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BIO:

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LEXISNEXIS SUMMARY:
... In the short time provided, I have to clear up any confusion among you by explaining what the summary jury trial is today and how it works; its evolution, philosophy, and effectiveness. ... At the *voir dire*, as well as in the Court's preliminary instruction, we follow the procedures utilized in regular jury trials except for my explanation that there will be no live testimony and the jury will be assisting the parties to resolve their dispute. ... I think the summary jury trial may answer some of the criticism of Professor Fiss and provide a more meaningful and realistic forum for the parties to test their positions. ... I think that from the court's point of view of saving time for other litigants, the use of the summary jury trial has been successful. ... In this situation, if there is a defense verdict, at least the parties would have an idea of what the jury thought plaintiff's damage claim is worth, and that may be of some value in negotiating a settlement if the parties think the plaintiff would have a better chance at the trial on the merits. ...

HIGHLIGHT: *The following is the text of a speech delivered by Hon. S. Arthur Spiegel to the Federal Bar Association on January 22, 1985.*

TEXT:
[*829] INTRODUCTION

I think it only right that I make the first public explanation to the Federal Bar Association of this new device for dispute resolution we inaugurated in July 1983. In the short time provided, I have to clear up any confusion among you by explaining what the summary jury trial is today and how it works; its evolution, philosophy, and effectiveness. I also want to review some of the concerns expressed by counsel who have participated in them and our attempts to meet these concerns.

PROVISIONS AND PROCEDURES

The summary jury trial is simply a jury trial without the presentation of live evidence. It consists of a *voir dire* by the Court to select the jury, a preliminary instruction on the law by the Court, opening statements by counsel, a presentation of evidence through counsel rather than from the witness stand, closing arguments, instructions on the law from the court, and the jury verdict.

We seek three things from the jury: first, to determine its views regarding liability; second, its views on the value of the damages that the plaintiff is claiming, independent of the liability question, as though the only issue before the jury was the amount of damages; and, third, who wins and how much.

At the *voir dire*, as well as in the Court's preliminary instruction, we follow the procedures utilized in regular jury trials except for my explanation that there will be no live testimony and the jury will be assisting the parties to resolve their dispute. We follow **[*830]** the formalities of an actual trial to impress on the jury the importance of the proceedings, but we do not mislead the jury into believing that they are participating in a regular jury trial. From time to time during the trial, at appropriate points, I explain to the jury that the evidence the lawyers are detailing for them, in an ordinary trial, might take weeks to present. Furthermore, jurors who participate in summary jury trials are segregated by the Clerk so that they will not participate on regular trials thereafter, but will be a part of the pool available for summary jury trials.

Two days should be sufficient to conduct a summary jury trial and, in that time, the entire case can be presented to the jury and the verdict returned.

I suggest that the summary jury trial should be held several weeks after the final pretrial conference and four to six weeks before the scheduled trial on the merits of the case. If we determine that a case may be appropriate for a summary jury trial proceeding at the preliminary pretrial conference, we will issue a pretrial order specifically devoted to the summary jury trial setting forth what will be required of the parties. It has a number of provisions to comply with. The order will establish a timetable by specifying when proposed *voir dire* questions, jury instructions, special interrogatories, and briefs on any novel issues of law must be filed. It will set a date for a conference to review jury instructions and to resolve any anticipated evidentiary matters. Before the trial, counsel are required to confer concerning the physical exhibits, which will include documents, reports, and other demonstrative types of evidence, and to reach an agreement as to their use.

Additionally, the order will require that two weeks before the trial, plaintiff's counsel will provide defense counsel with a list of witnesses, documents, depositions, interrogatories, requests for admissions, and affidavits he or she intends to refer to at the trial. One week before the trial, the defense counsel will provide plaintiff's counsel with a similar list. The parties are required to identify specifically the portions of such documents and depositions upon which they plan to rely.

The order also states that the case will be heard by a six-person jury and each side will be provided two peremptory challenges. Generally, the Court will conduct the *voir dire* to save time, but may permit questions from counsel, if necessary.

Another provision of the order is that, unless excused by the Court, individual clients must be in attendance at the trial, and corporate clients must be represented by a top echelon officer, or **[*831]** someone with decision-making authority. As will be explained later, this is to facilitate settlement. Finally, the order details the procedure which will be followed at the trial and provides that:

Counsel will make brief opening statements indicating what they expect the evidence will show. Following opening statements, all evidence shall be presented through attorneys for the parties. Both sides will be afforded an opportunity to present an entirely descriptive summary of the evidence. During this portion of the trial, counsel, in summarizing the testimony, may quote directly from depositions, interrogatories and other documentary material and sworn statements of potential witnesses and use exhibits. However, no witnesses' testimony or exhibits may be mentioned unless the reference is based upon discovery or upon a sworn statement of the witness or of counsel that the witness would so testify. The important thing is that counsel may not characterize or interpret the evidence during this phase of the summary proceeding. Following the descriptive summaries of the evidence given by both sides with plaintiffs having an opportunity to present brief rebuttal testimony, each, in turn, has the opportunity to present closing arguments, at which time counsel may characterize the evidence and argue the inferences to be drawn from it.

After closing arguments, the Court gives the jury an abbreviated charge on the applicable law and the jury is asked to deliberate and return answers to special interrogatories.

Further, the order provides that the jury decision is strictly advisory, and that neither the jury findings nor any statement of counsel during the summary jury trial are admissible on the trial on the merits or may be construed as judicial admissions. Of course, if counsel wish to stipulate that the verdict of the summary jury will be a final determination on the merits, the Court would be pleased to accept such a stipulation.

In further describing a summary jury trial, it is important to point out that timing is a primary consideration. Because the jury will be listening to lawyers and will not have an opportunity to relax as witnesses testify, great demands are made on their attentiveness and, therefore, breaks must be carefully scheduled. We attempt to time everything in such a fashion that before each recess the jury will have heard both sides and at no time will there be a major recess without that having occurred.

Finally, preconditions established for a summary jury trial require counsel to be available the day after the completion of the trial to attempt to negotiate a settlement based on what has been learned at the trial.

[*832] EVOLUTION

The summary jury trial concept certainly did not originate with me. I learned about it from Judge Thomas Lambros of the Northern District of Ohio, who has been using a similar device for some years to assist lawyers in settling cases. Similar techniques have also been used in the Third Circuit and judges in the Western District of Michigan have utilized it.

RATIONALE

Why do we use a summary jury trial? Since all of you are familiar with the statement, "Justice delayed is justice denied," this strategy addresses our shared critical concern, *i.e.*, current caseload and backlog. In the Southern District of Ohio, Western Division, we have the heaviest caseload per judge in the country, and I am pleased to say that Judge Rubin advised me that we are number one in case dispositions in the nation. At the end of 1984, Judge Rubin had approximately 1,400 cases, a number of which are Bendectin cases. I have approximately 1,000 cases. The Senior Judges, between them, have a couple hundred of them. Last year approximately 2,000 cases were filed in our District and we barely kept pace with the filings.

Realistically, there are only 200 active trial days per year for each active judge and, since over 95% of the cases are disposed of before trial on the merits, that means a judge with a caseload like ours, 50 trials must be conducted each year (being the remaining 5% of the 1,000 cases on our dockets).

When we analyze the cases that must be tried, we find very few of them will take less than four days -- and most will require a week or more -- so it becomes impossible to dispose of 50 cases a year. Our cases are complicated and some are quite timeconsuming, *i.e.*, asbestos cases, other product liability cases, age discrimination cases, antitrust cases, as well as the normal types of diversity and other federal question litigation. Add the criminal docket of each federal judge to this list and you readily see it is impossible to keep up with our dockets at the current pace. There simply is not enough time to do justice to the cases which must be tried in the ordinary course.

Normally, my objective is to dispose of cases within twelve months of the preliminary pretrial conference, which should be held within sixty days after filing, so it is obvious that a trial which may last for several weeks or more can really upset our plan of case disposition. A look at the dispute resolution devices **[*833]** available to us after a suit is filed (assuming that trial on the merits in the courtroom is the bottom line or the last resort), includes the following: settlement through negotiations of counsel without the assistance of court, settlement with the aid of the court, and arbitration, which will be introduced in the near future in the Western Division of the Southern District of Ohio. We don't know how successful arbitration will be, but we know it has been quite successful in the state court. Similarly,

mediation and conciliation efforts used in other districts have been quite successful in state courts in Michigan, particularly in Wayne County. However, we have no plan to adopt the mediation and conciliation technique at this time in the Southern District.

None of these methods provides the parties with their day in court where they can air their grievances. In the eyes of some, these techniques run counter to the American justice system's concept of ventilation, confrontation, and vindication of rights in a structured adversarial system.

PHILOSOPHY

There is respectable opinion that the function and purpose of adjudication is not solely as a mechanism for resolution of private disputes. Professor Owen Fiss of Yale Law School has written in *ABA Litigation*, Volume 11, Fall 1984, at page 3:

Adjudication uses public resources. It does not employ arbiters chosen by the parties, but rather public officials who are chosen by a process in which the public participates. They are entrusted with the power that has been defined and conferred by public law. The job of these officials is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative text such as the Constitution -- to interpret those values and to bring them into accord with reality. This duty is not discharged when the parties settle.

Well, how does all of this relate to the concept of the summary jury trial? As you have observed, the summary jury trial permits the parties to have their day in court where they can ventilate or air their grievances before a jury, where they get an objective evaluation on the issue of liability, damages and who should prevail. These advantages should provide a solid basis for helping to settle their differences.

The parties, by participating in the summary trial, become aware as it unfolds of the strengths and weaknesses of their **[*834]** positions, their chances of winning, their exposure, the cost of a trial on the merits, including not only attorney's fees but the time that is going to involve themselves, their executives, other employees, expert witnesses, etc. It can be argued that the jury verdict is more realistic and a better reflection of community attitudes than the decision of an arbitration panel since arbitrations are less formal and the decision-makers are lawyers usually. I think the summary jury trial may answer some of the criticism of Professor Fiss and provide a more meaningful and realistic forum for the parties to test their positions.

EFFECTIVENESS

To date, we have conducted eight summary jury trials. I imagine one of the best tests from the Court's point of view is to determine the number of days (or weeks) the parties estimate the trial on the merits would take, and how many days or weeks we have saved by use of the summary proceeding. We obtained this information relative to length of trial on the merits from the final pretrial orders of the cases where the summary jury trial was utilized. The total number of court days devoted to the eight summary jury trials were seventeen days on the outside. Actually, less time was used because I am including the period of jury deliberation in the total time. By contrast, the total number of days that would have been required to try each of the cases (where the summary jury trial was used), according to the pretrial orders in each case, were approximately 27 weeks or 135 trial days.

Of the eight summary jury trials, three settled following the summary jury trial; two settled during the plaintiff's case in the first week on the merits following the summary jury trial; one has gone to trial on the merits following summary jury trial and the verdict was the same as in the summary jury trial -- for the defendant; and the remaining two have not settled yet and probably will be tried on the merits. Therefore, in addition to the 17 days utilized for the summary trials, in the two cases that settled, nine more days were used, and in the case where there was a defendant's verdict on the merits, another seven trial days. These add up to a total of 33 trial days versus an estimated 135 trial days -- a substantial savings.

EVALUATION

I think that from the court's point of view of saving time for other litigants, the use of the summary jury trial has been **[*835]** successful. I also think that from the parties' point of view, participants agree that the technique was valuable, particularly for those who settled, and even for those who did not, because the time involved in preparing for the summary jury trial was not wasted. The preparation of opening statements and closing arguments, lining up witnesses and documents, and generally getting prepared for the summary jury trial obviously helped the parties prepare for trial on the merits. From the court's point of view, our preparation of the charge in the summary jury trial and the preview of the evidence certainly gave us a leg up in preparing for trial on the merits.

From all I have said so far, I think you see why I have been insisting that in all cases where I believe that summary jury trial is appropriate, I will schedule one. I plan to schedule summary jury trials in those cases which will take over a week to try where there has been a jury demand, and where the case seems appropriate, such as in cases based on circumstantial evidence rather than those where credibility of the witnesses is paramount. Thus, in a case where the jury is going to have to determine which witness is telling the truth, a swearing contest, I think a summary jury trial might not be appropriate.

COUNSEL CONCERNS AND THE COURT'S RESPONSE

Foremost, counsel cite the extra work and expense for their clients. My answer is if it succeeds, it certainly cuts the time the lawyers would spend in court trying the case on the merits and that alone should reduce their clients' expenses. If the summary trial fails to settle the case, the work of counsel and the Court hasn't been wasted as trial on the merits will be scheduled shortly thereafter.

In addition, some lawyers have been concerned that the summary jury trial requires them to show, in advance, their trial strategy, and that they may be sandbagged by the other side because of it. To date, I really have not seen any serious evidence of this fear. In all of the summary jury trials, I felt that the lawyers had earnestly presented their cases as diligently as possible. Furthermore, lawyers in my court know that I will not countenance any surprises, blindsiding, or trial by ambush, and that this philosophy applies to discovery, pretrial proceedings, summary jury trials, and the trial on the merits, so the likelihood of that concern being realized is remote.

Another criticism of counsel in the earlier cases was an overstating of evidence by counsel. I believe we have corrected that **[*836]** by requiring that all evidence must be exchanged before trial and, particularly, that counsel cannot comment on the evidence as they detail it to the jury but must reserve comment until closing arguments. Originally, we merely had opening statements and then closing arguments where counsel would tell the jury what evidence they introduced and argue its relevance at that particular point. Very likely this is where the overstatement may have occurred, but now that we require counsel to detail the evidence without comment to the jury, I think this problem has been contained.

Other criticisms relate to timing. As mentioned earlier, to correct this problem we try not to recess for the day until the jury has heard both sides, and will on the following day hear both sides before we give them the case for decision. Other complaints have resulted in establishing a timetable for exchanging evidence and for having a meaningful charging conference before the trial.

Some lawyers were concerned that the verdict in the summary jury trial might make it more difficult to settle the case. I think I agree with this concern where there is a verdict for the defendant. That is the reason we are now seeking three types of verdicts: a verdict on liability, a verdict on damages, and a third on who wins and how much. In this situation, if there is a defense verdict, at least the parties would have an idea of what the jury thought plaintiff's damage claim is worth, and that may be of some value in negotiating a settlement if the parties think the plaintiff would have a better chance at the trial on the merits. In those cases where we did have defense verdicts in a summary jury trial without having obtained the other information, there was no alternative for the plaintiff except to insist on trial on the

merits because the defendants really had no estimation of the size of a potential plaintiffs' verdict. [n1]

Finally, there has been concern expressed as to whether the summary jury trial would be a waste of effort if the verdict at the trial on the merits differed from that reached by the summary jury. Fortunately, in the first case where a verdict was rendered **[*837]** at trial on the merits, the jury confirmed the decision of the summary jury trial.

It has been my custom at each of the summary jury trials, after the jury goes upstairs to begin deliberations, to ask counsel to give me their candid comments, criticisms, or suggestions in their own handwriting before the jury comes back, and I have a notebook full, so anything you say may have been covered by them, but I hope I can allay any concerns or fears that you may have about the process, and ultimately that you will see the advantage of using it.

Thanks for your attention.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureInterrogationMiranda RightsRight to Counsel During QuestioningEvidenceDocumentary EvidenceWritingsGeneral OverviewGovernmentsLegislationTypes of Statutes

FOOTNOTES:

n1 At the talk, an attorney emphasized that sufficient time should be given to the jury to analyze the evidence relating to damage claims so that it can return a damage verdict that will be useful to the parties in negotiating a settlement, whether or not the jury returns a verdict for the defendant on liability. It may be that it is easier for a jury to decide liability than the amount of damages to be awarded and, therefore, they should have sufficient time to consider damages regardless of their finding on liability.