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NOTE: THE **SUMMARY JURY TRIAL** AS A METHOD OF DISPUTE RESOLUTION IN THE FEDERAL COURTS

NAME: GLENN NEWMAN

LEXISNEXIS SUMMARY:

... Furthermore, all ADR techniques seek to control courts' dockets by guiding disputes toward settlements rather than trials. ... Judge Lambros also has written in favor of a Rule 16 basis for local rules authorizing **summary jury trials** and further stated that even in the absence of a local rule that authorized **summary jury trials,** judges can find authority for **summary jury trials** in Rule 16's broad pretrial management provisions. ... No one disputes the existence of inherent powers. ... Scarfone court also relied on Rule 1, stating that **summary jury trials** and other ADR techniques enable some litigants to achieve just, speedy, and inexpensive resolutions that otherwise might not be possible due to the crushing caseloads that many district courts face. ... The Strandell II court held that compelled **summary jury trials** disturb the balance between the needs for pretrial disclosure and confidentiality by obliging the disclosure of information otherwise obtainable only through the usual discovery process, if at all. ... Finally, although not mentioned by the McKay court, it is apparent that Judge Posner emphasized the settlement purpose of **summary jury trials** and ignored the two other goals of the **summary jury trial** process, namely, community involvement in settlement negotiations and the benefits that arise when lawyers are forced to be well prepared for trial in the event that the **summary jury trial** fails to spur settlement. ... The validity of Rule 83 as a basis for mandatory **summary jury trials** depends on whether a local rule mandating **summary jury trials** is consistent with the Federal Rules of Civil Procedure and therefore valid. ... Because there is no logic in banning mandatory **summary jury trials** while permitting mandatory mediation, mandatory arbitration, and other mandatory ADR techniques to exist, it will not be long before these devices fall, too, if other courts adopt the reasoning of the Seventh Circuit's Strandell II.

TEXT:

[*177] I. INTRODUCTION

The federal district courts are dangerously overcrowded and something must be done about it. [n1]

Toward the end of alleviating crowded court dockets, many members of the legal profession have endeavored to develop alternatives to litigation. [n2] Collectively, these alternatives are known as alternative dispute resolution techniques (ADR). The primary purpose of ADR techniques is to reduce the dockets that currently plague the federal courts [n3] by increasing the likelihood of settlement. [n4] Additionally, ADR techniques can lessen costs faced by potential litigants [n5] and provide, in some instances, a measure of justice superior to that obtainable at a full-scale trial. [n6] Some disputes are served better by techniques not found in the ordinary course of litigation. [n7] The overloaded state of modern dockets requires the adoption of imaginative means "lest the courts, inundated by a tidal wave of cases," fail to provide just and speedy dispositions to all cases before them. [n8] Moreover, former Chief Justice Warren Burger has called on the legal community to develop alternatives to the present system of high costs and overloaded courts. [n9]

[*178] In response, Thomas Lambros, a federal district judge for the Northern District of Ohio, developed the **summary jury trial**, a unique ADR technique, in 1980. [n10] In recent years, the **summary jury trial** has "gained widespread use and acceptance as a valuable settlement tool." [n11] Recently, however, the Seventh Circuit has attacked the mandatory **summary jury trial**, stating that federal district court judges lack the authority to compel litigants to participate in the proceeding. [n12] Judge Richard Posner of the Seventh Circuit also has questioned the effectiveness of the **summary jury trial** in a recent law review article. [n13]

This note first will describe the problem the federal courts face in trying to control overcrowded dockets. [n14] This note then will outline the use of various ADR techniques and will focus on the use of the **summary jury trial**. [n15] Next, this note will analyze the contended bases for mandatory **summary jury trials** in an effort to ascertain whether any of those bases provide judges with the authority to compel attorneys' presence at **summary jury trials**. [n16] This note then will examine potential seventh amendment problems with the use of mandatory **summary jury trials** as well as various lawyers' criticisms of **summary jury trials** and commentators' criticisms of the effectiveness of **summary jury trials**. [n17] Finally, this note concludes that the criticisms of mandatory **summary jury trials**, particularly those outlined in the Seventh Circuit's decision in *Strandell v. Jackson County*, [n18] are inapt and that the use of mandatory **summary jury trials** should continue.

II. THE PROBLEM

In recent years, the number of cases filed in the federal courts has increased dramatically. Between 1940 and 1981, the number of federal civil cases filed rose from 35,000 to 180,000. [n19] The number of federal district judgeships has not kept pace with this increase. [n20] Accordingly, during that period, the caseload per judge has grown from 190 cases to 350 cases per year. [n21] The percentage of long-lasting trials also has climbed; these cases consume tremendous amounts of judicial resources **[*179]** and cost hundreds of millions of dollars. [n22] The federal court system is drowning in litigation [n23] and needs new ideas to stem the flow of cases reaching the courtroom. [n24]

Inconvenience is not the only consequence of an overloaded court system. As former Chief Justice Burger recognized, the courts cannot retain public confidence and respect if dispute resolution demands an excessive time investment. [n25] Eighteen years ago, one legal commentator warned that recent increases in case filings will require 5000 judges to decide one million cases a year, a situation that would lead to an expansion of the *Federal Reporter* by approximately 1000 volumes a year. [n26] Obviously, the increase in judicial dockets has not been this dramatic yet. However, these predictions illustrate the necessity of finding solutions to the problem of overcrowded courts.

III. THE SOLUTION

*A. Techniques Other Than **Summary Jury Trials***

The explosion of litigation plaguing the federal courts in recent years led to the development of a variety of ADR techniques. [n27] All ADR techniques seek to resolve disputes through methods other than formal adversarial trials. [n28] Furthermore, all ADR techniques seek to control courts' dockets by guiding disputes toward settlements rather than trials. [n29] ADR techniques are not intended to replace the present system. Rather, their purpose is to enable "absolutely hard-core, durable, trial-bound cases" to use the trial process. [n30]

One ADR technique state and federal courts use is court-annexed arbitration. [n31] Court-annexed arbitration is becoming increasingly popular **[*180]** in many states as a solution to court overcrowding. [n32] Judges automatically refer cases that fall within a specified jurisdictional damages limit to an arbitration panel generally consisting of one or more private attorneys or judges. [n33] Counsel present their arguments in an atmosphere of relative informality and relaxed procedural and evidentiary rules. [n34] The verdict the arbitrator reaches is not binding; either party is free to request a trial de novo if dissatisfied with the arbitrator's verdict. [n35]

Court-annexed arbitration has reduced the number of cases that go to trial in those jurisdictions where it is used. [n36] Most lawyers and litigants have responded to the device enthusiastically. [n37] As of January 1, 1986, court-annexed

arbitration was operating in all or part of eighteen state court systems and in ten federal district courts. n38

Another ADR technique currently in use is mediation. n39 Mediation is "the conciliation of a dispute through the non-coercive intervention of a third party." n40 In other words, mediation is arbitration with a softer edge; its goal is to offer an opportunity for conciliation rather than bind the parties to a particular settlement. In contrast to adversarial techniques of dispute resolution, mediation attempts to resolve disputes with as little acrimony as possible. n41 Traditionally, courts have used mediation to resolve international and labor relations disputes. n42 Recently, courts have expanded the use of mediation to encompass domestic disputes, race discrimination disputes, environmental disputes, n43 and business disputes of all kinds. n44 Some jurisdictions have initiated mandatory mediation, but it is not entirely clear how this ADR technique differs from arbitration. n45

Another ADR technique involves the use of neutral experts and special masters. These individuals often are appointed by judges in order to increase the likelihood of settlement. n46 The use of neutral experts and special masters as an ADR technique can have a mediational effect, thereby encouraging settlement. n47 Experts are individuals with a particular capacity to analyze complex facts, thereby exposing the litigants to **[*181]** the realities of the case and prompting settlement. n48 Judges appoint special masters to formulate effective case management plans so as to pave the way for just, speedy, and inexpensive determinations of complex cases or cases that involve multiple parties. n49 Although special masters often facilitate settlement, there are several costs related to their use. n50 For instance, there is the danger that special masters with broad discretion might invade areas that more appropriately belong to the judiciary, or change the nature of adjudication, or interfere with the attorney-client relationship. n51 Further, the informality which special masters bring to litigation, while often beneficial, also carries with it the danger of imprecision and increased costs. n52

Another ADR technique is the minitrial, which is a voluntary, private, and nonbinding procedure. n53 Minitrials consist of informal summary presentations by counsel before a neutral individual, often an expert, who, upon completion of the lawyers' presentations, will offer impressions and attempt to move the parties toward settlement. n54 The policy behind minitrials is to effectuate speedy and cost-effective dispute resolution by revealing the theories, strengths, and weaknesses of each party's case to the other side. n55

B. Summary Jury Trials

1. Purpose

Judge Thomas Lambros, perceiving the need for a continuous flow of settlements, devised the **summary jury trial** nine years ago. n56 The **summary jury trial** is an alternative form of dispute resolution that is in many ways fundamentally different from the ADR techniques outlined above. n57 The **summary jury trial** provides judges with a weapon, in addition to other ADR techniques, to fight backlogged dockets. As with other ADR devices, the goal of the **summary jury trial** is to encourage settlement by bringing the parties n58 and their lawyers face-to-face with **[*182]** the realities of the case. n59 The means used to achieve settlement with **summary jury trials**, however, are often unique.

The most distinctive aspect of the **summary jury trial** is its use of a jury to facilitate the settlement process. n60 In a **summary jury trial**, each attorney presents a summary of the case before a jury without resort to live witnesses. n61 After the presentation, the jury deliberates and reaches an advisory verdict. n62 The primary purpose of this exercise is to create a situation conducive to settlement. n63 Settlement, however, is not the only purpose of the procedure. Two other purposes of the **summary jury trial** are to increase community involvement in the settlement process and to increase lawyer preparedness for trial in the event the parties cannot attain a settlement.

Summary jury trials, unlike other alternative forms of dispute resolution, tend to enhance rather than diminish community involvement in the settlement process. In "Against Settlement," Professor Owen Fiss criticized ADR techniques as tending to promote "peace" rather than "justice." n64 Professor Fiss views adjudication in public rather

than private terms: the resolution of disputes through trials leads to binding precedents that better society; settlements merely end a single dispute. [n65] Although obviously not a trial, arguably **summary jury trials** go further than other ADR techniques in reaching Fiss' ideal. Through the use of a jury, the community has a direct role in the formation of settlements. Although the community has less input in **summary jury trials** than they would have in a binding, full-scale jury trial, the community has more input in **summary jury trials** than they would have in other ADR proceedings. Also, the use of a jury permits the parties, rather than merely the lawyers, to present their stories and have the dispute decided by an objective body. [n66] In sum, the **summary jury trial** is unique among settlement techniques in its use of a jury and the community involvement that juries bring to dispute resolution. [n67]

The third goal of **summary jury trials** is to increase the preparedness for trial by judges and lawyers in the event that the **summary jury trial** fails to facilitate its primary objective of settlement. Because the lawyers must prepare for the **summary jury trial** and because the judge hears the lawyers' summary presentations, all participants gain the advantage of **[*183]** becoming fully acquainted with the case. [n68] **Summary jury trials** crystallize the issues and proof for trial, thus ensuring that the parties are more prepared in the event of trial. [n69]

2. How It Works [n70]

The **summary jury trial** is named somewhat inaptly. Although the **summary jury trial** superficially resembles a trial, it is actually a settlement device designed to eliminate the cost and delay inherent in a trial. However, **summary jury trials** are obviously not a panacea for all the ills confronting the federal courts. [n71] For instance, the **summary jury trial** is not appropriate in all cases; rather, **summary jury trials** are aimed principally at those cases that do not settle after courts have employed more traditional settlement techniques. [n72]

Although opinions vary as to what type of cases judges should select for **summary jury trials**, several useful criteria for the selection of appropriate cases do exist. [n73] First, a **summary jury trial** is useful where the lawyers' evaluations of probable damage awards are widely disparate, [n74] thereby making settlement difficult to attain. [n75] Second, **summary jury trials** play a useful role when the litigants reach an impasse concerning their view of how the jury will perceive difficult legal concepts such as "reasonableness" and "ordinary care." [n76] **Summary jury trials** can rid a lawyer of the often unrealistic belief that a jury will look more favorably on a weak case if the lawyer has the opportunity to present it to the jury. [n77] Finally, the **summary jury trial** is often helpful in cases that fail to settle because of emotional factors. [n78] As for the latter, Judge Lambros believes some litigants reject settlement because of an emotional need for a "day in court." [n79] Due to this emotionalism, litigants may not be able to view the case objectively unless both sides have the opportunity to present the case to the jury. [n80]

The **summary jury trial** itself is essentially an abbreviated, informal trial. [n81] The **summary jury trial** is nonbinding unless the parties otherwise agree. [n82] The court generally holds a pretrial conference designed to prepare **[*184]** and hear motions shortly before the **summary jury trial** to ensure that the proceeding flows with minimal interruption. [n83] The pretrial conference is also useful to familiarize lawyers with the nature of the **summary jury trial** proceeding. [n84] In order to further promote the effectiveness of the **summary jury trial**, courts require the lawyers to submit requests for jury instructions and briefs on novel issues of law to the court at least three days prior to the proceeding. [n85] This requirement ensures that counsel are in a state of trial readiness by the time of the **summary jury trial**. [n86]

The court empanels the jury on the day of the proceeding. [n87] Although the lawyers select the jurors from the regular jury pool, **summary jury trials** generally only use six jurors and the court permits the lawyers to take only two challenges each. [n88] To further speed up the process, potential jurors complete short questionnaires that the lawyers use in the jury selection process. [n89]

There is some disagreement over what the judge should tell the jury about the nonbinding nature of the proceeding. Some judges are candid with the jury at the outset of the proceeding about the advisory nature of the verdict. [n90] The danger of this approach is a perceived reduction in the verdict's veracity. [n91] Other judges reveal the nonbinding nature

of the verdict to the jury only after the jury delivers its verdict, and some never tell the jury anything at all about the merely advisory nature of its verdict. [n92] Judge Lambros favors a balancing approach whereby judges carefully **[*185]** explain the procedure to the jury so as not to overemphasize its nonbinding character. [n93]

The **summary jury trial** itself is quite simple. Each side has approximately one hour to present its case. [n94] Although no live testimony is allowed, the judge will permit physical evidence, such as documents, to be admitted into evidence and the jury may consider the physical evidence during deliberations. [n95] Lawyers may summarize depositions, stipulations, signed statements of witnesses, and other documents in their presentations on the condition that all factual representations have their basis in these discovery materials. [n96] The entire proceeding generally lasts half a day. [n97] In conjunction with its objective of facilitating settlement, **summary jury trials** are not open to the public [n98] and a court reporter is not present unless counsel privately arrange for a reporter's presence. [n99]

The jury deliberates after the lawyers conclude their presentations and the judge delivers an abbreviated charge to the jury. [n100] The judge encourages the jury to reach a consensus verdict but, if a consensus is not possible, separate verdicts from each juror also facilitate settlement by revealing juror impressions and thought processes. [n101] The verdict should include separate determinations of liability and damages; the jury should make a damages assessment even if it reaches a prodefendant liability determination in order to enhance further the likelihood of settlement. [n102] Jurors should be able to assess damages with little difficulty because damage determinations and liability determinations are conceptually distinct.

To take advantage of the "special sense of urgency" that the **summary jury trial** may inculcate, it may be beneficial for the parties to conduct settlement negotiations even before the jury returns with its **[*186]** verdict. [n103] This benefit may occur because the pressure placed upon the lawyers and parties while awaiting the jury's verdict often makes everyone more amenable to settlement. [n104] After the jury completes its deliberations, a broad-ranging discussion of the case and the verdict ensues. [n105] The lawyers, parties, jurors, and judge who engage in this discussion may acquire a deeper understanding of the case, thereby setting the stage for fruitful settlement negotiations. [n106] If the parties do not achieve settlement as a result of the **summary jury trial**, a full-scale trial generally follows within sixty days. [n107]

The **summary jury trial** was originally and is today [n108] a compulsory ADR device. [n109] That is, judges can order both lawyers and parties [n110] to participate in this settlement technique against their wishes. In addition, because the presence of the parties is also necessary for fruitful settlement negotiations, at least one commentator believes that judges have the authority to order clients to attend the proceeding. [n111] This final element of the **summary jury trial**, the judge's power to order lawyers to participate and parties to attend the proceeding against their will, [n112] is presently at the center of a maelstrom of controversy. Any attempt to transform the **summary jury trial** into a purely voluntary device would eliminate greatly or eliminate totally the device's value as a settlement device. [n113]

IV. **SUMMARY JURY TRIALS** UNDER SIEGE: IS THERE A BASIS FOR COMPULSORY **SUMMARY JURY TRIALS**?

In *Strandell v. Jackson County*, the United States Court of Appeals for the Seventh Circuit struck down a criminal contempt order issued against an attorney who refused to participate in a compulsory **summary jury trial**. [n114] The court held that federal district court judges lack the **[*187]** authority to compel **summary jury trials**. [n115] This section will discuss the proffered bases, rejected by the Seventh Circuit, that have been offered to justify the existence of compulsory **summary jury trials**.

A. Rule 16 as a Basis

The first line of defense offered by proponents of mandatory **summary jury trials** derives from Rule 16 of the *Federal Rules of Civil Procedure*. Proponents argue that Rule 16 provides judges with the requisite authority to compel participation in **summary jury trials**. [n116] The theory underlying a Rule 16 basis for compulsory **summary jury trials**

relies particularly on the advisory committee notes for the recently amended Rule 16 that encourage settlement as a means of reducing the courts' overburdened dockets. [n117] Under this view, the settlement-inducing goal of the new Rule 16 strongly supports the introduction of the **summary jury trial**. [n118]

In *Strandell v. Jackson County (Strandell I)*, the district court, in a decision the Seventh Circuit later overruled in *Strandell II*, reasoned that Rule 16 gave it the power to compel lawyers to participate in a **summary jury trial** and to subject them to criminal contempt for noncompliance. [n119] Judge Lambros also has written in favor of a Rule 16 basis for local rules authorizing **summary jury trials** and further stated that even in the absence of a local rule that authorized **summary jury trials**, judges can find **[*188]** authority for **summary jury trials** in Rule 16's broad pretrial management provisions. [n120] One federal district court held that Rule 16 permits judges to order attorneys to attend "conferences" and that a **summary jury trial** is, for all intents and purposes, a "conference." [n121] Another court determined that the mandatory **summary jury trial** "is all but expressly authorized by" the provisions of Rule 16. [n122] As further support, the court noted that Rule 16(f) [n123] authorizes compelled attendance at settlement conferences. [n124] In related areas, courts have relied on Rule 16 to mandate discovery, [n125] to require lawyers to attend settlement conferences, [n126] and to require parties to attend settlement conferences. [n127]

The *Strandell II* court held that Rule 16 does not sanction *mandatory* **summary jury trials**. [n128] While the drafters of Rule 16 intended it to offer the litigants "a neutral forum" for settlement discussion in the form of a pretrial conference, the court reasoned that the drafters did not intend to force litigants to engage in unwanted settlement negotiations. [n129] The court stated, "Rule 16 . . . was not designed as a means for clubbing the parties -- or one of them -- into an involuntary compromise." [n130] The *Strandell II* court apparently assumed that **summary jury trials** also result in forced settlements, although the case the court relied on in making the preceding statement did not concern **summary jury trials**. The *Strandell II* court reversed the district court after examining Rule 16 and the advisory committee notes accompanying that rule. The Seventh Circuit relied on the advisory committee notes discussing the last sentence of Rule 16(c), which requires attorneys with authority to enter into stipulations to attend the settlement conference. [n131] Because **[*189Rule]** 16(c) does not demand that the attorney have the power to settle the case or make stipulations, [n132] the court felt that its interpretation of Rule 16 was justified. According to the court, the lack of such requirement reinforces its more restrictive interpretation of Rule 16. [n133]

In further support of its view that Rule 16 does not give judges the power to mandate participation in **summary jury trials**, the *Strandell II* court cited two other Seventh Circuit cases that it claimed were consistent with its ruling. [n134] In the first case, the court held that Rule 16 does not authorize a court to require parties to stipulate facts. [n135] In the second case, the court held that Rule 16 does not permit judges to compel discovery. [n136] Further, the *Strandell II* court asserted that nothing in the later amendments to Rule 16 nor in the advisory committee notes indicates that its drafters intended Rule 16 to become coercive. [n137]

One prominent commentator, Judge Posner of the Seventh Circuit, also has criticized a Rule 16 basis for **summary jury trials**. [n138] Judge Posner noted that the advisory committee notes to the amended version of Rule 16(c)(7) [n139] do not refer to **summary jury trials** or dictate special techniques designed to encourage settlement [n140] and asserted that although "not everything expressly authorized by the federal rules is therefore forbidden," "lack of clear authority is a reason for hesitation in sensitive areas." [n141] The "sensitive area" referred to by Judge Posner is the institution of a new, though admittedly mild, form of involuntary servitude that arises when courts use jurors as mediators. [n142]

B. Rule 83 as a Basis

Another proffered basis for mandatory **summary jury trials** is Rule **[*190]** 83 of the *Federal Rules of Civil Procedure*. Rule 83 allows district courts to promulgate local rules to aid them in their practices. [n143] The only condition on this power is that the promulgated rules must be consistent with the federal rules. [n144] Whether Rule 83 can be a basis for mandatory **summary jury trials** depends on whether a local rule authorizing district court judges to convene **summary jury trials** is consistent with the *Federal Rules of Civil Procedure*. [n145] Unfortunately, few cases directly discuss the relationship between local rules concerning **summary jury trials** and the *Federal Rules of Civil*

Procedure.

In *McKay v. Ashland Oil, Inc.*, the court held that there was no doubt that Kentucky Local Rule 23, authorizing mandatory **summary jury trials**, was clearly consistent with the federal rules because courts have used Rule 83 to uphold other, more intrusive, incursions into the autonomy of trial lawyers. [n146] According to the court, district court judges have the authority to enact local rules that are necessary for the disposition of court business. [n147] For example, as the *McKay* court noted, [n148] the Sixth Circuit has upheld a local rule authorizing mandatory mediation. [n149] Further, the *McKay* court cited other cases [n150] where courts have upheld local rules that sanction eleventh-hour settlements [n151] and provide for mandatory nonbinding arbitration. [n152] Finally, the *McKay* court noted that another court had held that a local rule requiring arbitration in certain cases was not inconsistent with Federal Rules 38 and 39, [n153] which guarantee the right to a jury trial, because the local rule **[*191]** did not impose "unduly onerous" preconditions on the right to a jury trial. [n154]

Rule 83 prohibits district courts from enacting local rules that are inconsistent with the federal rules. Accordingly, if local rules authorizing mandatory **summary jury trials** are inconsistent with Rule 16, then judges cannot use Rule 83 to justify mandatory **summary jury trials**. [n155] The *Strandell II* court found the **summary jury trial** order inconsistent with Rule 16. [n156] Unfortunately, the court did not discuss explicitly the Rule 83 implications of this holding. The *Strandell II* court, however, did cite another case that dealt with Rule 83 more directly. [n157] In that case, the court struck down a local rule that gave judges the power to compel litigants to stipulate facts after the court found that such a rule was inconsistent with Rule 16 and was thereby precluded from claiming a basis in Rule 83. [n158] However, the argument that a local rule is inconsistent with the *Federal Rules of Civil Procedure*, and therefore invalid, does not always prevail. [n159]

C. Inherent Powers as a Basis [n160]

Proponents of mandatory **summary jury trials** also have embraced the concept of courts' inherent powers in order to justify their position. [n161] The courts have used their inherent powers to dismiss a case for failure to prosecute, [n162] to impose time limits on various stages of trial, [n163] and to impose on an attorney the cost of empaneling a jury as a sanction for misconduct. [n164] No one disputes the existence of inherent **[*192]** powers. [n165] What exactly these inherent powers allow courts to do, however, is disputed because the notion of inherent powers is a "nebulous" and "shadowy" concept. [n166] Furthermore, it is not clear whether Rule 83 codifies and engulfs the concept of inherent powers or whether, despite the enactment of Rule 83, inherent powers continue to maintain a separate existence. [n167] However, the United States Supreme Court, in *Link v. Wabash*, did indicate that inherent powers are not dependent on the existence of any express statute or rule. [n168]

There are three types of inherent power. [n169] First, the courts possess a narrow "irreducible inherent authority" necessary to protect the constitutional requirement of separation of powers. [n170] The second and most commonly used type of inherent power springs from functional necessity, such as the contempt power. [n171] The third type, most relevant for our purposes, is the inherent power of the court to equip itself with the tools necessary for the administration of its duties. [n172] As with Rule 83, courts may exercise this type of inherent power only in the absence of an inconsistent legislative command. [n173]

Courts use the third type of inherent power when it is "useful" to do so. [n174] Examples of the use of inherent power include dismissing a case because a lawyer failed to appear at a pretrial conference, [n175] assessing juror costs against a lawyer who failed to settle until after sixty-five people appeared for jury duty on the morning of the trial, [n176] and sanctioning the parties themselves for violating pretrial orders. [n177]

The courts' inherent powers to manage their dockets and proceedings are not unlimited. A court may not order settlement [n178] or promulgate a rule or an order that controverts a legislative command. [n179] The **[*193]** existence of a statute or rule in the same general area, however, may not preclude a court from exercising its inherent powers. [n180] For example, the Supreme Court in *Colgrove v. Battin* [n181] outlined, and the Third Circuit fleshed out, [n182] related

limits on the courts' use of inherent powers to enact local rules. In *Colgrove,* the Supreme Court upheld a local rule providing for a six-member civil jury trial on the grounds that a six-member jury is not a "basic procedural innovation." n183 Basic procedural innovations are "those aspects of the litigatory process which bear upon the ultimate outcome of the litigation." n184 In other words, a basic procedural innovation is outcome determinative.

Therefore, if mandatory **summary jury trials** are not a basic procedural innovation, then the inherent powers of the court are potentially a basis for the device. In dicta, the *Strandell I* court asserted that its inherent power to manage its docket clearly gave it the power to mandate **summary jury trials**. n185 More to the point, the *McKay* court, after describing the **summary jury trial** as merely a useful settlement device, held that **summary jury trials** are not outcome determinative under the *Colgrove* test. n186 On this rationale, the *McKay* court held that inherent powers do provide a basis for mandatory **summary jury trials**. n187

Although the Seventh Circuit in *Strandell II* did not discuss whether **summary jury trials** are a basic procedural innovation, the court did hold that Rule 16 does not authorize mandatory **summary jury trials**. n188 Because it is inconsistent to find an inherent power basis for **summary jury trials** while simultaneously claiming that Rule 16 does not permit **summary jury trials**, the *Strandell II* court likely would have found the mandatory **summary jury trial** to be a basic procedural innovation. Alternatively, it would have based its holding on factors unrelated to inherent powers.

D. Rule 1 and the Speedy Trial Act as Bases

Rule 1 of the *Federal Rules of Civil Procedure* states: "These rules shall be construed to secure the just, speedy, and inexpensive determination of claims." n189 The *Strandell I* court posited that Rule 1 gives judges **[*194]** the authority to compel **summary jury trials**. n190 The *Arabian American Oil Co. v. Scarfone* court also relied on Rule 1, stating that **summary jury trials** and other ADR techniques enable some litigants to achieve just, speedy, and inexpensive resolutions that otherwise might not be possible due to the crushing caseloads that many district courts face. n191

Similarly, some have claimed that the Speedy Trial Act is a basis for mandatory **summary jury trials**. n192 The Speedy Trial Act requires courts to release criminal defendants if the courts are unable to process their cases within a specified period of time. n193 In *Strandell I,* the court, after citing numerous statistics attesting to its backlog, stated that the backlog, coupled with the court's obligations under the Speedy Trial Act, n194 gave it the authority to mandate **summary jury trials**. n195 In short, the *Strandell I* court argued that the existence of so many civil trials prevents many courts from hearing criminal trials within the statutory period and therefore compels courts to use alternatives such as the **summary jury trial** to speed the flow of settlements.

The underlying rationale for mandatory **summary jury trials** through Rule 1 and the Speedy Trial Act is necessity. The courts are overwhelmed and **summary jury trials** are one means of relieving the overcrowding. On the other hand, others argue that a crowded docket does not justify a court's attempt to exceed the bounds of its congressionally mandated jurisdiction. n196 Under this view, experiments intended to manage heavy caseloads are worthwhile only so long as they do not overstep the bounds of the statute. n197

E. Judicial Conference Resolution as a Basis

At the 1984 Judicial Conference, the participants discussed **summary jury trials**, and they passed a resolution on the subject. The original draft of the judicial conference resolution endorsed only the voluntary use of **summary jury trials**. n198 The final draft of the resolution, however, omitted the voluntary consent language. n199 Both the *Strandell* **[*195]** *I* n200 and *McKay* n201 courts found this omission in the final draft telling evidence in favor of a finding that a basis for mandatory **summary jury trials** exists. Further, the 1984 Judicial Conference endorsed the use of **summary jury trials** despite the conference's awareness that the *Federal Rules of Civil Procedure* did not authorize the procedure expressly. n202 In light of its holding that Rule 16 provides no basis for mandatory **summary jury trials**, the *Strandell II* court apparently did not consider the 1984 Judicial Conference resolution to be relevant, although the court was

cognizant of the issue. [n203] Of course, judicial conference recommendations cannot offer a formal "basis" for any decision. However, they can and should be very persuasive.

V. IS THE SEVENTH AMENDMENT AN OBSTACLE TO MANDATORY **SUMMARY JURY TRIALS**?

The seventh amendment to the United States Constitution guarantees litigants the right to a jury trial in most civil cases. [n204] Clearly, neither compulsory **summary jury trials** nor ADR techniques generally violate the letter of the amendment because none of these methods prevents the parties from proceeding to a jury trial if they are dissatisfied with the results of the court-ordered settlement device. [n205] The question of whether mandatory **summary jury trials** violate the spirit of the seventh amendment is, however, a separate question. Although no court has yet ruled on precisely this issue, a number of courts, both state [n206] and federal, [n207] have faced this question in regard to other ADR techniques.

One Pennsylvania district court, in validating a local rule authorizing compulsory, nonbinding arbitration held that the seventh amendment bars such a rule only if it imposes "conditions so burdensome or so onerous that it interferes with" the right to a jury trial. [n208] The court viewed arbitration as a valuable tool for facilitating speedy and inexpensive dispute resolution that did not impose overly burdensome conditions. [n209] In another case, the Sixth Circuit approved a local rule **[*196]** authorizing mandatory mediation in diversity cases involving monetary damages. [n210] In that case the court held that the seventh amendment only requires that the court give the parties the opportunity to let a jury ultimately determine factual questions. [n211] In sum, the seventh amendment demands only that ADR techniques not impose inordinately difficult conditions, such as excessive delay, [n212] on the right to a trial and that the litigants always have the opportunity to appear before a jury as a last resort.

Based on these cases, it does not appear that mandatory **summary jury trials**, at least in the abstract, violate the seventh amendment. Of course, if a particular local rule imposes unduly onerous preconditions on the right to a jury trial, then this imposition would violate the seventh amendment, and courts would have to invalidate the rule. [n213] With regard to mandatory **summary jury trials**, even the Seventh Circuit did not question their constitutionality; the *Strandell II* court simply felt that adopting the procedure was sufficiently drastic that it should have resulted from the national rule-making process that the Rules Enabling Act envisioned rather than through the actions of individual federal district court judges. [n214] The counterview, espoused by proponents of mandatory **summary jury trials**, is that the device simply does not constitute a drastic change from present practice nor is it an unreasonable interpretation of Rule 16 of the *Federal Rules of Civil Procedure*. [n215] And as the *Strandell II* court noted, [n216] Congress is considering legislation that would permit mandatory **summary jury trials**. [n217] Finally, because **summary jury trials** are first and foremost a settlement technique, the fact that the device utilizes an advisory jury to achieve its ends should not immunize it from seventh amendment scrutiny when necessary. Despite its use of a jury, the **summary jury trial** is not the type of "trial" that the drafters of the seventh amendment envisioned. The **summary jury trial** is merely a settlement device that superficially resembles a trial and, as such, never can satisfy the seventh amendment's right to trial by jury in civil cases. Likewise, because the **summary jury trial** does not replace the trial, it cannot constitute a violation of the seventh amendment.

[*197] VI. OTHER CRITICISMS OF **SUMMARY JURY TRIALS**

A. Lawyers' Concerns

One criticism levelled against mandatory **summary jury trials** is that the use of the proceeding adversely can affect discovery rules and the attorney work product privilege. [n218] In *Strandell*, the lawyer who refused to participate in a **summary jury trial** offered this excuse. [n219] Possibly, the lawyer feared a loss of control over trial strategy. The *Strandell II* court held that compelled **summary jury trials** disturb the balance between the needs for pretrial disclosure and confidentiality by obliging the disclosure of information otherwise obtainable only through the usual discovery process, if at all. [n220]

The *McKay* court took the opposite position. In modern federal court practice, the *McKay* court commented, discovery is extensive, the parties exchange witness lists and summaries of anticipated testimony, the court lists and marks all exhibits, and the court prepares a comprehensive pretrial order. [n221] After all this is done, the court asserted, there is little information left for the parties to disclose at the **summary jury trial** that they would not disclose at trial or that the judge had not included already in the pretrial order. [n222] Perry-Mason-style trial by ambush, the court remarked, is no longer a part of federal court trial practices. [n223] In addition, as courts generally hold **summary jury trials** thirty to sixty days prior to the trial date, [n224] presumably after most discovery has taken place, lawyers' work product and confidentiality fears appear misplaced.

Some lawyers are concerned that **summary jury trials** actually might be counterproductive by making settlement *more* difficult to attain. [n225] Under this view, if the jury in a **summary jury trial** returns with a prodefense verdict that lacks a damages estimate, then the litigants will have no foundation on which to build a settlement. [n226] Accordingly, many courts require the jury to make a determination of damages regardless of how it answered the liability question. [n227]

Some commentators also are concerned about the extra work and expense that the procedure entails. [n228] In *Federal Reserve Bank v. Carey-Canada, Inc.*, the court found that forcing a **summary jury trial** on objecting lawyers was justified despite their complaint that the procedure **[*198]** would cost each side approximately $ 50,000. [n229] The court felt that the advantages of a **summary jury trial** outweighed any potential costs. [n230] And anecdotal evidence does suggest that **summary jury trials** usually facilitate settlement, [n231] thus saving time and money that the parties and the court would have spent had the case gone on to trial.

B. Effectiveness

In "The **Summary Jury Trial** and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations," Judge Posner questioned the effectiveness of **summary jury trials**. Although Posner made clear that presently no authoritative studies on the subject exist, he did endeavor to analyze the statistics on **summary jury trials** that currently are available. [n232] From these statistics, Posner concluded that **summary jury trials** do not lead to increased judicial efficiency. [n233] Posner attributes the claims of fantastic success made by judges who use **summary jury trials**. [n234] to the selectivity with which those judges choose cases for the procedure and the judges' own zeal for the procedure. [n235] If either of those factors were absent, Posner contends that the success rate of **summary jury trials** would fall. [n236] Moreover, Judge Posner asserts that even if **summary jury trials** do induce some parties to settle, there will not be a decrease in the overall number of trials because "other cases will advance in the queue;" or judges will reduce the level of pressure put on the litigants to settle; or judges will refer fewer cases to magistrates. [n237] Also, even if the settlement rate did rise, the total costs to the court system might increase due to the costs arising from the **summary jury trials** themselves. [n238]

The most straightforward reply to Judge Posner came from the *McKay* court. That court said, essentially, that the **summary jury trial** at least should be given the chance to succeed; if it proves ineffectual judges will abandon it on their own initiative, without the prodding of naysayers. [n239] The *McKay* court also found merit in the unscientific, anecdotal **[*199]** evidence of **summary jury trial** success that Judge Posner derided. [n240] Finally, although not mentioned by the *McKay* court, it is apparent that Judge Posner emphasized the settlement purpose of **summary jury trials** and ignored the two other goals of the **summary jury trial** process, namely, community involvement in settlement negotiations and the benefits that arise when lawyers are forced to be well prepared for trial in the event that the **summary jury trial** fails to spur settlement. [n241]

VII. RESOLUTION: THE SEVENTH CIRCUIT IS WRONG

An innovative judge from Ohio invented the **summary jury trial** in 1980. For nearly six years many praised the **summary jury trial** as a technique capable of bringing at least some relief to the strained federal court docket. Moreover, former Chief Justice Burger strongly encouraged the development and use of new ADR techniques, [n242]

such as the **summary jury trial**. Recently, however, the **summary jury trial** has become a target for criticism. If the views of Judge Posner and *Strandell II* prevail, then the result will be the destruction of the **summary jury trial**, not merely its modification. And because other ADR techniques rely on the same bases for existence as the **summary jury trial** does, the Seventh Circuit's reasoning threatens all ADR techniques, not merely its current target.

The *Strandell II* court held that federal district court judges lack the power to require attorney participation in **summary jury trials**. [n243] The opinion focuses on Rule 16 which, the court held, cannot be interpreted as authorizing mandatory **summary jury trials**. [n244] In support, the court relied primarily on three cases discussed earlier. [n245] Alternatively, the court held that mandatory **summary jury trials** detrimentally will affect the rules regarding discovery and the work product privilege. [n246] As the remainder of this note will reveal, the cases are inapt and the work product fears are groundless.

In *Kothe v. Smith*, the trial court fined an attorney for not quickly settling for an amount that the judge considered appropriate. [n247] In reversing **[*200]** this abuse of authority, the appellate court stated, in a passage which the *Strandell II* court specifically relied on, [n248] that the drafters of Rule 16 did not intend that rule to be used to club parties into involuntary settlements. [n249] It is not clear why the *Strandell II* court believed this passage relevant to **summary jury trials. Summary jury trials** do not in any way coerce, compel, mandate, or require parties to settle. Undeniably, the primary purpose of **summary jury trials**, court-annexed arbitration, mediation, and other ADR techniques is settlement. However, if the results of these settlement techniques prove unsatisfactory to either side, nothing stands in the way of a full-scale jury trial. [n250] Perhaps the *Strandell II* court confused coercion with pressure. Courts rightly prohibit the former. However, Rule 16 encourages the latter. [n251] The very purpose of the amended Rule 16 is to apply pressure on the parties to settle.

For example, in the discovery context, one court held that the clear intent of Rule 16 is to provide judges with wide discretion. [n252] In that case, the court determined that a strict reading of Rule 16 -- that would allow judges to order counsel to *appear* at a pretrial conference while withholding from judges the power to make them *do* anything once they got there -- would not be meaningful. [n253] Similarly, in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, the court stated that Rule 16 grants district courts the power to order represented parties to appear at pretrial settlement conferences. [n254] It is hard to reconcile this reasonable view with the *Strandell II* court's view that Rule 16 does not authorize mandatory **summary jury trials**. And because a system of purely voluntary **summary jury trials** cannot be very effective, [n255] the *Strandell II* court has taken from the Seventh Circuit a potentially useful method of reducing its caseload.

There are cases that seemingly support a strict interpretation of Rule 16. In *J. F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp.*, the Seventh Circuit held that Rule 16 does not give judges the **[*201]** authority to compel counsel to stipulate facts. [n256] In *Identiseal Corp. v. Positive Identification System*, the same circuit held that judges cannot compel discovery. [n257] The *Strandell II* court relied on both cases. However, both cases are distinguishable from *Strandell II*. The unifying theme of both was not Rule 16 per se. Rather, it was the notion that judges should not take over the lawyer's role. In accordance with this view, the *Identiseal* court stated that its decision was based on the traditional belief that parties, not judges, should decide litigation strategy and was not based simply on the lack of express authority in Rule 16 sanctioning compulsory discovery. [n258]

Ordering lawyers to summarize their positions before an advisory jury, as in a **summary jury trial**, is fundamentally different from ordering discovery or the stipulation of facts. Both discovery and fact stipulation are crucial elements of litigation strategy. A **summary jury trial**, by contrast, is more like an expanded pretrial conference. [n259] If Rule 16 authorizes a judge to order a pretrial conference in the form of a condensed trial, as it surely does, [n260] there is no logical reason why the condensed trial or extended pretrial conference cannot take place before an advisory jury. It is worth noting that the pretrial conference itself can be a far-reaching procedure requiring considerable preparation. [n261] Finally, both *Edwards* and *Identiseal* came down before the 1983 amendments **[*202]** strengthened Rule 16, and before Judge Lambros introduced the **summary jury trial** and the 1984 Judicial Conference endorsed its experimental use. [n262] The drafters of the 1983 amendments to Rule 16 were intent on increasing the

likelihood of settlement. [n263] In addition, the 1984 Judicial Conference urged judges to experiment with **summary jury trials**, despite the absence of any reference to the device in the *Federal Rules of Civil Procedure.* [n264] Further, the 1984 Judicial Conference specifically considered -- and rejected -- the use of the word "voluntary" in its resolution authorizing the experimental use of **summary jury trials**. [n265]

The work product and discovery criticisms of mandatory **summary jury trials** are unpersuasive for two reasons. First, because the lawyers are in control of their own presentations, they are under no compulsion to reveal any particular fact. Furthermore, due to the very limited amount of time that the lawyers have to present their sides in the typical **summary jury trial**, the format naturally favors generality rather than specificity. Second, and more importantly, trial by ambush no longer exists in the federal courts. The discovery procedures of modern litigation largely prevent either side from surprising the other side with hitherto unknown information or witnesses at trial. [n266] Similarly, the purpose of a **summary jury trial** is to expose both sides to the realities of the case. [n267] Moreover, **summary jury trials** occur, if at all, very late in the dispute resolution process, generally thirty to sixty days before trial, and presumably after most discovery has taken place.

Rule 16 is the major basis for establishing the validity of mandatory **summary jury trials**. If Rule 16 is determined to be an appropriate basis, it is not necessary to search for any other. Rule 16(c)(7) explicitly directs participants at pretrial conferences to consider settlement and the use of extrajudicial dispute resolution procedures, [n268] seemingly paving the way for various ADR techniques. Nevertheless, the *Strandell II* court chose to read Rule 16 narrowly in order to prevent judges from utilizing **summary jury trials** productively. Considering the settlement-inducing purpose of Rule 16, the court's decision is overly restrictive.

The validity of Rule 83 as a basis for mandatory **summary jury trials** depends on whether a local rule mandating **summary jury trials** is consistent with the *Federal Rules of Civil Procedure* and therefore valid. As courts consistently have endorsed other more intrusive local rules, [n269] it is not logical to invalidate local rules for mandatory **summary jury trials** on the grounds of inconsistency with the *Federal Rules of Civil Procedure.* **[*203]** Inherent powers are similar to Rule 83 as a basis for compelling **summary jury trials**. The question for an inherent powers basis is whether the **summary jury trial** is a "basic procedural innovation." After *Colgrove v. Battin*, the clear answer is no. [n270] **Summary jury trials** are more like an innovative version of the ordinary pretrial conference [n271] than a basic procedural innovation.

The ultimate question concerning the Speedy Trial Act and Rule 1 as a basis for mandatory **summary jury trials** is whether their drafters intended these enactments to be effective. If the Speedy Trial Act is more than just an expression of good intentions, judges should be permitted to experiment with new procedures to help fulfill its requirements. Furthermore, if Rule 1 is to have substance, judges should be able to use it to authorize new procedures, such as the **summary jury trial**, that courts otherwise might invalidate for lacking a more traditional basis. [n272]

Furthermore, the seventh amendment is not an obstacle to compulsory **summary jury trials. The summary jury trial**, as it currently exists, does not prevent parties from having a real trial if they want one. [n273] Thus, the use of a compulsory **summary jury trial** does not interfere with the parties' subsequent right to a jury trial under the seventh amendment. [n274]

The *McKay* court skillfully answered Judge Posner's criticisms of the effectiveness of **summary jury trials**. [n275] First, the court expressed confidence in the anecdotal evidence that supports the effectiveness of **summary jury trials**. [n276] Second, the court contended that the real test of the effectiveness of **summary jury trials** will be in the courts, and if Posner's prediction that the **summary jury trial** will lead merely to cases "advanc[ing] in the queue" rather than decreasing the number of trials is correct, [n277] then judges will abandon **summary jury trials** on their own. [n278] Further, in his haste to tear down the **summary jury trial**, Judge Posner ignored the community involvement and issue-crystallizing advantages of **summary jury trials**. These latter two benefits, while not central to the **[*204]** settlement-fostering purpose of the procedure, are significant and it is a mistake to ignore them.

Finally, it is crucial to recognize that the **summary jury trial** must be compulsory. [n279] Lawyers should not have the option to refuse. By nature, lawyers are conservative creatures, reluctant to participate in nontraditional proceedings. [n280] Thus, *voluntary* ADR techniques are unlikely to be effective. [n281] In short, courts cannot excise compulsiveness from **summary jury trials** without destroying the value of the device, the Seventh Circuit notwithstanding. A totally voluntary **summary jury trial**, where lawyers know the judge is powerless to compel their participation, would damage the procedure's potential efficacy. [n282] Moreover, many other alternative dispute resolution techniques rely on compulsion. Because there is no logic in banning mandatory **summary jury trials** while permitting mandatory mediation, mandatory arbitration, and other mandatory ADR techniques to exist, it will not be long before these devices fall, too, if other courts adopt the reasoning of the Seventh Circuit's *Strandell II*. [n283] Undoubtedly, this would result in an even more desperate situation for the already strained federal courts. We should encourage judges such as Judge Lambros to develop new ways of solving the problem of overcrowding in the federal courts. To penalize innovation is to discourage it. Considering the dire straits that the courts presently face, discouraging innovation is not a good idea.

VII. CONCLUSION

The **summary jury trial** is an alternative dispute resolution technique designed to facilitate settlement. For better or for worse, alternative dispute resolution techniques are a necessity in this era of overcrowded judicial dockets. Judges who use **summary jury trials** find authority for compelling litigants to participate in the proceeding in Rule 1, Rule 16, and Rule 83 of the *Federal Rules of Civil Procedure*. [n284] Proponents of **summary jury trials** also rely on the courts' inherent docket management powers, the Speedy Trial Act, and the 1984 Judicial Conference to authorize mandatory use of the device. The Seventh Circuit in *Strandell v. Jackson County*, [n285] however, rejects the existence of a basis **[*205]** for mandatory **summary jury trials**. For those who still harbor doubts as to whether mandatory **summary jury trials** are authorized by Rule 16, the absolute necessity of providing for a rapid stream of settlements should tip the scales toward favoring the preservation of the mandatory **summary jury trial**. Finally, although Judge Posner's criticisms of the effectiveness of **summary jury trials** ultimately may prove to be accurate, [n286] they presently do not justify "smother[ing] a promising infant in the cradle as has been attempted by the Seventh Circuit." n287

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureTrialsJury TrialsJury Deliberations

FOOTNOTES:

n1 *The **Summary Jury Trial** and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461, 465 (1984) [hereinafter ***Summary Jury Trial***].

n2 *Id.* at 465.

n3 State courts are also inundated with cases. This note, however, will deal almost exclusively with the federal court system.

n4 ***Summary Jury Trial,*** *supra* note 1, at 465.

n5 Levin & Golash, *Alternative Dispute Resolution in Federal District Courts,* 37 U. FLA. L. REV. 29, 34 (1985) (court-annexed arbitration); *1986 Judicial Conference -- Second Circuit,* 115 F.R.D. 349, 367 (1986) (**summary jury trial**) [hereinafter *1986 Judicial Conference -- Second Circuit*].

n6 *1986 Judicial Conference -- Second Circuit, supra* note 5, at 362. At the conference, one participant stated that ADR techniques should be considered because "in some kinds of disputes [they are] a better way to do it than through the ordinary course of litigation." *Id.*

n7 *Id.*

n8 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988) (citing Lockhart v. Patel, 115 F.R.D. 44 (E.D. Ky. 1987)).

n9 ***Summary Jury Trial,*** *supra* note 1, at 465, in which Chief Justice Burger stated:

> Experimentation with new methods in the judicial system is imperative given growing case loads, 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.

Id.

n10 ***Summary Jury Trial*** *Innovation,* THIRD BRANCH, NOV. 1980, at 1.

n11 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988). This was a complex asbestos case. The judge ordered a **summary jury trial** despite objections by both lawyers.

n12 Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

n13 Posner, *The **Summary Jury Trial** and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

n14 *See infra* notes 19-26 and accompanying text.

n15 *See infra* notes 27-54 and accompanying text.

n16 *See infra* notes 114-201 and accompanying text.

n17 *See infra* notes 208-45 and accompanying text.

n18 Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

n19 *Chief Justice Burger Calls on Bar to Pursue Alternatives to Litigation*, THIRD BRANCH, Feb. 1982, at 1 [hereinafter *Burger Calls.*]

n20 *Id.*

n21 *Id.*

n22 Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 276 (1982) (between 1960 and 1981, the number of trials lasting longer than one month increased fivefold, from 35 to 185).

Former Chief Justice Burger believes that the increase is a result of a shift in the American psyche. He believes that "[r]emedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements'" leading to a situation where "[t]he courts have been expected to fill the void created by the decline of church, family and neighborhood." *Id.* at 275.

n23 ***Summary Jury Trial,*** *supra* note 1, at 465.

n24 Burger, *supra* note 22, at 276.

n25 *Id.*

n26 *Id.* at 275. Chief Justice Burger included Professor Barton's comment in his article for its shock value. The purpose is identical here. Nevertheless, as Burger wrote, "We do not need to rely on this scholar's perception to know that the future prospects are neither comfortable nor comforting." *Id.*

n27 Levin & Golash, *supra* note 5, at 29. Chief Justice Burger also has called for the development and use of alternatives to litigation. *Burger Calls*, *supra* note 19, at 1.

Additionally, recent amendments to the *Federal Rules of Civil Procedure*, particularly Rule 16, have been both a response to and, arguably, a valid basis for, ADR techniques. For further discussion of Rule 16, see *infra* notes 116-42 and accompanying text.

n28 Levin & Golash, *supra* note 5, at 31.

n29 ***Summary Jury Trial,*** *supra* note 1, at 465.

n30 *Id.*

n31 Hensler, *What We Know and Don't Know About Court-Administered Arbitration*, 69 JUDICATURE 270, 271 (1986).

n32 *Id.* at 271.

n33 *Id.*

n34 *Id.*

n35 *Id.; see also* Levin & Golash, *supra* note 5, at 33.

n36 Levin & Golash, *supra* note 5, at 33 (citing E. A. LIND, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS 5 (rev. ed. 1983)).

n37 *Id.* at 35 (referring to the Eastern District of Pennsylvania).

n38 Hensler, *supra* note 31, at 272 (chart).

n39 Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29 (1982).

n40 Levin & Golash, *supra* note 5, at 40.

n41 Riskin, *supra* note 39, at 30.

n42 *Id.*

n43 *Id.* at 32.

n44 L. RISKIN, DISPUTE RESOLUTION AND LAWYERS 199 (1987).

n45 Levin & Golash, *supra* note 5, at 37 (Michigan's mandatory mediation method).

n46 ***Summary Jury Trial,*** *supra* note 1, at 466.

n47 *Id.*

n48 *Id.*

n49 *Id.* at 467.

n50 Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication*, 53 U. CHI. L. REV. 394, 396 (1986).

n51 *Id.* at 396.

n52 *Id.* at 420.

n53 ***Summary Jury Trial,*** *supra* note 1, at 467.

n54 *Id.* at 467.

n55 *Id.*

n56 ***Summary Jury Trial*** *Innovation*, *supra* note 10, at 1.

n57 ***Summary Jury Trial,*** *supra* note 1, at 465.

n58 This note is concerned primarily with lawyers' participation in **summary jury trials**. In G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc), a divided Seventh Circuit held that parties may be required to attend pretrial settlement conferences. Thus, logically, courts should have the power to compel party attendance at **summary jury trials** (assuming, of course, that compulsory **summary jury trials** are themselves legitimate).

n59 Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987).

n60 Lambros, *The **Summary Jury Trial** -- An Alternative Method of Resolving Disputes*, 69 JUDICATURE 286, 286 (1986).

n61 ***Summary Jury Trial** Innovation, supra* note 10, at 1.

n62 *Id.*

n63 ***Summary Jury Trial,** supra* note 1, at 465.

n64 Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

n65 *Id.* at 1089.

n66 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 605 (D. Minn. 1988).

n67 Lambros, *supra* note 60, at 286.

n68 *Id.* at 288.

n69 Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

n70 The format of **summary jury trials** varies by jurisdiction. This note will describe a typical **summary jury trial**, primarily relying on information from the writings of Judge Lambros.

n71 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988).

n72 Lambros, *supra* note 60, at 286.

n73 *Id.*

n74 *Id.*

n75 ***Summary Jury Trial,*** *supra* note 1, at 471-72.

n76 Lambros, *supra* note 60, at 286.

n77 ***Summary Jury Trial,*** *supra* note 1, at 468.

n78 *Id.*

n79 *Id.; see also* Lambros, *supra* note 60, at 286.

n80 ***Summary Jury Trial,*** *supra* note 1, at 468.

n81 Lambros, *supra* note 60, at 288.

n82 *Id.*

n83 *Id.* at 287.

n84 *Id.*

n85 ***Summary Jury Trial,*** *supra* note 1, at 461, 483.

n86 *Id.* at 470.

n87 *Id.* at 471.

n88 *Id.*

n89 Lambros, *supra* note 60, at 288. As described by Judge Lambros, a typical juror questionnaire form states:

1) Juror's name and occupation;

2) Juror's marital status;

3) Juror's spouse's name and occupation;

4) Names and ages of juror's children;

5) Previous knowledge of the juror of any parties, counsel or the nature of the case;

6) Any prejudicial attitudes of the juror to the nature of the action.

Id.

n90 Posner, *supra* note 13, at 386.

n91 *Id.*

n92 *Id.* Judge Posner contends that withholding the true nature of the proceeding from the jury will have a detrimental effect on the judicial system. He explains:

If [the jury system] works at all, this may be because jurors are impressed by being told they are exercising governmental power. This makes them act more responsibly than one might have thought likely given the nature of the selection process and the lack of incentives for jurors to do well. . . . If word got around that some jurors are being fooled into thinking they are deciding cases when they are not, it could undermine the jury system.
Id. at 387.

Even if jurors are told the truth after reaching their verdict, they "are still being fooled; and they are learning that juries sometimes make decisions and at other times simply referee fake trials. As word spreads, the conscientiousness of jurors could decline; it is almost a detail that the utility of the **summary jury trial** would also decline." *Id.*

n93 Lambros, *supra* note 60, at 289. The author of this note is not convinced that judicial candor leads to lackadaisical jurors and therefore favors the approach espoused by Judge Lambros.

n94 ***Summary Jury Trial,*** *supra* note 1, at 483. Judges may extend the one-hour limit, however, if it is necessary. *d.*

n95 *Id.* at 484.

n96 *Id.* Additionally, although judges discourage objections at the **summary jury trial**, objections are appropriate if an attorney "overstep[s] the bounds of propriety as to a material aspect of the case." *Id.*

n97 *Id.* at 483. The procedure, however, may take longer. *See, e.g.*, Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988) (three-day **summary jury trial**).

n98 Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900 (6th Cir. 1988); *see also Carey-Canada, Inc.*, 123 F.R.D. at 607.

[T]he **summary jury trial**, for all it may appear like a trial, is a settlement technique [and therefore the press has no first amendment right of access because:] (1) there is no tradition of access to **summary jury trials** or other recognized settlement devices; and (2) public access "does not play a particularly significant positive role" in the functioning of the **summary jury trial** because "the proceeding is non-binding and has no effect on the merits of the case, other than settlement."
Cincinnati Gas & Elec. Co., 854 F.2d at 900 (citing *Joint Appendix*, 117 F.R.D. 597 (S.D. Ohio 1987)).

n99 ***Summary Jury Trial,*** *supra* note 1, at 471.

n100 *Id.*

n101 Spiegel, ***Summary Jury Trials***, 54 U. CIN. L. REV. 829 (1985).

n102 Lambros, *supra* note 60, at 289.

n103 *Id.*

n104 *Id.*

n105 *Id.*

n106 *Id.*

n107 ***Summary Jury Trial,*** *supra* note 1, at 484.

n108 The **summary jury trial** currently is used in the following federal district courts: S.D. Florida; D. Massachusetts; E.D. Michigan; W.D. Michigan; N.D. Ohio; S.D. Ohio; W.D. Oklahoma; E.D. Pennsylvania; M.D. Pennsylvania. Posner, *supra* note 13, at 377 (chart).

n109 ***Summary Jury Trial,*** *supra* note 1, at 485; *see, e.g., id.* at 487 (local rule for the Northern District of Ohio); *id.* at 496 (Montana Standing Order § 2).

n110 *But see supra* note 57 and accompanying text.

n111 Spiegel, *supra* note 101, at 830 ("[c]lients are expected to attend SJT. Leave of court must be sought to excuse attendance of a party. It must be remembered that clients' awareness of the jury's perception is as important as that of counsels."); ***Summary Jury Trial,*** *supra* note 1, at 470, 483; *id.* at 496 (Montana Standing Order § 2).

n112 This note focuses on attorney participation.

n113 Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill.), *rev'd,* 838 F.2d 884 (7th Cir. 1987). The court stated: "Attorneys are usually reluctant to participate in procedures which break from traditional and familiar methods of litigation. Reliance on totally voluntary use of non-binding alternative dispute resolution procedures where the attorneys are aware of the Court's inability to mandate their participation will severely undermine the utility of such procedures." *Id.*

n114 Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987).

n115 *Id.*

n116 The pertinent passages of Rule 16 are:

> In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as . . . facilitating the settlement of the case. . . . The participants at any 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; . . . the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and . . . such other matters as may aid in the disposition of the action.
> FED. R. CIV. P. 16.

n117 The advisory committee notes state:

> 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 litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it.
> FED. R. CIV. P. 16 advisory committee's note.

n118 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 607 (D. Minn. 1988), in which the court states:

> The Federal Rules of Civil Procedure were amended in 1983. The Advisory Committee Notes articulate that the obvious goal of the

amendments was the promotion of case management of which settlement is a valuable tool. Fed. R. Civ. P. 16 Advisory Committee Note to 1983 Amendments. Therefore, it is difficult to reconcile the argument that Rule 16 does not permit courts to order the parties to participate in **summary jury trials** with the goals of that rule. It is hard to imagine that the drafters of the 1983 amendments actually intended to strengthen courts' ability to manage their caseloads while at the same time intended to deny the court the power to compel participation by the parties to the litigation.
Id.

n119 Strandell v. Jackson County, 115 F.R.D. 333 (S.D. Ill.), *rev'd,* 838 F.2d 884 (7th Cir. 1987).

n120 Lambros, *supra* note 60, at 286.

n121 Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988) (endorsed mandatory **summary jury trials**), in which the court states:

Rule 16 calls these procedures conferences, but what is in a name. The obvious purpose and aim of Rule 16 is to allow courts the discretion and processes necessary for intelligent and effective case management and disposition. Whatever name the judge may give to these proceedings their purposes are the same and are sanctioned by Rule 16.
Id.

n122 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 47-48 (E.D. Ky. 1988).

n123 Rule 16(f) states: "If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference . . ., the Judge, upon motion or his own initiative [may order sanctions]." FED. R. CIV. P. 16.

n124 *McKay,* 120 F.R.D. at 48.

n125 Buffington v. Wood, 351 F.2d 292 (3d Cir. 1965). *But see* Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298 (7th Cir. 1977).

n126 Lockhart v. Patel, 115 F.R.D. 44, 46 (E.D. Ky. 1987).

n127 G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989) (en banc); *In re* LaMarre, 494 F.2d 753 (6th Cir. 1974) (insurance adjuster treated as party); *Lockhart,* 115 F.R.D. at 44.

n128 Strandell v. Jackson County, 838 F.2d 884, 887 (7th Cir. 1987).

n129 *Id.*

n130 *Id.* (quoting Kothe v. Smith 771 F.2d 667, 669 (2nd Cir. 1985)).

n131 *Id.* The advisory committee notes state:

The last sentence of subdivision (c) is new. It has been added to meet one of the criticisms of the present practice described earlier and insure proper preconference preparation so that the meeting is more than a ceremonial or ritualistic event. The reference to "authority" is not intended to insist upon the ability to settle the litigation. Nor should the rule be read to encourage the Judge conducting the conference to compel attorneys to enter into stipulations or to make admissions that they consider to unreasonable, that touch on matters that could not normally have been anticipated to arise at the conference, or on subjects of a dimension that normally require prior consultation with and approval from the client.
FED. R. CIV. P. 16 advisory committee's note.

n132 *Strandell*, 838 F.2d at 887.

n133 *Id.*

n134 *Id.* at 887-88.

n135 J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976).

n136 Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298, 302 (7th Cir. 1977).

n137 Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987).

n138 Posner, *supra* note 13, at 385-86.

n139 FED. R. CIV. P. 16(c)(7) allows for the discussion of settlement and the use of extrajudicial procedures at pretrial conferences.

n140 Posner, *supra* note 13, at 385.

n141 *Id.* at 386.

n142 *Id.* Posner stated:

> [I]n any event judges should be cautious about instituting new forms of involuntary servitude, mild as this one is. The fact that Congress appropriates money for jurors without indicating how they are to be used does not necessarily authorize novel forms of jury service. Nor does anything in the Jury Selection and Service Act of 1968, which governs the use of juries in federal courts, empower federal judges to summon jurors to serve as mediators.

Id.

n143 Rule 83 states:

> Each district court by action of a majority of the Judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, *make and amend rules governing its practice not inconsistent with these rules.* . . . In all cases not provided for by rule, the district Judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

FED. R. CIV. P. 83 (emphasis added).

n144 *Id.*

n145 The **summary jury trial** in *Strandell* was based solely on the judge's order. There was no local rule concerning **summary jury trials**. Therefore, arguably Rule 83 is not applicable to that case. Strandell v. Jackson County, 115 F.R.D. 333, 335-36 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987). The next section concerning inherent powers is applicable, however. Typically, local rules on the subject do exist.

n146 120 F.R.D. 43, 45 (E.D. Ky. 1988).

n147 *Id.* at 45 (citing Frazier v. Heebe, 107 S. Ct. 2607 (1987)).

n148 *Id.*

n149 Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

n150 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 45 (E.D. Ky. 1988).

n151 *Id.* (citing White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986); Eash v. Riggins Trucking, Inc., 757 F.2d 557 (3d Cir. 1985)).

n152 New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712 (E.D. Pa. 1983); *id.* (citing Davison v. Sinai Hosp., 462 F. Supp. 778 (D. Md. 1978)).

n153 Rule 39 of the *Federal Rules of Civil Procedure* states:
When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.
FED. R. CIV. P. 39.

n154 *McKay,* 120 F.R.D. at 45 (citing Kimbrough v. Holiday Inn, 478 F. Supp. 566, 570 (E.D. Pa. 1979)).

n155 *See supra* notes 115-37 and accompanying text.

n156 Strandell v. Jackson County, 838 F.2d 881, 887 (7th Cir. 1987).

n157 *Id.* at 887-88.

n158 J.F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1322 (7th Cir. 1976).

n159 *See, e.g.*, Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985); Kimbrough v. Holiday Inn, 478 F. Supp. 566 (E.D. Pa. 1979).

n160 In practice, there is often little distinction made between inherent powers and Rule 83. Nevertheless, this note will treat inherent powers and Rule 83 as distinct bases for **summary jury trials**.

n161 *See, e.g.*, McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988).

n162 Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962); *see also* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). The *Link* court stated:

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. The power is of ancient origin, having its roots in judgments of non-suit and non prosequitur entered at common law.

Id. at 629-30.

n163 United States v. Reaves, 636 F. Supp. 1575 (E.D. Ky. 1985).

n164 White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986). This case also held that courts have authority, pursuant to their inherent powers, to sanction the litigants themselves. *Id.* at 1177. For more on this point, see Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Alyeska v. Wilderness Soc'y, 421 U.S. 240 (1975).

n165 Eash v. Riggins Trucking, 757 F.2d 557, 561 (3d Cir. 1985) (citing Michaelson v. U.S., 266 U.S. 42 (1924)).

n166 *Id.* at 561.

n167 The *White* court seems to believe, though it is not entirely clear, that FED. R. CIV. P. 83 and 28 U.S.C. § 2071 (1982) codified the courts' inherent power to sanction attorneys and litigants. Perhaps the difference between Rule 83 and inherent powers lies in that Rule 83 is concerned only with local rules whereas inherent power includes isolated judicial orders as well.

In Link v. Wabash R.R. Co., 370 U.S. 626 (1962), the Supreme Court stated that a court's inherent authority over members of its bar is

not limited to those specific facets covered by a local rule. *Eash*, 757 F.2d at 568.

n168 *Link*, 370 U.S. at 626.

n169 *Eash*, 757 F.2d at 562.

n170 *Id.*

n171 *Id.; see also* Michaelson v. United States, 266 U.S. 42, 65 (1924); Myers v. United States, 264 U.S. 95, 103 (1924).

n172 *Eash*, 757 F.2d at 563 (citing *Ex parte* Peterson, 253 U.S. 300 (1920)).

n173 *Id.*

n174 *Id.*

n175 Link v. Wabash R.R. Co., 370 U.S. 626 (1962).

n176 White v. Raymark Indus., 783 F.2d 1175 (4th Cir. 1986).

n177 *Id.; see also* Roadway Express v. Piper, 447 U.S. 752 (1980); Alyeska v. Wilderness Soc'y, 421 U.S. 240 (1975).

n178 Kothe v. Smith, 771 F.2d 667 (2nd Cir. 1985).

n179 The first type of inherent power, however, is constitutional in nature. Therefore, it is likely courts can exercise it regardless of contrary legislative enactments. Eash v. Riggins Trucking, 757 F.2d 557, 568 (3d Cir. 1985).

n180 *Id.*

n181 Colgrove v. Battin, 413 U.S. 149, 161-63 (1973).

n182 *Eash*, 757 F.2d at 562.

n183 *Colgrove*, 413 U.S. at 164 n.23; *see also* Miner v. Atlass, 363 U.S. 641 (1960).

n184 *Colgrove*, 413 U.S. at 164 n.23.

n185 Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987). The court cited O'Malley v. Chrysler Corp., 160 F.2d 35 (7th Cir. 1947), in support of this proposition. The *O'Malley* court recognized the authority of a trial court to process a case for trial. *O'Malley*, 160 F.2d at 35.

n186 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 46 (E.D. Ky. 1988).

n187 *Id.* at 46.

n188 Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

n189 FED. R. CIV. P. 1.

n190 Strandell v. Jackson County, 115 F.R.D. 333, 335 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987).

n191 Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

n192 *See, e.g., Strandell,* 115 F.R.D. at 336.

n193 18 U.S.C. § 3162(a)(2) (1988) states, "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant."

n194 *Id.* §§ 3161-3174.

n195 *Strandell,* 115 F.R.D. at 336.

n196 Strandell v. Jackson County, 838 F.2d 881, 888 (7th Cir. 1987).

n197 *Id.*

n198 *Strandell,* 115 F.R.D. at 335, in which the court states:

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 rules, **summary jury trials** are recommended to District Courts for consideration as an optional device.
Id. (emphasis added).

n199 " 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 cases." *Id.*

n200 *Id.*

n201 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988).

n202 *Id.*

n203 Strandell v. Jackson County, 838 F.2d 881, 885-87 (7th Cir. 1987).

n204 The seventh amendment states:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

n205 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 605 (D. Minn. 1988).

n206 *See, e.g.*, Smith's Case, 381 Pa. 223, 112 A.2d 625 (1955) (interpreting art. 1, § 6, of the state constitution, Pennsylvania's analogue to the United States Constitution's seventh amendment).

n207 *See, e.g.*, New England Merchants Nat'l Bank v. Hughes, 556 F. Supp. 712 (E.D. Pa. 1983).

n208 Kimbrough v. Holiday Inn, 478 F. Supp. 566, 571 (E.D. Pa. 1979).

n209 *Id.*

n210 Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985).

n211 *Id.* at 268.

n212 *See, e.g.,* Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980), where the Pennsylvania Supreme Court struck down a compulsory arbitration provision of a medical malpractice statute because "the delays involved in processing these claims under the prescribed procedures set up under the Act result in an oppressive delay and impermissibly infringes upon the constitutional right to a jury." *Id.* at 396, 421 A.2d at 196.

n213 *See supra* note 211 and accompanying text.

n214 Strandell v. Jackson County, 838 F.2d 884, 888 (7th Cir. 1987).

n215 *Id.* at 888.

n216 *Id.* at 888 n.5.

n217 *See id.*

n218 *Id.*

n219 *Id.*

n220 *Id.*

n221 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988).

n222 *Id.* at 48; *see also* Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988).

n223 *McKay*, 120 F.R.D. at 48.

n224 ***Summary Jury Trial,*** *supra* note 1, at 484.

n225 Spiegel, *supra* note 101, at 836.

n226 *Id.*

n227 *Id.; see also supra* note 102 and accompanying text.

n228 Spiegel, *supra* note 101, at 836.

n229 123 F.R.D. 603, 604, 608 (D. Minn. 1988).

n230 *Id.* at 604.

n231 *See infra* note 234.

n232 Posner, *supra* note 13, at 375, 382. To test the effectiveness of **summary jury trials**, Posner proposes a wide-scale random study involving lawyers who are compelled to engage in **summary jury trials**. *Id.* at 374. This suggestion seems inconsistent with his view that Rule 16 does not offer a basis for **summary jury trials**.

n233 *Id.* at 382.

n234 For example, only five of the 153 cases that Judge Lambros assigned to **summary jury trials** proceeded to trial. Moreover, only three of 50 cases that federal district Judge Richard Hensler (Kalamazoo, Michigan) assigned to summary jury proceedings later went on to actual trials. However, as of yet no systematic study of the effectiveness of **summary jury trials** has been conducted. ***Summary Jury Trials***

Touted, A.B.A. J., Apr. 1, 1987, at 27.

n235 Posner, *supra* note 13, at 385.

n236 *Id.*

n237 *Id.* at 388.

n238 *Id.* at 373.

n239 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988).

n240 *Id.* The court stated:

> It is true that . . . we have only unscientific anecdotal evidence of the effectiveness of **summary jury trials**. But not everything in life can be scientifically verified. I have only unscientific anecdotal evidence that Hawaii is more beautiful than Covington, but I intend to expend a considerable sum to go there as soon as I get the chance.

Id.

n241 *See supra* notes 64-69 and accompanying text.

n242 *See supra* note 8 and accompanying text.

n243 Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

n244 *See supra* notes 127-45 and accompanying text.

n245 Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985); Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298 (7th Cir. 1977); J. F. Edwards Const. Co. v. Anderson Safeway Guard Rail, 542 F.2d 1318 (7th Cir. 1976).

n246 *See supra* notes 218-20 and accompanying text.

n247 *Kothe*, 771 F.2d at 669.

n248 Strandell v. Jackson County, 838 F.2d 884, 886 (7th Cir. 1987).

n249 *Kothe*, 771 F.2d at 669.

n250 Although it probably did not affect the result, it is possible that Judge Ripple misperceived the nature of **summary jury trials** due to the atypical example he had before him. For example, the **summary jury trial** the district court planned would involve some live witnesses and would last one or two days. Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill. 1987). The typical **summary jury trial**, by contrast, involves no live witnesses and lasts only one-half day. *See supra* notes 95, 97 and accompanying text.

n251 *See supra* notes 117-27 and accompanying text.

n252 Buffington v. Wood, 351 F.2d 292, 298 (3d Cir. 1965).

n253 *Id.*

n254 G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F. 2d 648 (7th Cir. 1989) (en banc). The dissent in G. Heileman Brewing Co. v. Joseph Oat Corp., 848 F. 2d 1415 (7th Cir. 1988), the case reversed by the en banc hearing cited immediately above, asserted that the courts are a "public resource" and, as such, that users of the courts cannot refuse reasonable procedures imposed on them that are intended to make the system function more efficiently. *Id.* at 1423.

n255 Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987).

n256 J. F. Edwards Constr. Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318, 1325 (7th Cir. 1976).

n257 Identiseal Corp. v. Positive Identification Sys., 560 F.2d 298, 302 (7th Cir. 1977).

n258 *Id.*

n259 Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988).

n260 *See* McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 48 (E.D. Ky. 1988) ("Plainly Rule 16 would authorize the trial judge to hold a final pretrial conference in the form of a condensed trial. In a **summary jury trial**, the court just has laymen sit in and give their reactions.").

n261 Rule 16(c) of the *Federal Rules of Civil Procedure* provides:

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

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

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

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

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.
FED. R. CIV. P. 16(c).

n262 *See supra* note 199 and accompanying text.

n263 ***Summary Jury Trial,*** *supra* note 1, at 484.

n264 *McKay*, 120 F.R.D. at 48.

n265 *Id.*

n266 Strandell v. Jackson County, 115 F.R.D. 333, 334 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987).

n267 *Id.*

n268 *See supra* note 139 and accompanying text.

n269 *See supra* notes 146-54 and accompanying text.

n270 *See supra* notes 181-86 and accompanying text.

n271 Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448, 449 (M.D. Fla. 1988).

n272 *Id.* at 448-49. The court described its predicament as follows:

> Statistically, the Middle District of Florida has the worst record in the nation for protracted trials; an accumulation of lengthy, untried cases, literally awaiting decades for trial disposition are delayed because of their extraordinary projected trial time. This court has effectively utilized **summary jury trials** since 1985; *without it opportunity for resolution is delayed, and justice is denied.*
> *Id.* (emphasis added).

n273 *See supra* notes 204-17 and accompanying text. However, we must remain diligent against particular procedures that place excessive hurdles in front of the seventh amendment's right to trial by jury in most civil cases.

n274 *See supra* note 205 and accompanying text.

n275 *See supra* notes 240-41 and accompanying text.

n276 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 49 (E.D. Ky. 1988).

n277 *See supra* note 237 and accompanying text.

n278 *McKay*, 120 F.R.D. at 49.

n279 *See supra* notes 108-13 and accompanying text.

n280 Federal Reserve Bank v. Carey-Canada, Inc., 123 F.R.D. 603, 604 (D. Minn. 1988); *see also supra* note 111 and accompanying text.

n281 Strandell v. Jackson County, 115 F.R.D. 333, 336 (S.D. Ill.), *rev'd*, 838 F.2d 884 (7th Cir. 1987). In this case, the judge was "baffl[ed]" by why a lawyer would refuse to attend such an innocuous proceeding as a **summary jury trial**. *Id.* at 334. There are at least two possibilities:

(1) the lawyer is too lazy to prepare in advance of trial; or

(2) the lawyer has a weak case and wants to conceal this fact just long enough to get a bigger settlement.

n282 *Carey-Canada, Inc.*, 123 F.R.D. at 608.

n283 Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

n284 FED. R. CIV. P. 1, 16, 83.

n285 *Strandell*, 838 F.2d at 884.

n286 *See* Posner, *supra* note 13.

n287 McKay v. Ashland Oil, Inc., 120 F.R.D. 43, 50 (E.D. Ky. 1988).