preferable that such referrals be made on a consensual basis.

Need for Legislation. The above consideration in turn raises the question of legal justification for the procedure; in particular, is specific authorizing legislation needed or appropriate? We answer both questions in the negative.

No provision of rules or statute specifically authorizes summary trials, but the subcommittee agrees with Judge Lambros that their use is within a district court's pretrial powers under Fed. R. Civ. P. 16. It is analogous to the use of advisory juries under Fed. R. Civ. P. 39(c) and 52(a), in which (as in a summary jury trial) the court and the parties are given the opportunity to utilize a lay jury's perceptions and insights to resolve a factual conundrum. We therefore find use of summary juries to be consistent with the Rules of Civil Procedure, and thus a proper subject for local rule under Rule 83. Accordingly, the enactment of specific

authorizing legislation appears unnecessary. Additionally, we believe that endorsement of such legislation would prove counter-productive by needlessly creating controversy and confusion about the procedure.

At the same time, we feel that underlying legal authorization is essential, and we recommend that no summary jury trial be conducted unless preceded by an appropriate local rule. We regard this to be a minimal requirement of due process, which also has the salutary effect of putting the local bar on notice about the procedure. An authorizing rule may be quite brief,* and the actual mechanics of conducting summary trials may be left to the discretion of the presiding judge or magistrate. In this regard, Judge Lambros' Handbook and Rules of the Court for Summary Jury Trial Proceedings (set out as Appendix A to the Federal Judicial Center study) is helpful. See also the brief description of the summary jury trial procedure that is appended to this report. As above, however, we advocate that all such procedures be set down in writing before the summary trials begin.

* For example, Civil Rule 17.02 of the Northern District of Ohio simply provides: "The Judge may, in his or her discretion, set any appropriate civil cases for Summary Jury Trial or other alternative method of dispute resolution, as he or she may choose." Similarly, local Rule 17(h) of the Western District of Oklahoma provides: "The court may, in its discretion, set any civil cases for summary jury trials or other alternative methods of dispute resolution as the Court may deem appropriate."

Nature of Service by Summary Jurors. One of the original concerns arising from the introduction of this procedure was the propriety of using appropriated funds to pay individuals for their service on summary juries. This issue was addressed in a memorandum prepared by the General Counsel's Office of the Administrative Office, and the subcommittee endorses that memorandum's finding that this expenditure is proper. A lingering concern exists, however, relating to de facto limitations on the service performed by summary jurors.

The Federal Judicial Center study noted that several judges in the Northern District of Ohio do not permit individuals who have served on summary juries to sit on regular panels. This response is understandable, given that summary jurors might develop distorted expectations regarding the formality of litigation and the type of evidence they may permissibly consider. Unfortunately, this creates two "tracks" of jurors, which could leave the perception that service on the advisory summary bodies is somehow less important than service on "real" juries. The Center's study reported that, while the brevity of summary jury trials gives some jurors whose time commitments might otherwise bar them from jury duty a chance to serve, there have been suggestions of dissatisfaction in being relegated to an advisory role.

The subcommittee agrees that summary jurors often may not be appropriate candidates for conventional panels, but nonetheless recommends against their automatic exclusion. Rather, we suggest that individuals with summary trial experience be included in conventional arrays and that litigants be advised of their previous service. These jurors may then be subject to voir dire on their experience, and, at the initiative of either the parties or the court, be excused for cause where it appears appropriate to do so. In this way, there will be no absolute prohibition against subsequent service, and the integrity of conventional jury trials will be preserved.

Nature of Cases Tried. A difficult procedural task is determining which cases are appropriate for presentation to summary juries. Inevitably, this will have to be left to the trial judge's discretion, giving due regard to the complexity of the issues and the degree of cooperation that can be expected from the parties and their counsel. Nonetheless, some generalizations can be made.

Contrary to the recommendations of the Federal Judicial Center, we believe that summary jury trials will be particularly useful in long cases rather than short cases. As Judge Lambros' personal experience bears out, summarization of a complex case, such as a major price-fixing claim or a complex

product liability case, is not impossible, and may, in fact, better acquaint a jury with the issues of a case than a formal, conventional trial. The complex case also offers the greater promise of settlement, in that few litigants will be likely to gamble the expense of a lengthy trial after failing to convince a summary jury. Furthermore, since the settlement of complex cases produces the greatest savings of trial time, complex cases are in fact the preferable candidates for the procedure. In a simple case, on the other hand, a summary presentation may not involve significantly less time than a conventional trial, and losing parties will have little disincentive from taking their chances again before a regular panel.

The one limitation which we recognize is that a case which turns on a witness's credibility cannot meaningfully be presented in a summary trial, because the witness himself does not appear. Judge Lambros suggested that parties could avoid this problem by presenting to the summary jury the basis for the witness's testimony (e.g., his ability to observe the event in question, or, if an expert, his credentials) together with a summary of his anticipated testimony. In his view, this will provide the jury with virtually the same opportunity for assessing veracity as a conventional trial. Despite Judge Lambros' sincere beliefs, we are not convinced. Providing a jury a summary look at a witness through

the rose-colored glasses of his lawyer is not an effective substitute for the jury's firsthand evaluation of tone and demeanor and all the other intangible qualities that influence the decision of whom to believe. We conclude that summary jury trials may not be appropriate for cases of this nature.

Conclusion and Recommendation. Your subcommittee believes that the summary jury trial is a worthwhile innovation that should be endorsed by the Judicial Conference and called to the attention of district judges. It cannot be expected to eliminate all congestion in court calendars, nor is it appropriate in all civil cases and in all situations. It is, however, an effective procedure that can, subject to the limitations we have discussed, demonstrably aid in the resolution of cases. In our view, the concept merits "publicity" by the Judicial Conference so that it will be used in appropriate cases as often as is possible.

We recommend that the Conference be asked to adopt the following resolution:

Resolved, the Judicial Conference endorses the use of summary jury trials, only with the voluntary consent of the parties, as a potentially effective means of promoting the fair and equitable settlement of

lengthy civil jury cases. With proper authorization by local rule, summary jury trials are recommended to district courts for consideration as an optional device.

If Conference approval is granted, we recommend further that notice of the resolution be distributed to all district judges, together with a brief description of the mechanics of summary jury trials, which is attached.

Respectfully submitted,

Subcommittee on Summary Jury Trials

John F. Nangle (Chairman)
J. Waldo Ackerman
William B. Enright
Clifford Scott Green

DISSENTING STATEMENT

I dissent. I do not want to support any action that may tend to erode the use of a jury trial in a civil case. I am of the opinion that the summary jury trial device may do that. Even though the use of the device is not compelled, the device itself distorts the substance and form of a jury trial.

Respectfully submitted,

John Feikens

Attachment

SUMMARY JURY TRIALS

A Brief Description of the Procedure

A summary jury trial is the summarized presentation of a civil case to an advisory jury for the purposes of providing the parties a realistic assessment of the value of their cases. The proceeding is voluntary and consists of an amalgam of opening and closing arguments with an overview of expected trial proofs. No testimony is taken from sworn witnesses. The summary jury's verdict is non-binding, and evidentiary and procedural rules are few and flexible. Nonetheless, to achieve the goal of facilitating settlement, the summary trial is conducted in open court with appropriate formalities, and clients are expected to attend. Counsel are to have their case in a state of trial readiness and to present to the summary jury the best possible summation of their claim. The summary trial is normally concluded in a half day, and rarely lasts longer than a full day.

Set forth below is a summary of the rules which commonly govern these proceedings.

The summary trial is conducted before a six-member jury. Counsel are permitted two challenges apiece to the venire, and are assisted in the exercise of such challenges by a brief voir dire examination conducted by the presiding judicial officer and by juror profile forms. There are no alternate jurors.

Counsel are expected to submit proposed jury instructions and briefs on any novel issues of law within three working days before the date set for hearing.

The attendance of clients or client representatives during the summary jury trial is mandatory unless they are excused by the court for good cause.

All evidence is presented through the attorneys for the parties. Only evidence that would be admissible at trial upon the merits may be presented. Attorneys may summarize and comment upon the evidence--that is, they may mingle representations of fact with argument--but considerations of responsibility and restraint must be observed. Counsel may only present factual representations supportable by reference to discovery materials, including depositions, stipulations, signed statements of witnesses, or other documents, or by a professional representation that counsel personally spoke with the witness and is repeating what the witness stated.

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Prior to trial, counsel are to confer with regard to physical exhibits, including documents and reports, and reach such agreement as is possible as to the use of such exhibits.

Objections are not encouraged, but will be received if, in the course of a presentation, counsel goes beyond the limits of propriety in presenting statements as to evidence or argument thereon.

After counsels' presentations, the jury is given an abbreviated charge on the applicable law.

The jury is encouraged to return a unanimous verdict. Barring unanimity, the jury is to submit a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages.

Unless specifically ordered by the court, the proceedings are not recorded. Counsel may, if desired, arrange for a court reporter.

Although the proceedings are non-binding, counsel may stipulate that a consensus verdict of the jury will be deemed a final determination on the merits and the judgment may be entered thereon by the court, or they may stipulate to any other use of the verdict that will aid in the resolution of the case.

F.R.D. 506, 510 (N.D. Oh. 1990), calling citizens from the qualified jury wheel to summary jury service may impermissibly alter the jury selection process in the Northern District of Ohio, and thus jury selection in the instant case.

Accordingly, after potential jurors were called, but prior to voir dire, an Order was issued expressing my concern regarding the jury selection process, staying proceedings pending a resolution of the matter and requesting Counsel to investigate, submit briefs, and thereafter, to argue the issues presented. Order of June 12, 1990; Transcript at XX. It must now be determined: (1) whether the use of citizens drawn from the qualified jury wheel for summary jury service impermissibly alters the jury selection process in the Northern District of Ohio and thus, the jury selection in the instant matter; and, (2) if so, the most efficient and least intrusive remedy.

A. The Jury Selection Process in the Northern District of Ohio

Drawn from the master wheel, the Cleveland qualified jury wheel for civil and criminal cases consists of approximately four-hundred names. Once the qualified jury wheel drops to two-hundred names, it is replenished.

Upon request by a judge, a panel of prospective jurors is drawn from the qualified jury wheel and directed to the court room. These jurors may be: (1) called to the jury box,

used to serve as jurors, and subsequently discharged; (2) called to the jury box, challenged ("challenged jurors") and returned to the qualified jury wheel; or (3) not called to the jury box ("leftover jurors") and returned to the jury assembly room. Initially, summary jury panels were only drawn directly from the qualified jury wheel. Since April, 1990, however, leftover jurors have also been selected for summary jury duty.

This use of leftover jurors creates a startling distortion in juror utilization statistics. By empaneling these leftovers for summary jury duty, the court appears to reach a higher level of juror utilization; i.e. fewer jurors are left in the pool at the end of the day. Generally, however, those empaneled for summary jury duty do not serve immediately, and in fact, may not be given any specific date for actual service. It is somewhat unclear why these jurors should be considered as utilized, but that question need not be addressed at this time.

If a summary jury trial is cancelled, the summary jurors scheduled to serve are returned to the qualified jury wheel. Potential jurors who serve as summary jurors are not returned to the qualified jury wheel, but are, instead, discharged from jury service.

Since April, 1990, thirty-seven summary jury panels have been sworn. At this time, only eight of those thirty-seven summary jury trials have gone forward. Thus, approximately two-hundred potential jurors have been diverted from petit

jury service to summary jury service. Many of these are in a limbo of sorts, still awaiting the selection of a date for the summary jury trials for which they are to sit. But for their assignment to summary jury service, these individuals would have remained in the qualified jury wheel.

Thus, the jury selection process in the Northern District of Ohio improperly involves calling citizens from the qualified jury wheel for service not only as grand jurors and petit jurors but also as summary jurors.

B. Judicial Intervention

Judicial intervention is appropriate when the jury selection process is not in compliance with the law. In particular, pursuant to 28 U.S.C. §1867(d), "[i]f the court determines that there has been a substantial failure to comply with provisions of [the Act] in selecting the petit jury, the court shall stay the proceedings pending the selection of a petit jury in conformity with [the Act]." A party need not actually be prejudiced by an impropriety to argue successfully a lack of compliance with the statute. See United States v. Okiyama, 521 F.2d 601, 603 (9th Cir. 1975). Certainly, the court must balance the significance of any impropriety against the time and effort expended in trying a case and reaching a verdict. However, in the instant matter, the court is considering the perceived impropriety prior to any trial proceedings, aside from calling jurors from the qualified jury

wheel. Since little time or effort has been expended in trying the instant matter, there is no reason for the court to overlook what it perceives as an intentional deviation from the jury selection process as laid out in the Act and the Plan.

The Government argues that it has no standing to challenge the propriety of assigning summoned jurors to serve in summary jury trials as it suffers no injury in fact from the diversion of jurors to summary jury service and, alternatively, because the matter can be administratively resolved by the Sixth Circuit Judicial Council. Both arguments are unpersuasive. Having perceived an impropriety in the jury selection process, the court ordered the parties to address the merits of that concern. That summary jurors are not involved in criminal trials is irrelevant; all jurors, whether they are summary jurors or criminal petit jurors, are called from the qualified jury wheel, as part of the jury selection process in the Northern District of Ohio.

C. Noncompliance with the Act and the Plan

Federal judges have no authority to summon jurors to serve as summary jurors. Hume v. M & C Management, 129 F.R.D. 506 (N.D. Oh. 1990).

As the court stated in Hume, there is no authority in the Act, the Plan or case law for summoning citizens to summary jury service. Hume, 129 F.R.D. at 508-09. This district

court is vested with authority to "devise and place into operation a written plan for random selection of grand and petit jurors." 28 U.S.C. §1863(a) (emphasis added). The language of the Plan is similar. Federal Rule of Civil Procedure 39(c), enacted pursuant to the Rules Enabling Act, provides that in "all actions not triable of right by jury the court . . . may try any issue with an advisory jury" Fed. R. Civ. P. 39(c) (emphasis added). While the circuit courts have ruled on the legality of matters pertaining to summary jury proceedings, they have not expressly addressed whether districts courts have the authority to call potential jurors to serve as summary jurors. Thus, the Act and the Plan authorize the utilization of citizens for service only on grand, petit and advisory juries. Any argument that a summary jury resembles these expressly authorized juries, and therefore, comes under the scope of or was contemplated by such authorization, is meritless.

Clearly, summary jury service is not the equivalent of petit jury service, not to mention grand jury service, either in function or purpose; thus, calling individuals from the qualified jury wheel to serve as summary jurors is not comparable to calling them to petit jury service. Hume, 129 F.R.D. at 509. In Cincinnati Gas & Electric Co. v. General Electric, 854 F.2d 900, 904 (6th Cir. 1988), in which the Sixth Circuit held that the First Amendment presumption of public access to trials did not apply to summary jury trials,

the court found unpersuasive the argument that summary jury trials are "structurally similar to ordinary civil jury trials" and emphasized the "purely settlement function" of a summary jury trial. In Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1986), the Seventh Circuit held that federal district courts may not require litigants to participate in summary jury trials, although the court specifically stated that "[w]e are not asked to determine the manner in which summary jury trials may be used with the consent of parties." Like the Sixth Circuit in Cincinnati Gas & Electric, the court distinguished a summary jury from a regular jury, noting that the stated purpose of summary jury trials is "to motivate litigants toward settlement by allowing them to estimate how an actual jury may respond to their evidence," 838 F.2 at 884. In Hume v. M & C Management, 129 F.R.D. 506, 509 (N.D. Oh. 1990), this court outlined several distinctions between summary jury service and petit jury service such as the nonbinding nature of summary jury verdicts.

The parties analogize summary jurors to advisory jurors, arguing that authority for summoning citizens to summary jury service can be drawn from or is contemplated by Federal Rule of Civil Procedure 39(c) which expressly authorizes the trial of issues with an advisory jury. This argument is unpersuasive. As this court noted in Hume v. M & C Management, 129 F.R.D. at 508 n.5, advisory juries and summary

juries are fundamentally distinct. Therefore summary juries are not covered by Rule 39(c). See also Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366, 385 n.27 (1986); Maatman, The Future of Summary Jury Trials in Federal Courts: Strandell v. Jackson County, 21 John Marshall Law Review 455, 478 (1988). Contrary to the suggestion of the parties', the lack of an express prohibition against calling jurors to serve as summary jurors should not be interpreted as authorization. Since the Act and Rule 39(c) expressly authorize the courts to call or conscript for grand, petit or advisory jury service, this means that citizens can be conscripted for those services and for no other services. Cf. Finley v. United States, 109 S.Ct 2003, 2009 (1989) (interpreting provision of the Federal Tort Claims Act "against the United States" to mean "against the United States and no one else") (emphasis supplied). Second, where there is experimentation with the law, especially longstanding experimentation as in the case of the summary jury trials, the law should not be read expansively. It has been noted regarding summary jury trials, that "[a]lthough express authorization from the federal rules is not always necessary, a lack of clear authority is cause for hesitation when experiments are be undertaken." Maatman, The Future of Summary Jury Trial in Federal Courts Strandell v. Jackson County, 21 John Marshall Law Review, 455, 477 (1988).

Likewise Judge Posner noted that "lack of clear authorization is a reason for hesitation in sensitive areas" and described summary jury service as "an enlargement of the use of the jury" and called jury service a "form of conscription." Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 337, 386 (1986) (quoted in Maatman, at 477 n.105); See also Taylor v. Oxford, 575 F.2d 152, 154 (7th Cir. 1978) (quoted in Maatman, at 477 n.105) ("innovative experiments may be admirable, and considering the heavy case loads in the district courts, understandable, but experiments must stay within the limitations of the statute"). The courts should be particularly careful when experimentation directly makes use of human subjects. See Hume, 129 F.R.D. at 508 & n.4 (quoting Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law).

Furthermore, the legislature has twice failed to pass legislation legitimizing summary juror trials: H.R. 473, 100th Cong., 1st Sess., 133 Cong. Rec. H. 157 (1987) (Alternative Dispute Resolution Promotion Act of 1987); S. 2038, 99th Cong., 2d Sess., 132 Cong. Rec. S. 848 (1986) (Alternative Dispute Resolution Promotion Act of 1986). Senator Biden recently introduced the "Civil Justice Reform Act," S. 6473, Cong. Rec. (May 17, 1990) which provides that "a civil justice expense and delay reduction plan developed and implemented

under this chapter shall include provisions applying . . . principles and guidelines of litigation management and cost and delay reduction" including "authorization to refer appropriate cases to alternative dispute resolution programs that . . . the court may make available, including mediation, minitrial, and summary jury trial." S. 2648, 101st Cong., 2d Sess. §473(a)(6)(b), 136 Cong. Rec. 6475 (1990) (emphasis added). Interestingly, alternative dispute resolution is an oft-used misnomer as applied to summary jury trials. As summary jury trials are non-binding, there is no alternative resolution as there would be in a process such as binding arbitration.

The legislature's failure to expressly authorize summary jury trials despite several opportunities to do so is especially significant when viewed in the light of the Seventh Circuit's statement that "the ease and speed with which the Federal Rules of Civil Procedure can be amended by those whom Congress entrusted with the responsibility for doing so should make federal judges hesitate to create new forms of judicial proceedings in the teeth of existing rules." Henson v. East Lincoln Township, 814 F.2d 410, 414 (7th Cir. 1987) (quoted in Maatman, at 477 n.105).

The Plan for this judicial district has not been amended to provide authorization for drawing summary jurors from the qualified jury wheel, and therefore, the Circuit Council has not granted any such authorization. Accordingly, the jurors

called in the instant matter, and necessarily drawn from the qualified jury wheel, emerged from a jury selection process involving a practice for which there is no basis in law.

D. Impermissible Alteration of the Jury Selection Process

In their briefs and oral arguments, the parties suggest that judicial intervention in the jury selection process is merited only when there exists a practice tending to result in a panel of jurors unrepresentative of a fair cross section of the community. In enacting 28 U.S.C. §1867, the legislature was primarily concerned with jury selection practices having such an effect. See H. Rep. No. 1076, Jury Selection and Service Act of 1968, 1792, 1794 (indicating that "substantial" referred to percentage deviations in a jury from the structure of the community). Thus, courts have held that "two important principles underlying the Act were random selection from voter lists and exclusion on the basis of objective criteria only" United States v. Nelson, 718 F.2d 315, 318 (9th Cir. 1983). Similarly, in United States v. Gregory, 730 F.2d 692, 699 (11th Cir. 1984), the court held that a substantial violation of the Act will be found only when two important general principles are frustrated : (1) random selection of juror names and (2) use of objective criteria for determination of disqualifications, excuses, exemptions, and exclusions. In contrast a mere "technical" deviation from the Act does not constitute an impermissible

deviation. Gregory, 730 F.2d at 699.

However, it can not be the case that the use of jurors for services other than those enumerated in the Act, namely serving as grand, petit and advisory jurors, should be considered and excused as a mere "technical" deviation from the Act. Intentional deviations are not permissible simply because they may not alter randomness. After all, "jury service is . . . a form of conscription." Posner, The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations, 53 U. Chi. L. Rev. 366, 386 (1986). Certainly, for example, utilizing potential jurors to wash the judges' cars could not be condoned as a mere technical deviation from the Act. While the use of jurors as summary jurors may seem less severe to some, it nonetheless constitutes an unauthorized use of jurors, and, in my view, an egregious deviation from the Act.

Intentional deviations from the statutory jury selection process cannot be allowed when they are perceived prior to a trial, before significant resources have been expended in trying a case. Therefore, the court cannot in the instant matter condone, prior to trial, the fact that jurors called to serve in this matter have emerged from a jury selection process involving a use of jurors, namely for summary jury service, that is clearly unauthorized by the Act, the Plan and case law and, although no opinion is asserted on this issue, may be unauthorized by the Constitution and violate certain

of its provisions. Accordingly, the jury selection process in the Northern District of Ohio from which the panel in the instant matter emerged has been impermissibly altered.

E. Remedy

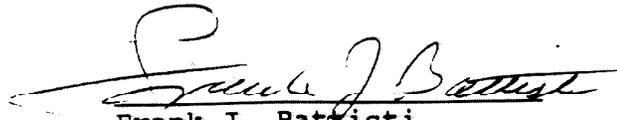
In order to resolve this matter as expeditiously as possible and in the least intrusive manner, the clerk is instructed to draw four hundred names from the master wheel and to place them in the qualified jury wheel. From this qualified jury wheel, jurors shall be called to try the instant matter. Of the jurors making up the qualified jury wheel, none may be used to serve as summary jurors either before or after a panel for the instant matter is called.

Accordingly, all criminal and civil jury trials pending before me are suspended until further order of this court. Because this matter involves an intentional and impermissible jury selection practice, "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).¹

¹ It seems notable that the use of summary jury trials bears a resemblance to the eighteenth century system of successive jury trials. At that time, the court system was "horizontal." The "superior" and "inferior" courts each exercised trial court jurisdiction, and each empaneled their own juries. Thus, successive jury trials were held in the same case. See W. Ritz, Rewriting the History of the Judiciary Act of 1789 27, 35 (1990). Of course, this horizontal system, with its successive jury trials, was abandoned with the adoption of the United States Constitution (see art. III & amend. VII) and the Judiciary Act of 1789.

The summary jury trial, originally conceived and promoted

IT IS SO ORDERED.


Frank J. Battisti
United States District Court

as a tool for complex and protracted cases, is now regularly used for routine litigation. There are no objective standards for the initiation or utilization of the process. If the Federal Rules of Civil Procedure and Federal Rules of Evidence became applicable then the summary jury trial would increasingly replicate the petit jury process. As such it would be a step backward towards the days of successive jury trials. On the other hand, if such rules are not made applicable, then it is unclear what the proper rules should be or how they should be formulated.

After ten years, the summary jury trial exists as an "experiment", commenced without controls, carried on without standards, evaluated without criteria, and developing without direction. Besides placing an added hardship on the parties, it remains unclear what the process has to offer over a traditional settlement conference between the parties and the judge. Also unclear is the effect of the summary jury trial on public and juror perception of -- or respect for -- the legal system. These, however, are questions best left for another day, and perhaps another forum.