The Judge's Role in Fostering Voluntary Settlements

Thomas D. Lambros
THE JUDGE'S ROLE IN FOSTERING VOLUNTARY SETTLEMENTS

Thomas D. Lambros†

I. INTRODUCTION

AMERICANS are taking their problems to the court house in greater numbers than ever before. During 1983, new civil case filings in the United States district courts increased 14.3% over 1982 and totaled 255,546.1 These new filings left the federal courts with the largest pending caseload in their history.2 This trend challenges the dispute management skills of judges. Unless judges respond dynamically to the problems posed by their ever-expanding dockets,3 the public’s confidence in America’s legal system will decline.4

Although traditional procedures, including the jury trial, continue to be essential to the resolution of certain cases, experience dem-

† United States District Judge, Northern District of Ohio. J.D., Cleveland-Marshall College of Law, 1952.
2. Id. at 11. Between 1982 and 1983 the pending case load of the federal district courts increased by 14.7%, going from 217,624 cases pending in 1982 to 246,863 cases pending in 1983. Id.
3. Chief Justice Burger, in his 1982 report on the state of the judiciary, noted that the average case load per federal district judge nearly doubled between 1940 and 1981, going from 190 cases in 1940 to 350 cases in 1981. Burger, Isn’t There a Better Way, 68 A.B.A. J. 274, 275 (1982). The Chief Justice also noted that the experience of federal appellate judges has been similar to that of the district judges: between 1950 and 1981 the average caseload of federal appellate judges went from 44 cases per judge to 200 cases per judge. Id.
4. According to one scholar’s calculations, “by the early 21st century the federal appellate courts alone will decide approximately 1 million cases each year.” Barton, Behind the Legal Explosion, 27 Stan. L. Rev. 567, 567 (1975). But see Sander, Varieties of Dispute Processing, 70 F.R.D. 111 (1976). In response to Professor Barton’s calculations, Professor Sander remarked,
   “I believe that one should view these dire predictions with a healthy skepticism. Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a variety of social factors. Nor should it be assumed that there will be no human intervention that could dramatically affect the accuracy of Professor Barton’s projections.”
   Id. at 111 (footnote omitted).
4. Chief Justice Burger has stated that “[i]f the courts are to retain public confidence, we cannot let disputes wait two, three, or five years to be disposed of, as is so often the situation.” Burger, supra note 2, at 276.

(1363)
onstrates that a large percentage of cases can be settled fairly and efficiently through judge-guided alternative methods of dispute resolution. In contrast to the alternative methods of dispute resolution employed solely by private parties, judicially-managed alternatives supplement, rather than replace, the traditional processes of civil litigation. As with most other alternatives to the traditional civil litigation process, judicially-supervised alternatives are valuable because they foster case settlements. Judicially-supervised alternatives are particularly effective because of the unique position of the judge: only the judge commands the court resources and the disinterested perspective necessary to efficiently and consistently guide parties toward fair settlements of substantial disputes.

This article explores judicially-managed alternatives to the traditional procedures of civil litigation. It will analyze some of the factors that have motivated judges and litigants to seek alternatives to traditional civil procedures. The article will then describe two judicially-managed alternative methods of dispute resolution: 1) the appointment of neutral experts and special masters, and 2) the summary jury trial.

II. ORIGINS OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION

Initially, it must be recognized that the vast increase in litigation in the United States was, and is, to be expected. If one considers the complexity of interpersonal and business relationships in modern society, one can see that this mass of litigation is not a new problem, but simply a compounding of a familiar facet of human experience. Throughout history, society has developed and implemented methods for meeting and resolving disputes as the disputes arose. As society became more complex, disputes and dispute resolution techniques also became more complex. It is from this process that our present system has evolved. It is because of this ability to meet the challenges of a changing society that our system endures.

Over the past several years many alternative methods of dispute resolution have been developed. Concurrently, many commentators

5. See note 8 infra.
6. See note 12 infra.
7. See generally G. ARCHER, HISTORY OF THE LAW (1928) (traces the history of law from the Code of Hammurabi (2200 B.C.) to America in the nineteenth century); P. EDMUNDS, LAW AND CIVILIZATION (1959).
8. See, e.g., Cooke, The Highways and Byways of Dispute Resolution, 55 ST. JOHN'S L. REV. 611, 618, 622-24 (1981) (recent alternatives to the traditional court framework include (1) screening panels to evaluate merits of medical malpractice claims, (2) a
have engaged in extensive comparative analyses of the various alternatives. Typically, these commentators describe the characteristics of various alternative methods of dispute resolution and then state which alternative is best. It is my view that altogether too much time and energy have been devoted to such debates. Accordingly, this article presupposes a working knowledge of alternative methods of dispute resolution and does not provide a description of the current state of the art. Instead, it focuses on certain factors that have made the two alternative methods advocated in this article particularly effective.

The goal of any judicially-managed alternative method of dispute resolution is to foster settlements and thereby obviate trials. This goal is often accomplished by providing a reasonably accurate forecast of trial outcomes. A common element among most alternative methods of dispute resolution is that they involve a neutral indi-
individual. The credibility that the disputants place in the result of the alternative process is a direct function of the confidence they have in the person administering the process. To produce an effective result, an alternative must demonstrate and employ the basic rudiments of fairness, which are the very essence of our court system. Thus, no method of dispute resolution will function efficiently unless the disputants have a high level of confidence in the neutral individual overseeing the process.

Several commentators have attributed the success rate of many alternatives to the coercive nature of the judicial process and the disputants’ fear of having to resort to the courts. One reason various alternative methods are effective is that the disputants realize that an unresolved dispute may result in trial. The motivation behind such settlements is mischaracterized, however, when one asserts that the

12. The use of a neutral individual to supervise dispute-resolution has been deemed “essential.” Olson, Dispute Resolution: An Alternative for Large Case Litigation, Litig., Winter, 1980, at 22, 24. But see Parker & Radoff, supra note 8, at 43 (“under some circumstances the benefits of a minirehearing may be obtained without the additional expense and possible delay that may result from the introduction of a neutral adviser”). The role of the neutral party in alternative forms of dispute resolution ranges from that of passive moderator to final arbiter of both law and fact. For example, the mediator’s role is to persuade the parties to conform themselves to the rules, rather than order them to do so. See Fuller, Mediation — Its Forms and Functions, 44 S. Cal. L. Rev. 305, 308 (1971). Professor Fuller explains that

the mediator can direct [the parties’] verbal exchanges away from recrimination and toward the issues that need to be faced, [and] by receiving separate and confidential communications from the parties he can gradually bring into the open issues so deep-cutting that the parties themselves had shared a tacit taboo against any discussion of them and that, finally, he can by his management of the interchange demonstrate to the parties that it is possible to discuss divisive issues without either rancor or evasion.

Id. at 309.

The neutral advisor in a minirehearing or minitrial plays a more active role with respect to the outcome of the dispute. See Parker & Radoff, supra note 8, at 43. The neutral advisor in this form of dispute resolution furnishes the parties with a non-binding evaluation of the merits in addition to supervising the process. Id. For other discussion of the role of the neutral advisor, see generally CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT (1982); Green, Marks & Olsen, SETTLING LARGE CASE LITIGATION: AN ALTERNATIVE APPROACH, 11 Loyola L. Rev. 493, 503 (1978).

In binding arbitration, the arbitrator renders a decision which binds the parties unless the statutory criteria for judicial modification are met. See, e.g., Novoseller v. Royal Globe Ins. Cos., ___ Pa. Super.___, 463 A.2d 1163 (1983) (interpreting 42 Pa. CONS. STAT. ANN. § 7315 (Purdon 1982)) (statute precludes modification of arbitrator’s decision unless arbitrator misapplied the law).

13. L. Hand, The Deficiencies of Trial to Reach the Heart of the Matter, reprinted in 3 LECTURES ON LEGAL TOPICS 89 (1926). Judge Learned Hand commented, “I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.” Id. at 105. See also Nejelski, The Small Claims and Access to Justice — DISPUTE RESOLUTION: TRENDS AND ISSUES, 20 ALBERTA L. REV. 314 (1982). Former Third Circuit Executive Paul Nejelski has characterized the prospect of courtroom litigation: “A firm trial date is a ‘Doomsday machine’ which forces the parties and their lawyers to prepare the case simultaneously and hopefully resolve it.” Id. at 323.
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The judicial system is a coercive and feared process. It is important to recognize that the judicial process is not inherently intimidating or coercive. Courts do not nullify the free will of litigants. Courts demand accountability, however. At some point in the judicial process, a litigant must present proof in support of a claim. To prepare and present such proof may be an expensive and time-consuming task. It is this high cost of litigation which often governs the decision to settle. Rather than arising from some form of inherent coercion or fear, the decision is a voluntary one, based on the disputants' balancing of a wide variety of factors, including cost, time, and uncertainty of results.

Several writers have suggested that America's court system should be replaced by a system that can resolve disputes more efficiently. These writers, however, fail to recognize that the American public continues to rely on its court system as its primary system for resolving disputes. Notwithstanding the current focus on the costly and time-consuming nature of litigation, the public's confidence in the ability of the judicial system to render just and equitable results remains high. Because of this enduring public confidence in the ju-


15. See, e.g., Breger, supra note 9, at 947-55. Professor Breger concludes his article by stating that "[f]inding the balance between efficiency and fairness values is the conundrum of modern judicial administration . . . ." Id. at 955. Professor Breger points out that in order to compensate for the current imbalance resulting from the dramatic increase in litigation, many reformers advocate "an effort to divert appropriate cases to informal fora." Id. at 947. The minitial, Breger notes, has the power to be a particularly effective alternative to formal litigation. Id. at 952-53. Beyond alternative procedures for dispute resolution, Professor Breger recommends development of a legal system that minimizes the need for complex legal interpretation. He explains that "minor changes in probate law could remove all but the most complex estates from judicial purview. The morass of government regulation should be scoured with an Ocean's razor honed to select the simpler regulatory alternatives." Id. at 955. Lawrence Cooke, Chief Judge of the New York Court of Appeals, similarly calls for alternatives to the traditional judicial mechanism. See Cooke, supra note 8. Observing that the overcrowded court "has become a beleaguered institution," Chief Judge Cooke continued: "Just as byways divert the flow of traffic from the highways, secondary systems of dispute resolution should be used to reduce the demands placed upon the traditional court system." Id. at 612. It should be noted that Chief Judge Cooke tempers his progressive recommendation with a call for tradition: "the major portion of the case flow should be directed through the highway of the courts . . . ." Id. at 631-32.

16. See Brink, Improving Our Justice System Through Alternatives, 68 A.B.A. J. 384 (1982). Commenting on the need for alternative means of dispute resolution, David R. Brink, President of the American Bar Association, observed that [the] movement toward dispute resolution outside court, in a broad range of cases, does not disparage the role of courts and lawyers. Many disputes, rights, and issues of our time can be resolved only by our judicial system. But that system can function even better if it is freed of matters that choke
diciary, judges must play a central role in the development and implementation of effective alternative methods of dispute resolution. If judges play an effective role in the development of alternatives to the traditional jury trial, they can aid in the efficient resolution of disputes without impairing the ability of courts to provide their traditional services.

Although the public's confidence in the judicial system continues, recent criticisms of the costs and delays associated with litigation have tended to erode that confidence. There is no question that the workload of the American judiciary is increasing at an alarming rate. Many have questioned the ability and competency of the courts to manage effectively the deluge of litigation. For example, a recent editorial concluded: "Public opinion polls show that as the cost of finding justice has accelerated, trust in the court system has dropped." Consequently, to maintain the public's confidence in our judicial system, judges must focus on resolving the problem of excessive delays and escalating costs. Failure to do so may result in the declining relevance of judicial systems in the United States. One commentator summarized the problem in these terms:

Toward the end of the twentieth century, the danger is not that the rule of law will formally end, but that it will become increasingly irrelevant. Unless American legal institutions are remade to meet the needs of the community, they will be, not eliminated, but bypassed by growing segments of the society.

History confirms that courts which become bywords of incompetence may continue formally in full dress and ceremony — but the society finds means of carrying on its business without them. [Eminent nineteenth-century jurist and historian Frederic W.] Maitland pointed out that, at the end of Queen Mary's reign, "the judges had nothing to do but 'to look about them.'" The inadequacies of the common law and the expense and delay involved in lawsuits had led the bulk of the community to avoid the courts at all

its facilities, either through the sheer volume of simple claims or the occasional complex case that can occupy it for months or years. Id. at 384.

17. See notes 1-4 and accompanying text supra.

18. See, e.g., Bell, Crises in the Courts: Proposals for Change, 31 VAND. L. REV. 3 (1978). Former United States Attorney General Bell states that "the quality of justice dispensed by our federal court system is beginning to deteriorate, and unless checked, this deterioration will accelerate." Id. at 5.

This is not an acceptable prediction of the fate of judicial systems in the United States. The American judiciary has the ability to meet the challenge of the increase in its workload. The judiciary must explore and adopt alternative methods of dispute resolution.

In 1970, Chief Justice Warren E. Burger asked the district judges of the United States for suggestions to improve the judicial system. In response to the Chief Justice's inquiry, I stated:

[W]e must find ways to resolve controversies before they become involved in the complex adversary judicial machinery. Methods must be examined which can effectively deal with disputes administratively and arbitratively but under judicial supervision and before formal litigation is commenced.21

In his 1983 Year-End Report on the Judiciary, the Chief Justice expressly recognized the need for the judicial system to implement alternatives:

Experimentation with new methods in the judicial system is imperative given growing caseloads, delays, and increasing costs. Federal and state judges throughout the country are trying new approaches to discovery, settlement negotiations, trial and alternatives to trial that deserve commendation and support. The bar should work with judges who are attempting to make practical improvements in the judicial system. Greater efficiency and cost-effectiveness serve both clients and the public. Legal educators and scholars can provide a valuable service by studying new approaches and reporting on successful innovations that can serve as models for other jurisdictions, and on experiments that do not survive the scrutiny of careful testing.22

The traditional role judges have played in dispute resolution has varied from judge to judge. While bench, bar, and society have differing perceptions of what this role has been and should be, all are concerned with the judge's effectiveness in disposing of disputes. Ad-

20. B. Schwartz, The Law in America 362-63 (1974). Accord Belli, The Law's Delays: Reforming Unnecessary Delay in Civil Litigation, 8 J. LEGIS. 16 (1981) (unless legislatures respond to the overload of litigation, the judicial system may deteriorate to the point where "laymen will be tempted to circumvent the legal process entirely")
ditionally, all agree that the pretrial process facilitates efficient disposition of disputes. 23

Some judges control their dockets with a heavy hand, by strongly suggesting that parties settle. Many such judges earn this reputation by imposing strict time tables in an attempt to achieve settlement through the force of rigid litigation schedules. Others, however, simply have an innate talent for resolving cases before trial without resorting to pressure tactics. Still other judges seem to approach settlement in a passive manner, choosing to play no role other than the final arbiter if the parties cannot work out a settlement on their own. Each of these approaches to settlement is appropriate in particular cases. The judge must use his ability and discretion to decide which of these paths, if any, should be followed in any particular dispute.

Lawyers also employ different pretrial techniques to facilitate settlement. Some seek an early settlement, while others play out their hands to the end — often the day of trial. In the background of all pretrial proceedings, however, the trial looms. Lawyers and litigants all want to avoid this moment. This is evidenced by the large percentage of settlements that occur just prior to trial. 24

Today, there are serious questions with respect to the judge’s participation in the pretrial mechanism. A primary concern is whether the judge has sufficient power and resources to keep from being overwhelmed by the backlog of cases. In an effort to improve the settlement process, some scholars have endeavored to develop mathematical formulas to predict the fair settlement value of a case. These scholars have recognized that a touchstone on the road to better settlements is the minimization of attorneys’ impulsive assessments of case values. 25 Judges must play a more tangible role in the elimi-...


24. In excess of 90% of civil actions are settled by negotiation, although settlements often come on the eve of the trial. See Smith & St. John, Negotiation and Settlement, Litig., Fall 1978, at 7. See also R. L. Simmons, Winning Before Trial: How to Prepare Cases for the Best Settlement or Trial Result 712-15 (1974) (providing a formula for determining the “fair settlement value” of a lawsuit); Greenburg, The Lawyer’s Use of Quantitative Analysis in Settlement Negotiations, 38 Bus. Law. 1557 (1983) (advocating the use of mathematical techniques to determine, in advance of trial, the expected value of an action in order to assess settlement offers).

25. See generally Greenburg, supra note 24. In his article, Ronald David Greenburg explains the potential for such formulas:

The use of quantitative techniques and terminology in legal counseling would also encourage lawyers to move beyond such shibboleths as “Litigation is expensive, and thus settlement may well be the best alternative.” All clients, and especially business executives, understand that the cost of litigation is high, and for that very reason they seek the lawyer’s expert estimate...
nation of such impulsive assessments. They must assist litigants in their efforts to ascertain the fair settlement value of cases.

A major goal of any judge who participates in alternative methods of dispute resolution is to predict for the disputants how a jury will decide the pending action. Predicting the outcome of a trial, however, is not unlike forecasting the weather: both serve valuable functions, and each is accomplished with a recognized margin of error. The goal of the judge, like that of a meteorologist, is to reduce that margin of error. While no predictions of what might go on in the minds of jurors can be foolproof, some level of accuracy is possible. In forming a prediction, the judge should consider the many variables involved, including jurors’ biases, prejudices, and attitudes, as well as the deliberation process itself. When the judge and counsel weigh these variables and formulate proposals based on such analysis, they have achieved the very essence of informed pretrial bargaining and negotiation.26

Based on this foundation, I have recently begun to employ two valuable alternative methods of dispute resolution which help litigants to predict trial outcomes more accurately. In 1980, I invented the summary jury trial.27 More recently, I have begun to retain neutral advisors and special masters in order to streamline pretrial proceeding in complex cases.28

III. Judge-Guided Alternative Methods of Dispute Resolution

A. Special Masters And Neutral Advisors

Drawing from the Rules of Equity, the Federal Rules of Civil Procedure permit the court to appoint special masters to assist the court in any matter.29 The court can limit the order appointing the master by specifying the functions to be performed or by requiring

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26. For a discussion of predictions of trial outcome as an inducement to settlement, see Perritt, supra note 13, at 1256 n.101.

27. See generally Lambros and Shunk, supra note 8. For a discussion of the summary jury trial, see notes 36-40 and accompanying text infra.

28. FED. R. CIV. P. 53 (authorizing appointment of special masters).

29. FED. R. CIV. P. 53(c). The Advisory Committee notes reveal that rule 53 is derived from former Equity Rules 49, 51-53, 59-61½, 63-65, and 67. Id. advisory committee notes.
the master to report only on special issues.\textsuperscript{30} The appointment of special masters should be the exception and not the rule.\textsuperscript{31} Exceptions in which the court is warranted in appointing a special master include complicated cases and cases involving exceptional issues.\textsuperscript{32} When the courts do appoint special masters, their assistance is generally a tremendous asset to the court and the litigants. This is so because special masters can assist in developing both procedural and substantive aspects of the case.

Special masters may be particularly valuable in tort cases which demand case management plans. My experience in this area consists of the appointment of special masters to develop a uniform pretrial and apportionment of damages plan in asbestos litigation.\textsuperscript{33} The special masters assisted me in establishing guidelines and standardized forms for discovery, and in collecting plaintiff profiles and settlement figures. Each of these will ultimately assist in the timely resolution of

\begin{itemize}
\item \textsuperscript{30} Id. 53(b).
\item \textsuperscript{31} Id. Rule 53(b) states in pertinent part: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury . . . a reference shall be made only upon a showing that some exceptional condition requires it." \textit{Id.}
\item \textsuperscript{32} See Fed. R. Civ. P. 53(g).
\item \textsuperscript{33} See generally Judge T.D. Lambros, \textit{Ohio Asbestos Litigation Case Management Plan and Case Evolution Apportionment Process} (N.D. Ohio 1983). Judge Lambros's order of appointment directed the Special Masters, Professors Eric Green and Francis McGovern, "to propose a plan for the management of the pretrial and trial phases of [the asbestos] cases." \textit{Id.} at 3. The order further stated:
\end{itemize}

In carrying out this mandate, the Special Masters are directed to familiarize themselves with the cases filed and to study the various methods, models and systems that have been suggested or may be developed by the various national groups studying the asbestos litigation problem and by other judges, legal scholars, and interested parties. The Special Masters shall also meet with the representatives of the interested parties in a manner they deem appropriate, including meetings \textit{ex parte}, in order to ensure that they have the benefit of all available input in making their recommendations. They may schedule and preside over discovery proceedings and examine and inspect all data, facts, documents and other materials relevant to their appointment. They may act to coordinate all proceedings not otherwise agreed to by the parties. The Special Masters may adopt appropriate rules and procedures to accomplish their task efficiently and fairly.

The Special Masters shall draft their recommendations for the handling of these cases, provide an opportunity for interested parties to comment, and submit final recommendations to me . . . with a plan to manage the pretrial and trial phases of these cases and any formulations by which settlement may be achieved.

\textit{Id.} at 4.
complicated litigation, while the court's resources are preserved so that other pressing matters may be addressed.

Additionally, a court may appoint neutral experts. Such experts provide an alternative means of addressing problems occasioned by conflicting expert testimony presented by the parties in particularly complex cases. Like special masters, neutral advisors assist in clarifying issues so that a speedy and just resolution may be reached.

In late 1981, I appointed a neutral economic expert to assist in the settlement of a consumer class action against the major retail grocery companies in northeastern Ohio. After thoroughly analyzing the mass of economic data presented by the parties' experts concerning damages, the neutral expert was instrumental in effectuating a $20 million settlement.

Although I recognize that special masters and neutral experts should not be appointed in every case, I am surprised that courts have rarely employed them to manage complex litigation. My experience has been that in complex cases they can provide valuable assistance to the court and facilitate settlement.

B. Summary Jury Trial

The summary jury trial is an alternative method of dispute resolution which I developed in 1980. The summary jury trial provides a no-risk method by which the parties can obtain the perception of six jurors on the merits of their case in the course of a half-day proceeding. This preview gives the parties a reliable basis upon which to build a mutually acceptable settlement.


35. See Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F.Supp. 1, 4 (N.D.Ohio 1982) (faced with the inability of either side to agree on underlying factual assumptions the court found it necessary to appoint its own advisor in order to interpret the data fairly).

36. Id. at 9-12.


38. See generally Lambros and Shunk, supra note 8. In the Northern District of Ohio, the use of summary jury trial is authorized by a local rule which provides that "[t]he Judge may, in his or her discretion, set any appropriate civil case for Summary Jury Trial or other alternative methods of dispute resolution, as he or she may choose." See N.D. OHIO LOC. R. 17.02.

Other jurisdictions have adopted the summary jury trial in a similar fashion. In the United States District Court for the District of Montana, for example, the summary jury trial is provided for by Standing Order:
The summary jury trial draws its format from our traditional civil litigation system, including trial before one's peers. In this respect, it is unique among alternative dispute resolution devices.39

Stated simply, a summary jury trial consists of counsel's presentations of their views of the case to a jury and the jury's subsequent decision based on the presentations. It is an amalgam of opening and closing arguments with an overview of the expected trial proofs. Counsel may restate the anticipated testimony of trial witnesses and are free to present exhibits for the jury. Because of the nonbinding nature of the proceedings, evidentiary and procedural rules are few and flexible. Counsel are encouraged to develop formats of presentation which are particularly suitable to the facts of their case. Tactical maneuvering is kept to a minimum. The summary jury trial proceeding itself is normally concluded in a half day, and will rarely last longer than a full day. The proceeding is presided over by either the judge or a magistrate upon assignment by the judge.

I developed the summary jury trial as a result of my perception that there is a certain class of cases in which the only bar to settlement among the parties is the difference in opinion of how a jury will perceive evidence adduced at trial. An attorney and his client may feel that a jury's perception of liability and damages may be more favorable than any settlement that could be reached in pretrial negotiation. This uncertainty is frequently present in cases involving a "reasonableness" standard of liability, where no amount of judicial or legal interpretation of the standard of liability will assist the parties in resolving the case. Additionally, there is frequently an attitude on the part of the parties that they want their "day in court" in order to satisfy their need to tell their story to someone. The summary jury trial can eliminate all of these barriers to settlement.

The summary jury trial is designed to provide a method by

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Summary Trial is a new pre-trial procedure to be used occasionally in cases assigned to the Court's docket. Although new to the American Judicial process, this procedural undertaking has as its foundation Rule 1 of the Federal Rules, "to secure the just, speedy and inexpensive determination of every action."

IT IS ORDERED that, pursuant to Rule 16 of the Federal Rules of Civil Procedure and the inherent power of the Court to control the docket, the following rules are adopted for the orderly presentation of Summary Trial . . .

STANDING ORDER NO. 6A SUMMARY TRIAL (D. Mont. 1983), reprinted in T.D. LAMBROS, supra note 37, Appendix E.

39. While there is no alternative dispute resolution device similar to the summary jury trial in the United States, the West German Stuttgart Model bears some similarities. See Cooke, supra note 8, at 619-20.
which the parties can obtain the opinions of a jury without the expense and time commitment that usually accompanies the jury trial. The result is nonbinding and in no way alters the parties’ rights to a full trial on the merits. A summary jury trial, however, typically meets the courtroom objectives of litigants while guiding them toward an equitable pretrial settlement. This tendency may be attributed to the summary jury process itself, which reveals to the parties a jury’s perception of their dispute. This unique perception provides guidance in the review of demands and the determination of acceptable compromises.

The summary jury trial is rooted in the Federal Rules of Civil Procedure. Rule 16(c)(7) provides that “the participants at any pretrial conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve the dispute.”40 The Advisory Committee notes, which elaborate on this concept, state in pertinent part:

Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(c)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. . . . For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party’s request, to have settlement conferences handled by another member of the court or by a magistrate.41

The concept of the summary jury trial is also analogous to the advisory jury proceeding authorized by rule 39(c).42 Admittedly, that rule provides for an advisory jury only in cases not triable as of right by jury. The clear purpose behind the rule, however, is to give the court and the parties the opportunity to use a jury’s particular expertise and perceptions when a case demands those special abilities. In the summary trial, the court is similarly calling upon jurors to pro-

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42. See Fed. R. Civ. P. 39(c). Rule 39(c) provides as follows:
   In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.
vide their peculiar expertise in a situation where that expertise is vital but not provided for by present civil procedure.

The summary jury trial process itself is relatively simple. Generally, cases in which settlement cannot be achieved during pretrial conferences due to differing perceptions of how a jury would evaluate the evidence are cases that are ripe for summary jury trial. Flexibility and insight on the part of the judge is a key aspect of making this determination.

Summary jury trial should not be limited to negligence actions, nor by the presence of multiple plaintiffs or defendants. While its use in negligence actions has proven very effective, the process has also proven useful in contract, personal injury, products liability, discrimination, admiralty, and antitrust actions. Surprisingly, summary trial has proven to be a particularly effective means of settling complex cases. Wherever a factual issue is in dispute, and the parties cannot resolve the dispute without going to trial, the summary jury trial is highly recommended as a final step prior to actual trial.

Additionally, the amount of relief sought should not be a limiting factor. This is not to say that every case should be preceded by a summary jury trial. Careful judicial evaluation is the best method of making the determination of which case will proceed to a summary jury trial.

The process itself may be presided over by a judge or magistrate. For the summary jury trial to be truly effective, the case must be ready for trial. Discovery should be complete, and any last minute motions should be decided at a conference held shortly before the start of the actual summary jury trial proceeding.

When the court schedules the summary jury trial, it should distribute to counsel materials that explain the summary jury trial process. Counsel will then be fully prepared and know what to expect when they enter the courtroom.

Within a specified time before the summary jury trial, counsel should be required to submit a trial brief on issues of law and a set of proposed jury instructions. The amount of information, or briefs, required by any one judge may vary from court to court or even from case to case. The court should establish and notify counsel of any specific requirements within a sufficient time so that there are no delays.

It is essential that the parties, or a representative of each party with settlement authority, be present at the summary jury trial. The summary jury trial is being conducted for them; their presence should only be excused by leave of court.
Just prior to the summary jury trial, the court calls a jury venire of a sufficient number to provide a jury of six. The members of the jury pool, after being given a brief description of the case, the parties, and the attorneys involved, are instructed to complete juror profile forms. The completed forms are subsequently copied and distributed to the presiding judicial officer and to the attorneys. A brief voir dire is then conducted after which counsel may make their peremptory challenges, usually two for each side. Typically, summary jury trial voir dire and preliminary remarks of the judge are both concluded in about fifteen minutes.

The attorneys for each side have one hour each to present all of their evidence. They may incorporate their arguments into their evidentiary summarizations. If requested by counsel, the court may break up the hour period to permit rebuttal.

After counsel have presented their cases, the presiding judicial officer gives the jury an abbreviated charge and the jury then retires. The jury may return a consensus verdict or individual verdicts that list each juror’s perception of liability and damages. The parties or the court may submit interrogatories to the jury. On occasion it has been enlightening to permit the attorneys to question the jurors, and vice versa, after a verdict has been returned.

The results of this procedure in the Northern District of Ohio have been gratifying. Recent statistics indicate that over ninety percent of the cases selected for summary jury trial thus far have settled, either before or after going through the actual process. Of those cases that have gone through the actual process the figure is even higher.43

Based on the average length and cost of a jury trial in the Northern District of Ohio, the summary jury trial, when successful, saves approximately $1,504.12 for each case that does not proceed to full trial on the merits.44 In addition to the lower costs, litigants, experts, and other witnesses save a considerable amount of time by not having to go through protracted jury trials.

Use of the process in other federal courts throughout the country is increasing. Since its inception, the process has been used in federal courts in Colorado, Florida, Massachusetts, Michigan, Montana, Oklahoma, and Pennsylvania. Other federal courts in Ohio are conducting summary jury trials. It is particularly encouraging that state and federal courts throughout the United States have expressed inter-

43. See T.D. LAMBROS, supra note 37, at 16-17.
44. Id. at 19.
est in and support for summary jury trials.45

IV. CONCLUSION

In the 1980’s and beyond, judges must direct their primary efforts toward supporting the present judicial system rather than replacing it. Judges must develop alternative methods of dispute resolution in order to improve the present system. If we are to preserve our system of trial by jury from the potentially damaging effects of overcrowding, we must have the ability to be certain that only those disputes which cannot be resolved in any manner are the ones that proceed to full trial. It is in this context that the bench and the bar must work together to implement existing alternative methods of dispute resolution and to take bold initiatives to establish other methods that can support our system. Judges and attorneys need vision and foresight to make the best use of the resources already available to them so that they can preserve our existing system as it faces the challenges ahead.

The final test of whether the American judicial system should adopt a particular method of dispute resolution focuses on whether that method increases the efficiency of the system without impinging on its basic fairness. A system of judge-managed alternative methods of dispute resolution which is integrated into the existing pre-trial/trial system provides such an efficient means of fostering settlement in a manner that is wholly consistent with due process.

45. At its September 1984 meeting, the Judicial Conference of the United States adopted the following resolution:

RESOLVED: The Judicial Conference endorses the experimental use of summary jury trial as a potentially effective means of promoting fair and equitable settlement of potentially lengthy civil jury cases.